

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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DAR NO. \_\_\_\_\_  
APPEALS COURT NO. 2022-P-1054

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COMMONWEALTH

v.

JAMES KIPTANUI

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DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

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FEBRUARY 2023

## REQUEST FOR DIRECT APPELLATE REVIEW

The defendant, James Kiptanui, requests that the Supreme Judicial Court (SJC) consider his appeal on direct appellate review. As grounds therefore, the defendant asserts that his appeal raises an important question about the proper resolution of claims brought pursuant to *Padilla v. Kentucky*, 559 U.S. 356 (2010). In recent years, many judges have added a new question to their plea colloquies. These judges ask defense counsel if they have advised their client about potential immigration consequences. The question does not ask counsel to detail the advice they provided to their client. It simply calls for a yes or no answer.

There is nothing inherently wrong with this question. The problem arises when counsel's affirmative response to this question is subsequently relied upon by the judge as the basis for denying a *Padilla* claim. An affirmative response to this question provides no insight into the specific advice that counsel provided to the defendant. The only thing that can be gleaned from an affirmative response is the fact that counsel provided some degree of immigration advice to the defendant. This advice may have been inaccurate or insufficient. An affirmative

response to the question says nothing about the adequacy of counsel's advice.

Yet judges are now using an affirmative response to the question as a basis for concluding that counsel provided constitutionally adequate advice about the immigration consequences of pleading guilty. The instant case is a prime example. The defendant is a refugee who pleaded guilty to a violent offense (assault and battery with a dangerous weapon). Counsel was therefore obligated to provide the specific immigration advice detailed by this Court in *Commonwealth v. Lavrinenko*, 473 Mass. 42 (2015). The defendant's evidence filed in support of his *Padilla* claim strongly indicated that counsel did not provide this advice. The judge nevertheless concluded that counsel must have provided this advice because, during the plea colloquy, the judge asked counsel if he had advised the defendant about "possible immigration consequences" and counsel answered in the affirmative.

The Court should address this flawed rationale before it spreads any further. The basis of most *Padilla* claims is not that counsel failed to have any discussion regarding immigration consequences; it is that counsel's advice on this topic was inadequate or

inaccurate. Ineffective counsel generally has no awareness of the inadequacy or inaccuracy of their immigration advice at the time of the plea colloquy. Lacking knowledge of their error, counsel is naturally going to respond in the affirmative when the judge asks them if they advised the defendant about possible immigration consequences. Thus, an affirmative response to this question cannot be treated as proof that counsel provided constitutionally competent advice.

#### STATEMENT OF PRIOR PROCEEDINGS

The Lawrence District Court issued two separate complaints against the defendant in 2017. The first complaint charged the defendant with assault and battery on a household member. The second complaint charged the defendant with assault and battery with a dangerous weapon. Both complaints stemmed from the same incident. The defendant pleaded guilty to both charges on September 5, 2018. The judge imposed a suspended sentence of two years in the house of correction and placed the defendant on probation for two years.

The defendant filed a motion to withdraw his plea on October 27, 2020. As grounds therefore, the

defendant argued that his attorney failed to provide constitutionally adequate advice about the immigration consequences of pleading guilty. The judge held a hearing on the motion on January 20, 2022.<sup>1</sup> She issued a written decision denying the defendant's motion on January 31, 2022. The defendant filed a timely notice of appeal.

The defendant's appeal was docketed in the Appeals Court on March 10, 2022. The defendant filed his brief shortly thereafter. The Commonwealth subsequently moved to stay the appeal and asked the court to remand the case to the trial court so that the judge could clarify her ruling. The defendant joined the Commonwealth's request for a remand. The Appeals Court allowed this request.

On remand, the parties filed a joint motion to reconsider. The joint motion asked the judge to make specific factual findings regarding the immigration advice that counsel provided to the defendant. The parties agreed that specific factual findings were necessary but disputed what those findings should be.

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<sup>1</sup> The judge who heard the motion was the same judge who took the defendant's plea.

A hearing on the motion to reconsider was held on August 24, 2022, and the judge took the matter under advisement. The judge issued another written decision denying the defendant's motion to withdraw his plea on September 19, 2022. The defendant again filed a timely notice of appeal.

#### STATEMENT OF FACTS

The following facts are taken from the transcript of the plea hearing, the documents submitted in support of the defendant's motion to withdraw his plea, and the two written decisions issued by the judge.

##### A. The Defendant's History in the United States.

The defendant was born in Kenya on October 2, 1986. His family were members of the Kalenjin tribe. In 1997, the defendant's father ran for political office. Kenyans from the rival Kikuyu tribe were not pleased with this development. They stormed the business owned by the defendant's father and burned it to the ground. They also beat the defendant's father and threatened him with a machete. In 1999, the violence worsened. An angry mob chased the defendant's father after he sought protection from the local police. He narrowly escaped with his life and fled to

the United States shortly thereafter. He applied for and was granted asylum in 2000. The defendant and his siblings were granted refugee status and reunited with their father in the United States in 2004. The defendant was seventeen years old at the time.

The defendant initially lived in Dayton, Ohio, with his family when he arrived in the United States. He moved to Boston in 2012. The defendant's mother and father were living in East Boston at the time of his plea. The same was true of his brother and sister. The defendant has no family or friends left in Kenya.

B. The Instant Case.

In 2017, the defendant was charged with a single count of assault and battery on a household member and a single count of assault and battery with a dangerous weapon. The charges were brought via separate complaints but they stemmed from the same incident. This incident took place on June 1, 2016, in Lawrence. The defendant's girlfriend alleged that the defendant punched her in the face and placed a knife against her neck.

The defendant was arraigned on May 3, 2017, and the court appointed counsel to represent him. The defendant negotiated a plea bargain and pleaded guilty

to both charges on September 5, 2018. During the plea colloquy, the judge had the following exchange with counsel:

JUDGE: And, counsel, you've had a chance to review the elements, penalties, any potential defenses or possible immigration consequences?

COUNSEL: Yes, your honor.

Pursuant to the plea bargain, the judge imposed a suspended sentence of two years in the house of correction and placed the defendant on probation for two years.<sup>2</sup>

C. The Removal Proceedings.

In June 2018, an officer with Immigration and Customs Enforcement (ICE) notified the defendant that ICE intended to deport him to Kenya based on a 2012 conviction out of Ohio for grand theft of a motor vehicle. The defendant received notice of ICE's intent to deport him prior to his guilty plea in the instant case. Removal proceedings were formally initiated against the defendant in March 2019 and he was taken into ICE custody. The removal case against the

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<sup>2</sup> A copy of the plea transcript is included in the appendix to this application at pages 42 to 51.



defendant remains ongoing. He has been held in ICE custody for the past three and a half years.

D. The Defendant's Motion to Withdraw his Plea.

The defendant filed a motion to withdraw his plea from the instant case in October 2020. As grounds therefore, the defendant argued that his attorney failed to provide him with constitutionally adequate advice regarding the immigration consequences of pleading guilty. The defendant asserted that counsel did not inquire into his immigration status and thus was unaware that the defendant is both a noncitizen and a refugee. Relying on *Commonwealth v. Lavrinenko*, 473 Mass. 42 (2015), the defendant argued that counsel had a duty to advise the defendant that pleading guilty would leave him with virtually no chance of obtaining an adjustment of status in immigration court if he were placed into removal proceedings.<sup>3</sup> An adjustment of status is a type of relief from removal

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<sup>3</sup> The defendant also argued that counsel had a duty to advise the defendant that pleading guilty would lead to presumptively mandatory deportation. The defendant relied on *Commonwealth v. Dejesus*, 468 Mass. 174 (2014), to support this argument. The defendant later abandoned this argument after acknowledging that the absence of this advice did not result in prejudice.

that is uniquely available to refugees like the defendant.

To provide evidentiary support for his motion, the defendant submitted an affidavit from plea counsel. In his affidavit, counsel stated that he had no recollection of how he advised the defendant with respect to the immigration consequences of pleading guilty. However, counsel also acknowledged that he was unaware of the defendant's lack of citizenship. He stated that his standard practice is to ask his clients about their citizenship when he reviews the bail questionnaire with them. He retrieved the bail questionnaire from the defendant's case and realized that the citizenship question was left blank.

The judge held a non-evidentiary hearing on the defendant's motion on January 20, 2022. She took the motion under advisement at the close of the hearing.

E. The Judge's First Decision.

The judge denied the defendant's motion in a written decision issued on January 31, 2022.<sup>4</sup> She discredited the defendant's affidavit and concluded that counsel adequately advised the defendant

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<sup>4</sup> The judge's first decision is included in the appendix to this application at pages 40 to 41.

regarding the immigration consequences of pleading guilty. On appeal, the defendant argued that there was no evidentiary basis for the judge to conclude that counsel provided the specific advice required by *Lavrinenko* because counsel himself acknowledged that he was unaware of the defendant's immigration status.

The defendant filed his brief with the Appeals Court on March 14, 2022. The Commonwealth did not file a brief in response but instead moved to stay the appeal so that the judge could clarify her ruling. The defendant joined the Commonwealth's motion and the Appeals Court remanded the case to the trial court.

F. The Judge's Second Decision.

The defendant and the Commonwealth filed a joint motion to reconsider in the trial court. The parties asked the judge to make specific factual findings as to how counsel advised the defendant with respect to the immigration consequences of pleading guilty. The parties further asked the judge to make a legal determination as to whether counsel's advice was constitutionally adequate. Though the parties agreed on the questions that needed to be answered by the judge, they did not agree on the answers to those questions.

A hearing on the joint motion to reconsider was held on August 24, 2022. The defendant argued that counsel could not have provided the specific advice required by *Lavrinenko* because counsel acknowledged that he was unaware of the defendant's immigration status. The judge took the matter under advisement after the hearing.

The judge issued another decision denying the defendant's motion on September 19, 2022.<sup>5</sup> The judge again concluded that counsel provided constitutionally adequate advice regarding the immigration consequences of pleading guilty. To support this conclusion, the judge highlighted the fact that she asked counsel at the colloquy whether he advised the defendant about any possible immigration consequences and counsel responded in the affirmative.

#### ISSUE OF LAW RAISED BY THE APPEAL

The defendant's appeal raises an important question regarding the proper resolution of claims based on *Padilla v. Kentucky*, 559 U.S. 356 (2010). Many judges have recently added a new question to their plea colloquies. These judges are asking defense

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<sup>5</sup> A copy of the judge's second decision is included in the appendix at pages 36 to 39.

counsel whether he or she has advised the defendant about possible immigration consequences. The question here is whether judges can rely upon counsel's affirmative response to this question as the basis for denying a subsequent *Padilla* claim.

This issue is properly preserved for appeal. As described above, the defendant based his *Padilla* claim on counsel's failure to provide the specific advice required by *Lavrinenko*. The judge concluded that counsel must have provided this advice because, at the plea colloquy, the judge asked counsel if he had advised the defendant about possible immigration consequences and counsel answered in the affirmative.

#### ARGUMENT IN SUPPORT OF THE DEFENDANT'S POSITION

This Court has repeatedly held that defense counsel has a constitutional duty to provide specific advice regarding the immigration consequences of pleading guilty. See *Commonwealth v. Dejesus*, 468 Mass. 174, 181 (2014) (counsel obligated to advise non-citizen that pleading guilty to aggravated felony will trigger presumptively mandatory deportation); *Commonwealth v. Lavrinenko*, 473 Mass. 42, 62 (2015) (counsel obligated to advise refugee client that pleading guilty to violent offense will drastically

reduce availability of discretionary relief from removal); *Commonwealth v. Clarke*, 460 Mass. 30, 48 n.20 (2011) (recognizing counsel's duty to "advise her client of the likelihood of specific and dire immigration consequences that might arise" from pleading guilty).

In an attempt to ensure that defense counsel has provided this advice, many judges have adopted the practice of asking counsel at the plea colloquy whether they advised the defendant about possible immigration consequences.<sup>6</sup> There is nothing inherently wrong with this question. However, a problem arises when the defendant subsequently raises a *Padilla* claim and the judge treats counsel's affirmative response to this question as conclusive proof that counsel provided constitutionally adequate advice. Contrary to this rationale, counsel's affirmative response to this question provides no insight into the adequacy of their advice.

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<sup>6</sup> Partial transcripts from ten different plea hearings are included in the appendix from pages 52 to 84. These plea hearings involved different judges and are from different courts throughout the Commonwealth. The presiding judge asked the question in some form at each of these hearings.

Before delving into how an affirmative response to this question should be treated for purposes of a *Padilla* claim, it is first important to understand the question itself. The question broadly asks defense counsel if they advised the defendant about possible immigration consequences. In the instant case, the judge asked the question in the following form:

JUDGE: And, counsel, you've had a chance to review the elements, penalties, any potential defenses or possible immigration consequences?

In other cases, the question has been specifically focused on immigration consequences:

JUDGE: To the extent there are any potential immigration consequences, have you gone over them [with the defendant?]

The question invites a yes or no answer from counsel. It does not ask counsel to detail the specific advice that they provided to the defendant. The question appears to have arisen in the wake of the Supreme Court's decision in *Padilla*. However, judges are not required to ask the question. In fact, the question appears nowhere in Rule 12 of the Massachusetts Rules of Criminal Procedure.

The issue here is not with the question itself, but with the probative value of counsel's affirmative

response to the question when the defendant subsequently raises a *Padilla* claim. Some judges are relying on counsel's affirmative response as conclusive proof that counsel provided constitutionally adequate advice. This is precisely what the judge did in the instant case. Despite evidence to the contrary, the judge concluded that counsel must have provided the specific advice required by *Lavrinenko* because counsel answered in the affirmative when the judge asked him if he advised the defendant about possible immigration consequences at the plea colloquy.<sup>7</sup>

This rationale is illogical. At the heart of every *Padilla* claim is the assertion that counsel was unaware of the inadequacy of their advice at the time

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<sup>7</sup> The case of *Commonwealth v. Jose Guerrero*, Bristol County Superior Court No. 1573CR00122, presents another example of a judge employing this rationale to deny a defendant's *Padilla* claim. The defendant in *Guerrero* submitted an affidavit from plea counsel in which he admitted that he did not advise the defendant that pleading guilty would result in presumptively mandatory deportation. The judge discredited counsel's affidavit because, during the plea colloquy, the judge asked counsel if he advised the defendant about adverse immigration consequences and counsel responded in the affirmative. A copy of the *Guerrero* decision is included in the appendix at pages 85 to 97. The Appeals Court affirmed the judge's decision and the defendant filed an application for further appellate review that remains pending.



of the plea colloquy. Lacking awareness of their error, ineffective counsel is naturally going to respond in the affirmative when the judge asks if they advised the defendant about possible immigration consequences. Even counsel who has provided inaccurate or woefully deficient advice is going to respond in the affirmative because, at the time of the plea colloquy, they see no fault in the adequacy of their advice. Thus, it is entirely illogical to treat counsel's affirmative response to the question as proof that counsel provided constitutionally adequate advice.

