COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY
No. OE

IN THE MATTER OF DIANE E. MORIARTY

CONDITIONAL SUBMISSION TO THE SUPREME JUDICIAL COURT UPON ACKNOWLEDGED EVIDENCE BY THE COMMISSION ON JUDICIAL CONDUCT AND THE HONORABLE DIANE E. MORIARTY PURSUANT TO G.L. C. 211C AND COMMISSION RULE 13B ON COMMISSION COMPLAINT NUMBERS 2007-89 AND 2007-108

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IMPOUNDED

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SUPREME JUDICIAL COURT

SUFFOLK, ss. COMMISSION ON JUDICIAL CONDUCT
COMMISSION COMPLAINT NUMBERS 2007-89 & 2007-108

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The Commission on Judicial Conduct ("the Commission"), acting pursuant to Commission Rule 13B, and the Honorable Diane E. Moriarty ("Judge Moriarty"), Associate Justice of the District Court, hereby submit this Agreement for Conditional Submission to the Supreme Judicial Court ("the Court") upon Acknowledged Evidence.

1. **Rule 13B(1)(a) Waiver**

   Judge Moriarty, by signing this Agreement, hereby waives her right to a Formal Hearing.

2. **Rule 13B(1)(b) Statement of Evidence which, in the Commission's View, Provides a Basis for a Finding of Misconduct**

   This Statement of Evidence incorporates Complaint Numbers 2007-89 and 2007-108 and all of the below-referenced Exhibits.

   a. At a Formal Hearing, the Commission would have presented the following evidence:

      Commonwealth v. Anthony Fontina

      On September 19, 2003, the Chelsea District Court issued a complaint charging a defendant, Anthony Fontina, with possession to distribute marijuana, in violation of

G. L. c. 94C, sec. 32C (Docket Number 0314CR003020). The defendant was also charged with possession of a knife, in violation of a municipal ordinance, but that charge was later dismissed by the Commonwealth on the condition that the defendant pay $200 in court costs. (Copies of the Complaint and Docket Sheet for Docket Number 0314CR003020 are attached as Exhibit A.)

On January 18, 2005, Mr. Fontina admitted to sufficient facts to warrant a finding of guilt on the drug charge. Judge Moriarty[1] accepted an agreed-upon tender of plea without giving an alien warning. During the colloquy, the prosecutor requested that the judge give an Alien Warning to the defendant pursuant to G.L. c. 278, sec. 29D. Judge Moriarty responded by asking Mr. Fontina where he was born. Mr. Fontina answered, "Cambridge, Massachusetts." Judge Moriarty then stated, "No alien warning." The plea colloquy continued, and the prosecutor requested that the Commonwealth's objection based on the failure to give the Alien Warning be noted for the record. Judge Moriarty then said to the prosecutor:

> "Don't do that again to me. It's not required if he's an American citizen. It's not required and it's within my jurisdiction, so I'm telling you, don't do it again."

The prosecutor concluded by stating that it was contrary to the statute not to provide the defendant with an alien warning. Judge Moriarty responded to the prosecutor by stating,

> "Then take me up."

Judge Moriarty then sentenced Mr. Fontina to a continuance without a finding until January 18, 2006, on the condition that Mr. Fontina remain drug free and undergo random drug testing.

As part of his plea, Mr. Fontina signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea form. (A copy of the Tender of Plea form used in Docket Number 0314CR003020 is attached as Exhibit B.)

Judge Moriarty signed the Tender of Plea form in Mr. Fontina's case on January 18, 2005[2]. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty certified on the Tender of Plea form that, on January 18, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation,

[1] Judge Moriarty was appointed an Associate Justice of the District Court of Massachusetts in 1998.

[2] Judge Moriarty incorrectly wrote on the form that the date she signed was January 18, 2004. The date she signed the form was, in fact, January 18, 2005.

exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Commonwealth v. Jennifer Delgado

On December 3, 2004, the Chelsea District Court issued a complaint charging a defendant, Jennifer Delgado, with two counts of unarmed burglary and assault, in violation of G. L. c. 266, sec. 14, two counts of assault and battery with injury on a person sixty years of age or older, in violation of G. L. c. 265, sec. 13K(b), assault and battery to intimidate, in violation of G. L. c. 265, sec. 39(a), and furnishing a false name or social security number after arrest, in violation of G. L. c. 268, c. 34A (Docket Number 0414CR003407).

On December 28, 2004, the two counts of assault and battery with injury on a person sixty years of age or older were amended to reflect that there was no serious injury. On the same day, the two counts of unarmed burglary and assault were dismissed at the request of the Commonwealth. (Copies of the Complaint and Docket Sheet for Docket Number 0414CR003407 are attached as Exhibit C.)

On January 18, 2005, Ms. Delgado pled guilty to the remaining charges. After the plea colloquy, the prosecutor objected to Judge Moriarty's failure to give an oral Alien Warning to the defendant. The judge and the prosecutor then had the following exchange:

Judge Moriarty:	"I've explained it to you. Do not do that to me again, so take me up."
Prosecutor:	"Yes, Your Honor."
Judge Moriarty:	"Do not do that to me again."
Prosecutor:	"I understand, Your Honor."
Judge Moriarty:	"You don't understand . . . You don't, so don't do that to me again. If you want to appeal me, appeal me on every case. Don't do that again."
Prosecutor:	"But in order to do that, your Honor, we do have to make a record."
Judge Moriarty:	(*Exclaiming*) "Well, make a record! I just told you I wouldn't do it. Take it up!"

Judge Moriarty then sentenced Ms. Delgado to two separate two-and-one-half-year terms in prison suspended for two-and-one-half years on each count of the assault and battery on a person sixty years of age or older charges, and to a two-and-one-half-year term of probation on the assault and battery to intimidate charge. A guilty finding was placed on file with respect to the furnishing of a false name or social security number charge. Ms. Delgado was also ordered to complete Drug Court.

Ms. Delgado also signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea form. (A copy of the Tender of Plea form used in Docket Number 0414CR003407 is attached as Exhibit D.)

Judge Moriarty signed the Tender of Plea form in Ms. Delgado's case on January 18, 2005. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty certified on the Tender of Plea form that, on January 18, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if she "is not a citizen of the United States, a conviction of the offense with which [she] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Commonwealth v. Luis A. Rodriguez

On November 4, 2004, the Chelsea District Court issued a complaint charging a defendant, Luis A. Rodriguez, with receiving stolen property over $250, in violation of G. L. c. 266, sec. 60 (Docket Number 0414CR003141).

On January 19, 2005, the Commonwealth and Mr. Rodriguez agreed to amend the charge on his complaint to receiving stolen property under $250. (Copies of the Complaint and Docket Sheet for Docket Number 0414CR003141 are attached as Exhibit E.)

On January 19, 2005, Mr. Rodriguez admitted to sufficient facts to warrant a finding of guilt. Judge Moriarty accepted an agreed-upon tender of plea without giving an alien warning.

After Judge Moriarty's plea colloquy in that matter, and before the clerk read the disposition, the prosecutor requested that Judge Moriarty give an oral Alien Warning to Mr. Rodriguez. Judge Moriarty responded, "What is it with the Commonwealth and the alien warnings?" Judge Moriarty then asked the defendant, "You were born in Boston, right?" After Mr. Rodriguez responded that he was born in "Brighton, Massachusetts," Judge Moriarty said to the prosecutor, "There you go."

Judge Moriarty sentenced Mr. Rodriguez to a continuance without a finding until July 19, 2005, on the condition that Mr. Rodriguez complete forty hours of community service and submit to probation.

Mr. Rodriguez also signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea form. (A copy of the Tender of Plea form used in Docket Number 0414CR003020 is attached as Exhibit F.)

Judge Moriarty signed the Tender of Plea form in Mr. Rodriguez's case on January 19, 2005. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty certified on the Tender of Plea form that, on January 19, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Suffolk County District Attorney's Response

On January 26, 2005, the Suffolk County District Attorney's Office filed a petition on behalf of the Commonwealth pursuant to G.L. c. 211, sec. 3 regarding Judge Moriarty's failure to provide alien warnings in Docket Numbers 0314CR003020, 0414CR003407 and 0414CR003141. This petition was docketed by the Court as SJ-2005-0039 (Commonwealth v. Anthony Fontina, Jennifer Delgado and Luis A. Rodriguez and A Judge of the Chelsea District Court.) (A copy of the Commonwealth's Petition is attached as Exhibit G.)

After that petition was filed, and while the matter was still pending before the Single Justice, Judge Moriarty scheduled a hearing in Chelsea District Court on January 26, 2006. At that hearing, Judge Moriarty provided the required alien warnings to the referenced defendants.

On February 10, 2006, now-retired Justice John M. Greaney subsequently dismissed the G.L. c. 211, sec. 3 petition as moot.

The Commission submits that the above-described evidence would support a finding that, either intentionally or because of a failure to maintain professional competence in the law, during the plea hearings in three different criminal matters in the Chelsea District Court, Commonwealth v. Anthony Fontina, Commonwealth v. Jennifer Delgado, and Commonwealth v. Luis Rodriguez, Judge Moriarty refused to provide Alien Warnings, as required by G.L. c. 278, sec. 29D. The Commission submits that, through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2) of the Code of Judicial Conduct (SJC Rule 3:09) ("the Code").

The Commission also submits that the above-described evidence would support a finding that, on the date of each of the above-referenced defendant's respective plea, the Commonwealth requested that Judge Moriarty provide the required Alien Warnings and, in each instance, Judge Moriarty refused to provide the required Alien Warnings, addressing the Commonwealth discourteously. The Commission submits that, through this conduct, Judge Moriarty violated Canon 3B (4) of the Code.

The Commission also submits that the above-described evidence would also support a finding that, on the date of each of the above-referenced defendant's respective plea, Judge Moriarty did not permit the Commonwealth a full opportunity to be heard according to the law. The Commission submits that, through this conduct, Judge Moriarty violated Canon 3B (7) of the Code.

Finally, the Commission submits that the above-described evidence would support a finding that, on the date of each of the above-referenced defendant's respective plea, after being asked to provide the required Alien Warnings and refusing to do so, Judge Moriarty then falsely certified that she had, in fact, provided the required Alien Warnings to each defendant. The Commission submits that, through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2) of the Code.

b. At a Formal Hearing, the Commission would have presented the following additional evidence:

Commonwealth v. Jaime Estrada

On March 18, 2003, a complaint issued in the Chelsea District Court (Suffolk County) against Jaime Estrada charging him with Assault with a Dangerous Weapon, in violation of G.L. c. 265, sec. 15B (b) (Docket Number 0314CR0609).

On March 24, 2003**,** an additional complaint was issued against Jaime Estrada in the Chelsea District Court charging him with Intimidation of a Witness, in violation of G.L. c. 268, sec. 13B, and Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127 (Docket Number 0314CR0688).

(Copies of the Complaints and Docket Sheets for Docket Numbers 0314CR0609 and 0314CR0688 are attached as Exhibit H.)

On September 3, 2003**,** Jaime Estrada appeared before Judge Moriarty in the Chelsea District Court and changed his plea on both complaints.

Judge Moriarty engaged Jaime Estrada in a plea colloquy, asking if he waived all

relevant constitutional rights and reading him all three Alien Warnings required by G.L. c. 278, sec. 29D. Judge Moriarty did not ask Jaime Estrada any questions about whether he had consumed drugs or alcohol on that day.

After the plea colloquy, Judge Moriarty sentenced Jaime Estrada to a guilty finding and one year of probation on all charges. (Copies of the Tender of Plea forms used in Docket Numbers 0314CR0609 and 0314CR0688 are attached as Exhibit I.)

In the "Judge's Certification" portion of the Tender of Plea forms used in Jaime Estrada's cases, Judge Moriarty was asked to certify as follows:

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

On June 16, 2006, Jaime Estrada filed a motion to "dismiss the conviction" or, in the alternative, to vacate his plea in the Chelsea District Court. That motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure. On that motion, Jaime Estrada was represented by Attorney Robert Carmel-Montes.

On June 20, 2006, Judge Moriarty denied this motion while sitting at the Quincy District Court (Norfolk County) without a hearing. (A copy of that motion with Judge Moriarty's notation indicating the motion was denied is attached as Exhibit J.)

On July 7, 2006[3], Jaime Estrada filed an "Emergency Motion to Reconsider Motion to Dismiss Conviction, or, in the Alternative, to Withdraw Guilty Plea, Vacate the Conviction and Grant a New Trial" in the Quincy District Court. That motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure. On that motion, Jaime Estrada was again represented by Attorney Robert Carmel-Montes. That motion was never served on the Suffolk County District Attorney's Office and was instead served on the Norfolk County District Attorney's Office, which was not a party.

[3] The Commission's investigation of this matter revealed that this motion was filed, heard, and decided on July 7, 2006. The Commission's investigation revealed that the Docket Sheets for Jaime Estrada's two criminal matters (Docket Numbers 0314CR0609 and 0314CR0688) incorrectly indicate that Jaime Estrada's "Emergency Motion" was filed with the Quincy District Court, and then heard and decided by Judge Moriarty, on July 6, 2006.

On July 7, 2006, Attorney Carmel-Montes appeared in Quincy District Court where Judge Moriarty was then sitting. On July 7, 2006, Attorney Carmel-Montes requested to appear before Judge Moriarty for an unscheduled hearing on his motion. Judge Moriarty agreed to hear from Attorney Carmel-Montes on the motion on July 7, 2006. The Suffolk County District Attorney's Office had no knowledge or prior notice of this July 7, 2006 hearing and was not represented. An Assistant District Attorney from the Norfolk County District Attorney's Office was present for this hearing but had been given no authority to appear on behalf of the Suffolk County District Attorney on the matter.

After hearing from Attorney Carmel-Montes on July 7, 2006, Judge Moriarty immediately ruled on and granted the defendant's motion. She wrote:

> "Allowed. Moriarty, J. Not ask if [defendant] was under inf. of drugs but [defendant] did say he under-stands . . . ."

(A copy of that motion with Judge Moriarty's notation indicating the motion was allowed is attached as Exhibit K.)

Commonwealth v. Gabriel Estrada

On March 18, 2003**,** a complaint issued in the Chelsea District Court (Suffolk County) against Gabriel Estrada (the brother of Jaime Estrada) charging him with Assault with a Dangerous Weapon, in violation of G.L. c. 265, sec. 15B (b) (Docket Number 0314CR0612).

On March 24, 2003**,** an additional complaint was issued against him in the Chelsea District Court charging him with Intimidation of a Witness, in violation of G.L. c. 268, sec. 13B, and Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127 (Docket Number 0314CR0689).

(Copies of the Complaints and Docket Sheets for Docket Numbers 0314CR0612 and 0314CR0689 are attached as Exhibit L.)

On September 3, 2003**,** Gabriel Estrada appeared before Judge Moriarty in the Chelsea District Court and changed his plea on both complaints.

Judge Moriarty engaged Gabriel Estrada in a plea colloquy, asking if he waived all relevant constitutional rights and reading him all three Alien Warnings required by G.L. c. 278, sec. 29D. Judge Moriarty did not ask Gabriel Estrada any questions about whether he had consumed drugs or alcohol on that day.

After the plea colloquy, Judge Moriarty sentenced Gabriel Estrada to a continuance without a finding for one year on all charges. (Copies of the Tender of Plea forms

used in Docket Numbers 0314CR0612 and 0314CR0689 are attached as Exhibit M.)

In the "Judge's Certification" portion of the Tender of Plea forms used in Gabriel Estrada's cases, Judge Moriarty was asked to certify as follows:

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

On July 14, 2006, Gabriel Estrada filed a Motion to Vacate his pleas in Chelsea District Court. (A copy of that motion is attached as Exhibit N.)

On that motion, Gabriel Estrada was represented by Attorney Ryan M. Schiff. That motion was served on the Suffolk County District Attorney's Office.

Gabriel Estrada's motion included, as an attachment, Judge Moriarty's order allowing his brother's (Jaime Estrada's) Motion to Vacate. Gabriel Estrada's motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure.

On August 15, 2006, without a hearing, Judge Moriarty granted the motion. Judge Moriarty endorsed a cover letter from the Clerk Magistrate of the Chelsea District Court, ruling:

> "Motion to Vacate dismissals after [defendant] completed probation period on CWOF is allowed. [Defendant] is granted a new trial on all charges based on not asking [defendant] if he had any drugs or alcohol in his system, not because he did not plea to the charge knowingly, willingly, and voluntarily. Moriarty, J. 8-15-06."

(A copy of the letter with Judge Moriarty's notation indicating the motion was allowed is attached as Exhibit O.)

Suffolk County District Attorney's Response

Once the Suffolk County District Attorney's Office became aware that the pleas in the Estrada cases had been vacated, it filed a Notice of Appeal for both orders on August 23, 2006. (Copies of the Suffolk County District Attorney's Office's Notices of Appeal are attached as Exhibit P.)

Because Judge Moriarty's orders vacating the pleas on the Estrada cases had not been entered on the appropriate dockets, Suffolk County Assistant District Attorney Christina Miller filed motions to clarify the records in the Estrada cases on October 12, 2006. Copies of those motions were mailed directly to Judge Moriarty by ADA Christina Miller. (Copies of the motions to clarify and a copy of the letter to Judge Moriarty are attached as Exhibit Q.)

The Appeals Court subsequently reversed Judge Moriarty's decisions to vacate the pleas in the Estrada cases. (Copies of the Appeals Court's decisions with respect to both defendants are attached as Exhibit R.)

Judge Moriarty's Representations to the Commission

In a February 10, 2010 letter to the Commission, Judge Moriarty's counsel explained her reasoning for granting the motions to vacate filed in the Estrada cases and described the manner in which Judge Moriarty reached her decision:

> "Judge Moriarty consulted with several of her colleagues on the Bench for their opinion(s) as to the legal ramifications and/or consequences of a Judge signing/certifying that she had asked a particular question during a colloquy wherein the judge did not, in fact, ask such question. Finding no consensus among her colleagues, Judge Moriarty decided that because she had certified via her signature on the plea forms, respectively, that she had asked the question regarding drugs/alcohol consumption and any resultant effect(s) when, in fact, she had not. . . , the colloquies were flawed. Consequently, she allowed the defendants' motions to withdraw their pleas."

As noted above, in the "Judge's Certification" portion of the Tender of Plea forms used in all of the Estrada complaints, Judge Moriarty was asked to certify as follows:

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

Despite Judge Moriarty's claim that she granted the Motions to Vacate in the Estrada cases because "she had certified via her signature on the plea forms, respectively, that she had asked the question regarding drugs/alcohol consumption and any resultant

effect(s) when, in fact, she had not" it is clear that Judge Moriarty's counsel's representation to the Commission was false and that she made no such certification. Nowhere on the Tender of Plea forms in the Estrada cases did Judge Moriarty certify that she "had asked the question regarding drugs/alcohol consumption and any resultant effect(s)." On the forms, Judge Moriarty merely certified that she was satisfied that each defendant was "not under the influence of any drug, medication, liquor or other substance that would impair his or her ability to fully understand those rights" on the date of their pleas.

In the same February 10, 2010 letter to the Commission, Judge Moriarty's counsel also claimed that, before making her decisions to allow the Motions to Vacate in the Estrada cases, Judge Moriarty "consulted with several of her colleagues on the Bench for their opinion(s) as to the legal ramifications and/or consequences of a Judge signing/certifying that she had asked a particular question during a colloquy wherein the judge did not, in fact, ask such question." Judge Moriarty's counsel then added that, "[f]inding no consensus among her colleagues," she granted the Motions to Vacate. However, Judge Moriarty's representation to the Commission, through counsel, that she "consulted with several of her colleagues on the Bench for their opinion(s)" before making her decision is not supported by the facts and appears to be false. On July 7, 2006, without prior notice, Jaime Estrada's counsel appeared before Judge Moriarty in Quincy District Court asked Judge Moriarty to conduct an unscheduled hearing on Jaime Estrada's "Emergency Motion." Following a brief hearing on that motion, during which Judge Moriarty remained on the bench and consulted with no other judges, Judge Moriarty immediately ruled on the motion on July 7, 2006.

The Commission submits that the above-described evidence would support a finding that, either intentionally or because of a failure to maintain professional competence in the law, Judge Moriarty addressed Rule 30(b) motions filed in the Jaime Estrada and Gabriel Estrada cases on July 7, 2006 and July 14, 2006 respectively, on an improper *ex parte* basis, and in a manner contrary to the clear hearing and/or notice requirements of Mass.R.Crim.P. Rule 30 and its commentary. The Commission submits that, through this conduct, Judge Moriarty violated Canons 1A, 2A, 3B (2), and 3B (7) of the Code.

