COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL
COURT No. FAR 30286
APPEALS COURT
No. 2024-P-0306

COMMONWEALTH
Appellee

v.

FAROUQ M. SAMEJA
Defendant-Appellant

DEFENDANT-APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

The Defendant-Appellant, FAROUQ SAMEJA , moves this Honorable Court, pursuant to M. G. L. c. 211A §11 and Mass. R. App. P. 27.1, for leave to obtain further appellate review of the March 27, 2025, Appeals Court Rule 23.0 Decision, which affirms the denial of a Probationer's Motion for a New trial in the Wrentham District Court, Docket No. 0157CR000919.

The grounds for further appellate review are set forth in the accompanying memorandum.

Date: April 17, 2025,

Respectfully submitted,
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For the Appellant

/s/ Kathleen J. Hill

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DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF APPLICATION FOR FURTHER APPELLATE REVIEW

I. STATEMENT OF PRIOR PROCEEDINGS

On May 18, 2001, the defendant was arraigned in Wrentham District Court on one count of Credit Card Fraud under $250 by Merchant, M. G. L. c. 266 § 37B (j), and three counts of Larceny under $250, c. 266 § 30 (1). (RA/4, 35).[1]

On December 7, 2001, the defendant tendered a guilty plea, and the plea judge sentenced the defendant to one-year straight probation and issued a restitution order in the amount of $400.00. (RA/36).Exhibit B,p.72.

On April 17, 2002, the probationer was found in violation of probation, and the docket sheet reflects that the "12/6/2002 restitution was to be determined by probation." (RA/36).

On December 6, 2002, the Probation Department served Mr. Sameja with a notice of violation of probation for having failed to pay $400.00 in restitution, and for

[1] The record appendix is cited as "RA/__." The July 11, 2023, hearing transcript on the day of filing the Rule 30 (b) Motion is cited as "T1/__." The August 15, 2023, non-evidentiary hearing transcript on the Rule 30 (b) Motion is cited as "T2/__." The February 14, 2024, hearing transcript pertaining to the request for a ruling on the Motion to Reconsider is cited as "T3/__."

not showing for two office visits on November 12, 2002, and November 21, 2002. (RA/14).

On March 7, 2003, the Probation Department served Mr. Sameja with an amended notice of violation of probation for having incurred a new criminal offense, namely, operating on a suspended license, attaching plates, and underinsured motorist; and, for not showing up for an office visit on March 21, 2003. (RA/14, 42).

Prior to the final probation revocation hearing, Mr. Sameja was taken into custody by ICE and transferred to a federal prison in the State of Louisiana, and he was placed in removal proceedings. (RA/14).

On October 28, 2003, Mr. Sameja's applied for cancellation of removal under 240A (a), as a pro se litigant. An immigration judge in Louisiana issued a cancellation order of removal, thereby making him no longer deportable. (RA/14-15, 46).

On October 1, 2004, at the final probation revocation hearing, Mr. Sameja was found in violation of probation and his probation was revoked. On Count One the judge imposed a one-year sentence in the house of correction; on Counts Two, Three, and Four, the judge imposed the statutory maximum sentence, a one-year

sentence in the house of correction, to run current with Count One. (RA/15).

On January 4, 2005, ICE investigated Mr. Sameja at Norfolk County House of Correction and determined that he was deportable. The "Record of Deportable /Inadmissible Alien" states, in pertinent part, that:

> "Subject is currently serving a one-year sentence after violating probation on a credit card fraud conviction. Subject is a native and citizen of Tanzania who immigrated to the U.S. as set forth above. Subject was in removal proceedings and was granted cancellation by the BIA. There are no applications pending relating to the subject with CIS. The subject immigrated to the U.S. at the age of 19 and there are no claims . . ."

On the completion of his one-year sentence ICE arrested Mr. Sameja at the Norfolk County House of Correction, and immediately commenced deportation proceedings in Boston, Massachusetts, based on new grounds of deportability, namely the one-year sentences imposed on the larceny convictions in this matter were now aggravated felonies. (RA/15-16,48) Exhibit B,p. 81.

On August 31, 2005, an immigration judge in Boston, Massachusetts issued an order to remove Mr. Sameja from the United States. (RA/51-52). ICE was not able to obtain travel documentation for Mr. Sameja, and he was placed on an order of supervision. (RA/16, 54).

On December 19, 2019, Mr. Sameja was deported to Tanzania, and he is deemed inadmissible to enter the United States for life. (RA/16).

On January 29, 2003, the probationer was notified of the violation of his probation by mail. (RA/37).

On October 1, 2004, the probationer was found in violation of probation, and he was sentence to one-year in the Norfolk County House of Correction. (RA/37).

On July 11, 2023, the probationer filed Defendant's Motion for a New Trial. The Clerk required the probationer to appear before the motion session judge to determine if he was entitled to file a Rule 30 (b) motion.[2] (RA/5; T1/2). See Exhibit B, p. 41.

On August 4, 2023, Legal Counsel for the Probation Department filed a Response to the Probationer's Motion for a New Trial. (RA/5, 78-79).

On August 15, 2023, at oral arguments on Defendant's Motion for a New Trial, the Court effectively determined that the probationer was entitled to file a Rule 30 (b) motion, and it took the motion under advisement. (RA/5; T2/4-5).

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[2] See *Comm*. v. *Patton*, 458 Mass. 119, 120 (2010) (probationer is entitled to raise a claim of ineffective assistance of counsel under Rule 30 (b)).

On September 1, 2023, the motion judge denied Defendant's Motion for a New Trial and made written findings. (RA/5, 83). On September 19, 2023, the probationer filed a Notice of Appeal taken on the denial of Defendant's Motion for a New Trial. (RA/5, 85).

On September 29, 2023, the probationer filed a Motion to Reconsider. (RA/5, 88-169).

On October 10, 2023, Legal Counsel for the Probation Department filed a Response to Probationer's Motion to Reconsider and rested on its arguments made at prior hearings. (RA/5, 170).

On December 4, 2023, the probationer filed a Request for a ruling on his Motion to Reconsider and a delay in the assembly of the record. (RA/5, 171).

On February 14, 2024, the motion judge denied the Probationer's Motion to Reconsider. (RA/5-6, 173).

On February 21, 2024, the probationer filed a Notice of Appeal taken on the denial of the motion to reconsider and the denial of the motion for a new trial. (RA/6, 181).

On March 20, 2024, this appeal entered in the Appeals Court, Case No. 2024-P-0306.

On March 27, 2025, the Appeals Court issued a summary decision, pursuant to Rule 23.0, affirming the

denial of Probationer's Motion for a New Trial, a copy of which is attached to this petition, as Exhibit A.

Mr. Sameja does not seek a rehearing.

II. STATEMENT OF RELEVANT FACTS

Farouq Sameja, a noncitizen, is a black male who was born and raised in Dar Es Salaam, Tanzania. On May 3, 1990, Mr. Sameja immigrated to the U.S. with his immediate family at the age of 19 on an immigration visa, with labor certification in soil drilling. (RA/16). His entire immediate family immigrated to the U.S. together, arriving in New York City, with the intention of locating to Massachusetts. Mr. Sameja's final address was 70 Orchard Lane, Attleboro, MA, where his parents reside to this day. (RA/16).

Initially, Mr. Sameja secured employment as an auto mechanic and a gas attendant. On March 30, 2001, while working as a gas attendant, he was arrested for double billing three customers for a total amount of $89.00. (RA/17). On December 7, 2001, Mr. Sameja accepted responsibility for the credit card misuse and larceny, tendered a plea of guilty, and the plea judge sentenced him to one-year of probation and issued an order of restitution in the amount of $400.00. *Id.*

On November 6, 2002, his last day of probation, Mr. Sameja was served with a notice of violation of probation for having failed to satisfy the restitution order and missing his last two office visits. Before the final probation revocation hearing was held, ICE arrested Mr. Sameja, and he was transferred to a federal prison in the State of Louisiana. *Id.*

While Mr. Sameja was imprisoned at a federal prison in Louisiana he wrote a letter to the immigration judge asking for the cancellation of the removal order. Mr. Sameja stated that he accepted responsibility for his actions; he was remorseful; he was caring for his parents; and he had learned from his mistakes. On October 28, 2003, the immigration judge granted cancellation of the removal order. (RA/18). The judge told Mr. Sameja to return to his family in Massachusetts and resolve this case. *Id.*

On October 1, 2004, at the final probation revocation hearing, Mr. Sameja told the hearing judge that the immigration judge who cancelled the removal order told him to return to his family in Massachusetts and to resolve this pending violation of probation case. *Id.* The hearing judge revoked his probation, and without consideration of the mitigation of factors the judge

imposed the statutory maximum sentence, one-year in the house of correction on the probationer. Mr. Sameja was not told that he could appeal the finding of a violation of probation and the one-year sentence imposed, or that he could file a motion for reconsideration. *Id.*

Although probation counsel does not recall this case, after reviewing the hand-written docket sheet, the criminal complaint, the green sheet, and the notice of violation, probationer's counsel asserts that, as a matter of practice, he would have asked the judge to impose a much lesser sentence than the statutory maximum sentence. *Id.* However, the probationer's counsel believes that he would not have asked the court to sentence Mr. Sameja to 364 days versus 365 days, **one day less** than one-year, to avoid the dire immigration consequences of the state misdemeanor being treated as an aggravated felony under federal law. *Id.* Probation counsel recalls that prior to *Padilla* there were no immigration practice advisories or Massachusetts case law to advise counsel that a state conviction for credit card misuse would be treated as an aggravated felony under federal law, if the judge imposed a one-year sentence on the probationer. (RA/18-19).

After Mr. Sameja fully completed his one-year sentence, ICE arrested him at the Norfolk County House of Correction and immediately commenced deportation proceedings in Boston, Massachusetts. (RA/19). On August 31, 2005, Mr. Sameja was ordered removed from the United States, but ICE was unable to obtain travel documents and he was placed on an order of supervision. *Id.*

During the years of supervision Mr. Sameja resided with his parents and his common-law wife. He helped his mother care for his father. He did the grocery shopping, paid the bills, and did the landscaping. He also fixed cars for people in his community, who did not have the funds to repair their cars. Mr. Sameja maintained steady employment, and he regularly paid his state and federal annual income taxes (1990 to 2019). (RA/19-20).

On December 19, 2019, Mr. Sameja was deported to Tanzania. He is deemed inadmissible **for life** because of this State conviction for credit card misuse and larceny convictions, in the total amount of $89.00. *Id.*

On July 11, 2023, Mr. Sameja filed a motion for a new trial, in this case a new probation revocation hearing, in which he raised several claims: (1) that probation counsel provided ineffective assistance of counsel at the dispositional stage of the final

probation revocation hearing because he did not adequately present all mitigating factors; (2) counsel failed to inform the hearing judge that if he imposed the maximum sentence on his client, the state misdemeanor would be treated as an aggravated felony under federal law and result in his client's deportation, whereas if he imposed 364 days his client would not be deported; (3) counsel did not advise his client of the right to appeal the revocation of probation and the sentence, which could have avoided his deportation; (4) counsel did not file a motion to reconsider his sentence and impose one day less, 364 days, to avoid his deportation; (5) and the hearing judge did not determine whether Mr. Sameja had the ability to pay restitution and if the alleged violation was willful, support by affidavit.(RA/5,7)Exhibit B, p. 89.

At the initial hearing on Mr. Sameja's motion for a new trial, the Probation Department questioned whether the probationer was entitled to move for a new probation revocation violation hearing. (T1/2). Probation stated that it would not oppose re-sentencing, but that it would oppose a new probation revocation hearing. (T1/4).

On August 15, 2023, after a non-evidentiary hearing, the motion judge took the matter under advisement. (T2/27).

On September 1, 2023, the motion judge denied Mr. Sameja's motion in a written decision. (RA/5).

Additional facts are reserved for the argument.

III. REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

Further appellate review is appropriate in this case, which resulted in the deprivation of liberty because when deciding the probationer's motion for a new trial the motion judge incorrectly applied *Comm. v. Quispe*, 433 Mass. 508 (2001), which was overruled by *Comm.* v. *Marinho*, 464 Mass. 115, 128 n.19 (2013), and the motion judge incorrectly reasoned that *Comm.* v. *Henry*, 475 Mass. 117 (2016), did not apply because "[*Henry*] had not been decided at the time of the probationer's revocation hearing," and when affirming the convictions the Appeals Court failed to consider the material facts to as applied to the prevailing law when analyzing this case, which violates the probationer's state and federal substantive due process rights guaranteed by the 6th Amendment of the United States Constitution, as implicated under the 14th Amendment of

the United States Constitution, and articles 1, 10 and 12, of the Massachusetts Declaration of Rights.

As a matter of public interest and in the interest of justice, this Court should review the decision of the Appeals Court to determine if the Court misapplied the prevailing law to the material facts in this case, *Comm. v. Sameja*, 2025 Mass. App. Unpub. LEXIS , (Mass. App. Ct. March 27, 2025). The taking of this case will solidify and reinforce the prevailing law in *Comm*. v. *Sylvain*, 466 Mass. 422, 436-437 (2013) (applying *Padilla* retroactively having determined that it does not announce a new rule), particularly at a time in our Democracy when the law is static; and in *Comm*. v. *Henry*, 475 Mass. 117 (2016), where the Court's reasoning is based on principles of due process and equal protection, plainly recognizing the fundamental unfairness of revoking probation automatically without considering whether adequate alternative methods of punishing the probationer are available, as reasoned in *Bearden* v. *GA*, 461 U.S. 600 (1983). These basic constitutional principles are recognized in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973); and *Comm*. v. *Durling,* 407 Mass. 108

(1990), which affords a probationer due process rights and equal protection under the laws of Massachusetts, for so long as our democracy may endure, and the voice of freedom is heard.

IV. ARGUMENT

1. The Appeals Court's reasoning is seriously flawed where it reasoned that it was not persuaded that *Commonwealth* v. *Marinho*, 464 Mass. 115 (2013), did not apply retroactively because the Supreme Judicial Court held in *Commonwealth* v. *Marinho*, 464 Mass. 115 (2013), that *Quispe* is overruled, which precedent the reviewing court should follow.

Mr. Sameja contends that the reviewing court erred when deciding his case on appeal where the Court reasoned that it was "not persuaded that *Commonwealth* v. *Marinho*, 464 Mass. 115, 128 n. 19, 981 N.E.2d 648 (2013), which overruled *Quispe*, 433 Mass. 508, applies retroactively." *Sameja*, at *5.

In *Comm.* v. *Marinho*, 464 Mass. 115 (2013), the Supreme Judicial Court held that "our precedent that a trial judge cannot factor immigration consequence into sentencing is no longer good law. See *Comm*. v. *Quispe*, *supra* at 512-513." *Marinho*, 464 Mass. at 128. "It is quintessentially the duty of counsel to provide his client with available advice about an issue like deportation" when advocating for the best possible disposition. *Padilla*, 559 U.S. at 371. Because the

Padilla decision is based on constitutional principles it is retroactive. See, e.g., *Comm*. v. *Sylvain*, 466 Mass. 422, 436-437 (2013) (applying *Padilla* retroactively having determined that *Padilla* does not announce a new rule). Massachusetts "continue(s) to adhere to the Supreme Court's original construction that a case announces a "new" rule only when the result is "not dictated by precedent." *Id*. at 434. Thus, *Quispe* is unconstitutional law, and the motion judge rendered the decision without legal justification.

Further still, where the Appeals Court reasoned that "even if we were to conclude otherwise, the defendant fares no better if only because he has not established that the outcome of the proceeding would have been different," is speculative and not based on the material facts of the case. See *Sameja*, *6. Applying the constitutional principles of equal protection and fairness Mr. Sameja would have fared better—had probation counsel advocated for one day less based on the mitigating facts of his case.

Here, Mr. Sameja contends that he was denied the right to effective assistance of counsel when his

counsel failed to adequately present mitigating factors. "It is incumbent upon the judge to determine, based on all the facts and circumstances adduced at the hearing, including mitigating circumstances, whether revocation is the appropriate disposition." *Comm*. v. *Pena* 464 Mass. 183, 188 (2012). Had probationer's counsel zealously advocated for a 364-day sentence versus the 365-day sentence, **one day less**, as "the best possible disposition," his non-citizen client could have avoided or minimized the impact of the immigration consequence. *Marinho*, 464 Mass. at 128; see also, *Pena* 464 Mass. at 188. He would not have been deported at all.

Probation counsel could have advocated for one day less to avoid mandatory deportation for an aggravated felony. See *Comm*. v. *Gordan*, 82 Mass. App. Ct. 389, 401 (2012) (reasoning that "[t]he judge, who was also the trial judge, concluded that the defendant could have negotiated for a lesser sentence –**even by one day**- thus avoiding the mandatory deportation for an aggravated felony (emphasis added)"); *Comm*. *Marinho*, 464 Mass. at 128 ("counsel's failure to argue for a shorter sentence [364 days] fell measurably below requisite professional

standards”). It is firmly established that if a non-citizen receives a sentence under one year for a crime of theft that State conviction will not be treated as an aggravated felony under federal law. See Title 8 U.S.C. § 1101 (a) (43) (G), as amended in 1996. Here, the written findings entered on the federal court docket sheet[3] that was accepted at the non-evidentiary hearing plainly shows that Mr. Sameja was deported due to the imposition of the one-year sentence, which established prejudice. (RA/100; T2/18).

Most telling of prejudice, in this case, counsel could have made an equal protection argument at the dispositional stage of the hearing by arguing that a 364-day sentence for a non-citizen is just as punitive as 365-day is sentence for a citizen. Had probationer counsel informed the hearing judge at the dispositional stage of the probation revocation proceeding that if the court imposed **one day less** than the one-year maximum

[3] United States District Court, District of Massachusetts (Springfield), Civil Docket for Case # 3:19-cv-40141-MGM.

sentence, a 364-day sentence would not have made Mr. Sameja deportable at all.

Considering *Padilla* and *Henry*, "when the constitutional theory on which the defendant has relied on was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case," the motion judge should have analyzed Mr. Sameja's claims as if they had been properly preserved under the "clairvoyance" exception.

"When we excuse a defendant's failure to raise a constitutional issue at trial or on direct appeal, we consider the issue "as if it were here for review in the regular course." *Commonwealth* v. *Kater*, 388 Mass. 519, 533 (1983) (remanding for new trial holding that counsel is not required to have clairvoyance when law is not substantially developed). If constitutional error has occurred, we reverse the conviction unless the error was harmless beyond a reasonable doubt. *DeJoinville* v. *Commonwealth*, supra at 254. *Commonwealth* v. *Garcia*, 379 Mass. 422, 442

(1980). *Connolly* v. *Commonwealth*, supra at 538. *Commonwealth* v. *Stokes*, supra at 585." *Rembiszewski*, 391 Mass. 123, 126 (1984).

Thus, the convictions should be reversed, and the case remanded for a new probation revocation hearing.

II. The Appeals Court erroneously concluded that there was no error when the probation hearing judge failed to consider the probationer's ability to pay the restitution because *Commonwealth* v. *Henry*, 475 Mass. 117 (2016) had not been decided at the time of the probationer's violation hearing.

Mr. Sameja contends that the reviewing court erroneously concluded that there was no error when the hearing judge failed to consider the probationer's ability to pay the restitution "because the seminal case on the subject, Commonwealth v. Henry, 475 Mass 117, 55 N.E.3d 943 (2016), had not been decided at the time of the defendant's violation hearing." Sameja, *7.

However, *Henry* is based on constitutional principles of due process and equal protection, dictated by precedent. *Id*. at 122. See, i.e., *Bearden* v. *GA*, 461 U.S. 600, 668-669 (1983) ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically

without considering whether adequate alternative methods of punishing the defendant are available"); *Rotonda*, 434 Mass. at 221; see also, G. L. c. 258B, § 3 (o); G. L. c. 261, § 27A (a); G. L. c. 279, § 1. Restitution must be "limited to economic losses caused by the defendant's conduct and documented by the victim" and "bear a causal connection to the defendant's crime." *Comm*. v. *McIntyre*, 436 Mass. 829, 834 (2002). When the record indicates that the amount of restitution was arrived at arbitrarily, as in this case, the order cannot stand. The amount of the

Assuming arguendo, even if probationer's counsel could not have known about the legal significance of *Henry* because the constitutional law was not sufficiently developed, as the motion judge concluded, counsel's failure to raise a constitutional challenge at the time of the probation revocation hearing should be excused under the "clairvoyance" exception at this time. See *Comm*. v. *Rembiszewski*, 391 Mass. 123, 126 (1984).

And because the Notice of Violation of Probation stated three reasons: failing to pay restitution, missing two office visits, and incurring a new offense (RA/42, 44), this Court cannot be certain what impact the alleged violation of the failure to pay restitution

had on the judge's decision when determining the disposition and imposing an extraordinarily harsh sentence, which offends the probationer's constitutional right of equal protection. (T2/24-26).

It further stands to reason that the fact that Mr. Sameja incurred a new criminal offense[4] and was subsequently found guilty and sentenced to six-months in the house of correction is not a factor that should be weighed more than all other factors when determining if the 365-day sentence versus a 364-day sentence is just, because when "determining its disposition, the court shall give such weight as it may deem appropriate to the recommendation of the Probation Department,[5] the probationer, and the District Attorney,[6] if any, and to such factors as public safety; the circumstances of any crime for which the probationer was placed on probation; the nature of the probation violation; the occurrence of

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[4] "The motion judge further noted that "failure to pay restitution was but one of several violations considered by the [probation hearing] judge, violations which included a new offense for which the defendant was subsequently found guilty and sentenced to a six-month period of incarceration." Sameja, at *6.

[5] Probation took "no position on the substance of the ineffective assistance of counsel claim." (RA/78).

[6] The District Attorney is taking "no position." (T1/3).

any previous violations; and the impact of the underlying crime on any person or community, as well as any mitigating factors." Mass. Dist. Ct. R. Prob. Violation Proc. 8 (d).

For all those reasons, the Court should reverse and remand for a new probation revocation hearing.

CONCLUSION

For all the foregoing reasons, the Appellant prays this Honorable Court grant further appellate review.

Respectfully Submitted,
Sameja M. Farouq
By his attorney,

/s/ Kathleen J. Hill

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CERTIFICATION OF COMPLIANCE

Pursuant to Mass. R. App. P. 16 (k) and Mass. R. App. P. 27.1, I hereby certify that, to the best of my knowledge, the above document complies with the rules of this Court pertaining to the filing of briefs and Petitions for Further Appellate Review. Compliance with Rule 27.1 (b) (5) was ascertained using Courier New,

size 12 Font, producing 10 characters per inch, on a total of 10 pages (reasons why further appellate review is appropriate), that are 8.5 inches in width and 11 inches in height.

Date: April 17, 2025 */s/ Kathleen J. Hill*

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2025, I filed the Defendant-Appellant's AFAR through the Electronic Filing Service Provider for electronic service to the following registered user:

Pamela Alford, A.D.A.
Office of the District Attorney/Norfolk
Chief of Appeals Unit
45 Shawmut Road
Canton, MA 02021

/s/ Kathleen J. Hill

ADDENDUM
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EXHIBIT A

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-306

COMMONWEALTH

vs.

FAROUQ SAMEJA.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, who is not a United States citizen, was born in Dar Es Salaam, Tanzania, and lawfully emigrated to the United States at the age of nineteen. Approximately twenty years ago, he was sentenced to a one-year term of incarceration as a result of the revocation of his probation in the District Court. As we explain in more detail below, the imposition of the one-year sentence subjected the defendant to automatic deportation without the possibility of reentry into the country. Represented by new counsel, the defendant filed a motion under Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001),

asserting, among other things,[1] that his prior attorney (probation counsel or counsel) was ineffective for failing to advocate for a sentence that would have avoided deportation. The motion was denied by a judge (motion judge), who was not the plea judge or the judge who revoked the defendant's probation (probation hearing judge), and the defendant appealed.[2] We affirm.

Background. On December 7, 2001, the defendant pleaded guilty to one count of credit card misuse, in violation of G. L. c. 266, § 37B (i), and three counts of larceny under $250, in violation of G. L. c. 266, § 30 (1). He was sentenced to one year of probation and ordered to pay restitution as a condition of probation. Another condition of his probation was that he not violate any criminal laws.

While on probation, the defendant committed new criminal offenses of driving with a suspended license and driving an

[1] The defendant also claimed that (1) probation counsel did not adequately present all mitigating factors; (2) counsel did not advise the defendant of the right to appeal the revocation of probation and the sentence, which could have avoided his deportation; (3) counsel did not file a motion to reconsider the defendant's sentence; (4) the probation hearing judge failed to determine the defendant's ability to pay restitution and if the alleged violation was willful; (5) the same judge failed to make a statement of reasons for the revocation and sentence imposed; and (6) the trial court did not advise the defendant that he had a right to appeal.

[2] The defendant also filed a motion to reconsider that was denied.

uninsured motor vehicle. He also failed to pay restitution. As a result, a notice of violation of probation was issued on March 28, 2002, alleging that he had violated the conditions of his probation by committing new criminal offenses and for missing an office visit. The defendant stipulated to the violations on April 17, 2002. A subsequent notice of violation of probation was issued on December 6, 2002 (and later amended in March 2003), for two missed office visits, failure to pay restitution and a victim witness fee, and for committing additional criminal offenses. However, before a hearing was conducted, the defendant was taken into custody by Immigrations and Customs Enforcement (ICE) and held in prison in Louisiana. An immigration judge granted cancellation of removal. In his affidavit submitted in support of his new trial motion, the defendant avers that the judge told him to "settle this case [in Massachusetts]."

Thereafter, on October 1, 2004, the defendant appeared in the District Court for his final violation of probation hearing, where he was found to be in violation of his probation. Probation was revoked on all four convictions, and concurrent sentences of one year in the house of corrections were imposed. According to the defendant, he informed the probation hearing judge that he had been in removal proceedings. Given the passage of time, there is no transcript of the hearing; however,

the defendant further asserts that while his counsel requested a lesser sentence, counsel did not inform the probation hearing judge (or him) that, upon receiving a one-year term of incarceration, the defendant's State misdemeanor convictions would be treated as aggravated felonies under Federal law, subjecting him to automatic deportation.

Thereafter, on January 4, 2005, the defendant was taken from the house of corrections and into custody by ICE a second time, and deportation proceedings commenced before an immigration judge in Boston, who issued a formal order of removal in August 2005. However, the defendant was not deported until approximately fourteen years later, on December 19, 2019. The defendant's motion for a new trial was filed on July 11, 2023. As previously noted, the motion, as well as a subsequent motion for reconsideration, were denied.

Discussion. It is well settled that the defendant was entitled to the effective assistance of counsel at the final violation of probation hearing and that such a claim is properly brought under Mass. R. Crim. P. 30 (b). See Commonwealth v. Patton, 458 Mass. 119, 120 (2010). In reaching her conclusion that the defendant had not met his burden of establishing that (1) "behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer" and (2) "whether it has likely deprived the defendant of an

otherwise available, substantial ground of defen[s]e," Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the motion judge noted that prior counsel "could not ethically have requested the [probation hearing] judge to consider the immigration consequences of a one-year sentence, nor could the judge have done so" at that time. The motion judge was correct. The controlling law in 2004, as explained in Commonwealth v. Quispe, 433 Mass. 508, 512-513 (2001), was that "[t]aking immigration consequences into consideration [at sentencing] was improper. The possibility that the defendant would be subject to action by the [relevant immigration authority] [was] a collateral consequence and [could not have] be[en] the basis for the judge's decision as to the disposition of this or any future case."[3] Accordingly, while we recognize the hardship the defendant has endured and, according to his affidavit, continues to face, and we are cognizant of the fact that, had the probation hearing judge imposed a sentence of 364 days rather than 365, the defendant might not have faced the same immigration consequences, the record does not support his claim of ineffective assistance of counsel and the motion was properly denied on this ground.

[3] We recognize that Quispe, 433 Mass. 508, was overruled a decade later. See Commonwealth v. Marinho, 464 Mass. 115, 128 n.19 (2013).

The defendant's remaining arguments require little discussion. We are not persuaded that Commonwealth v. Marinho, 464 Mass. 115, 128 n.19 (2013), which overruled Quispe, 433 Mass. 508, applies retroactively. In any event, even if we were to conclude otherwise, the defendant fares no better if only because he has not established that the outcome of the proceeding would have been different. In addition, we agree with the motion judge who, with respect to the defendant's argument that there was no evidence that the probation hearing judge considered his ability to pay the restitution he owed, concluded that because the seminal case on the subject, Commonwealth v. Henry, 475 Mass. 117 (2016), had not been decided at the time of the defendant's violation hearing, there was no error. The motion judge further noted that "failure to pay restitution was but one of several violations considered by the [probation hearing] judge, violations which included a new offense for which the defendant was subsequently found guilty and sentenced to a six-month period of incarceration." Lastly, we agree with the motion judge, who, relying on Commonwealth v. Hoyle, 67 Mass. App. Ct. 10 (2006), determined that the defendant "has not rebutted the presumption of regularity which applies to this very old case, of which a complete record is no longer available given the passage of time." As a result, the defendant's claims, which are supported only by his own

affidavit, including his argument that he allegedly was not advised of his right to appeal, are unavailing.

Lastly, we discern no abuse of discretion in the denial of the defendant's motion to reconsider. Contrary to the defendant's assertion, the motion judge's decision was supported by our case law and was not "without legal justification." Furthermore, although the motion judge did not directly address the question, we are not persuaded that, at the time of the defendant's probation revocation hearing, it was predictable that Quispie would be overruled and therefore he should not be precluded from making the argument that the probation hearing judge should have considered the immigration consequences of a one-year sentence.

Order denying motion for new trial affirmed.

Order denying motion for reconsideration affirmed.

By the Court (Vuono, Brennan & D'Angelo, JJ.[4]),

Clerk

Entered: March 27, 2025.

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

EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2024-P-0306

COMMONWEALTH OF MASSACHUSETTS
APPELLEE

v.

FAROUQ SAMEJA
DEFENDANT-APPELLANT

RECORD APPENDIX FOR THE DEFENDANT
ON APPEAL FROM
THE WRENTHAM DISTRICT COURT

KATHLEEN J. HILL
BBO NO. 644665
ATTORNEY FOR THE APPELLANT
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(617) 742-0457
lookjhill@gmail.com

April 29, 2024

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0157CR000919 Commonwealth vs. Sameja, Farouq M

- Case Type:
- Criminal
- Case Status:
- Disposed for Statistical Purposes
- File Date
- 04/18/2001
- DCM Track:
-
- Initiating Action:
- CREDIT CARD FRAUD UNDER $250 BY MERCHANT c266 §37B(i)
- Status Date:
- 12/07/2001
- Case Judge:
-
- Next Event:
-

All Information | Party | Charge | Event | Docket | Disposition

Party Information

Sameja, Farouq M
- Defendant

Alias

Party Attorney
- Attorney
- Hill, Esq., Kathleen J
- Bar Code
- 644665
- Address
- PO Box 576
  Swampscott, MA 01907
- Phone Number
- (617)742-0457

More Party Information

Songin, Tim
- Complainant

Alias

Party Attorney

More Party Information

Party Charge Information

- **Sameja, Farouq M**
- - Defendant
  Charge # 1:
  266/37B/B-0 - Misdemeanor - more than 100 days incarceration CREDIT CARD FRAUD UNDER $250 BY MERCHANT c266 §37B(i)

- Original Charge
  - 266/37B/B-0 CREDIT CARD FRAUD UNDER $250 BY MERCHANT c266 §37B(i) (Misdemeanor - more than 100 days incarceration)
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition

12/07/2001
Guilty

- **Sameja, Farouq M**
- - Defendant
  Charge # 2:
  266/30/C-0 - Misdemeanor - more than 100 days incarceration LARCENY UNDER $250 c266 §30(1)

- Original Charge
  - 266/30/C-0 LARCENY UNDER $250 c266 §30(1) (Misdemeanor - more than 100 days incarceration)
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition
12/07/2001
Guilty

- **Sameja, Farouq M**
- - Defendant
  Charge # 3:
  266/30/C-0 - Misdemeanor - more than 100 days incarceration LARCENY UNDER $250 c266 §30(1)

- Original Charge
  - 266/30/C-0 LARCENY UNDER $250 c266 §30(1) (Misdemeanor - more than 100 days incarceration)
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition
12/07/2001
Guilty

- **Sameja, Farouq M**
- - Defendant
  Charge # 4:
  266/30/C-0 - Misdemeanor - more than 100 days incarceration LARCENY UNDER $250 c266 §30(1)

- Original Charge
  - 266/30/C-0 LARCENY UNDER $250 c266 §30(1) (Misdemeanor - more than 100 days incarceration)
  - Amended Charge
  -

Charge Disposition
Disposition Date
Disposition
12/07/2001
Guilty

Events

Date	Session	Location	Type	Result
05/18/2001 08:30 AM	Legacy Arraignment Session		Arraignment	Held
07/25/2001 08:30 AM	Legacy Conversion Session		Pretrial Hearing	Unknown Conversion
09/18/2001 08:30 AM	Legacy Conversion Session		Pretrial Hearing	Unknown Conversion
10/24/2001 08:30 AM	Legacy Conversion Session		Pretrial Hearing	Unknown Conversion
12/07/2001 08:30 AM	Legacy Conversion Session		Pretrial Hearing	Unknown Conversion
03/07/2002 08:30 AM	Legacy Conversion Session		Continued For Payment Until	Unknown Conversion
04/11/2002 08:30 AM	Legacy Conversion Session		Continued For Payment Until	Unknown Conversion
04/17/2002 08:30 AM	Legacy Conversion Session		Continued For Payment Until	Unknown Conversion
04/17/2002 08:30 AM	Legacy Conversion Session		Probation Violation Hearing	Unknown Conversion

12/06/2002 08:30 AM	Legacy Conversion Session	Probation Until	Unknown Conversion
01/29/2003 08:30 AM	Legacy Conversion Session	Probation Violation Hearing	Unknown Conversion
04/30/2003 08:30 AM	Legacy Conversion Session	Probation Violation Hearing	Unknown Conversion
07/11/2023 08:30 AM	Arraignment Session	Motion Hearing (CR)	Reschedule of Hearing
08/15/2023 02:00 PM	Arraignment Session	Motion Hearing (CR)	Held - under advisement
02/14/2024 02:00 PM	Arraignment Session	Motion Hearing (CR)	Held - Motion denied

Docket Information

Docket Date	Docket Text	Image Avail.
04/18/2001	Complaint file. Converted Case from WMS	
12/12/2019	Defendant's motion to declared indigent filed with the following, if any, supporting documents:	
01/03/2020	The Court enters the following order: After review of affidavit of indigency the court does find the defendant to in fact be indigent. --- CPSC notified.	
07/11/2023	Event Resulted: Motion Hearing (CR) scheduled on: 07/11/2023 08:30 AM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Julieann Hernon, Presiding	
07/11/2023	Defendant's motion for defendant's motion for a new trial filed with the following, if any, supporting documents:	Image
07/11/2023	Defendant's motion for defendant's motion for a new trial (exhibits) filed with the following, if any, supporting documents:	Image
07/11/2023	Appearance filed On this date Kathleen J Hill, Esq. added as Private Counsel for Defendant Farouq M Sameja	
08/04/2023	Probation Officer's motion for Response to Defendant's Motion For a New Trial filed by Atty Fabiola White filed with the following, if any, supporting documents:	Image
08/15/2023	Event Resulted: Motion Hearing (CR) scheduled on: 08/15/2023 02:00 PM Has been: Held - under advisement Hon. Julieann Hernon, Presiding	
08/15/2023	Taken under advisement Judge: Hernon, Hon. Julieann	
09/01/2023	Finding of Judge on matter taken under advisement motion for new trial - denied Judge: Hernon, Hon. Julieann	Image
09/19/2023	Notice of Appeal filed by Atty Kathleen Hill Judge: Finigan, Hon. Thomas L.	
09/29/2023	Defendant's motion to motion to reconsider filed with the following, if any, supporting documents:	Image
10/02/2023	The Massachusetts Probation Service is in receipt of the defendant's motion to reconsider, dated 9/29/23. After review, Probation continues to object to the motion and rests on the arguments made in its previous filing.	
12/04/2023	Defendant's motion to defendant's request for ruling and delay in the assembly of the record filed with the following, if any, supporting documents:	Image
02/14/2024	Event Resulted: Motion Hearing (CR) scheduled on: 02/14/2024 02:00 PM Has been: Held - Motion denied	

	Hon. Julieann Hernon, Presiding	
02/14/2024	Motion to reconsider prior ruling of Denial of Defendant's Motion for a New Trial (new probation violation hearing) DENIED. Exhibits filed with motion are in the docket papers	Image
02/21/2024	Notice of appeal to the Appeals Court filed by the Defendant	Image
02/28/2024	Appeal transcripts received from transcriber Ben Gold	

Case Disposition

Disposition	Date
Disposed	12/07/2001

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
V.

FAROUQ SAMEJA
DEFENDANT

RECEIVED
WRENTHAM DISTRICT COURT
JUL 11 2023
CLERK-MAGISTRATE

DEFENDANT'S MOTION FOR A NEW TRIAL

Now comes the probationer, Farouq Sameja, who respectfully moves this Honorable Court to order a new final probation revocation hearing, pursuant to Mass. R. Crim. P. 30 (b). As grounds for this motion, the probationer states that (1) probation counsel provided ineffective assistance of counsel when he failed to affirmatively advocate for a disposition that avoided or minimized immigration consequences for his noncitizen client, particularly when a sentence one-day less would have avoided immigration consequences altogether; (2) probation counsel failed to inform the hearing judge about the extraordinarily harshness of imposing a one-year sentence, the maximum sentence on the probationer for a state misdemeanor, which

under federal law constitutes an aggravated felony,[1] subjecting the probationer to automatic mandatory deportation and inadmissibility for life; (3) probation counsel failed to advocate for a sentence of 364 days or less which would have avoided immigration consequences altogether; (4) probation counsel failed to advise the probationer that he had a right to appeal and or to file a motion to reconsider the extraordinarily harsh sentence imposed on the probationer for the credit card misuse and larceny convictions in the total amount of $89.00; (5) the hearing judge failed to consider the probationer's ability to pay the restitution and if the alleged violation was willful; (6) the hearing judge failed to make a Statement of Reasons for the revocation and sentence imposed, in accordance with Rule 8 (d) of the District Court Rules for Probation Violation Proceedings; and (7) the trial court did not advise the probationer that he had a right to appeal, in accordance with Mass. R. Crim. P. 28 (c).

Under *Padilla*, a noncitizen has a right to accurate advice about immigration consequences prior to trial or a plea, as part of the Sixth

[1] See 8 USC § 1101(a)(43) (G), theft – aggravated felony **only if** term of imprisonment is at least one year.

Amendment right to effective assistance of counsel. Similarly, under *Sylvain*, a noncitizen has a right to accurate advice about immigration consequences prior to trial or a plea, as part of article 12 of the Massachusetts Declaration of Rights. See *Commonwealth v. Sylvain*, 466 Mass. 422, 435 (2013) (finding *Padilla* retroactive). Not only must defense counsel properly advise noncitizens of immigration consequences prior to a plea or trial, but defense counsel must "zealously advocate the best possible disposition," that minimizes the impact of immigration consequences at sentencing. *Commonwealth v. Marinho*, 464 Mass. 115, 128 (2013); see also *Commonwealth* v. *Pena*, 464 Mass. 183, 188 (2012).

In further support of this motion, Mr. Sameja attaches his Affidavit (Exhibit I), Attorney Affidavit (Exhibit L), and Memorandum of Law, with Exhibits A-N.

Wherefore, the probationer respectfully requests this Honorable Court order an evidentiary hearing on the substantial issues raised in his Verified Motion and allow his motion for a new final probation revocation hearing, pursuant to Mass. R. Crim. P. 30 (b).

Date: July , 2023 Respectfully submitted,

For Farouq Sameja

Kathleen J. Hill, BBO # 644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

VERIFICATION

I, Kathleen J. Hill, attorney for Farouq Sameja, hereby verify under the penalties of perjury that the facts stated in this Verified Motion are based on my own personal knowledge and to the best of my knowledge are true and accurate.

Kathleen J. Hill

CERTIFICATE OF SERVICE

I, Katheen J. Hill, attorney for Farouq Sameja in the above-captioned matter hereby certify that on July 11, 2023 I served a true and accurate copy of Defendant's Motion for a New Trial and Memorandum of Law, with Exhibits A-N, by prepaid, U.S. Priority Mail on the attorney of record for the Commonwealth:

Michael Morrissey, D.A.
Norfolk County District Attorney's Office
45 Shawmut Road, Canton MA 02021

45 Shawmut Road, Canton, MA 02021

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

MEMORANDUM OF LAW

This Court should grant a new final probation revocation hearing, pursuant to Mass. R. Crim. P. 30 (b), because probation counsel provided ineffective assistance of counsel when he failed to affirmatively advocate for a disposition that avoided or minimized immigration consequences for his noncitizen client, particularly when a sentence one-day less would have avoided immigration consequences altogether; probation counsel did not inform the hearing judge about the extraordinarily harshness of imposing the maximum sentence for a state misdemeanor, which under federal law constituted an aggravated felony; probation counsel failed to advise his client that he had a right to appeal and or that he could have filed a motion to reconsider the

extraordinarily harsh sentence for the credit card misuse and larceny convictions in the total amount of $89.00; the the hearing judge failed to consider the probationer's ability to pay the restitution and if the alleged violation was willful; the hearing judge failed to make a Statement of Reasons for the revocation and sentence imposed, in accordance with Rule 8 (d) of the District Court Rules for Probation Violation Proceedings; and the trial court did not advise of his right to appeal, in accordance with Mass. R. Crim. P. 28 (c).

Introduction

Farouq Sameja is a long-term lawful permanent resident ("green card" holder) from Tanzania who was deported in December of 2019 at age 49 ½ after receiving a one-year sentence of incarceration, instead of 364 days or less, on a probation violation. On arrival in Tanzania, Mr. Sameja became homeless, unemployed, and gravely ill with Malaria.[2] Even though he had worked for 30 years in the U.S. and annually paid his state and federal taxes, he lost his right to collect social security when he was deported.[3] He is ineligible for national retirement benefits

[2] See Exhibit M- International Trade Department, U.S. Department of Commerce, Tanzania Healthcare, Overview.

[3] See Section 202 (n) (1) of the Social Security Act.

in Tanzania because he cannot secure gainful employment and work for the next 15 years. To qualify under the national retirement system in Tanzania, an individual must contribute for at least 180 months. Retirement is compulsory at age 60.[4] The life expectancy for a male in Tanzania is 58 years old.[5]

Mr. Sameja's entire family resides in the United States. His grandfather, parents, brother, sister, aunts, uncles, cousins, and son are U.S. Citizens. Today, Mr. Sameja is 53 years old, his health is seriously compromised due to diabetes, he remains homeless, and he struggles to find any kind of employment. See Exhibit B, Defendant's Affidavit, pp. 89-91.

Procedural History

On April 18, 2001, Farouq Sameja, was charged with one count of Credit Card Fraud under $250 By Merchant, M. G. L. c. 266, § 37B (i), and three counts of Larceny under $250, M. G. L. c. 266 § 30, in the Wrentham District Court, Docket No. 0157CR000919. *(Exhibit A, K).*

[4] See Exhibit N, IOPS Tanzania, Report issued on December 2011, validated by the Social Security Regulatory Authority of Tanzania, page 4.

[5] Id., page 2.

On December 7, 2001, Mr. Sameja tendered a guilty plea on the advice of his counsel. He was sentenced to a term of probation for one year and ordered to pay restitution in amount of $400.00. *(Exhibit B).*

On December 6, 2002, the probation department served Mr. Sameja with a notice of violation of probation for having failed to pay $400.00 in restitution, and for not showing for two office visits on November 12, 2002, and November 21, 2002. *(Exhibit C).*

On March 7, 2003, the probation department served Mr. Sameja with an amended notice of violation of probation for having incurred a new criminal offense, namely, operating on a suspended license, attaching plates, and underinsured motorist; and, not showing up for an office visit on March 21, 2003. *(Exhibit D).*

Prior to the final probation revocation hearing, Mr. Sameja was taken into custody by ICE and transferred to a federal prison in the State of Louisiana. He was placed in removal (deportation) proceedings.

On October 28, 2003, Mr. Sameja applied for cancellation of removal under 240A (a), as a pro se litigant. An immigration judge in Louisiana issued a cancellation order of removal, thereby making him

no longer deportable. *(Exhibit E).* Mr. Sameja returned to Massachusetts.

On October 1, 2004, at the final probation revocation hearing, Mr. Sameja was found in violation of probation and his probation was revoked. On Count One the judge imposed a one-year sentence in the house of correction; on Counts Two, Three, and Four, the judge imposed the statutory maximum sentence, a one-year sentence in the house of correction, current with Count One. *(Exhibit A).*

On January 4, 2005, ICE investigated Mr. Sameja at Norfolk County House of Correction and determined that he was deportable. The "Record of Deportable/Inadmissible Alien" states, in pertinent part, that:

> "Subject is currently serving a one-year sentence after violating probation on a credit card fraud conviction. Subject is a native and citizen of Tanzania who immigrated to the U.S. as set forth above. Subject was in removal proceedings and was granted cancellation by the BIA. There are no applications pending relating to the subject with CIS. The subject immigrated to the U.S. at the age of 19 and there are no claims . . ."

