

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPREME JUDICIAL COURT  
NO.  
A.C.NO. 25-P-0718  
SUPERIOR COURT  
CASE NO. 9481CR01148

COMMONWEALTH OF MASSACHUSETTS

vs.

FRANCISCO MALDONADO JR.

(True Name: Francisco Sanchez Nunez)

Defendant-Appellant

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DEFENDANT'S APPLICATION FOR DIRECT APPELLATE  
REVIEW CHALLENGING THE PROPRIETY OF APPLYING THE  
AFFIDAVIT FORMULA OF THE APPEALS COURT SET OUT IN  
COMMONWEALTH v. CIAMPA 51 Mass. App. Ct. 459  
(2001), TO BAR RELIEF PURSUANT TO THE ALIEN  
WARNINGS STATUTE; G.L.c. 278, sec. 29D, WHERE  
CIAMPA PRODUCES INCOMPLETE EVIDENCE THAT WARNINGS  
WERE GIVEN AND BARS RELIEF IN A MANNER  
INCONSISTENT WITH THE PURPOSE AND INTENT OF THE  
ALIEN WARNINGS STATUTE.

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1. REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to M.R.App. P. 11, Mr. Sanchez, the  
defendant/movant-Appellant Applicant, applies for  
final determination of the denial of his Alien  
Warnings Motion, in a case the parties agree is of  
first impression.

The Superior Court found that the Affidavit submitted by the long retired Superior Court judge who apparently conducted the plea proceeding, barred Alien Warnings relief for the Applicant because it fulfilled the parameters of Commonwealth v. Ciampa, 51 Mass. App. Ct. 459 (2011).

The Applicant contends that the Ciampa formula for an Affidavit is incomplete, unfair and unjust and should not stand. Where, in the absence of any other evidence that an Alien Warning was given, "Ciampa Affidavits" have barred relief to movants for decades without having to provide any explanation of the absence of a clerk's notation, it is appropriate for the Court to consider whether Ciampa should stand. The Applicant applies for the Court's consideration not only for himself, but for any movant seeking relief in the Commonwealth pursuant to G.L.c. 278, sec. 29D, the Alien Warnings Statute.

Pursuant to G.L.c. 221, sec. 29, the plea court had a duty to ensure files are properly maintained and this is especially important in Alien warnings cases because all the rights of the parties rest in the notation that Alien Warnings were administered.

Ciampa requires no explanation about why the notation is missing and this is why a Ciampa Affidavit is an incomplete and unfair bar to relief. G.L.c. 221, sec. 29 states as follows:

*The justices of the several courts shall inspect the doings of the clerks from time to time, and shall see that the records are made up seasonably and kept in good order; and if the records are left incomplete for more than six consecutive months, such neglect unless caused by illness or casualty shall be adjudged a forfeiture of the bond of the clerk. M.G.L. 221 § 29.*

If a warning had been given, the plea court should have ensured the notation was made by the clerk. The plea court had the power and the legal obligation to do so.

In light of G.L c. 221, sec. 29, a reasonable question is presented as to whether the Ciampa case and the parameters it establishes for an acceptable Affidavit to bar Alien Warnings relief is fair and does justice. Here, the Applicant contends it does not.

**2. THIS IS A QUESTION OF FIRST IMPRESSION**

At hearing, the Motion Court, Judge Haggan, asked, and the Commonwealth conceded, that this is a

question of first impression. In addition, this is a question of public interest impacting a considerable number of the people of Massachusetts.

Further, Ciampa provides a bar to relief that the Legislature does not intend in the Alien Warnings Statute by encouraging a formula Affidavit that does not provide a complete answer to the question of why, if Alien Warnings had been administered, was that administration not noted in the docket entries.

**3. STATEMENT OF PRIOR PROCEEDINGS**

On August 11, 1995, the Applicant made guilty pleas to ten charges in Case Numbers 93-1043 and 94-1148. The charges related to distribution and trafficking of cocaine on eight different occasions in the Somerville area during May and June 1994 and one in 1993 (Case Number 93-1043). On the same day he was sentenced to, with all sentences being concurrent with 941148-001, five years to five years and a day in State Prison.