The Commission also submits that the above-described evidence would support a finding that, either intentionally or because of a failure to maintain professional competence in the law, Judge Moriarty failed to adhere to Rule 12C (5) of the Rules of Criminal Procedure and to established precedent when she granted the motions to vacate in the Estrada cases. The Commission submits that, through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2) of the Code.

The Commission also submits that the above-described evidence would support a finding that Judge Moriarty's explanation for granting motions to vacate in the Estrada cases, as stated through counsel in a February 10, 2010 letter to the Commission, was not simply contrary to the law, it was also clearly unsupported by the facts, and was not true. The Commission submits that, through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, and 3B (2) of the Code.

Finally, the Commission submits that the above-described evidence would support a finding that Judge Moriarty's description of the process by which she made her decision on the second Motion to Vacate in Commonwealth v. Jaime Estrada, as stated through counsel in a February 10, 2010 letter to the Commission, was unsupported by the facts, and was not true. The Commission submits that, through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, and 3B (2) of the Code.

c. At a Formal Hearing, the Commission would have presented the following additional evidence:

Commonwealth v. Matthew West

On May 29, 2001, the Roxbury Division of the Boston Municipal Court issued a complaint against Matthew West charging him with Assault and Battery, in violation of G.L. c. 265, sec. 13A, Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127, Resisting Arrest, in violation of G.L. c. 268, sec. 32B, and Disorderly Conduct, in violation of G.L. c. 272, sec. 53 (Docket Number 0102CR2402). (Copies of the Complaint and Docket Sheet for Docket Number 0102CR2402 are attached as Exhibit S.)

On October 2, 2001, Mr. West pled guilty to all charges before Judge Moriarty. Judge Moriarty sentenced Mr. West to 90 days in a house of correction, suspended for eighteen months on the assault and battery charge. She sentenced Mr. West to probation on the other charges. (A copy of the Tender of Plea form used in Docket Number 0102CR2402 is attached as Exhibit T.)

On September 19, 2007, Attorney Timothy Flaherty filed a motion to vacate Mr. West's plea in the Roxbury Division of the Boston Municipal Court. (A copy of that motion is attached as Exhibit U.)

On or about September 21, 2007, Attorney Flaherty argued the motion in Roxbury before Judge Milton Wright with an Assistant District Attorney from Suffolk County present at the hearing. Judge Wright declined to act on the motion because Judge Moriarty was the plea judge.

On September 24, 2007, Attorney Flaherty appeared in Quincy District Court where Judge Moriarty was then sitting. On September 24, 2007, Attorney Flaherty requested to appear before Judge Moriarty for an unscheduled hearing on his motion. Judge Moriarty agreed to hear from Attorney Flaherty on the motion on September 24, 2007.

The Suffolk County District Attorney's Office had no knowledge of this September 24, 2007 hearing and was not represented. An ADA from the Norfolk County District Attorney's Office (Michael C. Connolly) was present for this hearing but had been given no authority to appear on behalf of the Suffolk County District Attorney. ADA Connolly had no prior knowledge of the substance of the matter at issue and was never provided with a copy of Mr. West's motion.

On September 24, 2007**,** Attorney Flaherty argued in support of that motion before Judge Moriarty. (The transcript of that hearing is attached as Exhibit V.)

At the conclusion of the September 24, 2007 hearing, Judge Moriarty granted Mr. West's motion, stating to Mr. West's attorney, "Okay. Tell him it was an early Christmas present." Judge Moriarty then endorsed Mr. West's motion, as follows:

"In the best interest of justice, motion to vacate is allowed. Moriarty, J 9-24-07."

(An endorsed copy of that motion is attached as Exhibit W.)

Response to Judge Moriarty's September 24, 2007 Order

Later on September 24, 2007, Mr. West was scheduled to appear before Judge William G. Young in the United States District Court in Boston to be sentenced on federal criminal charges on Criminal Number 06-10281-WGY. Mr. West faced an enhanced federal sentence (262 to 327 months in federal prison instead only of 16 to 21 months) because of his conviction on Docket Number 0102CR2402.

When the Assistant United States Attorney, John T. McNeil ("AUSA McNeil"), became aware, just prior to the federal sentencing hearing, that Mr. West's state conviction on Docket Number 0102CR2402 had been vacated, he requested and was granted a continuance of the sentencing hearing until October 10, 2007.

AUSA McNeil later filed a "Government's Status Report on Defendant's Prior State Conviction" dated October 2, 2007 with the federal court on Criminal Number 06-10281-WGY. This "Status Report" was critical of Judge Moriarty's handling of Mr. West's Motion to Vacate on his state criminal case, Docket Number 0102CR2402. (A copy of the "Government's Status Report on Defendant's Prior State Conviction" filed by AUSA McNeil is attached as Exhibit X.)

On October 1, 2007, the Suffolk County District Attorney's Office filed a petition on behalf of the Commonwealth pursuant to G.L. c. 211, sec. 3 regarding Judge Moriarty's decision to vacate Mr. West's conviction in Docket Number 0102CR2402. This petition was docketed by the Court as SJ-2007-0463 (Commonwealth v. Matthew West). (A copy of the Commonwealth's Petition is attached as Exhibit Y.)

After that petition was filed, and while the matter was still pending before the Single Justice, on October 9, 2007, Judge Moriarty issued an order vacating her prior order allowing the motion to vacate. (A copy of Judge Moriarty's October 9, 2007 order is attached as Exhibit Z.)

On October 9, 2007, Supreme Judicial Court Justice Margot Botsford subsequently dismissed the G.L. c. 211, sec. 3 petition as moot.

On October 10, 2007, Mr. West's federal sentencing hearing took place on Criminal Number 06-10281-WGY. Judge Young sentenced Mr. West to 15 years committed in federal prison. At the conclusion of that sentencing hearing, Judge Young commented on the events that had transpired relative to Mr. West's state criminal matter. (The transcript of Judge Young's comments relating to Mr. West's state criminal matter is attached as Exhibit A1.)

A number of newspaper articles were published regarding the events that had transpired in Commonwealth v. Matthew West, Docket Number 0102CR2402. (The below-cited articles are attached as Exhibit B1.) Those articles included the following:

- In an October 4, 2007 article titled, "Quincy judge in flap over sentence, US says she called ruling a 'present' to drug defendant," the *Boston Globe* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 4, 2007 article titled, "U.S. Attorney rips Quincy judge over 'present' to criminal," the *Boston Herald* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 10, 2007 article titled, "Judge reverses herself on conviction, Prosecutors fought to have defendant face tougher penalty," the *Boston Globe* reported on Judge Moriarty's decision to reverse her order vacating Matthew West's conviction.

- In an October 11, 2007 article titled, "Judge chastised for vacating assault conviction, 'Deviation from laws of the Commonwealth,'" the *Boston Globe* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 17, 2007 article titled, "The push to void old convictions vexes DAs, Tactic may limit federal sentencing," the *Boston Globe* reported on the problems District Attorneys are facing with defendants trying to vacate old convictions. This article referenced Judge Moriarty's handling of the Matthew West case.

- In an October 25, 2007 article titled, "Judging the judge," *Massachusetts Lawyers Weekly* reported on Judge Moriarty's handling of the Matthew West case.

The Commission submits that the above-described evidence would support a finding that, after the decisions of the Appeals Court in Commonwealth v. Jaime Estrada and Commonwealth v. Gabriel Estrada (Exhibit R), Judge Moriarty addressed another Rule 30(b) motion filed in Commonwealth v. Matthew West on an improper *ex parte* basis, and in a manner contrary to the clear hearing and/or notice requirements of Mass.R.Crim.P. Rule 30 and its commentary. The Commission submits that, through this conduct, Judge Moriarty violated Canons 1A, 2A, 3B (2), 3B (4), and Canon 3B (7) of the Code.

The Commission also submits that the above-described evidence would support a finding that, Judge Moriarty then knowingly and intentionally failed to respect and comply with, and to be faithful to, the law by granting the Motion to Vacate in Commonwealth v. Matthew West despite knowing that her order was unlawful. The Commission submits that. through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, 3B (2) and 3B (7) of the Code.

Finally, the Commission submits that the above-described evidence would support a finding that, through her misconduct in relation to Commonwealth v. Matthew West, and because of the subsequent media coverage of her unlawful order, Judge Moriarty failed to observe high standards of conduct and damaged public confidence in her integrity and in the integrity and impartiality of the judiciary. The Commission submits that. through this conduct, Judge Moriarty violated Canons 1A and 2A of the Code.

d. Finally, the Commission submits that all of the above-described evidence would support a finding that, by failing to comply with the law in a manner that consistently favored one side over another in the cases before her (specifically, the defendants in those cases), by consistently failing to grant the Commonwealth a full opportunity to be heard according to the law, and, when the proper representative for the Commonwealth was present, by treating that representative discourteously, Judge

Moriarty's above-described misconduct constituted a pattern evidencing bias against the Commonwealth and a lack of impartiality.

The Commission submits that, through her conduct, Judge Moriarty failed to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved, and failed to perform her duties without bias or prejudice, in violation of G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, 3B (4), and 3B (7) of the Code.

3. Rule 13B(1)(c) Acknowledgement

Judge Moriarty, by signing this Agreement, acknowledges that the evidence set forth in the above Statement of Evidence, if presented to and accepted by a Hearing Officer at a Formal Hearing as clear and convincing, would support a finding that she violated G.L. c. 211C and the Code of Judicial Conduct, as alleged by the Commission above.

On June 9, 2010, the Commission issued a Statement of Allegations to Judge Moriarty in Complaint Numbers 2007-89 and 2007-108.

Pursuant to Commission Rule 6L, Judge Moriarty submitted a written response to the Statement of Allegations issued to her by the Commission in Complaint Numbers 2007-89 and 2007-108.

Judge Moriarty's written response took the form of a June 29, 2010 letter to the Commission's Chairman, Judge Stephen E. Neel. The Commission received this written response on June 30, 2010.

Pursuant to Commission Rule 13B(2), the Statement of Allegations issued by the Commission and Judge Moriarty's written response to the Statement of Allegations are included in this submission.

However, at Judge Moriarty's request, her letter responding to the Statement of Allegations also appears below:

JUN 3 0 2010

June 29, 2010

Stephen E. Neel, Chairman
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108

RE: Complaint Nos. 2007-89 and 2007-108

Dear Judge Neel:

Thank you very much for the opportunity to respond to the charges contained in the Commission's Statement of Allegations. I will attempt to respond to each of the allegations, and I request an opportunity to be heard in person.

1. Alien Warnings

I concede that I did not provide the full statutory warnings to the defendants referenced in January, 2005.[1] At that time, the law was unclear as to whether the full warnings had to be provided in the colloquy to citizens who would not suffer adverse consequences under the statute.

Indeed, the Supreme Judicial Court has determined that a judge must be reversed in accepting a plea without giving the statutory warnings only if the defendant can demonstrate that he or she may face one of the enumerated consequences contained in the statute. See *Comm. v. Berthold*, 441 Mass. 183 (2004); See also, *Comm. v. Casimir*, 68 Mass. App. Ct. 257 (2007); *Comm. v. Barreiro*, 67 Mass. App. Ct. 25 (2006); *Comm. v. Agbogun*, 58 Mass. App. Ct. 206 (2003).

At that time and subsequent to that time, there have been hundreds of decisions by the Appellate Courts in Massachusetts concerning a judge's duty to provide alien and other necessary warnings in his/her, plea colloquy. (See Exhibit l). These cases reflect appellate decisions on a matter of law and do not represent an intentional violation of the canons of judicial conduct. I did sign the section of the tender of plea form that certified that I addressed and informed each defendant of the consequences of the tender of plea if he was an alien. The certification was not correct, but the act was not intended to be untruthful. It was a form that I signed, a form that is used to guide a judge through the colloquy and disposition of the tender of plea. I signed the form to ensure that I completed the requirements. Knowledge of the place of birth of each defendant, I believed, completed the section's requirement. In retrospect, I should have marked the section, "citizen" or something of equal value. I was not attempting to establish an untruthful record.

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[1] These incidents occurred 5 ½ years ago, and I have changed my practice for many years and in hundreds of pleas and colloquies.

Of more importance, however, is that when I was informed by the Office of the Attorney General that my interpretation of the statute was incorrect and I was required to give the full statutory warning in each case, I have been doing just that. On January 26, 2006, I provided the full warning to each of the three defendants. I have provided the full warning for the last 4 ½ years, and there has not been one complaint since January, 2005.[2]

2. Colloquy

I admit, as well, that in two cases in September, 2003 in accepting a tender of plea, I failed to verbally inquire whether the defendants were under the influence of drugs and alcohol.

Again, this legal issue has been the subject of numerous appellate decisions. The appellate case law is replete with decisions concerning the adequacy of the colloquy, even after the judge signed the tender and certification. (See Exhibit 2). Just last month, the Supreme Judicial Court through Justice Ireland reiterated that a motion to vacate a plea should not be allowed unless the three constitutional rights contained in the statute had not been provided. *Comm. v. Hubbard*, 457 Mass. 24 (2010).

The position taken by the Commission is contrary to what I believed, at the time, was the most natural reading of the certification. The second sentence of the certifications begins, "I made appropriate inquiry...." The most natural reading to me, at the time, was that I was required to "ma(k)e appropriate inquiry" into the mental capacity of each defendant to enter into the plea. To satisfy this requirement, I proceeded under the belief that I was required to ask a direct question concerning the defendant's consumption of "drugs, medication, liquor or other substances." In my view at the time, resolving this issue by situational inference would reflect uncertainty. My belief was that the court must probe into the relevant inquiry with a direct question that asked each defendant whether he had consumed any alcohol or drugs. I believed that this question was required in order to find that the defendants voluntarily entered into their pleas. I did not believe that it was permissible, as suggested by the Commission's statement of Allegations, that I could make the certification "merely" because I "was satisfied that each defendant was 'not under the influence of any drugs, medication, liquor or other substance that would impair his or her ability to fully understand those rights' on the date of their pleas."

In *Comm v. Correa*, 43 Mass. App. Ct. 714 (1997), the Appeals Court stated that, to determine whether a defendant's plea is voluntary, the court should conduct a "real probe of the defendant's mind," which should include a determination of "whether the defendant was under the influence of alcohol or drugs." *Id.* at 717-718. In the context of a motion for a new trial, the Appeals Court decided in *Comm v. Estrada*, 69 Mass. App. Ct. 514 (2007), that absent any indication of impairment the failure to make the inquiry will not provide, as matter of law, a right

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[2] The issue with regard to alien warnings was not unique to me and was the practice of a number of judges at Chelsea District Court. The letters from retired Justices Alan Jarasitis and Paul Buckley make clear that we all discussed this legal issue at the Chelsea District Court and had all, incorrectly, followed the same procedure. (See Exhibits 3 & 4).

to relief. The court stated,

> "(a)bsent some indication that the defendant's judgment is impaired by alcohol, drugs or medication at the time of his admission or plea, particular questions from the judge probing that possibility, while helpful, are not essential to establishing the intelligence and voluntariness of the admission of the admission or plea. Much more probative are the judge's observations of the defendant during the colloquy, particularly the defendant's interactions with his attorney and the judge and the manner in which the defendant follows and responds to questions posed. Ordinarily, the judge may infer from these observations the defendant's understanding and competence to enter an admission or plea." (Footnote omitted)

Id. at (2007). And the court noted that, "(t)he mere fact that the defendant 'had any drugs or alcohol in this system' does not render the defendant incompetent or his plea involuntary. What is important is whether the defendant's understanding is so impaired by alcohol, drugs or medication as to render him incapable of rational judgment." *Id* at n.7. But, at the time, I understood the language of the form as requiring, as matter of law, that I make the determination, and in a direct and unambiguous way. I vacated the pleas because of my understanding and the demonstrated showing through the transcript that, contrary to what I believed was required, I did not make the "appropriate inquiry." The Appeals Court has explained the context of what questioning is required. My interpretation was different. My legal reasoning should not be characterized as being "not true." More importantly, since the Appeals Court decision, I always make a specific note on each plea regarding this portion of the colloquy. [3]

Finally, I could not have ruled on Jamie Estrada's motion on July 6, 2006. The defendant's motion is dated July 6, 2006. Notice of the motion was delivered, in hand, to the Norfolk County District Attorney on July 7, 2006. My endorsement of the allowance of the motion is made on the page dated by defense counsel as July 6, 2006. The Commonwealth's motion for clarification, Exhibit Q, states that, as of October 11, 2006, my ruling had not been entered on the docket. The Commonwealth references an exhibit, but it is not part of the record. Each docket does place the date of my decision as having occurred on July 6, 2006. But, these are typewritten entries. Respectfully, the docket entries must have been reconstructed. And, the reconstruction must have used my endorsement on the page of the date the defendants' motions were drafted as the date of my decision.

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[3] With regard to the allegations regarding ex parte communications concerning these cases, upon receipt of the letter I did call Suffolk County/ADA Christina Miller to discuss procedural and scheduling issues. I was not attempting to gain any tactical advantages. It was not a violation of Cannon 3(b)(7)(A).

With regard to the allowance of the motions, both presented the same issues in open court and one as an emergency motion. I should not have acted upon them without the presence of the Suffolk County District Attorney, but a Norfolk County District Attorney was present.

I did consult with my colleagues. My counsel's statement to the Commission, a conveyance of my statement to him, was the truth. I understand that docket entries generally control, but the evidence reveals that in the administrative duty of reconstructing the docket, there was an error. I could not decide a motion on a date prior to when counsel for the defendants appeared before me.

3. Mathew West

I fully concede that I should not have allowed the motion to vacate for Mathew West. But, I would like to place that inappropriate decision in context.

Defense counsel had represented that all of the relevant parties were not objecting to the allowance of the motion-the Suffolk County District Attorney, the United States Attorney, and the Federal District Court Judge. (See Transcript attached as Exhibit 5).[4]

Further, I was in the midst of a of a heart attack during the hearing. Due to my impaired medical condition, I made an error in judgment allowing the motion to vacate. After my hospitalization and upon review of the transcript of the hearing, I sua sponte vacated my decision. When I reviewed the transcript, I did not recall most of the hearing but I do remember trying to ask questions so no one would see that I was ill while I tried not to pass out. I recall thinking I just need to get off the bench, and I allowed the motion in error. I do not recall even reading the submissions or which document I signed. On September 24, 2007, my judgment was impaired by my medical condition including dizziness, lightheadedness, chest pain, uncontrolled hypertension, fear, anxiety and inability to make appropriate decisions.

I understand and state emphatically that I should never have taken the bench that day. I should not have heard cases and or made rulings that day. I was driven home by a court officer and my husband took me to the emergency room at New England Medical Center as a result of my condition. A copy of the emergency room record has been provided to the commission.

A brief summary of my medical issues leading up to the day of the West case are as follows. As a result of abdominal surgery to remove a uterine mass in June, 2007, while at the hospital I began to experience tachycardia (rapid heart rate). I underwent several tests to rule out post-operative embolism and was released from the hospital. While recovering, I continued to have this heart issue which caused dizziness, lightheadedness, exhaustion and hypertension. In late August, 2007, I was taken to the hospital emergency room as a result of severe heart symptoms. I was admitted to New England Medical Center to undergo testing and for medical treatment for the tachycardia and chest pain. During the echocardio stress test, the front wall of my heart stopped. I was taken to the Operating Room for a cardiac catherization procedure. I was advised that I had a blockage in the coronary arteries. After five or six days of treatment and testing, I was released

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[4] Similar to the motions in the Estrada matters, it was error for me to hear this motion without a representative from the Suffolk County District Attorney being present, but I accepted the representations of defense counsel and the Norfolk County Assistant District Attorney who was present.

from the hospital with a cardiac treatment plan including a cardiac loop monitor which I wore everyday. I was told to send in transmissions when I experienced any heart symptoms. (See Exhibit 6).