On the completion of his one-year sentence ICE arrested Mr. Sameja at the Norfolk County House of Correction, and immediately commenced deportation proceedings in Boston,

Massachusetts, based on new grounds of deportability, namely the one-year sentences imposed on the larceny convictions in this matter were now aggravated felonies. *(Exhibit F).*

On August 31, 2005, an immigration judge in Boston, Massachusetts issued an order to remove Mr. Sameja from the United States. *(Exhibit G).* ICE was not able to obtain travel documentation for Mr. Sameja, and he was placed on an order of supervision. *(Exhibit H).*

On December 19, 2019, under a new administration, Mr. Sameja was deported to Tanzania, and he is deemed inadmissible to enter the United States for life. *(Exhibit I).*

Statement of Facts

Farouq Sameja, a noncitizen, is a black male who was born and raised in Dar Es Salaam, Tanzania. On May 3, 1990, Mr. Sameja immigrated to the U.S. with his immediate family at the age of 19 on an immigration visa, with labor certification in soil drilling. *(Exhibit I).* His entire immediate family immigrated to the U.S. together, arriving in New York City, with the intention of locating to Massachusetts. Mr. Sameja's final address was 70 Orchard Lane, Attleboro, MA, where his parents reside to this day. *Id.*

Initially, Mr. Sameja secured employment as an auto mechanic and a gas attendant. On March 30, 2001, while working as a gas attendant, he was arrested for double billing three customers for a total amount of $89.00. *(Exhibit J).* On December 7, 2001, Mr. Sameja accepted responsibility for the credit card misuse and larceny charges, tendered a plea of guilty, and the plea judge sentenced him to one-year of straight probation and issued an order of restitution in the amount of $400.00. *(Exhibit A and Exhibit B).*

On November 6, 2002, his last day of probation, Mr. Sameja was served with a notice of violation of probation for having failed to satisfy the restitution order and missing his last two office visits. Before the final probation revocation hearing was held, ICE arrested Mr. Sameja, and he was transferred to a federal prison in the State of Louisiana. *(Exhibit C).*

While Mr. Sameja was imprisoned at a federal prison in Louisiana he wrote a letter to the immigration judge asking for the cancellation of the removal order. In his letter, Mr. Sameja stated that he accepted responsibility for his actions; he was remorseful; he was caring for his parents; and he had learned from his mistakes. On October 28, 2003,

the immigration judge granted cancellation of the removal order. (Exhibit E). The judge told Mr. Sameja to return to his family in Massachusetts and resolve the pending revocation of probation matter. *(Exhibit I).*

On October 1, 2004, at the final probation revocation hearing, Mr. Sameja told the hearing judge that the immigration judge who cancelled the removal order told him to return to his family in Massachusetts and to resolve the pending violation of probation in this case. *Id.* The hearing judge revoked his probation, and imposed the statutory maximum sentence, one-year in the house of correction, on the probationer. Mr. Sameja was never told that he could appeal the finding of a violation of probation and the one-year sentence imposed, or that he could file a motion for reconsideration. *Id.*

Although probation counsel does not recall this case, after reviewing the hand-written docket sheet, the criminal complaint, the green sheet, and the notices of violation, probation counsel asserts that, as a matter of practice, he would have asked the judge to impose a much lesser sentence than the statutory maximum sentence. *(Exhibit L).* However, probation counsel believes that he would not have asked

the court to sentence Mr. Sameja to 364 days versus 365 days, **one day less** than one-year, to avoid the dire immigration consequences of the state misdemeanor being treated as an aggravated felony under federal law. Probation counsel recalls that prior to *Padilla* there were no immigration practice advisories or Massachusetts case law to advise counsel that a state conviction for credit card fraud/larceny[6] would be treated as an aggravated felony under federal law, if the judge imposed a one-year sentence on the probationer. *Id.*

After Mr. Sameja fully completed his one-year sentence in the house of correction, ICE arrested him at the Norfolk County House of Correction and immediately commenced deportation proceedings in Boston, Massachusetts. *(Exhibit I).* On August 31, 2005, Mr. Sameja was ordered removed from the United States, but ICE was unable to obtain travel documentation and he was placed on an order of supervision. *(Exhibit G).*

During the years of supervision Mr. Sameja resided with his parents and his common-law wife. He helped his mother care for his

[6] ICE refers to the convictions in question that subjected Mr. Sameja to deportation as "credit card fraud conviction." See Exhibit F, the "Record of Deportable/Inadmissible Alien."

father. He did the grocery shopping, paid the bills, and did the landscaping. He also fixed cars for people in his community, who did not have the funds to repair their cars. Mr. Sameja maintained steady employment, and he regularly paid his state and federal annual income taxes (1990 to 2019). *(Exhibit I).*

On December 19, 2019, Mr. Sameja was deported to Tanzania. He is deemed inadmissible **for life** because of the State larceny convictions, in the total amount of $89.00. *Id.*

Argument

This Court should determine that probation counsel provided ineffective assistance of counsel at the dispositional stage of the final probation revocation hearing because he failed to affirmatively advocate for a disposition that avoided or minimized immigration consequences for his noncitizen client, particularly when a sentence one-day less would have avoided immigration consequences altogether; probation counsel failed to inform the hearing judge that if he imposed the maximum one-year sentence on his client, the state misdemeanor would be treated as an aggravated felony under federal law and result in his client's deportation, whereas if the judge imposed 364 days on his client

he would not be deported; probation counsel did not advise his client of the right to appeal the revocation and sentence which could have avoided his deportation, and he did not file a motion to reconsider his sentence to 364 days to avoid his deportation; the hearing judge did not determine whether the probationer had the ability to pay restitution and if the alleged violation was willful; the hearing judge failed to make a Statement of Reasons for the revocation and sentence imposed, in accordance with Rule 8 (d) of the District Court Rules for Probation Violation Proceedings; and the record indicates that Mr. Sameja was not advised by the court of his right to appeal, in accordance with Mass. R. Crim. P. 28 (c).

As a matter of policy and practice, the federal government categorically prioritizes noncitizens convicted of an aggravated felony at the highest level of priority, mandating automatic deportation[7]and inadmissibility for life.[8] "After the 1996 effective date of amendments to the 1952 Immigration and Nationality Act, ... 'if a noncitizen has

[7] 8 U.S.C. § 1227 (a) (2) (A) (iii); 8 U.S.C. § 1229 (a) (2).

[8] 8 U.S.C. § 1229b (a) (3). See also, INA section 240A (b), INA section 212(a) (2), INA sections 212(h) and 212 (I), which precludes noncitizens convicted of an aggravated felony from qualifying for cancellation of removal and adjustment of status.

committed a removable offense ... , his removal is practically inevitable,' subject to limited exceptions." *Commonwealth* v. *DeJesus*, 468 Mass. 174, 180 (2014), quoting *Padilla* v. *Kentucky*, 559 U.S. 365, 363-364 (2010) ; see *Commonwealth* v. *Sylvain*, 466 Mass. 422, 436-437 (2013) (applying *Padilla* retroactively having reasoned that *Padilla* did not announce a new rule). Under art. 12 of the Massachusetts Declaration of Rights defense counsel must accurately advise on immigration consequences, and "zealously advocate the best possible disposition," that minimizes the impact of immigration consequences. *Commonwealth v. Marinho*, 464 Mass. 115, 128 (2013); see also *Commonwealth* v. *Pena*, 464 Mass. 183, 188 (2012).

Under the *Saferian* test, when evaluating whether a defendant has been deprived of constitutionally effective assistance of counsel, the primary question 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 " *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). "It is quintessentially the duty of counsel to provide [his] client with available advice about an issue like deportation and the failure to do so

'clearly satisfies the first prong of the *Strickland* [Strickland v. United States, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] analysis." *Padilla,* 559 U.S. at 371. In this case, probation counsel did not advise his client, who had just been granted cancellation, that the imposition of a one-year sentence would cause his larceny convictions to be treated as aggravated felonies (thereby making him newly deportable[9]) and counsel did not explain this to the court, and for that reason he failed to advocate for the imposition of sentences of 364 days or less, and he did not explain to Mr. Sameja that he had the right to appeal. *(Exhibit I).*

More specifically, probation counsel had an affirmative obligation under the Sixth and Fourteenth Amendment of the United States Constitution and article 12 of the Massachusetts Declaration of Rights "to conduct an independent investigation of the facts," which includes all mitigating factors to be raised at the disposition stage of the probation revocation hearing. *Commonwealth* v. *Baker*, 440 Mass. 519, 529 (2003) ("until he commenced such an investigation, he simply had no way of making a reasonable tactical judgment"); see also, *Marinho*,

[9] Cancellation of removal (deportation) is a one-time only form of relief. See INA 240A (c) (6).

464 Mass. at 128 (defense counsel must "zealously advocate the best possible disposition"). Here, counsel's performance fell below that of an ordinary fallible counsel because he did not adequately present all mitigating factors based on the circumstances of his client's immigration status when a federal judge had just cancelled the removal order, and he did not inform the judge that if he imposed the maximum sentence, a one-year sentence, on his client then the federal government would treat the larceny convictions as aggravated felonies, which would result in automatic mandatory deportation and inadmissibility **for life**. Still further, 8 U.S.C. § 1229b (a) (3) states that an aggravated felony precludes a noncitizen from applying to the U.S. Attorney General for relief. *(Exhibit L).* Consequently, Mr. Sameja is not even eligible to apply to the U.S. Attorney General for relief.

As a matter of justice, due process requires "[t]he parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey* v. *Brewer*, 408 U.S. 471, 488 (1972). And "it is incumbent upon the judge to determine, based on all the facts and circumstances adduced at the

hearing, including mitigating circumstances, whether revocation is the appropriate disposition." *Commonwealth* v. *Pena*, 464 Mass. 183, 188 (2012). Had probation counsel informed the hearing judge at the dispositional stage of the probation revocation proceeding that if the court imposed **one day less** than the one-year maximum sentence, the 364-day sentence would **not** have made Mr. Sameja deportable at all. *(Exhibit L)*. See *Commonwealth* v. *Satterfield*, 373 Mass. 109, 115 (1977) ("but for counsel's error, something material might have been accomplished in the defendant's favor"). Here, the prejudice flows from concluding that "better work would have accomplished something material for the defendant." *Commonwealth* v. *Adams*, 374 Mass. 727, 728 (1978). Most telling of prejudice, in this case, if Mr. Sameja had not received a one-year sentence then he would not have been deported at all because a federal judge had granted cancellation of removal after Mr. Sameja had pled guilty to the credit card misuse and larceny convictions.

Furthermore, the Statement of Reasons for the revocation of probation is missing from the record. *(Exhibit A)*. There is no reasonable explanation for why the hearing judge imposed the maximum sentence

on Mr. Sameja when the hearing judge, like probation counsel, was probably not aware that the State misdemeanor convictions would be treated as aggravated felonies if he imposed a one-year sentence in the house of correction on Mr. Sameja, as opposed to 364 days, particularly where a federal judge had just issued a cancellation order of removal. (*Exhibit L, Attorney Affidavit).* See *Morrissey* v. *Brewer*, 408 U.S. 471, 488 (1972) (due process requires findings of fact and a statement of the evidence relied on); *Fay* v. *Commonwealth*, 379 Mass. 498, 504-505 (1980) (due process requirement of findings of fact and evidence relied on stated on the record); Rule 8 (d) (v) of the District Court Rules for Probation Violation Proceedings. In this case, there is no reason to think that a prosecutor or the probation department would ask the judge to impose the maximum sentence when 364 days, **one day less**, would effectively result in the same punitive effect as 365 days, but without dire immigration consequences.[10] Simply put, probation counsel did not know that if Mr. Sameja received a 364-day sentence versus a 365-day sentence, **one day less,** that he would not have incurred the

[10] See Rule 8(d) of the District Court Rules for Probation Violation Proceedings pertaining to dispositional alternatives after finding a violation of probation: continuance of probation; termination; modification; revocation and statement of reasons.

dire immigration consequences: the loss of his entire family, his employment, health care, community, and retirement for life. In turn, the hearing judge was unaware that he could impose essentially the same one-year sentence, less one day, but without the profoundly inequitable result of deportation for a person convicted of a theft crime involving a total amount of $89.00.

Moreover, the hearing judge may have improperly imposed a harsh sentence on Mr. Sameja due to the alleged violation of the restitution order. Here, there is no showing that the hearing judge considered whether the restation order caused a manifest hardship on Mr. Sameja and his family, if he had the ability to pay restitution, and what efforts he made to pay restitution, which offends the constitutional requisites of a restitution order and "the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty." *Commonwealth* v. *Henry*, 475 Mass. 117, 12 (2016). *Bearden* v. *GA*, 461 U.S. 600, 668-669 (1983) ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without

considering whether adequate alternative methods of punishing the defendant are available.").

On this record there are no findings to show that the hearing judge at the final probation revocation hearing considered whether Mr. Sameja was financially able to pay the amount ordered[11] or that he willfully failed to pay restitution. Still further, there is no justification for why the original sentencing judge imposed a restitution order more than four times the value of the actual loss of goods when restitution should not exceed the actual costs of goods. *Id.* at 130. Thus, for this reason the revocation order should be vacated, and Mr. Sameja should be resentenced.

Finally, Mr. Sameja contends that he was not advised that he had the right to appeal the revocation of probation or the imposition of the one-year sentence, which is further supported by the docket sheet which does not show that he was advised of his right to appeal, in accordance with Mass. R. Crim. P. 28 (c). *(Exhibit A).* Probation counsel did not

[11] "The judge must consider the financial resources of the defendant, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependent. Ct. G. L. c. 261, § 27A (a)." *Henry*, 475 Mass. at 126.

move to reconsider wherein counsel could have requested the judge sentence Mr. Sameja to one day less than the one-year sentence imposed so that the federal government would not treat the convictions for larceny, misdemeanors, as aggravated felonies. See *Commonwealth* v. *Balboni*, 419 Mass. 42, 43 (1994), (motion to reconsider must be sought within 30 days of revoking probation and imposing the sentence); Cf. *Commonwealth* v. *Stubbs*, 15 Mass. App. Ct. 95 (1983) (remand is appropriate to determine whether counsel was ineffective for failing to timely file a motion to revise and revoke). If Mr. Sameja had been sentenced to just one-day less, 364 days versus 365 days, then he would not have been deported at all.

In sum, Mr. Sameja was denied his opportunity to persuade the hearing judge to impose essentially the same sentence but without the disproportionate effect of deportation due to ineffective assistance of counsel, and he was not advised about his right to appeal, all of which violates the Sixth Amendment of United States Constitution and article 12 of the Massachusetts Declaration of Rights. There is a reasonable probability that if the judge had conducted an informed analysis he would not have imposed such an extraordinarily harsh sentence on Mr.

Sameja for misuse of a credit card and larceny in the total amount of $89.00, the effects of which resulted in automatic mandatory deportation and inadmissibility for life.

Request For An Evidentiary Hearing

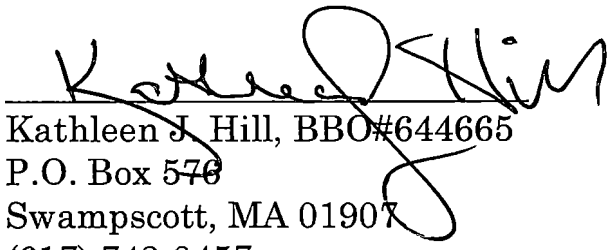
The probationer's motion and supporting affidavits adequately raise a substantial issue, which seriously casts doubt on whether justice was done in this case. See *Commonwealth* v. *Britto*, 433 Mass. 596, 608 (2001) (requiring an evidentiary hearing when defendant submits a claim raising a substantial issue); Mass. R. Crim. P. 30 (c) (3). "A defendant's submissions need not prove the factual basis of his motion in order to make an adequate showing of a substantial issue, but they must at least contain sufficient credible information to 'cast doubt on' the issue." *Commonwealth* v. *Goodreau*, 442 Mass. 341, 348 (2004), quoting *Commonwealth* v. *Britto*, supra. The probationer's showing of ineffectiveness of counsel at the dispositional stage of the final probation revocation hearing is of a constitutional dimension that warrants a new probation revocation hearing. See *Commonwealth* v. *Licata*, 412 Mass. 654, 660-661 (Mass. 1992). Thus, the probationer requests an evidentiary hearing, in accordance with Mass. R. Crim. P.

30 (c) (3). Based on the forgoing, this Court should order an evidentiary hearing to resolve this case.

WHEREFORE, the Defendant respectfully requests this Honorable Court order an evidentiary hearing on Defendant's Motion for a New Trial, and grant him a new final probation revocation hearing, pursuant to Mass. R. Crim. P. 30 (b).

Date: 07/11/2023

Respectfully Submitted,
For Farouq Sameja



Kathleen J. Hill, BBO#644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

ADDENDUM

TABLE OF CONTENTS

EXHIBIT A

CRIMINAL DOCKET

DOCKET NO.	0157CR000919
ATTORNEY NAME	MAY 1 8 2001 [illegible]
COURT DIVISION	Wrentham
INTERPRETER REQUIRED	☐
NAME, ADDRESS AND ZIP CODE OF DEFENDANT	SAMEJA, FAROUQ 70 ORCHARD LANE ATTLEBORO, MA 02703
DEFT. DOB AND SEX	06/12/1970 M
DATE OF OFFENSE(S)	02/12/2001
PLACE OF OFFENSE(S)	WALPOLE
COMPLAINANT	SONGIN, TIM
POLICE DEPARTMENT (if applicable)	WALPOLE PD
DATE OF COMPLAINT	04/18/2001
RETURN DATE AND TIME	05/18/2001 08:30:00

DATE and JUDGE	DOCKET ENTRY
MAY 1 8 2001 [signature]	☐ Attorney appointed (SJC R. 3:10) ☑ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
"	Terms of release set: ☑ PR ☐ Bail: PR ☐ Held (276 §58A) ☐ See back for special conditions
"	Arraigned and advised: ☑ Potential of bail revocation (276 §58) ☐ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
DEC 7 2001 [signature]	Advised of right to jury trial: ☐ Does not waive ☑ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE 1. 266/37B/B CREDIT CARD FRAUD UNDER $250 BY MERCH

FINE: — SURFINE: — COSTS: — RESTITUTION: — V/W ASSESSMENT: 35.— ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 7 2001 [signature]

DISPOSITION METHOD: ☑ Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning; ☐ Bench Trial; ☐ Jury Trial; ☐ None of the Above

FINDING: ☐ Not Guilty; ☑ Guilty; ☐ Not Responsible; ☐ Responsible; ☐ No Probable Cause; ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION:
☐ Sufficient facts found but continued without guilty finding until:
☑ Probation 12-6-02 ☐ Pretrial Probation (276 §87) - until: rest: $400.—
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION: ☐ Dismissed on recommendation of Probation Dept. ☐ Probation terminated: defendant discharged — JUDGE — DATE

2554E000010/01/01DWEF

COUNT/OFFENSE 2. 266/30/C LARCENY UNDER $250 c266 §30

FINE: — SURFINE: — COSTS: — RESTITUTION: — V/W ASSESSMENT: 35. ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 7 2001 [signature]

DISPOSITION METHOD: ☑ Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning; ☐ Bench Trial; ☐ Jury Trial; ☐ None of the Above

FINDING: ☐ Not Guilty; ☑ Guilty; ☐ Not Responsible; ☐ Responsible; ☐ No Probable Cause; ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION:
☐ Sufficient facts found but continued without guilty finding until:
☑ Probation 12-6-02 ☐ Pretrial Probation (276 §87) - until: conc w/ ct 1
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION: ☐ Dismissed on recommendation of Probation Dept. ☐ Probation terminated: defendant discharged — JUDGE — DATE

COUNT/OFFENSE 3. 266/30/C LARCENY UNDER $250 c266 §30

FINE: — SURFINE: — COSTS: — RESTITUTION: — V/W ASSESSMENT: 35.— ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 7 2001 [signature]

DISPOSITION METHOD: ☑ Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning; ☐ Bench Trial; ☐ Jury Trial; ☐ None of the Above

FINDING: ☐ Not Guilty; ☑ Guilty; ☐ Not Responsible; ☐ Responsible; ☐ No Probable Cause; ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION:
☐ Sufficient facts found but continued without guilty finding until:
☑ Probation 12-6-02 ☐ Pretrial Probation (276 §87) - until: conc w/ ct 1
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION: ☐ Dismissed on recommendation of Probation Dept. ☐ Probation terminated: defendant discharged — JUDGE — DATE

COUNT/OFFENSE 4. 266/30/C LARCENY UNDER $250 c266 §30

FINE: — SURFINE: — COSTS: — RESTITUTION: — V/W ASSESSMENT: 35.— ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 7 2001 [signature]

DISPOSITION METHOD: ☑ Guilty Plea or Admission to Sufficient Facts accepted after colloquy and 278 §29D warning; ☐ Bench Trial; ☐ Jury Trial; ☐ None of the Above

FINDING: ☐ Not Guilty; ☑ Guilty; ☐ Not Responsible; ☐ Responsible; ☐ No Probable Cause; ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION:
☐ Sufficient facts found but continued without guilty finding until:
☑ Probation 12-6-02 ☐ Pretrial Probation (276 §87) - until: conc w/ ct 1
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION: ☐ Dismissed on recommendation of Probation Dept. ☐ Probation terminated: defendant discharged — JUDGE — DATE: [illegible]

☐ ADDITIONAL COUNTS ATTACHED

COURT ADDRESS: Wrentham District Court, 60 East Street, Wrentham, MA 02093-0248

A TRUE COPY ATTEST: X CLERK-MAGISTRATE/ASST. CLERK ON (DATE)

DOCKET NUMBER: **0157CR000919** NAME: **SAMEJA, FAROUQ**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	7-25-01	PTH	☐ Held ☑ Cont'd [illegible]	[illegible]			
2	9-18-01	PTH	☐ Held ☑ Cont'd 8OC	WINSLOW, J.			
3	10/24/01	PTH	☐ Held ☑ Cont'd STC	Winslow			
4	12-7-01	PTH	☐ Held ☑ Cont'd 8OC	[illegible]			
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

ARR=Arraignment PT=Pretrial hearing CE=Discovery compliance and jury election T=Bench trial J=Jury Trial PC=Probable cause hearing M=Motion hearing SR=Status review SRP=Status review of payments FA=First appearance in jury session S=Sentencing CW=Continuance-without-finding scheduled to terminate P=Probation scheduled to terminate DFTA=Defendant failed to appear and was defaulted WAR=Warrant issued WARD=Default warrant issued WR=Warrant or default warrant recalled PR=Probation revocation hearing

ENTRY DATE	OTHER DOCKET ENTRIES
SEP 18 2001	Defaulted, default warrant (10:45). WINSLOW, J.
SEP 19 2001	Δ vol. came in. Warr recalled Wins.
	Dr/WR $75 def rem fee F/W
MAR 07 2002	C: 4-11-02 pymt
MAR 28 2002	C: 4-17-02 SH Atty Veer appt. prob. notified Δ by mail
4/5/02	Prob Notified Court Deft held @ Dartmouth
	H/C - Habe to issue for 4/17/02
APR 11 2002	C: 4-17-02 pymt
4/17/02	Vol/shop found G-prob. 12/16/02 restitution to be determined
	by probation, Gorth J.

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
	Legal Counsel Fee (211D §2A ¶2)			
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)			
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

DOCKET CONTINUATION	NAME OF CASE Farouq Sameja	DOCKET NUMBER 01-0919

NO.	DATE	DOCKET ENTRIES
	12-6-02	c: 1-29-03 SH prob. notified Δ by mail
	JAN 29 2003	Defaulted, dyman (10:30). [illegible]
	MAR 7 2003	Δ transported on war. Drewer
	"	Drewer, V. Sloan appted. (150. fee) [struck] C: 4-30-03 SH/9020, PR. - [illegible]
	APR 30 2003	Defaulted [illegible] (10:15). [illegible]
	9/30/04	PO Andy Glassman Req Δ be hailed into Court for 10/1/04 SH. Habe issd to Bristol Cty H/C
	10-1-04 Cts 1,2,3,4	→ VOP found, Probation [illegible], 1 yr [illegible] on each ct, conc. w/ [illegible]. [illegible] [illegible]
	1/3/20	Defs Motion to be Discharged Indigent Allowed Finnegan, J.
	1/3/20	Notice Sent to Δ + CPCS, Copy to File

DC-CR 14 (12/89)

EXHIBIT B

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS

DOCKET NO. 0919 0157CR~~0005~~ | NO. OF COUNTS | **Trial Court of Massachusetts District Court Department**

INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.

NAME OF DEFENDANT: Farouq M Samaja

COURT DIVISION: Wrentham District Court, 60 East Street - PO Box 248, Wrentham, MA 02093

SECTION I. TENDER OF PLEA

Defendant in this case hereby tenders the following: ☑ PLEA OF GUILTY ☐ ADMISSION TO FACTS SUFFICIENT FOR A FINDING OF GUILTY conditioned on the dispositional terms indicated below. *Include all proposed terms (guilty finding, finding of sufficient facts, continued without finding, dismissal, fine, costs, probation period and supervision terms, restitution amount including the identification of the recipient of restitution, and any sentence of incarceration, split sentence or suspended sentence, etc.). Number each count and specify terms for each count separately.*

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees. Check "No" if Prosecution disagrees)	PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
	☑ YES ☐ NO	1) Guilty - Probation 12mo. Restitution - $400.00
	☐ YES ☐ NO	2) Guilty & Prob Concurrent to Ct 1
	☐ YES ☐ NO	3) Guilty " "
	☐ YES ☐ NO	4) Guilty " "
	☐ YES ☐ NO	
	☐ YES ☐ NO	

WE HAVE CONSULTED WITH THE PROBATION DEPARTMENT REGARDING ANY PROBATION TERMS SET FORTH ABOVE.

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X	12-7-01	X	12/7/01

SECTION II. TENDER OF PLEA OR ADMISSION ACCEPTED BY COURT

The Court ☒ **ACCEPTS** the tendered Plea or Admission on defendant's terms set forth in Section I, and will impose sentence in accordance with said terms, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS.

SECTION III. TENDER OF PLEA OR ADMISSION REJECTED BY COURT

The Court ☐ **REJECTS** the defendant's dispositional terms set forth above and, in accordance with Mass. R. Crim. P. 12(c)(6), has set forth to the defendant the dispositional terms it would find acceptable, to wit:

DEFENDANT'S DECISION IF COURT REJECTS TENDERED PLEA OR ADMISSION:

☐ Defendant **WITHDRAWS** the tendered Plea or Admission; the parties must complete and file a Pretrial Conference Report, a Pretrial Hearing must be conducted and a trial date scheduled, if necessary.

☐ Defendant **ACCEPTS** terms set forth by the Court, a Plea or Admission will be accepted by the court and said dispositional terms imposed, subject to submission of defendant's written WAIVER (see Section IV on reverse of this form), completion of the required oral COLLOQUY, a determination that there is a FACTUAL BASIS for the Plea or Admission, and notice of ALIEN RIGHTS.

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (if rejection decision made)	DATE
X	12/7/01	X	

DC-CR 22 (6/96)

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L. c. 278, § 29D; ALFORD/NOLO CONTENDERE PLEA)

I, the undersigned defendant, understand and acknowledge that I am voluntarily giving up the right to be tried by a jury or a judge without a jury on these charges.

I have discussed my constitutional and other rights with my attorney. I understand that the jury would consist of six jurors chosen at random from the community, and that I could participate in selecting those jurors, who would determine unanimously whether I was guilty or not guilty. I understand that by entering my plea of guilty or admission, I will also be giving up my right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to testify or provide evidence against myself by asserting my privilege against self-incrimination, all with the assistance of my defense attorney; and to be presumed innocent until proven guilty by the prosecution beyond a reasonable doubt.

I am aware of the nature and elements of the charge or charges to which I am entering my guilty plea or admission. I am also aware of the nature and range of the possible sentence or sentences.

My guilty plea or admission is not the result of force or threats. It is not the result of assurances or promises, other than any agreed-upon recommendation by the prosecution, as set forth in Section I of this form. I have decided to plead guilty, or admit to sufficient facts, voluntarily and freely.

I am not now under the influence of any drug, medication, liquor or other substance that would impair my ability to fully understand the constitutional and statutory rights that I am waiving when I plead guilty, or admit to sufficient facts to support a finding of guilty.

I understand that if I am not a citizen of the United States, conviction of this offense may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF DEFENDANT	DATE
X Fanny M. Sanjur	12-7-01

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 278, § 29D)

As required by G.L. c. 218, § 26A, I certify that as legal counsel to the defendant in this case, I have explained to the defendant the above-stated provisions of law regarding the defendant's waiver of jury trial and other rights so as to enable the defendant to tender his or her plea of guilty or admission knowingly, intelligently and voluntarily.

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X	551252	12-7-01

SECTION VI JUDGE'S CERTIFICATION

I, the undersigned Justice of the District Court, addressed the defendant directly in open court. I made appropriate inquiry into the education and background of the defendant and am satisfied that he or she fully understands all of his or her rights as set forth in Section IV of this form, and that he or she is not under the influence of any drug, medication, liquor or other substance that would impair his or her ability to fully understand those rights. I find, after an oral colloquy with the defendant, that the defendant has knowingly, intelligently and voluntarily waived all of his or her rights as explained during these proceedings and as set forth in this form.

After a hearing, I have found a factual basis for the charge(s) to which the defendant is pleading guilty or admitting and I have found that the facts as related by the prosecution and admitted by the defendant would support a conviction on the charges to which the plea or admission is made.

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 with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X	12-7-01

EXHIBIT C

NOTICE OF PROBATION VIOLATION	Docket number of criminal case in which probation was ordered: 0157 CR 0919	Trial Court of Massachusetts District Court Department
Name of Probationer: Faroug Sameja	Date: 12/6/02	Court Name and Address: WRENTHAM DISTRICT COURT, 60 EAST STREET PO BOX 1006, WRENTHAM, MA. 02093

TO THE ABOVE-NAMED PROBATIONER:

YOU ARE HEREBY NOTIFIED of the following alleged violation(s) of the probation order that was issued to you in the criminal case identified above:

[X] You violated a criminal law of the commonwealth, namely: *ammended 3-7-03* *New offenses in Taunton Ct. 3-6-03 oper mv susp lic + Attach plates, lic Ins MV. oper mv susp Reg.*

[ ] You failed to attend or successfully complete a required program, specifically: *added 3/10/03 - attleboro Court (3/10/03) oper mv w/o rev lic, lic Reg MV, lic Ins MV, Att Plates, oper MV susp susp off*

[ ] You failed a required drug test, specifically:

[ ] You failed to make a required payment, specifically: *Restitution $400. Victim witness Fee $140.*

[ ] You failed to report as required by your probation specifically: *no show for office visit on 11/12/02 & 11/21/02.*

[ ] Other:

YOU ARE HEREBY ORDERED as follows:

[X] YOU MUST APPEAR in THIS COURT on ~~*Jan 9, 2003*~~ *4/30/03* (Date) at *9 am* (Time), for a hearing on the allegation(s) listed above.

You are entitled to have a lawyer to represent you at the hearing, and one will be appointed if you cannot afford to hire one. Evidence will be presented against you at the hearing and you will be able to present your own evidence. Speak with your attorney before the hearing to prepare. If you fail to appear, you may be subject to arrest with or without a warrant. If the probation violation(s) alleged above is (are) proved, your probation may be modified or revoked.

[ ] YOU MUST APPEAR in the ______ DISTRICT COURT

at ______ (Address) on ______ (Date)

at ______ (Time) for the appointment of counsel, if necessary, and the scheduling of a hearing on the alleged probation violation(s) listed above. If you fail to appear, you may be subject to arrest with or without a warrant.

A copy of this Notice has this day been [ ] SERVED IN HAND ON [X] MAILED FIRST CLASS TO THE ADDRESS OF RECORD OF the probationer named above.

12-6-02
Date

X *Andy Grossman*
Signature of Issuing Probation Officer

EXHIBIT D

NOTICE OF PROBATION VIOLATION

Docket number of criminal case in which probation was ordered: 0157CR0919 0057CR0005

Trial Court of Massachusetts District Court Department

Name of Probationer: Farouq Samaja
70 Orchard Lane
Attleboro, MA 02703

Date: 3-28-02

Court Name and Address:
WRENTHAM DISTRICT COURT
60 EAST STREET PO BOX 1006
WRENTHAM, MA. 02093

TO THE ABOVE-NAMED PROBATIONER:

YOU ARE HEREBY NOTIFIED of the following alleged violation(s) of the probation order that was issued to you in the criminal case identified above:

Attleboro 4 CR0234 CR1076) 3/20/02

[X] You violated a criminal law of the commonwealth, namely: 114B- Stop Lic, Unins MV, Attach Plates, Breakdown Lane Viol, Oper Refuse Identify Self.

[ ] You failed to attend or successfully complete a required program, specifically:

[ ] You failed a required drug test, specifically:

[ ] You failed to make a required payment, specifically:

[X] You failed to report as required by your probation specifically: Missed office visit 3/21/02.

[ ] Other:

YOU ARE HEREBY ORDERED as follows:

[X] YOU MUST APPEAR in THIS COURT on 4/17/02 (Date) at 9 Am (Time), for a hearing on the allegation(s) listed above.

You are entitled to have a lawyer to represent you at the hearing, and one will be appointed if you cannot afford to hire one. Evidence will be presented against you at the hearing and you will be able to present your own evidence. Speak with your attorney before the hearing to prepare. If you fail to appear, you may be subject to arrest with or without a warrant. If the probation violation(s) alleged above is (are) proved, your probation may be modified or revoked.

[ ] YOU MUST APPEAR in the _____ DISTRICT COURT

at _____ (Address) on _____ (Date)

at _____ (Time) for the appointment of counsel, if necessary, and the scheduling of a hearing on the alleged probation violation(s) listed above. If you fail to appear, you may be subject to arrest with or without a warrant.

A copy of this Notice has this day been [ ] SERVED IN HAND ON [X] MAILED FIRST CLASS TO THE ADDRESS OF RECORD OF the probationer named above.

3/28/02
Date

X Cindy Noramen
Signature of Issuing Probation Officer

ACDC 12-21-99

EXHIBIT E

IMMIGRATION COURT
1900 E. WHATLEY ROAD
OAKDALE, LA 71463

In the Matter of

SANEJA, FAROUQ
Respondent

Case No.: A41-450-585

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Oct 28, 2003. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to UNITED KINGDOM or in the alternative to TANZANIA.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to UNITED KINGDOM or in the alternative to TANZANIA.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to UNITED KINGDOM.

[✓] Respondent's application for asylum was ( )granted (✓)denied ( )withdrawn. under section 241(b)(3) of the INA, under Article 3 of Convention (case not joined

[✓] Respondent's application for withholding of removal was ( )granted (✓)denied ( )withdrawn.

[✓] Respondent's application for cancellation of removal under section 240A(a) was (✓)granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( )denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Oct 28, 2003

Appeal: Waived/Reserved Appeal Due By: Nov 28, 2003

By Government

CHARLES A. WIEGAND, III
Immigration Judge

KPR

9pt 3

EXHIBIT F

U.S. Department of Justice
Immigration and Naturalization Service

Record of Deportable/Inadmissible Alien

Family Name (CAPS)	First	Middle	Sex	Hair	Eyes	Complexion
SAMEJA, Farouq			M	BRO	BRO	DRK

Country of Citizenship	Passport Number and Country of Issue	File Number	Height	Weight	Occupation
TANZANIA		Case No: VBO0501000004 A041 450 585	66	200	LABORER

U.S. Address: NORFOLK COUNTY HOUSE OF CORRECTION 200 WEST STREET DEDHAM, MASSACHUSETTS

Scars and Marks: See Narrative

Date, Place, Time, and Manner of Last Entry: 05/03/1990, Unknown Time, At NYC, IMMIGRANT

Passenger Boarded at:

F.B.I. Number: 377811FB9

Marital Status: ☐ Single ☐ Divorced ☒ Married ☐ Widower ☐ Separated

Number, Street, City, Province (State) and Country of Permanent Residence:

Method of Location/Apprehension: O 511.2.2

Date of Birth	Date of Action	Location Code	At/Near	Date/Hour
06/12/1970 Age: 34	01/04/2005	VBO/VBO	Boston, MA	01/04/2005 0800

City, Province (State) and Country of Birth: MED, TANZANIA

AR: ☒ Form: (Type and No.) Lifted ☐ Not Lifted ☐

By:

NIV Issuing Post and NIV Number:

Social Security Account Name:

Status at Entry: Immigrant

Status When Found: IN INSTITUTION

Date Visa Issued:

Social Security Number: [redacted]

Length of Time Illegally in U.S.: NOT APPLICABLE

Immigration Record: POSITIVE - See Narrative

Criminal Record: None known

Name of Spouse (Maiden Name, if Appropriate) Nationality: TANZANIA

(b)(6) (b)(7)(c)

Number and Nationality of Minor Children: 1 TANZANIA

Father's Name, Nationality, and Address, if Known: Nationality: TANZANIA
SAMEJA, Mohamed
DFA

Mother's Present and Maiden Names, Nationality, and Address, if Known
SAMEJA, Hamahia
DFA

Monies Due/Property in U.S. Not in Immediate Possession	Fingerprinted?	INS Systems Checks	Charge Code Word(s)
	☒ Yes ☐ No	See Narrative	B2A3

Name and Address of (Last)/(Current) U.S. Employer	Type of Employment	Salary	Employed from/to
		Hr.	/ / / /

Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)

SCARS, MARKS AND TATTOOS
MOLE LEFT CHEEK

MOTHER'S NATIONALITY
TANZANIA

(b)(7)(e)

[redacted]

Narrative Title: Record of Deportable/Excludable Alien
Narrative Created by: [redacted] (b)(7)(c) (b)(6)

Investigation predicated upon subjects intake at the Norfolk County Jail. Subject is currently serving a one-year sentence after violating probation on a credit card fraud conviction. Subject is a native and citizen of Tanzania who immigrated to the U.S. as set forth above. Subject was in removal proceedings and was granted cancellation of removal by the BIA. There are no applications pending relating to the subject with CIS. The subject immigrated at the age of 19 and there are no claim[redacted]

Alien has been advised of communication privileges: [redacted] 1/4/05 (Date/Initials) (b)(7)(c) (b)(6) [redacted] (Signature and Title of Investigating Officer)

Distribution:
DRO
File

Received (Exhibits and Documents) (Record of Interview)
Officer: [redacted]
on: January 4, 2005 at: 0814 (time)

Disposition:

Examining Of[redacted]

Form I-213(Rev.4/1/97)Y

U.S. Department of Justice
Immigration and Naturalization Service [redacted] Continuation [redacted] for Form I-213

Alien's Name	File Number	Date
SAMEJA, Farouq	Case No: VBO0501000004 A041 450 585	01/04/2005

derivation issues. The subject has no military or welfare issues.
Inmate # 285667
FBI# 377811FB9
PED
WRAP DATE

(b)(7)(c) (b)(6)

Title
IMMIGRATION ENFORCEMENT AGENT

EXHIBIT G

UNITED STATES IMMIGRATION COURT
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203-0002

IN THE REMOVAL CASE OF
SAKEJA, FAROUQ
RESPONDENT

CASE NO.: A47-454-585

ORDERS

[X] This is a memorandum of the Court's Decision and Orders entered on 8-31-2006. This memorandum is solely for the convenience of the parties. The oral or written Findings, Decision and Orders is the official opinion in this case. [ ] Both parties waived issuance of a formal oral decision in the case.

[X] The respondent was ordered REMOVED from the United States to UNITED TANZANIA or in the alternative to TANZANIA.

[ ] Respondent's application for VOLUNTARY DEPARTURE was DENIED and respondent was ordered removed to _____, in the alternative to _____.

[ ] Respondent's application for VOLUNTARY DEPARTURE was GRANTED until _____, upon posting a voluntary departure bond in the amount of $_____ to INS within five business days from the date of this Order, with an alternate Order of removal to _____ or _____. Respondent shall present to INS within ( ) thirty days ( ) sixty days from the date of this Order, all necessary travel documents for voluntary departure.

[X] Respondent's application for ASYLUM was ( ) granted (X) denied
( ) withdrawn with prejudice.
( ) subject to the ANNUAL CAP under the INA section 207(a)(5).
( ) Respondent knowingly filed a FRIVOLOUS asylum application.

[X] Respondent's application for WITHHOLDING of removal under INA section 241(b)(3) was ( ) granted (X) denied ( ) withdrawn with prejudice.

[X] Respondent's application for WITHHOLDING of removal under the Torture Convention was ( ) granted (X) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for DEFERRAL of removal under the Torture Convention was ( ) granted ( ) denied ( ) withdrawn with prejudice.

[ ] Respondent's application for CANCELLATION of removal under section ( ) 203(b) of NACARA ( ) 240A(a) ( ) 240A(b)(1) ( ) 240A(b)(2) of the INA, was ( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that the INS issue all appropriate documents necessary to give effect to this Order. Respondent ( ) is ( ) is not subject to the ANNUAL CAP under INA section 240A(e).

[ ] Respondent's application for a WAIVER under the INA section _____ was ( ) granted ( ) denied ( ) withdrawn as ( ) other _____. The conditions imposed by INA section 216 on the respondent's permanent resident status were removed.

[ ] Respondent's application for ADJUSTMENT of status under section _____ of the ( ) INA ( ) NACARA was _____
( ) granted ( ) denied ( ) withdrawn with prejudice. If granted, it was ordered that INS issue all appropriate documents necessary to give effect to this Order.

GRO

CASE NUMBER: 41-460-588 RESPONDENT: SAMEJA, FAROUQ

[ ] Respondent's status was RESCINDED pursuant to the INA section 246.
[ ] Respondent's motion to WITHDRAW his application for admission was ( ) granted ( ) denied. If the respondent fails to abide by any of the conditions directed by the district director of INS, then the alternate Order of removal shall become immediately effective without further notice or proceedings: the respondent shall be removed from the United States to ______________
[ ] Respondent was ADMITTED as a ______________ until ______________. As a condition of admission, the respondent was ordered to post a $ ______________ bond.
[ ] Case was ( ) TERMINATED ( ) with ( ) without prejudice.
( ) ADMINISTRATIVELY CLOSED
[ ] Respondent was orally advised of the LIMITATION on discretionary relief and consequences for failure to depart as ordered.
[ ] If you fail to voluntarily depart when and as required, you shall be subject to civil money penalty of at least $1,000, but not more than $5,000, and be ineligible for a period of 10 years for any further relief under INA sections 240A, 240B, 245, and 248 (INA section 240B(d)).
[ ] If you are under a final order of removal, and if you willfully fail or refuse to 1) depart when and as required, 2) make timely application in good faith for any documents necessary for departure, or 3) present yourself for removal at the time and place required, or, if you conspire to or take any action designed to prevent or hamper your departure, you shall be subject to civil money penalty of up to $500 for each day under such violation. (INA section 274D(a)). If you are removable pursuant to INA 237(a), then you shall further be fined and/or imprisoned for up to 10 years. (INA section 243(a)(1))
[ ] Other:

____

____

Date: ~~Jun 8,~~ Aug 31, 2005

[signature]
MARGARET R. REICHENBERG, Judge

APPEAL: ( ) waived (X) reserved by (X) Respondent ( ) INS ( ) Both

DUE BY: 9-30-2005

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: [ ] MAIL [X] PERSONAL SERVICE
TO: [X] INS [X] ALIEN [ ] Alien's ATT/REP [ ] ALIEN c/o Custodial Officer
DATE: 8-31-05 BY: [ ] COURT STAFF [X] JUDGE MRR

Note: Copy of order FAXed to [illegible] on 8-31-2005

Y2
Y2

EXHIBIT H

U.S. Department of Homeland Security Subject ID : 277186029 **Record of Deportable/Inadmissible Alien**

Family Name (CAPS)	First	Middle	Sex	Hair	Eyes	Complex
SAMEJA, Farouq M			M	BLK	BRO	DRK

Country of Citizenship	Passport Number and Country of Issue	File Number	Height	Weight	Occupation
TANZANIA		Case ID:BOS0810000001 A041450585	66	200	

US. Address: NORFOLK COUNTY JAIL 200 WEST STREET DEDHAM, MASSACHUSETTS, 02026.

Scars and Marks:

Date, Place, Time and Manner of Last Entry	Passage Boarded at	F.B.I. Number	Marital Status
05/03/1990, Unknown Time, NYC, IMMIGRANT		377611FB9	☑ Single ☐ Divorced ☐ Married ☐ Widower ☐ Separated

Number, Street, City, Province (State) and Country of Permanent Residence:

Method of Location/Apprehension: CLC 520.3

Date of Birth	Date of Action	Location Code	Arrest Dedham, Massachusetts	Date/Hour
06/12/1970 Age: 39	10/01/2008	BOS/DOS		10/01/2008

City, Province (State) and Country of Birth	AR ☒ Form: (Type and No.) Lifed ☐ Not Lifed ☐	
TANZANIA, TANZANIA		

NIV Issuing Post and NIV Number	Social Security Account Name	Status at Entry	Status When Found
	FAROUQ SAMEJA	Immigrant	IN INSTITUTION

Date Visa Issued	Social Security Number	Length of Time Illegally in U.S.
	[redacted]	

Immigration Record	Criminal Record
POSITIVE - See Narrative	None Known

Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate): Number and Nationality of Minor Children: UNKNOWN

Father's Name, Nationality, and Address, if Known	Mother's Name and Maiden Name, Nationality, and Address, if Known
SAMEJA, Mouhamed	SAMEJA, Shaima

Marks On/Property in U.S. Not in Immediate Possession	Fingerprinted? ☒ Yes ☐ No	Systems Checks	Charge Code Words(s)
None Claimed		See Narrative	

Name and Address of (Last)(Current) U.S. Employer	Type of Employment	Salary	Employed from/to
		Hr	

Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and circums which establish administrative and/or criminal violation. Indicate means and route of travel to interior.)

OTHER ALIASES KNOWN BY:

MOHAMED HUSSEIN SAMEJA, FAROUQ

RECORDS CHECKED

[redacted] (b)(7)(e)

Record of Deportable/Excludable Alien:
Subject is a citizen and national of Tanzania , who was ordered deported by an immigration judge on , August 31,2005. ICE was unable to obtain a travel document on the subject,therefore subject was placed on an order of supervision.

Subject was located by Boston's CAP unit, while serving a sixth month sentence , for operating a motor vehicle /after license has been revoked.

I contacted deportation officer [redacted] (b)(7)(e) . (CONTINUED ON I-831)

(b)(7)(c) (b)(6) [redacted]

Alien has been advised of communication privileges (Date/Initial)

Distribution:

Received (Subject and Documents) (Report of Interview)

Office:

on October 1, 2008 (time)

Disposition: ADMINISTRATIVE PROCESSING I-851/I-851A

Examining Officer:

Form I-213 (Rev. 08/01/07)

EXHIBIT I

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 1157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

DEFENDANT'S AFFIDAVIT

I, Farouq Sameja, as deposed and under oath, state the following in support of Defendant's Motion for a New Trial.

1. On December 12, 2019, at the age of 49 ½ years old, I was deported to Tanzania, and I became homeless, unemployed, and gravely ill. Shortly after arriving, I contracted Malaria and was hospitalized. My health is seriously compromised due to diabetes, and I am still homeless. The life expectancy for a male in Tanzania is 58 years old; retirement is compulsory at age 60. I have lost the right to collect social security in the U.S. and am ineligible for any retirement benefits in Tanzania.

2. On June 12, 1970, I was born in Dar Es Salaam, Tanzania. My family and I lawfully immigrated to the United States when I was nineteen years old. I obtained a labor certification, as a trainee in soil drilling. *See Exhibit J, Immigration Visa and Alien Registration.* My family and I settled in Attleboro, Massachusetts, where my mother and father reside to this day. Over the years, my grandfather, parents, brother, sister, aunts and uncles, and cousins have all become U.S. Citizens.