Upon release from prison, the Applicant, a citizen of the Dominican Republic who had lawfully entered the United States in 1992, remained here in Middlesex County, working and staying out of trouble.

He married his long-time partner, an American citizen, in 2020 and the couple reside in the area with their eight year old daughter who attends a local school.

Finally married and settled down after some thirty years away from the Dominican Republic, the Applicant determined to visit his elderly mother and other family members. To that end, in 2020 he contacted experienced immigration counsel to obtain travel documents and subsequently retained motion counsel.

On August 4, 2023 he was was denied a travel document by Homeland Security.

On October 19, 2023, Mr. Sanchez moved to vacate his guilty pleas pursuant to the Alien Warnings Statute, G.L.c. 278, sec. 29D. In the Motion, Mr. Sanchez asserted both that 1) No Alien Warnings were given - specifically as to exclusion from admission - and; 2) that he has confirmed he would be excluded from admission were he to leave the country and that he has a bona fide desire to leave the country - the trial court has no discretion to preclude relief. See, Commonwealth v. Jean-Louis, 102 Mass. App. Ct. 348 (2023) following Commonwealth v. Petit-Homme, 482 Mass. 775, 784 & n.10 (2019).

On September 3, 2024, argument was presented before Judge Haggan. The Commonwealth conceded to the 1993 case, ultimately filing a notice of *nolle prosequi*, but opposed the 1994 case on the grounds that the Affidavit of retired Superior Court Judge Kottmeyer proved that the Alien Warnings had been administered properly over thirty years prior, citing Commonwealth v. Ciampa. 51 Mass.App.Ct. 459 (2001).

Judge Kottmeyer had apparently conducted the plea in the 1994 case but admitted to having no memory of the case.

Because the Commonwealth conceded, and the motion court agreed, that the requirements for relief otherwise had been fulfilled, the argument turned on the issue of whether the Ciampa Affidavit fairly served as a bar to relief.

On September 5, 2024, the defendant's motion to subpoena Judge Kottmeyer and the Motion to vacate the guilty plea were both denied, with Judge Haggan issuing written Findings.

A timely Notice of Appeal was filed on September 9, 2024.

**4. ISSUES OF LAW PRESENTED BY THIS APPEAL**

- A. WHETHER THE PARAMETERS SET FORTH IN THE APPEALS COURT FOR A CIAMPA AFFIDAVIT CAN BE FAIR AND DO JUSTICE WHERE NO COMPLETE EXPLANATION FOR THE ABSENCE OF A NOTATION THAT ALIEN WARNINGS WERE ADMINISTERED AT A GUILTY PLEA IS REQUIRED WHERE THE TRIAL COURT HAS A STATUTORY DUTY TO ENSURE COURT FILES ARE IN ORDER?
- B. WHETHER THE PROVISION OF A PLEA COURT'S AFFIDAVIT PURSUANT TO CIAMPA IS INCONSISTENT WITH THE STATUTORY INTENT OF THE ALIEN WARNINGS STATUTE?

5. ARGUMENT

The parameters set forth in Ciampa for a motion court's Affidavit sufficient to bar relief pursuant to the Alien Warnings Statute are perfunctory and unfair. As mentioned, there are statutes addressing the responsibility, power, and authority of a trial court to supervise itself and its personnel; however, the Ciampa case does not recognize that the trial court has a role not only over itself, but over its courtroom personnel. While overlooking the responsibility of the trial court, the movant suffers.

The Ciampa case has operated to add words to the Alien Warnings Statute that are not meant to be there, and this is impermissible. See, Commonwealth v. Russ R., 433 Mass. 515 (2001) (legislative enumeration of courts with power to immunize witnesses excludes other courts).

**6. STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW  
BY THIS COURT IS APPROPRIATE**

**a. Ciampa was never been reviewed by the Court:** as the defendant-appellant received relief in the form of *vacatur* in the Appeals Court, he returned to the trial court for a jury trial. Nevertheless, Ciampa has been barring relief pursuant to G.L.c. 278 sec. 29D since 2001.

**b. Ciampa is inconsistent with the intention of the Alien warnings Statute:** the formula Affidavit thwarts the purpose of the Statute and requires no meaningful address of the fundamental problem with the plea proceeding; that is, to explain and account for the absence of a contemporaneous notation that warnings were administered.