Several days leading up to the September 24, 2007, West case, I had been suffering from chest pain but assumed it would be resolved with the new medication. When I arrived at court on September 24, 2007, I was not feeling well. I was told by Judge McGovern that I didn't look well and should go home or to the doctor. I did not want to leave my session work to another judge, and I thought the heart issues would subside with the medication. I did send a heart monitor transmission via phone and discussed the symptoms. I was told to take the medication and send another monitor transmission in twenty minutes. The first transmission was at 11:10 a.m, and the second transmission was at 11:29 a.m. when the symptoms were worsening. I was advised to call 911. I did not want to go to the nearest hospital, Quincy Medical Center, where the ambulance would be required to take me. I wanted to go to the emergency room at New England Medical Center (New Tufts Medical Center). A court officer drove me home from court, and my husband drove me to New England Medical Center emergency room. The first EKG showed elevated ST waves indicating an abnormality, possibly a blockage in the heart. Again, I was taken to the operating room for an emergency cardiac catherization where again coronary artery blockage was found. I was admitted to the hospital. The diagnosis was possible unstable angina, coronary artery disease, hypertension, gastrointestinal reflux disease and further tests were ordered. I have had further medical issues since this date including several strokes as evidenced by the June, 2009 MRI and both carotid artery and heart surgery. (See Exhibit 7).[5]

While my medical condition(s) (see Exhibits 8, 9, 10, 11 &12) and my acceptance of the representations of defense counsel do not excuse my legal error, I hope you will consider the context in which it was made.

4. Pattern of Bias

I concede that I made legal errors in 2003 and 2005 on the alien warnings and colloquies which never adversely affected a defendant or the Commonwealth, but there have been no further complaints on either issue for over 5 ½ years. I have corrected the legal mistakes I made at that

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[5] Exhibit 7 is a letter from my primary care physician. In the letter, Dr. John M. Mazzullo states:

"It is apparent that Judge Moriarty was affected by her coronary disease on the morning of September 24, 2007. She would have experienced pain, fear and anxiety as a result of her cardiac condition. Many patients demonstrate an inability to focus and an ambivalence over whether to remain in a safe environment (in this case the courthouse) or to leave and seek treatment. Cardiac patients also tend to delay treatment in the hope that the symptoms will abate. The cardiac episode of September 24th would negatively affect Diane's memory, comprehension, and decision making ability."

time.[6]

I conduct myself fairly and impartially to all parties. I am not prejudiced or biased against the Commonwealth. As a judge for almost twelve years, I have always attempted to balance the interests of those who appear before me. In the Fontina case, I accepted the defendant's plea and terms of disposition. In Delgado, I rejected the defendant terms of disposition. In Rodriguez, I accepted the disposition requested by the defendant and the Commonwealth. In the case of Jaime Estrada, I rejected the dispositional terms offered by the defendant. I rejected the dispositional terms offered by Gabriel Estrada. In the West case, I also rejected the dispositional terms suggested by West. I do not harbor a bias against the Commonwealth. (See affidavits of Police Prosecutors (Exhibit 13) and former Suffolk County District Attorneys (Exhibit 14)). (See also attached copies of my evaluations (Exhibits 15, 16, 17 & 18)).

5. Discourteousness

The Commission asserts that I violated the Code of Judicial Conduct in the manner that I responded to the Commonwealth's request the I provide the so-called alien warnings. I understand that the Commission can inquire into the conduct of a judge which occurred more than one year prior to the date of a complaint. Yet, as to the allegation that I was discourteous, I am disadvantaged in responding to the allegation. Reproduced in the Statement of Allegation is my exchange with the prosecutor. It is a moment in time in the course of a colloquy. It is advanced that the prosecutor first objected, but the exchange is stripped of this context, and, at least in the case of Commonwealth v. Anthony Fontina, what has been reproduced suggests that the prosecutor had, at least once before, made an objection. The context of how I responded to this objection or what exchange occurred is not part of the Statement of Allegations or the exhibits. It is suggested that, in the case of Commonwealth v. Jennifer Delgado, I "(Exclaim[ed])," "Well, Make a record! I just told you I wouldn't do it. Take it up!" I do not recall the specific exchange, but it would not be my practice to vehemently tell the Commonwealth to do, or not to do, a particular act. Having said that, if any exchange between a judge and a litigator becomes heated or contentious, it is the judge's responsibility, I acknowledge, to control the particular situation and ensure that both decorum and order are maintained. Respectfully, in fairness, it has not been demonstrated that I have exhibited a pattern of discourteous treatment toward the Commonwealth, and the abstracted record should not be a basis on which to proceed with a formal allegation.

6. Mass.R.Crim.P 12(c)(5)

The Commission in its Statement of Allegations alleges that I violated Cannons 1A, 2A, and 3B(2), by "fail[ing] to adhere to Rule 12C (5) of the [Massachusetts] Rules of Criminal Procedure and to established precedent when [I] granted the motions to vacate in the **Estrada** cases." Respectfully, Rule 12C(5) governs the court's obligation to determine the voluntariness of a plea and

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[6] I would suggest that those legal mistakes made many years ago are now stale, have been changed in my practice since then in literally hundreds, if not thousands, of cases, and should not now serve as evidence of bias against the Commonwealth so many years later.

the factual basis of the charge. In addition, it informs the court that at the end of the hearing, a judge must state "the court's acceptance or rejection of the plea or admission." Rule 12(c)(5)(B). The rule does not govern the context to which it is applied.

7. Sanction

While assuming responsibility for the legal errors I have made, I feel that any suspension is fully disproportionate to my mistakes. I immediately changed my practice when corrected. Chief Justice Connolly has assigned me to be mentored by Justice Robert Rufo of the Superior Court, and I have learned from his advice and suggestions. (See letter from Justice Robert Rufo (Exhibit 19)). Since 2006, I have attended 25.5 days of judicial training/education. I also believe that my many years of hard work and dedication to the work of the judicial system far outweigh any of the legal errors which I made. (See affidavit of First Justice Mark Coven (Exhibit 20) and Exhibits 21-25).

I fully accept responsibility for my legal mistakes; I have adjusted my practice; but, I do not believe a suspension is warranted.

Sincerely,

Hon. Diane E. Moriarty

4. Rule 13B(1)(d) Recommendations for Discipline

The Commission and Judge Moriarty respectfully recommend to the Supreme Judicial Court that the following constitutes appropriate discipline for the misconduct alleged above:

a. Judge Moriarty shall be publicly censured, pursuant to G.L. c. 211C, sec. 8(4)(e).

b. Judge Moriarty shall be subject to monitoring by the Commission for a period of at least one year following the effective date of the Court's Order accepting this recommendation for discipline. At the sole discretion of the Commission, this period of monitoring may be extended for up to one additional year. During the period of monitoring, the Commission will, through appropriate means, monitor Judge Moriarty's handling of the matters that come before her.

c. Judge Moriarty shall conform her handling of the various civil and criminal matters that come before her to the requirements of the applicable statutes, rules, and case law, and to the Code of Judicial Conduct.

d. Judge Moriarty shall sign any necessary medical waiver(s) and during the period of monitoring, Judge Moriarty shall meet with her treating physician on at least a quarterly basis, comply with her treating physician's prescribed treatments, and arrange for her treating physician to provide written quarterly reports directly to the Commission, stating:

   i. that he has seen and examined her;

   ii. any medical conditions Judge Moriarty is suffering from that might affect her ability, physically or mentally, to discharge her judicial responsibilities;

   iii. her compliance with any prescribed treatments;

   iv. that he has discussed with Judge Moriarty her ability, physically and mentally, to discharge her judicial responsibilities; and

   v. his opinion with regard to her ability to do so.

e. During the period of monitoring, Judge Moriarty shall meet regularly with a mentor judge designated by the Commission, at intervals to be determined by the Commission in consultation with the mentor judge. Judge Moriarty's meetings with the mentor judge shall include at least one face-to-face meeting every three months. The mentor judge shall report to the Commission every three months regarding his or her meetings with Judge Moriarty.

f. Judge Moriarty shall agree that the following press release will be issued upon the effective date of the Court's Order accepting this joint recommendation:

On [DATE], the Commission on Judicial Conduct and Associate Justice of the District Court, Diane E. Moriarty, filed with the Supreme Judicial Court a Conditional Submission Upon Acknowledged Evidence (attached) pursuant to G.L. c. 211C and Commission Rule 13B on Commission Complaint Numbers 2007-89 and 2007-108.

Complaint Number 2007-89 was filed by the Supreme Judicial Court. Complaint Number 2007-108 was filed anonymously.

These complaints included allegations that Judge Moriarty conducted improper ex parte hearings, displayed discourtesy toward parties appearing before her, created an appearance of bias and lack of impartiality, and failed to be faithful to the law in connection with her handling of several District Court criminal matters from January 18, 2005 to September 24, 2007.

After a thorough investigation of these complaints, the Commission issued a Statement of Allegations to Judge Moriarty on June 9, 2010. Judge Moriarty provided the Commission with a written response to the Statement of Allegations on June 30, 2010 and, pursuant to Commission Rule 6L, made a personal appearance before the Commission on July 20, 2010 with her attorney, Daniel W. O'Malley, Esq.

By Order dated [DATE], the Supreme Judicial Court accepted the joint recommendation on Complaint Numbers 2007-89 and 2007-108 and publicly censured Judge Moriarty for violating General Laws Chapter 211C, Section 2(5)(b) and Canons 1A, 2A, 3B (2), 3B (4), 3B (5) and 3B (7) of the Code of Judicial Conduct (SJC Rule 3:09). Judge Moriarty is subject to conditions and further monitoring by the Commission for a period of up to two years from the effective date of the Court's Order.

The Commission's statute and rules are available on the Commission's website: www.mass.gov/cjc .

No statement or comment regarding this disposition other than the above press release will originate from the Commission or Judge Moriarty. If any misleading information becomes public through the acts of either party, the other party may issue such statements as are appropriate to clarify the matter.

g. If, at any point during the period of monitoring, the Commission believes that Judge Moriarty has violated any of the above terms and/or believes that Judge Moriarty suffers from a physical or mental disability affecting her judicial performance,

evidence of such violation and/or disability may be presented to the Court, so that the Court may consider an appropriate remedy.

5. Rule 13B(1)(e) Agreement of the Commission and the Judge

The Commission and Judge Moriarty agree that (i) if the Supreme Judicial Court accepts their agreed recommendation for discipline, the decision of the Supreme Judicial Court will constitute the final disposition of the case; and (ii) if the Supreme Judicial Court does not accept their agreed recommendation, the Commission will proceed to consider and dispose of the complaint in accordance with the Rules of the Commission.

6. Rule 13B(1)(f) Waiver of Confidentiality

Judge Moriarty, by signing this Agreement, waives any confidentiality rights that would preclude submission of the matter to the Supreme Judicial Court, including the items submitted herewith.

7. Rule 13B(1)(g) Impoundment

The Commission and Judge Moriarty agree that this submission shall be impounded by the Supreme Judicial Court unless and until the Supreme Judicial Court accepts the recommendation set forth herein.

Judge Moriarty requests that, if the Supreme Judicial Court accepts the agreed recommendation for discipline, the Court order the continued impoundment of her medical records, which were referenced in her response to the Statement of Allegations as Exhibits 6, 8, 9, 10, 11 and 12 and were included in this submission. The Commission has no objection to Judge Moriarty's request for continued impoundment.

8. Rule 13B(2) Submission Under Seal

This submission is submitted to the Supreme Judicial Court under seal and consists of the following:

1. This Agreement;

2. Copies of Commission Complaint Numbers 2007-89 and 2007-108;

3. A copy of the Statement of Allegations Issued to Judge Moriarty by the Commission in Complaint Numbers 2007-89 and 2007-108 (excluding referenced exhibits[4]);

4. The Exhibits referenced in the Commission's Statement of Evidence;

5. A copy of Judge Moriarty's written response to the Statement of Allegations (including referenced exhibits);

6. G.L. c. 211C;

7. The Rules of the Commission on Judicial Conduct; and

8. The Code of Judicial Conduct (Supreme Judicial Court Rule 3:09).

Respectfully Submitted,

by:

Stephen E. Neel,
Chairman
Commission on Judicial Conduct

Howard V. Neff, III,
Staff Attorney
Commission on Judicial Conduct
BBO # 640904

[4] The exhibits referenced in the Statement of Allegations are identical to the exhibits referenced in the Commission's Statement of Evidence, which were enclosed with this submission. The exhibits referenced in the Statement of Evidence are identified by the same letter (i.e. Exhibit A, B, C) as they are when referenced in the Commission's Statement of Allegations. For reasons of efficiency, this submission does not include a duplicate set of exhibits.

Hon. Diane E. Moriarty

Attorney Daniel W. O'Malley,
Counsel for Judge Diane E. Moriarty
Daniel W. O'Malley, P.C.
1266 Furnace Brook Parkway
Quincy, MA 02169
BBO # 547483

Dated: September 9, 2010

COMPLAINT NUMBER 2007-89

2007-89
OCT 25 2007

SUPREME JUDICIAL COURT
JOHN ADAMS COURTHOUSE

MARGARET H. MARSHALL
CHIEF JUSTICE

October 25, 2007

Confidential

Robert J. Guttentag, Chairman
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108-3006

Dear Mr. Guttentag:

The enclosed materials concerning a Judge in the District Court Department of the Trial Court were sent to me by Chief Justice Lynda M. Connolly in compliance with the provisions of S.J.C. Rule 3:09, Canon 3 (D)(1). After consultation with the Justices, I forward them to you for such action as the Commission on Judicial Conduct deems appropriate.

Yours sincerely,

Margaret H. Marshall

cc: Chief Justice Robert A. Mulligan (without enclosure)
Chief Justice Lynda M. Connolly (without enclosure)
Judge Diane E. Moriarty (without enclosure)

Lynda M. Connolly
Chief Justice

Trial Court of the Commonwealth
District Court Department

Administrative Office
Two Center Plaza, Suite 200
Boston, MA 02108-1906

TEL: (617) 788-8810
FAX: (617) 788-8985
TTY: (617) 788-8809

October 17, 2007

Honorable Margaret H. Marshall
Chief Justice
Supreme Judicial Court
One Pemberton Square, Suite 2200
Boston, MA 02108-1735

CONFIDENTIAL

Dear Chief Justice Marshall:

On September 24, 2007, Honorable Diane E. Moriarty, who is appointed to the Wareham District Court and regularly sits in the Quincy District Court, allowed a motion to vacate the defendant's conviction and withdraw his October 2, 2001 guilty plea in *Commonwealth v. Matthew West,* Roxbury Dist. Ct. No. 0102CR2402. The propriety of that ruling was subsequently the subject of both a G.L. c. 211, § 3 petition before Justice Margot Botsford as Single Justice in *Commonwealth v. Matthew West,* SJ-2007-0463, and comment in sentencing proceedings before Judge William G. Young in *U.S. v. Matthew West,* Criminal No. 06-10281-WGY. A copy of the transcript of the September 24 motion hearing, as filed in the Single Justice matter, is enclosed at Tab 1.

On October 9, 2007, after reviewing that transcript, Judge Moriarty vacated her earlier decision. Later that day Justice Botsford dismissed the G.L. c. 211, § 3 petition as moot.

Also on October 9, I met with Judge Moriarty and her counsel, Daniel W. O'Malley, who reviewed the sequence of events in this matter. Prior to that meeting I was aware that, shortly after making her ruling on September 24, Judge Moriarty had left the courthouse with chest pains and had gone to the emergency room of a local hospital (New England Medical Center), where she was subsequently admitted. (This followed an earlier incident of cardiac tachycardia in August 2007 that had resulted in Judge Moriarty's admission to the hospital and her absence from work for a week.) During our meeting Judge Moriarty told me that on September 24 she had experienced an onset of significant chest pain, nausea and lethargy prior to hearing the motion, but that she had wanted to complete her morning's work by hearing this and another matter before leaving the courthouse shortly after noontime.

Judge Moriarty also informed me that she would be undergoing further medical tests on October 12 in order to determine whether her medical condition is variant angina affecting the

coronary arteries or microvascular disease involving the smaller blood vessels. I asked Judge Moriarty not to return to work until after those medical tests. We also discussed the next steps I was considering including corresponding with the Supreme Judicial Court about these matters. Later that day I received the letter enclosed at Tab 2, which I had requested from her counsel.

The following day, October 10, I wrote to Judge Moriarty concerning her future sittings; a copy of that letter is enclosed at Tab 3. Also on October 10, Judge Young commented on Judge Moriarty's original decision, when he imposed sentence in the Federal case. A copy of his remarks, excerpted from the court transcript, is enclosed at Tab 4.

I am of course concerned about Judge Moriarty's health at this time and mindful that an impending medical crisis may have affected her judgment on September 24. At the same time, I am greatly concerned about the appearances of impropriety created by this matter and their impact on the District Court and ultimately on all of the Massachusetts judiciary. In light of the related issues that were raised in *Commonwealth v. Estrada,* 69 Mass. App. Ct. 514 (2007), and *Commonwealth v. Anthony Fontina et al.,* SJ-2005-0039, I feel that I am obligated by Supreme Judicial Court Rule 3:09, Canon 3(D)(1), to bring this matter to your attention. It raises questions of non-compliance with decisional law contrary to Canons 2(A) and 3(B)(2), the appearance of bias contrary to Canon 3(B)(5), and possible ex parte communications contrary to Canon 3(B)(7).

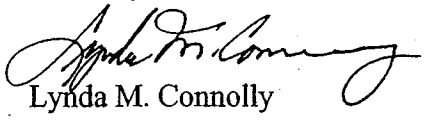
Judge Moriarty is presently on medical leave. I have determined that she cannot return to the bench until she presents a letter from her physician clearing her to resume her duties. Further, I have determined that prior to being assigned to sit in any session, she must complete a review of all of her work during the period from the onset of her cardiac illness in August through Friday, October 5, 2007, the last day she sat. Additionally, the Administrative Office of the District Court is undertaking a review of randomly selected tape recordings of Judge Moriarty's sessions over the last year to determine if there is a need for continuing professional development in any areas of District Court jurisdiction.

I have arranged with Superior Court Judge Robert C. Rufo, a former District Court colleague, to work as a mentor to Judge Moriarty, meeting with her periodically to discuss, inter alia, the need to ensure that all her work reflects appropriate procedural safeguards that protect the rights of all and avoid the appearance of impropriety. I hope too that Judge Moriarty's respect for the great privilege we enjoy as District Court judges, her respect for the Constitutional principles we each have sworn to honor and uphold, and her respect for the law will allow her to absorb Judge Rufo's sound advice especially regarding the need to balance compassion with, above all, adherence to the law in all matters that come before us.

Judge Moriarty is well regarded for her work ethic and for her efforts in the Quincy District Court Drug Court session. She is anxious to return to work, but prior to returning to the

District Court sitting schedule, she must meet with Regional Administrative Judge Paul C. Dawley and me to discuss appropriate future assignments. If you need any further information regarding this matter, please do not hesitate to contact me.

Sincerely,



Lynda M. Connolly
Chief Justice of the District Court

cc: Honorable Robert A. Mulligan, Chief Justice for Administration and Management
Honorable Diane E. Moriarty
Daniel W. O'Malley, Esquire

Transcript
Commonwealth v. Matthew West, No. 0102CR2402
Quincy District Court, Courtroom A
Monday, September 24, 2007
Justice Diane Moriarty

[9:33 a.m.]

COURT: Yes?

COURT OFFICER: He wants to speak to you on a case, did you want to confirm it now before?

COURT: On a?

COURT OFFICER: It's got nothing to do with a jury trial matter.

COURT: On a case with the D.A. that's pending?

DEFENSE: It's, actually it's an old case from Roxbury, Judge, and I apologize for bringing it here today, but it is a matter of a little bit of urgency, if you have a minute for me. This is a case from 2001 in Roxbury District Court that you presided over.

COURT: You're not going to expect me to remember this, correct?

DEFENSE: I know that you won't, Judge.

COURT: Thank you.

DEFENSE: You may, I tried to get to you last week and I understand that you were in training. And I appeared before Judge Wright in the Roxbury District Court on it-

COURT: Yeah.

DEFENSE: And he was inclined to act on the motion but he instructed me to speak with you. The papers are in Roxbury, but in sum, Judge, here's what the situation is.

COURT: I told him if he didn't plead guilty, he'd go to jail?

DEFENSE: No, the attorney, according to him-

COURT: Good. Okay.

DEFENSE: Here's what the situation is with respect to Mr. West, Judge. He is scheduled for sentencing today in the federal court in front of Judge Young. He was convicted several months ago after jury trial in the Federal District Court of possession with

intent to distribute a small amount of cocaine. His case is an offshoot of the Boston Police corruption case involving Roberto Polito. Mr. West was alleged to have hosted the unlicensed stripper parties, and the federal government believed that he maintained the guest list. They then selected him -- well, my argument is they selected him for prosecution, a government witness solicited purchase of cocaine from him. He on two occasions sold a total of 750 dollars of cocaine to the government witness. They concluded the investigation with the Boston Police, and then came to see West. He admitted his involvement, but refused to cooperate. They subsequently indicted him and detained him, and he went to trial on that basis. Because of this plea in the Roxbury District Court, which was an assault and battery, he is subject to a career offender-

COURT: Who's the lawyer? Do you remember?