3. From 1990 to 2002, I secured work as a garage mechanic. In 2001, I worked at a gas station as a gas attendant. I consistently paid my state and federal taxes from 1990 to 2019. On March 30, 2001, I was arrested for having double billed three customers at the gas station, for a total of $89.00, and charged with one count of Credit Card Misuse, c. 266, § 37B(i), and three counts of Larceny (less -$250) c. 266, § 30.

4. On December 7, 2001, on the advice of my trial attorney, I plead guilty to these charges. The plea judge sentenced me to one-year probation and ordered restitution in the amount of $400.00, as a condition of probation.

5. Prior to completing probation, on March 20, 2002, I incurred a new offense for driving with a suspended license and uninsured. *See Exhibit C, March 28, 2002, Notice of Violation of Probation.*

6. Before the Final Surrender hearing was held in this case, I was taken into custody and placed in removal proceedings, then I was transferred to a prison in Louisiana. I appeared before an immigration in Oakdale, Louisiana, without the assistance of counsel.

7. On October 28, 2003, the immigration judge in Louisiana granted cancellation of removal and told me to return to my family in Massachusetts and to resolve this case. *See Exhibit E, October 28, 2003, Order.*

8. At the October 1, 2004, Final Surrender Hearing, I told the hearing judge that I had been in removal proceedings for having incurred this offense, but that the immigration judge granted cancellation of removal and told me to settle this case.

9. However, the hearing judge found me in violation of probation and sentenced me to the maximum sentence on each charge, one-year in jail, served concurrently.

10. I recall when my lawyer asked for a lesser sentence he did not tell the judge that under federal law ICE would treat the larceny convictions, which are state misdemeanors, as an aggravated felonies if the judge sentenced me to the maximum sentence.

11. My lawyer did not tell me that if the judge imposed a one-year sentence for the credit card misuse and larceny convictions that under federal law ICE would treat the larceny convictions as an aggravated felonies, and that I would be automatically deportable for life.

12. Had I known that if I received one day less than the maximum sentence, then ICE would not have treated the larceny convictions as an aggravated felonies. I was not told that I could appeal the finding of a violation of probation and the one-year sentence or move for reconsideration.

13. On January 4, 2005, I was taken from the Norfolk County Jail, held in custody by ICE, and brought before an immigration judge in Boston. *See Exhibit F, January 4, 2005, Record of Deportable/Excludable Alien.*

14. On August 31, 2005, the immigration judge in Boston issued a Final Order of Removal. *See Exhibit G, August 21, 2005, Order.*

15. In the years that followed, because I did not have a passport I was held in detention by ICE for extended periods of time ranging from 14 months to over six months.

16. On December 12, 2019, ICE obtained travel documentation from the Republic of Tanzania, and I was deported for life because of this credit card misuse conviction.

17. My entire immediate family lives in Massachusetts, except my son. I also have a son who is turning 25 on April 13, 1998. To the best of knowledge and belief, my son currently lives in Maine.

18. Since I was deported, I have only seen my sister and mother once for two weeks when they traveled to Tanzania to visit me in September of 2022.

19. My parents are elderly. My mother is struggling to care for my father, who is currently living in a nursing home.

20. Before I was deported, I worked in a garage repairing cars and I resided with my mother and father. I helped my mother care for my father. I did the grocery shopping, paid the bills, and did the landscaping. I also fixed cars for people in our community who did not have the funds to repair their cars.

21. I have learned from my past mistakes and will choose to do good. I am confident that I can be a productive member of society by helping in others in our community and caring for my elderly parents.

22. I am asking the Court to vacate the finding of a violation of probation and the one-year sentence imposed, and for this Court to order a new Final Surrender hearing.

Signed under the pains and penalty of perjury on this 29th day of May 2023.

Farouq Sameja

Farouq Sameja

EXHIBIT J

Massachusetts Appeals Court Case: 2024-P-0306 Filed: 4/29/2024 12:00 AM

OPTIONAL FORM 155A (Rev. 6-85)
DEPT. OF STATE

NSN 7540-01-126-7761

50155-203

"VALID ONLY IF ACCOMPANYING OR FOLLOWING TO JOIN SPOUSE/PARENT/RELATIVE"

IMMIGRANT VISA AND ALIEN REGISTRATION

AKA: SAMEJA, MOHAMEDHUSSEIN

IV-41450585

☐ THE IMMIGRANT HAS BEEN PREVIOUSLY IN THE UNITED STATES

OF:	(Family Name) SAMEJA	(First Name) FAROUQ	(Middle Name) MOHAMEDHUSSEIN	INS FILE #, IF KNOWN

ACTION BY IMMIGRATION INSPECTOR

U. S. IMMIGRATION
NEW YORK, N.Y. 1900

MAY 03 1990
P5-3

ADMITTED
UNTIL: A41450585

THE IMMIGRANT NAMED ABOVE ARRIVED IN THE UNITED STATES VIA *(Name of vessel or flight no. of arrival)*: KQ101 5-3-90

INELIGIBILITY FOR VISA WAIVED UNDER SECTION: ☐ 212(e) ☐ 212(h) ☐ 212(g) ☐ 212(i)

CITY AND COUNTRY OF BIRTH: DAR ES SALAAM, TANZANIA

MO-DAY-YR OF BIRTH: 06/12/1970

CITY AND COUNTRY OF LAST RESIDENCE: DAR ES SALAAM, TANZANIA

NATIONALITY: TANZANIAN

MARITAL STATUS: ☐ M ☒ S ☐ W ☐ D ☐ SEP

MOTHER'S FIRST NAME: SHAMIMBANU

FATHER'S FIRST NAME: MOHAMEDHUSSEIN

FINAL ADDRESS IN THE UNITED STATES

STREET ADDRESS, INCLUDE—IN CARE OF & APT# IF APPLICABLE: 70 ORCHARD LANE

CITY, STATE, AND ZIP CODE, IF AVAILABLE: ATTLEBORO, MA 02703

SEC. 212(a)(14) LABOR CERTIFICATION ☒ NOT APPLICABLE ☐ NOT REQUIRED ☐ ATTACHED

OCCUPATION: TRAINEE (SOIL DRILLING)

SEX: M ☒ F ☐

This visa is issued under Section 221 of the Immigration and Nationality Act, and upon the basis of the facts stated in the application. Possession of a visa does not entitle the bearer to enter the United States if at the time he seeks to enter he is found to be inadmissible. Upon arrival in the United States, it must be surrendered to a United States Immigration Officer.

AMERICAN EMBASSY

AT DAR ES SALAAM, TANZANIA

Consular Officer of the United States of America

PHOTOGRAPH ATTACHED

FOREIGN SERVICE
UNITED STATES OF AMERICA

TEMPORARY EVIDENCE OF LAWFUL ADMISSION FOR PERMANENT RESIDENCE VALID UNTIL ... EMPLOYMENT AUTHORIZED

Tariff No. 21
Fee Paid $75
Local Cy. Equiv. T.Shs.

IMMIGRANT CLASSIFICATION

CLASSIFICATION SYMBOL: P5-3

FOREIGN STATE/OTHER AREA LIMITATION: TANZANIA

IMMIGRANT VISA NO.: -

ISSUED ON (Day) 10th (Month) January (Year) 1990

THE VALIDITY OF THIS VISA EXPIRES MIDNIGHT AT THE END OF (Day) 9th (Month) May (Year) 1990

PASSPORT

NO. 250843

OR OTHER TRAVEL DOCUMENTS (Describe): N/A

ISSUED TO: N/A

BY: N/A

ON: N/A

EXPIRES: N/A

IV-41450585

ACTION OF I.J.

ACTION ON APPEAL

U.S.P.H.S.

EXHIBIT K

APPLICATION FOR COMPLAINT ☒ ADULT ☐ JUVENILE

NUMBER: 01-0919

Trial Court of Massachusetts
District Court Department

☐ ARREST ☐ HEARING ☒ SUMMONS ☐ WARRANT

The within named complainant requests that a complaint issue against the within named defendant, charging said defendant with the offense(s) listed below.

COURT DIVISION: WRENTHAM DISTRICT COURT, EAST STREET, WRENTHAM, MA 02093

DATE OF APPLICATION: [illegible]/2001 | DATE OF OFFENSE: 02/[illegible]/2001 | PLACE OF OFFENSE: 971 MAIN ST.

NAME OF COMPLAINANT: PTL TIMOTHY W. BOUSIN 508-668-1075

ADDRESS AND ZIP CODE OF COMPLAINANT:
Walpole Police Department
972 Main Street
Walpole, MA 02081

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
SAMEJA, FAROUQ M. M#M0005093
70 ORCHARD LANE A#F0100014
ATTLEBORO, MA 02703 I#I0102560

NO.	OFFENSE	G.L. Ch. and Sec.
1.	266/37B/B POSING AS THE CARDHOLDER ~~NOT AUTHORIZED~~	266-37B
2.	266/30/C LARCENY OF PROPERTY, $250 ~~OR LESS (311)~~	266-30
3.	266/30/C Larceny - under.	
4.	266/30/C Larceny - under	

COURT USE ONLY → A hearing upon this complaint application will be held at the above court address on | DATE OF HEARING | AT | TIME OF HEARING | ← COURT USE ONLY

CASE PARTICULARS — BE SPECIFIC

NO.	NAME OF VICTIM Owner of property, person assaulted, etc.	DESCRIPTION OF PROPERTY Goods stolen, what destroyed, etc.	VALUE OF PROPERTY Over or under $250	TYPE OF CONTROLLED SUBSTANCE OR WEAPON Marijuana, gun, etc.
1	Master Card ~~Master Card~~			
2	Master Card		30.– under	
3	Master Card		30.– under	
4	Master Card		29.– under	

OTHER REMARKS: [This is page 1 of 1]
MR. SAMEJA FAROUQ DID USE CREDIT CARDS ON THREE SEPERATE OCCASIONS WITHOUT AUTHORIZATION AND AT THE EXPENSE OF TRUSTING CUSTOMERS.

x [signature]
SIGNATURE OF COMPLAINANT

DEFENDANT IDENTIFICATION INFORMATION — Complete data below if known.

DATE OF BIRTH	PLACE OF BIRTH	SOCIAL SECURITY NUMBER	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
[illegible]1970	TANZANIA	[redacted]	M	UNK	5' [illegible]		BRO	BLK

OCCUPATION	EMPLOYER/SCHOOL	MOTHER'S NAME (MAIDEN)	FATHER'S NAME
GAS ATTENDANT	WALPOLE GETTY ~~MAIN STREET~~		MOHAMMED SAMEJA

COURT USE ONLY

DATE	DISPOSITION	AUTHORIZED BY
	NO PROCESS TO ISSUE ☐ At request of complainant ☐ Complainant failed to prosecute ☐ Insufficient evidence having been presented	
3-22-01	PROCESS TO ISSUE ☒ Sufficient evidence presented ☐ Defendant failed to appear TYPE OF PROCESS ☐ Warrant ☒ Summons returnable	[initials]
	☐ Continued to	

COMMENTS – Oral presentation of Facts

DC-CR2 (8/86) **COURT COPY**

Walpole Police Department
March 22, 2001 Incident Report Thursday 08:25

Single Narrative

INCIDENT LOCAL # PRIORITY ACC REP	ACTIVITY ADDRESS (JURISDICTION) DISPOSITION	OFFICER(S)	RECEIVED DISPATCHED ARRIVED CLEARED	DISPATCHER SUPERVISOR NATURE INCIDENT TYPE
I0102560 4 No Yes	CALL FOR SERVICE GETTY STATION - MAI 571 MAIN ST. WALPOLE, MA, 02081 (01) REPORT	CONNOR	03/20/2001, 13:17 03/20/2001, 13:19 03/20/2001, 13:19 03/20/2001, 13:19	TSULLIVAN ANDERSON FRAUD FRAUD CT: TSULLIVAN

Reported as: FRAUD Found as: FRAUD
Domestic Abuse: No

Dispatcher Remarks:
REPORT OF CREDIT CARD MISUSE AT ABOVE LOCATION. FTL CONNOR TO TAKE A REPORT.

CHARGED (Male) M0005093	SAMEJA, FAROUQ M. 70 ORCHARD LANE ATTLEBORO MA 02703 Phone: None Recorded Race: U Commt: MISUSE OF CREDIT CARDS	License: (MA) SSN: DOB: 06/12/1970 Age: 30
INVOLVED M9401977	GETTY GAS 571 MAIN ST. WALPOLE MA 02081 Phone: 668-0232 Commt: INVOLVED	License: None DOB: None Recorded
CALL/VICT (Male) M0101031	AHARONIAN, G 571 MAIN ST. WALPOLE MA 02081 Phone: 668-0232 Commt: OWNER OF GETTY	License: None DOB: 09/30/1961 Age: 39
VICTIM M0101042	PAYMENT TECH PO BOX 650370 DALLAS TX 75265	License: None DOB: None Recorded
VICTIM M0101043	 WALPOLE MA 02081 Phone: None Recorded Commt: MISUSE OF THIS CARD	License: None DOB: None Recorded

Massachusetts Appeals Court Case: 2024-P-0306 Filed: 4/29/2024 12:00 AM

Single Narrative

INCIDENT LOCAL # PRIORITY ACC REP	ACTIVITY ADDRESS (JURISDICTION) DISPOSITION	OFFICER(S)	RECEIVED DISPATCHED ARRIVED CLEARED	DISPATCHER SUPERVISOR NATURE INCIDENT TYPE

Narrative(s):

Narr. 1: PTL. THOMAS R. CONNOR Division: None Status: Closed [I0102560]
Title: MISUSE OF C.C Entered: PTL. THOMAS R. CONNOR Date: 03/20/01
Reviewed: LT. RICHARD B. STILLMAN Edit: 03/21/01

FIELD NOTES
THIS REPORT MAY OR MAY NOT INCLUDE EVERYTHING KNOWN TO THE POLICE

On March 14, 2001 I was dispatched to the Getty station on Main St. to take a larceny report. Upon arrival I spoke with the owner Gary Aharonian who stated that Farouq Sameja (gas attendant) had overcharged some of the customers.

Farouq had been double billing the customers credit cards and taking the money for himself. On three separate occasions Farouq manual entered the customers card number, pocketed the money and ripped up the receipt. The dates and amounts are as follows 2/12-30.00, 2/21-30.00, and 2/29 for 29.00 dollars. Farouq was working on all the dates listed above. Farouq would open the store around 06:00am and run a credit card manually into the charge machine before the boss arrived. I was supplied with a batch of credit card statements that support those findings.

Farouq will be charged with Misuse of a Credit Card and Larceny.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 1157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

ATTORNEY AFFIDAVIT

I, Victor T. Sloan, Esq., as deposed and under oath, state the following in support of the Defendant's Motion for a New Trial.

1. On March 7, 2003, the court appointed me as Mr. Sameja's probation counsel in the above-captioned case.

2. Although I do not recall this case, I have reviewed the hand-written docket sheet, the criminal complaint, the green sheet, and the notice of violation.

3. On December 7, 2001, Mr. Sameja plead guilty to one count of Credit Card Misuse, c. 266, § 37B(i), and three counts of Larceny (less -$250) c. 266, § 30. The plea judge sentenced Mr. Sameja to one-year probation, and restitution as a condition of probation.

4. On October 1, 2004, the hearing judge found Mr. Sameja in violation of his probation and sentenced him to one-year in the HOC, on each count to be served concurrently.

5. On the finding of the violation of probation, as a matter of practice, I believe that I would have asked the judge to impose a lesser sentence than the maximum sentence of one-year sentence in the HOC that the court ultimately imposed.

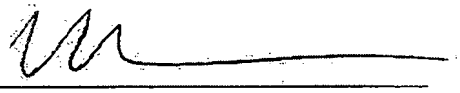
6. However, I do not believe that I would have moved the court to reconsider the sentence imposed, to sentence Mr. Sameja to no more than 364 days (one day less)

to avoid the state conviction of a misdemeanor being treated as an aggravated felony under federal law.

7. To the extent that I did not raise the issue of the state conviction treated as aggregated felony under federal law when the hearing judge imposed the one-year sentence on the defendant, I do not believe it was a strategic decision.

8. Prior to Padilla v. Kentucky, 559 U.S. 356 (2010), there were no immigration practice advisories or Massachusetts case law to advise counsel that the state conviction for credit card misuse may be treated as an aggravated felony under federal law, if the defendant was convicted of a theft offense and incurred a one-year sentence.

Signed under the pains and penalty of perjury on this 21 day of February 2023.



Victor T. Sloan

EXHIBIT M

Official Website of the International Trade Administration Here's how you know

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Search and Site

Home | Country Commercial Guides | Tanzania - Healthcare

Tanzania - Country Commercial Guide

Healthcare

This is a best prospect industry sector for this country. Includes a market overview and trade data.

Last published date: 2022-12-14

Overview

Tanzania is a resource strained country with a weak healthcare system which is challenged by high maternal mortality, child mortality, HIV/AIDS, pneumonia, and malaria. Tanzania's population also has some of the lowest rates of access to health personnel in the world. Over 60% of Tanzania healthcare facilities are run by the government with the rest being either faith-based or private. As the country, Tanzania is progressing towards universal healthcare. in 2020/2021 the government allocated $387.9 million for the health sector of which $155.5 million will be spent on development projects, which would help the government to implement its health improving initiatives. The sector has been allocated TZS 1,109billion in 2022/2023.

Healthcare financing is complimented by international donors who contribute up to 40% of the health budget. The US government, through USAID and CDC, contribute significantly to programs that assist the Tanzania government. Health insurance coverage is still low with only 32% of Tanzanians as of 2019 covered by health insurance. Of that number only 1% are members of private health insurance.

The Government of Tanzania in 2022/23 budget has identified some of the following issues which will be of great importance or priority; Strengthening the delivery of vaccines for children under age of five; and strengthening the quality of delivery of health services in the country

The government has called upon investors to establish pharmaceutical factories within the country. Health supplies, commodities and equipment comprise a significant portion of the pharmaceutical domestic development budget. However, firms operating locally will face several challenges such as need for skilled human resources, availability of modern technology and the ability to reach sufficient scale to compete with international suppliers.

Sub-Sector Best Prospects

- Establishment of pharmaceutical companies
- Training of healthcare personnel
- Establishment of primary healthcare services
- Supply of lab equipment
- Supply of medicines
- Establishment of diagnostic centers.

Opportunities

For specific information on current opportunities please visit the **Medical Store Department website**

Resources

United States Agency for International Development (USAID)
Ministry of Health, Community Development, Gender, Elderly and Children

World Health Organization (WHO)
Medical Stores Department (MSD)

Tanzania Medicine & Medical Devices Authority (TMDA)

Tanzania Budget Highlights 2022-23

For U.S. Businesses
Export Solutions
Research Center
Regulations & Agreements
Resolve a Trade Problem
Attend an Event
News & Highlights
Let Our Experts Help

For International Businesses
Buy From the USA
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About Us
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Site Map

INTERNATIONAL TRADE ADMINISTRATION

International Trade Administration
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

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EXHIBIT N

INTERNATIONAL ORGANISATION OF PENSION SUPERVISORS

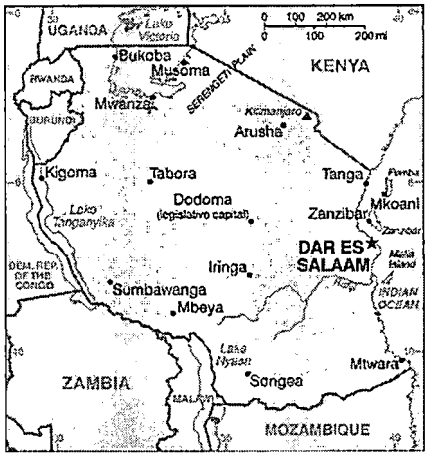
IOPS Member country or territory pension system profile:

TANZANIA

Report[1] issued on December 2011, validated by the Social Security Regulatory Authority of Tanzania (SSRA)

[1] *This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

TANZANIA



DEMOGRAPHICS AND MACROECONOMICS

Total Population (million)	44.8
Percentage 65 or older	3.1
Dependency Ratio (a)	91.8
Life Expectancy at Birth (years) for Men	58.2
Life Expectancy at Birth (years) for Women	60.3
Labour Force (million)[1]	22.15
Statutory Pensionable Age – Men	60
Statutory Pensionable Age – Women	60
Early pensionable age – Men	55
Early pensionable age – Women	55
GDP per capita (USD)	1426

Sources see the Reference information section

COUNTRY PENSION DESIGN

STRUCTURE OF THE PENSION SYSTEM

Public pensions (mandatory)

- National Social Security Fund (NSSF)
- Public Service Pension Fund (PSPF)
- Governmental Employees Provident Fund (GEPF)
- Local Authorities Pensions Fund (LAPF)
- Parastatal Pension Fund (PPF)

Source: OECD/IOPS Global Pension Statistic

TANZANIA: PENSION SYSTEM'S KEY CHARACTERISTICS

PUBLIC PENSION

1. Overview

The total effective labour force in Tanzania mainland is estimated at 20.6[2] million people, of which 5.4 per cent are covered by the existing social security schemes. Approximately 77 percent of the labour force is employed in the traditional agriculture sector, 9.3 percent in the informal sector, 2.4 percent in the government, 3.5 percent are domestic workers, 0.4 percent are employed in the parastatal sector and 8 percent in other sectors. The total number of contributing members is about 913,799 (2011).

Currently there are six formal institutions providing social security services which include pension and social health insurance in Tanzania mainland: Public Service Pensions Fund (PSPF), covering central government employees under permanent and pensionable terms; Parastatal Pension Fund (PPF) for employees of parastatal institutions; Local Authorities' Pensions Fund (LAPF) covering local government employees; one provident fund - Government Employees Provident Fund (GEPF) covering government operational employees under non-pensionable employment terms, National Social Security Fund (NSSF) covering government employees under non-pensionable employment terms, private sector employees, parastatals employees and self-employed persons and the National Health Fund.

With the exception of the GEPF, all pension schemes are operating on pay-as-you-go defined benefit basis.

Under the current system, the Provident Funds continue to operate for insured persons who leave employment before retirement age and who remain out of work for at least six months.

2. Coverage

Workers in the private sector (except in private companies covered by the parastatal special system), organized groups (such as cooperative members) in the formal sector, and public employees and self-employed persons not covered under the parastatal special system.

Special contributory systems exist for employees of parastatal organizations; self-employed persons, including informal-sector workers; workers who start new employment after age 46; expatriates contributing in their country of residence; persons with seasonal income; and local authority employees.

In addition, special non-contributory systems are set for armed forces personnel and political leaders.

Voluntary coverage is also available.

Household workers are not covered by social security arrangements.

3. Contributions

Insured persons (depending on their affiliation) are contributing 10 per cent of basic salary to the NSSF, 5 per cent to the PSPF, LAPF and 10 per cent of gross earnings are contributed to the PPF.

Voluntary contributors may pay 20 per cent of declared income but no less than 20% of the legal minimum wage.

[2] Analytical Report for Integrated Labour Force Survey, Tanzania, 2006

The legal monthly minimum wage depends with the sector minimum wage and varies.

The insured person's contributions (including self-employed) also finance other social benefits (cash maternity benefits, medical benefits, funeral grants, and work injury benefits with NSSF and LAPF).

Self-employed persons in NSSF contribute 20 per cent of declared income but no less than 20 per cent of the legal minimum wage.

The employer's contributions also finance cash maternity benefits, medical benefits, funeral grants, and work injury benefits.

Government: None; contributes as an employer.

4. Benefits

Old-age pension is paid at age 60 with at least 180 months of contributions (for NSSF, LAPF and PSPF funds) and 120 months (for the PPF); and at any age if permanently emigrating. Covered employment must cease.

Retirement benefits (form of payment): Retirement benefits are paid in two forms: as a lump sum (commuted pension) and a monthly pension. For a person to be eligible for pension and lump sum he/she must attain statutory retirement age (60 years compulsory, 55-59 voluntary) and make at least minimum number of monthly contributions (120 contributions for PPF and 180 contributions for other schemes). Those who do not meet the named conditions receive lump sum payment only.

Insured persons who were within 14 years of the pensionable age in July 1998 and who have fewer than 180 months of contributions at age 60 may receive a basic pension, as determined by the Director General of the National Social Security Fund.

Early pension is paid at age 55 with at least 180 months of contributions.

Deferred pension: A deferred pension is possible. There is no maximum deferral period.

Previous contributions made to the National Provident Fund (now known as National Social Security Fund NSSF) are converted into contribution credits.

Minimum benefits represent 80 per cent of the legal monthly minimum wage.

Under the PSPF, the pension benefits can be adjusted on the discretion by the Minister when deemed necessary. Under the law, these pension benefits can be adjusted by the Minister for Finance upon receipt of written intention from the President to do so and in consultation with Retirement Benefit Committee (approval from the National Assembly is also required).

Old-age benefits are not payable abroad.

Disability and survivors pensions are also available.

5. Administration:

Ministry of Labour and Employment

PRIVATE PENSION OCCUPATIONAL (MANDATORY)

N/A

PRIVATE PERSONAL (VOLUNTARY)

N/A

Not in place; however one of the schemes (GEPF) has started to provide personal private pension products. (Extract details will be provided at a later stage).

REFERENCE INFORMATION

- Key Legislation

2008: Social Security (Regulatory) Act No 8 of 2008; aimed to harmonise the social security sector, by sorting out the current legal and regulatory framework which is highly fragmented. All the six social security schemes currently in operation have been established by different Acts of Parliament and they all report to different Ministries. The Social Security (Regulatory) Act of 2008 establishes a regulatory body (SSRA) for social security sector and provides for matters related to regulation of the social security sector, among other things;

2006: Local Authorities Pension Fund (LAPF) Act N°9, established and governs the operation of the LAPF;

2001: Parastatal Pension Fund (PPF) Act (Amendment); amended the principal legislation on parastatal pension provision. The amendments, covering the participation of private sector employees and self-employed individuals in PPF, mainly aimed to establish flexibility in setting contribution rate, criminalize failure to remit contributions and provide for legal proceedings and penalties thereof, amend functions of the governing board to include private sector representatives, change retirement age from fifty to fifty five, setting annual pensionable emolument and provide for withdrawal of benefits;

1999: Public Service Retirement Benefit Act N°2; established and governs the operation of the Public Service Pension Fund (PSPF);

1997: National Social Security Fund (NSSF) Act N° 28; established the National Social Security Fund and provides for its constitution, administration and other matters related to the Fund;

1978: Parastatal Pensions Act; established and governs the operation of the parastatal pension fund (PPF);

1964: National Provident Fund (NPF) Act No 36; established a national provident fund to provide for contributions by all employed people to and the payment of benefits out of the Fund and for matters connected therewith and incidental thereto. The NPF was later converted into NSSF in 1997;

1964: The Provident Fund Act, No 7 to amend the Provident Fund (Government Employees) Ordinance of 1942. The main amendments were in relation to: deleting some words in section four related to salary caps, adding subsection four in section five of the ordinance introducing the title of "accounting officer" to mean Permanent Secretary of a Ministry or a Head of an independent Department in the government;

1942: Provident Fund (Government employees) Ordinance (GEPF); established and governs the operation of the GEPF

- Key supervisory authorities

Ministry of Labour and Employment, provides general supervision over National Social Security Fund (NSSF) (http://www.tanzania.go.tz/labour.htm);

Social Security Regulatory Authority (SSRA), supervises and regulates the performance of social security sector in Tanzania Mainland including but not limited to supervising operations of GEPF, PPF, PSPF, NSSF, LAPF and NHIF (http://www.ssra.go.tz);

Bank of Tanzania, supervises all financial institutions in Tanzania and has also been vested with the powers to provide oversight on investment issues of the pension sector, working in consultation with SSRA. (http://www.bot.go.tz);

Ministry of Finance supervises the operations of the GEPF, the PPF and the PSPF (http://www.mof.go.tz);

Prime Minister's Office in charge of the Regional Authorities and Local Governments supervises the operation of the LAPF (http://www.lapftz.org).

Sources:

Sources for Demographic and Macroeconomic data, page 2 of the report:

SOURCES: United Nations Population Division, Department of Economic and Social Affairs. World Population Prospects: The 2010 Revision Population Database, available at http://esa.un.org/unpd/wpp/unpp/panel_indicators.htm (2011); United Nations Development Programme. International Human Development Indicators (2010), available at http://hdrstats.undp.org/en/tables/default.html (2011); U.S. Central Intelligence Agency. The World Fact book, 2011 (Washington D.C.: Central Intelligence Agency, 2011).

NOTES: Information on statutory and pensionable ages is taken from the country summaries in this volume.

GDP = gross domestic product.

a. Population aged 14 or younger plus population aged 65 or older, divided by population aged 15-64.
b. General early pensionable age only; excludes early pensionable ages for specific groups of employees.
c. The country has no early pensionable age, has one only for specific groups, or information is not available.
d. Pensionable age varies depending on type of employment.
e. Early pension at any age with a minimum contribution period.
f. The statutory old-age pension system has yet to be implemented.

Additional sources: Sources National Bureau of Statistics (NBS), 2011; Sources: Schemes' Acts, 2011.

TABLES

Data to be provided for the past five years

1. Private Pension plans

2. Pension funds data overview:

- Total assets (million national currency), Net assets refers to Funds total resources less short term obligations (Total Assets - Current Liabilities)

Year/Fund	LAPF	PPF	PSPF
2009/2010	362	722	727
2008/2009	272	625	713
2007/2008	216	499	570
2006/2007	179	391	492
2005/2006	151	317	492

The LAPF and PSPF data sets are as at end of June of respect year. PPF data is as at end of December for respective year.

- Total assets as % of GDP: N/A

By financing vehicle as a % of Total assets: N/A

- Pension funds
- Book reserves
- Pension insurance contracts
- Other financial vehicles

Occupational assets: N/A

- % of DB assets
- %of DC assets

Personal assets

Structure of assets: Year 2010 (billions national currency)

- Cash and deposits: 721.54
- Bills and bonds issued by public and private sectors: 594.04
- Shares

- Loans: 773.08
- Buildings: 353.38
- Private Investment funds
- Other investments

Total contributions as % of GDP: N/A

Total benefits as % of GDP: N/A

Of them paid as lump sums

as pensions

Total number of pension funds: 6

N/A – data not available

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

WRENTHAM DISTRIC COURT
DOCKET NO. 0157CR00919

COMMONWEALTH

v.

FOROUQ SAMEJA

RECEIVED
WRENTHAM DISTRICT COURT
AUG 04 2023
CLERK-MAGISTRATE

MASSACHUSETTS PROBATION SERVICE'S RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL

The above captioned matter is a request from the probationer for a new trial pursuant to Mass. R. Crim. P. 30(b). The Massachusetts Probation Service ("Probation") opposes this motion because justice was served. Although the Massachusetts Rules of Criminal Procedure do not apply to probation violation hearings, the SJC has carved out and exception for ineffective assistance of counsel claims under rule 30(b), if the probationer's liberty is palpably at risk. *Commonwealth v. Patton*, 458 Mass. 119, 120 (2010).

Despite Probation taking no position on the substance of the ineffective assistance of counsel claim, the probationer is not entitled to a new trial. The probationer has not met the standard for a new violation of probation proceeding because the court's sentence was fair and appropriate, and the probationer has not made the required showing of prejudice. *Commonwealth v. Marinho*, 46 Mass 115, 124 (2013). To show prejudice due to counsel's poor performance, the probationer must show with a reasonable probability that the result of the sentence would have been more favorable, had counsel performed otherwise. *Id* at 124 . Even assuming for arguendo that counsel was ineffective, the probationer would still need to show a different result would have occurred. *Commonwealth v. Marinho*, 46 Mass 115, 131 (2013). ("In particular, the

defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted, and that the court would have approved it"). According to the probationer's affidavit, "At the October 1, 2004, Final Surrender hearing, I told the hearing judge that I had been in removal proceedings for having incurred this offense, but that the immigration judge granted cancellation or removal and told me to settle this case." *See* Affidavit, pp. 2, ¶ 8. Thus, the hearing judge was aware of the probationer's immigration status at the time of sentencing.

Moreover, the probationer's criminal history is clear indication that the sentence was fair and appropriate. The probationer has a fourteen-page criminal record stemming back to 1991, where he has previously been sentenced to committed time on at least two occasions, both after violating his probation. The probationer has 57 prior convictions, including for crimes of violence and moral turpitude. This court's sentence was not the first conviction, nor committed time given to the probationer. Thus, there is no evidence that the court's sentence was not fair and appropriate given the violation for a new offense, the probationer's history of violating probation, and his previous incarceration for those violations. *Id* at 129. Lastly, there is no evidence that the probationer's probation revocation was the sole cause of his deportation. *Id* at 132.

For these reasons, Probation requests that the court deny the probationer's motion because he has failed to make a showing of prejudice. [1]

[1] Here, the probationer was deported to Tanzania on December 19, 2019, 15 years after his final surrender hearing. If the court orders a new violation hearing, it would be a virtual hearing from Tanzania. Any technological issues that arise could affect the probationer's constitutional rights. *See Baez v. Commonwealth*, SJC-2023-0238 (July 25, 2023). As such, Probation would also object to a virtual hearing in this matter.

Respectfully submitted,
MASSACHUSETTS PROBATION SERVICE

By its attorney,

ATTORNEY GENERAL
MAURA HEALEY

Dated: 8/4/2023

/s/ Fabiola White
Fabiola White, BBO No. 683735
Nina Pomponio, BBO No. 669464
Special Assistant Attorney General
Massachusetts Probation Service
One Ashburton Place, Room 405
Boston, MA 02108
(857) 324-0241
Fabiola.white@jud.state.ma.us

CERTIFICATE OF SERVICE

I, Fabiola White, hereby certify that I have served a true copy of this document upon the parties at:

For the Probationer:
Kathleen J. Hill
P.O Box 576
Swampscott, MA 01907
lookjhill@gmail.com

By electronic mail, this 4th day of August 2023.

/s/ Fabiola White
Fabiola White

Two Supplemental Exhibits were submitted at the 8/15/2023 motion hearing, as is documented on page 18 of the transcript. (T2/18).

(1) Original signature page of D's Affidavit and envelope, which copy is included in Defendant's Motion for New Trial as Exhibit I (p. 27 of D's MNT).

(2) Sameja v. Sheriff of Franklin County MA et al, CIVIL DOCKET FOR CASE #: 3:19-cv-40141-MGM, which is also included in Defendant's Motion to Reconsider, Exhibit No. 2.

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss.

Wrentham Division
No. 0157CR000919

COMMONWEALTH)
)
v.)
)
FAROUQ SAMEJA)

ORDER OF THE COURT ON DEFENDANT'S MOTION FOR NEW TRIAL

The defendant's Motion For New Trial is denied without further hearing, as the defendant has not raised a substantial issue requiring such hearing.[i]

The challenged sentence was not illegal. Defense counsel advocated for a sentence less than the maximum one-year term which the probation hearing judge imposed, and which subjected the defendant to deportation. The defendant himself made the judge aware that he had been in removal proceedings because of the above-referenced complaint – information which apparently did not incline the judge to sentence below the maximum penalty. In any event, at the time of the hearing, counsel could not ethically have requested the judge to consider the immigration consequences of a one-year sentence, nor could the judge have done so. See *Commonwealth* v. *Quispe*, 433 Mass. 508 (2001).

Concerning the defendant's argument that there was no evidence that the probation hearing judge considered the defendant's ability to pay the restitution he owed, *Commonwealth* v. *Henry*, 475 Mass. 117 (2016), had not been decided at the time of the defendant's violation hearing. Moreover, failure to pay restitution was but one of several violations considered by the judge, violations which included a new offense for which the defendant was subsequently found guilty and sentenced to a six-month period of incarceration.

As to the defendant's remaining arguments, he has not rebutted the presumption of regularity which applies to this very old case, of which a complete record is no longer available given the passage of time. See *Commonwealth* v. *Hoyle*, 67 Mass. App. Ct. 10 (2006).

Julieann Hernon
Associate Justice of the District Court

September 1, 2023

[i] The event for which this case was scheduled on its last date was to determine whether the defendant was entitled to a hearing on the motion. On that date, defense counsel waived the defendant's presence, submitted extensive pleadings, and argued at length in support of the motion. Counsel suggested that the court could treat that day's proceedings as the hearing itself. In any event, whether treated as a request for hearing or a hearing, the result is the same.

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant, Farouq Sameja, being aggrieved by certain opinions, rulings, and findings pertaining to the September 1, 2023, Order on Defendant's Motion for a New Trial hereby appeals, pursuant to Massachusetts Rules of Appellate Procedure, Rule 3.

Date: September 11, 2023,

Respectfully submitted
For Farouq Sameja

/s/ Kathleen J. Hill

Kathleen J. Hill, BBO# 644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

CERTIFICATE OF SERVICE

I, Kathleen J. Hill, hereby certify that on September 11, 2023, I served a true and accurate copy the Defendant's Notice of Appeal on the attorney of record for the Commonwealth by 1st class mail & email:

Fabiola White, BBO No. 683735
Special Assistant Attorney
Massachusetts Probation Service
One Ashburton Place, Room 405
Boston, MA 02108
(857) 324-0241
Fabiola.white@jud.state.ma.us

/s/ Kathleen J. Hill

ATTORNEY KATHLEEN J. HILL
P.O. Box 576
Swampscott, MA 01907
Telephone: 617.742.0457 | E-mail: lookjhill@gmail.com

By Certified Mail
7020 1290 0001 4798 7586

September 28, 2023

Pamela Gauvin-Fernandes, Clerk Magistrate
Wrentham District Court
60 East Street
Wrentham, MA 02093

Re: Commonwealth v. Farouq Sameja
Wrentham District Court, Docket No. 0157CR000919

Dear Madam Clerk,

I enclose for filing in the Wrentham District Court Defendant's Motion to Reconsider the September 1, 2023, Order on Defendant's Motion for a New Trial in the above-referenced matter.

Kindly give a copy of this Motion to the hearing judge: Hon. Julieann Hernon. Thank you for your courteous assistance in this matter.

Sincerely,

Kathleen J. Hill

RECEIVED
WRENTHAM DISTRICT COURT
SEP 29 2023
CLERK-MAGISTRATE

cc: Norfolk County District Attorney's Office
Farouq Sameja, client

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

RECEIVED
WRENTHAM DISTRICT COURT
SEP 29 2023
CLERK-MAGISTRATE

DEFENDANT'S MOTION TO RECONSIDER

NOW COMES the defendant, Farouq Sameja, who respectfully moves this Honorable Court to reconsider the denial of Defendant's Motion for a New Trial (new probation violation hearing[1]) because it appears that justice may not have been done in this case, pursuant to Mass. R. Crim. P. 30 (b). As grounds for this motion to reconsider, Mr. Sameja states the precedent, *Commonwealth* v. *Quispe,* 433 Mass. 508 (2001),[2] that this court relies on when reasoning that "the judge could not have considered the immigration consequences of a one-year sentence" as a collateral consequence at the dispositional stage of the probation revocation hearing is no longer good law. See Exhibit 1, September 1, 2023, Order of the Court.

[1] A motion for a new trial is the proper vehicle for bringing a claim of ineffective of assistance of probation counsel, applying the *Saferian* standard. See *Commonwealth* v. *Patton*, 458 Mass. 119, 121 (2010).

[2] Exhibit 3, *Quispe.*

In *Commonwealth* v. *Marinho*, 464 Mass. 115, 128 (2013),[3] the SJC held "our precedent that a trial judge cannot factor immigration consequences into sentencing is no longer good law. See *Commonwealth* v. *Quispe*, supra at 512-513." See also *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010) ("[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation"). Because the *Padilla* decision is based on constitutional principles it is retroactive.[4] See, e.g., *Commonwealth* v. *Sylvain*, 466 Mass. at 436-437 (applying *Padilla* retroactively having determined that *Padilla* does not announce a new rule). Massachusetts "continue(s) to adhere to the Supreme Court's original construction that a case announces a "new" rule only when the result is "not dictated by precedent." *Id.* at 434. Thus, *Quispe* is unconstitutional law and the reliance on this decision is misplaced.

Similarly, where this court reasons "the defendant's argument that there was no evidence that the probation hearing judge considered the defendant's ability to pay the restitution he owed, *Commonwealth* v. *Henry*, 475 Mass. 117 (2016),[5] had not been decided at the time of the defendant's violation hearing" is inapt. See Exhibit 1, 9/1/2023, Order of the Court. *Henry* is based on constitutional

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[3] Exhibit 4, *Marinho*.

[4] By comparison, when a case is not based on constitutional principles and it announces, "a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power, there is no constitutional requirement that the new rule or new interpretation be applied retroactively, and we are therefore free to determine whether it should be applied only prospectively." *Commonwealth* v. *Dagley*, 442 Mass. 713, 721 (2004), cert. denied, 544 U.S. 930 (2005).

[5] Exhibit 6, *Henry*.

principles of due process and equal protection,[6] dictated by precedent, and therefore, the "clairvoyance" exception applies.[7] The *Henry* decision is based on the fundamental constitutional principles of fairness, which are deeply embedded in the state and federal constitution--constitutional principles that are designed to protect a probationer's conditional liberty interests and due process rights. "Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine." *Bearden* v. *Georgia*, 461 U.S. 660, 669 n. 10 (1983). Notably, at the time of the probation violation hearing in question State cases, as cited in Henry, plainly established that "[r]estitution is limited to economic losses caused by the defendant's conduct and documented by the victim." *Commonwealth* v. *McIntyre*, 436 Mass. 829, 833-834 (2002); *Commonwealth* v. *Rotonda*, 434 Mass. 221, 221 (2001) (restitution is limited to economic loss subject to proof of the economic loss); *Commonwealth* v. *Nawn*, 394 Mass. 1, 6 (1985) (judge must

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[6] *Henry* quoting from *Bearden*, whose reasoning is based on due process and equal protection- basic constitutional principles recognized in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v *Scarpelli*, 411 U.S. 778 (1973); and *Commonwealth* v. *Durling*, 407 Mass. 108 (1990). Specifically quoting, *Bearden* v. *Georgia*, 461 U.S. 660, 669 n. 10 (1983), "Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine." *Henry*, 475 Mass at 122.

[7] Explaining the "clairvoyance exception," "[w]e have excused the failure to raise a constitutional issue at trial or on direct appeal when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case. See *DeJoinville* v. *Commonwealth*, 381 Mass. 246, 248, 251 (1980); *Connolly* v. *Commonwealth*, 377 Mass. 527, 529-530 & n.5; *Commonwealth* v. *Stokes*, 374 Mass. 583, 587-588 (1978). When we excuse a defendant's failure to raise a constitutional issue at trial or on direct appeal, we consider the issue "as if it were here for review in the regular course." *Commonwealth* v. *Kater*, 388 Mass. 519, 533 (1983). If constitutional error has occurred, we reverse the conviction unless the error was harmless beyond a reasonable doubt. *DeJoinville* v. *Commonwealth*, supra at 254. *Commonwealth* v. *Garcia*, 379 Mass. 422, 442 (1980). *Connolly* v. *Commonwealth*, supra at 538. *Commonwealth* v. *Stokes*, supra at 585." *Commonwealth* v. *Rembiszewski*, 391 Mass. 123, 126 (1984).

determine whether the defendant has the ability to pay). Here, Mr. Sameja argues that the order of restitution in the amount of $400.00 unfairly exceeded the amount of the $89.00 loss that the victim was entitled to seek. See G. L. c. 258B, § 3 (o).

Massachusetts has long since recognized that an inability to pay is a defense to the alleged violation. *Henry*, 475 Mass. at 122. Arguendo, the probation department has not shown that Mr. Sameja willfully failed to pay restitution in the time specified by the judge or that he had the ability to pay. See G.L. c. 276, § 87A (a specified time); *Fay* v. *Commonwealth*, 379 Mass. 498, 504 (1980) (due process requires judge make findings of a willful violation); Mass. Dist. Ct. R. Prob. Violation Proc. 8 (c). And because the Notice of Violation of Probation stated two reasons: failing to pay restitution and incurring a new offense, this court cannot be certain what impact either one of the alleged violations had on the judge's decision making when determining the disposition. Most telling, the record indicates that the judge did not provide the requisite written Statement of Reasons and there is no entry on the docket sheet concerning the finding or the reasons.

It further stands to reason that the fact that Mr. Sameja incurred a new offense and was subsequently found guilty and sentenced to a six-month period of incarceration is not a factor that should be weighed more than all other factors when determining if the 365-day sentence versus a 364-day sentence is just, as this court suggests, because when "determining its disposition, the court shall give such weight as it may deem appropriate to the recommendation of the Probation Department, the probationer, and the District Attorney, if any, and to such

factors as public safety; the circumstances of any crime for which the probationer was placed on probation; the nature of the probation violation; the occurrence of any previous violations; and the impact of the underlying crime on any person or community, as well as any mitigating factors." Mass. Dist. Ct. R. Prob. Violation Proc. 8 (d). The analysis should give weight to his criminal history at the time of the final probation hearing with all of the factors.

And because Mr. Sameja[8] violated his probation by committing a new offense when applying the principle of equal protection under the Fourteenth Amendment of the U.S. Constitution[9] and arts. 1 and 10 of the Massachusetts Declaration of Rights, it is reasonable to conclude that the non-citizen's sentence should have been no greater than a citizen's sentence for the same crime. A 364-day sentence for a non-citizen is just as punitive as is a 365-day sentence for a citizen. In this case, the one-year sentence imposed on Mr. Sameja violates equal protection. It is exceedingly punitive and very harsh, depriving Mr. Sameja of his life, liberty, and property in the United States, which offends his due process rights in violation of the 5th and 14th Amendments of the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. Probation counsel could have advocated for one day less to avoid the mandatory deportation for an aggravated felony. See *Commonwealth* v. *Gordon*, 82 Mass.

[8] Mr. Sameja does not dispute that he incurred a new criminal violation for driving with a suspended license and uninsured and was subsequently found guilty and sentenced to six months in the House of Correction.

[9] "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." Sec. 1 of the 14th Amendment of the United States Constitution.

App. Ct. 389, 401 (2012)[10] (properly reasoning that "[t]he judge, who was also the trial judge, concluded that the defendant could have negotiated for a lesser sentence—**even by one day**—thus avoiding the mandatory deportation for an aggravated felony (emphasis added)"); *Commonwealth* v. *Marinho*, 464 Mass. 115, 128 (2013)[11] ("counsel's failure to argue for a shorter sentence [364 days] fell measurably below requisite professional standards"). It is firmly established that if a non-citizen receives a sentence under one year for a crime of theft that State conviction will not be treated as an aggravated felony under federal law. See Title 8 U.S.C. § 1101 (a) (43) (G), as amended in 1996.