**c. It strains credibility and creates an appearance of impropriety** to accept as fact and bar relief where a plea court concedes to having no memory of the instant plea proceeding occurring some thirty years prior, but insists the plea was conducted perfectly.

**d. The outline of an Affidavit required to fulfill Ciampa and bar relief results in an Affidavit which provides only an incomplete explanation as to the**



absence of a notation and that is not fair play and  
does not do substantial justice.

e. As mentioned, this is an appeal of first  
impression with implications affecting vital interests  
for the people for whom the statue was intended to  
help and protect, many of those people being  
Massachusetts residents.

Respectfully submitted for Applicant  
Francisco Sanchez Nunez  
By his attorney,



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COMMONWEALTH OF MASSACHUSETTS

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Certificate of Compliance Pursuant to Rule 16(k) of  
the  
Massachusetts Rules of Appellate Procedure

I, ADRIANA CONTARTESE, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 11

I further certify compliance with the applicable length limit of Rule 20 was ascertained by counting the pages of the entire Application (10 pages) and the presented in Courier New 12-point which prints out at ten characters per inch.



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COMMONWEALTH OF MASSACHUSETTS

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**Certificate of Service**

I certify on June 17, 2025, I served a copy of the foregoing on opposing counsel, ADA Chia Chi Lee of the Middlesex County DA's Office, by emailing a copy to his email address with his permission and with an offer to send a hard copy as well:

chichi.lee@mass.gov;

to Supervising ADA Tom Ralph via Efile; at Tom.

Ralph@Mass.gov;

and to the Middlesex DA's Office's Appeals Unit AA,

Ms. Kim Gouveia to her email at

Kim.Gouveia@mass.gov



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**ADDENDUM**

1. DOCKET ENTRY SHEETS
2. JUDGE HAGGAN'S FINDINGS

• Case Type:
• Indictment
• Case Status:
• Open
• File Date
• 06/29/1994
• DCM Track:
• I - Inventory
• Initiating Action:
• HEROIN/MORPHINE/OPIUM, TRAFFICKING IN c94C §32E(c)
• Status Date:
• 06/29/1994
• Case Judge:
• Next Event:
•

All information	Party	Change	Event	Docket	Disposition
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Docket Information			File Ref Nbr.	Image Avail.
Docket Date	Docket Text			
06/29/1994	Indictment returned		1	
07/11/1994	Affidavit of indigency filed; approved (Robert H Bohn, Justice)		2	
07/11/1994	Appointment of Counsel Glynn		3	
07/11/1994	Appearance of Commonwealth's Atty. Sable			
07/11/1994	Def't arraigned before Court			
07/11/1994	RE offense 1: Plea of not guilty			
07/11/1994	RE offense 2: Plea of not guilty			
07/11/1994	RE offense 3: Plea of not guilty			
07/11/1994	RE offense 4: Plea of not guilty			
07/11/1994	RE offense 5: Plea of not guilty			
07/11/1994	RE offense 6: Plea of not guilty			
07/11/1994	RE offense 7: Plea of not guilty			
07/11/1994	RE offense 8: Plea of not guilty			
07/11/1994	RE offense 9: Plea of not guilty			
07/11/1994	RE offense 10: Plea of not guilty			
07/11/1994	RE offense 11: Plea of not guilty			
07/11/1994	RE offense 12: Plea of not guilty			
07/11/1994	RE offense 13: Plea of not guilty			
07/11/1994	RE offense 14: Plea of not guilty			
07/11/1994	RE offense 15: Plea of not guilty			
07/11/1994	RE offense 16: Plea of not guilty			
07/11/1994	RE offense 17: Plea of not guilty			
07/11/1994	Bail set: \$500,000 With Surety Or \$50,000 Cash Without Prejudice (Robert H Bohn, Justice)			
07/11/1994	Mittimus issued Not Recognizing			
07/11/1994	Def't notified of right to request drug exam Pursuant to Ch. 111E Sec 10 Of The General Laws As Amended			
07/11/1994	Continued until 08/24/94 PTC			
07/14/1994	Mittimus Not Recog-Indictments Returned With Service		4	
09/27/1994	Continued until 11/9/94 for trial			
09/27/1994	Reporter present: Elizabeth Buchanan			
09/27/1994	Motion by Def't: For Funds To Hire A Private Investigator Filed In Court		5	
09/27/1994	Motion (P#6) and allowed not to exceed \$600. By the Court, Joseph M.Marshall C/J			
10/20/1994	Motion To File Motion to Suppress Late Filed in Court and Allowed. By the Court, Joseph M. Marshall, C/J		6	
10/20/1994	Motion by Def't to suppress evidence with affidavit in support of		7	
11/01/1994	Commonwealth's Motion for Joinder		8	
11/01/1994	Commonwealth's Motion to Advance and Continue Trial Date		9	