An additional problem with the judge's rationale is the potential scope of its application. Taken to its illogical extent, this rationale would strike a fatal blow to every *Padilla* claim. As noted above, every *Padilla* claim is based on an assertion that counsel provided inaccurate or insufficient advice regarding the immigration consequences of pleading guilty. Now imagine if this assertion could be discredited in every case simply because defense counsel provided an affirmative response when asked if they advised the defendant regarding possible immigration consequences. No *Padilla* claim would ever

be successful as long as counsel provided an affirmative response to the judge's question.

Counsel's affirmative response to the question solely establishes that counsel had some discussion with the defendant about possible immigration consequences. If the defendant claims that counsel said nothing at all about potential immigration consequences, then counsel's affirmative response to the question would cut against the defendant's claim. Yet, as noted above, many *Padilla* claims are not premised on a claim of complete non-advisement. These claims are instead based on an assertion that counsel discussed potential immigration consequences but did so in a way that was constitutionally inadequate. See *Dejesus*, 468 Mass. at 176-177 (counsel's advice inadequate because he simply advised defendant that pleading guilty would render him eligible for deportation); *Lavrinenko*, 473 Mass. at 54 (counsel's advice inadequate despite having provided defendant with standard warning on immigration consequences); *Commonwealth v. Sylvain*, 466 Mass. 422, 437-438 (2013) (counsel ineffective because he advised defendant that pleading guilty was unlikely to result in deportation).

That is precisely the type of *Padilla* claim made by the defendant here. The defendant acknowledged that counsel advised him that pleading guilty might result in immigration consequences. Despite this acknowledgement, the defendant claimed that counsel was ineffective because he failed to provide the specific advice required by *Lavrinenko*. The assertion was not that counsel failed to provide any advice regarding immigration consequences; it was that counsel's advice was insufficient. Counsel's affirmative response to the judge's question at the plea colloquy simply corroborated the fact that counsel provided some advice to the defendant regarding immigration consequences. It did not establish that counsel's advice was constitutionally adequate.

The determination as to whether counsel's advice was constitutionally adequate requires a narrow factual inquiry. The factual question here is whether counsel provided the specific advice required by *Lavrinenko*. In other cases, it is whether counsel provided the specific advice required by *Dejesus*. These narrow questions cannot be answered by simply relying upon counsel's assertion at the colloquy that

they advised the defendant regarding possible immigration consequences. The question asked by the judge ("Have you advised the defendant regarding the possible immigration consequences of pleading guilty?") is simply too broad to provide any insight into how counsel actually advised the defendant. In fact, if this same question was asked of counsel at a post-conviction evidentiary hearing, counsel's affirmative response would be similarly irrelevant as it would provide no insight into the specific content of counsel's advice.

Instead of focusing on counsel's affirmative response at the colloquy, judges should consider the actual evidence submitted by the parties. In particular, judges should look to plea counsel's affidavit. This affidavit often provides specific insight into how counsel advised the defendant regarding immigration consequences. In the instant case, counsel provided an affidavit in which he acknowledged that he was unaware of the defendant's lack of citizenship. This averment strongly supports the conclusion that counsel did not provide the advice required by *Lavrinenko*. Of course, the judge is not required to reach this conclusion. However, she should

not dismiss this conclusion simply because counsel answered in the affirmative at the plea colloquy when the judge asked him whether he advised the defendant regarding possible immigration consequences. If the judge has questions about how counsel specifically advised the defendant, then she should hold an evidentiary hearing and have counsel testify on the subject. Conducting a true factual inquiry into the specific advice that counsel provided to the defendant is the best way to resolve *Padilla* claims. It is certainly fairer to resolve *Padilla* claims in this way rather than summarily denying such claims simply because counsel asserted that he advised the defendant regarding possible immigration consequences at the plea colloquy.

#### WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

It is critically important that *Padilla* claims be resolved correctly as the defendant's future in the United States is often at stake. Despite this importance, the lower courts have had a tendency to deny *Padilla* claims by employing unduly simplistic rationale. For instance, judges have denied *Padilla* claims simply because the defendant received the judicial immigration warning required by G. L. c. 278,

s. 29D. See *Commonwealth v. Martinez*, 86 Mass. App. Ct. 545, 551-552 (2014); *Commonwealth v. Broomfield*, 85 Mass. App. Ct. 1104 (unpublished decision) (Mar. 6, 2014); *Commonwealth v. Mendez*, 98 Mass. App. Ct. 1120 (unpublished decision) (Nov. 23, 2020); *Commonwealth v. Dossantos*, 101 Mass. App. Ct. 1112 (unpublished decision) (June 30, 2022). The SJC has repeatedly rejected this rationale and implored judges to consider the specific advice that counsel provided to the defendant. See *Lavrinenko*, 473 Mass. at 54; *Dejesus*, 468 Mass. at 177 n.3; *Clarke*, 460 Mass. at 48 n.20.

The rationale employed by the judge here is destined to be the next line of reasoning that some judges will rely upon in denying *Padilla* claims. Under this rationale, counsel's assertion at the colloquy that they advised the defendant regarding possible immigration consequences can be treated as proof that counsel provided constitutionally adequate advice. The SJC should reject this rationale before it spreads any further.

CONCLUSION

For the reasons stated above, the Court should allow the defendant's application for direct appellate review.

Respectfully Submitted,  
JAMES KIPTANUI  
By His Attorney,

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Date: 2/10/23

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# 1718CR001579 Commonwealth vs. Kiptanui, James

- Case Type:
- Criminal
- Case Status:
- Open
- File Date
- 04/13/2017
- DCM Track:
- 
- Initiating Action:
- A&B ON FAMILY / HOUSEHOLD MEMBER c265 §13M(a)
- Status Date:
- 06/06/2018
- Case Judge:
- 
- Next Event:
- 

[All Information](#) [Party](#) [Charge](#) [Event](#) [Docket](#) [Disposition](#)

## Party Information

**Kiptanui, James**  
- Defendant

[Alias](#)

### Party Attorney

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[More Party Information](#)

## Party Charge Information

- **Kiptanui, James**
- - Defendant
- **Charge # 1:**  
**265/13M/B-0 - Misdemeanor - more than 100 days incarceration** A&B ON FAMILY / HOUSEHOLD MEMBER c265 §13M(a)
- Original Charge
- 265/13M/B-0 A&B ON FAMILY / HOUSEHOLD MEMBER c265 §13M(a)  
(Misdemeanor - more than 100 days incarceration)
- Amended Charge
- 

### Charge Disposition

Disposition Date  
Disposition  
09/05/2018  
Guilty - Plea

## Events

<a href="#">Date</a>	<a href="#">Session</a>	<a href="#">Location</a>	<a href="#">Type</a>	<a href="#">Result</a>
05/03/2017 08:00 AM	Arraignment Session	Courtroom 1	Arraignment	Held-Arraignment/58A Danger Request
06/12/2017 08:00 AM	Pretrial Session	Courtroom 4	Pretrial Hearing	Event Continued

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Result</u>
08/08/2017 08:00 AM	Pretrial Session Courtroom 4		Pretrial Hearing	Reschedule of Hearing
09/06/2017 08:00 AM	Pretrial Session Courtroom 4		Pretrial Hearing	Reschedule of Hearing
10/19/2017 08:00 AM	Pretrial Session Courtroom 4		Pretrial Hearing	Held
12/18/2017 08:00 AM	Jury Trial Session Courtroom 5		Jury Trial (CR)	Reschedule of Hearing
02/01/2018 08:00 AM	Jury Trial Session Courtroom 5		Jury Trial (CR)	Reschedule of Hearing
03/06/2018 08:00 AM	Jury Trial Session Courtroom 5		Jury Trial (CR)	Defendant defaulted-FI to Appear
06/06/2018 08:00 AM	Arraignment Session Courtroom 1		Default Removal Hearing	Held - Default Removed - CR
07/05/2018 08:00 AM	Pretrial Session Courtroom 4		Pretrial Hearing	Held
08/02/2018 09:00 AM	Pretrial Session Courtroom 4		Discovery Compliance & Jury Election	Held
09/05/2018 09:00 AM	Jury Trial Session Courtroom 5		Jury Trial (CR)	Not Held - Disposed by plea
09/04/2020 09:00 AM	Administrative Session - Report to Probation		Probation Until	Defendant defaulted-FI to Appear
11/15/2021 09:00 AM	Arraignment Session Courtroom 1		Motion Hearing (CR)	Reschedule of Hearing
12/15/2021 02:00 PM	Virtual Court Session		Motion Hearing (CR)	Reschedule of Hearing
01/20/2022 09:00 AM	Virtual Court Session		Motion Hearing (CR)	Held - under advisement
02/25/2022 09:00 AM	Virtual Court Session		Hearing to Review Status	Review Completed
08/24/2022 09:00 AM	Trial Session Courtroom 4		Motion Hearing (CR)	Held - under advisement
09/21/2022 09:00 AM	Arraignment Session Courtroom 1		Hearing to Review Status	

### Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>Image Avail.</u>
04/11/2017	Complaint issued with a summons.	
04/13/2017	Event Scheduled Event: Arraignment Date: 05/03/2017 Time: 08:00 AM Result: Held-Arraignment/58A Hearing	
05/03/2017	Event Scheduled Event: Pretrial Hearing Date: 06/12/2017 Time: 08:00 AM Result: Event Continued	
05/03/2017	Event Resulted The following event: Arraignment scheduled for 05/03/2017 08:00 AM has been resulted as follows: Result: Held-Arraignment/58A Hearing	
06/12/2017	Event Resulted The following event: Pretrial Hearing scheduled for 06/12/2017 08:00 AM has been resulted as follows: Result: Event Continued	
06/15/2017	Event Scheduled Event: Pretrial Hearing Date: 08/08/2017 Time: 08:00 AM Result: Reschedule of Hearing	

<u>Docket Date</u>	<u>Docket Text</u>	<u>Image Avail.</u>
08/08/2017	Event Resulted The following event: Pretrial Hearing scheduled for 08/08/2017 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: Defendant's request without objection	
09/06/2017	Event Resulted The following event: Pretrial Hearing scheduled for 09/06/2017 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
09/06/2017	Appearance filed for the purpose of Case in Chief by Judge Hon. Lynn C Rooney.	
09/06/2017	Joined with docket # 1718cr2123	
09/08/2017	Legal Counsel Fee Waived.	
10/19/2017	Event Resulted Judge: Gaffney, Hon. Kevin J The following event: Pretrial Hearing scheduled for 10/19/2017 08:00 AM has been resulted as follows: Result: Held	
12/18/2017	Event Resulted Judge: Rooney, Hon. Lynn C The following event: Jury Trial (CR) scheduled for 12/18/2017 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
02/01/2018	Event Resulted Judge: Broadbent, Hon. Holly V The following event: Jury Trial (CR) scheduled for 02/01/2018 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
03/06/2018	Event Resulted Judge: Gaffney, Hon. Kevin J The following event: Jury Trial (CR) scheduled for 03/06/2018 08:00 AM has been resulted as follows: Result: Defendant defaulted-FI to Appear	
03/06/2018	Default Warrant ordered to issue. Judge: Gaffney, Hon. Kevin J	
03/19/2018	Defendant is ordered committed without bail because DEFENDANT'S BAIL HAS BEEN REVOKED (276 s. 58) to Essex County House of Correction returnable for 06/06/2018 08:00 AM Default Removal Hearing; mittimus issued.  Court location of next event (if not this court): Further Orders:  Judge: Fortes, Hon. Stacey J	
04/30/2018	Habeas Corpus for prosecution issued to Middlesex County House of Correction returnable for 06/06/2018 08:00 AM Default Removal Hearing: Further Orders: PLEASE TRANSPORT DEFENDANT ON 6/6/18	
06/06/2018	Warrant recalled: Default Warrant cancelled on 06/06/2018 for Kiptanui, James	
06/06/2018	Event Resulted: Default Removal Hearing scheduled on: 06/06/2018 08:00 AM Has been: Held - Default Removed - CR Hon. Ernest L Sarason, Jr., Presiding Appeared: Staff:	
07/05/2018	Event Resulted: Pretrial Hearing scheduled on: 07/05/2018 08:00 AM Has been: Held Hon. Mark A Sullivan, Presiding Appeared: Staff:	
08/02/2018	Event Resulted: Discovery Compliance & Jury Election scheduled on: 08/02/2018 09:00 AM Has been: Held Hon. Michael A Uhlarik, Presiding Appeared: Staff:	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">Image Avail.</a>
09/05/2018	Charges Disposed:: Charge # 1 A&B ON FAMILY / HOUSEHOLD MEMBER c265 §13M(a) On: 09/05/2018 Judge: Hon. Lynn C Rooney Guilty - Plea	
09/05/2018	Event Resulted: Jury Trial (CR) scheduled on: 09/05/2018 09:00 AM Has been: Not Held - Disposed by plea Hon. Lynn C Rooney, Presiding Appeared: Staff:	
09/05/2018	One or more charges disposed by tender of plea. Judge: Rooney, Hon. Lynn C	
09/05/2018	Plea colloquy given. Judge: Rooney, Hon. Lynn C	
09/05/2018	Change of plea to Guilty entered. Judge: Rooney, Hon. Lynn C	
09/05/2018	Waiver of Jury Trial found after colloquy Judge: Rooney, Hon. Lynn C	
09/05/2018	Defendant warned pursuant to alien status, G.L. c. 278, § 29D. Judge: Rooney, Hon. Lynn C	
09/05/2018	Tender of plea filed and accepted by the Court.  Judge: Rooney, Hon. Lynn C	<a href="#">Image</a>
09/05/2018	THE COURT ORDERS IPAPP SUBSTANCE ABUSE EVALUATION MENTAL HEALTH EVALUATION STAY AWAY NO CONTACT	
02/19/2019	COURT ORDERS ALL MONIES OWED REMITTED - ALL OTHER TERMS STAND DEFENDANT MUST PAY FOR B.I.P. AND IPAAP PROGRAM	
02/19/2019	Defendant's motion to remit monies filed with the following, if any, supporting documents: affidavit in support of motion	<a href="#">Image</a>
09/04/2020	Event Resulted: Probation Until scheduled on: 09/04/2020 09:00 AM Has been: Defendant defaulted-FI to Appear Hon. Mark A Sullivan, Presiding	
09/04/2020	Warrant Issued: Straight Warrant issued on 09/04/2020 for Kiptanui, James	
10/27/2020	Defendant's motion to Dismiss filed with the following, if any, supporting documents: affidavit in support of motion	<a href="#">Image</a>
11/15/2021	Event Resulted: Motion Hearing (CR) scheduled on: 11/15/2021 09:00 AM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Lynn C Rooney, Presiding	
11/15/2021	HABE ISSUED TO STRAFFORD COUNTY HOUSE OF CORRECTIONS IN DOVER, NH	
12/15/2021	Event Resulted: Motion Hearing (CR) scheduled on: 12/15/2021 02:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Lynn C Rooney, Presiding	
12/15/2021	HABE ISSUED TO STRAFFORD COUNTY HOUSE OF CORRECTIONS IN DOVER, NH	
01/20/2022	Event Resulted: Motion Hearing (CR) scheduled on: 01/20/2022 09:00 AM Has been: Held - under advisement Hon. Lynn C Rooney, Presiding	
01/20/2022	Taken under advisement Judge: Rooney, Hon. Lynn C	
02/25/2022	Event Resulted: Hearing to Review Status scheduled on: 02/25/2022 09:00 AM Has been: Review Completed Hon. Lynn C Rooney, Presiding	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">Image Avail.</a>
03/09/2022	NOTICE OF THE ASSEMBLY OF THE RECORD ON APPEAL APPELLATE COURT ENTRY STATEMENT	<a href="#">Image</a>
08/24/2022	Docket report of court proceedings to date	<a href="#">Image</a>
08/24/2022	Event Resulted: Motion Hearing (CR) scheduled on: 08/24/2022 09:00 AM Has been: Held - under advisement Hon. Lynn C Rooney, Presiding	
08/24/2022	Taken under advisement	
09/22/2022	Written finding of Justice after motion for hearing received and filed. Court Order on Motion to Clarify Denial of Motion to Withdraw Guilty Plea	<a href="#">Image</a>
10/17/2022	Notice of appeal to the Appeals Court filed by the Defendant	<a href="#">Image</a>
10/28/2022	Notice of assembly of the record sent to the Appeals Court  Judge: Micale, Mark D	
11/02/2022	Notice of appeal to the Appeals Court filed by the Defendant	<a href="#">Image</a>