In light of *Padilla* and *Henry*, "when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case," this court should analyze Mr. Sameja's claims as if they had been properly preserved under the "clairvoyance" exception. See *Commonwealth* v. *Rembiszewski*, 391 Mass. 123, 126 (1984).[12] Here, the question is: Had probation counsel zealously argued all mitigating factors, including the significance of cancelation and the specific immigration consequences, would the hearing judge have imposed a 365-day sentence versus a 364-day sentence when one day less would NOT have had the effect of converting the state misdemeanor, a misuse of a

[10] Exhibit 5, *Gordon*.

[11] Exhibit 4, *Marinho*.

[12] Exhibit 7, *Rembiszewski*.

credit card conviction, in the total amount of $89.00, into a federal aggravated felony?

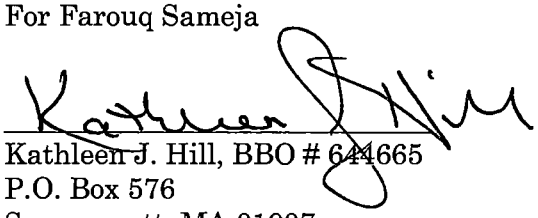
Finally, the record is sufficient to decide this case because the Wrentham District Court docket sheet, the court filings, and "some probation documents" are available, as the Chief of Probation Department represented at the motion hearing. And the written findings entered on the federal court docket report that was submitted at the motion hearing plainly shows that Mr. Sameja was deported due to this State conviction and the imposition of the one-year sentence. See Exhibit 2, United States District Court, District of Massachusetts (Springfield), Civil Docket for Case # 3:19-cv-40141-MGM. Still further, this case does not pertain to the withdrawal of a guilty plea and what advise probation counsel should have given his non-citizen client prior to tendering a plea, as in *Commonwealth* v. *Hoyle*, 67 Mass. App. Ct. 10 (2006). There is no issue about a waiver or acceptance of admission in this case.

In further support of this Motion to Reconsider, Mr. Sameja attaches the following cases: *Commonwealth* v. *Quispe,* 433 Mass. 508 (2001), as Exhibit 3; *Commonwealth* v. *Marinho*, 464 Mass. 115 (2013), as Exhibit 4; *Commonwealth* v. *Gordon*, 82 Mass. App. Ct. 389, 401 (2012), as Exhibit 5; *Commonwealth* v. *Henry*, 475 Mass. 117 (2016), as Exhibit 6; and *Commonwealth* v. *Rembiszewski*, 391 Mass. 123 (1984), as Exhibit 7.

Wherefore, the Defendant respectfully requests this Honorable Court reconsider the denial of Defendant's Motion for a New Trial and allow his motion for a new probation violation hearing, in accordance with Mass. R. Crim. P. 30 (b).

Date: September 28, 2023,

Respectfully submitted,
For Farouq Sameja



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CERTIFICATE OF SERVICE

I, Katheen J. Hill, attorney for Farouq Sameja in the above-captioned matter hereby certify that on September 28, 2023, I served a true and accurate copy of Defendant's Motion for Reconsideration by prepaid, U.S. 1st class mail on the attorney of record for the Commonwealth:

Michael Morrissey, D.A.
Norfolk County District Attorney's Office
45 Shawmut Road, Canton, MA 02021

Fabiola White, Special Assistant Attorney (by Email)
One Ashburton Place, Room 405
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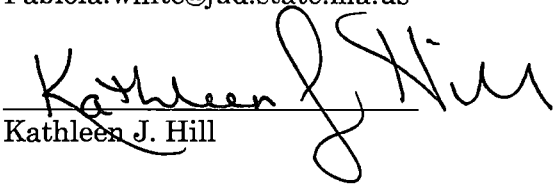

Kathleen J. Hill

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

NORFOLK, ss.

Wrentham Division
No. 0157CR000919

COMMONWEALTH)
)
v.)
)
FAROUQ SAMEJA)

ORDER OF THE COURT ON DEFENDANT'S MOTION FOR NEW TRIAL

The defendant's Motion For New Trial is denied without further hearing, as the defendant has not raised a substantial issue requiring such hearing.[1]

The challenged sentence was not illegal. Defense counsel advocated for a sentence less than the maximum one-year term which the probation hearing judge imposed, and which subjected the defendant to deportation. The defendant himself made the judge aware that he had been in removal proceedings because of the above-referenced complaint – information which apparently did not incline the judge to sentence below the maximum penalty. In any event, at the time of the hearing, counsel could not ethically have requested the judge to consider the immigration consequences of a one-year sentence, nor could the judge have done so. See *Commonwealth* v. *Quispe*, 433 Mass. 508 (2001).

Concerning the defendant's argument that there was no evidence that the probation hearing judge considered the defendant's ability to pay the restitution he owed, *Commonwealth* v. *Henry*, 475 Mass. 117 (2016), had not been decided at the time of the defendant's violation hearing. Moreover, failure to pay restitution was but one of several violations considered by the judge, violations which included a new offense for which the defendant was subsequently found guilty and sentenced to a six-month period of incarceration.

As to the defendant's remaining arguments, he has not rebutted the presumption of regularity which applies to this very old case, of which a complete record is no longer available given the passage of time. See *Commonwealth* v. *Hoyle*, 67 Mass. App. Ct. 10 (2006).

Julieann Hernon
Associate Justice of the District Court

September 1, 2023

[i] The event for which this case was scheduled on its last date was to determine whether the defendant was entitled to a hearing on the motion. On that date, defense counsel waived the defendant's presence, submitted extensive pleadings, and argued at length in support of the motion. Counsel suggested that the court could treat that day's proceedings as the hearing itself. In any event, whether treated as a request for hearing or a hearing, the result is the same.

EXHIBIT 2

CLOSED,HABEAS

United States District Court
District of Massachusetts (Springfield)
CIVIL DOCKET FOR CASE #: 3:19-cv-40141-MGM

Sameja v. Sheriff of Franklin County MA et al
Assigned to: Judge Mark G. Mastroianni
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 10/29/2019
Date Terminated: 01/10/2020
Jury Demand: None
Nature of Suit: 463 Habeas Corpus - Alien Detainee
Jurisdiction: U.S. Government Defendant

Petitioner

Farouq Sameja

represented by **Jodi Kim Miller**
Bulkley Richardson & Gelinas
1500 Main Street
Suite 2700
PO Box 15507
Springfield, MA 01115-5507
413-272-6249
Email: jmiller@bulkley.com
ATTORNEY TO BE NOTICED

V.

Respondent

Sheriff of Franklin County MA

represented by **Christopher L. Morgan**
United States Attorney's Office
Suite 230
United States Courthouse
300 State St.
Springfield, MA 01105
413-785-0269
Email: christopher.morgan2@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

US Attorney General William Barr
TERMINATED: 11/01/2019

represented by **Christopher L. Morgan**
(See above for address)
LEAD ATTORNEY

ATTORNEY TO BE NOTICED

Email All Attorneys

Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
10/29/2019	1	PETITION for Writ of Habeas Corpus (2241), filed by Farouq Sameja. (Attachments: # 1 Exhibit)(Warnock, Douglas) (Entered: 10/29/2019)
10/29/2019	2	Case transferred to Western Division (Springfield) (Warnock, Douglas) (Entered: 10/29/2019)
10/29/2019	3	ELECTRONIC NOTICE of Case Assignment. Judge Mark G. Mastroianni assigned to case. (Healy, Bethaney) (Entered: 10/29/2019)
10/29/2019	4	Filing fee/payment: $5.00, receipt number 1BST077025 for 1 Petition for Writ of Habeas Corpus (2241) (Coppola, Katelyn) (Entered: 10/30/2019)
11/01/2019	5	Judge Mark G. Mastroianni: ORDER entered. SERVICE ORDER re 2241 Petition. The Sheriff of Franklin County shall be the sole respondent. The Clerk serve a copy of the Petition upon the Sheriff of Franklin County and the United States Attorney for the District of Massachusetts. Respondent shall, no later than Friday, November 22, 2019, file a motion for the grant or denial of the Petition and a memorandum in support thereof. To give the Court time to consider the matter, unless otherwise ordered by the Court, Sameja shall not be moved outside the District of Massachusetts without providing the Court 48 hours advance notice of the move and the reason therefor. (PSSA, 3) (Entered: 11/01/2019)
11/06/2019	6	NOTICE of Appearance by Jodi Kim Miller on behalf of Farouq Sameja (Miller, Jodi) (Entered: 11/06/2019)
11/08/2019	7	Letter/request (non-motion) from the Plaintiff Farouq Sameja filed. (Finn, Mary) (Entered: 11/08/2019)
11/08/2019	8	Filing by Farouq Sameja (Finn, Mary) (Entered: 11/08/2019)
11/12/2019	9	Remark - Envelope from the Pltf. Farouq Sameja. (Finn, Mary) (Entered: 11/12/2019)
11/19/2019	10	AMENDED DOCUMENT by Farouq Sameja. Amendment to 1 Petition for Writ of Habeas Corpus (2241) *(Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. Section 2241)*. (Attachments: # 1 Attachment A, # 2 Attachment B, # 3 Attachment C, # 4 Attachment D)(Miller, Jodi) (Entered: 11/19/2019)
11/20/2019	11	NOTICE of Appearance by Christopher L. Morgan on behalf of Sheriff of Franklin County MA (Morgan, Christopher) (Entered: 11/20/2019)
11/26/2019	12	Judge Mark G. Mastroianni: ELECTRONIC ORDER entered. Pursuant to the Service Order 5 entered by this court on November 1, 2019, Respondent was required to file a motion for the granting or denial of the Petition no later than November 22, 2020. Counsel for Respondent entered an appearance on November 20, 2019, but as of the time of this order no motion has been received. In the absence of a motion from the

		Respondent, the court is prepared to grant the petition, but will delay issuing such an order until December 3, 2019 to provide Respondent with a final opportunity to file a motion or to articulate a good cause basis for an extension of time to file. (Lindsay, Maurice) (Entered: 11/26/2019)
12/02/2019	13	MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *or, in the Alternative, Deny the Amended Petition* by William Barr, Sheriff of Franklin County MA.(Morgan, Christopher) (Entered: 12/02/2019)
12/02/2019	14	MEMORANDUM in Support re 13 MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM *or, in the Alternative, Deny the Amended Petition* filed by William Barr, Sheriff of Franklin County MA. (Attachments: # 1 Exhibit 1)(Morgan, Christopher) (Entered: 12/02/2019)
12/03/2019	15	NOTICE by Sheriff of Franklin County MA *of Intent to Remove* (Morgan, Christopher) (Entered: 12/03/2019)
12/12/2019	16	Judge Mark G. Mastroianni: ELECTRONIC ORDER entered granting 13 Motion to Dismiss. Petitioner is subject to a final order of removal issued in 2005 and has been in the custody of United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) since February 28, 2019. Petitioner does not dispute the validity of the removal order and he has previously cooperated with efforts to remove him. He filed this action seeking a writ of habeas corpus on October 29, 2019, at which point he had been in ICE custody for more than six months. Petitioner had previously been held by ICE for periods of approximately nine months and fourteen months while he awaited removal to Tanzania, only to be released when ICE was unable to obtain travel documents for him. These prior experiences and the absence of information regarding the status of his travel documents, led Plaintiff to believe his removal was not reasonably foreseeable. On December 2, 2019, Respondent filed the pending motion to dismiss in which he reported that Tanzania issued travel documents for Petitioner on November 25, 2019 and Petitioners removal was scheduled for the third week in December. The following day, Respondent filed a notice of intent to remove, reconfirming that travel documents have been issued for Petitioner and he is scheduled to be removed during the week of December 16, 2019. As the court has previously explained, in this type of case, the courts role is limited to determining whether the removal of Petitioner is reasonably foreseeable. See Reid v. Donelon, 22 F.Supp.3d 84 (D. Mass. 2014). This limit reflects the Supreme Courts instruction that a post-removal period of detention be no longer than the period reasonably necessary to bring about [a petitioners] removal from the United States. Zadvydas v. Davis, 533 U.S. 678, 689 (2001). Though Petitioner had good reason to believe his removal was not reasonably foreseeable when he filed his petitioner and his amended petition, Respondent has now provided specific representations that Petitioners removal will be accomplished within the next two weeks. For this reason, the court now grants Respondents Motion to Dismiss and denies Petitioners pending

		motion seeking immediate release. Should the government fail to effectuate Petitioners removal by December 21, 2019, Petitioner is free to renew his habeas petition. Additionally, the government is directed to file a statement with this court within seven days of the removal, confirming the date of removal and that Petitioner was removed to Tanzania, not simply relocated to a different detention facility within the United States. (Lindsay, Maurice) (Entered: 12/12/2019)
12/20/2019	17	NOTICE by Sheriff of Franklin County MA *of Removal from the United States* (Morgan, Christopher) (Entered: 12/20/2019)
01/10/2020	18	Judge Mark G. Mastroianni: ORDER DISMISSING CASE ENTERED. (Healy, Bethaney) (Entered: 01/10/2020)

PACER Service Center

Transaction Receipt

08/09/2023 20:30:39

PACER Login:	kh260713	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	3:19-cv-40141-MGM
Billable Pages:	3	**Cost:**	0.30

EXHIBIT 3

Warning
As of: September 24, 2023 12:03 AM Z

Commonwealth v. Quispe

Supreme Judicial Court of Massachusetts

January 12, 2001, Argued ; March 16, 2001, Decided

SJC-08410

Reporter
433 Mass. 508 *; 744 N.E.2d 21 **; 2001 Mass. LEXIS 164 ***

COMMONWEALTH vs. DANIEL E. QUISPE.

Subsequent History: [*1]** As Corrected October 2, 2001.

Prior History: Suffolk. Complaint received and sworn to in the Boston Municipal Court Department on February 18, 2000. A motion to dismiss was heard by Raymond G. Dougan, Jr., J. Civil action commenced in the Supreme Judicial Court for the county of Suffolk on July 7, 2000. The case was reported by Greaney, J.

Disposition: Judge's order dismissing charges against defendant vacated, and case remanded for further proceedings.

Core Terms

immigration, probation, alcohol

Case Summary

Procedural Posture

Boston Municipal Court dismissed driving charges against the defendant. The Commonwealth filed a notice of appeal pursuant to *Mass. Gen. Laws ch. 278, § 28E*, and a petition for relief under *Mass. Gen. Laws ch. 211, § 3* with the Supreme Judicial Court for the County of Suffolk, and then petitioned a single justice of the Supreme Judicial Court of Massachusetts to vacate the judge's order or reserve and report the case to the full court.

Overview

Defendant was charged with operating a motor vehicle after suspension of his license, and while under the influence of intoxicating liquor (OMVUI), and a marked lanes violation. The municipal court judge expressed concern that, because defendant was not a United States citizen, if defendant were again charged, the remedies, which included deportation, were much harsher than for a United States citizen. Taking immigration consequences into consideration was improper. The fact that the defendant could be subject to deportation was a collateral consequence and could not be the basis for a judge's decision as to the disposition of a case. The judge's concern about immigration effects did not justify dismissal in the interests of public justice under the Brandano standard, which case did not apply to OMVUI charges. His views about the wisdom or propriety of a given law were irrelevant and undermined the principle of separation of powers. Pretrial dismissal violated the mandates of *Mass. Gen. Laws ch. 90, § 24(1)(a)(1)*.

Outcome

The court vacated the order of the municipal court, and remanded the case for further proceedings consistent with the opinion.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Driving Under the Influence > Blood Alcohol & Field Sobriety Testing > Admissibility

Evidence > ... > Scientific Evidence > Bodily Evidence > Blood Alcohol

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Driving Under the Influence > Blood Alcohol & Field Sobriety Testing > General Overview

Evidence > ... > Scientific Evidence > Bodily Evidence > Sobriety Tests

HN1[] Blood Alcohol & Field Sobriety Testing, Admissibility

Evidence that a person's blood alcohol level is .08 percent creates a permissible inference that a person is under the influence of alcohol.

Governments > Courts > Authority to Adjudicate

HN2[] Courts, Authority to Adjudicate

Mass. Gen. Laws ch. 211, § 3, grants the Supreme Judicial Court of Massachusetts general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, but only if no other adequate and effective remedy is available.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Governments > Courts > Authority to Adjudicate

HN3[] Judicial Officers, Judges

Mass. Gen. Laws ch. 278, § 28E, permits the Commonwealth to take an appeal to the appeals court from an order of a district court judge (including a Boston Municipal Court judge).

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Governments > Courts > Authority to Adjudicate

HN4[] Right to Appeal, Defendants

The public has a right to expect the Supreme Judicial Court of Massachusetts to correct any abuse of judicial power, if not under the statute, Mass. Gen. Laws ch. 278, § 28E, then at least under its superintendence powers.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Continuances

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

HN5[] Pretrial Motions & Procedures, Continuances

See Mass. Gen. Laws ch. 90, § 24(1)(a)(1), para. 7.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

HN6[] Probation, Conditions

See Mass. Gen. Laws ch. 90, § 24D.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Substance Abuse Programs

HN7[] Probation, Conditions

See Mass. Gen. Laws ch. 90, § 24E.

Civil Procedure > Judicial Officers > Judges > General Overview

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Substance Abuse Programs

HN8 **Judicial Officers, Judges**

Mass. Gen. Laws ch. 90, § 24(1)(a)(1) expressly limits the available dispositions for a charge of operating while under the influence (OMVUI) and establishes a procedure whereby such a charge can be dismissed: § 24(1)(a)(1) permits a judge to continue a case without a finding only if the conditions of Mass. Gen. Laws ch. 90, § 24D are imposed; § 24D permits such a defendant to be placed on probation with conditions for alcohol education and, if necessary, alcohol treatment and rehabilitation; and Mass. Gen. Laws ch. 90, § 24E provides that, where the case has been continued without a finding and the defendant placed on probation, a hearing to determine whether dismissal of the charge is warranted shall be held 60 to 90 days after the continuance. This is the only procedure available for dismissal of a charge of OMVUI. Unless the complaint is legally invalid, a judge has no discretion to dismiss a charge under § 24(1)(a)(1), except in accordance with the dispositional options provided by the governing statute.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN9 **Pretrial Motions & Procedures, Dismissal**

An independent legal justification for dismissing a case arises when the complaint or indictment is legally invalid.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

Criminal Law & Procedure > Preliminary Proceedings > General Overview

HN10 **Pretrial Motions & Procedures, Dismissal**

The pretrial dismissal process articulated in Brandano is not available to the judge as an alternative to the procedures provided by the operating while under the influence statute. Mass. Gen. Laws ch. 90, § 24E provides the only means for dismissing an operating while under the influence charge.

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN11 **Right to Appeal, Defendants**

Brandano permits a judge to dismiss a valid complaint or indictment over the Commonwealth's objection pursuant to certain standards of procedure.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Dismissal

Criminal Law & Procedure > ... > Vehicular Crimes > Driving Under the Influence > General Overview

HN12 **Pretrial Motions & Procedures, Dismissal**

The Brandano procedure cannot apply to a charge of operating while under the influence.

Civil Procedure > Judicial

Officers > Judges > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Continuances

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

HN13[] **Judicial Officers, Judges**

The Brandano case provides that a valid complaint or indictment cannot be dismissed without the prosecutor's consent unless, among other requirements, the interests of public justice mandate a dismissal. Taking immigration consequences into consideration is improper. The possibility that a defendant would be subject to action by the United States Immigration and Naturalization Service is a collateral consequence and cannot be the basis for a judge's decision as to the disposition of a case.

Criminal Law & Procedure > ... > Accusatory Instruments > Dismissal > General Overview

Governments > Legislation > Enactment

HN14[] **Accusatory Instruments, Dismissal**

A judge's concern about immigration effects does not justify a dismissal in the interests of public justice. His personal views regarding the wisdom or propriety of a given law are irrelevant and undermine the principle of separation of powers. Courts may not substitute their judgment for that of legislature. Deference to the legislature is recognition of separation of powers. Judicial inquiry does not extend to the expediency, wisdom, or necessity of the legislative judgment for that is a function that rests entirely with the lawmaking department.

Headnotes/Summary

Headnotes

Supreme Judicial Court, Superintendence of inferior courts. *Motor Vehicle,* Operating under the influence. *Practice, Criminal,* Dismissal. *Judge. Constitutional Law,* Separation of powers.

Counsel: John P. Zanini, Assistant District Attorney, for the Commonwealth.

Paul M. Richardson for the defendant.

Judges: Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, & Sosman, JJ.

Opinion by: COWIN

Opinion

[21]** **[*508]** COWIN, J. The defendant was charged in the Boston Municipal Court Department with operating a motor vehicle while under the influence of intoxicating liquor, operating a motor vehicle after suspension of his license, and a marked lanes violation. He requested pretrial probation without a change of plea [1] for a **[*509]** period of one year and filed a written motion and an affidavit in support of his request. The Commonwealth objected and requested a hearing.

[*2]** **[**22]** Following arguments, a judge in the Boston Municipal Court dismissed the charges against the defendant. The Commonwealth filed a notice of appeal pursuant to G. L. c. 278, § 28E, and a petition for relief under G. L. c. 211, § 3, and thereafter petitioned a single justice of this court to vacate the judge's order or reserve and report the case to the full court. The single justice reserved and reported the case to the full court. We remand the case to the county court for entry of an order vacating the order of the Boston Municipal Court judge.

1. *The judge's findings.* In his written findings, which we set forth in relevant part, the judge determined that the defendant was in fact operating while under the influence of alcohol. [2] **[***4]** He stated that "[a] continuance without a finding after an admission to sufficient facts then dismissal or probation is the disposition or sentence in the Boston Municipal Court for almost all first and second offenders, including

[1] The defendant had pleaded not guilty at his arraignment.

[2] He noted that the police report regarding the defendant's arrest indicated that the defendant had failed field sobriety tests, admitted to being under the influence, and scored a 0.16 on the breathalyzer test. "*HN1*[] Evidence that a person's blood alcohol level is 0.08 per cent creates a permissible inference that a person is under the influence of alcohol." Commonwealth v. McCravy, 430 Mass. 758, 760, 723 N.E.2d 517 (2000), citing G. L. c. 90, § 24 (1) (e).

[operating while under the influence] offenders." [3] The judge, however, was concerned that such a continuance or admission could subject the defendant to **[***3]** action by the United States Immigration and Naturalization Service (INS), as the defendant is not a United States citizen. The judge indicated that, under current law, "the INS takes no action for a first offense admission or conviction [of operating under the influence]," but he stated that "the effect or consequence for [the defendant] of future INS action for a subsequent conviction or admission to many criminal offenses . . . is significantly disproportionate to those penalties and sanctions for the same crimes imposed by the courts on individuals who are citizens of the United States." He concluded that, because of the potential immigration consequences of an admission (e.g., "deportation, exclusion from the United States **[*510]** or denial of an application for residency or citizenship"), the "interests of public justice" required a dismissal of the complaint. During the hearing, the judge stated that he would continue to dismiss similar cases "until a court specifically, in language that is iron clad, on the record tells me that I don't have the authority."

2. *Jurisdiction.* The defendant challenges our jurisdiction to entertain the Commonwealth's appeal under G. L. c. 211, § 3. HN2[↑] General Laws c. 211, § 3, grants this court "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein," but only if no other adequate and effective remedy is available. See Lykus v. Commonwealth, 432 Mass. 160, 161, 732 N.E.2d 897 (2000), quoting *Lanoue v. Commonwealth, 427 Mass. 1014, 1015, 696 N.E.2d 518 (1998)*; Commonwealth v. Jenkins, 431 Mass. 501, 504, 727 N.E.2d 1172 (2000). The defendant contends that the Commonwealth had a remedy under HN3[↑] G. L. c. 278, § 28E, which permits the Commonwealth to take an appeal to the **[***5]** Appeals Court from an order of a District Court judge (including a Boston Municipal Court judge, see G. L. c. 4, § 7, Fifty-sixth) allowing a motion to dismiss a complaint. Although the Commonwealth could have obtained relief in this specific case from the Appeals Court pursuant to G. L. c. 278, § 28E, [4] it is appropriate that we exercise our general superintendence powers under G. L. c. 211, § 3, in this case, in light of the judge's **[**23]** express intent to continue to dismiss complaints, such as the present one, involving similarly situated defendants. See Commonwealth v. Taylor, 428 Mass. 623, 625, 704 N.E.2d 170 (1999), quoting Commonwealth v. Cowan, 422 Mass. 546, 547, 664 N.E.2d 425 (1996) ("HN4[↑] The public has a right to expect the Supreme Judicial Court to correct any abuse of judicial power, if not under the statute, G. L. c. 278, § 28E, then at least under its superintendence powers").

[*6]** 3. *Pretrial dismissal.* HN5[↑] General Laws c. 90, § 24 (1) (a) (1), seventh par., provides, in pertinent part, that "[a] prosecution commenced under [this section] shall not be placed on file or continued without a finding except for dispositions under [§ 24D] ." HN6[↑] General Laws c. 90, § 24D, in turn, states that a person charged with operating while under the influence "may, **[*511]** if such person consents, be placed on probation for not more than two years and shall, as a condition of probation, be assigned to a driver alcohol education program . . . and, if deemed necessary by the court, to an alcohol treatment or rehabilitation program or to both, and such person's license . . . shall be suspended for a [certain] period." HN7[↑] General Laws c. 90, § 24E, provides:

> "Where a person has been charged with operating a motor vehicle **[***7]** under the influence of intoxicating liquor, and where the case has been continued without a finding and such person has been placed on probation with his consent and where such person is qualified for disposition under this section, a hearing shall be held by the court at any time after sixty days but not later than ninety days from the date where the case has been continued without a finding to review such person's compliance with the program ordered as a condition of probation and to determine whether dismissal of the charge is warranted."

The Commonwealth argues that the judge's pretrial dismissal of the charge of operating while under the influence violated the legislative mandate of G. L. c. 90, § 24 (1) (a) (1) . We agree. HN8[↑] In that section, the Legislature expressly limited the available dispositions for a charge of operating while under the influence and established a procedure whereby such a charge could be dismissed: § 24 (1) (a) (1) permits a judge to continue a case without a finding only if the conditions of § 24D are imposed; § 24D permits **[***8]** such a defendant to be placed on probation with conditions for alcohol education and, if necessary, alcohol treatment

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[3] We express no opinion as to the accuracy of this statement by the judge.

[4] The Commonwealth, as noted above, filed a notice of appeal pursuant to G. L. c. 278, § 28E, as well as a petition for relief under G. L. c. 211, § 3.

and rehabilitation; and § 24E provides that, where the case has been continued without a finding and the defendant placed on probation, a hearing to determine whether dismissal of the charge is warranted shall be held sixty to ninety days after the continuance. See J.R. Nolan & B.R. Henry, Criminal Law § 559, at 444-445 (2d ed. 1988). Thus, the Legislature has provided that this is the *only* procedure available for dismissal of a charge of operating while under the influence. Unless the complaint were **[*512]** legally invalid, [5] see, e.g., Angiulo v. Commonwealth, 401 Mass. 71, 79-80, 514 N.E.2d 669 (1987) (double jeopardy principles prohibit prosecution); Commonwealth v. McCarthy, 385 Mass. 160, 163, 430 N.E.2d 1195 (1982) (insufficient evidence presented to grand jury), a judge has no discretion to dismiss a charge under § 24 (1) (a) (1), except in accordance with the dispositional options provided by the governing statute.

[*9]** **[**24]** Contrary to the defendant's contention, HN10[↑] the pretrial dismissal process articulated in Commonwealth v. Brandano, 359 Mass. 332, 337, 269 N.E.2d 84 (1971), [6] is not available to the judge as an alternative to the procedures provided by the operating while under the influence statute. The statute here provided the only means for dismissing an operating while under the influence charge.

[*10]** Although HN12[↑] the *Brandano* procedure cannot apply to a charge of operating while under the influence, we believe the judge's stated reasons for dismissal merit further discussion. HN13[↑] The *Brandano* case provides that a valid complaint or indictment cannot be dismissed without the prosecutor's consent unless, among other requirements, the "interests of public justice" mandate a dismissal. Commonwealth v. Brandano, supra at 337. Here, inpurporting to hold a *Brandano* hearing, the judge concluded that the potential immigration consequences to the defendant of an admission to sufficient facts justified a dismissal. Taking immigration **[*513]** consequences into consideration was improper. The possibility that the defendant would be subject to action by the INS is a collateral consequence and cannot be the basis for the judge's decision as to the disposition of this or any future case. See United States v. Gonzalez, 202 F.3d 20, 27 (1st Cir. 2000), quoting **[***11]** Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) (immigration effects are collateral because deportation is "not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he has no responsibility"); Commonwealth v. Medeiros, 48 Mass. App. Ct. 374, 375, 720 N.E.2d 845 (1999) ("judge had no obligation to anticipate changes in the operation of Federal immigration law"); Commonwealth v. Hason, 27 Mass. App. Ct. 840, 843, 545 N.E.2d 52 (1989) (immigration ramifications of conviction are collateral and contingent consequences).

In addition, HN14[↑] the judge's concern about immigration effects does not justify a dismissal in the "interests of public justice." His personal views regarding the wisdom or propriety of a given law are irrelevant and undermine the principle of separation of powers. See McHerron v. Jiminy Peak, Inc., 422 Mass. 678, 681, 665 N.E.2d **[**25]** 26 (1996) (courts may not substitute their judgment for that of Legislature); Commonwealth v. Leno, 415 Mass. 835, 841, 616 N.E.2d 453 (1993) **[***12]** (deference to Legislature is recognition of separation of powers); District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 694, 411 N.E.2d 1274 (1980) (Quirico, J., dissenting), quoting Commonwealth v. Leis, 355 Mass. 189, 201, 243 N.E.2d 898 (1969) (Kirk, J., concurring) ("Judicial inquiry does not extend to the expediency, wisdom or necessity of the legislative judgment for that is a function that rests entirely with the lawmaking department").

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[5] HN9[↑] An "independent legal justification" for dismissing a case arises when the complaint or indictment is legally invalid. See Commonwealth v. Gordon, 410 Mass. 498, 502-503, 574 N.E.2d 974 (1991) (providing examples of dismissals on "legal basis"); Commonwealth v. Vascovitch, 40 Mass. App. Ct. 62, 64, 661 N.E.2d 117 (1996).

[6] HN11[↑] Commonwealth v. Brandano, 359 Mass. 332, 269 N.E.2d 84 (1971), permitted a judge to dismiss a valid complaint or indictment over the Commonwealth's objection pursuant to certain "standards of procedure." The Legislature later codified the general sentiment expressed in the *Brandano* decision, although not its precise "standards of procedure," in G. L. c. 278, § 18. See Commonwealth v. Pyles, 423 Mass. 717, 722, 672 N.E.2d 96 (1996) ("We believe . . . that, in enacting § 18, the Legislature was undoubtedly aware of the decision in the *Brandano* case, which created a practice concerning the dismissal of a criminal charge after a continuance that has been used for twenty-five years without substantive challenge"); cf. Commonwealth v. Clerk of the Boston Div. of the Juvenile Court Dep't, 432 Mass. 693, 700 n.10, 738 N.E.2d 1124 (2000) (not deciding whether the *Brandano* procedures survived after promulgation of ***Mass. R. Crim. P. 15***, as appearing in 422 Mass. 1501 [1996], permitting Commonwealth to appeal from dismissals of complaints or indictments).

The Boston Municipal Court judge's order dismissing the charges against the defendant is vacated, and the case is remanded for further proceedings consistent with this opinion. [7]

[*13]** *So ordered.*

End of Document

[7] The transcript of the proceedings before the Boston Municipal Court judge and the judge's findings of fact and rulings of law discuss only the judge's reasons for dismissing the charge of operating while under the influence. As we have said, that ruling was erroneous. The judge did not specifically address his reasons for dismissing the other charges, and the parties have not specifically briefed or argued the correctness of the judge's ruling on these charges. We conclude that the dismissal of all the charges should be reviewed on remand in light of our decision today. We therefore vacate the dismissal of the charges of operating a motor vehicle after a license suspension and the marked lanes violation (a civil motor vehicle infraction), as well as the dismissal of the charge of operating while under the influence.

EXHIBIT 4

Positive
As of: September 18, 2023 6:53 PM Z

Commonwealth v. Marinho

Supreme Judicial Court of Massachusetts

September 4, 2012, Argued; January 14, 2013, Decided

SJC-11058

Reporter
464 Mass. 115 *; 981 N.E.2d 648 **; 2013 Mass. LEXIS 9 ***; 2013 WL 135711

COMMONWEALTH vs. ALESSANDRO M. MARINHO.

Prior History: [***1] Barnstable. Complaint received and sworn to in the Orleans Division of the District Court Department on February 12, 2009. The case was tried before Brian R. Merrick, J., and a motion for a new trial was heard by him. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Disposition: Judgment affirmed. Order denying motion for a new trial affirmed.

Core Terms

deportation, immigration consequences, sentence, noncitizen, removal, alien, immigrants, reasonable probability, defense counsel, undocumented, advise, serious bodily injury, assault and battery, aggravated felony, convicted, assault, plea bargain, no evidence, charges, counsel's performance, required finding, guilty plea, new trial, ineffective, fight, criminal conviction, circumstances, impairment, plea negotiation, apartment

Case Summary

Procedural Posture

Defendant appealed a judgment and order by the Orleans Division of the District Court Department (Massachusetts) that convicted him of assault and battery causing serious bodily injury pursuant to *Mass. Gen. Laws ch. 265, § 13A(b)*, and thereafter denied his *Mass.R.Crim.P. 30(b)* motion for a new trial.

Overview

After a codefendant and the victim began fighting, defendant entered the fray and began to fight the victim. Defendant claimed that the evidence was insufficient to establish that the victim's injuries were "serious," and that he caused them. He also alleged that his trial counsel failed to advise him of the immigration consequences of the conviction. The Supreme Judicial Court found, inter alia, that the testimonial evidence of the victim's significant and lasting vision impairment was such that a reasonable jury could have found "serious bodily injury" within the meaning of *§ 13A(b)(i)*. Accordingly, there was no error in the denial of defendant's motion for a required finding of not guilty. Defense counsel's failure to advice defendant about the potential for deportation constituted ineffectiveness under *Mass. Const. Decl. Rights art. XII* and *U.S. Const. amend. VI*. However, defendant was not entitled to a new trial because he offered no proof of prejudice. Therefore, his *Rule 30(b)* motion for a new trial was properly denied.

Outcome

The judgment and the order were affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

HN1 **Standards of Review, Plain Error**

The Supreme Judicial Court of Massachusetts reviews an unpreserved error under the substantial risk of a miscarriage of justice standard.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Findings of Fact

Criminal Law & Procedure > Trials > Motions for Acquittal

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] Substantial Evidence, Findings of Fact

In reviewing the sufficiency of the evidence, appellate courts must look at the evidence in a light most favorable to the Commonwealth to determine whether any rational jury could have found the essential elements beyond a reasonable doubt. The Commonwealth need only present evidence that allows a jury to infer essential facts, and the fact that contradictory evidence exists is not a sufficient basis for granting a motion for a required finding of not guilty.

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

HN3[] Simple Offenses, Elements

In an assault context, "serious bodily injury" is defined as bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death. *Mass. Gen. Laws ch. 265, § 13A(c)*.

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

HN4[] Simple Offenses, Elements

In an assault context, loss or impairment of a bodily function need not be permanent to meet the definition of "serious bodily injury."

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN5[] Simple Offenses, Elements

The Commonwealth may establish causation in an assault and battery case by proving beyond a reasonable doubt that a defendant either directly caused or directly and substantially set in motion a chain of events that produced a serious injury in a natural and continuous sequence.

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

Criminal Law & Procedure > Accessories > General Overview

HN6[] Simple Offenses, Elements

In an assault context, where there is more than one proximate cause, liability is not required to be related to any theory of joint liability.

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Elements

Criminal Law & Procedure > Accessories > General Overview

HN7[] Simple Offenses, Elements

In an assault context, evidence supporting conviction on a joint venture theory can be considered in determining the sufficiency of the evidence of causation.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > General Overview

HN8[] Brady Materials, Appellate Review

To state a claim that the government has lost or

destroyed potentially exculpatory evidence, a defendant has the burden of establishing, based on concrete evidence, that there was a reasonable possibility that the allegedly lost statement would have supported his case. The trial judge then must weigh the materiality of the evidence and the potential prejudice to the defendant, as well as the culpability of the Commonwealth and its agents. An appellate court, in turn, reviews the judge's determination for clear error.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN9 **Trials, Jury Instructions**

Appellate courts evaluate jury instructions as a whole and interpret them as would a reasonable juror.

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

HN10 **Trials, Jury Instructions**

In a jury instruction context, judges are not required to use particular words, but only that legal concepts are properly conveyed.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > New Trial

HN11 **Postconviction Proceedings, Motions for New Trial**

Appellate courts review the denial of a motion for a new trial for abuse of discretion.

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > ... > Procedural Matters > Preliminary Questions > Credibility & Weight of Evidence

HN12 **Burdens of Proof, Defense**

A defendant bears the burden of proof on a motion for a new trial, and a judge is entitled to discredit affidavits that he or she does not find credible.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN13 **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In Massachusetts, a defendant must show that counsel's performance fell measurably below that which might be expected from an ordinary fallible lawyer, and that his performance likely deprived the defendant of an otherwise available, substantial ground of defence.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN14 **Criminal Process, Assistance of Counsel**

In the context of effectiveness of counsel, Massachusetts grants more expansive protections under *Mass. Const. Decl. Rights art. XII* than have been required of states under the Sixth Amendment.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN15 **Sentencing, Deportation & Removal**

Counsel must advise a defendant that a guilty plea may carry deportation consequences.

Criminal Law & Procedure > Sentencing > Deportation & Removal

HN16 **Sentencing, Deportation & Removal**

Deportation is an integral part--indeed, sometimes the most important part--of the criminal process.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Sentencing > Deportation & Removal

HN17 **Criminal Process, Assistance of Counsel**

Underlying the U.S. Supreme Court's decision that deportation consequences are not "collateral" to the criminal justice process and thus not removed from a noncitizen's Sixth Amendment right to counsel is a deep appreciation of the seriousness of deportation for noncitizen defendants.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN18 **Sentencing, Deportation & Removal**

In an effective assistance context, preserving a client's right to remain in the United States may be more important to the client than any potential jail sentence.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN19 **Sentencing, Deportation & Removal**

The U.S. Supreme Court's holding in Padilla, that defense counsel must advise noncitizen clients that pleading guilty may result in deportation, requires counsel to inform a noncitizen client that conviction at trial may similarly carry immigration consequences.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN20 **Sentencing, Deportation & Removal**

Although Padilla and its progeny concerned the duties of counsel in the plea context, the language of Padilla implicates counsel's duties in the context of advice rendered to clients about immigration consequences more broadly.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN21 **Sentencing, Deportation & Removal**

Counsel has an affirmative duty to advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. Such broad language suggests that Padilla imposes on defense counsel a duty to inform a noncitizen client that conviction, whether by plea or by trial, may carry adverse immigration consequences.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN22 **Sentencing, Deportation & Removal**

The failure to advise a defendant that he could be deported if convicted will constitute ineffectiveness.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN23 **Sentencing, Deportation & Removal**

Counsel must also advise a client of the consequences of a conviction, including possible immigration consequences including but not limited to deportation, denial of naturalization, or refusal of reentry into the United States.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN24 **Sentencing, Deportation & Removal**

Defense counsel has an affirmative duty to advise a noncitizen criminal client about the immigration consequences of involvement in the criminal justice system; a defense counsel who remains silent about potential immigration consequences fails to provide constitutionally effective counsel.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN25 **Counsel, Effective Assistance of Counsel**

Constitutional deficiency of counsel is necessarily linked to the practice and expectations of the legal community.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN26 **Sentencing, Deportation & Removal**

Padilla is not directly applicable outside the context of defense counsel's duty to advise a noncitizen client that immigration consequences may flow from conviction, whether by plea or by trial. Immigration consequences may nevertheless factor into litigation strategy, including at plea and sentencing stages. That immigration consequences inform trial strategy is appropriate given the grave impact involvement with the criminal justice system can have on a noncitizen defendant's immigration status and the view, following Padilla, that immigration consequences like deportation are no longer collateral to conviction.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN27 **Counsel, Effective Assistance of Counsel**

Appellate courts judge the reasonableness of counsel's challenged conduct on the facts of the particular case, and decline to define the constitutional obligations of counsel in more specific terms.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN28 **Effective Assistance of Counsel, Pleas**

Defense counsel does not have an absolute duty to engage in plea negotiations.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN29 **Effective Assistance of Counsel, Pleas**

Plea discussions should be considered the norm, and failure to seek such discussions is an exception unless defense counsel concludes that sound reasons exist for not doing so.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN30 **Effective Assistance of Counsel, Pleas**

For purposes of effective assistance of counsel, a defense attorney has no duty to enter into plea negotiations.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

HN31 **Effective Assistance of Counsel, Pleas**

Claims of ineffective assistance of counsel for failure to engage in plea negotiations have typically been rejected when defense counsel has a justifiable explanation for making the strategic decision not to explore a plea deal.

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN32 **Entry of Pleas, Guilty Pleas**

A criminal defendant has no constitutional right to a plea bargain.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > General Overview

HN33 **Counsel, Effective Assistance of Counsel**

An attorney should explore all alternatives to trial, including the possible resolution of a case through a negotiated plea or admission to sufficient facts.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN34 **Sentencing, Deportation & Removal**

The standard practice for defense counsel in Massachusetts is to consider the immigration consequences that may attach to a sentence and to zealously advocate the best possible disposition for the client. In failing to do so, counsel's performance falls measurably below that which might be expected from an ordinary fallible lawyer.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN35 **Effective Assistance of Counsel, Pleas**

To establish prejudice on account of counsel's deficient performance in the plea context, the defendant must show a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial. In particular, the defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN36 **Effective Assistance of Counsel, Pleas**

A defendant must show that, but for the ineffective advice of counsel, there is a reasonable probability that a plea offer would have been presented to a court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN37[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

In an ineffective assistance of counsel context, proof of prejudice cannot be based on mere conjecture or speculation as to outcome.

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

Criminal Law & Procedure > Counsel > Waiver > General Overview

HN38[] **Right to Appeal, Defendants**

Although the right the assistance of counsel may be waived, criminal defendants in Massachusetts have a statutory right of appeal. *Mass. Gen. Laws ch. 278, § 28*.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

HN39[] **Sentencing, Deportation & Removal**

Evidence that there was no plea negotiation does not establish that there was any real opportunity to avoid the immigration consequences of a conviction, particularly for an undocumented person.

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Penalties

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > Penalties

HN40[] **Sentencing, Deportation & Removal**

The reason that simple assault and aggravated assault and battery convictions that carry an imposed sentence of one year or more may render a lawful immigrant deportable is that both offenses may constitute "aggravated felonies," which are defined as crimes of violence, *8 U.S.C.S. § 1101(a)(43)(F) (2006)*, or offenses that have as an element the use, attempted use, or threatened use of physical force against the person or property of another. *18 U.S.C. S. § 16 (2006)*. The alternative elements of simple assault in Massachusetts--the attempted or threatened use of physical force against the person of another--mirror the definition of "crimes of violence" under Federal statute.

Criminal Law & Procedure > Sentencing > Deportation & Removal

HN41[] **Sentencing, Deportation & Removal**

The grounds of deportability under *8 U.S.C.S. §§ 1101(a)(13)(A)*, *1227(a)(2)(A)(iii)* presuppose that an immigrant was lawfully "admitted."

Criminal Law & Procedure > Sentencing > Deportation & Removal

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

HN42[] **Sentencing, Deportation & Removal**

See *8 U.S.C.S. § 1227(a)(2)(A)(iii)*.

Criminal Law & Procedure > Sentencing > Deportation & Removal

HN43[] **Sentencing, Deportation & Removal**

A sentence remains a sentence for immigration purposes, even if its imposition or execution has been suspended in whole or in part. *8 U.S.C.S. § 1101(a)(48)(B) (2006)*.

Headnotes/Summary

Headnotes

Assault and Battery. Evidence, Exculpatory. *Practice, Criminal*, Loss of evidence by prosecution, Instructions to jury, Assistance of counsel, Plea. *Due Process of Law*, Loss of evidence by prosecution, Assistance of counsel. *Constitutional Law*, Assistance of counsel. *Alien. Words*, "Serious bodily injury."

Counsel: *Amy M. Belger* for the defendant.

Elizabeth Sweeney, Assistant District Attorney, for the Commonwealth.

Jennifer Klein, *Wendy Wayne*, & *Jeanette Kain*, Committee for Public Counsel Services, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

Judges: Present: Ireland, C.J., Spina, Cordy, Botsford, Gants, Duffly, & Lenk, JJ. DUFFLY, J. (concurring in part and dissenting in part).

Opinion by: SPINA

Opinion

[*116] [651]** SPINA, J. On February 17, 2010, a jury in the District Court convicted the defendant, Alessandro M. Marinho, and a codefendant, Justin Parietti, each of one count of assault and battery causing serious bodily injury pursuant to G. L. c. 265, § 13A (b). The defendant was acquitted of assault and battery with a dangerous weapon pursuant to G. L. c. 265, § 15A (b).[1] He was sentenced to two and one-half years in a house of correction, **[***2]** nine months to serve with the balance suspended.

The defendant filed a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), **[**652]** as appearing in 435 Mass. 1501 (2001), alleging ineffective assistance of counsel for his lawyer's failure (1) to advise him of the immigration consequences of an assault and battery conviction, (2) to explore a plea resolution, and (3) to advocate for a sentence that might have mitigated such immigration consequences. The motion was denied following a nonevidentiary hearing. The defendant filed timely appeals from both the conviction and the denial of his motion for a new trial. We transferred the case here on our own motion.

The defendant alleges error in (1) the denial of his motion for a required finding of not guilty; (2) the denial of his motion to dismiss based on the loss of exculpatory evidence; (3) the judge's failure to instruct the jury on multiple defendants; and (4) the denial of his motion for a new trial.[2] We affirm the conviction and the order denying the defendant's motion for a new trial.

1. Background. **[***3]** The jury could have found the following facts. See Commonwealth v. Latimore, 378 Mass. 671, 677, 393 N.E.2d 370 (1979). We reserve other details for discussion of specific issues.

[*117] On December 22, 2008, Sam Scherer and his girl friend, Jessica Cardinal, were at Cardinal's apartment in Wellfleet. Cardinal shared the apartment with Parietti, who lived in an upstairs room. In Parietti's room was a television that another man, Zack Store, owned and had left in the apartment.