11/03/1994	Continued until 11/22/1994 for M B Joseph M. H. Shar, C/M	
11/22/1994	Continued until 1/18/95 for ATD	
11/22/1994	Reporter present: Elizabeth B Piper	
03/01/1995	Continued until 3/30/95 for trial	
03/01/1995	Reporter present: Elizabeth B Piper	
03/30/1995	Continued until 05/11/95 for Status	
03/30/1995	Reporter present: Elizabeth Tyler	
05/11/1995	Continued until 6/14/95 for trial	
05/11/1995	Reporter present: Elizabeth B Piper	
06/13/1995	Motion (P#8) Denied. See this Court's Memorandum of Decision and Order dated June 13, 1995 (Robert H Bohn Jr, Justice) all parties notified	
06/13/1995	Memorandum of Decision and Order on Defendant's Motion to Suppress Evidence: Order: Denied (Robert H Bohn Jr, Justice) copy sent all parties	10
06/14/1995	Continued until 8/7/95 for trial	
06/14/1995	Reporter present: Elizabeth B Piper	
08/07/1995	Withdrawal of appearance filed by Glynn	12
08/07/1995	Motion (P#12)allowed. (Diane M Kotmyer, Justice)	
08/07/1995	Appointment of Counsel Chance	13
08/07/1995	Appearance of Deft's Atty: Chance	
08/10/1995	Writ of habeas corpus issued Cambridge Jail for 8/11/95	11
08/11/1995	Commonwealth files: Partial Nolle Prosequi at to indictment #001, filed in Court.	14
08/11/1995	Commonwealth's nolle prosequi as to indictments 005, 006, 009, 011, 012 & 015, filed in Court.	15
08/11/1995	RE offense 1: Guilty plea to lessr offns	
08/11/1995	RE offense 2: Guilty plea	
08/11/1995	RE offense 3: Guilty plea	
08/11/1995	RE offense 4: Guilty plea	
08/11/1995	RE offense 5: Nolle prosequi	
08/11/1995	RE offense 6: Nolle prosequi	
08/11/1995	RE offense 7: Guilty plea	
08/11/1995	RE offense 8: Guilty plea	
08/11/1995	RE offense 9: Nolle prosequi	
08/11/1995	RE offense 10: Guilty plea	
08/11/1995	RE offense 11: Nolle prosequi	
08/11/1995	RE offense 12: Nolle prosequi	
08/11/1995	RE offense 13: Guilty plea	
08/11/1995	RE offense 14: Guilty plea	
08/11/1995	RE offense 15: Nolle prosequi	
08/11/1995	RE offense 16: Nolle prosequi	
08/11/1995	RE offense 17: Guilty plea	
08/11/1995	001:Plea retracted and plea guilty to so much that alleges trafficking +28 grams but less than 100 grams and accepted by the Court. 002, 003, 004, 008, 010, 013, 014 & 017:Plea retracted and plea guilty offered and accepted by the Court. Commonwealth moves for sentence.	
08/11/1995	001 & 008: Sentence-MCI Cedar Junction for a term not exceeding 5 yrs. & 1 dy. or less than 5 yrs., 008 to be served concurrently with 001, 002, 007, 010, 013, 014 & 017: Sentence-MCI Cedar Junction for a term not exceeding 5 yrs. or less than 4 yrs., these sentence to be served concurrently with 001. (Diane M Kotmyer, Justice)	
08/11/1995	Mittimus' issued to MCI Cedar Junction.	
08/11/1995	Sentence credit given as per 279.33A: 429 days.	
08/11/1995	Notified of right of appeal under Rule 64 (Appellate Appeal)	
08/11/1995	Victim-witness fee assessed: \$50.00	
08/11/1995	Attested copy of indictments sent to MCI Cedar Junction.	
08/11/1995	003 & 004: On file defendant not objecting (Diane M Kotmyer, Justice)	
08/11/1995	Reporter present: Elizabeth B Piper	
08/16/1995	Motion by Deft.: to revise & revoke with supporting affidavit. (copy sent to Justice Kotlymer)	16