DEFENSE: The papers are there, I looked at it, I'm not sure who the lawyer was, Judge. It was bar counsel I think. But because of this conviction in the Roxbury District Court, his sentence guidelines go from 15 to 21 months to 262 months. Judge, you're-

COURT: This isn't -- was not his only felony charge, right? He's had previous-

DEFENSE: When he was 22 years old, he served time in Virginia for distribution of cocaine. This happened when he was about 35 or so-

COURT: Okay.

DEFENSE: -this assault and battery. He was trouble free, Judge, since his release from incarceration in Virginia.

COURT: And how long did he do in Virginia?

DEFENSE: He got -- he got a pretty heavy sentence. He sold, you know, four grams of cocaine to an undercover. He got ten years, was told he'd be paroled in eight months, but he did four years. When he got out, he then got a job at UNICCO Service Company. He bought a home in Saugus. He's engaged to be married to Tatiana Hall. He's got a ten-year-old daughter and a one-year-old son that was born just after he was arrested on this. He -- this case speaks to what's wrong with the federal sentencing guidelines, Judge, and I think Judge Young recognizes that. Judge Young ruled in a case that was decided in the First Circuit in 2006, *U.S. v. Teague*, that he concluded that even though a person was a career offender, that he should be sentenced according to the post-*Booker* statutory guidelines, and not be subject to what he called an excessive penalty. And I think this is a similar case. And what I'm just trying to do is give Judge Young something to hang his hat on so he can sentence the defendant appropriately with the guideline provisions that apply to him. Essentially what happens is, because of this conviction, the government-

COURT: I know.

DEFENSE: Yeah.

COURT: I know.

DEFENSE: I didn't know-

COURT: But I didn't -- I don't, did you get a copy of the colloquy?

DEFENSE: There's no audiotape of the colloquy.

COURT: Timmy Flaherty says I didn't do it right.

DEFENSE: Well-

COURT: I'm not sure about that. I always made sure that I did it.

DEFENSE: The one unusual thing on the docket, Judge, is that-

COURT: Is there a green sheet?

DEFENSE: There's a green sheet.

COURT: Yeah.

DEFENSE: But on the docket it says, "Colloquy given in court to defendant," and I don't usually see that in dockets. Which -- and I don't know the reason for it. It was just unusual to me. So I don't-

COURT: Was that -- that might have been the new clerk.

DEFENSE: Yeah, it could have been.

COURT: Do you know who the new clerk -- we had a ton of new clerks come in in Roxbury at the time, so I don't know-

DEFENSE: Essentially, Judge, the only basis-

COURT: -but the green sheet has my signature on it, right?

DEFENSE: I'm sure it does, yeah.

COURT: Mmmhmm.

DEFENSE: The only basis for the defendant moving to vacate the conviction is that he wasn't advised of the possible sentencing enhancement potential were he to plea to the assault and battery as a crime of violence. And essentially the facts are-

COURT: I mean, I don't have to give him that for something that might occur in the future. I only have to give him what he can do for state time, right?

DEFENSE: You might be right, Judge, you may be right, but-

COURT: Well, but the reason I'm asking you these questions is I just got turned over on doing this. They said I didn't make -- I did the appropriate colloquy. I didn't have to ask them if they've had any drugs or alcohol. I didn't have to tell them that they might in the future have a problem with federal guideline sentencing.

DEFENSE: Mmmhmm.

COURT: Because I just allowed a motion to withdraw a plea in Chelsea based on similar -- he also had I.N.S. problems, and the Appeals Court two months ago told me that I didn't have to do any of those things. That's what my problem is.

DEFENSE: Well in the interest of justice, Judge, I think you have discretion to vacate, and I would only suggest that the fact-

COURT: Except now you want to, hmm. What is the D.A. -- Did you file with the D.A.?

DEFENSE: I did, yeah, Jonathan Tynes, the supervising D.A. over there-

COURT: What did he say?

DEFENSE: He says-

COURT: He didn't file an opposition, because, I tell you, they took me up in Chelsea.

DEFENSE: Yeah, he tells me that, for the record, what he would do is he would just object for the record, but he would not make a strenuous argument, and that's what his position was in front of Judge Wright. I think-

COURT: I wish I had evidence of that.

DEFENSE: Tynes and I have discussed this.

COURT: Yeah, I know.

DEFENSE: I can give you the sentencing guide -- the pre-sentence report on Matt West. I have a copy of it with me where they go through the whole thing.

COURT: Yeah, let me take a look at it. I don't like to do this. I'm looking at this, this was an easy sentence for me. 90 days suspended.

DEFENSE: I know, Judge.

COURT: Six months probation.

DEFENSE: He completed – he got anger management, completed -- I mean, you understand what they're doing with this kid.

COURT: I do. What information were they looking for that he wouldn't give them?

DEFENSE: Who the other cops were at the parties.

COURT: The other cops? They're going to find that out anyways.

DEFENSE: They've got it all audio and videotaped. What they did was, they came to him and they said, "Look. You're going to do 25 years-

COURT: Why didn't he just give it to them?

DEFENSE: He's not that type of guy, Judge. He wouldn't tell them -- essentially-

COURT: Someone was going to give it to them.

DEFENSE: What happened -- and the facts were produced at trial. What happened essentially is that the government witnesses solicited him on a couple of occasions. We didn't interpose an entrapment defense at trial because it wouldn't fly with his record.

COURT: Yeah. Yeah.

DEFENSE: But essentially he asked him, can you get us some party favors? And he said, with the girls? I don't do that, that's up to you. And then the informant touched his nose, and my client responded on the audiotape, you mean powders? Well, I can't do that, but I can network it for you. So essentially, the evidence against him is, he received some cocaine from an unidentified person and refused to give the source to the government. He handed it over to the informant, and transferred the money back to the source. And for that he's facing, you know, essentially 22 years. And that's -- you know, they were looking for him -- my first conversation with the AUSA was, they would recommend-

COURT: Was this straight assault and battery on mine?

DEFENSE: He was -- there was assault and battery, maybe disorderly-

COURT: It's assault and battery, malicious destruction of property over.

DEFENSE: Yeah.

COURT: So it's the malicious destruction of property over that's the problem for you?

DEFENSE: No, I think it's the assault and battery, Judge. A crime of violence-

COURT: Even though it's a misdemeanor?

CLERK: I was just going to say, it's a misdemeanor.

COURT: It's a misdemeanor, right?

DEFENSE: I think it's-

COURT: It's not the-

DEFENSE: It qualifies as a crime of violence. I mean I would ask you to vacate-

COURT: Is that what the issue is? You think-

DEFENSE: I believe it's-

COURT: Because, see, I thought it was all felony stuff that triggered the sentencing.

DEFENSE: The way the career offender enhancement section reads, it's two prior felony convictions-

COURT: Right.

DEFENSE: Either one for drugs and one for violence, or two of each, and this assault and battery, I believe, qualifies as a predicate offense for a crime of violence, even though-

COURT: It's not a felony.

DEFENSE: Yeah.

COURT: Because it's not a felony.

DEFENSE: Not in Massachusetts it's not a felony, but I think it's regarded for purposes of career offender enhancements as a felony conviction, or crime of violence that satisfies the predicate. The facts of this case, the assault and battery conviction, were that he and his fiancée were parking a car in Roxbury, and-

COURT: It was a domestic case.

DEFENSE: Well, essentially what happened was, they bumped a -- the pre-sentence makes it look like domestic but it wasn't. They bumped a bumper of a car in front of them, and the guy in that car came out and came after the fiancée. West intervened. A neighbor called the police to defend West, because there was a social club across the street. A bunch of guys piled out, and when the cops arrived there was more yelling and shouting. West got locked up. Titiana was pushing a cop. And, you know, it was one of those things.

COURT: Well, I'm just looking -- he's the got the juvenile stuff, he was convicted, but he's got an ABPO in Cambridge.

DEFENSE: But it's beyond the -- it's beyond the applicable time provisions because it's -- the career offenders go back only ten years for the enhancements. So the ones that count are the most recent: Virginia and Suffolk.

COURT: This '92 one?

DEFENSE: According to-

COURT: Ten years?

DEFENSE: But he was released-

COURT: Yeah, I see that.

DEFENSE: You see where he was released in 1996. So it's just within the ten-year time period.

[extended period of silence]

COURT: They didn't charge him with ABPO. Right?

DEFENSE: Yeah they didn't, and it was-

COURT: Which is really what it sounds like it was.

DEFENSE: Right. And I think -- I'm not sure if they were originally charged that way and then they reduced it, but that recitation of facts doesn't read the same way the police report does. The police report is, oddly enough, not as bad against the defendant as the recitation by the probation officer is. The police report, you know, says that he was flailing about, and then it's almost an admission of excessive force because they did kind of bundle him and mace him repeatedly, and then when he was in the cell area he refused medical treatment but he was obviously in agony, and that's when he was-

COURT: So if this is reduced, what does he get? Do you know?

DEFENSE: Yeah, he does 15 to 21 months. The – let me get the sentencing memorandum.

COURT: 15 to 21 months?

DEFENSE: The guidelines call, well, I mean it's discretionary-

COURT: I know. Who's the sentencing judge?

DEFENSE: Young.

COURT: Well, Young won't give him the lower end.

DEFENSE: Well, he'll give him something less than 262 to 327. Young tried the case-

COURT: Right. So he knows. And what's the government asking for?

DEFENSE: Well, they're looking for the current enhancement of 262 to 327. And frankly, Judge, in my conversation with-

COURT: Do you have, it that what they asked for?

DEFENSE: That's what they're going to ask for today. The AUSA keeps calling me saying have you been able to -- he said, I know you're not going to vacate Virginia, but have you done anything in Mass., and I said, well, we're still working on it. I think he frankly, Judge, is uneasy with this. I think everyone's uneasy with it.

COURT: Well, when this goes up they're going to overturn me, you understand that?

DEFENSE: I don't think they're going to appeal it.

COURT: It was the same office.

DEFENSE: Not the same D.A.

COURT: I hope you're right about that.

DEFENSE: I think I am.

COURT: Because now they're going to try it all over again. That's not going to make them happy. Right?

DEFENSE: He'll plea, right after he's sentenced.

COURT: He will?

DEFENSE: He'll plea to committed time on advice and instruction of counsel.

COURT: Okay. [writing] Tell him it was an early Christmas present.

DEFENSE: You are a just and wise woman.

COURT: [laughs]

DEFENSE: [laughs]. Thank you.

COURT: You're welcome.

DEFENSE: Matt West thanks you.

[9:51 a.m.]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 06-10281-WGY
	)	
MATTHEW WEST	)	

GOVERNMENT'S STATUS REPORT ON DEFENDANT'S PRIOR STATE CONVICTION

The United States of America, by and through Assistant United States Attorney John T. McNeil, respectfully submits this report on the status of the defendant's efforts to vacate a prior conviction in the Roxbury District Court which qualifies as a predicate for the application of the career offender enhancement at sentencing.

On the date of sentencing in this matter, September 24, 2007, the defendant informed the Court that his 2001 convictions in the Roxbury District Court had been vacated that morning by Quincy District Court Justice Diane Moriarty.[1] A copy of the order allowing the defendant's motion was provided to the government several minutes before the sentencing hearing. See Exhibit 2. Because the state court's action appeared irregular, the government requested a continuance of the sentencing hearing in this matter to determine the procedure employed for vacating the conviction and the state court's basis for doing so.

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[1]On October 2, 2001, the defendant pleaded guilty to assault and battery, resisting arrest, malicious destruction of property, and disorderly conduct before Justice Moriarty in the Roxbury District Court. See PSR ¶46 ; Exhibit 1 (docket sheet and complaint). Assault and battery and resisting arrest qualify as "crimes of violence" for the applicability of the career offender guideline and statute. See PSR ¶37. Since the time of West's plea, Justice Moriarty has moved to Quincy District Court.

As set forth below, the record reveals that Justice Moriarty vacated West's 2001 convictions after a brief ex parte hearing, and, in her own words, as "an early Christmas present" for the defendant. She granted West's motion despite acknowledging that she would be overturned by the appeals court, and despite telling defense counsel that she was overturned twice in July 2007 for granting nearly identical motions in other cases. She was persuaded to grant the motion in part because West's counsel assured her that West would plead guilty to the very same charges as soon as his federal sentencing in this case is concluded. The transcript of the hearing reflects the tawdry reality of the "cottage industry" in vacating prior state convictions where guilty pleas are "treated like a Las Vegas marriage, to be annulled when they become burdensome or inconvenient." United States v. Marsh, 486 F.Supp.2d 150, 159 (D.Mass. 2007). The status of this matter is as follows:

On or about September 19, 2007, the defendant filed a motion in the Roxbury District Court to vacate his 2001 convictions. See Exhibit 2. On September 21, 2007, the defendant pressed his motion orally in the Roxbury District Court. See Exhibit 3 at 4. The Suffolk District Attorney's Office, representing the Commonwealth, objected to the motion. Id. The judge presiding in that session of the Roxbury District Court declined to act on the motion. Id.

On the morning of September 24, 2007, counsel for the defendant appeared in Quincy District Court where Justice Moriarty was sitting. See Exhibit 4 (hearing transcript). Justice Moriarty heard the motion ex parte; the Suffolk County District Attorney's Office was not notified of the hearing, nor was it present. Id.; Exhibit 3 at 4.

During the brief hearing, the defendant candidly admitted that the only reason he was seeking to vacate his prior conviction was because it qualified him as a career offender in the

instant case. See Exhibit 4 at 4-5, 8. Counsel pressed the argument that, "this case speaks to what's wrong with the federal sentencing guidelines." Id. at 2. He not only told Justice Moriarty that the Roxbury conviction was a predicate for the career offender applicability, resulting in a sentence of 262 months, but that if the court vacated the conviction West would face only 16-21 months under the United States Sentencing Guidelines. Id. at 4-5, 8. Defense counsel also provided a copy of West's Presentence Report from the instant case to Justice Moriarty. Id. Counsel also admitted that he had no evidence that West's prior plea colloquy was incomplete; moreover, Justice Moriarty stated "I always made sure that I did it." Id. at 3. Rather, counsel for West argued that at the time of his plea he did not appreciate that pleading guilty could subject him to a career offender penalty if he re-offended and was federally prosecuted. Id. at 4. Counsel also argued that this Court was critical of the career offender sentencing guidelines, and that this Court was looking for "something to hang its hat on" to reduce the defendant's federal sentence. Id. at 2.

Justice Moriarty responded that vacating a plea for not advising a defendant of the future consequences of a conviction was improper and, "I just got turned over [on appeal] on doing this." Id. at 4.[2] She also warned defense counsel that, "when this goes up [on appeal], they're going to overturn me." Id. at 8. Defense counsel told Justice Moriarty that he did not believe that the Commonwealth would appeal her decision. Id. Counsel also assured her that West would plead guilty to the Roxbury charges again right after he is sentenced in federal court. Id.

Justice Moriarty granted the motion, stating, "Tell him [West] it was an early Christmas

---

[2] Justice Moriarty was reversed by the Massachusetts Court of Appeals on July 3, 2007, in two cases in which she held ex parte hearings and vacated prior state convictions. See Commonwealth v. Gabriel Estrada, 868 N.E.2d 1259, 69 Mass. App. Ct. 514 (2007); Commonwealth v. Jaime Estrada, 869 N.E. 2d 632, 69 Mass. App. Ct. 1110 (2007) (table).

present." Id. at 9.

On October 1, 2007, the Commonwealth filed a petition with the Single Justice of the Massachusetts Supreme Judicial Court seeking to vacate Justice Moriarty's order and seeking an order from the Single Justice directing Justice Moriarty not to conduct ex parte motions to withdraw guilty pleas. See Exhibit 3. The Commonwealth notified the Single Justice that this Court has set a sentencing hearing for October 10, 2007, and is unlikely to grant an additional continuance. The Commonwealth requested a decision from the Single Justice before that date.

In the event that the Single Justice rules on the Commonwealth's petition before the sentencing date scheduled in this case, the government will provide notice to the Court and to the Probation Office. In the event that this Court goes forward with the defendant's sentencing before the Single Justice acts, the government will file a motion for an upward departure/deviation.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

Date: October 2, 2007

By: /s/ John T. McNeil
JOHN T. MCNEIL
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
October 2, 2007

I, John T. McNeil, Assistant United States Attorney, do hereby certify that this document, filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non registered participants on this date.

/s/ John T. McNeil

JOHN T. McNEIL
Assistant U.S. Attorney

COMPLAINT NUMBER 2007-108

COMMONWEALTH OF MASSACHUSETTS
COMMISSION ON JUDICIAL CONDUCT
11 BEACON STREET SUITE 525
BOSTON, MASSACHUSETTS 02108-3006
Phone: (617) 725-8050
Fax: (617) 248-9938

OCT 26 2007

COMPLAINT FORM

CJC Complaint No. 2007-108

This form is designed to provide the Commission with the information to screen your complaint and to begin an investigation of your allegations. Please read the accompanying materials on the Commission's function and procedures before filling out this form. ONLY ONE JUDGE MAY BE COMPLAINED OF ON EACH FORM.

PLEASE TYPE OR PRINT CLEARLY ALL INFORMATION

Your name ANON

Address _____

_____ Zip Code _____

Daytime telephone _____

Name of judge MORIARTY

Court QUINCY

Case name WEST + ESTRADA

Docket number SEE ENCLOSED

Attorneys involved _____

Date(s) of misconduct _____

Has an appeal been filed? _____

A summary of the general nature of your complaint: _____

COURT EX PARTE HEARINGS

AND ACTS UNLAWFULLY TO VACATE

VALID CONVICTIONS ON MULTIPLE OCCASIONS

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT - QUINCY DIVISION
DENNIS F. RYAN PARKWAY
QUINCY, MASSACHUSETTS 02169
(617) 471-1650

MARK S. COVEN
FIRST JUSTICE

ARTHUR H. TOBIN
CLERK-MAGISTRATE

MICHAEL A. WALSH
CHIEF PROBATION OFFICER

October 9,2007

Criminal Clerk
Boston Municipal Court
Roxbury Division
85 Warren Street
Roxbury, Ma.02119

HAND-DELIVERED

Re: Commonwealth v. Matthew West
Docket # 0102cr2402

Dear Sir or Madam:

Relative to the above-captioned criminal action, enclosed herewith please find my Order.

Kindly docket same.

Thank you in advance for your consideration in this regard.

Very truly yours,
Diane E. Moriarty, Associate Justice

cc.(With enclosure)

cc:Suffolk County Assistant District Attorney Jonathan Tynes
Via Fax (617)619-4160 and U.S. Mail

Suffolk County District Attorney's Office- Appellate Division
Via Fax (617)619-4160 and U.S. Mail

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT - QUINCY DIVISION
DENNIS F. RYAN PARKWAY
QUINCY, MASSACHUSETTS 02169
(617) 471-1650

MARK S. COVEN
FIRST JUSTICE

ARTHUR H. TOBIN
CLERK - MAGISTRATE

MICHAEL A. WALSH
CHIEF PROBATION OFFICER

cc:Timothy Flaherty, Esquire
Via Fax (617)227-1844 and U.S. Mail

Clerk, Supreme Judicial Court for Suffolk County
Via Fax (617) 657-1034 and U.S. Mail

Assistant United States Attorney, John T. McNeil
Via Fax (617)748-3974 and U.S. Mail

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

ROXBURY DISTRICT COURT
DOCKET #0102cr2402

COMMONWEALTH

V.

ORDER

MATTHEW WEST

Upon review of a transcript of the September 24, 2007 motion hearing in the above-entitled case and from an improved physical condition, I hereby vacate my order allowing the Defendant's Motion to Vacate Conviction and, instead, deny the defendant's motion.

Dated: October 9, 2007

So Ordered,

Diane E. Moriarty
Associate Justice

Transcript
Commonwealth v. Matthew West, No. 0102CR2402
Quincy District Court, Courtroom A
Monday, September 24, 2007
Justice Diane Moriarty

[9:33 a.m.]

COURT: Yes?

COURT OFFICER: He wants to speak to you on a case, did you want to confirm it now before?

COURT: On a?

COURT OFFICER: It's got nothing to do with a jury trial matter.

COURT: On a case with the D.A. that's pending?

DEFENSE: It's, actually it's an old case from Roxbury, Judge, and I apologize for bringing it here today, but it is a matter of a little bit of urgency, if you have a minute for me. This is a case from 2001 in Roxbury District Court that you presided over.

COURT: You're not going to expect me to remember this, correct?