That evening, Store went to the apartment and had a discussion with Scherer in which Store agreed to sell the television to Scherer. Store and Scherer retrieved the television from Parietti's room and installed it in the living room. Store left the apartment.

Shortly thereafter, Parietti arrived at the apartment with two friends, the defendant and Hunter Carwile. After Parietti saw that the television was no longer in his room, he and Scherer stepped outside and a physical fight ensued. Testimony about the particulars of the fight differed. Suffice it to say that the two men fell to the ground with Scherer positioned on top of Parietti.[3] Parietti began making choking sounds. The defendant entered the fray when Scherer was still on top **[***4]** of Parietti, and he began to fight Scherer. After the fight, Scherer was brought to Cape Cod Hospital but then was transported to Beth Israel Deaconess Medical Center. He had a fractured nose, cheekbones, and orbital (eye socket) bones. As a consequence of the fight, Scherer had reconstructive surgery on his face. His vision was affected by the altercation; he had double vision for three to four months after the assault, and his vision at the time of trial had not been restored to normal. The defendant is not a United States citizen and was in the United States illegally. At the time of this appeal, the defendant had been deported.

2. Motion for a required finding of not guilty. The defendant contends that the judge erred in denying his motion for a required finding of not guilty. Specifically, he argues that the evidence was insufficient to establish

[1] The alleged dangerous weapon was a boot or a "shod foot."

[2] We acknowledge the amicus brief of the Committee for Public Counsel Services.

[3] Although Cardinal also was involved in the altercation and suffered injuries, her involvement is not relevant to this appeal. Carwile's involvement is also immaterial.

that (1) Scherer's injuries were "serious" within the meaning of G. L. c. 265, § 13A (b) (i), and (2) the defendant caused Scherer's injuries. The issue whether the evidence **[***5]** was sufficient to establish that Scherer's injuries were "serious" **[**653]** was preserved for appellate review by a timely objection at trial, and by the defendant's motion for a required **[*118]** finding of not guilty. We thus review the denial of this aspect of the defendant's motion under the standard set forth in Commonwealth v. Latimore, supra at 677-678. The issue of the sufficiency of the evidence of causation was not preserved. HN1[↑] We review this unpreserved error under the substantial risk of a miscarriage of justice standard. See Commonwealth v. Melton, 436 Mass. 291, 294 n.2, 763 N.E.2d 1092 (2002).

HN2[↑] In reviewing the sufficiency of the evidence, we must look at the evidence in a light most favorable to the Commonwealth to determine whether any rational jury could have found the essential elements beyond a reasonable doubt. Commonwealth v. Latimore, supra at 676-677. The Commonwealth need only present evidence that allows a jury to infer essential facts, Commonwealth v. Merola, 405 Mass. 529, 533, 542 N.E.2d 249 (1989), and the fact "[t]hat contradictory evidence exists is not a sufficient basis for granting a motion for a required finding of not guilty." Commonwealth v. Merry, 453 Mass. 653, 662, 904 N.E.2d 413 (2009). As the defendant had two **[***6]** reasons for contesting the denial of the motion for a required finding, we take each in turn.

a. Serious bodily injury. HN3[↑] "[S]erious bodily injury" is defined as "bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death." G. L. c. 265, § 13A (c). HN4[↑] Loss or impairment of a bodily function need not be permanent to meet the definition of "serious bodily injury." See Commonwealth v. Baro, 73 Mass. App. Ct. 218, 219-220, 897 N.E.2d 99 (2008) (punches and kicks to head resulting in broken bones and temporary loss of sight for one and one-half months constitutes "serious bodily injury"); Commonwealth v. Jean-Pierre, 65 Mass. App. Ct. 162, 162, 164, 837 N.E.2d 707 (2005) (punches resulting in broken jaw and several weeks of tube-feeding constitutes "serious bodily injury").

The defendant argues that there was insufficient evidence that Scherer suffered loss or impairment of a bodily function, limb, or organ. He relies on the hospital records and claims that they offer no evidence of impairment to Scherer's vision. The defendant paints an incomplete picture of the evidence of Scherer's significant vision loss following the violent confrontation **[***7]** with the defendant. Although some of the medical records do not reflect that Scherer's vision was impaired, other records state **[*119]** that Scherer presented with "blurred vision" and "vision changes." Scherer also testified to his impaired vision following the fight with Parietti and the defendant. He testified that he had to return to the hospital multiple times after undergoing facial reconstruction surgery to ensure that his vision kept improving. He stated that he experienced double vision for three or four months following the altercation and that he still was having trouble seeing at the time of trial, which was over a year after the fight. This testimonial evidence of significant and lasting vision impairment, even if it conflicts with some of the medical records, indicates that Scherer's injuries were not -- as the defendant suggests -- mere "facial injuries resulting from a fistfight." To the contrary, the evidence was such that a reasonable jury could have found "serious bodily injury" within the meaning of G. L. c. 265, § 13A (b) (i).

b. Whether the defendant caused Scherer's injuries. The defendant also asserts that the judge erred in denying his motion for a required finding **[***8]** of not guilty **[**654]** because there was insufficient evidence to establish that the defendant's and not Parietti's actions caused Scherer's injuries. He suggests that the combination of the defendant's acquittal of assault and battery with a dangerous weapon and the fact that the defendant entered the fight after Parietti is such that no reasonable jury could have found the essential causation element.

At the close of all the evidence, the Commonwealth requested and the judge denied a joint venture jury instruction. Therefore, the burden was on the Commonwealth to prove causation beyond a reasonable doubt as to the defendant. Because the defendant did not preserve the causation issue, we review the denial of the motion to determine whether any error resulted in a substantial miscarriage of justice. Commonwealth v. Melton, supra. We conclude that there was none.

HN5[↑] The Commonwealth may establish causation in an assault and battery case by proving beyond a reasonable doubt that the defendant either directly caused or "directly and substantially set in motion a chain of events that produced" the serious injury in a natural and continuous sequence. See Instruction 6.160

of the Criminal Model Jury Instructions **[***9]** for Use in the District Court (2009). Cf. *Commonwealth v. Smiley, 431 Mass. 477, 489 [*120] n.9, 727 N.E.2d 1182 (2000)*. The judge correctly instructed the jury on these methods of proving causation. Although the evidence of who did what to whom was conflicted, it did not thereby become insufficient. The jury could have found that the defendant caused serious injury (fractured orbital bones and double vision) to Scherer by kicking Scherer in the head while Scherer was holding Parietti on the ground, thereby rendering Scherer unconscious. The fact that the defendant was acquitted on the assault and battery with a dangerous weapon charge[4] does not disprove that there was direct contact attributable solely to the defendant.[5] Because there was sufficient evidence to support the jury's verdict, we conclude there was no error in the denial of the motion for a required finding of not guilty.

3. Motion to dismiss based on the loss of exculpatory evidence. The defendant asserts error in the denial of his motion to dismiss the complaint where the Commonwealth allegedly lost potentially exculpatory evidence, namely a statement Scherer reportedly wrote following **[***11]** the altercation with Parietti and the defendant. The issue was preserved at trial. The basis for the motion was the testimony of a police officer who arrived on the scene **[**655]** following the altercation. He recalled reading Scherer's statement but was unsure what had become of it. He did not know whether Scherer had ever given the statement to the police or if the police had misplaced it. It was the defendant's position that any **[*121]** discrepancies between the statement and Scherer's testimony would have undercut Scherer's credibility as a witness; therefore, the defendant claims, he was deprived of a meaningful opportunity for cross-examination by the Commonwealth's failure to produce the statement.

HN8[↑] To state a claim that the government has lost or destroyed potentially exculpatory evidence, the defendant has the burden of establishing, based on concrete evidence, that there was a reasonable possibility that the allegedly lost statement would have supported his case. See *Commonwealth v. Williams, 455 Mass. 706, 718, 919 N.E.2d 685 (2010)*. The trial judge then must "weigh the materiality of the evidence and the potential prejudice to the defendant, as well as the culpability of the Commonwealth and its agents." **[***12]** *Commonwealth v. Harwood, 432 Mass. 290, 295, 733 N.E.2d 547 (2000)*. We, in turn, review the judge's determination for clear error. See id.

We conclude that the judge did not err in denying the motion to dismiss. The defendant presented no evidence whatsoever of the contents of the elusive statement. His claim that it would have been inconsistent, much less materially inconsistent, is speculative. Therefore, he did not meet his threshold burden of proving that the statement was exculpatory.[6]

4. Failure to instruct the jury on multiple defendants. The judge denied the Commonwealth's request to instruct the jury on joint venture.[7] The defendant alleges error **[***13]** in the judge's failure to use the model jury instruction applicable to cases with multiple defendants, and to his use of the singular "defendant" as opposed to

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[4] Because an issue at trial was the type of footwear the defendant was wearing, the jury could have acquitted him on the ground that the footwear did not constitute a deadly weapon.

[5] In the alternative, the jury could have found that the concurrent actions of Parietti and the defendant, both of whom landed blows on Scherer within **[***10]** a short period of time, caused Scherer's severe injuries. See *Commonwealth v. Perry, 432 Mass. 214, 225-226, 229, 733 N.E.2d 83 (2000)* (deciding that, although cumulative effect of multiple beatings caused victim's death, evidence was sufficient for jury to conclude that defendant caused victim's death on theory of individual liability); *Commonwealth v. McLeod, 394 Mass. 727, 745, 477 N.E.2d 972*, cert. denied sub nom. ***Aiello v. Massachusetts, 474 U.S. 919, 106 S. Ct. 248, 88 L. Ed. 2d 256 (1985)*** (***HN6***[↑] where there is more than one proximate cause, "liability . . . [is not required to] be related to any theory of joint liability"). In yet another alternative, although the judge did not instruct the jury on joint venture, joint venture was a viable theory at the time the Commonwealth rested; therefore, ***HN7***[↑] evidence supporting conviction on joint venture theory could be considered in determining the sufficiency of the evidence of causation. See *Commonwealth v. Mills, 436 Mass. 387, 393, 764 N.E.2d 854 (2002)*.

[6] Contrary to the defendant's argument, the judge did not usurp the jury's fact-finding prerogative in merely reflecting that he was "not so sure [the statement] did exist" when the police officer had testified the previous day that he read the report. The judge was not addressing the jury at the time and, thus, could not have invaded the jury's function. See *Commonwealth v. McColl, 375 Mass. 316, 321, 376 N.E.2d 562 (1978)*. In addition, the judge did not remove from the jury's consideration any factual issues that the defendant was entitled to have the jury resolve.

[7] Counsel for Parietti, the codefendant, objected to the Commonwealth's request for a joint venture instruction. Counsel for the defendant did not.

the plural "defendants" in instructing the jury. The consequence, according to the defendant, was avoidable jury confusion as to which of the two defendants was responsible for each distinct act.

[*122] *HN9*[↑] We evaluate jury instructions as a whole and interpret them as would a reasonable juror. *Commonwealth v. Trapp, 423 Mass. 356, 361, 668 N.E.2d 327*, cert. denied, *519 U.S. 1045, 117 S. Ct. 618, 136 L. Ed. 2d 542 (1996)*. We do *HN10*[↑] not require that judges use particular words, but only that legal concepts are properly conveyed. *Id. at 359*. Because the defendant did not object to the jury instruction at trial, we review his claim to determine first whether there was error, and if so, we then inquire whether the error created a substantial risk of a miscarriage of justice. See *Commonwealth v. Belcher, 446 Mass. 693, 696, 846 N.E.2d 1141 (2006)*.

The defendant's argument is unpersuasive. In his instructions, the judge emphasized that each defendant faced distinct charges **[***14]** and differentiated between the **[**656]** charges against each individual defendant. Significantly, he instructed the jury that the "burden of the Commonwealth is to prove every single element of the charge against each defendant beyond a reasonable doubt." In so doing, the judge correctly conveyed the law. Because there was no error of law, there was no substantial miscarriage of justice.[8] See *Commonwealth v. Randolph, 438 Mass. 290, 303, 780 N.E.2d 58 (2002)*.

5. Denial of the motion for a new trial. The defendant moved, pursuant to *Mass. R. Crim. P. 30 (b)*, as appearing in 435 Mass. 1501 (2001), for a new trial on the ground that he was deprived of his right to the effective assistance of counsel under the *Sixth Amendment to the United States Constitution* and *art. 12 of the Massachusetts Declaration of Rights*. **[***15]** His counsel's alleged failings were many[9] and they occurred at different stages of the litigation. Counsel's purported deficiencies included the failure (1) to advise the defendant prior to trial of the potential immigration consequences of an assault and battery conviction at trial, (2) to discuss the possibility of a plea resolution with the **[*123]** defendant, and (3) to advocate for a sentence that might have mitigated the immigration consequences of a conviction.

A hearing on the motion was held in June, 2012, after which the motion was denied. *HN11*[↑] We review the denial of the motion for abuse of discretion. See *Commonwealth v. Lucien, 440 Mass. 658, 670, 801 N.E.2d 247 (2004)*. *HN12*[↑] A defendant bears the burden of proof on a motion for a new trial,[10] see *Commonwealth v. Watson, 455 Mass. 246, 256, 915 N.E.2d 1052 (2009)*, and a judge is entitled to discredit affidavits he or she does not find credible, see *Commonwealth v. Grace, 370 Mass. 746, 751-752, 352 N.E.2d 175 (1976)*, **[***16]** citing *Commonwealth v. Heffernan, 350 Mass. 48, 53, 213 N.E.2d 399*, cert. denied, *384 U.S. 960, 86 S. Ct. 1586, 16 L. Ed. 2d 673 (1966)*. We conclude that the judge did not abuse his discretion and affirm the order denying the motion for a new trial. We reach this conclusion because the defendant offered no proof that there was "a 'reasonable probability' that 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Commonwealth v. Mahar, 442 Mass. 11, 15, 809 N.E.2d 989 (2004)*, quoting *Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. See *Missouri v. Frye, 132 S. Ct. 1399, 1410, 182 L. Ed. 2d 379 (2012)* (Frye); *Lafler v. Cooper, 132 S. Ct. 1376, 1385, 182 L. Ed. 2d 398 (2012)* (Lafler).

The two-part test a defendant must satisfy to prevail on a claim of ineffective assistance of counsel in Massachusetts is familiar. *HN13*[↑] The defendant must show that **[**657]** counsel's performance fell "measurably below that which might be expected from an ordinary fallible **[***17]** lawyer," and that his performance "likely deprived the defendant of an

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[8] The defendant makes an additional argument that his defense counsel was ineffective in failing to request a jury instruction on how to evaluate a case with multiple defendants. Because there was no error of law giving rise to a substantial miscarriage of justice, there could not have been ineffective assistance of counsel. See *Commonwealth v. Emeny, 463 Mass. 138, 153, 972 N.E.2d 1003 (2012)*; *Commonwealth v. Wright, 411 Mass. 678, 682, 584 N.E.2d 621 (1992)*.

[9] In addition to the claims we discuss at greater length, the defendant also alleges that his counsel failed to prepare him to testify at trial and to inform him of the elements of the charged offenses and relevant defenses. The trial transcript does not indicate lack of preparedness.

[10] The defendant and his trial attorney, who was not appellate counsel, submitted affidavits that attest to the defendant's claims. The codefendant's attorney and the assistant district attorney also submitted affidavits that indicate that the defendant's trial counsel would not engage in a plea negotiation.

otherwise available, substantial ground of defence."[11] Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974) (Saferian). Although the defendant's claim fails for lack of proof of prejudice, we consider whether defense **[*124]** counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer," id., before we address the prejudice issue.

a. Professional standards. We consider defense counsel's performance under the first prong of Saferian in light of Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) (Padilla), a recent case in which the United **[***18]** States Supreme Court held that ***HN15*** counsel must advise a defendant that a guilty plea may carry deportation consequences. In Padilla, supra at 1480, the Court chronicled the changes in immigration law that have led to an increase in deportable offenses and concluded that ***HN16*** "deportation is an integral part -- indeed, sometimes the most important part," of the criminal process. Because of this intimate connection between the criminal process and deportation, the Court declined to regard deportation as a mere "collateral consequence" of criminal conviction. ***HN17*** Underlying the Supreme Court's decision that deportation consequences are not "collateral" to the criminal justice process and thus not removed from a noncitizens' Sixth Amendment right to counsel is a deep appreciation of the "seriousness of deportation" for noncitizen defendants. Id. at 1486. Indeed, ***HN18*** "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." Id. at 1483, quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001). With the changed landscape following Padilla in **[***19]** mind, we briefly address each of counsel's alleged failings individually.

i. Failure to advise defendant of immigration consequences of conviction at trial. An initial issue in this appeal is whether ***HN19*** the Supreme Court's holding in Padilla, supra at 1486, that defense counsel must advise noncitizen clients that pleading guilty may result in deportation, requires counsel to inform a noncitizen client that conviction at trial may similarly carry immigration consequences. We hold that it does. ***HN20*** Although Padilla and its progeny, Frye, supra, and Lafler, supra, concerned the duties of counsel in the plea context, the language of Padilla, much of which this court acknowledged in Commonwealth v. Clarke, 460 Mass. 30, 42-46, 949 N.E.2d 892 (2011) (Clarke), implicates counsel's duties in the context of advice rendered to clients about immigration consequences more broadly. For example, the Court states **[*125]** that ***HN21*** counsel has an affirmative duty[12] to "advise **[**658]** a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[13] Padilla, supra at 1483. See Clarke, supra at 42. Such broad language suggests that Padilla imposes on defense counsel a duty to inform a noncitizen client **[***20]** that conviction, whether by plea or by trial, may carry adverse immigration consequences.[14] Padilla, supra at 1482-1483. Clarke, supra. Moreover, national guidelines[15] dictate "that

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[11] Satisfying Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974) (Saferian), necessarily satisfies the Federal standard articulated in Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for evaluating the constitutional effectiveness of counsel. Commonwealth v. Clarke, 460 Mass. 30, 45, 949 N.E.2d 892 (2011) (Clarke). In fact, ***HN14*** we "grant more expansive protections under [art. 12 of the Massachusetts Declaration of Rights] than have been required of States under the Sixth Amendment." Commonwealth v. Rainwater, 425 Mass. 540, 553, 681 N.E.2d 1218 (1997), cert. denied, ***522 U.S. 1095, 118 S. Ct. 892, 139 L. Ed. 2d 878 (1998)***.

[12] Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1484, 176 L. Ed. 2d 284 (2012) (Padilla), makes plain that ***HN24*** defense counsel has an affirmative duty to advise a noncitizen criminal client about the immigration consequences of involvement in the criminal justice system; a defense counsel who remains silent about potential immigration consequences fails to provide constitutionally effective counsel. See Clarke, supra at 43.

[13] In Padilla, supra at 1483, the precise immigration consequences of the noncitizen defendant's conviction for transporting marijuana were "succinct, clear, and explicit" and easily ascertainable "simply from reading the text of the statute." See 8 U.S.C. § 1227(a)(2)(B)(i) (2006). Therefore, the Court determined that defense counsel should have advised his client that conviction would result in deportation. The substantive **[***22]** adequacy of counsel's advice is not at issue in this case because the record indicates that defense counsel said nothing to the defendant about the immigration consequences of conviction.

[14] In the aftermath of Padilla, earlier characterizations of immigration consequences as "collateral" are no longer good law. See, e.g., United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003), and cases cited.

[15] ***HN25*** Constitutional deficiency is "necessarily linked to the practice and expectations of the legal community." Clarke,

counsel must advise her client regarding the risk of deportation," without specific reference to conviction by guilty plea. *Padilla, supra at 1482*, citing National Legal Aid & Defender Ass'n, Performance Guidelines for Criminal Representation § 6.2 (1995). See J.W. Hall, Jr., Professional Responsibility in Criminal Defense Practice § 10:29 (3d ed. 2005) (***HN22***[↑] "The failure to advise a defendant that he could be deported if convicted . . . would constitute ineffectiveness"). Similarly, the expectation in the Massachusetts legal community is that defense counsel should inform a client about immigration consequences associated with criminal conviction, however imposed. See Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 15 (rev. June 2011) (CPCS Manual) (***HN23***[↑] "Counsel must also advise the client . . . of the consequences of a conviction, including . . . possible immigration consequences including but not limited to deportation, **[*126]** denial of naturalization or refusal of reentry into the United States").[16] **[***21]** Because "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation," *Clarke, supra at 46*, quoting *Padilla, supra at 1484*, and the defense counsel in the present case failed to do so, we conclude that his performance fell "measurably below that which might be expected from an ordinary fallible lawyer." See *Saferian, supra.*

ii. Failure to discuss plea resolution with defendant.[17]

HN26[↑] Padilla is **[**659]** not directly applicable outside the context of defense counsel's duty to advise a noncitizen client that immigration consequences may flow from conviction, whether by plea or by trial. Immigration consequences may nevertheless factor into litigation strategy, including at plea and sentencing **[***23]** stages. That immigration consequences inform trial strategy is appropriate given the grave impact involvement with the criminal justice system can have on a noncitizen defendant's immigration status and the view, following Padilla, that immigration consequences like **[*127]** deportation are no longer collateral to conviction. With these ideas in mind, we turn to the defendant's two other claims of attorney error: that defense counsel failed to discuss the possibility of a plea resolution and to advocate for a sentence that might have mitigated the immigration consequences of a conviction. ***HN27***[↑] We "judge the reasonableness of counsel's challenged conduct on the facts of the particular case," *Clarke, supra at 38*, quoting *Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, and "decline[] to define the constitutional obligations of counsel in more specific terms." *Clarke, supra.* See *Roe v. Flores-Ortega, 528 U.S. 470, 479-480, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)* (rejecting bright-line rules governing constitutional duties of counsel).

It is undisputed that***HN32***[↑] a criminal defendant has no constitutional right to a plea bargain. *Lafler, supra at 1395*. Moreover, the prosecutor in the present case never put a formal plea offer on the table. Cf. *Frye, supra at 1408-1409*. Nevertheless, defense counsel should have informed the defendant that the prosecution was interested in discussing a plea resolution and proceeded to discuss that possibility with the defendant prior to trial. Today, "[p]leas account for nearly 95 [per cent] of all criminal convictions." *Padilla,*

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supra at 42, quoting *Padilla, supra at 1482*.

[16] Although we are not bound by the Committee for Public Counsel Services's Assigned Counsel Manual (rev. June 2011) (CPCS Manual), we find it persuasive. We further note that the CPCS Manual governs the conduct of both assigned and appointed counsel. CPCS Manual, supra at c. 1, at 1.

[17] In his brief, the defendant often frames this allegation as counsel's failure to engage in plea negotiations with the prosecutor. We agree with the defendant that it is generally prudent practice **[***24]** for defense counsel to explore the possibility of a plea bargain, particularly in light of potentially severe immigration consequences of conviction. See, e.g., CPCS Manual, supra at c. 4, at 46. However, ***HN28***[↑] defense counsel does not have an absolute duty to engage in plea negotiations. See American Bar Association, Standards for Criminal Justice, Prosecution Function and Defense Function § 4-6.2, at 205 (3d ed. 1993) (***HN29***[↑] "Plea discussions should be considered the norm and failure to seek such discussions is an exception unless defense counsel concludes that sound reasons exist for not doing so" [emphasis added]); G.N. Herman, Plea Bargaining § 3:03, at 21 (3d ed. 2012) (***HN30***[↑] "for purposes of effective assistance of counsel, a defense attorney has no duty to enter into plea negotiations . . ."). ***HN31***[↑] Claims of ineffective assistance of counsel for failure to engage in plea negotiations have typically been rejected when defense counsel has a justifiable explanation for making the strategic decision not to explore a plea deal. See, e.g., *People v. Sherman, 172 P.3d 911, 913 (Colo. App. 2006)*; *People v. Palmer, 162 Ill. 2d 465, 478-479, 643 N.E.2d 797, 205 Ill. Dec. 506 (1994)*, cert. denied, ***514 U.S. 1086, 115 S. Ct. 1800, 131 L. Ed. 2d 727 (1995)***. See also D. Kesselbrenner **[***25]** & W. Wayne, Defending Immigrants Partnership, Selected Immigration Consequences of Certain Massachusetts Offenses 3 (2006); *Annot., Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A.L.R.4th 660, at § 2(a)* (1981).

supra at 1485. It is standard practice that HN33[↑] "the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts." CPCS Manual, supra at c. 4, at 46. In the present case, defense counsel knew that the defendant faced possible deportation and yet failed to tell the defendant that the prosecutor twice approached him about **[***26]** the possibility of plea resolution. Thus, whether a plea was a real option or would have resulted in less severe immigration consequences, the defendant was deprived of the opportunity to make an intelligent decision, based on greater information, about whether to proceed to trial or to request that counsel engage in plea negotiations. See Frye, supra; *Mass. R. Prof. C. 1.2*, 426 Mass. 1310 (1998) (client's decision to accept plea); *Mass. R. Prof. C. 1.4*, 426 Mass. 1314 (1998) (client communication). **[**660]** For these reasons, counsel's performance was deficient.

iii. Failure to advocate for lesser sentence. We similarly conclude that counsel's failure to argue for a shorter sentence **[*128]** fell measurably below requisite professional standards.[18] In Padilla, supra at 1486, the Supreme Court emphasized that criminal conviction may carry severe immigration consequences for a noncitizen criminal defendant and his family. We likewise appreciate the grave impact sentencing can have on deportability. For a noncitizen defendant, the difference between imposed sentences of three hundred and sixty-four days and of one year following convictions of simple assault or aggravated assault and battery may be the **[***27]** difference between life in this country and deportation. See D. Kesselbrenner & W. Wayne, Defending Immigrants Partnership, Selected Immigration Consequences of Certain Massachusetts Offenses 3, 4 (2006) (Kesselbrenner & Wayne). Moreover, HN34[↑] the standard practice for defense counsel in Massachusetts is to consider the immigration consequences that may attach to a sentence and to "zealously advocate the best possible disposition" for the client.[19] CPCS Manual, supra at c. 4, at 22-24. In failing to do so, counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer." Saferian, supra.

b. Prejudice. Having determined that counsel's performance failed to satisfy the first prong of Saferian, supra, we now reach the central reason for the disposition of this appeal: the defendant's failure to show that he was prejudiced by counsel's performance. We conclude that the defendant is not entitled to a new trial because he offers no proof of prejudice. In support of his argument that he was prejudiced by counsel's allegedly deficient performance, the defendant relies on his own affidavit, **[*129]** as well as affidavits from his counsel, the codefendant's counsel, and the assistant district attorney. These affidavits merely reflect counsel's purported failures and do not establish that "better work might have accomplished **[***29]** something material for the defense." Commonwealth v. Dargon, 457 Mass. 387, 403, 930 N.E.2d 707 (2010), quoting Commonwealth v. Satterfield, 373 Mass. 109, 115, 364 N.E.2d 1260 (1977).

i. Failure to advise defendant of immigration consequences of conviction. The defendant argues that, had he known the potential immigration consequences of the charges, he would have requested that counsel engage in plea negotiations in an attempt to lessen the immigration consequences. He shows no specific prejudice from counsel's failure to inform him of the consequences of conviction at trial but, instead, relies on the other two areas of **[**661]** ineffectiveness to establish overall prejudice.

ii. Failure to discuss possibility of plea resolution with defendant. HN35[↑] To establish prejudice on account of counsel's deficient performance in the plea context, the defendant must show a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial. See Frye, supra at 1409; Lafler, supra at 1385. In particular, the defendant must demonstrate a reasonable probability that the

[18] As we discuss later, we are disturbed by the dearth of proof of counsel's performance at sentencing.

[19] Reasoning that immigration consequences are collateral to conviction, this court has held that a trial judge should not consider the potential immigration consequences in fashioning a sentence. See Commonwealth v. Quispe, 433 Mass. 508, 513, 744 N.E.2d 21 (2001). This reasoning was undermined in Padilla when the Supreme Court declined to accept the view that immigration consequences are collateral to conviction. Padilla, supra at 1481. Therefore, our precedent that a trial judge **[***28]** cannot factor immigration consequences into sentencing is no longer good law. See Commonwealth v. Quispe, supra at 512-513. See, e.g., United States v. Kwan, 407 F.3d 1005, 1017 (9th Cir. 2005) (judge may factor immigration consequences into sentencing); United States v. Castro, 26 F.3d 557, 560 (5th Cir. 1994) (same). See also, e.g., Note, Extracting Compassion from Confusion: Sentencing Noncitizens after United States v. Booker, 79 Fordham L. Rev. 2129, 2156-2165 (2011).

prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it. See *Frye, supra* **[***30]** (concluding that defendant had not established prejudice because of "strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final"); *Lafler, supra* (***HN36***[↑]) "defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").[20] Moreover, ***HN37***[↑] "[p]roof of prejudice . . . cannot be based on mere conjecture or speculation as to outcome." *People [*130] v. Palmer, 162 Ill. 2d 465, 481, 643 N.E.2d 797, 205 Ill. Dec. 506 (1994)*, cert. denied, *514 U.S. 1086, 115 S. Ct. 1800, 131 L. Ed. 2d 727 (1995)*.

The affidavits submitted by the defendant merely state that defense counsel decided against engaging in a plea negotiation or discussing that option with the defendant. The defendant offered no evidence that the prosecutor would have offered him a favorable plea bargain, or that **[**662]** the judge would have accepted one. ***HN39***[↑] Evidence that there was no plea negotiation also does not establish that there was any real opportunity to avoid the immigration consequences of a conviction, particularly for an undocumented person. The reality of the defendant's status as an undocumented person living in the United **[***33]** States was that he was deportable per se on account of his unlawful status.[21] The **[*131]** defendant was, in fact, removed from this country following his criminal proceedings. Although plausible, we have been shown no evidence that the defendant's criminal activity made him a more likely target for deportation. The defendant provided no proof that his counsel's conduct as opposed to his undocumented status led to his deportation. See, e.g., *United States vs. Gutierrez Martinez, U.S. Dist. Ct., Nos. 07-91(5), 10-2553, 2010 U.S. Dist. LEXIS 134052 at *10 (D. Minn. Dec. 17, 2010)* (finding no prejudice because guilty plea had no bearing on defendant's deportability given his undocumented status).

The defendant contends that, had the Commonwealth agreed to **[***34]** a disposition by a plea to simple assault, he would have avoided deportation. This argument also fails for lack of proof. We have been shown no evidence[22] that criminal convictions carry the

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[20] The dissent contends that the defendant was altogether denied the assistance of counsel at a critical plea negotiation stage of the proceedings. This, according to the dissent, is per se ineffective assistance of counsel for which no specific showing of prejudice is required. Post at . The basis for this outcome is *Roe v. Flores-Ortega, 528 U.S. 470, 483-484, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)* (Flores-Ortega), a case involving counsel's failure to file **[***31]** a notice of appeal that resulted in the forfeiture, effectively a complete denial, of a judicial proceeding altogether.

The dissent's reliance on Flores-Ortega is misplaced. ***HN38***[↑] Although the right may be waived, see *Commonwealth v. Petetabella, 459 Mass. 177, 181, 944 N.E.2d 582 (2011)*, criminal defendants in Massachusetts have a statutory right of appeal. *G. L. c. 278, § 28*. See *Commonwealth v. Cowie, 404 Mass. 119, 122, 533 N.E.2d 1329 (1989)*. Criminal defendants have no right to a plea bargain. *Lafler v. Cooper, 132 S. Ct. 1376, 1395, 182 L. Ed. 2d 398 (2012)* (Lafler). Therefore counsel's failure to discuss the possibility of a plea bargain did not deprive the defendant of any rights. Said differently, the defendant forfeited nothing. Moreover, in relying on Flores-Ortega, the dissent completely disregards the fact that both the Supreme Court and this court have required a showing of actual prejudice in analogous contexts. See *Missouri v. Frye, 132 S. Ct. 1399, 1409, 182 L. Ed. 2d 379 (2012)* (lapsed plea); *Lafler, supra at 1385* (rejected plea); *Clarke, supra at 47-49* (uninformed guilty plea). See also *Padilla, supra at 1487* (remanding for proceedings on actual prejudice). Courts in other jurisdictions that have considered the evidence necessary to satisfy **[***32]** the prejudice prong of an ineffective assistance claim in the context of counsel's failure to adequately explore a plea resolution similarly required a showing of actual prejudice. See, e.g., *United States v. Boone, 62 F.3d 323, 327 (10th Cir.)*, cert. denied, ***516 U.S. 1014, 116 S. Ct. 576, 133 L. Ed. 2d 499 (1995)*** (no proof that plea would have been acceptable to judge or that resulting sentence would have been different); *People v. Sherman, 172 P.3d 911, 914 (Colo. App. 2006)* (no proof of defendant's willingness to accept plea offer); *People v. Palmer, 162 Ill. 2d 465, 481, 643 N.E.2d 797, 205 Ill. Dec. 506 (1994)* (no proof that State would have offered plea deal).

[21] Our consideration of the defendant's undocumented status in no way implies that an undocumented defendant can never successfully state a claim of ineffective assistance of counsel. New avenues may open in the ever-changing field of immigration law that change the legal landscape for undocumented people. We simply ask that undocumented defendants address the issue of their particular status and how different performance of counsel could have led to a better outcome.

[22] ***HN40***[↑] The reason that simple assault and aggravated assault and battery convictions that carry an imposed sentence of one year or more **[***35]** may render a lawful

same deportation consequences for undocumented immigrants as they do for lawful immigrants.[23] The only evidence included in the record is a chart that, even if it were equally as applicable to undocumented immigrants as it is to lawful immigrants, does not advance the defendant's position. The chart indicates that simple assault, like assault and battery causing serious bodily injury, may result in deportation of a noncitizen defendant if the sentence imposed is one year or more. 8 U.S.C. § 1227 (2006 & Supp. II) (aggravated felonies are deportable offenses).[24] See Kesselbrenner & Wayne, supra at 3, 4. Therefore, even if the prosecutor had offered a plea to simple assault -- **[*132]** and there is no evidence that he might have -- the defendant well may have faced the same immigration consequence **[**663]** as he did following conviction of assault and battery causing serious bodily injury.

iii. Failure to advocate for lesser sentence. We know that a jury convicted the defendant of assault and battery causing serious bodily injury and, therefore, that the judge imposed a sentence based on this conviction. We also know that the defendant was sentenced to two and one-half years in a house of correction, and was required to serve nine months with the balance suspended.[25] We are told by the defendant and his counsel in the form of affidavits that defense counsel did not raise the immigration consequences with the judge for consideration in sentencing. Even taking the affiants at their word, something we are not required **[***37]** to do, we are disturbed by the dearth of proof of counsel's performance at sentencing. The defendant failed to provide a transcript of the sentencing hearing. See Commonwealth v. Watson, 455 Mass. 246, 256, 915 N.E.2d 1052 (2009). If a transcript was unavailable, the defendant also failed to avail himself of the opportunity afforded in our Rules of Appellate Procedure to file a statement of the evidence. Mass. R. A. P. 8 (c), as amended, 378 Mass. 932 (1979). Consequently, we do not know what factors the judge considered in fashioning the sentence or whether he would have imposed a lighter sentence had the potential immigration consequences been argued to him.[26]

Moreover, we have been shown no evidence that a lighter sentence might have allowed the undocumented defendant to "fly under the radar" **[***38]** and avoid deportation. Even assuming criminal convictions carry the same deportation consequences for undocumented immigrants as they do for lawful immigrants, we have no evidence that deportation would not have been the **[*133]** consequence of the aggravated assault and battery conviction, irrespective of the length of the sentence. See 8 U.S.C. § 1227(a)(2)(A)(i). See also Kesselbrenner & Wayne, supra at 4 (aggravated assault and battery may qualify as "crime involving moral turpitude" rendering defendants deportable regardless of sentence length).[27] Thus, because the

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immigrant deportable is that both offenses may constitute "aggravated felon[ies]," defined as "crim[es] of violence," 8 U.S.C. § 1101(a)(43)(F) (2006), or "offense[s] that [have] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16 (2006). The alternative elements of simple assault in Massachusetts -- the attempted or threatened use of physical force against the person of another, see Commonwealth v. Gorassi, 432 Mass. 244, 248, 733 N.E.2d 106 (2000) -- mirror the definition of "crime[s] of violence" under Federal statute.

[23] ***HN41*** The grounds of deportability under Federal statute presuppose that an immigrant was lawfully "admitted." 8 U.S.C. § 1101(a)(13)(A) (2006) (defining "admission" as lawful entry into United States). 8 U.S.C. § 1227(a)(2)(A)(iii) (***HN42*** "Any alien who is convicted of an aggravated felony at any time after admission is deportable"). The defendant in this case was not admitted lawfully; he was in this country illegally.

[24] The reason that simple assault and aggravated assault and battery convictions that carry an imposed sentence of one year or more may render a lawful immigrant deportable is **[***36]** that both offenses may constitute "aggravated felon[ies]," defined as "crim[es] of violence," 8 U.S.C. § 1101(a)(43)(F) (2006), or "offense[s] that [have] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 16 (2006). The alternative elements of simple assault in Massachusetts -- the attempted or threatened use of physical force against the person of another, see Commonwealth v. Gorassi, 432 Mass. 244, 248, 733 N.E.2d 106 (2000) -- mirror the definition of "crime[s] of violence" under Federal statute.

[25] ***HN43*** A sentence remains a sentence for immigration purposes, even if its imposition or execution has been suspended in whole or in part. See 8 U.S.C. § 1101(a)(48)(B) (2006).

[26] That the sentencing judge only required the defendant to serve nine months of his sentence does not necessarily indicate a willingness to impose a lighter sentence, even if potential immigration consequences were brought to his attention.

[27] Irrespective of his conviction, the defendant is subject to a term of inadmissibility because he was removed following a period of unlawful presence in this country. 8 U.S.C. § 1182(a)(9) (2006) (inadmissibility of aliens previously

undocumented defendant offered no evidence that his fate would have been different if defense counsel had argued for a lighter sentence, we cannot conclude that he was prejudiced.

Judgment affirmed.

Order denying motion for a new trial affirmed.

Concur by: DUFFLY (In Part)

Dissent by: DUFFLY (In Part)

Dissent

DUFFLY, J. (concurring in part and dissenting in part). I agree with the court that, considered in light of firmly rooted constitutional protections for noncitizen defendants, the defendant **[**664]** has shown that defense counsel's deficiencies deprived the defendant "of the opportunity to make an intelligent decision, based on greater information, about whether to proceed to trial or to request that counsel engage in plea negotiations." Ante at. In these circumstances, prejudice is shown under an established framework that was set forth by the United States Supreme Court in *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010)* (Padilla), citing *Roe v. Flores-Ortega, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)* (Flores-Ortega). A noncitizen defendant who is given inaccurate advice about the immigration consequences of pleading guilty must "convince **[***40]** the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla, supra*, citing *Flores-Ortega, supra.* **[*134]** This framework also must guide our analysis when counsel's deficiencies consist of failing to "have informed the defendant that the prosecution was interested in discussing a plea resolution" and further failing to "discuss that possibility with the defendant prior to trial." Ante at.

The court departs from this framework. By requiring that a noncitizen defendant in these circumstances present proof of a specific plea that the prosecutor would have offered, and show that the result of a plea would have been more favorable than the outcome of the trial, the court has imposed a standard more burdensome than that of the United States Supreme Court and thereby has erected a barrier to vindication of a noncitizen defendant's constitutional right to effective assistance of counsel that no defendant in these circumstances reasonably will be able to overcome.

The defendant's submissions establish both that his counsel was ineffective and that the defendant was prejudiced by counsel's deficiencies; I would therefore have allowed the defendant's motion **[***41]** for a new trial, and respectfully dissent.[1]

1. Prejudice under Padilla and Flores-Ortega. Under the second prong of *Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974)*, in order to prevail on a claim of ineffective assistance, a defendant must show that he was prejudiced by counsel's serious deficiency. In Padilla, the United States Supreme Court discussed the **[*135]** prejudice prong of a claim that counsel was deficient in advising his noncitizen client about immigration consequence; the Court cited *Flores-Ortega, supra at 486*, in support of its holding that "to obtain relief on this **[**665]** type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the

removed). Because his sentence was for over one year, and thus his aggravated assault and battery conviction amounted to an "aggravated felony," he may be inadmissible for longer. Id. There is also the possibility that **[***39]** he will never be able to return. Id. Because we were provided no information about these issues, we cannot conclude that a remand for resentencing would serve the defendant's interests.

[1] The court concludes that the defendant's submissions in support of his motion for a new trial establish that his counsel was ineffective in several important respects: (1) counsel failed to provide the defendant information about the immigration consequences of his conviction, ante at ; (2) counsel failed to discuss with the defendant the possibility of plea resolution, notwithstanding his knowledge that the defendant faced possible deportation and that the prosecutor had twice approached him about the possibility of plea resolution, ante at ; and (3) counsel failed to advocate for a lesser sentence, ante at . I concur in this aspect of the court's opinion. I would hold also that defense counsel's failure to enter into plea negotiations with the prosecutor, after the prosecutor twice had expressed interest in plea bargaining, amounted to deficient performance. Under prevailing professional norms, defense attorneys are expected to engage in plea negotiations to attempt to obtain sentences that preclude or ameliorate immigration consequences. See K. Kanstroom & L.M. Glaser, Immigration, in Crime and Consequence: The Collateral Effects **[***42]** of Criminal Conduct § 8.7, at 8-25 (Mass. Cont. Legal Educ. 2d ed. 2009); K. Kanstroom, Immigration Consequences of Criminal Convictions, in Collateral Consequences of Criminal Convictions 19 (Mass. Cont. Legal Educ. 2001).

circumstances." Padilla, supra at 1485.

The Court's reliance on Flores-Ortega, and to the specific citation in that opinion, is telling. The defendant in Flores-Ortega alleged that his counsel failed to file an appeal without his consent; the Court held that the applicable prejudice requirement may be satisfied **[***43]** if a defendant shows nonfrivolous grounds for appeal, but a defendant need not "'specify the points he would raise were his right to appeal reinstated'... where there are other substantial reasons to believe that he would have appealed." Flores-Ortega, supra at 485-486, quoting Rodriguez v. United States, 395 U.S. 327, 330, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969). What is required to show prejudice is that "the defendant demonstrate that, but for counsel's deficient conduct, he would have appealed." Flores-Ortega, supra at 486.

A similar framework is described in Commonwealth v. Clarke, 460 Mass. 30, 47-48, 949 N.E.2d 892 (2011) (Clarke). In Clarke, we concluded that a defendant who received deficient assistance of counsel at the plea bargaining stage may show prejudice by establishing "the presence of 'special circumstances' that support the conclusion that [the defendant] placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." Id., citing Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (Hill). See State v. Sandoval, 171 Wash. 2d 163, 175, 176, 249 P.3d 1015 (2011). That prejudice requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea **[***44]** process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, supra at 59.[2] Where, as here, counsel's deficient representation included his failure to respond to the prosecutor's **[*136]** plea overtures, knowing that the defendant faced possible deportation, prejudice is shown if the defendant can demonstrate that, but for counsel's deficient conduct, he would have sought a plea that minimized the risk of the potential consequence of deportation for life. The defendant need not prove that he necessarily would have obtained a better result by plea bargaining than by going to trial.

In its analysis of what it views to be the applicable prejudice standard, the court does not cite Padilla and its reliance on Flores-Ortega but, instead, concludes that, under Missouri v. Frye, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (Frye), and Lafler v. Cooper, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (Lafler), "the defendant must show a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial.... In particular, the defendant must demonstrate a reasonable probability that the prosecution would **[**666]** have made an offer, that the defendant would have accepted it, and that the court would have approved it." Ante at.[3]

Frye and Lafler do not account for Padilla's discussion of the severe consequence of deportation, see Padilla, supra at 1480, 1485, and the fact that a noncitizen defendant's risk assessment **[***46]** includes consideration of the probability that, depending on the criminal charges filed against him, he faces presumptive permanent removal. In this case, as in Padilla, supra, the defendant's primary concern was avoiding that severe consequence, which depended not only on the length of the sentence, but also on the nature of the charges. See Roberts, Proving Prejudice, Post-Padilla, 54 Howard L.J. 693, 697 (2011) ("disclosure about a severe collateral consequence can radically alter a defendant's risk analysis, and might lead some defendants to take a risk at trial where acquittal or conviction on a lesser charge is the only way to potentially avoid that consequence"). Moreover, **[*137]** unlike in Frye and Lafler, as a consequence of counsel's deficient performance, no specific plea offer was made here, and consequently none was ever discussed with the noncitizen defendant.[4]

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[2] We apply a similar approach in the context of motions for a new trial based on claims of newly discovered evidence, where a defendant is not asked to provide proof that a jury provided with the proffered evidence would have found him not guilty. The standard in such circumstances is whether "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial... not whether **[***45]** the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations." Commonwealth v. Grace, 397 Mass. 303, 306, 491 N.E.2d 246 (1986).

[3] The court appears to add an additional requirement: that the defendant provide "proof that his counsel's conduct as opposed to his undocumented status led to his deportation." Ante at.

[4] As the United States Supreme Court has recognized, "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution

Thus, Frye and Lafler do not prescribe the appropriate prejudice standard. Rather, as set forth in *Padilla, supra at 1485*; *Flores-Ortega, supra*; and *Hill, supra*, a noncitizen defendant who faces adverse immigration consequences may establish prejudice by showing that it would have been rational under the circumstances to seek a plea, and that he would have accepted a plea imposing substantial penal consequences if that would have avoided the immigration consequence of deportation with no possibility of return. This showing focuses on a defendant's special circumstances, in particular his immigration status and the consequence of removal, and asks a reviewing court to consider what a rational defendant faced with permanent removal, as compared to a lengthy incarceration should he be found guilty, would have done had he been counseled properly.

Because the focus is not on what a prosecutor and trial judge might have done when considering solely those factors related to the charged crime and appropriate sentencing, "no further showing from the defendant of the merits of his underlying claims" is required. **[***48]** *Flores-Ortega, supra at 484*. Instead, a defendant "must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult him" about whether to engage in plea negotiations, he would have sought a resolution of the charges without trial. Id. Under this framework, applicable here, prejudice may be established by evidence of a defendant's statements to his counsel that he wanted to participate in plea bargaining, or the presence of "other substantial reasons to believe" that a defendant would have wanted to engage in plea discussions.[5] *Id. at 485-486*.

[667]** 2. The defendant has established a reasonable probability of **[*138]** prejudice. Even under the court's prejudice rubric, the defendant has shown a "reasonable probability that the result of a plea would have been more favorable than the outcome of the trial," ante at , when "more favorable" takes into account the consequence of permanent removal from the United States. "A reasonable probability is a probability sufficient to undermine confidence in the outcome"; it does not mean "more likely than not." *Strickland v. Washington, 466 U.S. 668, 693, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

That there is a reasonable probability that the prosecutor would have engaged in plea discussions is established, first, by the prosecutor's affidavit, in which he states that he twice sought to engage in plea discussions with defense counsel, at a time when counsel was aware that the defendant faced immigration consequences,[6] and, second, by the widely recognized premise noted by the United States Supreme Court that most criminal cases today are resolved by plea bargaining rather than trials. See *Lafler, supra at 1388*.