08/18/1995      **D.A.R. A.C. NO. 25-P- 0718 PAGE 015**      17

013,014 & 017.      **Defendant's Motion to Vacate the Judgment, withdraw his Guilty Pleas, and enter Pleas of Not Guilty Pursuant to G.L.C. 278, Section 29D**      

10/27/1995      Victim-witness fee paid as assessed \$50.      17

10/19/2023      's Defendant 's Motion and Memorandum to Vacate the Judgement, withdraw his Guilty Pleas, and enter Pleas of Not Guilty Pursuant to G.L.C. 278, Section 29D      18



10/19/2023      Attorney appearance  
On this date Brian W Chance, Esq. dismissed/withdrawn as Private Counsel for Defendant Francisco Maldonado, Jr.      19

11/13/2023      ORDER: PROCEDURAL ORDER:  
The defendant has filed a motion for post-conviction relief. The court ORDERS that the Commonwealth file a response to the defendants pending motion on or before December 27, 2023.      19



Charge: Heroin/Morphine/Opium Trafficking In  
ADA: Linda Sable, Esq.  
Type of Motion: Def.'s Motion to Vacate the Judgment, Withdraw his Guilty Pleas, and Enter Pleas of Not Guilty Pursuant to G.L.C. 278, 29D  
Motion Filed By: Adriana Contartese, Esq.  
Sentencing Judge: Diane Kotmyer  
By the Court (Pierce, J.)

12/22/2023      Attorney appearance  
On this date Chia Chi Lee, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth      20

12/22/2023      Opposition to (P#18)- To Defendant's Motion to Withdraw Guilty Plea filed by Commonwealth      20



12/22/2023      Affidavit of Justice Diane M. Kotmyer (RET.)      20.1

05/16/2024      Defendant 's Reply for issuance of a summons Commonwealth's Opposition to His Motion to Vacate the Judgement, Withdraw his Guilty Pleas, and Enter Pleas of Not Guilty Pursuant to G.L.C. 278, 29D      21

09/03/2024      Defendant 's Motion To Issue Subpoena For Her Honor, Judge Kotmyer, Ret., And For Commonwealth To Cooperate By Providing Her Honor's Contact Information, To Attend Evidentiary Hearing And Be Examined      22

09/05/2024      Endorsement on Defendant's Motion To Issue Subpoena For Her Honor, Judge Kotmyer, Ret., And For Commonwealth To Cooperate By Providing Her Honor's Contact Information, To Attend Evidentiary Hearing And Be Examined. (#22.0):  
After hearing with argument, motion DENIED.  
Judge: Haggan, Hon. Patrick      23

09/05/2024      MEMORANDUM & ORDER:  
Decision And Order On Defendant's Motion To Withdraw Plea ORDER/  
For the foregoing reasons, the Defendant's Motion to Withdraw Plea is DENIED.  
Judge: Haggan, Hon. Patrick      23



09/09/2024      Notice of appeal filed.      24

09/09/2024      Applies To: Maldonado, Jr., Francisco (Defendant); Contartese, Esq., Adriana (Attorney) on behalf of Maldonado, Jr., Francisco (Defendant)      25

09/09/2024      Defendant 's Motion to Be Declared Indigent      25



09/27/2024      Endorsement on Motion to Be Declared Indigent, (#25.0): ALLOWED  
After review, motion Allowed to be declared indigent. Fees and costs related to production of copy of recorded proceedings is allowed. Request for transcripts is contingent on subsequent affidavit. (Haggan, J.) (Copy mailed to Def.)      25

12/09/2024      CD of Transcript of 09/03/2024 02:00 PM Hearing on Motion for New Trial received from Donna Dominguez (Transcript received via email)      25