DEFENSE: I know that you won't, Judge.

COURT: Thank you.

DEFENSE: You may, I tried to get to you last week and I understand that you were in training. And I appeared before Judge Wright in the Roxbury District Court on it-

COURT: Yeah.

DEFENSE: And he was inclined to act on the motion but he instructed me to speak with you. The papers are in Roxbury, but in sum, Judge, here's what the situation is.

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DEFENSE: No, the attorney, according to him-

COURT: Good. Okay.

DEFENSE: Here's what the situation is with respect to Mr. West, Judge. He is scheduled for sentencing today in the federal court in front of Judge Young. He was convicted several months ago after jury trial in the Federal District Court of possession with

intent to distribute a small amount of cocaine. His case is an offshoot of the Boston Police corruption case involving Roberto Polito. Mr. West was alleged to have hosted the unlicensed stripper parties, and the federal government believed that he maintained the guest list. They then selected him -- well, my argument is they selected him for prosecution, a government witness solicited purchase of cocaine from him. He on two occasions sold a total of 750 dollars of cocaine to the government witness. They concluded the investigation with the Boston Police, and then came to see West. He admitted his involvement, but refused to cooperate. They subsequently indicted him and detained him, and he went to trial on that basis. Because of this plea in the Roxbury District Court, which was an assault and battery, he is subject to a career offender-

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COURT: This isn't -- was not his only felony charge, right? He's had previous-

DEFENSE: When he was 22 years old, he served time in Virginia for distribution of cocaine. This happened when he was about 35 or so-

COURT: Okay.

DEFENSE: -this assault and battery. He was trouble free, Judge, since his release from incarceration in Virginia.

COURT: And how long did he do in Virginia?

DEFENSE: He got -- he got a pretty heavy sentence. He sold, you know, four grams of cocaine to an undercover. He got ten years, was told he'd be paroled in eight months, but he did four years. When he got out, he then got a job at UNICCO Service Company. He bought a home in Saugus. He's engaged to be married to Tatiana Hall. He's got a ten-year-old daughter and a one-year-old son that was born just after he was arrested on this. He -- this case speaks to what's wrong with the federal sentencing guidelines, Judge, and I think Judge Young recognizes that. Judge Young ruled in a case that was decided in the First Circuit in 2006, *U.S. v. Teague*, that he concluded that even though a person was a career offender, that he should be sentenced according to the post-*Booker* statutory guidelines, and not be subject to what he called an excessive penalty. And I think this is a similar case. And what I'm just trying to do is give Judge Young something to hang his hat on so he can sentence the defendant appropriately with the guideline provisions that apply to him. Essentially what happens is, because of this conviction, the government-

COURT: I know.

DEFENSE: Yeah.

COURT: I know.

DEFENSE: I didn't know-

COURT: But I didn't -- I don't, did you get a copy of the colloquy?

DEFENSE: There's no audiotape of the colloquy.

COURT: Timmy Flaherty says I didn't do it right.

DEFENSE: Well-

COURT: I'm not sure about that. I always made sure that I did it.

DEFENSE: The one unusual thing on the docket, Judge, is that-

COURT: Is there a green sheet?

DEFENSE: There's a green sheet.

COURT: Yeah.

DEFENSE: But on the docket it says, "Colloquy given in court to defendant," and I don't usually see that in dockets. Which -- and I don't know the reason for it. It was just unusual to me. So I don't-

COURT: Was that -- that might have been the new clerk.

DEFENSE: Yeah, it could have been.

COURT: Do you know who the new clerk -- we had a ton of new clerks come in in Roxbury at the time, so I don't know-

DEFENSE: Essentially, Judge, the only basis-

COURT: -but the green sheet has my signature on it, right?

DEFENSE: I'm sure it does, yeah.

COURT: Mmmhmm.

DEFENSE: The only basis for the defendant moving to vacate the conviction is that he wasn't advised of the possible sentencing enhancement potential were he to plea to the assault and battery as a crime of violence. And essentially the facts are-

COURT: I mean, I don't have to give him that for something that might occur in the future. I only have to give him what he can do for state time, right?

DEFENSE: You might be right, Judge, you may be right, but-

COURT: Well, but the reason I'm asking you these questions is I just got turned over on doing this. They said I didn't make -- I did the appropriate colloquy. I didn't have to ask them if they've had any drugs or alcohol. I didn't have to tell them that they might in the future have a problem with federal guideline sentencing.

DEFENSE: Mmmhmm.

COURT: Because I just allowed a motion to withdraw a plea in Chelsea based on similar -- he also had I.N.S. problems, and the Appeals Court two months ago told me that I didn't have to do any of those things. That's what my problem is.

DEFENSE: Well in the interest of justice, Judge, I think you have discretion to vacate, and I would only suggest that the fact-

COURT: Except now you want to, hmm. What is the D.A. -- Did you file with the D.A.?

DEFENSE: I did, yeah, Jonathan Tynes, the supervising D.A. over there-

COURT: What did he say?

DEFENSE: He says-

COURT: He didn't file an opposition, because, I tell you, they took me up in Chelsea.

DEFENSE: Yeah, he tells me that, for the record, what he would do is he would just object for the record, but he would not make a strenuous argument, and that's what his position was in front of Judge Wright. I think-

COURT: I wish I had evidence of that.

DEFENSE: Tynes and I have discussed this.

COURT: Yeah, I know.

DEFENSE: I can give you the sentencing guide -- the pre-sentence report on Matt West. I have a copy of it with me where they go through the whole thing.

COURT: Yeah, let me take a look at it. I don't like to do this. I'm looking at this, this was an easy sentence for me. 90 days suspended.

DEFENSE: I know, Judge.

COURT: Six months probation.

DEFENSE: He completed -- he got anger management, completed -- I mean, you understand what they're doing with this kid.

COURT: I do. What information were they looking for that he wouldn't give them?

DEFENSE: Who the other cops were at the parties.

COURT: The other cops? They're going to find that out anyways.

DEFENSE: They've got it all audio and videotaped. What they did was, they came to him and they said, "Look. You're going to do 25 years-

COURT: Why didn't he just give it to them?

DEFENSE: He's not that type of guy, Judge. He wouldn't tell them -- essentially-

COURT: Someone was going to give it to them.

DEFENSE: What happened -- and the facts were produced at trial. What happened essentially is that the government witnesses solicited him on a couple of occasions. We didn't interpose an entrapment defense at trial because it wouldn't fly with his record.

COURT: Yeah. Yeah.

DEFENSE: But essentially he asked him, can you get us some party favors? And he said, with the girls? I don't do that, that's up to you. And then the informant touched his nose, and my client responded on the audiotape, you mean powders? Well, I can't do that, but I can network it for you. So essentially, the evidence against him is, he received some cocaine from an unidentified person and refused to give the source to the government. He handed it over to the informant, and transferred the money back to the source. And for that he's facing, you know, essentially 22 years. And that's -- you know, they were looking for him -- my first conversation with the AUSA was, they would recommend-

COURT: Was this straight assault and battery on mine?

DEFENSE: He was -- there was assault and battery, maybe disorderly-

COURT: It's assault and battery, malicious destruction of property over.

DEFENSE: Yeah.

COURT: So it's the malicious destruction of property over that's the problem for you?

DEFENSE: No, I think it's the assault and battery, Judge. A crime of violence-

COURT: Even though it's a misdemeanor?

CLERK: I was just going to say, it's a misdemeanor.

COURT: It's a misdemeanor, right?

DEFENSE: I think it's-

COURT: It's not the-

DEFENSE: It qualifies as a crime of violence. I mean I would ask you to vacate-

COURT: Is that what the issue is? You think-

DEFENSE: I believe it's-

COURT: Because, see, I thought it was all felony stuff that triggered the sentencing.

DEFENSE: The way the career offender enhancement section reads, it's two prior felony convictions-

COURT: Right.

DEFENSE: Either one for drugs and one for violence, or two of each, and this assault and battery, I believe, qualifies as a predicate offense for a crime of violence, even though-

COURT: It's not a felony.

DEFENSE: Yeah.

COURT: Because it's not a felony.

DEFENSE: Not in Massachusetts it's not a felony, but I think it's regarded for purposes of career offender enhancements as a felony conviction, or crime of violence that satisfies the predicate. The facts of this case, the assault and battery conviction, were that he and his fiancée were parking a car in Roxbury, and-

COURT: It was a domestic case.

DEFENSE: Well, essentially what happened was, they bumped a -- the pre-sentence makes it look like domestic but it wasn't. They bumped a bumper of a car in front of them, and the guy in that car came out and came after the fiancée. West intervened. A neighbor called the police to defend West, because there was a social club across the street. A bunch of guys piled out, and when the cops arrived there was more yelling and shouting. West got locked up. Titiana was pushing a cop. And, you know, it was one of those things.

COURT: Well, I'm just looking -- he's the got the juvenile stuff, he was convicted, but he's got an ABPO in Cambridge.

DEFENSE: But it's beyond the -- it's beyond the applicable time provisions because it's -- the career offenders go back only ten years for the enhancements. So the ones that count are the most recent: Virginia and Suffolk.

COURT: This '92 one?

DEFENSE: According to-

COURT: Ten years?

DEFENSE: But he was released-

COURT: Yeah, I see that.

DEFENSE: You see where he was released in 1996. So it's just within the ten-year time period.

[extended period of silence]

COURT: They didn't charge him with ABPO. Right?

DEFENSE: Yeah they didn't, and it was-

COURT: Which is really what it sounds like it was.

DEFENSE: Right. And I think -- I'm not sure if they were originally charged that way and then they reduced it, but that recitation of facts doesn't read the same way the police report does. The police report is, oddly enough, not as bad against the defendant as the recitation by the probation officer is. The police report, you know, says that he was flailing about, and then it's almost an admission of excessive force because they did kind of bundle him and mace him repeatedly, and then when he was in the cell area he refused medical treatment but he was obviously in agony, and that's when he was-

COURT: So if this is reduced, what does he get? Do you know?

DEFENSE: Yeah, he does 15 to 21 months. The – let me get the sentencing memorandum.

COURT: 15 to 21 months?

DEFENSE: The guidelines call, well, I mean it's discretionary-

COURT: I know. Who's the sentencing judge?

DEFENSE: Young.

COURT: Well, Young won't give him the lower end.

DEFENSE: Well, he'll give him something less than 262 to 327. Young tried the case-

COURT: Right. So he knows. And what's the government asking for?

DEFENSE: Well, they're looking for the current enhancement of 262 to 327. And frankly, Judge, in my conversation with-

COURT: Do you have, it that what they asked for?

DEFENSE: That's what they're going to ask for today. The AUSA keeps calling me saying have you been able to -- he said, I know you're not going to vacate Virginia, but have you done anything in Mass., and I said, well, we're still working on it. I think he frankly, Judge, is uneasy with this. I think everyone's uneasy with it.

COURT: Well, when this goes up they're going to overturn me, you understand that?

DEFENSE: I don't think they're going to appeal it.

COURT: It was the same office.

DEFENSE: Not the same D.A.

COURT: I hope you're right about that.

DEFENSE: I think I am.

COURT: Because now they're going to try it all over again. That's not going to make them happy. Right?

DEFENSE: He'll plea, right after he's sentenced.

COURT: He will?

DEFENSE: He'll plea to committed time on advice and instruction of counsel.

COURT: Okay. [writing] Tell him it was an early Christmas present.

DEFENSE: You are a just and wise woman.

COURT: [laughs]

DEFENSE: [laughs]. Thank you.

COURT: You're welcome.

DEFENSE: Matt West thanks you.

[9:51 a.m.]

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

06-P-1327

COMMONWEALTH

vs.

JAIME ESTRADA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from a District Court judge's allowance of the defendant's motion to vacate his admissions to sufficient facts and resultant convictions of assault by means of a dangerous weapon; intimidation of witness; and malicious destruction of property. On review of the record, we conclude that the judge committed clear error in vacating the defendant's convictions. We reverse the order allowing the defendant's motion to vacate the convictions, and reinstate the convictions.

1. Background. On September 3, 2003, the defendant tendered an admission to sufficient facts in District Court. The Commonwealth recommended the imposition of guilty findings and eighteen months of probation, concurrent on all charges; the defendant asked the judge to continue the matters without a finding of guilt for one year, to be dismissed thereafter. After colloquy, the judge accepted the defendant's admissions, entered guilty findings and imposed one year of probation, concurrent on all charges. The judge properly advised the defendant of all

EXHIBIT 5

three consequences of the alien warning. See G. L. c. 278, § 29D. The defendant completed his probationary period, and probation terminated on November 14, 2004.

On June 16, 2006, prompted by concerns of deportation, the defendant moved for a new trial and to vacate his convictions. He asserted that his admissions were constitutionally inadequate because (1) the judge failed to inquire whether the defendant was under the influence of any drug, medication, liquor or other substance that would impair his ability to enter his admissions intelligently and voluntarily;[1] and (2) his admissions were coerced by his attorney, whose unpreparedness amounted to ineffective assistance of counsel. On June 20, 2006, the judge denied the defendant's motion without a hearing.

On July 6, 2006, without notice to the Suffolk County prosecutor[2], the defendant filed an emergency motion to reconsider in Norfolk County, where the judge was then sitting, in which he asserted that his liberty "truly and figuratively hangs in the balance." That same day, the judge allowed the

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[1] The defendant did not file an affidavit in support of his motion, choosing to stand on the contemporaneous record of the proceeding. He maintained that notwithstanding the assertions in the "green sheet" accompanying his admission, the judge had an obligation to inquire orally regarding each of those assertions, and particularly regarding the consumption of drugs, medication or liquor; and any promises or inducements regarding his admission.

[2] The defendant served a copy of his motion on the Norfolk County district attorney's office, which was not a party.

motion, noting that she did "not ask if defendant under inf[luence] of drugs but defendant did say he under[stood his rights and was waiving them]."[3] The Commonwealth subsequently learned of the defendant's motion, and its allowance, by happenstance when the defendant's brother and codefendant served a similar motion and attached thereto a copy of the defendant's emergency motion with the judge's endorsement of allowance.[4] This appeal followed.

2. Discussion. We have reviewed the transcript of the colloquy of the defendant's admissions and discern no proper basis on which the judge could have allowed a motion to vacate the defendant's convictions. That Federal immigration law may work an unfortunate and harsh result is not a basis for vacating convictions that are otherwise lawful in all respects. There is no merit to the contention that the judge's failure to inquire whether the defendant was under the influence of alcohol, drugs or medication at the time of the admissions, standing alone, warrants vacating the admissions. Such questioning is not required by rule. See Mass.R.Crim.P. 12(c), as amended, 399 Mass. 1215 (1987). Nor is it mandated to establish the

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[3] The defendant has never asserted by affidavit or otherwise that he was under the influence of drugs, medication or alcohol at the time he tendered his admissions.

[4] See Commonwealth v. Gabriel Estrada, 69 Mass. App. Ct. ___ (2007) (published opinion in case of the defendant's brother).

intelligence of a plea or admission, i.e., the defendant's understanding of the nature of the charges and the consequences of his admissions. See Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 638 (2007). Absent some indication that the defendant's judgment is impaired by alcohol, drugs or medication at the time of his plea or admission, particular questions from the judge probing that possibility are not essential to establishing intelligence and voluntariness. Indeed, a judge may ordinarily infer the defendant's understanding and awareness from observations made during the colloquy and has an independent obligation not to accept a plea or admission from a defendant who lacks the capacity to make such a tender. See Commonwealth v. Robbins, 431 Mass. 442, 445 (2000) (test of competence to plead guilty similar to that for standing trial).

The defendant has never claimed that he was under the influence of any substance during the colloquy. Contrast Commonwealth v. Gonzalez, 43 Mass. App. Ct. 926, 926 (1997). Moreover, the transcript of the colloquy reflects that the defendant was competent to tender his admissions freely and understandingly and that he was not impaired by alcohol, drugs or medication. The defendant answered all questions rationally and appropriately. He signified his understanding of the right to trial by jury, and that he was giving up his right to trial by a jury or a judge; his privilege against self-incrimination, his

right to confront and cross-examine witnesses and to present his own evidence. He admitted that the prosecutor's factual recitation was true; acknowledged that no one forced him to admit; and that he was doing so freely, willingly and voluntarily.[5] In such circumstances, the defendant failed to present a credible reason to vacate his admissions. See Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992).

Likewise lacking in merit are the defendant's unsupported contentions that his plea was coerced and the result of counsel's unpreparedness. The record is devoid of objective indicia or credible extrinsic proof that the defendant's admissions were the product of counsel's coercion and unpreparedness. See Hiskin, supra at 640.

Order allowing motion to vacate convictions reversed.[6]

By the Court (Grasso, Berry & Cohen, JJ.),

Clerk

Entered: July 3, 2007.

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[5] Absent a credible showing that the defendant's admissions were the product of coercion or threats, a judge may infer their voluntariness from the defendant's responses to the questions posed and the favorable consequences of his plea. See Commonwealth v. Correa, 43 Mass. App. Ct. at 714, 719 (1997).

[6] The defendant's request for attorney's fees and costs is denied. See Mass.R.Crim.P. 15(d) and 30(c)(8)(B), as appearing in 435 Mass. 1501 (2001).

BEFORE THE COMMISSION ON JUDICIAL CONDUCT

Complaint Numbers 2007-89 and 2007-108

STATEMENT OF ALLEGATIONS

The Commission on Judicial Conduct ("the Commission") makes this Statement of Allegations against the Honorable Diane E. Moriarty ("Judge Moriarty"), Associate Justice of the Wareham District Court, pursuant to M.G.L. c. 211C, sec. 5(5). This Statement of Allegations incorporates Complaint Numbers 2007-89 and 2007-108 and all of the referenced Exhibits.

The Commission alleges that Judge Moriarty has engaged in judicial misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer. This misconduct includes: willful misconduct in office, in violation of G.L. c. 211C, sec. 2 (5)(b); failure to maintain and observe high standards of conduct in violation of Canon 1A of the Code of Judicial Conduct (Supreme Judicial Court Rule 3:09); failure to respect and comply with the law and to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Canon 2A; failure to be faithful to the law and maintain professional competence in it, in violation of Canon 3B (2); failure to be patient and courteous to litigants and lawyers, in violation of Canon 3B (4); and failure to accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law (including failure to refrain from initiating, permitting or considering, *ex parte* communications concerning a pending or impending proceeding), in violation of Canon 3B (7).

The Commission specifically alleges that:

1. **Judge Moriarty was appointed an Associate Justice of the District Court of Massachusetts in 1998.**

2. **Either intentionally or because of a failure to maintain professional competence in the law, during the plea hearings in three different criminal matters in the Chelsea District Court, Commonwealth v. Anthony Fontina, Commonwealth v. Jennifer Delgado, and Commonwealth v. Luis Rodriguez, Judge Moriarty refused to provide Alien Warnings, as required by G.L. c. 278, sec. 29D. Through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2).**

   On the date of each defendant's respective plea, the Commonwealth requested that Judge Moriarty provide the required Alien Warnings. In each instance, Judge Moriarty responded by refusing to provide the required Alien Warnings. In each instance, the manner in which Judge Moriarty responded to these requests was discourteous in violation of Canon 3B (4) and did not permit the Commonwealth a full opportunity to be heard according to the law, in violation of Canon 3B (7).

   Finally, on the date of each defendant's respective plea, after being asked to provide

the required Alien Warnings and refusing to do so, Judge Moriarty then falsely certified that she had, in fact, provided the required Alien Warnings to each defendant. Through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2).

Commonwealth v. Anthony Fontina

On September 19, 2003, the Chelsea District Court issued a complaint charging a defendant, Anthony Fontina, with possession to distribute marijuana, in violation of G. L. c. 94C, sec. 32C (Docket Number 0314CR003020). The defendant was also charged with possession of a knife, in violation of a municipal ordinance, but that charge was later dismissed by the Commonwealth on the condition that the defendant pay $200 in court costs. (Copies of the Complaint and Docket Sheet for Docket Number 0314CR003020 are attached as Exhibit A.)

On January 18, 2005, Mr. Fontina admitted to sufficient facts to warrant a finding of guilt on the drug charge. Judge Moriarty accepted an agreed-upon tender of plea without giving an alien warning. During the colloquy, the prosecutor requested that the judge give an alien warning to the defendant pursuant to G.L. c. 278, sec. 29D. Judge Moriarty responded by asking Mr. Fontina where he was born. Mr. Fontina answered, "Cambridge, Massachusetts." Judge Moriarty then stated, "No alien warning." The plea colloquy continued, and the prosecutor requested that the Commonwealth's objection based on the failure to give the alien warning be noted for the record. Judge Moriarty then said to the prosecutor:

> "Don't do that again to me. It's not required if he's an American citizen. It's not required and it's within my jurisdiction, so I'm telling you, don't do it again."