**Case Disposition**

<a href="#">Disposition</a>	<a href="#">Date</a>
Disposed by Plea	09/07/2018

# 1718CR002123 Commonwealth vs. Kiptanui, James

- Case Type:
- Criminal
- Case Status:
- Open
- File Date
- 05/17/2017
- DCM Track:
- 
- Initiating Action:
- A&B WITH DANGEROUS WEAPON c265 §15A(b)
- Status Date:
- 07/10/2018
- Case Judge:
- 
- Next Event:
- 

[All Information](#) [Party](#) [Charge](#) [Event](#) [Docket](#) [Disposition](#)

## Party Information

**Kiptanui, James**  
- Defendant

[Alias](#)

### Party Attorney

- Attorney
- Errico, Esq., Paul D
- Bar Code
- 697326
- Address
- Law Offices Of Paul D. Errico LLC
- 401 Andover St
- Suite 12
- North Andover, MA 01845
- Phone Number
- (978)725-5200
- Attorney
- Hooper, Jr., Esq., Mark Clinton
- Bar Code
- 563137
- Address
- law Office of Mark C Hooper jr
- 349 Essex St
- Lawrence, MA 01841
- Phone Number
- (978)423-1992

[More Party Information](#)

## Party Charge Information

- **Kiptanui, James**
- - Defendant
- Charge # 1:
- **265/15A/A-1 - Felony** A&B WITH DANGEROUS WEAPON c265 §15A(b)
- Original Charge
- 265/15A/A-1 A&B WITH DANGEROUS WEAPON c265 §15A(b) (Felony)
- Amended Charge
- 

### Charge Disposition

Disposition Date  
Disposition  
09/05/2018  
Guilty - Plea

**Events**

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Result</u>
06/12/2017 08:00 AM	Pretrial Session	Courtroom 4	Arraignment	Held-Arraignment/58A Danger Request
08/08/2017 08:00 AM	Pretrial Session	Courtroom 4	Pretrial Hearing	Not Held
09/06/2017 08:00 AM	Pretrial Session	Courtroom 4	Pretrial Hearing	Reschedule of Hearing
10/19/2017 08:00 AM	Pretrial Session	Courtroom 4	Pretrial Hearing	Held
12/18/2017 08:00 AM	Jury Trial Session	Courtroom 5	Jury Trial (CR)	Reschedule of Hearing
02/01/2018 09:00 AM	Trial Session	Courtroom 4	Jury Trial (CR)	Reschedule of Hearing
03/06/2018 08:00 AM	Jury Trial Session	Courtroom 5	Jury Trial (CR)	Defendant defaulted-FI to Appear
06/06/2018 08:00 AM	Arraignment Session	Courtroom 1	Default Removal Hearing	Held - Default Removed - CR
07/05/2018 08:00 AM	Pretrial Session	Courtroom 4	Pretrial Hearing	Held
08/02/2018 09:00 AM	Video Conference Session	Courtroom 4	Discovery Compliance & Jury Election	Held
09/05/2018 09:00 AM	Jury Trial Session	Courtroom 5	Jury Trial (CR)	Not Held - Disposed by plea
09/04/2020 09:00 AM	Administrative Session - Report to Probation		Probation Until	Defendant defaulted-FI to Appear
11/15/2021 09:00 AM	Arraignment Session	Courtroom 1	Motion Hearing (CR)	Reschedule of Hearing
12/15/2021 02:00 PM	Virtual Court Session		Motion Hearing (CR)	Reschedule of Hearing
01/20/2022 02:00 PM	Virtual Court Session		Motion Hearing (CR)	Held - under advisement
02/25/2022 09:00 AM	Virtual Court Session		Hearing to Review Status	Review Completed
08/24/2022 09:00 AM	Trial Session	Courtroom 4	Motion Hearing (CR)	Held - under advisement
09/21/2022 09:00 AM	Arraignment Session	Courtroom 1	Hearing to Review Status	

**Docket Information**

<u>Docket Date</u>	<u>Docket Text</u>	<u>Image Avail.</u>
05/17/2017	Event Scheduled Event: Arraignment Date: 06/12/2017 Time: 08:00 AM Result: Held-Arraignment/58A Hearing	
06/12/2017	Event Resulted The following event: Arraignment scheduled for 06/12/2017 08:00 AM has been resulted as follows: Result: Held-Arraignment/58A Hearing	
06/15/2017	Event Scheduled Event: Pretrial Hearing Date: 08/08/2017 Time: 08:00 AM Result: Not Held	
08/08/2017	Event Resulted The following event: Pretrial Hearing scheduled for 08/08/2017 08:00 AM has been resulted as follows: Result: Not Held Reason: To same date as companion case	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">Image Avail.</a>
09/06/2017	Event Resulted The following event: Pretrial Hearing scheduled for 09/06/2017 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
09/06/2017	Appearance filed for the purpose of Case in Chief by Judge Hon. Lynn C Rooney.	
09/06/2017	Joined with docket # 1718cr1579	
10/19/2017	Event Resulted Judge: Gaffney, Hon. Kevin J The following event: Pretrial Hearing scheduled for 10/19/2017 08:00 AM has been resulted as follows: Result: Held	
12/18/2017	Event Resulted Judge: Rooney, Hon. Lynn C The following event: Jury Trial (CR) scheduled for 12/18/2017 08:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
02/01/2018	Event Resulted Judge: Broadbent, Hon. Holly V The following event: Jury Trial (CR) scheduled for 02/01/2018 09:00 AM has been resulted as follows: Result: Reschedule of Hearing Reason: On Order of the Court	
03/06/2018	Event Resulted Judge: Gaffney, Hon. Kevin J The following event: Jury Trial (CR) scheduled for 03/06/2018 08:00 AM has been resulted as follows: Result: Defendant defaulted-FI to Appear	
03/06/2018	Default Warrant ordered to issue. Judge: Gaffney, Hon. Kevin J	
03/19/2018	Defendant is ordered committed without bail because DEFENDANT'S BAIL HAS BEEN REVOKED (276 s. 58) to Essex County House of Correction returnable for 06/06/2018 08:00 AM Default Removal Hearing; mittimus issued.  Court location of next event (if not this court): Further Orders: HELD WITHOUT BAIL FOR UP TO 90 DAYS  Judge: Fortes, Hon. Stacey J	
06/06/2018	Event Resulted: Default Removal Hearing scheduled on: 06/06/2018 08:00 AM Has been: Held - Default Removed - CR Hon. Ernest L Sarason, Jr., Presiding Appeared: Staff:	
06/06/2018	Appearance filed for the purpose of Case in Chief by Judge Hon. Ernest L Sarason, Jr..	
06/06/2018	Defendant is ordered committed to Essex County House of Correction in lieu of having posted bail in the amount ordered: (\$30,000.00 Bond; \$3,000.00 Cash), returnable for 07/05/2018 08:00 AM Pretrial Hearing; mittimus issued.  Court location of next event (if not your court): Further Orders: DO NOT TRANSPORT VIDEO CONFERENCE  Judge: Sarason, Jr., Hon. Ernest L	
06/06/2018	Reasons for ordering bail.  Judge: Sarason, Jr., Hon. Ernest L	<a href="#">Image</a>
07/05/2018	Event Resulted: Pretrial Hearing scheduled on: 07/05/2018 08:00 AM Has been: Held Hon. Lynn C Rooney, Presiding Appeared: Staff:	



<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">Image Avail.</a>
07/05/2018	Habeas Corpus for prosecution issued to Essex County House of Correction returnable for 08/02/2018 09:00 AM Discovery Compliance & Jury Election: Further Orders: *****DO NOT TRANSPORT VIDEO CONFERENCE*****  Judge: Rooney, Hon. Lynn C	
07/10/2018	Warrant recalled: Default Warrant cancelled on 07/10/2018 for Kiptanui, James	
07/10/2018	Defendant is ordered committed to Essex County House of Correction in lieu of having posted bail in the amount ordered: (\$30,000.00 Bond; \$3,000.00 Cash), returnable for 08/02/2018 09:00 AM Discovery Compliance & Jury Election; mittimus issued.  Court location of next event (if not your court): Further Orders: DO NOT TRANSPORT - VIDEO CONFERENCE  Judge: Mehta, Hon. Tejal	
07/12/2018	Petition for review of bail filed Originating Court: Lawrence District Court Receiving Court: Essex County Case Number: 1877BP00479 ;	
07/13/2018	Reasons for ordering bail.  07/13/2018 Bail petition denied. Judge: Drechsler, Hon. Thomas  Judge: Drechsler, Hon. Thomas Drechsler, Hon. Thomas  Judge: Rooney, Hon. Lynn C	
08/02/2018	Event Resulted: Discovery Compliance & Jury Election scheduled on: 08/02/2018 09:00 AM Has been: Held Hon. Michael A Uhlarik, Presiding Appeared: Staff:	
08/06/2018	Finding of the Superior Court on Bail Review Petition under G.L. c.276, §58.  07/13/2018 Bail petition denied. Judge: Drechsler, Hon. Thomas	
08/06/2018	Defendant is ordered committed to Essex County House of Correction in lieu of having posted bail in the amount ordered: (\$30,000.00 Bond; \$3,000.00 Cash), returnable for 09/05/2018 09:00 AM Jury Trial (CR); mittimus issued.  Court location of next event (if not your court): Further Orders:  Judge: Rooney, Hon. Lynn C	
09/05/2018	Charges Disposed:: Charge # 1 A&B WITH DANGEROUS WEAPON c265 §15A(b) On: 09/05/2018 Judge: Hon. Lynn C Rooney Guilty - Plea	
09/05/2018	Event Resulted: Jury Trial (CR) scheduled on: 09/05/2018 09:00 AM Has been: Not Held - Disposed by plea Hon. Lynn C Rooney, Presiding Appeared: Staff:	
09/05/2018	One or more charges disposed by tender of plea. Judge: Rooney, Hon. Lynn C	
09/05/2018	Plea colloquy given. Judge: Rooney, Hon. Lynn C	
09/05/2018	Change of plea to Guilty entered. Judge: Rooney, Hon. Lynn C	
09/05/2018	Waiver of Jury Trial found after colloquy Judge: Rooney, Hon. Lynn C	
09/05/2018	Defendant warned pursuant to alien status, G.L. c. 278, § 29D. Judge: Rooney, Hon. Lynn C	

<a href="#">Docket Date</a>	<a href="#">Docket Text</a>	<a href="#">Image Avail.</a>
09/05/2018	Tender of plea filed and accepted by the Court.  Judge: Rooney, Hon. Lynn C	<a href="#">Image</a>
09/05/2018	THE COURT ORDERS IPAPP SUBSTANCE ABUSE EVALUATION AND TREATMENT AS NECESSARY MENTAL HEALTH EVALUATION AND TREATMENT AS NECESSARY STAY AWAY NO CONTACT	
02/19/2019	COURT ORDERS ALL MONIES OWED REMITTED - ALL OTHER TERMS STAND DEFENDANT MUST PAY FOR B.I.P. AND IPAAP PROGRAM	
02/19/2019	Defendant's motion to Remit monies filed with the following, if any, supporting documents: affidavit in support of motion	<a href="#">Image</a>
09/04/2020	Event Resulted: Probation Until scheduled on: 09/04/2020 09:00 AM Has been: Defendant defaulted-FI to Appear Hon. Mark A Sullivan, Presiding	
09/04/2020	Warrant Issued: Straight Warrant issued on 09/04/2020 for Kiptanui, James	
09/21/2020	WARRANT NOTICE RETURNED	
10/27/2020	Defendant's motion to Dismiss filed with the following, if any, supporting documents: affidavit in support of motion, certif. of service on opposing party Original Copy Filed in 1718CR001579	<a href="#">Image</a>
11/15/2021	Event Resulted: Motion Hearing (CR) scheduled on: 11/15/2021 09:00 AM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Lynn C Rooney, Presiding	
11/15/2021	HABE ISSUED TO STRAFFORD COUNTY HOUSE OF CORRECTIONS IN DOVER, NH	
12/15/2021	Event Resulted: Motion Hearing (CR) scheduled on: 12/15/2021 02:00 PM Has been: Reschedule of Hearing For the following reason: On Order of the Court Hon. Lynn C Rooney, Presiding	
01/20/2022	Event Resulted: Motion Hearing (CR) scheduled on: 01/20/2022 02:00 PM Has been: Held - under advisement Hon. Lynn C Rooney, Presiding	
01/31/2022	Written finding of Justice after motion for hearing received and filed. Defendant's Motion to vacate - Denied  Judge: Rooney, Hon. Lynn C	<a href="#">Image</a>
01/31/2022	Taken under advisement Judge: Rooney, Hon. Lynn C	
02/25/2022	Event Resulted: Hearing to Review Status scheduled on: 02/25/2022 09:00 AM Has been: Review Completed Hon. Lynn C Rooney, Presiding	
03/09/2022	NOTICE OF THE ASSEMBLY OF THE RECORD ON APPEAL APPELLATE COURT ENTRY STATEMENT	<a href="#">Image</a>
08/24/2022	Docket report of court proceedings to date	<a href="#">Image</a>
08/24/2022	Event Resulted: Motion Hearing (CR) scheduled on: 08/24/2022 09:00 AM Has been: Held - under advisement Hon. Lynn C Rooney, Presiding	
08/24/2022	Taken under advisement	
09/22/2022	Written finding of Justice after motion for hearing received and filed. Court Order on Motion to Clarify Denial of Motion to Withdraw Guilty Plea	<a href="#">Image</a>
10/17/2022	Notice of appeal to the Appeals Court filed by the Defendant	<a href="#">Image</a>
10/28/2022	Notice of assembly of the record sent to the Appeals Court  Judge: Micale, Mark D	

Case Disposition

<a href="#">Disposition</a>	<a href="#">Date</a>
Disposed by Plea	09/10/2018

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

LAWRENCE DISTRICT COURT  
DOCKET NOS. 1718CR1579  
1718CR2123

COMMONWEALTH

VS.