Moreover, prosecutors are advised to consider all consequences of a defendant's conviction when deciding whether to enter into a plea agreement. See U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.420(A)(8) (1997); National Dist. Attorneys Ass'n, National Prosecution Standards § 68.1(g), at 191-192 (2d ed. 1991).[7] Under the American Bar Association

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may well be able to reach agreements that better **[***47]** satisfy the interests of both parties." *Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010)*.

[5] The defendant states in his affidavit that his attorney never discussed his immigration status with him and "never discussed the immigration consequences of a conviction for the charges." He thus "did not know that a conviction would likely result in [his] being deported from the United States and never be[ing] able to return to be with [his] family." Had he been advised of the potential immigration consequences of conviction, he "would have requested that [his] counsel engage in plea negotiations and attempt to work out a plea agreement that would not necessarily [have] render[ed] [him] ineligible to **[***49]** remain in the United States" or, if he left, would not necessarily have prevented his return.

[6] According to the prosecutor's **[***50]** affidavit, between October 7, 2009 (the date of a lobby conference), and December 9, 2009 (the scheduled trial date), he discussed with counsel for the defendant and his codefendant "the possibility of resolving their clients' cases prior to trial" but was informed that counsel "would not consider a plea because of immigration consequences for his client." The trial was continued to February 16, 2010. Prior to that date, the prosecutor again approached defense counsel regarding the possibility of resolving the case. Counsel "reiterated that he would not consider a plea to the charges because of immigration consequences for his client." Nothing in the record suggests that the prosecutor ever made any specific offer of a plea.

[7] The President of the National District Attorneys Association has urged prosecutors to consider the immigration consequences of a defendant's conviction "if we are to see that justice is done." Johnson, Collateral Consequences, 35 The Prosecutor, no. 3, May-June 2001, at 5 (May-June 2001). Prosecutors have a duty to do justice, not to win cases.

Standards for Criminal Justice, Prosecution Function and Defense **[*139]** Function, Standard § 3-4.1 (3d ed. 1993), **[***51]** "[t]he prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea." Indeed, this court and the United States Supreme Court have recognized that "the defense and prosecution may well be able to reach agreements that better satisfy the interests of both **[**668]** parties" if all sides are aware of the immigration consequences. *Clarke, supra at 47 n.18*, quoting *Padilla, supra at 1486*.

Based on the foregoing, had defense counsel participated in plea negotiations, there is a reasonable probability that the prosecutor would have been amenable to a plea to lesser offenses, in lieu of assault and battery causing serious bodily injury,[8] in order to avoid the consequences to the defendant of deportation without the possibility of return. See, e.g., K. Kanstroom & L.M. Glaser, Immigration, in Crime and Consequence: The Collateral Effects of Criminal Conduct § 8.7.2, at 8-27 (Mass. Cont. Legal Educ. 2d ed. 2009) (recommending plea to disorderly conduct as alternative to assault and battery).[9] Even if the defendant were to have pleaded guilty to assault and battery causing serious bodily injury, a sentencing recommendation of less than one year would have avoided a conviction for what, **[*140]** under applicable immigration law, constitutes an aggravated felony,[10] and would have ameliorated the consequence of deportation to the defendant.

The record demonstrates that the defendant had a viable defense of defense of another, and that conviction for the offenses charged was far from certain. See, e.g., *Padilla, supra at 1486* ("a criminal episode may provide the basis for multiple charges, of which **[***54]** only a subset mandate deportation following conviction"). A plea agreement to a lesser offense would have saved the Commonwealth the time and expense of a trial. The prosecutor twice indicated his willingness to bargain, the second time after having learned of the defendant's immigration status. There was thus a reasonable probability that the prosecutor would have accepted such a plea.[11]

Finally, I respectfully disagree with the court's assertion that "[e]vidence that there was no plea negotiation . . . does not establish that there was any real opportunity to avoid the immigration consequences of a conviction, particularly for an undocumented person. The reality of the defendant's status as an undocumented person living in the United States was that he was deportable per se on account of his unlawful status. The defendant **[***55]** was, in fact removed from this country following his criminal proceedings." (Footnote omitted.) **[**669]** Ante at . This assertion does not reflect current immigration law and policies, which are reflected in decisional law, including that of the United States Supreme Court. See *Arizona v. United States, 132 S. Ct. 2492, 2499, 183 L. Ed. 2d 351 (2012)* (Arizona). See also *Padilla, supra*; *Clarke, supra*; *Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 397-398, 974 N.E.2d 645 (2012)*. Moreover, the defendant's immigration status as an undocumented alien does not mean that he suffered no prejudice **[*141]** by being subject to removal for having committed an aggravated felony.[12]

Commonwealth v. Shelley, 374 Mass. 466, 472, 373 N.E.2d 951 (1978), quoting *Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)* ("the prosecuting attorney 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win **[***52]** a case, but that justice shall be done'").

[8] Under *G. L. c. 265, § 13A (b) (i)*, "[w]hoever commits an assault or an assault and battery . . . upon another and by such assault and battery causes serious bodily injury . . . shall be punished by imprisonment **[***53]** in the state prison for not more than [five] years or in the house of correction for not more than [two and one-half] years, or by a fine of not more than $5,000, or by both such fine and imprisonment."

[9] Under *G. L. c. 272, § 53 (b)*, conviction as a disorderly person, "first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than [six] months, or by a fine of not more than $200, or by both such fine and imprisonment."

[10] An "aggravated felony" is a "crime of violence" as defined in *18 U.S.C. § 16 (2006)*, "for which the term of imprisonment [is] at least one year." *8 U.S.C. § 1101(a)(43)(F) (2006)*. A "crime of violence" is defined as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another . . . ." *18 U.S.C. § 16(a)*.

[11] Based on the judge's sentence of nine months to be served in a house of corrections, with the balance of two and one-half years suspended, the record also indicates a reasonable probability -- a probability sufficient to undermine confidence in the outcome -- that the judge would have been willing to accept a plea to offenses carrying sentences of less than one year.

[12] This court may take judicial notice of Federal immigration

The defendant's status as an undocumented alien rendered him "inadmissible", 8 U.S.C. § 1182(a)(6)(A)(i) (2006), and consequently subject to removal, 8 U.S.C. § 1227(a)(1)(A) (2006), but the fact that a defendant has the status of an inadmissible alien **[***56]** has consequences quite distinct from those he faces if he is also convicted of an aggravated felony. Under 8 U.S.C. § 1228(c) (2006), any noncitizen convicted of an aggravated felony is conclusively presumed to be deportable. The statute directs the Attorney General to provide for "special removal proceedings" for aliens convicted of aggravated felonies, "in a manner which assures expeditious removal following the end of the alien's incarceration for the underlying sentence." 8 U.S.C. § 1228(a)(1) (2006). Once removed, an alien convicted of an aggravated felony may never return to the United States. 8 U.S.C. § 1182(a)(9)(A)(i) (2006).

By contrast, the defendant's status as an inadmissible alien does not mean that he would have been deported on that basis. Even if removal proceedings were commenced because of his inadmissible status, the defendant could have sought discretionary relief under 8 U.S.C. § 1229b(b)(1) (2006 & Supp. VI) on the basis of hardship to his family.[13] See Commonwealth v. Gordon, supra at 397-398 ("The United States Attorney General generally has the discretion to 'cancel removal,' allowing a noncitizen who is currently a permanent resident to remain in the country, **[***57]** but individuals convicted of an aggravated felony **[*142]** are ineligible for cancellation of removal"). If that relief were denied him, the defendant still would have become eligible to apply for a waiver to reenter the United States ten years after his removal. See 8 U.S.C. § 1182(a)(9)(B)(i)(II) (2006). As the defendant's submissions reflect, that option was foreclosed to the defendant upon his conviction of an aggravated felony.

Given **[***58]** the facts of this case, there is also a reasonable probability that no removal proceeding would have been commenced at all were it not for the defendant's criminal conviction. Immigration officials exercise **[**670]** discretion and prioritize the use of limited resources to seek removal of criminal aliens convicted of the most serious offenses.

> "A principal feature of the removal system is the broad discretion exercised by immigration officials. . . . Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal. See [8 U.S.C.] § 1229a(c)(4)[. See also 8 U.S.C.] §§ 1158 (asylum), 1229b (cancellation of removal), 1229c (voluntary departure)."

Arizona, supra at 2499. The discretion that may be exercised

> "embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born **[***59]** in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this [n]ation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission."

Id.

The United States Supreme Court has also recognized that, in addition to human concerns, there are national concerns that **[*143]** dictate the use of discretion not to remove an alien. "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire [n]ation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws. . . . Perceived mistreatment of

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statutes and the decisional law interpreting and explaining the discretionary manner in which those laws are enforced. See G. L. c. 233, § 70 ("The courts shall take judicial notice of the law of the United States . . . whenever the same shall be material").

[13] Section 1229b(b)(1) provides that the Attorney General may cancel removal and grant legal permanent resident status to "an alien who is inadmissible or deportable" if the alien (1) has been physically present in the United States continuously for at least the prior ten years, (2) is a "person of good moral character," (3) has not been convicted of certain crimes including crimes of moral turpitude, controlled substances violations, firearms violations, domestic violence crimes, falsification of documents, or aggravated felonies; and (4) can show that removal will "result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1) (2006 & Supp. VI).

aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad." *Id. at 2498*. These national concerns are reflected in the policies that prioritize which aliens will be removed. *Id. at 2499*.

There are many instances where it is "unlikely that the Attorney General would have the alien removed." *Id. at 2508*, citing Memorandum from John Morton, Director, Immigration and Customs **[***60]** Enforcement (ICE), to All Field Office Directors et al., Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4-5 (June 17, 2011) (ICE Memorandum). As reflected in that memorandum, it is the policy of ICE to prioritize the use of its limited resources "to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national safety, border security, public safety, and the integrity of the immigration system." ICE Memorandum, supra at 2. It does so by exercising prosecutorial discretion "not to assert the full scope of the enforcement authority available to the agency in a given case." Id.

In this case, the record reflects that immigration officials waited until after the defendant was convicted of an aggravated felony to commence removal proceedings.[14] **[**671]** Doing so was not only consistent with stated enforcement policies, but provided for an expedited removal to which inadmissible aliens are not subject. Conviction of an aggravated felony had the consequence of removal without the possibility of cancellation **[***61]** or return, in essence a banishment for life from the country that had been the **[*144]** defendant's home since childhood. Had the defendant been afforded the opportunity, he could have negotiated a plea that, at the very least, would not have had the consequence of removal without any opportunity to return.[15] As the defendant states in his affidavit, he had lived in the United States his entire adult life, and has family members in this country who depend on him; for him, the opportunities to petition for cancellation of removal or a waiver to return would have been "serious benefit[s]." See *Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 596 n.2, 966 N.E.2d 223 (2012)*.

Even under the framework employed by the court, and unquestionably under the prejudice standard enunciated in *Padilla, supra at 1485*; *Flores-Ortega, supra at 486*; and *Hill, supra at 59*, the denial to the defendant of the opportunity to engage in a plea process, which had a reasonable probability of resulting in an agreement that would have preserved his opportunity to return to the United States -- an opportunity more important to this defendant than the length of incarceration -- requires that he now be afforded that opportunity.

Because the noncitizen defendant's right to the effective assistance of counsel under the *Sixth Amendment to the United States Constitution* was denied "at the only stage when legal aid and advice would help him," *Frye, supra at 1408*, quoting *Massiah v. United States, 377 U.S. 201, 204, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964)*, and he suffered prejudice as a result, the defendant's conviction should be vacated and his motion for a new trial allowed. The defendant, who placed particular **[***63]** emphasis on his immigration status, would then be in a position to participate in the plea phase, informed by the advice of counsel as to potential immigration consequences, and thus able intelligently to consider whether to accept any offered plea or proceed to a new trial.[16]

End of Document

[14] Docket entries indicate that, at the conclusion of the defendant's trial, on February 25, 2010, the District Court "Received Request for Faxed Copy of Docket Sheet from Immigration" and that a copy was faxed on that date. After a notice of appeal was filed, on March 4, 2010, the court "Received via mail a request for both faxed and certified copies from Immigrations & Customs Enforcement." According to the docket, copies were faxed and certified copies were mailed to Immigrations & Customs Enforcement on the following day.

[15] A plea to assault **[***62]** and battery, with a sentence of less than one year, would have achieved that result and, in terms of the period of incarceration actually served, would have been consistent with the sentence imposed after trial.

[16] Allowance of a new trial has been preferred by courts confronted with similar circumstances, because "the remedy of a 'new trial' signifies not only a new trial but also a resumption of plea bargaining." *In re Alvernaz, 2 Cal. 4th 924, 942, 8 Cal. Rptr. 2d 713, 830 P.2d 747 (1992)*, and cases cited. See, e.g., *United States v. Blaylock, 20 F.3d 1458, 1468-1469 (9th Cir. 1994)*; *Carmichael v. People, 206 P.3d 800, 809 (Colo. 2009)*; *People v. Curry, 178 Ill. 2d 509, 536, 687 N.E.2d 877, 227 Ill. Dec. 395 (1997)*.

EXHIBIT 5

Caution
As of: September 24, 2023 12:05 AM Z

Commonwealth v. Gordon

Appeals Court of Massachusetts

June 1, 2012, Argued; September 6, 2012, Decided

No. 11-P-435.

Reporter
82 Mass. App. Ct. 389 *; 974 N.E.2d 645 **; 2012 Mass. App. LEXIS 244 ***; 2012 WL 3831449

COMMONWEALTH vs. DANEROY GORDON.

Prior History: [***1] Suffolk. Complaint received and sworn to in the Dorchester Division of the Boston Municipal Court Department on September 2, 2008. A motion to vacate conviction or to reconsider prior sentencing order, filed on May 21, 2010, was heard by Tracy-Lee Lyons, J., and motions to reconsider, filed on July 16, 2010, and December 10, 2012, were also heard by her.

Core Terms

sentence, deportation, guilty plea, evidentiary hearing, immigration, one year, ineffective, firearm, aggravated felony, charges, removal, substantial issue, motion for a new trial, vacate, cancellation, noncitizen, convicted, one-year, advice, advise, assistance of counsel, assault and battery, defense motion, police officer, violent crime, plea bargain, recommendations, proceedings, concurrent, offenses

Case Summary

Procedural Posture
Defendant pleaded guilty in the Dorchester Division of the Boston Municipal Court Department (Massachusetts) to charges including firearms offenses and assault and battery on a police officer (ABPO). Defendant filed a motion for a new trial. The motion judge allowed defendant's motion to reconsider his sentence and later denied a motion by the Commonwealth of Massachusetts to reconsider and revise defendant's sentences. The Commonwealth appealed.

Overview

Because defendant was not a United States citizen, the firearms convictions made it possible that he was to be deported. However, the conviction for ABPO, given the one-year sentence which defendant received for that offense, made his deportation certain under 8 U.S.C.S. § 1227(a)(2)(A)(iii) (2006). Defendant moved for a new trial, under Mass.R.Crim.P. 30(b), asserting that his plea counsel was ineffective for advising him that the immigration authorities would only consider the firearms charges and not the ABPO charge as grounds for possible deportation. On appeal, the court found that defendant's motion raised a serious issue as to the ineffectiveness of his plea counsel in regards to counsel advising defendant as to possible deportation consequences and was supported by substantial evidence in the form of affidavits. The motion, however, should not have been allowed without an evidentiary hearing because, although defendant raised substantial issues, an evidentiary hearing was required to address ambiguities and gaps in the affidavits and to determine whether defendant's guilty plea should have been vacated and a new trial ordered.

Outcome
The order denying the Commonwealth's motion for reconsideration was reversed. The order allowing the defendant's motion for new trial was vacated, and the matter was remanded for further proceedings.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Entry of Pleas > Guilty Pleas > Changes & Withdrawals

Criminal Law & Procedure > Trials > Judicial Discretion

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN1[] Guilty Pleas, Changes & Withdrawals

A post-sentence motion to withdraw a guilty plea is considered a motion for a new trial under Mass.R.Crim.P. 30(b), and is governed by the usual standards for such motions. A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly. However, it is within a judge's discretion, applying a rigorous standard, to grant such a motion at any time if it appears that justice may not have been done. Justice is not done if a defendant has received ineffective assistance of counsel in deciding to plead guilty.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN2[] Postconviction Proceedings, Motions for New Trial

See Mass.R.Crim.P. 30(c)(3).

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN3[] Postconviction Proceedings, Motions for New Trial

A judge has discretion to deny a new trial motion on the affidavits. Indeed, Mass.R.Crim.P. 30(c)(3) encourages the denial of a motion for a new trial on the papers, without hearing, where no substantial issue is raised.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Types of Evidence > Documentary Evidence > Affidavits

HN4[] Postconviction Proceedings, Motions for New Trial

Generally, where a substantial issue is raised and is supported by a substantial evidentiary showing, a judge should hold an evidentiary hearing. For instance, courts have remanded for an evidentiary hearing where the defendant and the Commonwealth of Massachusetts presented conflicting affidavits, and where the affidavits were missing key elements. Holding an evidentiary hearing provides the Commonwealth the opportunity to challenge the evidence presented in the affidavits. Such a hearing also enables the judge to make the findings of fact required to decide the motion. Mass.R.Crim.P. 30(b) provides that a judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law. An evidentiary hearing may not be necessary, however, if the substantial issue raised is solely a question of law, or if the facts are undisputed in the record.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Evidence > Burdens of Proof > Allocation

HN5[] Postconviction Proceedings, Motions for New Trial

In determining whether a motion raises a substantial issue which merits an evidentiary hearing, a judge should look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing. Mass.R.Crim.P. 30(c)(3).

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN6[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

The question of ineffective assistance is governed by the standard of whether there was serious incompetency, inefficiency, or inattention of counsel that has likely deprived a defendant of an otherwise available, substantial ground of defence. The burden lies with the defendant, and with respect to the second prong of the test, the defendant must show that better work might have accomplished something material for the defense.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN7[] Effective Assistance of Counsel, Pleas

A defense counsel's failure to advise a client that a consequence of his guilty plea likely would be deportation constitutes ineffective assistance of counsel.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN8[] Criminal Process, Assistance of Counsel

The *Sixth Amendment to the United States Constitution* requires effective counsel to advise a defendant on the risk of deportation so that the defendant may make a fully informed and voluntary decision whether to plead guilty. A bright line has not been drawn between affirmative bad advice and a mere failure to advise of possible consequences. Instead, when the deportation consequence of a guilty plea is truly clear, competent counsel must give correct advice concerning the risk of deportation. On the other hand, due to the complexity of immigration law, when the law is not succinct and straightforward a criminal defense attorney needs do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Governments > Federal Government > Employees & Officials

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > Sentencing > Ranges

Governments > Federal Government > Executive Offices

HN9[] Classification of Offenses, Felonies

Under *8 U.S.C.S. § 1227(a)(2)(A)(iii) (2006)*, any noncitizen convicted of an aggravated felony is deportable, and shall, upon the order of the Attorney General of the United States of America, be removed, or deported. *8 U.S.C.S. § 1227(a)*. An aggravated felony, according to *8 U.S.C.S. § 1101(a)(43)(F) (2006)*, includes a crime of violence for which one is sentenced to at least one year of imprisonment. The United States Attorney General generally has the discretion to cancel removal, allowing a noncitizen who is currently a permanent resident to remain in the country, but individuals convicted of an aggravated felony are ineligible for cancellation of removal. *8 U.S.C.S. § 1229b(a)(3) (2006)*. If a noncitizen has committed a removable offense after 1996, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal. The opportunity to petition for cancellation of removal is a serious benefit.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Immigration Law > Deportation & Removal > Relief From Deportation & Removal > Cancellation of Removal

HN10[] Criminal Activity, Aggravated Felonies

A noncitizen convicted of firearms offenses is deportable. *8 U.S.C.S. § 1227(a)(2)(C)*. However, firearms offenses do not necessarily make a noncitizen ineligible for cancellation of removal.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

HN11[] Criminal Activity, Aggravated Felonies

See *18 U.S.C.S. § 16 (2006)*.

Criminal Law & Procedure > Criminal

Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > Sentencing > Ranges

HN12[] Classification of Offenses, Felonies

For purposes of 18 U.S.C.S. § 16(b), an offense is classified by Federal law as a felony if the maximum term of imprisonment authorized is more than one year.

Criminal Law & Procedure > ... > Assault & Battery > Aggravated Offenses > Elements

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > Aggravated Felonies

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > Sentencing > Ranges

HN13[] Aggravated Offenses, Elements

Conviction for assault and battery on a police officer (ABPO) under Mass. Gen. Laws ch. 265, § 13D, requires proof of either the intentional and unjustified use of force or the intentional commission of a wanton or reckless act causing physical or bodily injury to another. Because the offense requires either the use of force or bodily injury, it is a crime of violence under Federal law. ABPO is therefore an aggravated felony if the sentence imposed is at least one year in prison.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN14[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

To succeed on an ineffective assistance of counsel claim, the consequence of counsel's serious incompetency must be prejudicial.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Pleas

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN15[] Effective Assistance of Counsel, Pleas

A defendant may show prejudice caused by ineffective assistance of counsel by demonstrating a reasonable probability that a different plea bargain (absent consequences) could have been negotiated at the time.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN16[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

A defendant may satisfy the prejudice requirement for an ineffective assistance of counsel claim by identifying an available, substantial ground of defence he could have pursued at trial, or by demonstrating that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > Burdens of Proof > Allocation

HN17[] Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel

A defendant bears the burden of establishing prejudice on a claim of ineffective assistance of counsel.

Headnotes/Summary

Headnotes

Alien. Assault and Battery on Certain Public Officers and Employees. Constitutional Law, Assistance of counsel. *Practice, Criminal*, Assistance of counsel, Plea, Sentence.

Counsel: Amanda Teo, Assistant District Attorney, for the Commonwealth.

Derege B. Demissie for the defendant.

Judges: Present: Cypher, Kafker, & Graham, JJ.

Opinion by: KAFKER

Opinion

[*389] **[**646]** KAFKER, J. In 2008, the defendant, Daneroy Gordon, pleaded guilty to charges including firearms offenses and assault and battery on a police officer (ABPO). His sentences included **[**647]** eighteen months committed in the house of correction for illegally possessing a firearm and, as relevant here, a concurrent sentence of one year for ABPO. As the defendant is not a United States citizen, the firearms convictions made it possible he would **[*390]** be deported. However, the conviction of ABPO, given the one-year sentence he received, made his deportation certain.

After deportation proceedings were commenced against him, the defendant moved for a new trial under *Padilla v. Kentucky, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)* (Padilla), **[***2]** asserting that his plea counsel was ineffective for advising him that the immigration authorities would only consider the firearms charges and not the ABPO charge. A judge of the Boston Municipal Court ultimately granted the motion and vacated the defendant's guilty plea on the ABPO charge.[1] The Commonwealth appealed, arguing that the defendant did not meet his burden on either element of his ineffective assistance of counsel claim, and that the motion judge was required to hold an evidentiary hearing. Because we agree that an evidentiary hearing is necessary to decide the defendant's claim, we vacate and remand for further proceedings.

1. Procedural history. On December 15, 2008, the defendant pleaded guilty to all **[***3]** five counts in the complaint against him: carrying a firearm without a license, in violation of *G. L. c. 269, § 10(a)* (Count 1); unlawful possession of ammunition, in violation of *G. L. c. 269, § 10(h)* (Count 2); carrying a loaded firearm without a license, in violation of *G. L. c. 269, § 10(n)* (Count 3); assault and battery on a police officer, in violation of *G. L. c. 265, § 13D* (Count 4); and resisting arrest, in violation of *G. L. c. 268, § 32B* (Count 5). After hearing sentencing recommendations from the prosecution and defense counsel, the plea judge (who has since retired) imposed the following sentences: on Count 1, two and one-half years in the house of correction, eighteen months to serve, the balance suspended for three years; on Count 2, eighteen months in the house of correction concurrent with Count One; on each of Counts 4 and 5, one year in the house of correction concurrent with Count One; and on Count 3, three years of probation from and after the sentence on Count 1. These sentences were largely consistent with the defendant's recommendations, and in particular, the plea judge accepted **[*391]** the defendant's sentencing recommendations on Counts 4 (ABPO) and 5 (resisting **[***4]** arrest).

As part of the plea colloquy, the judge gave, in substance, the immigration warnings required by *G. L. c. 278, § 29D*, telling the defendant that "a disposition of this nature could affect your status with the department of immigration and naturalization to the extent that it could result in . . . deportation." The tender of plea form, which was signed by the defendant, plea counsel, and the judge, indicated that the defendant understood that his plea "may have the consequence[] of deportation" and that plea counsel had explained the defendant's rights to him.[2]

[648]** On January 2, 2009, an officer of the United **[***5]** States Department of Homeland Security issued a notice to appear, commencing "removal," i.e.,

[1] The parties indicate in their briefs that the motion judge ordered all five of the defendant's guilty pleas vacated. We are not certain, from the text of the decision, whether this is in fact what the judge ordered. The decision refers consistently to the defendant's "conviction" or "plea" in the singular. In light of our disposition, this issue is not currently material, but on remand it should be clarified which, if any, of the defendant's other pleas were to be vacated.

[2] Although relevant to the inquiry, neither the judge's warning nor the tender of plea form is dispositive of the defendant's ineffective assistance claim. See *Padilla, supra at 1486-1487 & n.15* (holding that defendant's counsel was constitutionally deficient despite deportation warning on tender of plea form); *Commonwealth v. Clarke, 460 Mass. 30, 48 n.20, 949 N.E.2d 892 (2011)* (such warnings are no substitute for effective advice of counsel, but may bear on prejudice); *Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 597 n.3, 966 N.E.2d 223 (2012)* (immigration warning by judge "does not affect our analysis").

deportation proceedings against the defendant.[3] The notice indicated that the defendant was subject to deportation because of his conviction of ABPO. The notice made no mention of the other charges of which the defendant was convicted.[4]

On May 16, 2010, the defendant, represented by new counsel, filed a "Motion to Vacate Conviction and/or Reconsider Prior Sentencing Order," seeking that the court either vacate the defendant's "conviction" or retroactively reduce his sentences on the ABPO and resisting arrest charges from one year to eleven months. Among other things, he argued that his plea counsel had been ineffective under *Padilla*.

The defendant's affidavit stated, in part: "I accepted the plea in this case because my lawyer told me that I did not have any other options available to me. When I **[***6]** asked about my immigration **[*392]** status he told me that 'they would look at the gun charge, but they would not look at the Assault and Battery charge.'" He further stated: "My lawyer never told me that a reduction in my sentence of one day would make a difference in my deportation case. Had my lawyer informed me of that, I would have elected a trial and tried to obtain that reduction." His affidavit also revealed the following background information: the defendant, a citizen of Jamaica, has been a lawful permanent resident of the United States since 1993, graduated from high school in Massachusetts, and has maintained steady employment in this country. The defendant's mother, girlfriend, and two children are all United States citizens.

The defendant also included an affidavit from motion counsel stating that a one-year sentence for ABPO meant that the defendant's deportation was mandatory, whereas he could apply for "cancellation of removal" if his sentence were less than one year. Counsel also averred that the "one year rule" was "firmly established" and that she had taught defense lawyers about it at continuing legal education programs and annual trainings for the Committee for Public Counsel **[***7]** Services. There was initially no affidavit from plea counsel.

The motion judge held a nonevidentiary hearing at which she stated that an affidavit from plea counsel "would be very helpful to the court." The same day, the defendant filed an affidavit from plea counsel stating, in its entirety, the following:

> "1. I represented [the defendant] in the above matter.
>
> "2. I remember the case well because we litigated a motion to suppress in front of Judge Kelly that was denied.
>
> "3. I was aware of [the defendant's] immigration status and discussed it with him prior to his acceptance of the plea.
>
> "4. [Motion counsel] has informed me that I had requested a one year suspended sentence on a charge of Assault and Battery on a Police Officer.
>
> **[**649]** "5. Based on my review of this case, I believe I likely mistakenly advised [the defendant] that his concern was **[*393]** the charges involving the firearm offenses, and that he did not need to worry about the Assault and Battery on a Police Officer charge."

The motion judge allowed the defendant's motion to reconsider his sentence without further hearing. At another nonevidentiary hearing a few weeks later, she denied the Commonwealth's oral motion to reconsider and revised **[***8]** the defendant's sentences for ABPO and resisting arrest to eleven months, nunc pro tunc.

The Commonwealth filed a timely motion for reconsideration, arguing that the defendant should have sought the revision of his sentence through a motion to revise and revoke pursuant to *Mass.R.Crim.P. 29(a)*, 378 Mass. 899 (1979), which would have been timely only within sixty days of sentencing. See *Commonwealth v. Fanelli, 412 Mass. 497, 504 n.4, 590 N.E.2d 186 (1992)*; *Commonwealth v. DeJesus, 440 Mass. 147, 151, 795 N.E.2d 547 (2003)*. The Commonwealth also moved for written findings and rulings.

The motion judge issued a written decision in which she credited the affidavits of the defendant and plea counsel, noting with respect to the latter that "[h]e is an attorney who practices regularly in this court and [he] stated he 'mistakenly advised [the defendant] that he did not have to worry about the Assault and Battery on a police officer.'" She found that "[t]here is a reasonable probability that but for the error of counsel there would have been a significant, different and more favorable result" with regard to the disposition of the case and the effect on to his immigration status. She quoted a

[3] The record reflects that the defendant was served with papers relating to deportation on February 19, 2010. It is unclear whether he had notice of the proceedings prior to that date.

[4] As discussed below, however, all five charges to which the defendant pleaded guilty could have led to his deportation.

passage from Justice Alito's concurrence **[***9]** in Padilla regarding the significance of "affirmative misadvice" by counsel in distorting the decision to plead guilty[5] and concluded: "The Court allows the Commonwealth's motion to reconsider . . . . However, the defendant's motion to vacate his plea is allowed, and the case is to be placed on the trial list." The motion judge denied the Commonwealth's further motion for reconsideration, and the Commonwealth appealed.

2. Necessity for evidentiary hearing. ***HN1***[↑] A postsentence motion to withdraw a guilty plea is considered a motion for a new trial under *Mass.R.Crim.P. 30(b)*, as appearing in 435 Mass. 1501 **[*394]** (2001), and is governed by the usual standards for such motions. See *Commonwealth v. Furr, 454 Mass. 101, 106, 907 N.E.2d 664 (2009)*, and cases cited. A strong policy of finality limits the grant of new trial motions to exceptional situations, and such motions should not be allowed lightly. See *Commonwealth v. Lopez, 426 Mass. 657, 662-663, 690 N.E.2d 809 (1998)*, and cases cited. However, it is within a judge's discretion, applying a "rigorous standard," to grant such a motion at any time "if it appears that justice may not have been done." *Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353, 881 N.E.2d 1148 (2008)*, **[***10]** quoting from *Commonwealth v. Berrios, 447 Mass. 701, 708, 856 N.E.2d 857 (2006)*, cert. denied, *550 U.S. 907, 127 S. Ct. 2103, 167 L. Ed. 2d 819 (2007)*. Justice is not done if the defendant has received ineffective assistance of counsel in deciding to plead guilty. See *Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 637-638, 863 N.E.2d 978 (2007)*.

The motion judge took the unusual step of granting what was effectively a motion for a new trial without holding an evidentiary hearing. This aspect of her ruling is governed by *Mass.R.Crim.P. 30(c)(3)*, as **[**650]** appearing in 435 Mass. 1502 (2001), which states: ***HN2***[↑] "Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits" (emphasis supplied).

It is well established that ***HN3***[↑] a judge has discretion to deny a new trial motion on the affidavits. See, e.g., *Commonwealth v. Stewart, 383 Mass. 253, 257, 418 N.E.2d 1219 (1981)*. Cf. *Commonwealth v. Clarke, 460 Mass. 30, 49, 949 N.E.2d 892 (2011)* (Clarke) (declining to remand for further proceedings where the defendant's **[***11]** affidavits "ha[ve] come nowhere near meeting the burden he bears on the issue of prejudice"). Indeed, the rule encourages the denial of a motion for a new trial on the papers, without hearing, where no substantial issue is raised. See *Commonwealth v. Stewart, supra at 260*; Reporters' Notes to *Rule 30(c)(3)*, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, at 1641 (LexisNexis 2011-2012).

A judge's power to grant such a motion on the papers is more circumscribed. See *Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 406-407, 446 N.E.2d 97 (1983)*.***HN4***[↑] Generally, "where a substantial **[*395]** issue is raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing." *Commonwealth v. Stewart, supra at 260*. See also Reporters' Notes to *Rule 30(c)(3)*, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, supra ("Where a substantial issue is raised, however, the better practice is to conduct an evidentiary hearing"). For instance, courts have remanded for an evidentiary hearing where the defendant and the Commonwealth presented conflicting affidavits, *Commonwealth v. Saarela, supra*, and where the affidavits were missing key elements, see *Commonwealth v. Companonio, 420 Mass. 1003, 1003, 650 N.E.2d 351 (1995)*, **[***12]** S.C., *445 Mass. 39, 833 N.E.2d 136 (2005)*. Holding an evidentiary hearing provides the Commonwealth the opportunity to challenge the evidence presented in the affidavits. Cf. *Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 492, 475 N.E.2d 763 (1985)* ("the defendant may offer extraneous evidence to supplement [or contradict] the record, but in that event the Commonwealth has a like right to offer evidence"). Such a hearing also enables the judge to make the findings of fact required to decide the motion. See *Mass.R.Crim.P. 30(b)* (judge "shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law"). An evidentiary hearing may not be necessary, however, if the substantial issue raised is solely a question of law, or if the facts are undisputed in the record. Cf. *Commonwealth v. Gagliardi, 418 Mass. 562, 572, 638 N.E.2d 20 (1994)*, cert. denied, *513 U.S. 1091, 115 S. Ct. 753, 130 L. Ed. 2d 652 (1995)* (evidentiary hearing would not be useful where sole issue in new trial motion was matter of law); *Commonwealth v. Sherman, 68 Mass. App. Ct. 797, 799-800, 864 N.E.2d 1241 (2007)*, S.C., *451 Mass. 332, 885 N.E.2d 122 (2008)* (motion relying solely on contemporaneous plea colloquy need

[5] See *Padilla, 130 S. Ct. at 1492-1493* (Alito, J., concurring).

not include affidavits).

We conclude that the defendant has raised a serious legal **[***13]** issue, and he has made a substantial enough evidentiary showing to justify an evidentiary hearing. His showing is not, however, sufficient for allowance of the motion for a new trial based on the affidavits alone, as the affidavits leave too many factual questions unanswered. **[**651]** See Reporters' Notes to *Rule 30(c)(3)*, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, at 1641 (*HN5*[↑]) "In determining whether the motion raises a substantial issue which merits an evidentiary hearing, the judge should **[*396]** look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing").

3. Ineffectiveness of counsel. The defendant's claim is based on ineffective assistance of counsel. *HN6*[↑] The question of ineffective assistance is governed by the familiar standard of *Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974)*: whether there was "serious incompetency, inefficiency, or inattention of counsel . . . [that] has likely deprived the defendant of an otherwise available, substantial ground of defence." See *Commonwealth v. Mahar, 442 Mass. 11, 15, 809 N.E.2d 989 (2004)*. "The burden lies with the defendant, see *Commonwealth v. Healy, 438 Mass. 672, 677, 783 N.E.2d 428 (2003)*, and with respect to the second **[***14]** prong of the Saferian test, the defendant must show that 'better work might have accomplished something material for the defense.' *Commonwealth v. Satterfield, 373 Mass. 109, 115, 364 N.E.2d 1260 (1977)*." *Commonwealth v. Phinney, 446 Mass. 155, 162, 843 N.E.2d 1024 (2006)*, S.C., *448 Mass. 621, 863 N.E.2d 496 (2007)*.

"In Padilla, the United States Supreme Court held that *HN7*[↑] defense counsel's failure to advise a client that a consequence of his guilty plea likely would be deportation constituted ineffective assistance of counsel." *Clarke, 460 Mass. at 31*, citing *Padilla, 130 S. Ct. at 1483*.[6] Specifically, Padilla's counsel wrongly told him before he pleaded guilty that he "'did not have to worry about immigration status since he had been in the country so long,'" whereas the drug charges to which he pleaded guilty actually "made his deportation virtually mandatory." *Padilla, supra at 1478*, quoting from *Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)*. The Supreme Court held that *HN8*[↑] the *Sixth Amendment to the United States Constitution* requires effective counsel to advise a defendant on the risk of deportation so that the defendant may make a fully informed and voluntary decision whether to plead guilty. See *id. at 1481-1483*. The Court **[***15]** declined to draw a bright line between affirmative misadvice and a mere failure to advise of possible consequences. See *id. at 1484-1486*. Instead, it held that "when the deportation consequence [of a guilty plea] is truly clear," competent counsel must give correct advice concerning the risk of deportation. *Id. at 1483*. On the other hand, due to the complexity **[*397]** of immigration law, "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Ibid*. Because Padilla's risk of deportation was clear and his counsel misinformed him that he was not at risk, the Court found his counsel deficient. See *id. at 1483-1484*.

Unlike in *Padilla*, counsel in the instant case did not fail completely to advise the defendant of the risk of deportation. Indeed, counsel advised the defendant of a risk of deportation based on the firearms convictions. If counsel was ineffective, it was because of his advice and sentencing recommendations regarding the ABPO conviction, **[***16]** which rendered the defendant's **[**652]** deportation inevitable. The Commonwealth contends that the advice here satisfied Padilla standards because the immigration issues were not succinct and straightforward and counsel generally advised the defendant that pleading guilty placed him at a risk of deportation.

a. The immigration issue related to the one-year sentence for ABPO was clear and consequential. Determining the consequences of the plea and sentence involves several Federal statutory provisions. *HN9*[↑] Under *8 U.S.C. § 1227(a)(2)(A)(iii) (2006)*, any noncitizen convicted of an "aggravated felony" is deportable, and "shall, upon the order of the Attorney General, be removed," or deported.[7] *8 U.S.C. § 1227(a)*. An aggravated felony, according to *8 U.S.C. § 1101(a)(43)(F)(2006)*, includes a crime of violence[8] for

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[6] The holding of *Padilla* applies retroactively to the defendant's case. See *Clarke, supra at 45*.

[7] *HN10*[↑] A noncitizen convicted of firearms offenses such as those to which the defendant pleaded guilty is also deportable. See *8 U.S.C. § 1227(a)(2)(C)*. However, firearms offenses do not necessarily make a noncitizen ineligible for cancellation of removal.

[8] *HN11*[↑] A "crime of violence" for these purposes is defined

which one is sentenced to at least one year of imprisonment. The United States Attorney General generally **[*398]** has the discretion to "cancel removal," allowing a noncitizen who is currently a permanent resident to remain in the country, but individuals convicted of an aggravated felony are ineligible for cancellation of removal.[9] *8 U.S.C. § 1229b(a)(3) (2006)*. As the Supreme Court summarized, "if **[***17]** a noncitizen has committed a removable offense after [1996], his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal." *Padilla, 130 S.Ct. at 1480*. We have held that the opportunity to petition for cancellation of removal is a "serious benefit." *Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 596 n.2, 966 N.E.2d 223 (2012)*.[10]

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as:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *18 U.S.C. § 16 (2006)*.

HN12[↑] For purposes of *subsection (b)*, "[a]n offense is classified by [F]ederal law as a felony if 'the maximum **[***18]** term of imprisonment authorized' is more than one year." *Blake v. Gonzales, 481 F.3d 152, 160 (2d Cir. 2007)* (Sotomayor, J.), quoting from *18 U.S.C. § 3559(a)*.

[9] Although decisions on cancellation of removal are fact-specific, the immigration authorities have described a number of factors guiding the exercise of their discretion. See *Matter of Marin, 16 I. & N. Dec. 581, 584-585* (B.I.A. 1978); *Matter of C-V-T-, 22 I. & N. Dec. 7, 11-12* (B.I.A. 1998); *Matter of Sotelo, 23 I. & N. Dec. 201, 203-204* (B.I.A. 2001).

[10] The Department of Justice typically grants approximately 3,000 to 4,000 requests for cancellation of removal by lawful permanent residents each year, but does not regularly release statistics on how frequently such relief is requested. See U.S. Department of Justice, Executive Office for Immigration Review, Fiscal Year 2011 Statistical Year Book, available at *http://www.justice.gov/eoir/statspub/fy11syb.pdf*, at R3 (last viewed July 10, 2012). However, it did disclose that in Fiscal Year 2005, 2,534 out of 4,643 applications for cancellation of removal under this provision were successful, a rate of 54.5%. See U.S. Department of Justice, Executive Office for Immigration Review, **[***19]** AILA-EOIR Agenda Questions and Answers, October 18, 2006, available at *http://www.justice.gov/eoir/statspub/eoiraila101806.pdf*, at 15 (last viewed July 10, 2012). We cannot discern from these statistics the number of removals that were cancelled involving firearms offenses.

HN13[↑] Conviction for ABPO under *G. L. c. 265, § 13D*, requires proof of either "the intentional and unjustified use of force" or "the intentional commission of a wanton or **[**653]** reckless act . . . causing physical or bodily injury to another." *Commonwealth v. Correia, 50 Mass. App. Ct. 455, 456, 737 N.E.2d 1264 (2000)*, quoting from *Commonwealth v. Burno, 396 Mass. 622, 625, 487 N.E.2d 1366 (1986)*. Because the offense requires either the use of force or bodily injury, it is a crime of violence under Federal law. *Blake v. Gonzales, 481 F.3d 152, 159-162 (2d Cir. 2007)*. Cf. *United States v. Santos, 363 F.3d 19, 23-24 (1st Cir. 2004)*, cert. denied, *544 U.S. 923, 125 S. Ct. 1636, 161 L. Ed. 2d 482* ***[*399]*** *(2005)* (*G. L. c. 265, § 13D*, is a crime of violence for Federal sentencing purposes).[11] ABPO is therefore an aggravated felony if the sentence imposed is at least one year in prison.

The consequences of the defendant's guilty plea to ABPO were not as obvious as in *Padilla* and *Clarke*. In those cases, a single provision of the United States Federal Code stated that any drug conviction, except for simple possession of a small amount of marijuana, subjected a noncitizen to deportation. See *Padilla, 130 S. Ct. at 1483*; *Clarke, 460 Mass. at 46*, quoting from *8 U.S.C. § 1227(a)(2)(B)(i)*. Here several provisions of the Federal Code must be read in concert. However, the issue is not so complex or confused that a reasonably competent attorney would be uncertain of the consequences of the plea. Contrast *Padilla, supra at 1488-1490* (Alito, J., concurring) (listing numerous examples of unclear issues of immigration law). The issue is also highly significant, as it renders removal certain. See Buso, Church, Kanstroom, Keehn, Levy, Padellaro, & Weinberger, Collateral Consequences of Criminal Convictions, at 19 (MCLE 2001) **[***21]** ("The practitioner representing a noncitizen should attempt to avoid a conviction for an aggravated felony if at all possible, because the consequences are devastating"); McWhirter, ABA, The Criminal Lawyer's Guide to

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[11] Although both parties have primarily focused on the ABPO conviction, the same reasoning and analysis applies to the conviction **[***20]** for resisting arrest. See *Estrada-Rodriguez v. Mukasey, 512 F.3d 517, 520-521 (9th Cir. 2007)* (Arizona resisting arrest statute, nearly identical to *G. L. c. 268, § 32B*, is crime of violence). Cf. *United States v. Almenas, 553 F.3d 27, 32-35 (1st Cir.)*, cert. denied, ***556 U.S. 1251, 129 S. Ct. 2415, 173 L. Ed. 2d 1320 (2009)*** (*G. L. c. 268, § 32B*, is crime of violence under Federal sentencing guidelines).

Immigration Law: Questions and Answers § 5.1, at 146 (2d ed. 2006) ("*Title 8 U.S.C. § 1101[a][43]* lists aggravated felonies. Whenever an alien is charged with a crime, look at this statute!" [emphasis in original]). As the defendant's motion counsel stated in her affidavit, in 2008 it was "firmly established" that a defendant sentenced to less than one year would not receive the label of "aggravated felon." See Winslow, Crime and Consequence: The Collateral Effects of Criminal Conduct § 8.6.2, at 204 (MCLE 2001) ("Crimes of violence . . . are considered aggravated felonies if the prison sentence is at least one year. A sentence of less than **[*400]** one year will not make the charge an aggravated felony")[12]; McWhirter, supra at § 5.27 at 158 ("[I]f counsel representing the alien can get a sentence of 364 days or less, [crimes of violence] are not aggravated felonies"). We therefore conclude that the issue was clear and consequential enough that effective counsel should have advised **[***22]** the defendant appropriately on this issue before he pleaded guilty. The issue is **[**654]** particularly problematic because defense counsel apparently recommended the one-year sentence on the ABPO charge.

b. Prejudice. ***HN14***[↑] "To succeed on an ineffective assistance of counsel claim, the consequence of counsel's serious incompetency must be prejudicial." *Clarke, supra at 46-47*. Of particular relevance here, the court in Clarke stated that ***HN15***[↑] a defendant may show prejudice by demonstrating "a reasonable probability that a different plea bargain (absent [the dire immigration] consequences) could have been negotiated at the time." *Id. at 47*.[13] Cf. *Padilla, supra at 1486* (competent counsel "may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation"). Clarke pleaded guilty to possession of cocaine and marijuana with intent to distribute, in exchange for **[***23]** which the Commonwealth agreed to the dismissal of school zone violations, which carried mandatory minimum penalties. *Clarke, supra at 32, 48*. Only if he had been allowed to plead down further to the lesser included offenses of simple possession could Clarke have avoided aggravated felonies. See *id. at 47 n.18*. There was no showing in Clarke that this theoretical plea bargain was in any way plausible. Ibid.