The prosecutor concluded by stating that it was contrary to the statute not to provide the defendant with an alien warning. Judge Moriarty responded to the prosecutor by stating,

> "Then take me up."

Judge Moriarty then sentenced Mr. Fontina to a continuance without a finding until January 18, 2006, on the condition that Mr. Fontina remain drug free and undergo random drug testing.

As part of his plea, Mr. Fontina signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea Form. (A copy of the Tender of Plea form used in Docket Number 0314CR003020 is attached as Exhibit B.)

Judge Moriarty signed the Tender of Plea Form in Mr. Fontina's case on January 18,

2005[1]. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty falsely certified on the Tender of Plea form that, on January 18, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Commonwealth v. Jennifer Delgado

On December 3, 2004, the Chelsea District Court issued a complaint charging a defendant, Jennifer Delgado, with two counts of unarmed burglary and assault, in violation of G. L. c. 266, sec. 14, two counts of assault and battery with injury on a person sixty years of age or older, in violation of G. L. c. 265, sec. 13K(b), assault and battery to intimidate, in violation of G. L. c. 265, sec. 39(a), and furnishing a false name or social security number after arrest, in violation of G. L. c. 268, c. 34A (Docket Number 0414CR003407).

On December 28, 2004, the two counts of assault and battery with injury on a person sixty years of age or older were amended to reflect that there was no serious injury. On the same day, the two counts of unarmed burglary and assault were dismissed at the request of the Commonwealth. (Copies of the Complaint and Docket Sheet for Docket Number 0414CR003407 are attached as Exhibit C.)

On January 18, 2005, Ms. Delgado pled guilty to the remaining charges. After the plea colloquy, the prosecutor objected to Judge Moriarty's failure to give an oral alien warning to the defendant. The judge and the prosecutor then had the following exchange:

Judge Moriarty:	"I've explained it to you. Do not do that to me again, so take me up."
Prosecutor:	"Yes, Your Honor."
Judge Moriarty:	"Do not do that to me again."
Prosecutor:	"I understand, Your Honor."
Judge Moriarty:	"You don't understand . . . You don't, so don't do that to me again. If you want to appeal me, appeal me on every case. Don't do that again."

[1] Judge Moriarty incorrectly wrote on the form that the date she signed was January 18, 2004. It appears that the date she signed the form was, in fact, January 18, 2005.

Prosecutor: "But in order to do that, your Honor, we do have to make a record."

Judge Moriarty: (*Exclaiming*) "Well, make a record! I just told you I wouldn't do it. Take it up!"

Judge Moriarty then sentenced Ms. Delgado to two separate two-and-one-half-year terms in prison suspended for two-and-one-half years on each count of the assault and battery on a person sixty years of age or older charges, and to a two-and-one-half-year term of probation on the assault and battery to intimidate charge. A guilty finding was placed on file with respect to the furnishing of a false name or social security number charge. Ms. Delgado was also ordered to complete drug court.

Ms. Delgado also signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea Form. (A copy of the Tender of Plea form used in Docket Number 0414CR003407 is attached as Exhibit D.)

Judge Moriarty signed the Tender of Plea Form in Ms. Delgado's case on January 18, 2005. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty falsely certified on the Tender of Plea form that, on January 18, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if she "is not a citizen of the United States, a conviction of the offense with which [she] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Commonwealth v. Luis A. Rodriguez

On November 4, 2004, the Chelsea District Court issued a complaint charging a defendant, Luis A. Rodriguez, with receiving stolen property over $250, in violation of G. L. c. 266, sec. 60 (Docket Number 0414CR003141).

On January 19, 2005, the Commonwealth and Mr. Rodriguez agreed to amend the charge on his complaint to receiving stolen property under $250. (Copies of the Complaint and Docket Sheet for Docket Number 0414CR003141 are attached as Exhibit E.)

On January 19, 2005, Mr. Rodriguez admitted to sufficient facts to warrant a finding of guilt. Judge Moriarty accepted an agreed-upon tender of plea without giving an alien warning.

After Judge Moriarty's plea colloquy in that matter, and before the clerk read the disposition, the prosecutor requested that Judge Moriarty give an oral alien warning to Mr. Rodriguez. Judge Moriarty responded, "What is it with the Commonwealth and the alien warnings?" Judge Moriarty then asked the defendant, "You were born in Boston, right?" After Mr. Rodriguez responded that he was born in "Brighton, Massachusetts,"

Judge Moriarty said to the prosecutor, "There you go."

Judge Moriarty sentenced Mr. Rodriguez to a continuance without a finding until July 19, 2005, on the condition that Mr. Rodriguez complete forty hours of community service and submit to probation.

Mr. Rodriguez also signed a Waiver of Rights and Alien Rights Notice on the Tender of Plea Form. (A copy of the Tender of Plea form used in Docket Number 0414CR003020 is attached as Exhibit F.)

Judge Moriarty signed the Tender of Plea Form in Mr. Rodriguez's case on January 19, 2005. Despite refusing the Commonwealth's request to provide the Alien Warning, Judge Moriarty falsely certified on the Tender of Plea form that, on January 19, 2005, she had "addressed the defendant directly in open court," and that she had "informed and advised" the defendant that, if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States."

Suffolk County District Attorney's Response

On January 26, 2005, the Suffolk County District Attorney's Office filed a petition on behalf of the Commonwealth pursuant to G.L. c. 211, sec. 3 regarding Judge Moriarty's failure to provide alien warnings in Docket Numbers 0314CR003020, 0414CR003407 and 0414CR003141. This petition was docketed by the Court as SJ-2005-0039 (Commonwealth v. Anthony Fontina, Jennifer Delgado and Luis A. Rodriguez and A Judge of the Chelsea District Court.) (A copy of the Commonwealth's Petition is attached as Exhibit G.)

After that petition was filed, and while the matter was still pending before the Single Justice, Judge Moriarty scheduled a hearing in Chelsea District Court on January 26, 2006. At that hearing, Judge Moriarty provided the required alien warnings to the referenced defendants.

On February 10, 2006, now-Retired Justice John M. Greaney subsequently dismissed the G.L. c. 211, sec. 3 petition as moot.

3. **Either intentionally or because of a failure to maintain professional competence in the law, Judge Moriarty addressed Rule 30(b) motions filed in the Jaime Estrada and Gabriel Estrada cases on July 6, 2006 and July 14, 2006 respectively, on an *ex parte* basis, in violation of Canon 3B (7), and in a manner contrary to the clear hearing and/or notice requirements of Mass.R.Crim.P. Rule 30 and its commentary, in violation of Canons 1A, 2A, 3B (2), and 3B (7).**

Either intentionally or because of a failure to maintain professional competence in

the law, Judge Moriarty also failed to adhere to Rule 12C (5) of the Rules of Criminal Procedure and to established precedent when she granted the motions to vacate in the Estrada cases. Through this conduct, Judge Moriarty violated Canons 1A, 2A, and 3B (2).

Judge Moriarty's explanation for granting motions to vacate in the Estrada cases, as stated through counsel in a February 10, 2010 letter to the Commission, was not simply contrary to the law, it was also clearly unsupported by the facts, and was not true. Through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, and 3B (2).

Judge Moriarty's description of the process by which she made her decision on the second Motion to Vacate in Commonwealth v. Jaime Estrada, as stated through counsel in a February 10, 2010 letter to the Commission, was also clearly unsupported by the facts, and was not true. Through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, and 3B (2).

In response to motions to clarify filed by the Suffolk County District Attorney in connection with its appeals of Judge Moriarty's orders vacating the pleas in the Estrada cases, Judge Moriarty initiated an *ex parte* communication with a Suffolk County Assistant District Attorney, in violation of Canon 3B (7).

Commonwealth v. Jaime Estrada

On March 18, 2003, a complaint issued in the Chelsea District Court (Suffolk County) against Jaime Estrada charging him with Assault with a Dangerous Weapon, in violation of G.L. c. 265, sec. 15B (b) (Docket Number 0314CR0609).

On March 24, 2003, an additional complaint was issued against Jaime Estrada in the Chelsea District Court charging him with Intimidation of a Witness, in violation of G.L. c. 268, sec. 13B, and Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127 (Docket Number 0314CR0688).

(Copies of the Complaints and Docket Sheets for Docket Numbers 0314CR0609 and 0314CR0688 are attached as Exhibit H.)

On September 3, 2003, Jaime Estrada appeared before Judge Moriarty in the Chelsea District Court and changed his plea on both complaints.

Judge Moriarty engaged Jaime Estrada in a plea colloquy, asking if he waived all relevant constitutional rights and reading him all three immigration warnings required by G.L. c. 278, sec. 29D. Judge Moriarty did not ask Jaime Estrada any questions about whether he had consumed drugs or alcohol on that day.

After the plea colloquy, Judge Moriarty sentenced Jaime Estrada to a guilty finding and

one year of probation on all charges. (Copies of the Tender of Plea forms used in Docket Numbers 0314CR0609 and 0314CR0688 are attached as Exhibit I.)

In the "Judge's Certification" portion of the Tender of Plea Forms used in Jaime Estrada's cases, Judge Moriarty was, in part, asked to certify as follows:

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

On June 16, 2006, Jaime Estrada filed a Motion to "dismiss the conviction" or, in the alternative, to vacate his plea in the Chelsea District Court. That motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure. On that motion, Jaime Estrada was represented by Attorney Robert Carmel-Montes.

On June 20, 2006, Judge Moriarty denied this motion while sitting at the Quincy District Court (Norfolk County) without a hearing. (A copy of that motion with Judge Moriarty's notation indicating the motion was denied is attached as Exhibit J.)

On July 6, 2006, Jaime Estrada filed an "Emergency Motion to Reconsider Motion to Dismiss Conviction, or, in the Alternative, to Withdraw Guilty Plea, Vacate the Conviction and Grant a New Trial" in the Quincy District Court. That motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure. On that motion, Jaime Estrada was again represented by Attorney Robert Carmel-Montes. That motion was never served on the Suffolk County District Attorney's Office and was instead served on the Norfolk County District Attorney's Office, which was not a party.

On July 6, 2006, Attorney Carmel-Montes appeared in Quincy District Court where Judge Moriarty was then sitting. On July 6, 2006, Attorney Carmel-Montes requested to appear before Judge Moriarty for an unscheduled hearing on his motion. Judge Moriarty agreed to hear from Attorney Carmel-Montes on the motion on July 6, 2006.

The Suffolk County District Attorney's Office had no knowledge or prior notice of this July 6, 2006 hearing and was not represented. An Assistant District Attorney from the Norfolk County District Attorney's Office was present for this hearing but had been given no authority to appear on behalf of the Suffolk County District Attorney on the matter.

After hearing from Attorney Carmel-Montes on July 6, 2006, Judge Moriarty

immediately ruled on and granted the defendant's motion. She wrote:

> "Allowed. Moriarty, J. Not ask if [defendant] was under inf. of drugs but [defendant] did say he under-stands . . . ."

(A copy of that motion with Judge Moriarty's notation indicating the motion was allowed is attached as Exhibit K.)

Commonwealth v. Gabriel Estrada

On March 18, 2003, a complaint issued in the Chelsea District Court (Suffolk County) against Gabriel Estrada (the brother of Jaime Estrada) charging him with Assault with a Dangerous Weapon, in violation of G.L. c. 265, sec. 15B (b) (Docket Number 0314CR0612).

On March 24, 2003, an additional complaint was issued against him in the Chelsea District Court charging him with Intimidation of a Witness, in violation of G.L. c. 268, sec. 13B, and Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127 (Docket Number 0314CR0689).

(Copies of the Complaints and Docket Sheets for Docket Numbers 0314CR0612 and 0314CR0689 are attached as Exhibit L.)

On September 3, 2003, Gabriel Estrada appeared before Judge Moriarty in the Chelsea District Court and changed his plea on both complaints.

Judge Moriarty engaged Gabriel Estrada in a plea colloquy, asking if he waived all relevant constitutional rights and reading him all three immigration warnings required by G.L. c. 278, sec. 29D. Judge Moriarty did not ask Gabriel Estrada any questions about whether he had consumed drugs or alcohol on that day.

After the plea colloquy, Judge Moriarty sentenced Gabriel Estrada to a continuance without a finding for one year on all charges. (Copies of the Tender of Plea forms used in Docket Numbers 0314CR0612 and 0314CR0689 are attached as Exhibit M.)

In the "Judge's Certification" portion of the Tender of Plea Forms used in Gabriel Estrada's cases, Judge Moriarty was, in part, asked to certify as follows:

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

waived all of his or her rights as explained during these proceedings and as set forth in this form."

On July 14, 2006, Gabriel Estrada filed a Motion to Vacate his pleas in Chelsea District Court. (A copy of that motion is attached as Exhibit N.)

Gabriel Estrada's motion included, as an attachment, Judge Moriarty's order allowing his brother's (Jaime Estrada's) Motion to Vacate. Gabriel Estrada's motion was filed pursuant to Rule 30 (b) of the Massachusetts Rules of Criminal Procedure.

On August 15, 2006, without a hearing, Judge Moriarty granted the motion. Judge Moriarty endorsed a cover letter from the Clerk Magistrate of the Chelsea District Court, ruling:

> "Motion to Vacate dismissals after [defendant] completed probation period on CWOF is allowed. [Defendant] is granted a new trial on all charges based on not asking [defendant] if he had any drugs or alcohol in his system, not because he did not plea to the charge knowingly, willingly, and voluntarily. Moriarty, J. 8-15-06."

(A copy of the letter with Judge Moriarty's notation indicating the motion was allowed is attached as Exhibit O.)

On that motion, Gabriel Estrada was represented by Attorney Ryan M. Schiff. That motion was served on the Suffolk County District Attorney's Office.

Suffolk County District Attorney's Response

Once the Suffolk County District Attorney's Office became aware that the pleas in the Estrada cases had been vacated, it filed a Notice of Appeal for both orders on August 23, 2006. (Copies of the Suffolk County District Attorney's Office's Notices of Appeal are attached as Exhibit P.)

Because Judge Moriarty's orders vacating the pleas on the Estrada cases had not been entered on the appropriate dockets, Suffolk County Assistant District Attorney Christina Miller filed motions to clarify the records in the Estrada cases on October 12, 2006. Copies of those motions were mailed directly to Judge Moriarty by ADA Christina Miller. (Copies of the motions to clarify and a copy of the letter to Judge Moriarty are attached as Exhibit Q.)

Within approximately one week of the filing of those motions, Judge Moriarty phoned ADA Miller to speak with her. Judge Moriarty left a voicemail message for ADA Miller. In that message, Judge Moriarty told ADA Miller that she did grant the motions to vacate, that she was glad ADA Miller had filed the motions, and that she wished to talk to her further. ADA Miller immediately contacted each defendant's respective counsel to

inform them that she had been contacted by Judge Moriarty.

The Appeals Court subsequently reversed Judge Moriarty's decisions to vacate the pleas in the Estrada cases. (Copies of the Appeals Court's decisions with respect to both defendants are attached as Exhibit R.)

Judge Moriarty's Representations to the Commission

In a February 10, 2010 letter to the Commission, Judge Moriarty's counsel explained her reasoning for granting the motions to vacate filed in the Estrada cases and described the manner in which Judge Moriarty reached her decision:

> "Judge Moriarty consulted with several of her colleagues on the Bench for their opinion(s) as to the legal ramifications and/or consequences of a Judge signing/certifying that she had asked a particular question during a colloquy wherein the judge did not, in fact, ask such question. Finding no consensus among her colleagues, Judge Moriarty decided that because she had certified via her signature on the plea forms, respectively, that she had asked the question regarding drugs/alcohol consumption and any resultant effect(s) when, in fact, she had not. . . , the colloquies were flawed. Consequently, she allowed the defendants' motions to withdraw their pleas."

As noted above, in the "Judge's Certification" portion of the Tender of Plea Forms used in all of the Estrada complaints, Judge Moriarty was asked to certify as follows:

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

Despite Judge Moriarty's claim that she granted the Motions to Vacate in the Estrada cases because "she had certified via her signature on the plea forms, respectively, that she had asked the question regarding drugs/alcohol consumption and any resultant effect(s) when, in fact, she had not" it is clear that Judge Moriarty's counsel's representation to the Commission was false and that she made no such certification. Nowhere on the Tender of Plea forms in the Estrada cases did Judge Moriarty certify that she "had asked the question regarding drugs/alcohol consumption and any resultant effect(s)." On the forms, Judge Moriarty merely certified that she was satisfied that each defendant was "not under the influence of any drug, medication, liquor or other substance that would impair his or her ability to fully understand those rights" on the date of their pleas.

In the same February 10, 2010 letter to the Commission, Judge Moriarty's counsel also claimed that, before making her decisions to allow the Motions to Vacate in the Estrada cases, Judge Moriarty "consulted with several of her colleagues on the Bench for their opinion(s) as to the legal ramifications and/or consequences of a Judge signing/certifying that she had asked a particular question during a colloquy wherein the judge did not, in fact, ask such question." Judge Moriarty's counsel then added that, "[f]inding no consensus among her colleagues," she granted the Motions to Vacate. However, Judge Moriarty's representation to the Commission, through counsel, that she "consulted with several of her colleagues on the Bench for their opinion(s)" before making her decision is not supported by the facts and appears to be false. On July 6, 2006, without prior notice, Jaime Estrada's counsel appeared before Judge Moriarty in Quincy District Court asked Judge Moriarty to conduct an unscheduled hearing on Jaime Estrada's "Emergency Motion." Following a brief hearing on that motion, during which Judge Moriarty remained on the bench and consulted with no other judges, Judge Moriarty immediately ruled on the motion on July 6, 2006.

4. **After the decisions of the Appeals Court in Commonwealth v. Jaime Estrada and Commonwealth v. Gabriel Estrada (Exhibit R), Judge Moriarty addressed another Rule 30(b) motion filed in Commonwealth v. Matthew West on an improper *ex parte* basis in violation on Canon 3B (7), and in a manner contrary to the clear hearing and/or notice requirements of Mass.R.Crim.P. Rule 30 and its commentary, in violation of Canons 1A, 2A, 3B (2), and 3B (4).**

   Judge Moriarty then knowingly and intentionally failed to respect and comply with, and to be faithful to, the law by granting the Motion to Vacate in Commonwealth v. Matthew West despite knowing that her order was unlawful. Through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, 3B (2) and 3B (7).

   Through her misconduct in relation to Commonwealth v. Matthew West, and because of the subsequent media coverage of her unlawful order, Judge Moriarty failed to observe high standards of conduct and damaged public confidence in her integrity and in the integrity and impartiality of the judiciary. Through this conduct, Judge Moriarty violated Canons 1A and 2A.

   Commonwealth v. Matthew West

   On May 29, 2001, the Roxbury Division of the Boston Municipal Court issued a complaint against Matthew West charging him with Assault and Battery, in violation of G.L. c. 265, sec. 13A, Malicious Destruction of Property over $250, in violation of G.L. c. 266, sec. 127, Resisting Arrest, in violation of G.L. c. 268, sec. 32B, and Disorderly Conduct, in violation of G.L. c. 272, sec. 53 (Docket Number 0102CR2402). (Copies of the Complaint and Docket Sheet for Docket Number 0102CR2402 are attached as Exhibit S.)

On October 2, 2001, Mr. West pled guilty to all charges before Judge Moriarty. Judge Moriarty sentenced Mr. West to 90 days in a house of correction, suspended for eighteen months on the assault and battery charge. She sentenced Mr. West to probation on the other charges. (A copy of the Tender of Plea form used in Docket Number 0102CR2402 is attached as Exhibit T.)

On September 19, 2007, Attorney Timothy Flaherty filed a motion to vacate Mr. West's plea in the Roxbury Division of the Boston Municipal Court. (A copy of that motion is attached as Exhibit U.)

On or about September 21, 2007, Attorney Flaherty argued the motion in Roxbury before Judge Milton Wright with an Assistant District Attorney from Suffolk County present at the hearing. Judge Wright declined to act on the motion because Judge Moriarty was the plea judge.

On September 24, 2007, Attorney Flaherty appeared in Quincy District Court where Judge Moriarty was then sitting. On September 24, 2007, Attorney Flaherty requested to appear before Judge Moriarty for an unscheduled hearing on his motion. Judge Moriarty agreed to hear from Attorney Flaherty on the motion on September 24, 2007.