JAMES KIPTUANI

**COURT'S ORDER ON  
MOTION TO CLARIFY DENIAL OF MOTION TO WITHDRAW GUILTY  
PLEA**

Procedural Background

On September 5, 2018, the defendant tendered a guilty plea to one count of assault and battery on a family or household member and one count of assault and battery by means of a dangerous weapon. He received a two year sentence suspended for a period of two years, with several conditions. The defendant is currently in default on this probation due to being held in federal custody.

The defendant was placed in removal proceedings on June 1, 2018 because of a conviction for an aggravated felony on February 9, 2012 out of Montgomery County in Ohio. The defendant was provided notice of that on June 1, 2018. *Exhibit 1*. Plea counsel submitted an affidavit stating that he had no recollection of discussing immigration issues with the defendant, that he was unaware that the defendant is not a citizen, does not remember the defendant advising him that he was not a citizen, and that his standard practice was to inquire of his clients as to the status of his/her citizenship

when reviewing the bail questionnaire<sup>1</sup> and also review the immigration warnings on the back of the green sheet before any tender of plea was offered, regardless of whether the client was a citizen or not. The defendant's affidavit states that although Attorney Errico warned him that his plea might result in immigration consequences, they did not have any additional discussion regarding potential immigration consequences. Both the tender of plea sheet and the docket reflect that the Court provided the appropriate immigration warnings to the defendant at the time of his plea. Additionally, it is the Court's practice to both warn the defendant directly of immigration consequences as well as inquire of defense counsel if he had the opportunity to discuss any potential immigration consequences with the defendant; if counsel had indicated that he had not had that conversation, the Court would not have proceeded with the plea.

### Rulings of Law

A motion to withdraw a guilty plea based upon ineffective assistance of counsel is governed by the same standard as other claims concerning ineffective assistance of counsel. See Commonwealth v. Walker, 443 Mass. 867, 871 cert. denied, 546 U.S. 1021 (2005). In Padilla v Kentucky, 559 U.S. 356 (2010), the United States Supreme Court held that the sixth amendment to the United States Constitution requires an attorney for a criminal defendant to provide advice about the risk of deportation arising from a guilty plea. In Commonwealth v. Clark, 460 Mass 30 (2011), the SJC held that Padilla applies retroactively to cases on collateral review. This conclusion was rejected by the Supreme Court in Chaidez v. United States, 133 S.Ct. 1103 (2013). But in Commonwealth v.

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<sup>1</sup> The Superior Court's July 13, 2018 denial of the defendant's petition for review of bail notes that the defendant is a "legal resident/non-citizen"; although plea counsel did not represent the defendant at the bail review, this occurred one month after plea counsel was appointed to represent the defendant and counsel's affidavit states that it was his usual practice to review the bail questionnaire.

Sylvain, 456 Mass 182 (2010), the SJC stated that they intended to give broader retroactive effect to Padilla as a matter of state law and thus defendants whose state law convictions were final after April 1, 1997, may attack their convictions collaterally on Padilla grounds. The Court went on to hold that defense counsel has a duty to provide noncitizen defendants with accurate advice regarding the deportation consequences of pleading guilty or being convicted at trial and this right also applies retroactively to cases on collateral review. Sylvain at 436. *See also* Commonwealth v Marinho, 464 Mass 115 (2013).

To establish a claim of ineffective assistance of counsel, the defendant has the burden of demonstrating that the behavior of plea counsel fell measurably below that which might be expected from an ordinary fallible lawyer. The Supreme Judicial Court has said that “the failure of a criminal defense attorney to make a reasonable inquiry of the client regarding his or her citizenship and immigration status is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis.” Commonwealth v Lavrinenko, 473 Mass 42, 53 (2015); Commonwealth v Clark, 460 Mass 30 (2011).

Plea counsel in this case indicated by way of affidavit that it was his standard practice to ask clients about their citizenship status and the Court inquired of counsel at the time of the plea whether he had the opportunity to discuss any potential immigration consequences with the defendant and he answered in the affirmative. Perhaps most importantly, in this particular instance, the defendant was on notice that he was already in immigration proceedings due to a prior guilty plea that he had tendered. If the defendant chose not to share that information with his attorney, the consequences of that can not be the basis for an ineffective assistance of counsel claim. Although it certainly is the

obligation of counsel to make inquiry, no attorney is clairvoyant. Further, counsel cannot be expected to take into consideration critical information that the defendant chose not to share. I credit both counsel's affidavit that it was his standard practice to inquire of his clients regarding their immigration status and his affirmative answer to the Court that he did discuss immigration consequences with the defendant. Thus, because I find that the defendant has not established the first prong of *Saferian*, the motion to withdraw his guilty plea is **Denied**.

**SO ORDERED.**

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Lynn C. Rooney  
Associate Justice

Dated: September 19, 2022

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

LAWRENCE DISTRICT COURT  
DOCKET NOS. 1718CR2123  
1718CR1579

COMMONWEALTH

VS.

JAMES KIPTANUI

**COURT'S ORDER ON DEFENDANT'S  
MOTION TO VACATE**

After hearing, the Court **Denies** the Defendant's Motion to Vacate.

**Procedural Background**

On September 5, 2018, the defendant tendered a guilty plea to one count of assault and battery on a household or family member and one count of assault and battery by means of a dangerous weapon. He received a two year sentence suspended for a period of two years, with several conditions. The defendant is currently in default on this probation due to being held in federal custody.

The defendant was placed in removal proceedings on June 1, 2018 because of a conviction for an aggravated felony on February 9, 2012 out of Montgomery County in Ohio. The defendant was provided notice of that on June 1, 2018. *Exhibit 1.* Plea counsel has submitted an affidavit indicating he has no recollection of discussing immigration issues with the defendant; the defendant's affidavit states that although Attorney Errico warned him that his plea might result in immigration consequences, they did not have any additional discussion regarding potential immigration consequences. The defendant states that he was unaware of the possibility that a tender of plea in these

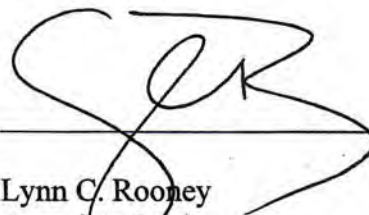


cases might affect his immigration status. Both the tender of plea sheet and the docket reflect that the Court provided the appropriate immigration warnings to the defendant at the time of his plea.

Rulings of Law

The defendant maintains that he did not understand the mandatory nature of the immigration consequences attendant to his guilty plea. I do not credit this statement. The defendant had been served notice from the U.S. Department of Homeland Security on June 1, 2018 that he was placed "In Removal Proceedings" because of an aggravated felony conviction from 2012. To state that he was unaware of any potential immigration consequences only three months later strains credulity. All of the paperwork reflects that the immigration warnings were provided and it is the practice of the Court to advise every defendant of the warnings when accepting a plea thus I have no question that the defendant was advised of his warnings. The defendant concedes that Attorney Errico informed him that a plea might result in immigration consequences; I do not credit the defendant's assertion that there was no further discussion regarding immigration consequences or that he was unaware that he could be subject to deportation at the time of the plea given that he was already in removal proceedings. Because I find that the defendant has not demonstrated that he was unaware of the potential immigration consequences, the defendant's motion is **Denied**.

**SO ORDERED.**

  
\_\_\_\_\_  
Lynn C. Rooney  
Associate Justice

Dated: January 31, 2022

Pages: 1-7  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
ESSEX, SS. LAWRENCE DISTRICT COURT

\* \* \* \* \*  
COMMONWEALTH OF MASSACHUSETTS  
v. Docket Nos. 1718CR2123  
JAMES KIPTANUI 1718CR1579  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE LYNN ROONEY

APPEARANCES:

For the Commonwealth:  
Essex County District Attorney's Office  
188 Street  
Newburyport, Massachusetts 01950  
By: Mary Eileen Spano, Assistant District Attorney

For the Defendant:  
Law Offices Of Paul D. Errico LLC  
401 Andover Street, Suite 12  
North Andover, Massachusetts 01845  
By: Paul Errico, Esq.

Lawrence, Massachusetts  
September 5, 2018

Cambridge Transcriptions  
Approved Court Transcriber

1 (Court called to order.)

2 THE CLERK: James Kiptanu (sic).

3 MR. ERRICO: Kiptanui, Your Honor, (indiscernible; low  
4 volume at 10:37:33). Good morning, Your Honor. Paul  
5 Errico on behalf of James Kiptanui.

6 THE COURT: Good morning.

7 THE CLERK: These matters have been joined.

8 (Defendant sworn.)

9 THE COURT: Sir, I do have two green sheets here, both  
10 of which have your signatures on the back of them?

11 MR. KIPTANUI: Yes, Your Honor.

12 THE COURT: And you had a chance to review them with  
13 your attorney before you signed them?

14 MR. KIPTANUI: Yes, Your Honor.

15 THE COURT: All right, and the agreement is, on both  
16 matters, guilty findings would enter. Would be a two-year  
17 sentence suspended for a period of two years, that you  
18 enter and complete the intimate partners awareness  
19 prevention program, have a substance abuse evaluation, any  
20 follow-up treatment, as well as a mental health evaluation  
21 and any follow-up treatment. There'd also be a stay away  
22 and no contact with the named victim. Is that your  
23 understanding?

24 MR. KIPTANUI: Yes, Your Honor.

25 THE COURT: Okay. I'm going to ask the Assistant

1 District Attorney to tell me the facts, and then I'll have  
2 some questions to ask you. All right? Commonwealth?

3 MS. SPANO: Thank you, Your Honor. For the record,  
4 Mary Eileen Spano for the Commonwealth. On June 1, 2016  
5 officers were dispatched to 55 Bowdoin Street in Lawrence  
6 for the report of a domestic incident. Upon arrival,  
7 officers spoke to a Margaret Nanyonga (phonetic) who stated  
8 that her boyfriend of seven months, the Defendant before  
9 you, had punched her in the face, they had struggled in the  
10 garage area of the condo, and that the Defendant had  
11 threatened her with a knife towards her neck stating that  
12 he was going to cut her. He then fled the area. Officers  
13 did note that she did have an injury above her eye. Those  
14 are essentially the facts, Judge.

15 THE COURT: And is this -- is it a 2016 case?

16 MS. SPANO: It is, and it was originally dismissed and  
17 then reissued.

18 THE COURT: Okay, all right. So with respect to those  
19 facts, are those facts, true?

20 MR. KIPTANUI: Yes, Your Honor.

21 THE COURT: Can you tell me your name?

22 MR. KIPTANUI: James Kiptanui.

23 THE COURT: How old are you?

24 MR. KIPTANUI: I'm 31, Your Honor.

25 THE COURT: How far did you go in school?

1 MR. KIPTANUI: Four-year college.

2 THE COURT: As you're here today, are you aware of  
3 suffering from any mental health issues?

4 MR. KIPTANUI: No, Your Honor.

5 THE COURT: Within the last 24 hours, have you had any  
6 drugs, alcohol, or medications?

7 MR. KIPTANUI: No, Your Honor.

8 THE COURT: Have you had enough time to speak with  
9 your attorney about these cases?

10 MR. KIPTANUI: Yes, Your Honor.

11 THE COURT: Are you satisfied with his advice?

12 MR. KIPTANUI: Yes, Your Honor.

13 THE COURT: And, Counsel, you've had a chance to  
14 review the elements, penalties, any potential defenses or  
15 possible immigration consequences?

16 MR. ERRICO: Yes, Your Honor.

17 THE COURT: Sir, you do need to understand that by  
18 admitting here today, you are giving up several rights.  
19 You're giving up your right to have a jury trial or a trial  
20 in front of a judge. You're giving up your right to  
21 testify on your own behalf, to present other evidence on  
22 your own behalf, or to cross-examine any witness the  
23 Commonwealth might call. Do you understand that?

24 MR. KIPTANUI: Yes, Your Honor.

25 THE COURT: Has anyone forced you, threatened you,

1 promised you anything to get you to admit to these facts or  
2 give up any of these rights?

3 MR. KIPTANUI: No, Your Honor.

4 THE COURT: And, sir, I do have to advise you that if  
5 you are not a United States citizen, these admissions could  
6 result in deportation, exclusion from admission to the  
7 United States, or denial of naturalization as a citizen,  
8 and it is practically inevitable that one or more of those  
9 things will happen if either of the offenses to which you  
10 are pleading here today is one under federal law that  
11 presumptively mandates removal from the United States. Do  
12 you understand that?

13 MR. KIPTANUI: Yes, Your Honor.

14 THE COURT: Do you need any more time to speak with  
15 your attorney?

16 MR. KIPTANUI: No, Your Honor.

17 THE COURT: Do you have any questions for me?

18 MR. KIPTANUI: No, Your Honor.

19 THE COURT: Understanding everything that I've just  
20 explained to you, sir, do you still wish to admit to these  
21 facts and accept this probation?