This case is distinguishable from *Clarke*. To avoid the consequence of which the defendant complains -- ineligibility for cancellation of removal -- it would not have been necessary for **[*401]** him to plead guilty to different or lesser charges, or even to serve less time. Rather, what was necessary was to convince the judge to sentence him to at least one day less on the ABPO charge. **[***24]** Because the ABPO sentence was concurrent with the sentences on the firearms charges, the end result of the sentencing could have been essentially the same, while leaving the defendant eligible to petition the Attorney General for relief from deportation. The defendant averred that, had he been aware one day would have made a difference, he would have rejected the plea bargain and sought a trial or a reduction. Unlike in Clarke, we conclude that a plea bargain for a sentence of less than one year on the ABPO, with different deportation consequences as a matter of law, may have been a reasonable probability given the overall sentence he received, and so it may have been rational for him to reject the one-year sentence on the ABPO. Compare *Clarke, 460 Mass. at 47-49 & n.18*. The defendant has therefore raised a substantial issue as to prejudice. See *Commonwealth v. Martinez, 81 Mass. App. Ct. at 600*. On remand, ***HN17***[↑] he bears the burden of establishing prejudice. See *Clarke, supra at 46-47*; *Commonwealth v. Martinez, supra at 599-600*.

c. Ambiguities and gaps in the affidavits. Although the defendant has raised substantial issues, an evidentiary hearing is required to address ambiguities and gaps **[***25]** in the affidavits. See *Commonwealth v. Companonio, 420 Mass. at 1003*. Plea counsel's affidavit only states that he believes that he likely gave the defendant mistaken advice regarding the effect of the ABPO on deportation. **[**655]** We cannot judge from the affidavit how firm that belief was or how likely he thought it was that he gave mistaken advice. We also cannot determine what plea counsel said about the risk of deportation in regard to the firearm offenses.[14] Was

[12] The second edition of this book, published after the plea in this case, reaffirms that "[a] lesser sentence, even by one day, will avoid an aggravated felony." Meade & Winslow, Crime and Consequence: The Collateral Effects of Criminal Conduct § 8.7.2, at 8-26 (MCLE 2009).

[13] ***HN16***[↑] A defendant may also satisfy the prejudice requirement by identifying an "available, substantial ground of defence" he could have pursued at trial, *Commonwealth v. Saferian, 366 Mass. at 96*, or by demonstrating that he "placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." *Clarke, supra at 47-48*. See *Commonwealth v. Martinez, 81 Mass. App. Ct. at 600*.

[14] The likelihood of cancellation of removal for these offenses,

the defendant informed, for example, that the risk was great in regard to the firearm offenses? Additionally, it is not clear what the defendant's response to counsel's advice was at the time, or whether he was particularly concerned about deportation. See *Commonwealth v. Martinez, supra at 600*. The affidavits do not explain why counsel proposed a one-year sentence or whether the Commonwealth would have opposed a one-day reduction. **[*402]** The record contains insufficient information about the facts of the ABPO and whether the defendant had any viable defense at trial on this charge. See *Clarke, supra at 47*, citing *Commonwealth v. Saferian, 366 Mass. at 96*. We therefore conclude, as stated above, that it was error to allow the motion **[***26]** for a new trial without an evidentiary hearing. Cf. *Commonwealth v. Saarela, 15 Mass. App. Ct. at 406-407*.

4. Conclusion. The defendant's motion raised a serious issue as to the ineffectiveness of his plea counsel and was supported by substantial evidence. The motion, however, should not have been allowed without an evidentiary hearing. Such a hearing is necessary to determine whether his guilty plea should be vacated and a new trial ordered. The order dated February 9, 2011, denying the Commonwealth's motion for reconsideration is reversed. The order allowing the defendant's motion for new trial, dated November 18, 2010, is vacated, and the matter is remanded for further proceedings consistent with this opinion.

So ordered.

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particularly the firearm offenses, may be relevant to the prejudice inquiry. The record does not provide us with this information.

EXHIBIT 6

⚠ Caution
As of: September 18, 2023 6:55 PM Z

Commonwealth v. Henry

Supreme Judicial Court of Massachusetts

February 10, 2016, Argued; August 8, 2016, Decided

SJC-11965.

Reporter
475 Mass. 117 *; 55 N.E.3d 943 **; 2016 Mass. LEXIS 592 ***

COMMONWEALTH *vs.* KIM HENRY.

Prior History: [***1] Essex. COMPLAINT received and sworn to in the Salem Division of the District Court Department on November 7, 2013.

A proceeding to determine restitution was had before *Michael C. Lauranzano*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Core Terms

probation, restitution, restitution order, restitution amount, Sentencing, ability to pay, retail, retail price, probationer, conditions of probation, actual loss, stolen, economic loss, circumstances, inability to pay, theft, probation department, replacement, preponderance of evidence, pay restitution, revoke, items stolen, stolen goods, retail sale, new crime, calculating, free-bag, monthly, probationary period, financial hardship

Case Summary

Overview
HOLDINGS: [1]-In determining a defendant's ability to pay restitution, the defendant's financial resources and obligations had to be considered, including his or her income, net assets, and expenses required to meet basic human needs; [2]-Defendant was improperly ordered to pay restitution based only on the amount of loss, without considering whether she was financially able to pay that amount during the remaining period of her probation; [3]-The probation department was improperly delegated the responsibility of establishing a payment schedule; [4]-The actual loss to a retail store was the stolen items' replacement value, which was their wholesale price, unless they would have been sold were they not stolen, in which case the actual loss was their retail price; [5]-As defendant free-bagged the items, it was reasonably found that the items would have been sold had they not been stolen.

Outcome
Restitution order vacated. Case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

HN1 **Probation, Conditions**

In determining whether to impose restitution and the amount of any such restitution, a judge must consider a defendant's ability to pay, and may not impose a longer period of probation or extend the length of probation because of a defendant's limited ability to pay restitution.

Criminal Law & Procedure > Sentencing > Restitution

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

HN2 **Sentencing, Restitution**

In cases of retail theft, the amount of actual economic

loss for purposes of restitution is the replacement value of the stolen goods unless the Commonwealth proves by a preponderance of the evidence that the stolen goods would otherwise have been sold, in which case the retail sales value is the better measure of actual loss.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Sentencing > Restitution

Evidence > Burdens of Proof > Preponderance of Evidence

HN3 **Probation, Conditions**

A judge may order a defendant to pay restitution to the victim as a condition of probation provided that the restitution is limited to economic losses caused by the defendant's conduct and documented by the victim. There is no question that restitution is an appropriate consideration in a criminal sentencing. The procedure used to determine the amount of restitution or reparation must be reasonable and fair. The prosecution should disclose prior to the hearing the amount of restitution it seeks. Where the defendant does not stipulate to the amount, the judge should conduct an evidentiary hearing at which the Commonwealth bears the burden of proving by a preponderance of the evidence the amount of the victim's losses. At such a hearing, the victim may testify regarding the amount of the loss, and the defendant may cross-examine the victim, with such cross-examination limited to the issue of restitution. The defendant may rebut the victim's estimate of the amount of loss with expert testimony or other evidence.

Criminal Law & Procedure > Sentencing > Restitution

HN4 **Sentencing, Restitution**

In deciding whether to order restitution and, if so ordered, the amount, the judge should consider whether the defendant is financially able to pay the amount ordered. Model Sentencing and Corrections Act § 3-601(d). The amount of restitution is not merely the measure of the value of the goods and money stolen from the victim by the defendant; the judge must also decide the amount that the defendant is able to pay and how such payment is to be made.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > Sentencing > Restitution

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

HN5 **Probation, Conditions**

In practice, at the close of the evidentiary hearing, the judge must make two findings in deciding whether to order restitution as a condition of probation and, where ordered, the amount of restitution to be paid during the period of probation. First, the judge must determine the amount of the victim's actual economic loss causally connected to the defendant's crime. The Commonwealth bears the burden of proof as to this finding. The order of restitution may not exceed this amount. Second, the judge must determine the amount the defendant is able to pay. Where a defendant claims that he or she is unable to pay the full amount of the victim's economic loss, the defendant bears the burden of proving an inability to pay. The defendant bears the burden of persuasion regarding indigency, in part because a criminal defendant is the party in possession of all material facts regarding her own wealth and is asserting a negative.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

Criminal Law & Procedure > ... > Probation > Revocation > Standards

HN6 **Probation, Conditions**

The state's highest court requires a judge to consider

the defendant's ability to pay when setting the restitution amount because a judge may order restitution in a criminal case only as a condition of probation, and therefore the collection of restitution is enforced by the threat or imposition of a criminal sanction for violation of a probation condition. A defendant can be found in violation of a probationary condition only where the violation was wilful, and the failure to make a restitution payment that the probationer is unable to pay is not a wilful violation of probation.

Criminal Law & Procedure > Sentencing > Restitution

HN7[] Sentencing, Restitution

Burdening a defendant with the risks attendant to noncompliance by imposing restitution that the defendant will be unable to pay violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty. To avoid this unlawful result, the state's highest court requires the judge to consider the defendant's ability to pay when initially setting the restitution amount. A court's assessment of a defendant's reasonable ability to pay is a constitutional prerequisite for a criminal restitution order.

Criminal Law & Procedure > Sentencing > Restitution

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

HN8[] Sentencing, Restitution

Where, because of the defendant's limited ability to pay, the restitution amount is less than the victim's total economic loss, nothing bars the victim from filing a civil action and obtaining a judgment against the defendant for the full amount of the loss. The victim may seek to collect on this judgment through a civil execution.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

Criminal Law & Procedure > ... > Probation > Revocation > Proceedings

HN9[] Probation, Conditions

A judge may not ignore a defendant's ability to pay in determining restitution under the rationale that, if the defendant were to violate the probation condition of payment of restitution because of an inability to pay, the judge would not revoke probation but would instead extend the period of probation to allow the defendant more time to pay. Probation serves as a disposition of and punishment for a crime; it is not a civil program or sanction. It punishes a defendant by ordering the defendant to comply with conditions deemed appropriate by the sentencing judge and, if a defendant violates one or more conditions of probation, a judge may revoke his probation and sentence him to a term of imprisonment for his underlying conviction, or return the defendant to probation, with new or revised conditions.

Criminal Law & Procedure > ... > Probation > Revocation > Proceedings

HN10[] Revocation, Proceedings

An extension of the period of probation punishes a defendant in two ways. First, it extends the restrictions on a defendant's liberty arising from probation. Under the general conditions of probation, a probationer may be required to report periodically to his or her probation officer, may not leave the State without permission, and must pay a monthly probation fee or, in lieu of payment, provide community service, unless payment is waived by the judge because of the order of restitution. *Mass. Gen. Laws ch. 276, § 87A*. A probation officer may search the home of a probationer by obtaining a warrant supported only by reasonable suspicion rather than probable cause. Special conditions, where ordered, may impose further restrictions and obligations, such as drug and alcohol testing and evaluation, participation in treatment programs, GPS monitoring, and home confinement curfews. ch. 276, *§ 87A*.

Criminal Law & Procedure > ... > Probation > Revocation > Proceedings

Evidence > Burdens of Proof > Preponderance of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN11 **Revocation, Proceedings**

Where a probationary period is extended, and a defendant commits a new crime during the extended period, the defendant, in addition to being convicted and sentenced for the new crime, can have his or her probation revoked and be sentenced anew on the conviction for which he or she was placed on probation. And probation may be revoked for the commission of a new crime based on proof by a preponderance of the evidence, so a defendant may be found not guilty at trial of committing the new crime where the evidence fell short of proof beyond a reasonable doubt but still have his or her probation revoked because a judge found it more likely than not that he or she committed the new crime. Thus, extending the length of a probationary period because of a probationer's inability to pay subjects the probationer to additional punishment solely because of his or her poverty. The state's highest court invokes its superintendence power to declare that a judge may not extend the length of probation where a probationer violated an order of restitution due solely to an inability to pay. The state's highest court acknowledges that extending the length of probation in such circumstances has not been recognized to be in violation of federal constitutional law.

Criminal Law & Procedure > ... > Probation > Revocation > Standards

HN12 **Revocation, Standards**

A judge remains free to revoke probation or extend the term of probation where a probationer violates a condition of probation by willfully failing to pay a restitution amount he or she had the ability to pay. If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Sentencing Alternatives > Probation

Criminal Law & Procedure > Sentencing > Restitution

HN13 **Probation, Conditions**

Equal justice means that the length of probation supervision imposed at the time of sentence should not be affected by the financial means of the defendant or the ability of the defendant to pay restitution. An extended period of supervision for the purpose of collecting money can be particularly troublesome since it necessarily means that greater burdens are imposed on poor offenders compared to those with economic resources. To ensure that a defendant does not face a longer probationary period because of his or her limited means, the ability to pay determination should be made only after the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

HN14 **Probation, Conditions**

Once the judge has determined the appropriate length of the probationary period, restitution may be a condition of probation for the length of that period at the maximum monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss. The amount of restitution ordered should not exceed this monthly amount multiplied by the months of probation, even if that amount is less than the amount of financial loss sustained by the victim. The monthly amount must be determined by the judge; it cannot be delegated to the probation department. But the judge may be aided in that determination by the guidance of the probation department.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

HN15 **Probation, Conditions**

Where a judge determines that there is no reason to impose probation other than to collect restitution, a judge may impose a brief period of probation (e.g., thirty or sixty days) and determine how much of the economic loss the defendant is able to pay during that time period, and make that amount of restitution a condition of the brief period of probation.

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > Conditions

Criminal Law & Procedure > Sentencing > Restitution

HN16 **Probation, Conditions**

A defendant may be required to report to his or her probation officer any change in the defendant's ability to pay, and the probation officer may petition the judge to modify the condition of probation by increasing or decreasing the amount of restitution due based on any material change in the probationer's financial circumstances. A judge may add or modify a probation condition that will increase the scope of the original probation conditions only where there has been a material change in the probationer's circumstances since the time that the terms of probation were initially imposed, and where the added or modified conditions are not so punitive as to significantly increase the severity of the original probation.

Criminal Law & Procedure > Sentencing > Restitution

HN17 **Sentencing, Restitution**

In determining the defendant's ability to pay restitution, the judge must consider the financial resources of the defendant, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents.

Criminal Law & Procedure > Counsel > Assignment of Counsel

Criminal Law & Procedure > Sentencing > Restitution

HN18 **Counsel, Assignment of Counsel**

The payment of restitution, like any court-imposed fee, should not cause a defendant substantial financial hardship. In determining a defendant's ability to pay, a judge must consider whether the defendant remains indigent and whether repayment would cause manifest hardship. Restitution payments that would deprive the defendant or his or her dependents of minimum basic human needs would cause substantial financial hardship. Where a defendant has been found indigent by the court for purposes of the appointment of counsel, a judge should consider carefully whether restitution can be ordered without causing substantial financial hardship.

Criminal Law & Procedure > Sentencing > Restitution

HN19 **Sentencing, Restitution**

In determining a defendant's ability to pay restitution, a judge may consider a defendant's ability to earn based on the defendant's employment history and financial prospects, but a judge may attribute potential income to the defendant only after specifically finding that the defendant is earning less than he or she could through reasonable effort.

Criminal Law & Procedure > Sentencing > Restitution

HN20 **Sentencing, Restitution**

The payment of restitution is limited to economic losses caused by the defendant's conduct and documented by the victim. Because the purpose of restitution is to reimburse the victim for any economic loss caused by the defendant's actions, the amount of restitution may not exceed the victim's actual loss.

Criminal Law & Procedure > Sentencing > Restitution

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

Torts > Intentional Torts > Conversion > Remedies

HN21[] **Sentencing, Restitution**

Where items are stolen from a retail store, the actual loss to the victim is the replacement value of the items, that is, their wholesale price, unless the Commonwealth proves by a preponderance of the evidence that the items would have been sold were they not stolen, in which event the actual loss would be the retail price of the items. In the context of retail theft, unless the government can show the defendant's crime depleted the stock of a particular fungible or readily replaceable good at a time when the victim might otherwise have been able to sell that good to a willing buyer, something akin to replacement or wholesale cost clearly appears the more accurate measure of actual loss. When goods for sale are stolen from a retail seller and not recovered, the measure of economic damages for the seller in a restitution proceeding is the same measure of damages that would be available to the seller in a tort action for conversion: the reasonable market value of the goods converted at the time and place of conversion, and the market that determines that reasonable value is the market to which the seller would resort to replace the stolen goods, generally the wholesale market.

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Restitution > *Practice, Criminal* > Probation > Restitution > *Supreme Judicial Court* > Superintendence of inferior courts

Discussion of the determination of restitution to the victim as a condition of probation. [120]

This court concluded that in determining whether to impose restitution to the victim as a condition of probation and the amount of any such restitution, a judge must consider a defendant's ability to pay, and may not impose a longer period of probation or extend the length of probation because of a defendant's limited ability to pay restitution, i.e., the ability to pay determination should be made only after the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public, and in determining the defendant's ability to pay, the judge must consider the financial resources of the defendant, including income and net assets, the defendant's financial obligations (such that restitution not cause substantial financial hardship), and the defendant's ability to earn [120-127]; accordingly, remand was required in the circumstances of a criminal proceeding in which the judge failed to consider the defendant's ability to pay in determining whether to order restitution and in determining the amount of restitution [127-128].

This court concluded that, in determining the amount of restitution to the victim in cases of retail theft, the amount of actual economic loss for purposes of restitution is the replacement value of the stolen goods unless the Commonwealth proves by a preponderance of the evidence that the stolen goods would otherwise have been sold, in which case the retail sales value is the better measure of actual loss. [128-130] CORDY, J., concurring in part.

Counsel: **[*118]** *Rebecca Kiley*, Committee for Public Counsel Services, for the defendant.

Kenneth E. Steinfield, Assistant District Attorney, for the Commonwealth.

Matthew R. Segal & Jessie J. Rossman, for the American Civil Liberties Union Foundation of Massachusetts, amicus curiae, submitted a brief.

Judges: Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, LENK, & HINES, JJ.[1]

Opinion by: GANTS

Opinion

[947]** GANTS, C.J. This case presents two issues on appeal: first, whether a defendant's ability to pay should be considered by a judge in deciding whether to order

[1] Justice Duffly participated in the deliberation on this case prior to her retirement.

restitution as a condition of probation and in deciding the amount of any such restitution; and second, where goods are stolen from a retail store, whether the amount of the victim's actual economic loss for purposes of restitution is the replacement value or the retail sales value of the stolen goods. As to the first issue, **[***2]** we hold that *HN1*[↑] in determining whether to impose restitution and the amount of any such restitution, a judge must consider a defendant's ability to pay, and may not impose a longer period of probation or extend the length of probation because of a defendant's limited ability to pay restitution. As to the second issue, we hold that, *HN2*[↑] in cases of retail theft, the amount of actual economic loss for purposes of restitution is the replacement value of the stolen goods unless the Commonwealth proves by a preponderance of the evidence that the stolen goods would otherwise have been sold, in which case the retail sales value is the better measure of actual loss.[2]

Background. The defendant was employed as a cashier at a Walmart department store in Salem. A Walmart video camera captured the defendant "free-bagging" items; that is, with certain customers, she placed some store items into bags without scanning the items at the cash register, so that these customers received these items without paying for them. As a result, in November, 2013, a complaint issued in the Salem Division of the District Court **[***3]** Department alleging that the defendant stole the property of Walmart having **[**948]** a value of more than $250 pursuant to a single larcenous scheme on various dates between July 20 and September 4, 2013, in violation of G. L. c. 266, § 30 (1). In April, 2014, the defendant admitted to facts sufficient to warrant a finding of guilty, and the judge continued her case without a finding for eighteen months, with restitution to be determined at **[*119]** a later date.[3] The defendant was placed on administrative probation for eighteen months, with a special condition that she have no contact with Walmart.

At a restitution hearing in September, 2014, the defendant stipulated that the loss to Walmart was $5,256.10, and a judge (who was not the plea judge) ordered that restitution in that amount be paid. However, in October, 2014, the defendant **[***4]** filed a motion to revise and revoke the order of restitution, which was allowed, and a new restitution hearing was held in November, 2014, before yet another judge. At this evidentiary hearing, the Commonwealth offered testimony from Ronald Capistran, the loss protection manager at the Salem Walmart, who calculated that the retail sales price of the items stolen totaled $5,256.10. He estimated that the "markup" on most of the items sold in the store was "somewhere between [seven per cent] and probably [fifteen per cent]" but, in a rare case, "it could be [fifty]" per cent. The defendant testified that she was "discharged" from Walmart in September, 2013, after working there as a cashier for nearly twelve years. She received unemployment benefits for approximately three months following her termination, but was found ineligible for such benefits after a department of unemployment assistance hearing and was ordered to reimburse the Commonwealth for the benefits she had received. At the time of the restitution hearing, she had been unable to find employment and had no income or government assistance of any kind. She had been evicted from her apartment and was staying with someone, but **[***5]** not paying rent. She testified that she "free-bagged" the items only for friends, and received only fifty dollars once for having done so.

The prosecutor argued that restitution should be based on the retail sales value of the items stolen because the theft was at the point of sale, and Walmart was deprived of the value of the goods that should have been paid by the customer. The prosecutor also argued that the amount of restitution should not be reduced based on the defendant's inability to pay because the defendant "by her actions created her inability to pay in that she was fired from a job by stealing." The defendant argued that the actual loss to Walmart **[*120]** is the replacement cost of the stolen goods, not their retail price, because Walmart is not entitled to recover in restitution for its lost profits. The defendant also argued that she should not be ordered to pay restitution because she was financially unable to pay, noting that, if ordered to pay "any figure remotely near" the amount of restitution sought, she will be in violation of her probation because of her inability to pay. The judge declared that the loss is measured by the retail loss and ordered that restitution in the **[***6]** amount of $5,256 be paid during the period of probation at a rate to be

[2] We acknowledge the amicus brief submitted by the American Civil Liberties Union of Massachusetts.

[3] The defendant recommended that her case be continued without a finding for eighteen months. The prosecutor recommended that a guilty finding be entered, that she be placed on probation for a period of two years, and that she be ordered as a condition of probation to pay Walmart $5,256.10 in restitution. The defendant accepted the judge's disposition even though it exceeded her recommendation. See G. L. c. 278, § 18.

determined by the probation department.[4] The defendant **[**949]** timely appealed from this order, and we allowed the defendant's application for direct appellate review.

[↑] *Discussion.* ***HN3***[↑] A judge may order a defendant to pay restitution to the victim as a condition of probation provided that the "[r]estitution is limited to economic losses caused by the defendant's conduct and documented by the victim." *Commonwealth v. McIntyre, 436 Mass. 829, 833-834, 767 N.E.2d 578 (2002)*. See *Commonwealth v. Nawn, 394 Mass. 1, 6, 474 N.E.2d 545 (1985)* ("There is no question that restitution is an appropriate consideration in a criminal sentencing"). "The procedure used to determine the amount of restitution or reparation must be reasonable and fair." *Id. at 6-7*. The prosecution should disclose prior to the hearing the amount of restitution it seeks. *Id. at 7*, citing *People v. Gallagher, 55 Mich. App. 613, 620, 223 N.W.2d 92 (1974)*. Where the defendant does not stipulate to the amount, the judge should conduct an evidentiary hearing at which "the Commonwealth bears the burden of proving by a preponderance of the evidence the amount of the victim's losses." *Nawn, 394 Mass. at 7-8*. At such a hearing, the victim may testify regarding the amount of the loss, and the defendant may cross-examine the victim, with **[***7]** such cross-examination limited to the issue of restitution. *Id. at 8*. The defendant may rebut the victim's estimate of the amount of loss with expert testimony or other evidence. *Id. at 7*.

[↑] 1. *Ability to pay.* ***HN4***[↑] In deciding whether to order restitution and, if so ordered, the amount, the judge should "consider whether the defendant is financially able to pay the amount ordered." *Nawn, 394 Mass. at 7*, citing Model Sentencing and Corrections Act § 3-601(d), 10 U.L.A. 322 (Supp. 1984), and ABA Standards Relating to Probation § 3.2(d) (1970). "The amount of restitution is not merely the measure of the value of the goods and money **[*121]** stolen from the victim by the defendant; ... the judge must also decide the amount that the defendant is able to pay and how such payment is to be made." *Nawn, supra at 8-9*.

HN5[↑] In practice, this means that, at the close of the evidentiary hearing, the judge must make two findings in deciding whether to order restitution as a condition of probation and, where ordered, the amount of restitution to be paid during the period of probation. First, the judge must determine the amount of the victim's actual economic loss causally connected to the defendant's crime. See *McIntyre, 436 Mass. at 834*. The Commonwealth bears the burden of proof as to this finding. See *Nawn, 394 Mass. at 7-8*. The order of restitution may **[***8]** not exceed this amount. See *Commonwealth v. Rotonda, 434 Mass. 211, 221, 747 N.E.2d 1199 (2001)*. Second, the judge must determine the amount the defendant is able to pay. See *Nawn, supra at 8-9*. Where a defendant claims that he or she is unable to pay the full amount of the victim's economic loss, the defendant bears the burden of proving an inability to pay. See *Commonwealth v. Porter, 462 Mass. 724, 732-733, 971 N.E.2d 291 (2012)* (defendant bears burden of persuasion regarding indigency, in part because "[a] criminal defendant is the party in possession of all material facts regarding her own wealth and is asserting a negative"). Cf. *United States v. Fuentes, 107 F.3d 1515, 1532 (11th Cir. 1997)* (regarding restitution, "the defendant must establish her financial resources and needs by a preponderance of the evidence").

[950]** ***HN6***[↑] We require a judge to consider the defendant's ability to pay when setting the restitution amount because a judge may order restitution in a criminal case only as a condition of probation, and therefore the collection of restitution is enforced by the threat or imposition of a criminal sanction for violation of a probation condition. See *Commonwealth v. Denehy, 466 Mass. 723, 737, 2 N.E.3d 161 (2014)*; *Commonwealth v. Goodwin, 458 Mass. 11, 15, 933 N.E.2d 925 (2010)*. Cf. *G. L. c. 258B, § 3 (u)* (victim shall be informed of "right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim"). A defendant can be found in violation **[***9]** of a probationary condition only where the violation was wilful, and the failure to make a restitution payment that the probationer is unable to pay is not a wilful violation of probation. See *Commonwealth v. Canadyan, 458 Mass. 574, 579, 944 N.E.2d 93 (2010)* ("where there was no evidence of wilful noncompliance, a finding of violation of the condition of wearing an operable [global positioning system **[*122]** (GPS)] monitoring device was unwarranted, and is akin to punishing the defendant for being homeless"); *Commonwealth v. Gomes, 407 Mass. 206, 212-213, 552 N.E.2d 101 (1990)* (imposition of default costs permitted only when default is wilful). Cf. *Bearden v. Georgia, 461 U.S. 660, 669 n.10, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983)* ("Numerous decisions by state and

[4] The judge waived the probation supervision fee and the indigent counsel fee.

federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine" [footnote omitted]).

To allow a judge to impose a restitution amount that the defendant cannot afford to pay simply dooms the defendant to noncompliance. Such noncompliance may trigger a notice of probation violation even though a probationer cannot be found in violation for failing to pay a restitution amount that the probationer cannot reasonably afford to pay. See *Canadyan, supra*; *Gomes, supra.* Not only would a notice of violation under such circumstances waste the time of the court, but **[***10]** it imposes upon the blameless probationer the risk of an arrest on a probation warrant, of payment of a warrant fee, of being held in custody pending a hearing, and of probation revocation if the judge were to fail to recognize that inability to pay is a defense to the alleged violation. See *G. L. c. 276, § 87A*; *Fay v. Commonwealth, 379 Mass. 498, 504, 399 N.E.2d 11 (1980)*; Rule 3 of the District/Municipal Courts Rules for Probation Violation Proceedings, Mass. Ann. Laws Court Rules (LexisNexis 2015-2016).

HN7[↑] Burdening a defendant with these risks by imposing restitution that the defendant will be unable to pay violates the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty. See *Canadyan, supra*; *Gomes, supra at 212-213*. Cf. *Bearden, 461 U.S. at 668-669* ("if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available" [footnote omitted]). To avoid this unlawful result, we require the judge to consider the defendant's ability to pay when initially setting the restitution amount.[5] See *State [**951] v. Blank, 570 N.W.2d 924, 927 (Iowa 1997)* ("A court's assessment of a defendant's **[***11]** reasonable ability to pay **[*123]** is a constitutional prerequisite for a criminal restitution order"). Cf. *Fuentes, 107 F.3d at 1529* ("Although a sentencing court may order restitution even if the defendant is indigent at the time of sentencing, ... it may not order restitution in an amount that the defendant cannot repay").

HN9[↑] A judge may not ignore a defendant's ability to pay in determining restitution under the rationale that, if the defendant were to violate the probation condition of payment of restitution because of an inability to pay, the judge would not revoke probation but would instead extend the period of probation to allow the defendant more time to pay. Probation "serves as a disposition of and punishment for a *crime*; it is not a civil program or sanction" (emphasis in original). *Commonwealth v. Cory, 454 Mass. 559, 566, 911 N.E.2d 187 (2009)*. It punishes a defendant by ordering the defendant to comply with conditions **[***12]** deemed appropriate by the sentencing judge, and "[i]f a defendant violates one or more conditions of probation, a judge may revoke his probation and sentence him to a term of imprisonment for his underlying conviction, or return the defendant to probation, with new or revised conditions." *Commonwealth v. Goodwin, 458 Mass. 11, 15, 933 N.E.2d 925 (2010)*.

HN10[↑] An extension of the period of probation punishes a defendant in two ways. First, it extends the restrictions on a defendant's liberty arising from probation. Under the general conditions of probation, a probationer may be required to report periodically to his or her probation officer, may not leave the State without permission, and must pay a monthly probation fee or, in lieu of payment, provide community service, unless payment is waived by the judge because of the order of restitution. See *G. L. c. 276, § 87A*; Commentary to Rules 2 and 4 of the District/Municipal Courts Rules for Probation Violation Proceedings, Mass. Ann. Laws Court Rules, at 77-78, 86 (LexisNexis 2015-2016). A probation officer may search the home of a probationer by obtaining a warrant supported only by reasonable suspicion rather than probable cause. See *Commonwealth v. LaFrance, 402 Mass. 789, 792-793, 525 N.E.2d 379 (1988)*. Special conditions, where ordered, may impose further restrictions and obligations, such as drug and **[***13]** alcohol testing and evaluation, participation in treatment programs, GPS monitoring, and home confinement curfews. See *G. L. c. 276, § 87A*.

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[5] ***HN8***[↑] Where, because of the defendant's limited ability to pay, the restitution amount is less than the victim's total economic loss, nothing bars the victim from filing a civil action and obtaining a judgment against the defendant for the full amount of the loss. The victim may seek to collect on this judgment through a civil execution. See *Commonwealth v. Klein, 400 Mass. 309, 311, 509 N.E.2d 265 (1987)*; *Commonwealth v. Malick, 86 Mass. App. Ct. 174, 178, 14 N.E.3d 338 (2014)*; *Fidelity Mgt. & Research Co. v. Ostrander, 40 Mass. App. Ct. 195, 199, 662 N.E.2d 699 (1996)*. See also *G. L. c. 258B, § 3 (u)*.

Second, HN11[↑] where a probationary period is extended, and a defend- [*124] ant commits a new crime during the extended period, the defendant, in addition to being convicted and sentenced for the new crime, can have his or her probation revoked and be sentenced anew on the conviction for which he or she was placed on probation. See Goodwin, 458 Mass. at 17. And probation may be revoked for the commission of a new crime based on proof by a preponderance of the evidence, so a defendant may be found not guilty at trial of committing the new crime where the evidence fell short of proof beyond a reasonable doubt but still have his or her probation revoked because a judge found it more likely than not that he or she committed the new crime. See Commonwealth v. Hartfield, 474 Mass. 474, 481-483, [**952] 51 N.E.3d 465 (2016). Thus, extending the length of a probationary period because of a probationer's inability to pay subjects the probationer to additional punishment solely because of his or her poverty. See Canadyan, 458 Mass. at 579; Gomes, 407 Mass. at 212-213. We need not reach the question whether an extension of the length of probation in such circumstances violates the Massachusetts Declaration of Rights, because we invoke our superintendence [***14] power to declare that a judge may not extend the length of probation where a probationer violated an order of restitution due solely to an inability to pay.[6,7]

For the same reasons, HN13[↑] equal justice means that the length of probation supervision imposed at the time of sentence should not be affected by the financial means of the defendant or the ability of the defendant to pay restitution. See Superior Court Working Group on Sentencing Best Practices, Criminal Sentencing in the Superior Court: Best Practices for Individualized Evidence-Based Sentencing, at 15 (Mar. 2016) (Superior Court Best Practices for Sentencing) ("An extended period of supervision for the purpose of collecting money can be particularly troublesome [***15] since it necessarily means that greater burdens are imposed on poor offenders compared to those with economic resources"). To en- [*125] sure that a defendant does not face a longer probationary period because of his or her limited means, the ability to pay determination should be made only *after* the judge has determined the appropriate length of the probationary period based on the amount of time necessary to serve the twin goals of rehabilitating the defendant and protecting the public. See Cory, 454 Mass. at 567; Commonwealth v. Lapointe, 435 Mass. 455, 459, 759 N.E.2d 294 (2011). See also State v. Farrell, 207 Mont. 483, 498-499, 676 P.2d 168 (1984) (to impose longer suspended sentence because of defendant's indigency in order to extend time to pay restitution would violate due process and fundamental fairness). Cf. Superior Court Best Practices for Sentencing, *supra* ("probationary terms should generally be limited in duration, extending only long enough to facilitate a period of structured reintegration into the community"). HN14[↑] Once the judge has determined the appropriate length of the probationary period, restitution may be a condition of probation for the length of that period at the maximum monthly amount that the defendant is able to pay, provided the total amount does not exceed the actual loss. The amount of restitution ordered should not exceed this monthly amount multiplied by [***16] the months of probation, even if that amount is less than the amount of financial loss sustained by the victim. The monthly amount must be determined by the judge; it cannot be delegated to the probation department. But the judge may be aided in that determination by the guidance of [**953] the probation department.[8]

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[6] HN12[↑] A judge remains free to revoke probation or to extend the term of probation where a probationer violates a condition of probation by willfully failing to pay a restitution amount he or she had the ability to pay. See Bearden v. Georgia, 461 U.S. 660, 668, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983) ("If the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection"); Commonwealth v. Avram A., 83 Mass. App. Ct. 208, 212-213, 982 N.E.2d 548 (2013).

[7] We acknowledge that extending the length of probation in such circumstances has not been recognized to be in violation of Federal constitutional law. See Bearden, 461 U.S. at 674 (where defendant on probation is unable to pay fine, court may extend time for payment).

[8] For example, where a defendant has been found guilty of shoplifting and the judge determines that the economic loss to the victim is $5,000, the judge might decide that the defendant's risk of future criminal conduct is most effectively diminished by two years of treatment for the defendant's drug and mental health problems, and that the defendant should therefore be placed on supervised probation for two years, with special conditions of drug and mental health treatment. Once the judge has decided on this two-year probationary period, the judge must then consider the defendant's ability to pay and determine the amount of restitution that the defendant is able to pay. The judge might determine that, for example, the defendant has the ability to pay fifty dollars per month for each of the twenty-four months. If the defendant successfully

[*126] HN16[↑] The defendant may be required to report to his or her probation officer any change in the defendant's ability to pay, and the probation officer may petition the judge to modify the condition of probation by increasing or decreasing the amount of restitution due based on any material change in the probationer's financial circumstances. See Goodwin, 458 Mass. at 18, quoting Buckley v. Quincy Div. of the Dist. Court Dep't, 395 Mass. 815, 820, 482 N.E.2d 511 (1985) ("A judge may add or modify a probation condition that will increase the scope of the original probation conditions only where there has been a 'material change in the probationer's circumstances [***18] since the time that the terms of probation were initially imposed,' and where the added or modified conditions are not so punitive as to significantly increase the severity of the original probation"). Cf. United States Sentencing Commission Guidelines Manual § 5B1.3(a)(7) (updated Nov. 2015) ("the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution").

Because we have not previously had the opportunity to articulate the legal standard for determining the defendant's ability to pay restitution, we do so here for the first time. HN17[↑] In determining the defendant's ability to pay, the judge must consider the financial resources of the defendant, including income and net assets, and the defendant's financial obligations, including the amount necessary to meet minimum basic human needs such as food, shelter, and clothing for the defendant and his or her dependents. Cf. G. L. c. 261, § 27A (a) (defining "[i]ndigent" with respect to civil litigants who seek waiver of court fees as person who is "unable to pay the fees and costs of the proceeding in which he is involved or is unable to do so without depriving himself or his dependents of the necessities [***19] of life, including food, shelter, and clothing"); United States v. McGiffen, 267 F.3d 581, 589 (7th Cir. 2001), citing United States v. Embry, 128 F.3d 584, 586 (7th Cir. 1997) (in determining whether defendant is financially able to contribute to cost of appointed counsel, judge must find "whether requiring the contribution would impose an extreme hardship on the defendant, whether it would interfere with his obligations to his family, and whether there [**954] were third parties with valid claims to the funds"); Museitef v. United States, 131 F.3d 714, 716 (8th Cir. [*127] 1997) (test of inability to pay costs of appointed counsel "is whether repayment would cause such financial hardship as to make it impractical or unjust . ... The ability to pay must be evaluated in light of the liquidity of the individual's finances, his personal and familial needs, or changes in his financial circumstances"); Model Penal Code: Sentencing § 6.04(2) (Proposed Official Draft 2012) ("The total severity of economic sanctions imposed on an offender may never exceed the offender's ability to pay while retaining sufficient means for reasonable living expenses and existing family obligations").

HN18[↑] The payment of restitution, like any court-imposed fee, should not cause a defendant substantial financial hardship. See People v. Jackson, 483 Mich. 271, 275, 769 N.W.2d 630 (2009) (in determining defendant's ability to pay, judge must consider "whether the defendant [***20] remains indigent and whether repayment would cause manifest hardship"). Cf. S.J.C. Rule 3:10, § 10 (a), 475 Mass. 1301 (2016) ("The indigent counsel fee shall be waived where a judge, after the indigency verification process, determines that the party is unable without substantial financial hardship to pay the indigent counsel fee within 180 days"). Restitution payments that would deprive the defendant or his or her dependents of minimum basic human needs would cause substantial financial hardship. Where a defendant has been found indigent by the court for purposes of the appointment of counsel, a judge should consider carefully whether restitution can be ordered without causing substantial financial hardship.

HN19[↑] A judge may also consider a defendant's ability to earn based on "the defendant's employment history and financial prospects," Nawn, 394 Mass. at 9, but a judge may attribute potential income to the defendant only after specifically finding that the defendant is earning less than he or she could through reasonable effort. Cf. Child Support Guidelines (Aug. 1, 2013) (allowing attribution of potential income "[i]f the Court makes a determination that either party is earning less than he or she could through reasonable effort").

[↑] 2. *Order [***21] of restitution.* We now turn to the order of restitution in this case. The judge here ordered

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completes the probation period and meets the [***17] required monthly payments, the defendant's probation must be terminated, even though the defendant paid only $1,200 in restitution; probation may not be extended so that the victim may be paid the balance of $3,800. The victim may initiate a civil action to recover the unpaid balance of economic loss.

HN15[↑] Where a judge determines that there is no reason to impose probation other than to collect restitution, a judge may impose a brief period of probation (e.g., thirty or sixty days) and determine how much of the economic loss the defendant is able to pay during that time period, and make that amount of restitution a condition of the brief period of probation.

restitution in the amount of the "retail loss" — $5,256 — even though the judge appeared to recognize that the defendant could not afford to pay that amount during the remaining period of her probation.[9] The judge did not set a monthly amount for the defendant to pay, but instead **[*128]** directed that the probation department set a payment schedule. It was error for the judge to order restitution based only on the amount of loss, without considering whether the defendant was financially able to pay that amount during the remaining period of her probation. It was also error for the judge to delegate to the probation department the responsibility of establishing a payment schedule.

The consequence of these errors demonstrates why it is so important that the ability to pay be considered in setting the amount of restitution. Although the record **[**955]** does not reveal what payment schedule was established by the probation department, a notice of violation issued on May 11, 2015, for the defendant's failure to pay the required amount,[10] and a warrant issued for her arrest when she failed to appear at the probation violation hearing on May 22. The warrant was recalled on June 4, and she stipulated to a violation of her probation at a hearing on July 15, where the judge restored her to the same terms and conditions of probation, but ordered her to make restitution payments of thirty dollars per month. Although the defendant made the required monthly payments, on October 28, 2015, the day her probation was set to expire, the probation department issued a second notice of violation for her failure to pay the balance of her restitution, which the probation department calculated as $5,176.[11] The probation hearing on that notice of violation has been continued in light of this pending appeal.[12] If the defendant had **[***23]** not been poor, she could have afforded to pay the restitution in full before October 28, 2015, and would no longer have been subject after that date to the conditions of probation or the risk that a new crime might result in her being resentenced on her larceny from Walmart. It was only because of her poverty that she was subject to the prolonged punishment of probation.

[↑] 3. *Calculation of amount of economic loss.* The defendant claims that the judge erred, not only in failing to consider her ability to **[*129]** pay, but also in calculating the amount of restitution as the retail price of the items stolen. We earlier noted that ***HN20***[↑] the payment of restitution "is limited to economic losses caused by the defendant's conduct and documented by the victim." *McIntyre, 436 Mass. at 834*. Because the purpose of restitution is to reimburse the victim "for any economic **[***24]** loss caused by the defendant's actions," *Rotonda, 434 Mass. at 221*, the amount of restitution may not exceed the victim's actual loss. See *McIntyre, supra.* See also *United States v. Ferdman, 779 F.3d 1129, 1132 (10th Cir. 2015)*, quoting *United States v. James, 564 F.3d 1237, 1243 (10th Cir. 2009)* ("a district court may not order restitution in an amount that exceeds the actual loss caused by the defendant's conduct, which would amount to an illegal sentence constituting plain error"); *United States v. Boccagna, 450 F.3d 107, 119 (2d Cir. 2006)* ("Criminal restitution ... is not concerned with a victim's disappointed expectations but only with [its] actual loss").

HN21[↑] Where items are stolen from a retail store, the actual loss to the victim is the replacement value of the items, that is, their wholesale price, unless the Commonwealth proves by a preponderance of the evidence that the items would have been sold were they not stolen, in which event the actual loss would be the retail price of the items. See *Ferdman, 779 F.3d at 1140* (considering restitution in the context of retail theft and holding that, "unless the Government can show the defendant's crime depleted the stock of a particular fungible or readily replaceable good ... at a time when the victim might otherwise have been able to sell that good to a **[**956]** willing buyer, something akin to replacement or wholesale cost clearly appears the more accurate measure **[***25]** of actual loss"); *People v. Chappelone, 183 Cal. App. 4th 1159, 1178-1179, 107 Cal. Rptr. 3d 895 (2010)* (because prosecutor presented no evidence that store lost any sales of "mass-produced consumer goods" that it "sold in abundance," judge

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[9] When the restitution hearing was conducted, the defendant had only approximately eleven months remaining on her eighteen-month probation term. The judge acknowledged that "you can't get blood out of a stone" and declared it "a sad case." He said that he did not know whether "she can get a job somewhere at Dunkin' Donuts and pay it off that way." He added, "I'm not sitting here feeling great about this, believe me. I feel terrible. **[***22]** ... [B]ut a lot of that's on her. ... [I]t's tough. I feel bad for her."

[10] The record on appeal reflects that the defendant made only two payments of five dollars for restitution.

[11] The Commonwealth correctly noted that this amount is in error, and that the amount of restitution due on that date was actually $5,126.

[12] The record reflects that the defendant continued to make monthly restitution payments of thirty dollars at least through December, 2015.

erred in awarding restitution in amount of retail value rather than replacement cost); State v. Islam, 359 Ore. 796, 807, 377 P.3d 533 (2016) ("[W]hen goods for sale are stolen from a retail seller and not recovered, ... the measure of 'economic damages' for the seller in a restitution proceeding is the same measure of damages that would be available to the seller in a tort action for conversion[:] ... the reasonable market value of the goods converted at the time and place of conversion, and the market that determines that reasonable value is the market to which the seller would resort to replace the stolen goods, generally the wholesale market"). But see State v. Smith, 144 Idaho 687, 693, 169 P.3d 275 (Ct. App. 2007) **[*130]** ("the district court did not err in calculating the amount of restitution owed for the property stolen ... by using the ascertained retail value of that property").[13]

Here, the record reflects that the theft occurred when the defendant's friends brought merchandise to her cashier counter, and that the defendant scanned some items and "free-bagged" others. Although the record is silent as to how the defendant chose which items to "free-bag" and whether her friends knew in advance that she would "free-bag" particular items (or "free-bag" any), the judge reasonably could have inferred from the circumstances of the theft that, had the defendant scanned these items at her counter, the friends would have paid for them. Therefore, because these items were stolen not from inventory, but after they were brought to the cashier's counter, the judge reasonably could have found by a preponderance of the evidence that these items would have been sold had they not been stolen, and that the retail price of the items was the appropriate measure of the victim's actual loss. Although it is not plain that the judge applied **[***27]** this analysis in calculating the amount of restitution as the "retail loss," we conclude that the judge did not err in determining that the appropriate amount of the victim's actual loss in these circumstances was the aggregate retail price of the items stolen.

Conclusion. Because the judge erred in failing to consider the defendant's ability to pay in determining whether to order restitution and in determining the amount of restitution, we vacate the judge's restitution order and remand the case to the District Court for further proceedings consistent with this opinion.

So ordered.

Concur by: CORDY (In Part)

Concur

CORDY, J. (concurring in part). I agree that in setting an amount of restitution especially as a condition of a probation, a judge can and should take into account the likely ability of the defendant to pay that amount during the term of the probation imposed. I disagree with the extra burden the court seems prepared to place **[*131]** on victims in establishing their economic loss in the context of thefts from a retail enterprise.

[957]** It seems to me that the economic loss incurred in that context should be presumed to be the retail price of the goods stolen, an amount that can be readily ascertained and presented **[***28]** to the court at a restitution hearing. See State v. Smith, 144 Idaho 687, 693, 169 P.3d 275 (2007) (where retailer's items stolen, correct value for restitution will generally be retail market value of items).

The court suggests, however, that store owner victims are only entitled to restitution based on the retail prices of the items stolen if they can affirmatively prove by a preponderance of the evidence that the specific items would have been sold at the retail price if they had not been stolen. This is an unnecessary burden in the ordinary case, and the cases cited by the court in support of its proposition are far from ordinary.

For example, in People v. Chappelone, 183 Cal. App. 4th 1159, 107 Cal. Rptr. 3d 895 (2010), the victim was the Target department store, and the principal defendant was an employee responsible for seeing that damaged items and merchandise withdrawn by manufacturers were taken off the sales floor and returned to the appropriate entity for credit (or sold for deeply discounted prices to charitable organizations). Id. at 1163, 1165-1166. The theft at issue involved large quantities of such items awaiting disposal from storage. Id. at 1165.