The Suffolk County District Attorney's Office had no knowledge of this hearing and was not represented. An ADA from the Norfolk County District Attorney's Office (Michael C. Connolly) was present for this hearing but had been given no authority to appear on behalf of the Suffolk County District Attorney. ADA Connolly had no prior knowledge of the substance of the matter at issue and was never provided with a copy of Matthew West's motion.

On September 24, 2007, Attorney Flaherty argued in support of that motion before Judge Moriarty. (The transcript of that hearing is attached as Exhibit V.)

At the conclusion of the September 24, 2007 hearing, Judge Moriarty granted Matthew West's motion, stating to Mr. West's attorney, "Okay. Tell him it was an early Christmas present." Judge Moriarty then endorsed Matthew West's motion, as follows:

> "In the best interest of justice, motion to vacate is allowed. Moriarty, J 9-24-07."

(An endorsed copy of that motion is attached as Exhibit W.)

Response to Judge Moriarty's September 24, 2007 Order

Later on September 24, 2007, Mr. West was scheduled to appear before Judge William G. Young in the United States District Court in Boston to be sentenced on federal criminal charges on Criminal Number 06-10281-WGY. Mr. West faced an enhanced federal sentence (262 to 327 months in federal prison instead only of 16 to 21 months)

because of his conviction on Docket Number 0102CR2402.

When the Assistant United States Attorney, John T. McNeil ("AUSA McNeil"), became aware, just prior to the federal sentencing hearing, that Mr. West's state conviction on Docket Number 0102CR2402 had been vacated, he requested and was granted a continuance of the sentencing hearing until October 10, 2007.

AUSA McNeil later filed a "Government's Status Report on Defendant's Prior State Conviction" dated October 2, 2007 with the federal court on Criminal Number 06-10281-WGY. This "Status Report" was critical of Judge Moriarty's handling of Matthew West's Motion to Vacate on his state criminal case, Docket Number 0102CR2402. (A copy of the "Government's Status Report on Defendant's Prior State Conviction" filed by AUSA McNeil is attached as Exhibit X.)

On October 1, 2007, the Suffolk County District Attorney's Office filed a petition on behalf of the Commonwealth pursuant to G.L. c. 211, sec. 3 regarding Judge Moriarty's decision to vacate Matthew West's conviction in Docket Number 0102CR2402. This petition was docketed by the Court as SJ-2007-0463 (Commonwealth v. Matthew West). (A copy of the Commonwealth's Petition is attached as Exhibit Y.)

After that petition was filed, and while the matter was still pending before the Single Justice, on October 9, 2007, Judge Moriarty issued an order vacating her prior order allowing the motion to vacate. (A copy of Judge Moriarty's October 9, 2007 order is attached as Exhibit Z.)

On October 9, 2007, Supreme Judicial Court Justice Margot Botsford subsequently dismissed the G.L. c. 211, sec. 3 petition as moot.

On October 10, 2007, Mr. West's federal sentencing hearing took place on Criminal Number 06-10281-WGY. Judge Young sentenced Matthew West to 15 years committed in federal prison. At the conclusion of that sentencing hearing, Judge Young commented on the events that had transpired relative to Mr. West's state criminal matter. (The transcript of Judge Young's comments relating to Mr. West's state criminal matter is attached as Exhibit A1.)

A number of newspaper articles were published regarding the events that had transpired in Commonwealth v. Matthew West, Docket Number 0102CR2402. (The below-cited articles are attached as Exhibit B1.) Those articles included the following:

- In an October 4, 2007 article titled, "Quincy judge in flap over sentence, US says she called ruling a 'present' to drug defendant," the *Boston Globe* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 4, 2007 article titled, "U.S. Attorney rips Quincy judge over

- 'present' to criminal," the *Boston Herald* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 10, 2007 article titled, "Judge reverses herself on conviction, Prosecutors fought to have defendant face tougher penalty," the *Boston Globe* reported on Judge Moriarty's decision to reverse her order vacating Matthew West's conviction.

- In an October 11, 2007 article titled, "Judge chastised for vacating assault conviction, 'Deviation from laws of the Commonwealth,'" the *Boston Globe* reported on Judge Moriarty's handling of the Matthew West case.

- In an October 17, 2007 article titled, "The push to void old convictions vexes DAs, Tactic may limit federal sentencing," the *Boston Globe* reported on the problems District Attorneys are facing with defendants trying to vacate old convictions. This article referenced Judge Moriarty's handling of the Matthew West case.

- In an October 25, 2007 article titled, "Judging the judge," *Massachusetts Lawyers Weekly* reported on Judge Moriarty's handling of the Matthew West case.

5. **By failing to comply with the law in a manner that consistently favored one side over another in the cases before her (specifically, the defendants in those cases), by consistently failing to grant the Commonwealth a full opportunity to be heard according to the law, and, when the proper representative for the Commonwealth was present, by treating that representative discourteously, Judge Moriarty's above-described misconduct constituted a pattern evidencing bias against the Commonwealth and a lack of impartiality. Judge Moriarty failed to observe high standards of conduct so that the integrity and independence of the judiciary will be preserved, and failed to perform her duties without bias or prejudice. Through this conduct, Judge Moriarty violated G.L. c. 211C, sec. 2(5)(b) and Canons 1A, 2A, 3B (4), and 3B (7).**

The conduct set forth above, if true, constitutes conduct prejudicial to the administration of justice and unbecoming a judicial officer, brings the judicial office into disrepute, and violates the Code of Judicial Conduct.

For the Commission,

Stephen E. Neel
Chairman

Date: 6/9/10

NOTICE OF PROCEDURES PURSUANT TO STATEMENT OF ALLEGATIONS

Complaint Numbers 2007-89 and 2007-108

The Commission hereby notifies Judge Moriarty that, pursuant to M.G.L. c. 211C, § 5(7) and Commission Rule 6L, she has twenty-one (21) days following her receipt of this Statement of Allegations to respond in writing to the charges and, if she wishes, to file a written request for a personal appearance before the Commission.

The Commission also notifies Judge Moriarty that, pursuant to M.G.L. c. 211C, § 5(8) and Commission Rule 6P(1), after she is served with this Statement of Allegations, she is entitled to compel by subpoena the attendance and testimony of witnesses through depositions, and to provide for the inspection of documents, books, accounts, written or electronically recorded statements, and other records. The judge may file written material for Commission consideration before the issuance of Formal Charges.

For the Commission,

Stephen E. Neel
Chairman

Date: 6/9/10

EXHIBIT A

CRIMINAL COMPLAINT	0314CR003020

Trial Court of Massachusetts
Chelsea District Court

DEFENDANT
FONTINA, ANTHONY
35 CRESCENT AVE.
#3
REVERE, MA 02151

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
07/25/1986	M	W	5'06"	170	BLK	BLK

INCIDENT REPORT #	SOCIAL SECURITY #
	032-66-8386

DATE OF OFFENSE	PLACE OF OFFENSE
09/18/2003	REVERE

COMPLAINANT	POLICE DEPARTMENT
CUCCIO, DONALD	REVERE PD

DATE OF COMPLAINT	RETURN DATE AND TIME
09/19/2003	09/19/2003 9:00 AM

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

COUNT-OFFENSE
1. 666666 MISCELLANEOUS MUNIC ORDINANCE/BYLAW VIOL

on 09/18/2003 did POSS. OF KNIFE, in violation of 9.20.020 of the City or Town of REVERE.

COUNT-OFFENSE
2. 94C/32C/C DRUG, POSSESS TO DISTRIB CLASS D c94C §32C(

on 09/18/2003, not being authorized by law, did knowingly or intentionally possess with intent to manufacture, distribute, dispense or cultivate a controlled substance in Class D of G.L. c.94C, §31, to wit: MARIJUANA, in violation of G.L. c.94C, §32C(a). (PENALTY: imprisonment not more than 2½ years; or not less than $500, not more than $5000; or both; G.L. c.280, §6B: plus Drug Analysis Fee of not less than $35, not more than $100, with maximum fee of $500 for multiple offenses from single incident.)

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X [signature]	X [signature]	9-19-03	2

FIRST JUSTICE	COURT ADDRESS	
Hon. Timothy H Gailey	Chelsea District Court 120 Broadway Chelsea, MA 02150	87

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

CRIMINAL DOCKET

DOCKET NO. 0314CR003020

ATTORNEY NAME: Bryant, 12/4/03 DEVER

COURT DIVISION: Chelsea

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
FONTINA, ANTHONY
35 CRESCENT AVE.
#3
REVERE, MA 02151

BAIL FORFEITED

540 Revere St, Revere, MA 02151 — 10/25/04 — 3/10/05
3011B000007/01/04BAIL 200.00
5134B000010/29/04BAIL 500.00
1/18/05

DEFT. DOB AND SEX: 07/25/1986 M

DATE OF OFFENSE(S): 09/18/2003

PLACE OF OFFENSE(S): REVERE

COMPLAINANT: CUCCIO, DONALD

POLICE DEPARTMENT (if applicable): REVERE PD

DATE OF COMPLAINT: 09/19/2003

RETURN DATE AND TIME: 09/19/2003 09:00:00

DATE and JUDGE	DOCKET ENTRY
	☐ Attorney appointed (SJC R. 3:10) ☐ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
	Terms of release set: ☐ PR ☒ Bail: $500 cash 10-25-04 TG ☐ Held (276 §58A) ☐ See back for special conditions
	Arraigned and advised: ☑ Potential of bail revocation (276 §58) ☐ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
	Advised of right to jury trial: ☐ Does not waive ☐ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE 1. 666666 MISCELLANEOUS MUNIC ORDINANCE/BYLAW VIO

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
		200		☐ WAIVED

DISPOSITION DATE and JUDGE: 1-18-05 Moriarty

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

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

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

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

COUNT/OFFENSE 2. 94C/32C/C DRUG, POSSESS TO DISTRIB CLASS D c94C §:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				90 ☐ WAIVED

(*) 10/05 SF over

DISPOSITION DATE and JUDGE: 1-18-05 Moriarty

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

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

SENTENCE OR OTHER DISPOSITION: ☑ Sufficient facts found but continued without guilty finding until: 1-18-06 ☐ Probation ☐ Pretrial Probation (276 §87) - until: ☐ To be dismissed upon payment of court costs/restitution ☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other: ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

1 drug free
2 random testing
3 TCT

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

0084C000006/28/05VWAF 79.10

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

4325C000001/17/06VWAF 10.90

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

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

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

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

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

☐ ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

DOCKET NUMBER: **0314CR003020** NAME: **FONTINA, ANTHONY**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	SEP 19 2003	ARR (1)	☐ Held ☐ Cont'd				
2	11-13-03	PTH (1)	☐ Held ☐ Cont'd DFTA - WARRANT				
3	12/4/03	CW (1)	☑ Held ☐ Cont'd (1)	Connor	610		
4	1/22/04	PTH (1)	☑ Held ☐ Cont'd (1)	MALDO	047		
5	3/23/04	M (4)	☐ Held ☐ Cont'd				
6	MAR 10 2004	A+C 1	☐ Held ☐ Cont'd				
7	5-3-04	M 4	☐ Held ☐ Cont'd DFTA				
8	7/1/04	WR	☐ Held ☐ Cont'd (1)	Millonado	351		
9	7/8/04	Sta (1)	☐ Held ☐ Cont'd DFTA - WARRANT -	HOLD FOR	Cont		
10	OCT 2_ 200_	CW (1)	☑ Held ☐ Cont'd (1)	Gailey			

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

ENTRY DATE	OTHER DOCKET ENTRIES
11/14/03	WI WMS B
12/4/03	WRWMS CM
8 [illegible]	Δ Files motion(s) to Suppress (1) Statements (2) Evidence
8 [illegible]	(3) For B.O.P. (4) For CORI of witnesses <DLM>
	Δ's mot. for Funds for Investigator Filed +
	Allowed <Maldonado, J>
5-4-04	WI WMS MCC
7/1/04	WRWMS
7/1/04	Cont'd to 7/8/04 to reunite w/ atty. Driver
7/9/04	WI WMS LL

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
SEP 19 2003	Legal Counsel Fee (211D §2A ¶2)	$150 -	1-18-06	
	Legal Counsel Contribution (211D §2)		6774B000001/27/05LEGALCOUNS 150.00	
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)			
12/4/03 AC	Default Warrant Assessment Fee (276 §30 ¶2)	$50	1-18-06	
7/1/04	Default Warrant Removal Fee (276 §30 ¶1)	50	1-18-06	
7/1/04		75	1-18-06	

DOCKET NUMBER: 0314CR003020 NAME: FONTINA, ANTHONY

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	11-16-04	PTH (1)	☑ Held ☐ Cont'd (1)	Weyler	610		
2	1-18-05	M (4)	☐ Held ☐ Cont'd	Moriarty	45 #14	2855	350
3	1-18-06	CWOF	☑ Held ☐ Cont'd				
4	MAR - 1 2005	ALC 1	☐ Held ☐ Cont'd 1	MORIARTY	#101	1730	1800
5	1.18.06	CWOF	☐ Held ☐ Cont'd				
6	5.11.05	AD/JN	☐ Held ☐ Cont'd				
7	6.10.05	VOPH (4)	☑ Held ☐ Cont'd (1)	Ashley	280		
8	6/9/06	P (8)	☐ Held ☐ Cont'd				
9	9/20/05	ADVC	☐ Held ☐ Cont'd VOP a[illegible]	Bruker			
10			☐ Held ☐ Cont'd				

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ENTRY DATE	OTHER DOCKET ENTRIES
10/25/04	WRWSCH
OCT 2 [illegible]	$700 CASH BAIL POSTED ON 7/1/04 FORFEITED,
	NEW BAIL OF $500 CASH ORDERED, ATTY
	SLATER APPT'D, CONT TO 11-16-04 FOR
	PTH (1) <GAILEN, J>
11-16-04	Cont'd for M to Suppress to 1/18/05 <Weyler, J>
1.18.05	Bail Return Ch# 10734 (CF) + 10735. [illegible]
3-1-05	~~[illegible]~~ Non Alien Alien rights given By <Moriarty J>
	Δ's Presence waived
3.10.05	Bail forfeited Gen Revenue. March. [illegible]

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
	Legal Counsel Fee (211D §2A ¶2)			
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)			
[illegible]	Default Warrant Assessment Fee (276 §30 ¶2)	$50 —	1.18.06	
	Default Warrant Removal Fee (276 §30 ¶1)			

DOCKET NUMBER: 0314CR003020 NAME: FONTINA, ANTHONY

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1			☐ Held ☐ Cont'd				
2			☐ Held ☐ Cont'd				
3			☐ Held ☐ Cont'd				
4			☐ Held ☐ Cont'd				
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
5.11.05	Atty Lynne Hodoian appointed. PC found for VOP. Held w/o Bail pending final VOP (Lindsay J)
JUN 10	Δ STIPS TO VOP, FOUND IN VOP, CWOF Revoked, Guilty to Enter, Probation Extended to 6/9/06 w/ new Terms & Cond's (See Findings DTD 6/10/05) (Curley J)
9/20/05	ADV. BY Prob Dept for VOP, ORDER TO Issue (Hold for Court) (Brady J)

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
	Legal Counsel Fee (211D §2A ¶2)			
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
JUN 10 TC	Probation Supervision Fee (276 §87A)	$65/MONTH		
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			
JUN 10 TC	CRIP Assessment Fee	$350.00		

DOCKET NUMBER: **0314CR003020** NAME: **FONTINA, ANTHONY**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	10-24-05	SH 4	☐ Held ☐ Cont'd	D. m	434	261	42
2	10-24-06	Prob	☐ Held ☐ Cont'd				
3	1-26-06	STATUS	☐ Held ☐ Cont'd (1)	Mc[illegible]	42	170	172
4	5-19-06	VN ①	☐ Held ☐ Cont'd DFTA Warrant - Held For Court (Jackson)				
5	9-19-06	SH	☐ Held ☐ Cont'd DFTA				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
9/20/05	WI WMS[illegible]
10/3/05	WRMSCY
OCT 03 2005	Warr Recalled in error, Clerk not to
	Reissue (Moran, J)
10-4-05.	WI. WMS. MCD
10/11/05	WRMSCY
10-24-05	Stipulation to V.O.P found in V.O.P re DKT 05-1047
	CWOF vacated Prob extended 1Y 10-24-06
	same terms
1-3-06	Notice sent to def + Atty to appear 1-26-06 for Alien warnings to be given —

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

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

DOCKET NUMBER: **0314CR003020** NAME: **FONTINA, ANTHONY**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	~~11-7-06~~	~~SH (4)~~	☐ Held / ☐ Cont'd				
2	102406	SA 4	☐ Held / ☐ Cont'd				
3			☐ Held ☐ Cont'd				
4			☐ Held ☐ Cont'd				
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
1-26-06	Case advanced. Alien warning given
	[Moriarty]
5/19/2006	W/ WMS LC
AUG 11 2006	WR WMS S.R.
~~5-T~~	~~D FTA~~
9-20-06	WI WMS LL
9/29/06	WR [illegible]
"	P/C for VOP D Detained w/o Bail for
	Final Surr. to be seen @ medical Unit
	for detox

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

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

DOCKET NUMBER: **0314CR003020** NAME: **FONTINA, ANTHONY**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1			☐ Held ☐ Cont'd				
2			☐ Held ☐ Cont'd				
3			☐ Held ☐ Cont'd				
4			☐ Held ☐ Cont'd				
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
10-24-06	Stipulation to V.O.P found in V.O.P (failure to complete Batterer's Prog and Child ASAP) Prob- revoked 90 days HC sentence imposed credit for 69 days. Any monies owed remitted

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

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

EXHIBIT B

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS

DOCKET NO. 0314-3020

NO. OF COUNTS 2

Trial Court of Massachusetts
District Court Department

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

NAME OF DEFENDANT Anthony Fontine

COURT DIVISION
Chelsea District Court
120 Broadway
Chelsea, MA 02150

SECTION I — TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1	Dismissed $200 c.c.	X YES / NO	
1	CWF 1yr Prob, Abandon Drug ~~Stay away~~ testing treatment as deemed necessary	X YES / NO	1.18-c6 tet
		YES / NO	90.24 C5 1.10 22.1
		YES / NO	
		YES / NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X	1/18/05	X	1/18/05

SECTION II — PLEA OR ADMISSION **ACCEPTED** BY THE COURT

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

SECTION III — PLEA OR ADMISSION **REJECTED** BY THE COURT

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

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X	1-18-05		

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Anthony Lutz	1/18/05

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X	648593	1/18/05

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X D Murphy J	1-18-04

EXHIBIT C

CRIMINAL COMPLAINT	0414CR003407

Trial Court of Massachusetts
Chelsea District Court

TO ANY JUSTICE OR CLERK-MAGISTRATE OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DEFENDANT

DELGADO, JENNIFER
11 MAVERICK STREET
APT. 3
CHELSEA, MA 02150

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
11/18/1966	F	W	5'05"	180	BRO	BRO

INCIDENT REPORT #	SOCIAL SECURITY #
	028-56-3955

DATE OF OFFENSE	PLACE OF OFFENSE
12/02/2004	CHELSEA

COMPLAINANT	POLICE DEPARTMENT
OBRIEN, JAMES	CHELSEA PD

DATE OF COMPLAINT	RETURN DATE AND TIME
12/03/2004	12/03/2004 8:30 AM

COUNT-OFFENSE (X) D/R/C/w 12-28-04 <Conlon, J>

1. 266/14/E BURGLARY, UNARMED & ASSAULT c266 §14

on 12/02/2004 did in the night time break and enter the dwelling house of JORGE A. RODRIGUEZ with intent to commit a felony therein, and did make an actual assault upon JORGE A. RODRIGUEZ, a person lawfully therein, in violation of G.L. c.266, §14. (NO DISTRICT COURT FINAL JURISDICTION IN ADULT SESSION.)

COUNT-OFFENSE

2. 265/13K/A A&B ON +60/DISABLED WITH INJURY c265 §13K(b)

on 12/02/2004 did commit an assault and battery upon JORGE A. RODRIGUEZ, a person 60 years of age or older or a person with a disability, and by such assault and battery did cause bodily injury, as such terms are defined in G.L. c.265, §13K(a), in violation of G.L. c.265, §13K(b). (PENALTY: state prison not more than 5 years; or house of correction not more than 2½ years; or not more than $1000; or both imprisonment and fine.)