22 MR. KIPTANUI: Yes, Your Honor.

23 THE COURT: All right. I find a factual basis for the  
24 plea and that it's knowing and voluntary, and I'll adopt  
25 the tender and impose those sentences.

1           THE CLERK: (Indiscernible; low volume at 10:41:23).  
2   Sir, as to your plea of guilty, as to both of these  
3   matters, Docket 1579 and 2123 of 2017, the Court does find  
4   you guilty. It would be two years house of correction.  
5   However, that will be suspended for that same two-year  
6   period or until September 4, 2020. As to each of the  
7   cases, you are to have a substance abuse evaluation and any  
8   treatment deemed necessary, a mental health evaluation and  
9   any treatment deemed necessary, and stay away/no contact  
10   with the victim in these matters. There will be a \$90  
11   victim witness fee as to Docket 2123, and there would be a  
12   \$65 monthly probation supervision fee, sir. The Court will  
13   give you the full two years to make the payments -- to make  
14   all your payments. There was an attorney fee, there was a  
15   default fee, and now this \$90 victim witness fee. So the  
16   Court will give you the full two years to make those  
17   payments. However, you have to pay \$65 every month towards  
18   the probation supervision. Okay? So you need to sign the  
19   contract before you leave, sir.

20           THE COURT: Good luck, sir.

21           MR. KIPTANUI: Thank you.

22           MR. ERRICO: Thank you, Your Honor.

23   (Court adjourned.)  
24  
25



**The Commonwealth of Massachusetts**  
**ADMINISTRATIVE OFFICE OF THE TRIAL COURT**  
**Office of Transcription Services (OTS)**  
Two Center Plaza  
Boston, Massachusetts 02108

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**TODAY'S DATE:** October 16, 2020  
**CASE NAME:** Commonwealth v. Kiptanui  
**JUDGE:** Lynn Rooney

**TRANSCRIBER NAME:** Cambridge Transcriptions  
**DOCKET NO.:** 1718CR2123  
**RECORDING DATE:** September 5, 2018  
**TRANSCRIPT VOLUME:** 1 OF 1

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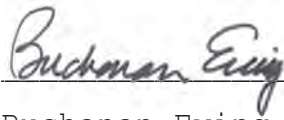
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13 the parties to the action in which this hearing was taken,  
14 and further that we are not financially nor otherwise  
15 interested in the outcome of the action.

16  
17 

18 Buchanan Ewing

19 10/16/2020

20 Date

21  
22 75 Hancock Street, Cambridge, MA 02139

23 617-547-5690

24 buck@ctran.com  
25

<p><b>A</b></p> <p><b>above-entitled</b> 7:5</p> <p><b>abuse</b> 2:19 6:7</p> <p><b>accept</b> 5:21</p> <p><b>accurate</b> 7:3</p> <p><b>action</b> 7:13,15</p> <p><b>adjourned</b> 6:23</p> <p><b>Administrative</b> 7:8</p> <p><b>admission</b> 5:6</p> <p><b>admissions</b> 5:5</p> <p><b>admit</b> 5:1,20</p> <p><b>admitting</b> 4:18</p> <p><b>adopt</b> 5:24</p> <p><b>advice</b> 4:11</p> <p><b>advise</b> 5:4</p> <p><b>agreement</b> 2:15</p> <p><b>alcohol</b> 4:6</p> <p><b>Andover</b> 1:16 1:17</p> <p><b>APPEARAN...</b> 1:10</p> <p><b>Approved</b> 1:24 7:1</p> <p><b>area</b> 3:10,12</p> <p><b>arrival</b> 3:6</p> <p><b>Assistant</b> 1:13 2:25</p> <p><b>attorney</b> 1:13 2:13 3:1 4:9 5:15 6:14</p> <p><b>Attorney's</b> 1:12</p> <p><b>audio</b> 7:3</p> <p><b>aware</b> 4:2</p> <p><b>awareness</b> 2:18</p> <p><b>away/no</b> 6:9</p>	<p><b>C</b></p> <p><b>call</b> 4:23</p> <p><b>called</b> 2:1</p> <p><b>Cambridge</b> 1:23 7:1,7,11,22</p> <p><b>case</b> 3:15</p> <p><b>cases</b> 4:9 6:7</p> <p><b>certify</b> 7:2,7,11</p> <p><b>chance</b> 2:12 4:13</p> <p><b>citizen</b> 5:5,7</p> <p><b>CLERK</b> 2:2,7 6:1</p> <p><b>college</b> 4:1</p> <p><b>Commonwealth</b> 1:2,5,11 3:2,4 4:23</p> <p><b>complete</b> 2:18</p> <p><b>compliance</b> 7:8</p> <p><b>condo</b> 3:10</p> <p><b>consequences</b> 4:15</p> <p><b>contact</b> 2:22 6:9</p> <p><b>contract</b> 6:19</p> <p><b>correction</b> 6:4</p> <p><b>counsel</b> 4:13 7:12</p> <p><b>County</b> 1:12</p> <p><b>Court</b> 1:3,24 2:1 2:6,9,12,15,25 3:15,18,21,23 3:25 4:2,5,8,11 4:13,17,25 5:4 5:14,17,19,23 6:3,12,16,20 6:23 7:1,4,9</p> <p><b>Crane</b> 7:4</p> <p><b>cross-examine</b> 4:22</p> <p><b>cut</b> 3:12</p>	<p><b>defenses</b> 4:14</p> <p><b>denial</b> 5:7</p> <p><b>deportation</b> 5:6</p> <p><b>Directive</b> 7:9</p> <p><b>dismissed</b> 3:16</p> <p><b>dispatched</b> 3:5</p> <p><b>District</b> 1:3,12 1:13 3:1 7:4</p> <p><b>Docket</b> 1:6 6:3 6:11</p> <p><b>domestic</b> 3:6</p> <p><b>drugs</b> 4:6</p> <p><b>E</b></p> <p><b>Edward</b> 7:4</p> <p><b>Eileen</b> 1:13 3:4</p> <p><b>either</b> 5:9</p> <p><b>elements</b> 4:14</p> <p><b>employed</b> 7:12</p> <p><b>enter</b> 2:16,18</p> <p><b>Errico</b> 1:15,18 2:3,5 4:16 6:22</p> <p><b>Esq</b> 1:18 7:4</p> <p><b>essentially</b> 3:14</p> <p><b>Essex</b> 1:3,12</p> <p><b>evaluation</b> 2:19 2:20 6:7,8</p> <p><b>evidence</b> 4:21</p> <p><b>Ewing</b> 7:18</p> <p><b>exclusion</b> 5:6</p> <p><b>Exhibits</b> 1:1</p> <p><b>explained</b> 5:20</p> <p><b>eye</b> 3:13</p>	<p><b>forced</b> 4:25</p> <p><b>foregoing</b> 7:2,8</p> <p><b>Format</b> 7:9</p> <p><b>Four-year</b> 4:1</p> <p><b>front</b> 4:20</p> <p><b>full</b> 6:13,16</p> <p><b>further</b> 7:7,11 7:14</p> <p><b>G</b></p> <p><b>garage</b> 3:10</p> <p><b>give</b> 5:2 6:13,16</p> <p><b>giving</b> 4:18,19 4:20</p> <p><b>go</b> 3:25</p> <p><b>going</b> 2:25 3:12</p> <p><b>Good</b> 2:4,6 6:20</p> <p><b>green</b> 2:9</p> <p><b>guilty</b> 2:16 6:2,4</p> <p><b>H</b></p> <p><b>Hancock</b> 7:22</p> <p><b>happen</b> 5:9</p> <p><b>health</b> 2:20 4:3 6:8</p> <p><b>hearing</b> 1:9 7:13</p> <p><b>Honor</b> 2:3,4,11 2:14,24 3:3,20 3:24 4:4,7,10 4:12,16,24 5:3 5:13,16,18,22 6:22</p> <p><b>HONORABLE</b> 1:9</p> <p><b>hours</b> 4:5</p> <p><b>house</b> 6:4</p>	<p><b>J</b></p> <p><b>James</b> 1:7 2:2,5 3:22</p> <p><b>joined</b> 2:7</p> <p><b>judge</b> 3:14 4:20</p> <p><b>June</b> 3:4</p> <p><b>jury</b> 4:19</p> <p><b>K</b></p> <p><b>Kiptanu</b> 2:2</p> <p><b>Kiptanui</b> 1:7 2:3 2:5,11,14,24 3:20,22,22,24 4:1,4,7,10,12 4:24 5:3,13,16 5:18,22 6:21</p> <p><b>knife</b> 3:11</p> <p><b>knowing</b> 5:24</p> <p><b>L</b></p> <p><b>law</b> 1:15 5:10</p> <p><b>Lawrence</b> 1:3 1:20 3:5 7:4</p> <p><b>leave</b> 6:19</p> <p><b>LLC</b> 1:15</p> <p><b>low</b> 2:3 6:1</p> <p><b>luck</b> 6:20</p> <p><b>LYNN</b> 1:9</p> <p><b>M</b></p> <p><b>MA</b> 7:22</p> <p><b>mandates</b> 5:11</p> <p><b>Margaret</b> 3:7</p> <p><b>Mary</b> 1:13 3:4</p> <p><b>Massachusetts</b> 1:2,5,13,17,20</p> <p><b>matter</b> 7:5</p> <p><b>matters</b> 2:7,16 6:3,10</p> <p><b>medications</b> 4:6</p> <p><b>mental</b> 2:20 4:3 6:8</p> <p><b>month</b> 6:17</p> <p><b>monthly</b> 6:12</p> <p><b>months</b> 3:8</p> <p><b>morning</b> 2:4,6</p> <p><b>N</b></p> <p><b>name</b> 3:21</p>
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Pages: 1-10  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
MIDDLESEX, SS. MARLBOROUGH DISTRICT COURT  
\* \* \* \* \*  
\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 2121CR000002  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE MEGHAN S. SPRING

APPEARANCES:

For the Commonwealth:  
Middlesex County District Attorney's Office  
15 Commonwealth Avenue  
Woburn, Massachusetts 01801  
By: Tamisha Claude, Assistant District Attorney

For the Defendant:  
Cornelius E. Dailey, Jr., Attorney at Law  
1253 Worcester Road  
PO Box 1493  
Framingham, Massachusetts 01701  
By: Cornelius E. Dailey, Jr., Esq.

Marlborough, Massachusetts  
September 2, 2021

Cambridge Transcriptions  
Approved Court Transcriber

1           THE COURT: In the last 24 hours, have you had any  
2 drugs, alcohol, or medication?

3           MR. [REDACTED]: No.

4           THE COURT: Have you had enough time to speak with  
5 your attorney about this case?

6           MR. [REDACTED]: Yes.

7           THE COURT: Are you satisfied with his advice?

8           MR. [REDACTED]: Yes.

9           THE COURT: Counsel, have you gone over other avenues  
10 besides admitting to sufficient facts, as well as the  
11 maximum penalties and the immigration consequences?

12          MR. DAILEY: Yes.

13          THE COURT: Sir, by admitting to sufficient facts  
14 today, you are giving up your right to have a trial before  
15 a judge or a jury. If you had a jury trial, you and your  
16 attorney would pick six citizens of this county to sit and  
17 hear the evidence. The judge would give them the law.  
18 They would apply the facts and determine your guilt or  
19 innocence by unanimous verdict. Do you understand that you  
20 are giving up that right?

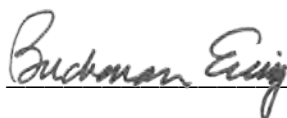
21          MR. [REDACTED]: Yes.

22          THE COURT: You're also giving up your right to have a  
23 trial in front of a judge. In that case, the judge would  
24 hear the facts, apply the law, and determine your guilt or  
25 innocence by him or herself. Do you understand that you're

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14       and further that we are not financially nor otherwise  
15       interested in the outcome of the action.  
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17       

18       Buchanan Ewing

19       2/03/2023

20       Date

21  
22       75 Hancock St, Cambridge, MA 02139

23       617-547-5690

24       buck@ctran.com  
25

Pages: 1-14  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
PLYMOUTH, SS. BROCKTON DISTRICT COURT  
\* \* \* \* \*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 2115CR000106  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE JEFFREY CLIFFORD

APPEARANCES:

For the Commonwealth:  
Plymouth County District Attorney's Office  
166 Main Street  
Brockton, Massachusetts 02301  
By: Perry Gans, Assistant District Attorney

For the Defendant:  
Law Office of D. Sean Noonan, Esq.  
1308 Belmont Street  
Brockton, Massachusetts 02301  
By: D. Sean Noonan, Esq.

Brockton, Massachusetts  
February 1, 2022

Cambridge Transcriptions  
Approved Court Transcriber

1 THE COURT: So now you've heard all of the facts,  
2 including the statement of correction or addition, if you  
3 will, by your attorney. Are those facts true?

4 MR. [REDACTED]: Yes.

5 THE COURT: Can you please state your full name, sir?

6 MR. [REDACTED]: [REDACTED].

7 THE COURT: Okay, and how old are you, sir?

8 MR. [REDACTED]: 35.

9 THE COURT: How far did you go in school?

10 MR. [REDACTED]: Twelfth grade.

11 THE COURT: Are you suffering from any sort of mental  
12 health issue?

13 MR. [REDACTED]: Nope.

14 THE COURT: In the last 24 hours, have you had any  
15 drugs, alcohol, or medication, including prescribed  
16 medication?

17 MR. [REDACTED]: No.

18 THE COURT: Okay. Have you had enough time to speak  
19 with your attorney about this case? Are you satisfied with  
20 his advice?

21 MR. [REDACTED]: Yes.

22 THE COURT: Counsel, have you reviewed the elements  
23 the maximum penalties, the possible defenses, the other  
24 choices besides pleading guilty, as well as any potential  
25 immigration consequences with your client?



1 MR. NOONAN: I have, Your Honor.

2 THE COURT: And sir, you understand, by admitting to  
3 these facts today, you are giving up several rights?

4 MR. [REDACTED]: Yes.

5 THE COURT: You have to say it out loud, sir.

6 MR. [REDACTED]: Yes.

7 THE COURT: You are giving up your right to have a  
8 trial before a jury or a judge. If you chose to go to  
9 trial, you are presumed innocent, meaning that the  
10 Commonwealth will be required to prove your guilt beyond a  
11 reasonable doubt. You would not have to do anything. More  
12 specifically, you could not be forced to testify against  
13 yourself. At trial, you would have the right to question  
14 any witness called by the Commonwealth against you, as well  
15 as the right to call witnesses or present evidence in your  
16 own defense. Do you understand that you have all of these  
17 rights and that you are giving them up by pleading guilty  
18 here today?