**COMMONWEALTH OF MASSACHUSETTS**

**MIDDLESEX, ss.**

**SUPERIOR COURT  
CRIMINAL ACTION  
NO. 9481CR01148**

**COMMONWEALTH**

**vs.**

**FRANCISCO MALDONADO**

**DECISION AND ORDER ON DEFENDANT'S MOTION TO WITHDRAW PLEA**

On August 11, 1995, the defendant entered a guilty plea to certain indictments on the above-captioned case. This case is now before the court on the defendant's motion to withdraw his plea pursuant to G.L. c. 278, § 29D. That statute requires a defendant to receive full immigration warnings at the time of a change of plea, and allows a defendant to withdraw a change of plea at any time upon a showing that the warnings were not received *and* that his plea and conviction may have or have had one of the consequences enumerated in the warnings. "Absent a record that the Court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement." G.L. c. 278, § 29D.<sup>1</sup> In addition to reviewing the pleadings submitted by the parties, this court held a hearing on the motion on September 3, 2024.

In support of his motion, the defendant includes the relevant docket entries that do not show any notation within the record that immigration warnings were given. At the hearing, the

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<sup>1</sup> This language comes from the statute as amended in 1978 and in effect at the time of the defendant's plea. This statute was amended to its current version which states in relevant part, "Absent an official record or a contemporaneously written record kept in the court file that the court provide the advisement as prescribed in this section...the defendant shall be presumed not to have received advisement." G.L. c. 278, § 29D.



parties agreed that there was no notation in the docket indicating that the immigration warnings were given and the parties agreed that any recordings of the plea proceeding from 1995 no longer existed. The defendant also submitted an affidavit of immigration counsel, an affidavit of the defendant, and correspondence from the U.S. Department of Homeland Security/U.S. Citizenship and Immigration Services essentially establishing the consequence of exclusion from re-admission to the United States as a result of the convictions resulting from the defendant's plea to these indictments. In its opposition to the defendant's motion to withdraw his plea, the Commonwealth submitted a sworn affidavit of the judge who conducted the plea hearing (Affidavit of Justice Diane M. Kottmyer (Ret.), Paper No. 20.1).

In its request to deny the motion, the Commonwealth cites *Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459 (2001) as the controlling case for the issues presented by this motion. Similar to the case at bar, in *Ciampa*, the defendant tendered a plea in 1983. Based upon subsequent immigration consequences more than a decade later, the defendant filed a motion to withdraw his guilty plea pursuant to G.L. c. 278, § 29D on the grounds that he was not provided "alien warnings" at the plea hearing. 51 Mass. App. Ct. at 459. Upon the submission of affidavits of both the defendant and his plea counsel asserting that no immigration warnings had been given<sup>2</sup>, and following a determination that there was an absence in the docket of any reference to immigration warnings and that any recordings or transcripts of the plea hearing had been destroyed, the Commonwealth submitted an affidavit of the retired plea hearing judge that set

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<sup>2</sup> In the case at bar, the defendant did not submit an affidavit of plea counsel. At the hearing on this motion, counsel for the defendant averred that attempts were made to elicit an affidavit from plea counsel, but this was not possible due to health issues impacting mental capacity to produce such a document. The Commonwealth did not contest this assertion and the court credits defense counsel's representation. Additionally, the defendant's affidavit does not specifically aver that immigration warnings were not given, but instead states: "When I did my plea, if I had known that my guilty plea may have the consequence of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States, I would not have made the plea." Defendant Affidavit Paragraph 10.

forth his custom and practice to administer the “alien warning” as a matter of routine when accepting guilty pleas. *Id.* at 460-461.

In *Ciampa*, which has been cited repeatedly and remains good law at present, the Appeals Court held that a “plea judge’s statement that it was his usual practice to administer the warnings to all defendants, constitutes a ‘record’ within the meaning of G.L. c. 267, § 29D, and that the presumption no longer applies.” 51 Mass. App. at 462. The *Ciampa* court then addressed whether a plea judge’s affidavit was sufficient for the Commonwealth to establish a record adequate to support a finding that the warnings were given stating:

[A] judge’s statement of past practice must include the following information:  
(a) that it was customary practice of the plea judge to administer the warnings;  
(b) when the customary practice was instituted and whether it was in effect at the time of the hearing; (c) that the advisement consisted of all three warnings, given conformably with the language set forth in G.L. c. 278, § 29D; and  
(d) that the advisement was given to all defendants.”  
*Id.* at 463.