[13] The concurrence contends that we should declare the retail price to be the best measure of actual loss in order to avoid placing an "extra burden" on victim retailers who seek restitution. *Post* at 131. A retailer should be able to ascertain the wholesale price of stolen **[***26]** items as easily as the retail price, and we do not think it unfair to require the victim retailer to show that it is more likely than not that the stolen items would have been sold to obtain the higher retail price as the measure of restitution.

The court set restitution at $278,678, based on the full retail price of the goods.[1] Id. at 1170. On appeal, the Court of Appeal noted that the vast majority of stolen goods had in fact **[***29]** been recovered and returned to Target, and that the items, even before the theft, were identified by Target as damaged or otherwise not saleable at retail in any event.[2] Id. at 1173-1174. In these circumstances, the Court of Appeal reasonably held that valuing the merchandise at its full retail price highly inflated its actual value, and the recovery of that amount would result in a windfall to Target. Id. at 1178-1179. While the retail price was a "reasonable starting point the value should have been discounted to reflect the true nature of the goods." Id. at 1175. Consequently, the restitution order was vacated and the matter remanded for a further **[*132]** hearing.

The facts in United States v. Ferdman, 779 F.3d 1129 (2015), are also exceptional. The items at issue in that case were eighty-six cellular telephones that the defendant purchased at Sprint stores (fraudulently using various corporate accounts) for a "subsidized price" contingent on Sprint service agreements. Id. at 1131, 1136. The defendant then resold the telephones. *Id.*

The trial judge ordered restitution in an amount based on the full retail price **[***30]** that could have been charged to a customer purchasing the telephones without a service agreement.[3] Id. at 1131. While the Appeals Court concluded that the trial court judge could ordinarily include lost **[**958]** retail sales and lost profits in a restitution order, the specific language of the Federal Mandatory Victims Restitution Act of 1996, as applied in this case, required more than just an unverified letter from Sprint stating that its losses were the full unsubsidized retail prices of the telephones, without any evidence from which the trial judge could infer that the defendant's theft caused the victim to lose actual retail sales at those prices. Id. at 1136-1137, 1139-1140.

In sum, it is unnecessary in the present case to conclude anything other than that the retail price of goods stolen from a retail store in the straightforward circumstances of this case was proper.

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[1] This amount also included $44,000 in expenses incurred by the Target department store during the investigation. People v. Chappelone, 183 Cal. App. 4th 1159, 1170, 107 Cal. Rptr. 3d 895 (2010).

[2] The merchandise was ultimately donated by Target to charities. See id. at 1171.

[3] This amount included apparently $3,300 in investigative costs incurred by Sprint. See United States v. Ferdman, 779 F.3d 1129, 1134 (2015).

EXHIBIT 7

⚠ Caution
As of: September 18, 2023 6:30 PM Z

Commonwealth v. Rembiszewski

Supreme Judicial Court of Massachusetts

October 4, 1982, Argued ; February 10, 1984, Decided

No Number in Original

Reporter
391 Mass. 123 *; 461 N.E.2d 201 **; 1984 Mass. LEXIS 1369 ***

Commonwealth v. Joseph P. Rembiszewski, Jr.

Prior History: [***1] Suffolk. Worcester.

Indictment found and returned in the Superior Court on May 8, 1970.

A motion for a new trial, filed on February 19, 1980, was heard by *Meagher,* J. An application for leave to appeal was heard by *Wilkins,* J., in the Supreme Judicial Court for the county of Suffolk.

Disposition: *So ordered.*

Core Terms

beyond a reasonable doubt, jurors, decisions, lives, guilt, degree of certainty, important decision, instructions, convict, cases, personal decision, reasonable doubt, moral certainty, illustrated, burden of proof, leave to appeal, direct appeal, murder

Case Summary

Procedural Posture
Defendant appealed from a judgment of the Superior Court (Massachusetts), which convicted him of murder in the first degree and sentenced him to death and denied his motion for a new trial, and from the decision of a single justice of the court pursuant to Mass. Gen. Laws ch. 278, M 33E, denying his motion for leave to appeal except as to the denial of his motion for a new trial.

Overview
After his first-degree murder conviction and sentence of life imprisonment were affirmed on a plenary appeal, defendant moved for a new trial on the ground that the trial judge's charge to the jury, which compared the standard of "beyond a reasonable doubt" to the standard jurors employed in reaching important decisions in their personal lives, was a constitutionally inadequate explanation of the prosecution's burden of proof. The court reversed defendant's conviction, set the verdict aside, and remanded the case for a new trial. The theory that an instruction comparing the "beyond a reasonable doubt" standard to decisions in jurors' personal lives unconstitutionally tended to reduce the standard of proof to the "preponderance of the evidence" standard of civil trials had not been judicially adopted or foreshadowed until after defendant's trial and plenary appeal. Accordingly, his failure to raise the constitutional issue at trial or on direct appeal was excused by the fact that the constitutional theory on which he relied was not sufficiently developed at the time of trial or direct appeal to afford him a genuine opportunity to raise his claim at those junctures of the case.

Outcome
The judgment was reversed, the verdict of guilt was set aside, and the case was remanded to the Superior Court for a new trial. The appeal from the single justice's partial denial of the petition for leave to appeal was dismissed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of

Review > De Novo Review > General Overview

HN1[] **Murder, First-Degree Murder**

On an appeal from the denial of a motion for a new trial after conviction of murder in the first degree, where the conviction has already received plenary review pursuant to *Mass. Gen. Laws ch. 278, § 33E*, a defendant is not entitled to reversal of his conviction without establishing specific error.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Constitutional Rights

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > General Overview

HN2[] **Harmless & Invited Error, Constitutional Rights**

The appellate courts excuse the failure to raise a constitutional issue at trial or on direct appeal when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case.When the appellate court excuses a defendant's failure to raise a constitutional issue at trial or on direct appeal, it considers the issue as if it were here for review in the regular course. If constitutional error occurs, the appellate court reverses the conviction unless the error was harmless beyond a reasonable doubt.

Headnotes/Summary

Headnotes

Practice, Criminal, Instructions to jury, Postconviction relief, Appeal. *Words,* "Reasonable doubt."

Syllabus

A defendant's failure during his trial and appeal to raise a claim that the judge, in instructing the jury, erred in using examples of important decisions in the jurors' own lives to define the Commonwealth's burden of proving his guilt beyond a reasonable doubt did not preclude him from raising it on a subsequent motion for a new trial where the rule established by this court in *Commonwealth v. Ferreira, 373 Mass. 116, 128-130 (1977)*, was not so predictable when the case was tried, or when it was argued, that he could be said to have had a genuine opportunity to raise his claim at that time. [126-130]

The judge at a murder trial erred in including in his instruction to the jury on reasonable doubt specific examples of important decisions **[***2]** in the jurors' own lives and then stating that "proof beyond a reasonable doubt is the same kind of proof and degree of satisfaction or conviction which you wanted for yourself when you were considering one of those very important decisions." [130-135]

Counsel: *Ned C. Lofton* (*Conrad W. Fisher* with him) for the defendant.

Thomas A. Rosiello, Assistant District Attorney, for the Commonwealth.

Judges: Hennessey, C.J., Liacos, Nolan, & O'Connor, JJ.

Opinion by: O'CONNOR

Opinion

[*123] **[**203]** The defendant was convicted in December, 1970, of murder in the first degree and sentenced to a term of life imprisonment. We affirmed the conviction **[*124]** after plenary review under *G. L. c. 278, § 33E*. *Commonwealth v. Rembiszewski, 363 Mass. 311, 324 (1973)*. The defendant filed a motion for a new trial on February 19, 1980. The trial judge died before he could act on the motion and, after hearing, the motion was considered by another judge in the Superior Court, and was denied. The defendant then petitioned a single justice of this court, pursuant to *G. L. c. 278, § 33E*, for leave to appeal from the denial of his motion. The single justice granted the defendant leave **[***3]** to appeal only in so far as the new trial motion challenged the trial judge's charge to the jury. He otherwise denied

the defendant's petition for leave to appeal on the ground that the other issues presented by the motion were not "new and substantial" within the meaning of G. L. c. 278, § 33E. See Leaster v. Commonwealth, 385 Mass. 547 (1982).

There are two appeals before us. One challenges the judge's charge and the other challenges the single justice's partial denial of the defendant's petition for leave to appeal. We hold that there was error in the charge requiring reversal of the conviction. As a consequence, we dismiss the appeal from the single justice's order as moot.

We summarize the relevant evidence which is set out in greater detail in Commonwealth v. Rembiszewski, 363 Mass. 311, 312-315, 322-324 (1973). Joan Rembiszewski was the wife of the defendant. She was killed in the early morning of October 12, 1969. The Rembiszewskis had left the home of friends at about 12:30 A.M. that morning in the Rembiszewskis' station wagon. Two other couples were traveling in another motor vehicle on Route 146 in Sutton, at about 2 A.M., when they saw the defendant **[***4]** on his hands and knees at the side of the road feebly signalling for help. They stopped. The defendant appeared to be hysterical and kept repeating "Help Joan. They hit her with a hammer," or words to that effects. The police were summoned and they found Mrs. Rembiszewski's body lying beside the Rembiszewskis' station wagon on a cart path in a wooded area off Route 146. Her clothing was in place, and rings **[*125]** and a wrist watch were undisturbed. According to medical testimony, her death had been caused by severe blows with an instrument which crushed her forehead and upper face. A pool of blood had collected under the victim's head. Her clothing was bloodstained, and a small amount of blood had spattered the exterior of the car next to where she lay. No blood was found on the defendant's person or clothing.

The police took the defendant from the scene to a hospital for a medical examination. He complained of facial and head pains. The examination revealed no gross physical injury other than abrasions on the face and a small puncture on the right heel.

At the trial, the Commonwealth introduced testimony that tended to show that the defendant had a motive to kill **[***5]** his wife. The Commonwealth introduced other evidence in support of the indictment.

The defendant testified that after leaving their friends' home, he and his wife were driving on Grafton Street just west of the Millbury-Grafton town line, when they came upon a vehicle that was parked at an angle to the road and a man, apparently injured, was lying face down near the vehicle. Intending to offer help, the defendant stopped his car and he and his wife began to alight. The man then stood up and, along with an accomplice, forced the Rembiszewskis back into the front seat of the station wagon. The men seated themselves in the rear seat. They ordered the defendant, who was at the wheel, to drive an erratic course that led them to Route 146. Finally the defendant was ordered to **[**204]** pull off Route 146, and to drive down the cart path where the vehicle was subsequently found. When the vehicle stopped, the men ordered the Rembiszewskis from the car and began to strike them. As the defendant stepped out of the car one of them pulled him by the shirt and he lost his glasses. The defendant saw his wife being struck with some instrument. One of the attackers pursued the defendant, **[***6]** hit him over the head with a stick, and knocked him down. The defendant testified that he remembered nothing **[*126]** after that until he was discovered on his hands and knees on the shoulder of Route 146.

HN1[↑] Since this is an appeal from the denial of a motion for a new trial after conviction of murder in the first degree, and the conviction has already received plenary review pursuant to G. L. c. 278, § 33E, the defendant is not entitled to reversal of his conviction without establishing specific error. Commonwealth v. Breese, 389 Mass. 540, 541 (1983). Furthermore, the defendant is not entitled to our determination whether the instructions were erroneous if the issues presented could have been raised at trial or on direct appeal but were not. Commonwealth v. Antobenedetto, 366 Mass. 51, 58-59 (1974). Commonwealth v. Underwood, 358 Mass. 506, 511-512 (1970). However, that rule is not without qualification. HN2[↑] We have excused the failure to raise a constitutional issue at trial or on direct appeal when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a **[***7]** genuine opportunity to raise his claim at those junctures of the case. See DeJoinville v. Commonwealth, 381 Mass. 246, 248, 251 (1980); Connolly v. Commonwealth, 377 Mass. 527, 529-530 & n.5 (1979); Commonwealth v. Stokes, 374 Mass. 583, 587-588 (1978). When we excuse a defendant's failure to raise a constitutional issue at trial or on direct appeal, we consider the issue "as if it were here for review in the regular course." Commonwealth v. Kater, 388 Mass. 519, 533 (1983). If constitutional error has occurred, we

reverse the conviction unless the error was harmless beyond a reasonable doubt. DeJoinville v. Commonwealth, supra at 254. Commonwealth v. Garcia, 379 Mass. 422, 442 (1980). Connolly v. Commonwealth, supra at 538. Commonwealth v. Stokes, supra at 585.

The question that we must answer first is whether the defendant's challenge to the jury instructions raises constitutional issues which he did not have a genuine opportunity to raise at trial or on direct appeal. The defendant's main contention is that in explaining to the jury proof beyond a reasonable doubt the judge made extended references to specific **[***8]** **[*127]** social and economic decisions in the jurors' own lives, and then stated that the kind of evidence and the degree of proof that were necessary to convict the defendant were the same as those the jurors wanted when they made those important decisions. The defendant asserts that using those examples from the personal lives of the jurors to define the concept of proof beyond a reasonable doubt detracted both from the seriousness of the jurors' duty and from the Commonwealth's burden of proof. He relies on our decisions in Commonwealth v. Ferreira, 373 Mass. 116, 128-130 (1977), and Commonwealth v. Garcia, supra.

In Commonwealth v. Ferreira, supra at 128-130, we reversed a conviction of murder in the first degree because the judge's charge analogized proof beyond a reasonable doubt to the degree of proof that the jurors would have had when they made important decisions in their own lives, and gave specific examples. We reasoned that "these examples understated and tended to trivialize the awesome duty of the jury to determine whether the defendant's guilt was proved beyond a reasonable doubt" and we noted that the examples "detracted both from the **[***9]** seriousness of the decision and the Commonwealth's **[**205]** burden of proof." Id. at 129. In Commonwealth v. Garcia, supra at 440-441, we held that the instructions on reasonable doubt, like those in *Ferreira,* were constitutionally inadequate and that *Ferreira* must be applied retroactively.

In 1970, when this case was tried, and in November, 1972, when it was argued, there had been no foreshadowing of the rule expressed in *Ferreira.* Until December, 1972, when we decided Commonwealth v. Bumpus, 362 Mass. 672 (1972), judgment vacated and remanded on other grounds, *411 U.S. 945 (1973)*, aff'd on rehearing, 365 Mass. 66 (1974), petition for habeas corpus sub nom. Bumpus v. Gunter, 452 F. Supp. 1060 (D. Mass. 1978), the use of examples of important decisions in the lives of jurors to illustrate the Commonwealth's burden of proof was a common and approved practice. See Commonwealth v. Bumpus, supra at 681, 682; Commonwealth v. Libby, 358 Mass. 617, 621 **[*128]** (1971). Our first criticism of the practice was expressed in Bumpus, supra at 682, in which we simply said that the use of such examples "may not be illustrative **[***10]** of the degree of certainty required" for proof beyond a reasonable doubt. We conclude, therefore, that the rule of *Ferreira* was not so predictable when this case was tried, or when it was argued, that the defendant's failure to challenge previously the adequacy of the judge's charge on reasonable doubt should preclude him from doing so now.

The relevant portion of the judge's charge appears in the margin. [1] **[**206]** "[W]e have never held nor do we

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[1] "Now I said that the Government has the burden of proving the defendant guilty beyond a reasonable doubt. What do these words mean, 'beyond a reasonable doubt'? They mean this:

"The Commonwealth has the burden to prove the charges in this indictment against this defendant beyond a reasonable doubt.

"Now proof beyond a reasonable doubt does not mean proof beyond all doubt, nor proof beyond a whimsical or fanciful doubt, nor proof beyond the possibility of innocence.

"It is rarely if ever possible to find a case so clear that there cannot be a possibility of innocence.

"If an unreasonable doubt or mere possibility of innocence was sufficient to prevent a conviction, practically every criminal would be set free to prey upon the community and such a rule would be wholly impractical and would break down the forces of law and make the lawless supreme.

"A reasonable doubt does not mean a doubt as may exist in the mind of a man who is earnestly seeking doubts or for an excuse to acquit a defendant. But it means such doubt as remains in the minds of reasonable men who are earnestly seeking the truth.

"A fact is proved beyond a reasonable doubt when it is proved to a moral certainty, when it is proved to a degree of certainty that satisfies the judgment and conscience of the jury as reasonable men and leaves in their minds as reasonable men a clear and settled conviction of guilt.

"When all is said and done, if there remains in the minds of the jury any reasonable doubt of the existence of any fact which is essential to the guilt of the defendant on the particular charge in the indictment, the defendant must have the benefit and

cannot be found guilty on that charge.

"Now another way of explaining these words beyond a reasonable doubt is this: Reasonable doubt means doubt that you can give a good reason for on the evidence that you heard in this case. It is not all kinds of doubts, all kinds of suspicions. It must be a reasonable doubt on the evidence.

"It means that the evidence must leave your judgment and your conscience satisfied that you have reached the correct conclusion.

"Now let me see if I can explain to you in a more practical way what these words beyond a reasonable doubt mean. I am going to turn to certain experiences.

"I am sure all of you after you got through your formal schooling, whether it was elementary or high school or further education, you came to a point in life where you had to make an important decision. You had to decide what work you were going to go into, or what profession, or what business. Now that was an important decision for you to make.

"And you weighed the factors on both sides and you came to a decision.

"Later on there might have been a question of getting married. Well, that was an important decision and you weighed the factors on both sides and you made a decision.

"Later on in life there might have been a question of buying a house, which was an important decision; or, you might have been in a job or in a business for a long period of time and there came a question of changing jobs, going into another business. Well, those were important decisions. And you weighed the factors on both sides and you came to a decision.

"Well, I could go along with other examples of important decisions, such as surgery either for yourself or members of your family. But, anyway, what I am speaking about here is important decisions in your lifetime.

"I am not talking about routine decisions, daily decisions that you make, whether you are going to shave in the morning or at night, or, whether you are going to buy a Motorola T.V. or a Zenith T.V., or a Chevrolet or a Ford car.

"I am talking about important decisions and these are examples that I gave you. There are others as I said before.

"Now when you are faced with the necessity of making a decision or when you were contemplating one of these things, these important matters, you gave careful consideration to all of the reasons or factors on both sides of the question. You allowed yourselves a reasonable period of time in which to deliberate so that you might make the right decision.

"At some point you decided. You either did or did not do the things which you had under consideration. When you did that you were not necessarily free from all doubt. You may have had some lingering doubt but you were sufficiently convinced so that you made the decision. You did the thing or you decided you wouldn't do it.

"Now the kind of evidence and the degree and extent of proof which is required of the Commonwealth in this case to constitute proof beyond a reasonable doubt is the same kind of proof and degree of satisfaction or conviction which you wanted for yourself when you were considering one of those very important decisions.

"If the Commonwealth's evidence meets that test, then it is proof beyond a reasonable doubt. If it does not, it is not. The burden is on the Commonwealth.

"If the Commonwealth fails to sustain that burden as to any essential element of a particular crime -- and I will take up those elements later -- you must find the defendant not guilty of that crime."

now hold, that **[*129]** the use of specific examples necessarily imports error, constitutional or otherwise. . . . We have repeatedly said that **[*130]** to determine whether a definition of reasonable doubt accurately conveys the meaning of the term, it is necessary to consider the charge as a whole." *Commonwealth v. Smith, 381 Mass. 141, 145 (1980)*. After careful consideration of the whole charge, we are convinced that the defendant did not have the benefit of a constitutionally adequate explanation to the jury of the meaning of proof beyond a reasonable doubt.

[*11]** The judge's instruction that "[a] fact is proved beyond a reasonable doubt when it is proved to a moral certainty, when it is proved to a degree of certainty that satisfies the judgment and conscience of the jury as reasonable men and leaves in their minds as reasonable men a clear and settled conviction of guilt," was correct. However, he then undertook to "explain . . . in a more practical way what [those] words beyond a reasonable doubt mean." After giving the jury several examples of important decisions in their personal lives, the judge instructed the jury that "proof beyond a reasonable doubt is the same kind of proof and degree of satisfaction or conviction which you wanted for yourself when you were considering one of those very important decisions. If the Commonwealth's evidence meets that test, then it is proof beyond a reasonable doubt. If it does not, it is not." The examples of important decisions that had been given by the judge were: what work to go into, whether to get married, whether to buy a house, whether to change jobs after having held one for a long period of time, and whether to undergo surgery.

The judge's use of examples of decisions in the personal **[***12]** lives of the jurors detracted from the seriousness of the issue before them. The decision

whether to convict a man of murder in the first degree cannot fairly be placed in the same category as the decisions to which the judge referred. More significantly, the certainty that a juror would want before making such a decision is likely to be considerably less then the kind of certainty that excludes reasonable doubt. As we observed in *Commonwealth v. Ferreira, supra at 130*, "[w]e do not think that people customarily **[*131]** make private decisions according to [the beyond a reasonable doubt] standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable." Human experience **[**207]** teaches that most, if not all, of the decisions to which the judge referred as illustrating the meaning of proof beyond a reasonable doubt are made on the basis of perceptions as to probabilities. Equating the proof that the jurors might have wanted in making decisions with respect to **[***13]** their personal affairs with the degree of certitude necessary to convict the defendant tended to reduce the standard of proof from the criminal standard of proof beyond a reasonable doubt to the standard in civil cases, proof by a fair preponderance of the evidence. See *Commonwealth v. Garcia, supra at 441*.

There is no significant distinction between the instructions given in this case and those given in *Ferreira*. In *Ferreira,* the judge told the jury that they "must be sure that Mr. Ferreira is guilty. Otherwise, [they] must give him the benefit of the doubt and acquit him." The jury in *Ferreira, supra at 128*, were then told that they "must be as sure as [they] would have been any time in [their] own lives that [they] had to make important decisions affecting [their] own economic or social lives." The judge went on to give as examples decisions whether to leave school or to get a job, to get married or divorced, to buy a house or to continue to rent, or to leave the community for what, hopefully, would be a better job. In *Ferreira,* the judge defined the degree of certainty necessary for conviction as sureness; the kind of sureness that the jurors **[***14]** would have had when they had to make the type of decision illustrated by the examples he gave. In the present case, the judge defined the degree of certainty necessary for conviction as "moral certainty" and as the "degree of certainty that satisfies the judgment and conscience of the jury as reasonable men and leaves in their minds as reasonable men a clear and settled conviction of **[*132]** guilt." Just as the judge in *Ferreira* explained what he meant when he said that the jury must be "sure" by giving examples of "important" decisions in their lives, the judge here explained the meaning of "moral certainty" and "certainty that satisfies the judgment and conscience of the jury . . . and leaves in their minds . . . a clear and settled conviction of guilt" by giving the same examples. The meaning of "moral certainty" and of "certainty that satisfies . . . the jury . . . and leaves in their minds a clear and settled conviction of guilt" was qualified by the examples given in this case just as much as the requirement of sureness to convict was qualified by the examples given in *Ferreira*.

In *Ferreira, supra at 128*, the judge charged the jury that in order to convict **[***15]** they must be as sure as they "would have been" when they had to make such decisions as he illustrated by examples. In the case at bar, the judge instructed the jury that in order to convict it was necessary that they have the degree of satisfaction or conviction that they "wanted" for themselves when they were considering the important personal decisions described to them.

The Commonwealth argues that the instructions in the two cases are significantly different because the degree of certainty that a juror would "want" is much greater than the degree he or she "would have" before making a personal decision. We observed in *Commonwealth v. Ferguson, 365 Mass. 1, 12 n.9 (1974)*, that "[t]he level [of conviction] one would 'want' may be higher than that upon which one would be 'willing to act,' a phrase that has appeared often in the cases." The distinction is without merit. There is no reason to believe that a juror would understand, without explanation, that there is a significant difference between the certainty he would want, and the certainty he would reasonably expect to have, before making the indicated types of personal decisions. Furthermore, we held in *Commonwealth* ***[***16]*** *v. Garcia, supra at 441-442*, that the definition of reasonable doubt given to the jury in that case did not comport with our decision in *Ferreira* and was erroneous. In *Garcia, supra at 439 n.9*, the judge instructed the jury **[*133]** with respect to proof beyond a reasonable doubt that in order to convict **[**208]** the defendant the jurors would have to be "as sure as you *want* to be when in your own lives you had to make important decisions involving your personal, your social or your economic lives" (emphasis added). The judge cited examples of such decisions similar to those that were given in the present case. The jury instructions in the case at bar are not distinguishable from those in *Garcia*. As in *Garcia,* the instructions were constitutionally infirm. Furthermore, it makes no difference that during the course of the instructions the

judge on several occasions said that the Commonwealth had the burden of proof beyond a reasonable doubt. The jury's knowledge of which party had the burden did not inform them with respect to the extent of that burden.

The Commonwealth argues that the charge in the case at bar was more like the charges in cases **[***17]** in which the judgment was affirmed, such as *Commonwealth v. Tameleo, 384 Mass. 368 (1981)*, *Commonwealth v. Grace, 381 Mass. 753 (1980)*, *Commonwealth v. Smith, 381 Mass. 141 (1980)*, and *Commonwealth v. Hughes, 380 Mass. 596 (1980)*, than it was like the charges in *Ferreira* or *Garcia*. We do not agree.

It is enough that our conclusion that the charge in this case was infected with constitutional error finds support in reason and in *Ferreira* and *Garcia*. We need not, and we do not, attempt to reconcile our decisions in the several cases in which we have considered a *Ferreira*-type charge since the *Ferreira* case was decided. We note, however, that *Commonwealth v. Grace, supra*, was tried after our decision in *Commonwealth v. Bumpus, 362 Mass. 672 (1972)*, in which the use of jurors' personal decisions was criticized. *Id. at 682*. In *Grace,* we placed substantial reliance on the facts that, despite the criticism in *Bumpus,* the defendant did not object at trial to the judge's reference in his charge to such decisions and that he did not raise the point in his first motion for a new trial or in his appeal. We **[***18]** observed that "[t]he repeated failures of counsel to raise the **[*134]** point suggest that it was not thought to be critical." *Id. at 760*. *Commonwealth v. Hughes, supra*, which involved a conviction of breaking and entering a dwelling house in the nighttime with intent to commit larceny, was also tried after our decision in *Commonwealth v. Bumpus, supra*, and on appeal we applied the "substantial risk of a miscarriage of justice" standard articulated in *Commonwealth v. Freeman, 352 Mass. 556, 564 (1967)*. Also, the only personal decision referred to in the charge was a decision whether to undergo surgery. We concluded that in the context of the charge as a whole the example given had "far less tendency to trivialize the jury's duty than the illustrations used in the *Ferreira* or *Garcia* cases." *Hughes, supra at 601*. We also concluded that the judge had "used the heart surgery illustration more to explain the seriousness of the decision than to illustrate the required degree of certainty." *Id.* That is not the same as the present case.

Commonwealth v. Smith, 381 Mass. 141 (1980), gives more support to the Commonwealth's argument than **[***19]** any of our other cases. However, that case does not overrule *Ferreira* or *Garcia,* nor does it reflect adversely on their reasoning. There the judge illustrated the definition of proof beyond a reasonable doubt by a recitation of examples of personal decisions that was nearly identical to the recitation in the present case. In holding that there was no error, we focused on the judge's emphasis on moral certainty, concluding that that emphasis, together with other appropriate language in the charge, was sufficient for an acceptable definition of the Commonwealth's burden of proof. *Id. at 146*. We are not persuaded that the same conclusion is appropriate here. It is clear in this case that the jury were instructed to treat proof beyond a reasonable doubt, proof to a moral certainty, and proof to a degree of certainty that the jurors would want in making decisions about their futures **[**209]** as equivalent concepts. This was constitutional error, and we need not consider other defects in the charge alleged by the defendant.

This case is unlike *Commonwealth v. Garcia, supra*, in which the evidence of the defendant's guilt was overwhelming. **[*135]** There we **[***20]** were "convinced beyond a reasonable doubt that the error did not contribute to the guilty verdict, and that [the error] was therefore harmless." *Id. at 442*. Here, however, the evidence of guilt cannot be characterized as "overwhelming." There were no eyewitnesses to the murder. The Commonwealth presented a case based on circumstantial evidence which did not compel a conclusion of guilt. The defendant presented evidence that reasonably would have permitted the conclusion that he did not kill his wife and that others did. We cannot say that the evidence in this case so overwhelmingly established the guilt of the defendant that the verdict could not reasonably have been affected by the erroneous charge. See *DeJoinville v. Commonwealth, 381 Mass. 246, 254-255 (1980)*. Even applying a substantial miscarriage of justice standard, see *Commonwealth v. Pisa, 384 Mass. 362, 363-364 (1981)*, we would be unable to conclude that the charge did not create a risk of such a miscarriage. We cannot treat the error as harmless.

Accordingly, the judgment is reversed, the verdict is set aside, and the case is remanded to the Superior Court for a new trial. The appeal from the **[***21]** single justice's partial denial of the defendant's petition for leave to appeal is dismissed.

So ordered.

THE TRIAL COURT OF MASSACHUSETTS
MASSACHUSETTS PROBATION SERVICE

One Ashburton Place
Room 405
Boston, MA 02108

Edward J. Dolan
Commissioner

Dianne Fasano
First Deputy Commissioner

By First-Class Mail

September 28, 2023

Wrentham District Court
Attn: Criminal Clerk's Office
60 East St.
Wrentham, MA 02093

RE: Commonwealth v. Farouq Sameja
Docket No. 0157CR000919

Dear Clerk,

The Massachusetts Probation Service is in receipt of the Defendant's Motion to Reconsider, dated September 28, 2023, in the above-mentioned matter. After review, Probation continues to object to the motion and rests on the arguments made in its previous filing.

If you have any questions or concerns, please contact me directly at the number or email below.

Respectfully,

__/c/Fabiola White__
Fabiola White
Deputy Legal Counsel
Massachusetts Probation Service
(p) 857-324-0241
(e) fabiola.white@jud.state.ma.us

cc: Chief Sandra Adams (By Electronic Mail)
Kathleen J. Hill, Esq. (By Electronic Mail)
Norfolk Michael Morrissey, District Attorney's Office (By First Class Mail)

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

DEFENDANT'S REQUEST FOR RULING And DELAY IN THE ASSEMBLY OF THE RECORD

NOW COMES the defendant, Farouq Sameja, who respectfully moves this Honorable Court to rule on Defendant's Motion to Reconsider because it appears that justice may not have been done in this case, in accordance with Mass. R. Crim. P. 30 (b). As grounds for his request, Mr. Sameja states that on October 25, 2023, the transcripts for the July 11, 2023, motion hearing and the August 15, 2023, motion hearing on Defendant's Motion for a New Trial were served on the Clerk of the Wrentham District Court and the parties. Affording the Hon. Juliann Hernon sufficient time to rule on the Defendant's Motion to Reconsider and to allow the Clerk to delay the assembly of the record is in the best interest of the parties and for reason of judicial economy.

Wherefore, the Defendant respectfully requests this Honorable Court rule on the Defendant's Motion to Reconsider the denial of Defendant's Motion for a New Trial, and allow the Clerk to delay the assembly of the record until such time as the hearing judge has ruled.

Date: November 29, 2023,

Respectfully submitted,
For Farouq Sameja

Kathleen J. Hill, BBO # 644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

CERTIFICATE OF SERVICE

I, Katheen J. Hill, attorney for Farouq Sameja in the above-captioned matter hereby certify that on November 29, 2023, I served a true and accurate copy of Defendant's Request by prepaid, U.S. 1st Class Mail on the attorney of record for the Commonwealth:

Michael Morrissey, D.A.
Norfolk County District Attorney's Office
45 Shawmut Road, Canton, MA 02021

Courtesy Copy by Email –
Fabiola White, Special Assistant Attorney
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Fabiola.white@jud.state.ma.us

Probation's Administrative Coordinator
kailey.dow@jud.state.ma.us

Kathleen J. Hill

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

Denied
2-14-24

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

RECEIVED
WRENTHAM DISTRICT COURT
SEP 29 2023
CLERK-MAGISTRATE

DEFENDANT'S MOTION TO RECONSIDER

NOW COMES the defendant, Farouq Sameja, who respectfully moves this Honorable Court to reconsider the denial of Defendant's Motion for a New Trial (new probation violation hearing[1]) because it appears that justice may not have been done in this case, pursuant to Mass. R. Crim. P. 30 (b). As grounds for this motion to reconsider, Mr. Sameja states the precedent, *Commonwealth* v. *Quispe,* 433 Mass. 508 (2001),[2] that this court relies on when reasoning that "the judge could not have considered the immigration consequences of a one-year sentence" as a collateral consequence at the dispositional stage of the probation revocation hearing is no longer good law. See Exhibit 1, September 1, 2023, Order of the Court.

[1] A motion for a new trial is the proper vehicle for bringing a claim of ineffective of assistance of probation counsel, applying the *Saferian* standard. See *Commonwealth* v. *Patton*, 458 Mass. 119, 121 (2010).

[2] Exhibit 3, *Quispe*.

In *Commonwealth* v. *Marinho*, 464 Mass. 115, 128 (2013),[3] the SJC held "our precedent that a trial judge cannot factor immigration consequences into sentencing is no longer good law. See *Commonwealth* v. *Quispe*, supra at 512-513." See also *Padilla* v. *Kentucky*, 559 U.S. 356, 371 (2010) ("[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation"). Because the *Padilla* decision is based on constitutional principles it is retroactive.[4] See, e.g., *Commonwealth* v. *Sylvain*, 466 Mass. at 436-437 (applying *Padilla* retroactively having determined that *Padilla* does not announce a new rule). Massachusetts "continue(s) to adhere to the Supreme Court's original construction that a case announces a "new" rule only when the result is "not dictated by precedent." *Id.* at 434. Thus, *Quispe* is unconstitutional law and the reliance on this decision is misplaced.

Similarly, where this court reasons "the defendant's argument that there was no evidence that the probation hearing judge considered the defendant's ability to pay the restitution he owed, *Commonwealth* v. *Henry,* 475 Mass. 117 (2016),[5] had not been decided at the time of the defendant's violation hearing" is inapt. See Exhibit 1, 9/1/2023, Order of the Court. *Henry* is based on constitutional

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[3] Exhibit 4, *Marinho*.

[4] By comparison, when a case is not based on constitutional principles and it announces, "a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power, there is no constitutional requirement that the new rule or new interpretation be applied retroactively, and we are therefore free to determine whether it should be applied only prospectively." *Commonwealth* v. *Dagley*, 442 Mass. 713, 721 (2004), cert. denied, 544 U.S. 930 (2005).

[5] Exhibit 6, *Henry*.

principles of due process and equal protection,[6] dictated by precedent, and therefore, the "clairvoyance" exception applies.[7] The *Henry* decision is based on the fundamental constitutional principles of fairness, which are deeply embedded in the state and federal constitution--constitutional principles that are designed to protect a probationer's conditional liberty interests and due process rights. "Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine." *Bearden* v. *Georgia*, 461 U.S. 660, 669 n. 10 (1983). Notably, at the time of the probation violation hearing in question State cases, as cited in Henry, plainly established that "[r]estitution is limited to economic losses caused by the defendant's conduct and documented by the victim." *Commonwealth* v. *McIntyre*, 436 Mass. 829, 833-834 (2002); *Commonwealth* v. *Rotonda*, 434 Mass. 221, 221 (2001) (restitution is limited to economic loss subject to proof of the economic loss); *Commonwealth* v. *Nawn*, 394 Mass. 1, 6 (1985) (judge must

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[6] *Henry* quoting from *Bearden*, whose reasoning is based on due process and equal protection- basic constitutional principles recognized in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972); *Gagnon* v *Scarpelli*, 411 U.S. 778 (1973); and *Commonwealth* v. *Durling*, 407 Mass. 108 (1990). Specifically quoting, *Bearden* v. *Georgia*, 461 U.S. 660, 669 n. 10 (1983), "Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine." *Henry*, 475 Mass at 122.

[7] Explaining the "clairvoyance exception," "[w]e have excused the failure to raise a constitutional issue at trial or on direct appeal when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case. See *DeJoinville* v. *Commonwealth*, 381 Mass. 246, 248, 251 (1980); *Connolly* v. *Commonwealth*, 377 Mass. 527, 529-530 & n.5; *Commonwealth* v. *Stokes*, 374 Mass. 583, 587-588 (1978). When we excuse a defendant's failure to raise a constitutional issue at trial or on direct appeal, we consider the issue "as if it were here for review in the regular course." *Commonwealth* v. *Kater*, 388 Mass. 519, 533 (1983). If constitutional error has occurred, we reverse the conviction unless the error was harmless beyond a reasonable doubt. *DeJoinville* v. *Commonwealth*, supra at 254. *Commonwealth* v. *Garcia*, 379 Mass. 422, 442 (1980). *Connolly* v. *Commonwealth*, supra at 538. *Commonwealth* v. *Stokes*, supra at 585." *Commonwealth* v. *Rembiszewski*, 391 Mass. 123, 126 (1984).

determine whether the defendant has the ability to pay). Here, Mr. Sameja argues that the order of restitution in the amount of $400.00 unfairly exceeded the amount of the $89.00 loss that the victim was entitled to seek. See G. L. c. 258B, § 3 (o).

Massachusetts has long since recognized that an inability to pay is a defense to the alleged violation. *Henry*, 475 Mass. at 122. Arguendo, the probation department has not shown that Mr. Sameja willfully failed to pay restitution in the time specified by the judge or that he had the ability to pay. See G.L. c. 276, § 87A (a specified time); *Fay* v. *Commonwealth*, 379 Mass. 498, 504 (1980) (due process requires judge make findings of a willful violation); Mass. Dist. Ct. R. Prob. Violation Proc. 8 (c). And because the Notice of Violation of Probation stated two reasons: failing to pay restitution and incurring a new offense, this court cannot be certain what impact either one of the alleged violations had on the judge's decision making when determining the disposition. Most telling, the record indicates that the judge did not provide the requisite written Statement of Reasons and there is no entry on the docket sheet concerning the finding or the reasons.

It further stands to reason that the fact that Mr. Sameja incurred a new offense and was subsequently found guilty and sentenced to a six-month period of incarceration is not a factor that should be weighed more than all other factors when determining if the 365-day sentence versus a 364-day sentence is just, as this court suggests, because when "determining its disposition, the court shall give such weight as it may deem appropriate to the recommendation of the Probation Department, the probationer, and the District Attorney, if any, and to such

factors as public safety; the circumstances of any crime for which the probationer was placed on probation; the nature of the probation violation; the occurrence of any previous violations; and the impact of the underlying crime on any person or community, as well as any mitigating factors." Mass. Dist. Ct. R. Prob. Violation Proc. 8 (d). The analysis should give weight to his criminal history at the time of the final probation hearing with all of the factors.

And because Mr. Sameja[8] violated his probation by committing a new offense when applying the principle of equal protection under the Fourteenth Amendment of the U.S. Constitution[9] and arts. 1 and 10 of the Massachusetts Declaration of Rights, it is reasonable to conclude that the non-citizen's sentence should have been no greater than a citizen's sentence for the same crime. A 364-day sentence for a non-citizen is just as punitive as is a 365-day sentence for a citizen. In this case, the one-year sentence imposed on Mr. Sameja violates equal protection. It is exceedingly punitive and very harsh, depriving Mr. Sameja of his life, liberty, and property in the United States, which offends his due process rights in violation of the 5th and 14th Amendments of the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. Probation counsel could have advocated for one day less to avoid the mandatory deportation for an aggravated felony. See *Commonwealth* v. *Gordon*, 82 Mass.

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[8] Mr. Sameja does not dispute that he incurred a new criminal violation for driving with a suspended license and uninsured and was subsequently found guilty and sentenced to six months in the House of Correction.

[9] "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." Sec. 1 of the 14th Amendment of the United States Constitution.

App. Ct. 389, 401 (2012)[10] (properly reasoning that "[t]he judge, who was also the trial judge, concluded that the defendant could have negotiated for a lesser sentence—**even by one day**—thus avoiding the mandatory deportation for an aggravated felony (emphasis added)"); *Commonwealth* v. *Marinho*, 464 Mass. 115, 128 (2013)[11] ("counsel's failure to argue for a shorter sentence [364 days] fell measurably below requisite professional standards"). It is firmly established that if a non-citizen receives a sentence under one year for a crime of theft that State conviction will not be treated as an aggravated felony under federal law. See Title 8 U.S.C. § 1101 (a) (43) (G), as amended in 1996.

In light of *Padilla* and *Henry*, "when the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case," this court should analyze Mr. Sameja's claims as if they had been properly preserved under the "clairvoyance" exception. See *Commonwealth* v. *Rembiszewski*, 391 Mass. 123, 126 (1984).[12] Here, the question is: Had probation counsel zealously argued all mitigating factors, including the significance of cancelation and the specific immigration consequences, would the hearing judge have imposed a 365-day sentence versus a 364-day sentence when one day less would NOT have had the effect of converting the state misdemeanor, a misuse of a

[10] Exhibit 5, *Gordon*.

[11] Exhibit 4, *Marinho*.

[12] Exhibit 7, *Rembiszewski*.

credit card conviction, in the total amount of $89.00, into a federal aggravated felony?

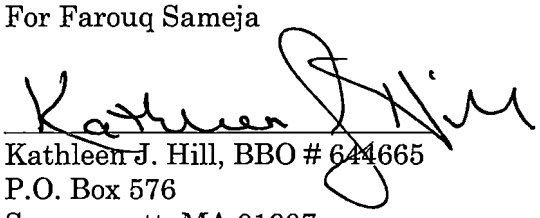
Finally, the record is sufficient to decide this case because the Wrentham District Court docket sheet, the court filings, and "some probation documents" are available, as the Chief of Probation Department represented at the motion hearing. And the written findings entered on the federal court docket report that was submitted at the motion hearing plainly shows that Mr. Sameja was deported due to this State conviction and the imposition of the one-year sentence. See Exhibit 2, United States District Court, District of Massachusetts (Springfield), Civil Docket for Case # 3:19-cv-40141-MGM. Still further, this case does not pertain to the withdrawal of a guilty plea and what advise probation counsel should have given his non-citizen client prior to tendering a plea, as in *Commonwealth* v. *Hoyle*, 67 Mass. App. Ct. 10 (2006). There is no issue about a waiver or acceptance of admission in this case.

In further support of this Motion to Reconsider, Mr. Sameja attaches the following cases: *Commonwealth* v. *Quispe,* 433 Mass. 508 (2001), as Exhibit 3; *Commonwealth* v. *Marinho*, 464 Mass. 115 (2013), as Exhibit 4; *Commonwealth* v. *Gordon*, 82 Mass. App. Ct. 389, 401 (2012), as Exhibit 5; *Commonwealth* v. *Henry*, 475 Mass. 117 (2016), as Exhibit 6; and *Commonwealth* v. *Rembiszewski*, 391 Mass. 123 (1984), as Exhibit 7.

Wherefore, the Defendant respectfully requests this Honorable Court reconsider the denial of Defendant's Motion for a New Trial and allow his motion for a new probation violation hearing, in accordance with Mass. R. Crim. P. 30 (b).

Date: September 28, 2023,

Respectfully submitted,
For Farouq Sameja



Kathleen J. Hill, BBO # 644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

CERTIFICATE OF SERVICE

I, Katheen J. Hill, attorney for Farouq Sameja in the above-captioned matter hereby certify that on September 28, 2023, I served a true and accurate copy of Defendant's Motion for Reconsideration by prepaid, U.S. 1st class mail on the attorney of record for the Commonwealth:

Michael Morrissey, D.A.
Norfolk County District Attorney's Office
45 Shawmut Road, Canton, MA 02021

Fabiola White, Special Assistant Attorney (by Email)
One Ashburton Place, Room 405
Boston, MA 02108
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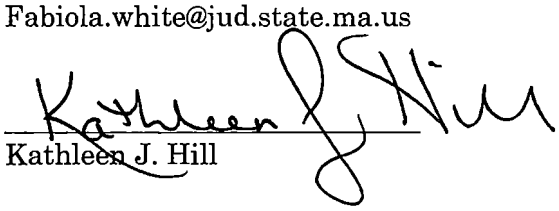

Kathleen J. Hill

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

NORFOLK, SS.

WRENTHAM DISTRICT COURT
DOCKET NO. 0157CR000919

COMMONWEALTH
PLAINTIFF
v.

FAROUQ SAMEJA
DEFENDANT

RECEIVED
WRENTHAM DISTRICT COURT
FEB 21 2024
CLERK MAGISTRATE

NOTICE OF APPEAL

Notice is hereby given that the Defendant, Farouq Sameja, being aggrieved by certain opinions, rulings, and findings pertaining to the September 1, 2023, Order on Defendant's Motion for a New Trial and the February 14, 2024, Order on Defendant's Motion to Reconsider hereby appeals, pursuant to Massachusetts Rules of Appellate Procedure, Rule 3.

Date: February 14, 2024

Respectfully submitted,
For Farouq Sameja

/s/ Kathleen J. Hill

Kathleen J. Hill, BBO# 644665
P.O. Box 576
Swampscott, MA 01907
(617) 742-0457
lookjhill@gmail.com

CERTIFICATE OF SERVICE

I, Kathleen J. Hill, hereby certify that on February 14, 2024, I served a true and accurate copy the Defendant's Notice of Appeal on the attorney of record for the Commonwealth by 1st class mail & email:

Arthur J. Czugh, Special Assistant Attorney
Massachusetts Probation Service
One Ashburton Place, Room 405
Boston, MA 02108
(857) 324-0241
Arthur.czugh@jud.state.ma.us.

/s/ Kathleen J. Hill

ATTORNEY KATHLEEN J. HILL
P.O. Box 576
Swampscott, MA 01907
Telephone: 617.742.0457 | E-mail: lookjhill@gmail.com

By Certified Mail
7020 1290 0001 4798 7593

RECEIVED
WRENTHAM DISTRICT COURT
FEB 21 2023
CLERK MAGISTRATE

February 15, 2024

Wrentham District Court
Attn: Criminal Clerk
60 East Street
Wrentham, MA 02093

Re: Commonwealth v. Farouq Sameja
Wrentham District Court, Docket No. 0157CR000919

Dear Sir or Madam Clerk,

I enclose for filing in the Wrentham District Court the Defendant's Notice of Appeal taken on the denial of Defendant's Motion for New Trial and on the denial of Defendant's Motion to Reconsider in the above-referenced matter. Kindly docket Defendant's Notice of Appeal.

Sincerely,

Kathleen J. Hill

cc: Arthur J. Czugh, Special Assistant Attorney
Farouq Sameja, client

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I filed the Defendant-Appellant's Record Appendix through the Electronic Filing Service Provider for electronic service to the following registered user:

Pamela Alford, A.D.A.
Office of the District
Attorney/Norfolk
Chief of Appeals Unit
45 Shawmut Road
Canton, MA 02021

/s/ Kathleen J. Hill