19 MR. [REDACTED]: Yes.

20 THE COURT: Has anyone forced you, threatened you, or  
21 promised you anything in return for you admitting to these  
22 facts today?

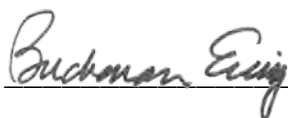
23 MR. [REDACTED]: No.

24 THE COURT: I am required to advise you, sir, that if  
25 you're not a United States citizen, this guilty plea may

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14       and further that we are not financially nor otherwise  
15       interested in the outcome of the action.  
16

17       

18       Buchanan Ewing

19       2/02/2023

20       Date

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23       617-547-5690

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25

Pages: 1-11  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
ESSEX, SS. LYNN DISTRICT COURT  
\* \* \* \* \*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 2213CR000940  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE INA R. HOWARD-HOGAN

APPEARANCES:

For the Commonwealth:  
Essex County District Attorney's Office  
121 Central Avenue  
Lynn, Massachusetts 01901  
By: Gina Del Rio Gazzo, Assistant District Attorney

For the Defendant:  
Satin Law Offices  
385 Broadway, Suite 202  
Revere, Massachusetts 02151  
By: Jay Paul Satin, Esq.

Lynn, Massachusetts  
January 11, 2023

Cambridge Transcriptions  
Approved Court Transcriber

1 THE COURT: Have you had enough time to speak with  
2 your attorney about this case?

3 MR. [REDACTED]: Yes.

4 THE COURT: Counsel, have you reviewed the elements,  
5 maximum penalties, possible defenses besides admitting to  
6 sufficient facts, as well as the immigration consequences,  
7 and the consequences of being on probation?

8 MR. SATIN: I have, Your Honor.

9 THE COURT: Mr. [REDACTED], you are asking this Court to  
10 consider a sentence that would require you to be on a  
11 probationary period. I need to inform you, if you were to  
12 violate that probation, on Count 1, the sentence would be a  
13 fine. On Count 2, you'd be sentenced to the house of  
14 correction for not more than six months. Do you understand  
15 that?

16 MR. [REDACTED]: Yes.

17 THE COURT: Has anyone forced you, threatened you, or  
18 promised you anything for you to admit to sufficient facts?

19 MR. [REDACTED]: No.

20 THE COURT: I also need to advise you that, if you're  
21 not a United States citizen, this admission may result in  
22 deportation, exclusion from admission to the United States,  
23 or denial of naturalization. Do you understand that?

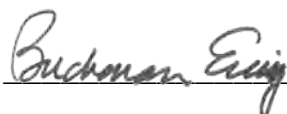
24 MR. [REDACTED]: Yes.

25 THE COURT: Do you need any more time to speak with

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5       proceedings in the above-entitled matter.  
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15       interested in the outcome of the action.  
16

17       

18       Buchanan Ewing

19       2/08/2023

20       Date

21  
22       75 Hancock St, Cambridge, MA 02139

23       617-547-5690

24       buck@ctran.com  
25

Pages: 1-10  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS. CHELSEA DISTRICT COURT  
\* \* \* \* \*  
\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 2114CR000706  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE JANE PRINCE

APPEARANCES:

For the Commonwealth:  
Suffolk County District Attorney's Office  
One Bulfinch Place  
Boston, Massachusetts 02114  
By: Kate L. Fraiman, Assistant District Attorney

For the Defendant:  
Zachary R. Barry, Attorney at Law  
3 Bessom Street  
Marblehead, Massachusetts 01945  
By: Zachary R. Barry, Esq.

Chelsea, Massachusetts  
May 31, 2022

Cambridge Transcriptions  
Approved Court Transcriber

1 THE COURT: Are you satisfied with his advice?

2 MR. [REDACTED]: Yes, Your Honor.

3 THE COURT: Counsel, have you reviewed the elements,  
4 maximum penalties, and other choices besides pleading  
5 guilty?

6 MR. BARRY: Yes, Your Honor.

7 THE COURT: And to the extent that there's any  
8 potential immigration consequences, have you gone over  
9 that?

10 MR. BARRY: Yes, Your Honor.

11 THE COURT: Okay. So, Mr. [REDACTED], you're giving up  
12 very important rights today. Namely, you're giving up your  
13 right to a jury trial. At that jury trial, you're presumed  
14 innocent unless and until the Commonwealth proves you  
15 guilty beyond a reasonable doubt as to each and every  
16 element of the offense. Do you understand that you're  
17 giving up your presumption of innocence?

18 MR. [REDACTED]: Yes, Your Honor.

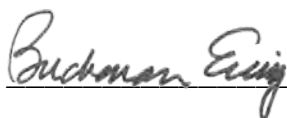
19 THE COURT: And so you're entitled to a jury trial.  
20 If you elected a jury trial, you, together with your  
21 attorney, would choose six members of the community who  
22 would have to decide unanimously whether or not the  
23 Commonwealth met its burden. Do you understand you're  
24 giving up your right to a jury trial?

25 MR. [REDACTED]: Yes, Your Honor.

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14       and further that we are not financially nor otherwise  
15       interested in the outcome of the action.  
16

17       

18       Buchanan Ewing

19       2/02/2023

20       Date

21  
22       75 Hancock St, Cambridge, MA 02139

23       617-547-5690

24       buck@ctran.com  
25



Pages: 1-18  
Exhibits: 0

COMMONWEALTH OF MASSACHUSETTS  
ESSEX, SS. LAWRENCE DISTRICT COURT  
\* \* \* \* \*  
\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 1618CR004443  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PROBABLY DISPOSITION  
BEFORE THE HONORABLE JOSEPH P. HURLEY

APPEARANCES:

For the Commonwealth:  
Essex County District Attorney's Office  
2 Appleton Street  
Lawrence, Massachusetts 01840  
By: Michelle A. Reid, Assistant District Attorney

For the Defendant:  
Law Office of Mark C. Hooper, Jr.  
349 Essex Street  
Lawrence, Massachusetts 01841  
By: Mark C. Hooper, Jr., Esq.

Lawrence, Massachusetts  
July 19, 2022

Cambridge Transcriptions  
Approved Court Transcriber

1           THE COURT:  -- but we're not going to require screens.  
2   If there was a change in your employment with the recovery  
3   house and if the reasons for that were drug use related,  
4   that would trigger a violation, perhaps, and conditions  
5   could be imposed then.

6           MR. [REDACTED]:  Understand, Your Honor.

7           THE COURT:  All right.  And you also understand that  
8   if you did violate the probation or get charged with  
9   another crime during the nine months that this continued  
10  without a finding could turn into a guilty --

11          MR. [REDACTED]:  I do, Your Honor.

12          THE COURT:  All right.  Okay, so by admitting to  
13  sufficient facts, you're giving up several rights and I  
14  need to go over those rights with you.

15          MR. [REDACTED]:  Yes, sir.

16          THE COURT:  Attorney Hooper, have you gone over other  
17  avenues besides admitting to sufficient facts, including  
18  maximum penalties and any potential integration  
19  consequences?

20          MR. HOOPER:  Yes, Your Honor.

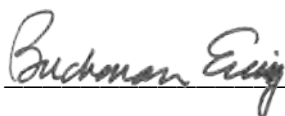
21          THE COURT:  All right.

22          Mr. [REDACTED], by your admission today, you're giving up  
23  your right to have a trial before a judge or a jury.  At a  
24  jury trial, you or your lawyer would pick six citizens of  
25  this county to hear the evidence, a judge would give them

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14       and further that we are not financially nor otherwise  
15       interested in the outcome of the action.  
16

17       

18       Buchanan Ewing

19       2/08/2023

20       Date

21  
22       75 Hancock St, Cambridge, MA 02139

23       617-547-5690

24       buck@ctran.com  
25

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COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS. BOSTON MUNICIPAL COURT  
DORCHESTER DIVISION

\* \* \* \* \*  
\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 1607CR3200  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE LISA ANN GRANT

APPEARANCES:  
For the Commonwealth:  
Suffolk County District Attorney's Office  
1A Everett Street  
Boston, Massachusetts 02128  
By: Brian Z. LeBlanc, Assistant District Attorney  
  
For the Defendant:  
Law Office of Christine M. Fosco  
400 Granite Avenue  
Milton, Massachusetts 02186  
By: Christine M. Fosco, Esq.

Dorchester, Massachusetts  
January 10, 2017

Cambridge Transcriptions  
Approved Court Transcriber

1 MR. [REDACTED]: Yes.

2 THE COURT: And sir, do you understand, as I stated  
3 before you are presumed innocent and the Commonwealth  
4 always bears the entire burden of proof in this case, but  
5 by admitting to sufficient facts today, you are waiving  
6 these rights, and even thought you're not obligated to  
7 testify against yourself, you are waiving these rights  
8 today after speaking to your attorney?

9 MR. [REDACTED]: Yes.

10 THE COURT: And Attorney Fosco, have you explained the  
11 charges, the elements that need to be proven, maximum  
12 penalties, possible defenses, options other than admitting  
13 to sufficient facts, as well as potential consequences  
14 including, but not limited to, the immigration consequence?

15 MS. FOSCO: I have, Your Honor.

16 THE COURT: And Mr. [REDACTED], do you understand  
17 that -- oh, I'm sorry. Have you had enough time to speak  
18 to Attorney Fosco about your case?

19 MR. [REDACTED]: Yes.

20 THE COURT: And do you feel that she's acted in your  
21 best interest?

22 MR. [REDACTED]: Yes.

23 THE COURT: And are you satisfied with her advice?

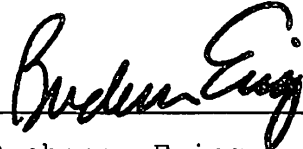
24 MR. [REDACTED]: Yes.

25 THE COURT: And do you understand, sir, that I made a

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13 the parties to the action in which this hearing was taken,  
14 and further that we are not financially nor otherwise  
15 interested in the outcome of the action.  
16

17   
18 \_\_\_\_\_

Buchanan Ewing

19 7/13/2018  
20 \_\_\_\_\_

Date

21  
22 675 Massachusetts Avenue, Cambridge, MA 02139

23 617-547-5690

24 buck@ctran.com  
25

Pages: 1-17  
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COMMONWEALTH OF MASSACHUSETTS  
WORCESTER, SS. WORCESTER DISTRICT COURT  
\* \* \* \* \*  
\*  
COMMONWEALTH OF MASSACHUSETTS \*  
\*  
v. \* Docket No. 1562CR0485  
\*  
[REDACTED] \*  
\*  
\* \* \* \* \*

PLEA HEARING  
BEFORE THE HONORABLE ROBERT J. PELLEGRINI

APPEARANCES:

For the Commonwealth:  
Worcester District Attorney's Office  
Worcester Trial Court, 225 Main Street  
Worcester, Massachusetts 01608  
By: Jane A. Sullivan, Assistant District Attorney

For the Defendant:  
Bruce Hopper, Attorney at Law  
149 Martin Luther King Boulevard  
Worcester, Massachusetts 01608  
By: Bruce Hopper, Esq.

Worcester, Massachusetts  
September 28, 2015

Cambridge Transcriptions  
Approved Court Transcriber

1 MR. [REDACTED]: [REDACTED].

2 THE COURT: Thank you. [REDACTED], how old are you?

3 MR. [REDACTED]: Twenty-eight.

4 THE COURT: And how far did you go in school?

5 MR. [REDACTED]: College.

6 THE COURT: And whatever mental issues you may suffer,  
7 does that affect your ability to understand what you're  
8 doing today?

9 MR. [REDACTED]: No.

10 THE COURT: And you have not consumed drugs, alcohol,  
11 medication in the past 24 hours; have you?

12 MR. [REDACTED]: No.

13 THE COURT: Now, and have you had enough time to  
14 discuss all of your options with Mr. Hopper, your lawyer?

15 MR. [REDACTED]: Yes.

16 THE COURT: And you feel you're satisfied that you've  
17 had enough time to talk to him, and you're satisfied with  
18 his advice?

19 MR. [REDACTED]: Yes, sir.

20 THE COURT: All right. Mr. Hopper, you went over with  
21 him the elements of each offense, the maximum penalties,  
22 the choices besides pleading guilty, the immigration  
23 consequences, alternatives to plea, such as trial, in  
24 addition to that, the potential consequences of being on  
25 probation for two years, and the penalties that could be



1 imposed if there's a violation of probation; you discussed  
2 all that with him?

3 MR. HOPPER: I did, Your Honor.

4 THE COURT: All right. [REDACTED], as you know from  
5 speaking to Mr. Hopper, you could have a trial on this  
6 case, and in this country, you could have a trial in front  
7 of a judge, someone like myself, or a jury. A jury is six  
8 people from the community. We call in a whole bunch of  
9 people, and we pick six to sit on the jury to decide  
10 whether the Government can prove your guilty beyond a  
11 reasonable doubt. Now, you and Mr. Hopper can participate  
12 in the selection of those six jurors. Now, in a jury  
13 trial, the verdict has to be unanimous, means all six  
14 jurors must agree as to whether it's been proved that  
15 you're guilty. If not, they'll find you not guilty. All  
16 right.

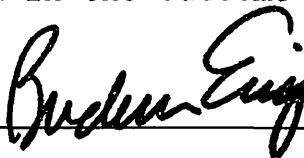
17 Now, at trial in this country, you are presumed  
18 innocent until the Government proves your guilt beyond a  
19 reasonable doubt. In this country, you cannot be forced to  
20 take the witness stand unless you choose to do so. The  
21 Government can't call you to the witness stand over your  
22 objection. Mr. Hopper can question all of the Government  
23 witnesses. We call that cross-examination.

24 When the Government rests its case, [REDACTED], if you  
25 wish, you can testify. If you wish, you could call

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15 interested in the outcome of the action.

16  
17             
18 \_\_\_\_\_

Buchanan Ewing

19           2/12/2018  
20 \_\_\_\_\_

Date

21  
22           675 Massachusetts Avenue, Cambridge, MA 02139

23           617-547-5690

24           buck@ctran.com  
25

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss

SUPERIOR COURT DEPARTMENT

---

COMMONWEALTH OF MASSACHUSETTS

vs.

1573CR00122



---

Plea Colloquy  
before the Honorable Dupuis, J.