The case was remanded to the trial court for further proceedings in accordance with the new standard.

In the case at bar, there is no doubt that the affidavit submitted by plea judge satisfies the requirements prescribed by *Ciampa* to establish a “record” within the meaning of G.L. c. 278, § 29D that the immigration warnings were given. Furthermore, in meeting the requirements of a plea judge affidavit as defined in *Ciampa*, the affidavit of the plea judge in this case constitutes a record adequate to support a finding that the warnings were given in this case. Asserting that *Ciampa* was an erroneous decision by the Appeals court that was never directly affirmed by an SJC case, and relying upon G.L. c. 221, § 29, the defendant asks this court to find that the record is insufficient to support a finding that immigration warnings were given in compliance with G.L. c. 278, § 29D and allow the motion to withdraw his plea. In the alternative, the defendant

asks this court to hold an evidentiary hearing and allow testimony of the plea judge on the issue of why the warnings she avers she gave the defendant were not recorded in the docket.

In this court's view, the defendant's reliance on G.L. c. 221, § 29 is misplaced. That statute titled "Records: Duty of Justices to Inspect," states, "The justices of the several courts shall inspect the doings of the clerks from time to time, and shall see that the records are made up seasonably and kept in good order; and if the records are left incomplete for more than six consecutive months, such neglect unless caused by illness or casualty shall be adjudged a forfeiture of the bond of the clerk." The defendant essentially suggests that this statute imposes a mandatory duty on every judge who takes a plea to ensure that the docket accurately reflects all of the warnings provided by the court, and that a judge's failure to do so should result in a presumption that an omitted warning was not provided. The defendant provided no case, nor could this court find a case, where this statute was applied to a motion to vacate a plea. Furthermore, the language of the statute requiring inspection "from time to time" and the "records are made up seasonably and kept in good order" belies that suggestion that it establishes a mandatory procedure by which a plea judge in *every* case subsequently inspects the docket to ensure accuracy. Additionally, the stated consequence "if the records are left incomplete for more than six consecutive months" is solely related to the bond of the clerk. The statute mentions no consequence related to any record pursuant to G.L. c. 278, § 29D. Therefore, G.L. c. 221, § 29 is not applicable to this case and does not warrant allowance of the motion to withdraw the defendant's plea. Additionally, the court declines to find, as the defendant requests, that *Ciampa* is no longer good law that would apply to this case.

As an alternative to allowing the motion on the papers the defendant moves for an evidentiary hearing and for a subpoena to issue to the plea judge. "A judge may make the ruling

based solely on the affidavits and must hold an evidentiary hearing only if the affidavits or the motion itself raises a 'substantial issue' that is supported by a 'substantial evidentiary showing.' *Commonwealth v. Scott*, 467 Mass. 336, 344 (2014) quoting *Commonwealth v. Stewart*, 383 Mass. 253, 260 (1981). At the hearing during argument, counsel for the defendant was unable to persuade this court that any relevant information would be established through the testimony of the plea judge. The primary question counsel seeks to pose is why the plea judge did not specifically check the docket to confirm that it adequately reflected the warnings she gave to this defendant. According to the plea judge's affidavit, she had no specific memory of the plea in this case and instead relied upon her consistent custom and practice of taking pleas during the relevant time. It is therefore illogical to presume that she would even be able to recall why she did not inspect the specific docket. Furthermore, as this court finds that there is no requirement that a judge inspect the docket for accuracy at the conclusion of every plea, this line of questioning would be irrelevant. The motion for an evidentiary hearing is therefore DENIED.

Pursuant to G.L. c. 278, § 29D and *Commonwealth v. Ciampa*, 51 Mass. App. Ct. 459 (2001), the court finds that there is an adequate record that the immigration warnings were given by the plea judge, and thus finds that the warnings were in fact given. Therefore, the defendant's motion must be denied.

**ORDER**

For the foregoing reasons, the Defendant's Motion to Withdraw Plea is DENIED.

  
Patrick M. Haggan  
Justice of the Superior Court

September 5, 2024