**APPEARANCES:** Assistant District Attorney Jeanne Veenstra  
Bristol County District Attorney's Office  
888 Purchase Street  
New Bedford, MA 02740

Attorney Patrick Mullen  
628 Pleasant Street, #4  
New Bedford, MA 02740

**VENUE:** Fall River Justice Center  
186 South Main Street  
Fall River, MA 02720

**DATE:** April 5, 2018

*Kathleen Ann Pallatroni*  
*Official Court Reporter*

1 THE COURT: This is your decision and your  
2 decision alone to plead guilty?

3 A Yes.

4 THE COURT: [REDACTED], if you're not a  
5 citizen of the United States you are advised that the  
6 acceptance by this court of your plea of guilty will have  
7 the consequences of deportation, exclusion from admission  
8 to the United States or denial of naturalization pursuant  
9 to the laws of the United States. Understanding this, do  
10 you still wish to plead guilty to this indictment?

11 A Yes.

12 THE COURT: Mr. Mullen, have you  
13 investigated the adverse immigration consequences that  
14 will result in conviction on the pending charge and have  
15 you discussed that with him?

16 MR. MULLEN: Yes, I have, your Honor.

17 THE COURT: Thank you. [REDACTED], has Mr.  
18 Mullen advised you of the consequences, the immigration  
19 consequences?

20 A Yes.

21 THE COURT: You will be required to provide  
22 a DNA sample for inclusion in the state DNA database as a  
23 consequence of your guilty plea, are you aware of that?

24 A Yes.

## COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

I, Kathleen Ann Pallatroni, CVR, MSE, Official Court Reporter, do hereby certify that the foregoing is a true and accurate transcript from the record of the court proceedings in the above entitled matter.

I, Kathleen Ann Pallatroni, further certify that I neither am counsel for, related to nor employed by any of the parties to the action which this hearing was taken and further that I am not financially or otherwise interested in the outcome of the action.

---

Kathleen Ann Pallatroni, CVR, MSE  
Official Court Reporter, Superior Court Dept.  
Nine Court Street  
Taunton, MA 02780  
508-823-6488

date:

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

\* \* \* \* \*  
COMMONWEALTH OF MASSACHUSETTS  
v.  
[REDACTED]  
\* \* \* \* \*

\* Docket No.NOCR2009-963  
\*  
\*  
\*  
\*

CHANGE OF PLEA  
BEFORE THE HONORABLE E. SUSAN GARSH

APPEARANCES:

For the Commonwealth:  
By: DEBI PAYTON, ADA, ESQUIRE  
For the Defendant:  
By: ALLISON CARTWRIGHT, ESQUIRE

February 26, 2013  
Norfolk Superior Court  
650 High Street  
Dedham, Massachusetts 02062

Dawna Chapin  
Official Court Reporter

1 A Yes, your Honor.

2 THE COURT: Ms. Cartwright, have you done  
3 the research on the immigration consequences with  
4 respect to a plea of guilty to this charge and  
5 discussed -- advised the defendant with respect to  
6 immigration consequences?

7 MS. CARTWRIGHT: Yes, I have, your Honor.

8 BY THE COURT

9 Q Understanding what I've just said to you, are  
10 you still willing to plead guilty to this  
11 indictment?

12 A Yes, your Honor.

13 Q Do you understand by pleading guilty to this  
14 indictment, you'll be required by law to submit a  
15 sample of your blood, hair, and/or saliva to the  
16 State Police Crime Laboratory?

17 A Yes, your Honor.

18 Q Do you understand unless you're determined to be  
19 indigent, you'll be required to pay for the cost of  
20 collecting, preparing and processing that sample?

21 A Yes, your Honor.

22 Q Do you understand your failure to comply with  
23 this law may subject you to separate criminal  
24 penalties?

25 A Yes, your Honor.

1 MS. CARTWRIGHT: I have, your Honor.

2 THE COURT: And have you discussed with  
3 him his rights, his defenses and the possible  
4 consequences of guilty plea, including immigration  
5 consequences?

6 MS. CARTWRIGHT: I have, your Honor.

7 THE COURT: Are you satisfied, as counsel  
8 for the defendant, that his plea of guilty is made  
9 knowingly, willingly, intelligently and voluntarily?

10 MS. CARTWRIGHT: Yes, your Honor.

11 THE COURT: Do you know of any reason I  
12 should not accept the plea?

13 MS. CARTWRIGHT: No, I do not.

14 THE COURT: Does the Commonwealth know of  
15 any reason I should not accept the plea?

16 MS. CURLEY: No, your Honor.

17 THE COURT: I find that the defendant is  
18 not presently under the influence of drugs or  
19 alcohol. I find the defendant is not presently  
20 suffering from any mental illness or condition. I  
21 find the defendant's plea of guilty with respect to  
22 so much of the indictment as charges thirty-six  
23 grams or more trafficking, is made knowingly,  
24 intelligently and voluntarily and with full  
25 knowledge of its consequences. I find the



C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

I, Dawna M. Chapin, an Official Court  
Reporter in and for the Commonwealth of  
Massachusetts, do hereby certify that the foregoing  
transcript represents a complete, accurate and true  
copy of my notes taken in the above-entitled matter,  
to the best of my knowledge, skill and ability.

\_\_\_\_\_  
Dawna M. Chapin

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COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Superior Court  
Ricciardone, J.

\*\*\*\*\*

Commonwealth

vs.

[REDACTED]

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\*  
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\*

MICR-2013-00934

\*\*\*\*\*

APPEARANCES:

Assistant District Attorney Megan Williams on behalf of the  
Commonwealth

Attorney Robert Normandin on behalf of the Defendant

Lowell Superior Court  
Wednesday, 3 December 2014  
Change of Plea  
9:20

**LINDA M. RATTIGAN**  
**OFFICIAL COURT REPORTER**

1 THE DEFENDANT: Yes, I do.

2 THE COURT: In other words, the decision whether  
3 to have a trial or to plead guilty is yours and basically  
4 yours alone, although you're entitled to have a  
5 professional lawyer's advice such as that of Mr.  
6 Normandin. But you understand that concept that the  
7 decision to plead guilty must be yours?

8 THE DEFENDANT: Yes, I do, sir.

9 THE COURT: Is this your decision?

10 THE DEFENDANT: Yes, it is, sir.

11 THE COURT: I hereby advise you if you are not a  
12 citizen of the United States, that the acceptance by this  
13 Court of your guilty plea will have the consequences of  
14 deportation, exclusion from admission to the United  
15 States, or denial of naturalization pursuant to the laws  
16 of the United States. Understanding this, do you still  
17 wish to plead guilty to these indictments?

18 THE DEFENDANT: Yes.

19 THE COURT: And to counsel, although immigration  
20 consequences may not be at play here, have you discussed  
21 the potential for this or basically for any collateral  
22 consequences?

23 MR. NORMANDIN: Yes, I have, Your Honor.

24 THE COURT: Involved with this plea. Okay. So,  
25 as a result, Mr. [REDACTED], as a result of this plea you

## CERTIFICATE

## COMMONWEALTH OF MASSACHUSETTS

I, Linda M. Rattigan, official court reporter in and for the Commonwealth of Massachusetts, hereby certify:

That the foregoing is a verbatim transcript, prepared by me, of the proceedings of a change of plea in the matter of Commonwealth vs. [REDACTED] 1 held on 3 December 2014 at which I was present.

I certify further that I am not a party interested in the outcome of the proceedings and am not related to any of the parties.

\_\_\_\_\_  
Linda M. Rattigan  
Official Court Reporter

\_\_\_\_\_  
Date

#20

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
NO. 1573CR00122  
BRISTOL, SS SUPERIOR COURT  
FILED

COMMONWEALTH

MAY 26 2021

vs.

MARC J SANTOS, ESQ.  
CLERK/MAGISTRATE

JOSE ANGEL GUERRERO

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' RENEWED  
MOTION TO WITHDRAW GUILTY PLEA AND ORDER A NEW TRIAL**

On April 5, 2018, the defendant, Jose Angel Guerrero, pleaded guilty to possession of a Class A controlled substance with intent to distribute before this jurist. Relying on *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010), he now moves to withdraw his guilty plea on the grounds that his plea counsel provided ineffective assistance by failing to adequately advise him of the immigration consequences of the plea, thereby causing his plea not to be knowing and voluntary. For the following reasons, the defendant's renewed motion is **DENIED**.<sup>1</sup>

**BACKGROUND**

On May 21, 2015, a Bristol County grand jury indicted the defendant for trafficking in a Class A controlled substance, over 36 grams, in violation of G. L. c. 94C, § 32E(c)(2). If convicted of this charge, the defendant faced a mandatory minimum sentence of three and one-

<sup>1</sup> An evidentiary hearing was not required because the defendant's motion and accompanying affidavits present no "substantial issue." See *Commonwealth v. Lys*, 481 Mass. 1, 5-7 (2018) ("If a motion judge finds that the motion and affidavits do not present a substantial issue, then [t]he judge may rule on a motion for a new trial without an evidentiary hearing") (quotations omitted). The defendant's assertions in his motion, as well as the averments in his and plea counsel's accompanying affidavits, are inadequate to show a substantial issue because they contradict their statements during the plea colloquy, are not credible, and are unpersuasive. See *id.* at 5 (in deciding whether motion for new trial presents substantial issue, "a motion judge need not accept statements in the defendant's affidavits as true, even if the statements are undisputed"); *Commonwealth v. Goodreau*, 442 Mass. 341, 348-349 (2004) ("If the theory of the motion, as presented by the papers, is not credible or not persuasive, holding an evidentiary hearing to have the witnesses repeat the same evidence ... will accomplish nothing").



half years and a maximum sentence of twenty years in state prison. On April 5, 2018, the defendant agreed to plead guilty to a reduced charge of possession of a Class A substance with intent to distribute, in violation of G. L. c. 94C, § 32(a). With the reduced charge, the defendant faced a maximum potential penalty of ten years in state prison with no mandatory minimum sentence. After conducting a plea colloquy with the defendant on April 5, 2018, I accepted his guilty plea.

### **The Plea Hearing**

When the defendant's case was called on April 5, 2018, the parties requested a sidebar to discuss an un-agreed plea. The prosecutor stated the Commonwealth would reduce the trafficking charge to possession with intent to distribute and would recommend a sentence of three to five years in state prison. Defense counsel, Attorney Patrick Mullen, indicated that he would be asking for a five-year probationary sentence. After reviewing the facts of the case, I advised the parties that I would not adopt defense counsel's recommendation of probation, but I would be inclined to impose a sentence of one and one-half to two years in state prison.

After a recess, the defendant pleaded guilty. During the plea colloquy, the prosecutor read the following facts into the record, which the defendant admitted were true:

In the late winter, early spring of 2015, this defendant was under investigation by the New Bedford Police Department. He was the subject of a search warrant which was executed on May 2<sup>nd</sup> of 2015. He was stopped in a motor vehicle near the residence located at 190 Rivet Street, the entry was made utilizing a key from the defendant's person. A search of the apartment revealed over 77 grams of heroin located in two separate plastic bags in a closet in a bedroom. They field tested positive for heroin, they were ultimately sent to the State Police laboratory and in fact tested positive for heroin, a Class A substance. There was also a bag of white powder, believed to be a cutting agent, found in that bedroom. One thousand five hundred and twenty-seven dollars, some scales, re-rocking press, some baggies and cut corner bags and also some items of standing for the defendant were found in that apartment.

The plea colloquy was done through a Spanish interpreter. The defendant indicated that he spoke some English but preferred to have the colloquy done in Spanish as Spanish was his primary language.<sup>2</sup> The defendant stated that he pleaded guilty willingly, freely, and voluntarily. He confirmed that he had adequate time to discuss the matter fully with Attorney Mullen and that Mullen had explained to him all of his rights and all of his options, including all the considerations involved in deciding to plead guilty. The defendant also indicated that he felt Attorney Mullen had acted in his best interest and he was satisfied with Mullen's advice and representation.

In addition, I asked the defendant whether he was aware of the immigration consequences that would result from his guilty plea. I then asked plea counsel whether he had researched and advised the defendant of the adverse immigration consequences that would result from his conviction. This portion of the colloquy appears below:

THE COURT: Mr. Guerrero, if you're not a citizen of the United States[,] you are advised that the acceptance by this court of your plea of guilty will have the consequences of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. Understanding this, do you still wish to plead guilty to this indictment?

MR. GUERRERO: Yes.

THE COURT: Mr. Mullen, have you investigated the adverse immigration consequences that will result in conviction on the pending charge and have you discussed that with him?

MR. MULLEN: Yes.

THE COURT: Thank you. Mr. Guerrero, has Mr. Mullen advised you of the consequences, the immigration consequences?

MR. GUERRERO: Yes.

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<sup>2</sup> The tender of plea form signed by the defendant was in Spanish and English.



After further colloquy, I accepted the defendant's plea, found that he was fully competent to plead guilty and that he waived his rights and pleaded guilty freely, voluntarily, and willingly. I then granted the defendant's motion to continue sentencing for two weeks so that he could arrange his affairs. On April 23, 2018, I sentenced the defendant to state prison for one and one-half to two years.

### **The Present Motion**

As a result of the defendant's conviction in this matter, he was removed from the United States on October 6, 2020. He is currently in the Dominican Republic.

On February 17, 2021, the defendant, through new counsel, Attorney Todd C. Pomerleau, filed the present motion to withdraw his guilty plea and order a new trial.<sup>3</sup> In support of the motion, the defendant submitted an affidavit in which he claims that he did not properly understand the consequences of his conviction at the time of his plea and that plea counsel failed to properly advise him about its immigration consequences. The defendant also submitted an affidavit from Attorney Mullen in which he avers that his immigration advice to the defendant "consisted of the alien warnings included in the Alien Rights Notice provided on the tender of plea." Attorney Mullen avers that he did not advise the defendant "that he would face presumptively mandatory lifetime deportation and permanent exclusion from admission to the United States."

The defendant's affidavit further states that he is twenty-eight years old and a native and citizen of the Dominican Republic. He came to the United States as a lawful permanent resident ("LPR") when he was seventeen years old. He has friends and family in the Dominican

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<sup>3</sup> On September 16, 2020, the defendant filed a motion to withdraw his plea and order a new trial. The following day, I ordered him to provide a copy of the plea transcript forthwith. On December 4, 2020, I denied the defendant's motion without prejudice because he had not filed the plea transcript. After obtaining the plea transcript from the court reporter, the defendant filed his renewed motion with a copy of the plea transcript attached as an exhibit.



Republic as well as in the United States. His children (ages 5 and 7), father, and two sisters live in the United States and are U.S. citizens. Prior to his removal, he lived in New Bedford, Massachusetts. He studied at New Bedford High School and worked at a parachute manufacturing company and at Sid Wainer as a deliveryman.<sup>4</sup> With the money he earned from work prior to his incarceration, he provided financial support to his children.<sup>5</sup>

On April 26, 2021, the Commonwealth filed a written opposition to the defendant's motion.

## DISCUSSION

### **I. Standard**

Courts treat a motion to withdraw a guilty plea as a motion for a new trial. *Commonwealth v. Lastowski*, 478 Mass. 572, 575 (2018). "A motion for a new trial may be granted 'if it appears that justice may not have been done.'" *Commonwealth v. Lys*, 481 Mass. 1, 7 (2018), quoting Mass. R. Crim. P. 30(b). "In the context of a guilty plea, justice is not done when a defendant's plea of guilt is not intelligent and voluntary ... or is made without the advice of competent counsel." *Commonwealth v. Hiskin*, 68 Mass. App. Ct. 633, 637-638 (2007) (citations omitted). Here, the defendant contends that a new trial is warranted because his guilty plea was the product of Attorney Mullen's ineffective assistance of counsel. I disagree.

### **II. Ineffective Assistance of Counsel**

To prevail on an ineffective assistance claim, the defendant must show that his counsel was ineffective and that he was sufficiently prejudiced as a result. *Commonwealth v. Saferian*,

<sup>4</sup> During the plea colloquy, the defendant stated that he did not graduate from high school and had not obtained his GED.

<sup>5</sup> The defendant also submitted an affidavit from the mother of his children, Rosmailin Batista, who states that, before his incarceration, the defendant provided financial support to her and their children. Ms. Batista and the defendant are no longer together.

366 Mass. 89, 96 (1974). The burden is on the defendant to prove that counsel was ineffective. See *Commonwealth v. Bannister*, 15 Mass. App. Ct. 71, 75 (1983). The defendant argues that Attorney Mullen was ineffective because he failed to advise him of the immigration consequences of his guilty plea as required by *Padilla v. Kentucky*, 559 U.S. 356 (2010). In *Padilla*, 559 U.S. at 368-369, the United States Supreme Court held a defendant has received ineffective assistance of counsel if his lawyer does not provide accurate information about the deportation consequences of a guilty plea. “To show prejudice when seeking to withdraw a guilty plea on the ground of ineffective assistance, a defendant must provide sufficient credible facts to demonstrate a reasonable probability that a reasonable person in the defendant’s circumstances would have gone to trial if given constitutionally effective advice.” *Lys*, 481 Mass. at 7 (quotations and citations omitted). “At a minimum, this means that the defendant must aver that to be the case.” *Id.* (quotations and citations omitted). The defendant here has averred that if he had known that his guilty plea would lead to the revocation of his LPR status and his eventual removal from the United States, he would have “taken the case to trial.”

#### A. Counsel’s Performance

When the defendant claims ineffective assistance under *Padilla*, the determination of whether counsel’s performance fell below an objective standard depends on the clarity of the immigration consequences resulting from the conviction. See *Padilla*, 559 U.S. at 369. When the immigration consequence is clear, plea counsel has an affirmative duty to give correct advice about that consequence. *Id.* Here, the immigration consequences were clear. The defendant’s guilty plea rendered him *per se* removeable under 8 U.S.C. § 1227(a)(2)(A)(i) for being convicted of an aggravated felony and under 8 U.S.C. § 1227(a)(2)(B)(i) for being convicted of a controlled substance violation. It also made him permanently inadmissible to the United States.



See 8 U.S.C. § 1182(a)(9)(A) (providing aggravated felons are permanently inadmissible); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (providing for inadmissibility of noncitizens convicted of violating federal or state controlled substance laws).

In his affidavit, the defendant claims that Attorney Mullen never properly advised him of the presumptively mandatory immigration consequences he faced as a result of his guilty plea to the drug distribution charge. Attorney Mullen's affidavit supports the defendant's claim in this regard.<sup>6</sup> However, the contemporaneous record of the plea substantially undermines the credibility of their claims. Indeed, the transcript of the plea colloquy shows that I advised the defendant that his guilty plea "w[ould] have the consequences of deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States." Also, in response to questioning, Attorney Mullen confirmed that he had investigated and advised the defendant of the "adverse immigration consequences that w[ould] result" from his plea. Further, in response to follow-up questioning, the defendant confirmed that Attorney Mullen had advised him of the immigration consequences that would result. In view of the above, if Attorney Mullen or the defendant truly thought that deportation was not mandatory but merely a possibility, then they would have communicated their confusion upon hearing me clearly advise the defendant that he would be deported as a result of his plea. Considering Attorney Mullen's responses to my direct question about mandatory immigration consequences together with the defendant's subsequent confirmation that he had been advised of those consequences, I credit Mullen's and the defendant's colloquy statements that Mullen advised the defendant of the adverse immigration consequences that would result from his plea. "While not

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<sup>6</sup> Attorney Mullen states in his affidavit that it was not his standard practice to tell his noncitizen clients that their plea would carry mandatory immigration consequences if that were the case. He states that his advice would have consisted of the alien warnings contained in the Alien Rights Notice provided on the tender of plea that the defendant signed on the date of his plea.

solely determinative of the intelligence and voluntariness of a plea, the defendant's sworn statements at colloquy have undeniable bearing and heft in resolving a later claim to the contrary" *Commonwealth v. Hiskin*, 68 Mass. App. Ct. 633, 639 (2007). I do not credit their affidavits. See *Buckman*, 461 Mass. 24, 43 (2011) ("A judge is not required to credit assertions in affidavits submitted in support of a motion for new trial, but may evaluate such affidavits in light of factors pertinent to credibility, including bias, self-interest, and delay").

Accordingly, I find that the defendant has not shown that his plea counsel failed to warn him of his plea's mandatory immigration consequences; therefore, he has failed to establish that plea counsel's performance was deficient.

### **B. Prejudice**

Even if it were assumed that Attorney Mullen's performance was deficient, the defendant's ineffectiveness claim still fails because he has not shown prejudice. *Padilla*, 559 U.S. at 369. See *Commonwealth v. Marinho*, 464 Mass. 115, 128-129 (2013) (denial of new trial motion affirmed where counsel was ineffective, but defendant did not establish prejudice). To satisfy the prejudice requirement "[i]n the context of a guilty plea, ... the defendant has the burden of establishing 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.'" *Commonwealth v. Clarke*, 460 Mass. 30, 47 (2011), quoting *Hill v. Lockhart*, 474 U.S. 52, 60 (1985). The defendant can establish this "by showing that (1) he had an available, substantial ground of defence that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have



placed, particular emphasis on immigration consequences in deciding whether to plead guilty.” *Clarke*, 460 Mass. at 47-48 (citations and quotations omitted). The defendant’s proffered evidence must [be of sufficient weight to] convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” *Id.* (quotations omitted). “If the defendant fails to establish any of these three *Clarke* factors, then the ineffective assistance of counsel claim must fail for lack of prejudice. If the defendant does establish at least one of the *Clarke* factors, then the judge must move to the second step and evaluate whether, under the totality of the circumstances, there is a reasonable probability that a reasonable person in the defendant’s circumstances would have gone to trial if given constitutionally effective advice.” *Lys*, 481 Mass. at 7-8 (citations omitted).

### **1. Substantial ground of defense**

The defendant does not argue that he had a substantial ground of defense. Indeed, his pretrial motions to suppress and dismiss were denied. Thus, this factor does not weigh in his favor.

### **2. Possibility of alternative plea bargain**

Moreover, as the plea judge, I find that it was not likely that a better plea bargain could have been negotiated beyond the very favorable disposition the defendant received. The defendant was charged with trafficking a Class A controlled substance, which carried a mandatory minimum sentence of three and one-half years. In exchange for the defendant’s guilty plea, the Commonwealth agreed to reduce the trafficking charge to possession with intent to distribute which does not have a mandatory minimum sentence. After hearing the parties’ arguments, I clearly told Attorney Mullen that probation alone was inappropriate, that he would need to serve time on this case, and that I would sentence him to one and one-half to two years if

he pleaded guilty. Accordingly, I conclude there was no reasonable possibility of a more favorable plea bargain that would have eliminated the adverse immigration consequences facing the defendant. See *Commonwealth v. Lastowski*, 478 Mass. 572, 577 (2018) (motion judge, who was also plea judge, in best position to determine likelihood of different disposition).

### 3. Presence of “special circumstances”

“In evaluating whether the defendant has established the existence of special circumstances, a judge must consider collectively all of the factors supporting the conclusion that the defendant ‘placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.’” *Lys*, 481 Mass. at 8, quoting *Clarke*, 460 Mass. at 47-48. Here, the defendant avers he entered the United States at the age of seventeen as an LPR; he worked during his time in the United States; he has two minor U.S. citizen children in the United States who rely on him emotionally and financially; and his U.S. citizen father and two U.S. citizen sisters live in the United States. The defendant avers that, during his first meeting in Attorney Mullen’s office, he told Mullen that his “primary concern was avoiding removal from the United States” and that “if he had known of the dire immigration consequences of his plea, he would have tried to push for a different plea bargain or even taken his case to trial if another plea were not possible.”

However, plea counsel’s affidavit does not corroborate the defendant’s claim that he attached special significance to his ability to remain in the United States at the time of the plea and would not have tendered his plea had he known that deportation was certain to be his fate. Nowhere in Attorney Mullen’s affidavit does he say that the defendant’s pre-trial focus was on avoiding adverse immigration consequences. This gap in the defendant’s evidentiary proffer is significant. Inasmuch as Attorney Mullen would likely have had insight into the defendant’s



decisional calculus regarding the proposed plea bargain given his intimate involvement in the matter, he would be in a position to aver from first-hand knowledge any special importance the defendant attached to immigration consequences if this were the case. He did not do so in his affidavit. Considering this fact together with the fact the defendant never expressed confusion or sought clarification of my clear immigration warnings, I do not credit the defendant's self-serving affidavit as it pertains to special circumstances. See *Commonwealth v. Lamotte*, 84 Mass. App. Ct. 1119, 2013 WL 6009143 at \*3 n. 4 (2013) (Rule 1:28 Decision), citing *Clarke*, 460 Mass. at 48 n. 20 (oral and written warnings of deportation given during plea proceeding "may be relevant to the prejudice prong" under *Padilla*).

Further, I find that the defendant's affidavit falls short of demonstrating special circumstances. He spent most of his life in the Dominican Republic, from birth until age seventeen, and he has family members there. He also speaks Spanish, the Dominican Republic's native language. He was twenty-two years old when he was charged with this offense and twenty-five when he pleaded guilty. Prior to his incarceration, he did not maintain steady employment, going through several jobs including manufacturing parachutes and delivering for a grocery company. He was not, and is not, married, and his minor children lived with and continue to live with their mother in a home where the defendant did not live but sometimes stayed. The defendant and his children's mother are no longer together. In addition, it was in the home of his children and their mother that the seventy-seven grams of heroin and other drug paraphernalia were found. These facts are not the type that establish special circumstances. Cf. *Commonwealth v. DeJesus*, 468 Mass. 174, 183-184 (2014) (special circumstances existed based on confluence of three factors: defendant had been in United States since he was eleven years old; his family was in Boston; and he had maintained steady employment in Boston area);

*Commonwealth v. Cano*, 87 Mass. App. Ct. 238, 247-248 (2015) (finding that defendant raised substantial issue concerning “special circumstances” because he “ha[d] not lived in Colombia since he moved to the United States in 1979, at age twelve”; was “largely dependent on his family members in the United States for many of the basic requirements of daily life”; and “depend[ed] to a significant extent on governmental benefits to meet his financial needs”).

Taking all of these considerations together, I conclude that neither this defendant nor any rational person in the defendant’s circumstances would have rejected the Commonwealth’s plea bargain even if he had been advised by counsel that a guilty plea would result in mandatory removal and inadmissibility. Hence, even assuming plea counsel’s performance was deficient, the defendant has not established prejudice; thus, the second prong of the test for ineffective assistance of counsel is not satisfied. See *Clarke*, 460 Mass. at 49.

### **III. Immigration Warnings provided by the Court**

The defendant argues that the court provided an insufficient immigration warning because I did not inform the defendant that pleading guilty would carry the “practically inevitable” consequence of “deportation, exclusion from admission, or denial of naturalization under the laws of the United States” as required under Mass. R. Crim. P. 12(c)(3)(A)(iii)(b) (2019) (“rule (b) warning”). The defendant’s claim lacks merit. The rule (b) warning was removed from Rule 12 in 2020 by way of an additional amendment by the Supreme Judicial Court’s Standing Advisory Committee on the Rules of Criminal Procedure. See Mass. R. Crim. P. 12 (2020). In 2019, the SJC noted that the rule (b) warning was too “technical, legalistic, and complex in its application to be particularly informative,” and subsequently referred the question to the Standing Advisory Committee on the Rules of Criminal Procedure to “review and reconsider the 2015 amendment [rule (b) warning], to determine whether it is appropriate to

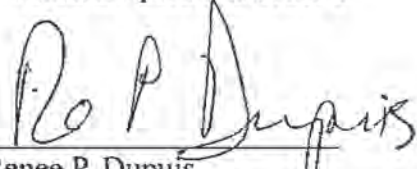


further amend or dispense with the amendment altogether.” *Commonwealth v. Petit-Homme*, 482 Mass. 775, 787 (2019). The Standing Advisory Committee amended Rule 12 on July 8, 2020, removing the rule (b) warning entirely. This amendment took effect on September 1, 2020. Mass. R. Civ. P. 12. Thus, there was no error in foregoing rule (b)’s warning where it was later eliminated for its confusing nature.

Furthermore, the defendant’s contention that “the Court only informed Mr. Guerrero that there was a possibility that the conviction had the consequence of deportation, inadmissibility, or denial of naturalization” is incorrect. The warnings I provided clearly warned the defendant of more than a mere possibility: “Mr. Guerrero, if you’re not a citizen of the United States, you are advised that the acceptance by this court of your plea of guilty *will have the consequences of* deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States.” (emphasis added)

### ORDER

For the foregoing reasons, the defendant’s renewed motion to withdraw plea and order a new trial is DENIED.

  
 Renee P. Dupuis  
 Justice of the Superior Court

DATED: May 26, 2021

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Essex, ss.

DAR No. \_\_\_\_\_  
Appeals Court No. 2022-P-1054

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COMMONWEALTH

v.

JAMES KIPTANUI  
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CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury,  
that I have served a copy of the defendant's application for  
direct appellate review to Assistant District Attorney Kayla  
Johnson, Essex County District Attorney's Office, Ten Federal  
Street, Salem, MA 01970. I have made service via email.

/s/ Edward Crane /s/  
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Dated: 2/10/23