COUNT-OFFENSE

3. 265/13K/A A&B ON +60/DISABLED WITH INJURY c265 §13K(b)

on 12/02/2004 did commit an assault and battery upon AMADELIA RODRIGUEZ, a person 60 years of age or older or a person with a disability, and by such assault and battery did cause bodily injury, as such terms are defined in G.L. c.265, §13K(a), in violation of G.L. c.265, §13K(b). (PENALTY: state prison not more than 5 years; or house of correction not more than 2½ years; or not more than $1000; or both imprisonment and fine.)

COUNT-OFFENSE (X) D/R/C/w 12-28-04 <Conlon, J>

4. 266/14/E BURGLARY, UNARMED & ASSAULT c266 §14

on 12/02/2004 did in the night time break and enter the dwelling house of AMADELIA RODRIGUEZ with intent to commit a felony therein, and did make an actual assault upon AMADELIA, a person lawfully therein, in violation of G.L. c.266, §14. (NO DISTRICT COURT FINAL JURISDICTION IN ADULT SESSION.)

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X James O'B	X Edward H Foster	12/3/04	6

FIRST JUSTICE	COURT ADDRESS
Hon. Timothy H Gailey	Chelsea District Court 120 Broadway Chelsea, MA 02150

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

99

ADDITIONAL COUNTS

DOCKET NUMBER
0414CR003407

COUNT-OFFENSE
5. 265/39/B A&B TO INTIMIDATE c265 §39(a)

on 12/02/2004 did commit an assault and battery upon JORGE A. RODRIGUEZ with the intent to intimidate such person because of such person's race, color, religion, national origin, sexual orientation, or disability, in violation of G.L. c.265, §39(a). (PENALTY: house of correction not more than 2« years; or not more than $5000 fine, plus surcharge of $100 for Diversity Awareness Education Fund; or both; and defendant "shall complete a diversity awareness program" approved by the Trial Court's Chief Justice for Administration and Management "prior to release from incarceration or prior to completion of the terms of probation, whichever is applicable.")

COUNT-OFFENSE
6. 268/34A FALSE NAME/SSN, ARRESTEE FURNISH c268 §34A

on 12/02/2004 did knowingly and willfully furnish a false name or Social Security number to a law enforcement officer or law enforcement official following an arrest, in violation of G.L. c.268, §34A. (PENALTY: house of correction not more than 1 year to run from and after the sentence for the underlying offense; or fine not more than $1000; or both; and restitution may be ordered for resulting monetary losses suffered by any person whose identity has been assumed.)

COUNT-OFFENSE

COUNT-OFFENSE

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)
X	X	100

CRIMINAL DOCKET

DOCKET NO. 0414CR003407

ATTORNEY NAME: JC MARK FJI.NO (1)

COURT DIVISION: Chelsea

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

DELGADO, JENNIFER
11 MAVERICK STREET
APT. 3
CHELSEA, MA 02150

DEFT. DOB AND SEX: 11/18/1966 F

DATE OF OFFENSE(S): 12/02/2004

PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: OBRIEN, JAMES

POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 12/03/2004

RETURN DATE AND TIME: 12/03/2004 08:30:00

DATE and JUDGE	DOCKET ENTRY
12-3-04 DM	☑ Attorney appointed (SJC R. 3:10) ☐ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
12-3-04 DM	Terms of release set: ☐ PR ☑ Bail: $15,000 Cash ☐ Held (276 §58A) ☐ See back for special conditions
12-3-04 DM	Arraigned and advised: ☑ Potential of bail revocation (276 §58) ☑ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
	Advised of right to jury trial: ☐ Does not waive ☐ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE 1. 266/14/E BURGLARY, UNARMED & ASSAULT c266 §14

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 28 2004 CONLON

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

FINDING
- ☐ Not Guilty
- ☐ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

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

DISMISSED AT REQ. OF COMM.

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

7/18/07

COUNT/OFFENSE amended 1-18-05 to serious injury 2. 265/13K/A A&B ON +60/DISABLED WITH INJURY c265 §13K

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT 90 ☐ WAIVED

DISPOSITION DATE and JUDGE: 1-18-05 Moriarty

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

FINDING
- ☐ Not Guilty
- ☑ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation 7-18-07 ☐ Pretrial Probation (276 §87) - until:
- ☐ To be dismissed upon payment of court costs/restitution
- ☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim
- ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
- ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

2 1/2 yrs HC SS
2 1/2 yrs Prob
drug ct condition
S/A from victim

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

7/18/07

COUNT/OFFENSE amended same as ct 2 3. 265/13K/A A&B ON +60/DISABLED WITH INJURY c265 §13K

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: 1-18-05 Moriarty

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

FINDING
- ☐ Not Guilty
- ☑ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation 7-18-07 ☐ Pretrial Probation (276 §87) - until:
- ☐ To be dismissed upon payment of court costs/restitution
- ☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim
- ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
- ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

2 1/2 yrs HC
conc ct 2 SS
2 1/2 yrs Prob

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

7/18/07

COUNT/OFFENSE 4. 266/14/E BURGLARY, UNARMED & ASSAULT c266 §14

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: DEC 28 2004 CONLON

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

FINDING
- ☐ Not Guilty
- ☐ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

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

DISMISSED AT REQ. OF COMM.

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

7/18/07

☒ ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

101

ADDITIONAL COUNTS

DOCKET NUMBER
0414CR003407

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE
5. 265/39/B A&B TO INTIMIDATE c265 §39(a)					

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
1.18.05	☐ Not Guilty ☐ Guilty ☐ Nolo	2 1/2 yrs Prob
	☐ New Plea: ☑ Admits suff. facts	
	FINDING G JUDGE Moriarty	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☑ Discharged from probation 7/18/07
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE
6. 268/34A FALSE NAME/SSN, ARRESTEE FURNISH c268 §34A					

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
1.18.05	☐ Not Guilty ☐ Guilty ☐ Nolo	held for disp on 1.25.05
	☐ New Plea: ☐ Admits suff. facts	
	FINDING G JUDGE	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☑ Discharged from probation 7/18/07
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
	☐ Not Guilty ☐ Guilty ☐ Nolo	
	☐ New Plea: ☐ Admits suff. facts	
	FINDING JUDGE	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☐ Discharged from probation
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
	☐ Not Guilty ☐ Guilty ☐ Nolo	
	☐ New Plea: ☐ Admits suff. facts	
	FINDING JUDGE	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☐ Discharged from probation
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
	☐ Not Guilty ☐ Guilty ☐ Nolo	
	☐ New Plea: ☐ Admits suff. facts	
	FINDING JUDGE	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☐ Discharged from probation
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

COUNT-OFFENSE	V/W FEE	FINE	SURFINE	COSTS	TOTAL DUE

DATE	PLEA	IMPRISONMENT AND OTHER DISPOSITION
	☐ Not Guilty ☐ Guilty ☐ Nolo	
	☐ New Plea: ☐ Admits suff. facts	
	FINDING JUDGE	FINAL DISPOSITION DATE
	☐ Cont. w/o finding until:	☐ Discharged from probation
	☐ Appeal of find. & disp. ☐ Appeal of disp.	☐ Dismissed at request of probation

DOCKET NUMBER: **0414CR003407** NAME: **DELGADO, JENNIFER**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	12-3-04	ARR	☒ Held ☒ Cont'd (1)	Maldonado			
2	12-28-04	PC (1)	☐ Held ☒ Cont'd (1)	Conlon			
3	1/18/05	STS (10)	☐ Held ☐ Cont'd	Moriarty	20 49	1790	end
4	1-25-05	Drug ct	☐ Held ☐ Cont'd				
5	7-18-07	Pmt	☐ Held ☐ Cont'd				
6	1-25-05	DRUG C (·)	☐ Held ☐ Cont'd (8)	Maldonado			
7	~~2-8-05~~	~~DRUG C (·)~~	☐ Held ☐ Cont'd				
8	2-1-05	DRUG Ct (10)	☐ Held ☒ Cont'd (6)	Maldonado			
9	2-8-05	SENT/DRUG Ct (·)	☐ Held ☐ Cont'd				
10	2-7-05	ADV	☐ Held ☐ Cont'd VOP WARRANT - Hold for Court	(Sinnott)			

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

ENTRY DATE	OTHER DOCKET ENTRIES
12-3-04	Stay away from alleged victims <Maldonado>
DEC 28 2004	Counts 1, 4 DISMISSED AT REQ OF COMM., Cont to
	1/18/05 for status in DG CT Session / Possible
	Dispo (10), Bail status unchanged @
	$15,000 Cash <Conlon, J>
1-18-05	Ct 6 continued for disp ~~ts~~ same bail
	STS 15,000 CB Judge Moriarty
1-25-05	Count #6 continued further for disposition. Same
	bail status $15,000 cash bail <Maldonado>
2/7/05	WEMS LB

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
12-3-04 DM	Legal Counsel Fee (211D §2A ¶2)	150	7-18-07	
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)	65	7-18-07	
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

DOCKET NUMBER: 0414 CR 3407 NAME: DELGADO JENNifer

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	MAR - 1 200[illegible]	A+C 1	☐ Held ☐ Cont'd 1	Moriarty	#161	1738	1800
2	4-28-05	WR	☐ Held ☐ Cont'd (c)	Maldo			
3	5/10/05	VOPH (10)	☐ Held ☐ Cont'd (4)	[illegible]	169	380	850
4			☐ Held ☐ Cont'd				
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
2-1-05	Bail reduced to personal recognizance. Defendant sent to Program Latino y Ninos 263 Eustis St Roxbury by Transportation Order <Maldonado>
MAR - 1 [illegible]	Non Alien Alien rights given By <Moriarty J> Δ's presence waived
4/28/05	WRWS—
4-28-05	Atty Craig Ninemeia. PC found for VOP Held w/o Bail pending final VOP hearing <Maldonado>
—	

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

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

DOCKET NUMBER: 04-1 CR 3457 NAME: DELGADO, JENNIFER

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	1-26-06	STATUS/RPP	☐ Held ☐ Cont'd (1)	Moriarty	42	3220	3326
2			☐ Held ☐ Cont'd				
3			☐ Held ☐ Cont'd				
4			☐ Held ☐ Cont'd				
5			☐ Held ☐ Cont'd				
6			☐ Held ☐ Cont'd				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

(S)

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

ENTRY DATE	OTHER DOCKET ENTRIES
5/15/05	Stipulation to VOP. VOP found. Probation revoked.
	Count's # 2, 3, & 2 1/2 years H&C
	Committed, concurrent with each other. Count
	# 6 Guilty filed Count # 5
	2 years H&C concurrent with counts 2 & 3
	& 74 days credit (Brent)
1-4-06	~~Defendant~~ sent notice to Retail Facility Entry Form for
	Alien rights Hearing 1-26-06
1-26-06	Alien Warning given (Moriarty)

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

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

EXHIBIT D

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS

DOCKET NO. 0414CR-003407

NO. OF COUNTS 6

Trial Court of Massachusetts District Court Department

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

NAME OF DEFENDANT: Jennifer Delgado

COURT DIVISION: **Chelsea District Court**
120 Broadway
Chelsea, MA 02150

SECTION I — TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
#1 AND #4	- DISMISSED on 12/28/04 at req of CW. - DISMISSED on 12/28/04.	YES / NO	
#2	Guilty: 2½ yrs. H/C, #46 dys to serve, DEEMED SERVED, bal S/S 2 yrs. PROBATION: DRUG COURT	YES / NO	(G) 3 yr. HOC 1 yr to serve bal. (SS) 3 yrs S/A/NC with victims. Testing evaluation & treatment.
#3	Guilty: 2½ yrs H/C, #46 Dys to serve, DEEMED SERVED, BAL S/S 2 yrs., Concurrent w/ CT #2 PROBATION: DRUG COURT	YES / NO	(G) concurrent w/ ct. 2.
#5	Guilty: 2½ yrs H/C, #46 dys to serve, deemed served, BAL S/S 2 yrs., Con ~~PROBA~~ current w/ CT #2 PROBATION: DRUG COURT	YES / NO	(G) " concurrent w/ ct 2
#6	Guilty: FILED.	YES / NO	(G) " Concurrent w/ ct. 2

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X	1/18/05	X	1/18/05

SECTION II — PLEA OR ADMISSION ACCEPTED BY THE COURT

MARK L. FERINO

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

SECTION III — PLEA OR ADMISSION REJECTED BY THE COURT

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

X
2+3 6 2½ yrs HOC
SS 2½ yrs
5. 6 2½ probation
6. 6 filed enter into complete drug ct

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X	1-18-05		1/18/05

DC-CR 22 (8/96)

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Jennifer DeLuca JENNIFER DELUCA	01/18/05

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X Mark L. Folino MARK L. FOLINO, ESQ.	545293	01/18/05

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X D Moriarty	1-18-05

EXHIBIT E

CRIMINAL COMPLAINT	0414CR003141

Trial Court of Massachusetts
Chelsea District Court

DEFENDANT
RODRIGUEZ, LUIS A.
127 SPENCER AVE.
CHELSEA, MA 02150

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
07/21/1987	M	W	5'08"	125	BRO	BLK

INCIDENT REPORT #	SOCIAL SECURITY #
	- -

DATE OF OFFENSE	PLACE OF OFFENSE
11/02/2004	CHELSEA

COMPLAINANT	POLICE DEPARTMENT
OBRIEN, JAMES	CHELSEA PD

DATE OF COMPLAINT	RETURN DATE AND TIME
11/04/2004	11/23/2004 8:30 AM

COUNT-OFFENSE

1. 266/60/A RECEIVE STOLEN PROPERTY +$250 c266 §60 (*) Amended to Less Than $250 (Moriarty, J) 1/19/05

on 11/02/2004 did buy, receive or aid in the concealment of stolen or embezzled property of LUIS ZAUALA, of a value in excess of $250, knowing such property to have been stolen or embezzled, in violation of G.L. c.266, §60. (PENALTY: state prison not more than 5 years; or jail or house of correction not more than 2½ years; or not more than $500.)

COUNT-OFFENSE

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X James O'Brien	X	11/4/04	1

	FIRST JUSTICE	COURT ADDRESS	
	Hon. Timothy H Gailey	Chelsea District Court 120 Broadway Chelsea, MA 02150	

A TRUE COPY ATTEST:	CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)	
X			110

CRIMINAL DOCKET	DOCKET NO. 0414CR003141	ATTORNEY NAME Folino $150 ICF

COURT DIVISION: Chelsea
☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
RODRIGUEZ, LUIS A.
127 SPENCER AVE.
CHELSEA, MA 02150

DEFT. DOB AND SEX: 07/21/1987 M

DATE OF OFFENSE(S): 11/02/2004
PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: OBRIEN, JAMES
POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 11/04/2004
RETURN DATE AND TIME: 11/23/2004 08:30:00

DATE and JUDGE	DOCKET ENTRY
PD	☑ Attorney appointed (SJC R. 3:10) ☐ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
NOV 23 PD	Terms of release set: ☑ PR ☐ Bail: ☐ Held (276 §58A) ☐ See back for special conditions
NOV 23 PD	Arraigned and advised: ☑ Potential of bail revocation (276 §58) ☐ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
	Advised of right to jury trial: ☐ Does not waive ☐ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE: 1-19-05 Amended to Larceny
1. 266/60/A RECEIVE STOLEN PROPERTY +$250 c266 §60

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				$50 ☐ WAIVED

DISPOSITION DATE and JUDGE: 1-19-05 Moriarty

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

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

SENTENCE OR OTHER DISPOSITION:
☑ Sufficient facts found but continued without guilty finding until: 7/19/05 052/R000007/21/05VWAF 50.00
☐ Probation ☐ Pretrial Probation (276 §87) - until: Admin. Prob and 40 hours of community service
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION — JUDGE — DATE: 8/5/05
☐ Dismissed on recommendation of Probation Dept.
☑ Probation terminated: defendant discharged

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

☐ ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS:
Chelsea District Court
120 Broadway
Chelsea, MA 02150

111

DOCKET NUMBER: **0414CR003141** NAME: **RODRIGUEZ, LUIS A.**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	NOV 23 2004	Arr (1)	☑ Held ☐ Cont'd	Dowling			
2	1/10/05	PTH (1)	☐ Held ☑ Cont'd (1)	Singer	13		
3	1/19/05	PTH (1)	☐ Held ☐ Cont'd TOP Filed (1)	Moriarty	033	2400	3000
4	7/19/05	CWOF (8)	☐ Held ☑ Cont'd				
5	AUG	A+L 1	☐ Held ☐ Cont'd 1	Moriarty	#101	1730	1800
6	8/5/05	P (8)	☐ Held ☐ Cont'd <PTDD>				
7	1-26-06	STATUS	☐ Held ☐ Cont'd (1)	Moriarty	42	1700	1752
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
1/10/05	Atty Tobias ill. Cont'd to 1/19/05 for further PTH <Singer, J>
JAN 19 2005	Complaint Amended to "Less Than $250" by
	Agreement <Moriarty, J>
JAN 19	TOP Filed + Accepted after Colloquy <Moriarty, J>
MAR -	Nine alien Alien Rights given by <Moriarty J> D's
	Presence waived
1-4-06	notice of Judge Moriarty's Order sent to Def + Def atty + ADA.
	Cont for Status 1-26-06 -
1-26-06	Alien Warning Given <Moriarty>

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
NOV 23 2004 PD	Legal Counsel Fee (211D §2A ¶2)	$150 —	0526B000007/21/05LEGALCOUNS	150.00
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
JAN 19 2005 DM	Probation Supervision Fee (276 §87A)	$21/month		
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

EXHIBIT F

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS

DOCKET NO. 0414 CR003141

NO. OF COUNTS #1

Trial Court of Massachusetts District Court Department

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

NAME OF DEFENDANT: Luis A. RODRIGUEZ

COURT DIVISION: **Chelsea District Court, 120 Broadway, Chelsea, MA 02150**

SECTION I — TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1.	C.W.O.F. 6 Months · 40 hours community service. · unsupervised probation.	☒ YES NO	c/w and d/c agree to amend 04-3141 to RSP (under $250)
		YES NO	
		YES NO	
		YES NO	
		YES NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X	1/19/05	X	1/19/05

SECTION II — MARK L. FAINS. PLEA OR ADMISSION ACCEPTED BY THE COURT

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

SECTION III — PLEA OR ADMISSION REJECTED BY THE COURT

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

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X D. Kenneally	1-19-05		

DC-CR 22 (8/96)

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Luis A. Rodriguez LUIS A. RODRIGUEZ	01/19/05

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X MARK C. FAVINO, ESQ.	545293	01/19/05

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X	1-19-05

EXHIBIT G

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJ-2005-0039

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

ANTHONY FONTINA, JENNIFER DELGADO,
and LUIS A. RODRIGUEZ,
Defendants-Respondents,
and
A JUDGE OF THE CHELSEA DISTRICT COURT,
Respondent

COMMONWEALTH'S PETITION FOR RELIEF UNDER G. L. c. 211, § 3, SEEKING A SUPERVISORY ORDER THAT A CHELSEA DISTRICT COURT JUDGE PROVIDE THESE DEFENDANTS, AND ALL OTHERS WHO TENDER PLEAS OF GUILT OR ADMISSIONS TO SUFFICIENT FACTS BEFORE THE COURT, WITH ORAL "ALIEN WARNINGS" MANDATED BY G. L. c. 278, § 29D

The Commonwealth of Massachusetts respectfully requests that this Honorable Court exercise its extraordinary powers under G. L. c. 211, § 3, in this case where a judge of the Chelsea District Court, Moriarty, J., in three separate instances, refused to orally deliver the requisite "alien warnings" pursuant to G. L. c. 278, § 29D.[1] *See Commonwealth v. Hilaire*,

[1] Effective August 28, 2004, G. L. c. 278, § 29D, states:

437 Mass. 809, 813-817 (2002). The Commonwealth seeks

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

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

G. L. c. 278, § 29D.

a supervisory order from this Court ordering the Chelsea District Court to provide these defendants with the statutorily mandated oral alien warnings, and enjoin the court from disregarding this Legislative requirement in future cases.

Since the Chelsea District Court Judge has accepted three deficient pleas that must be vacated in the event of any adverse immigration actions against each of these defendants, she has impaired the substantial rights of the Commonwealth in preventing three valid pleas from being enforced. Furthermore, the Commonwealth has no appellate remedy in the ordinary course from defective plea colloquies.

I. BACKGROUND

A. *Commonwealth v. Anthony Fontina*

On September 19, 2003, the Chelsea District Court issued a complaint charging the defendant, Anthony Fontina, with possession to distribute marijuana, in violation of G. L. c. 94C, § 32C (Complaint No. 0314CR003020) (Exhibit 1). The defendant was also charged with possession of a knife, in violation of a municipal ordinance, but that charge was later dismissed by the Commonwealth on the condition that

the defendant pay $200 in court costs (Exhibits 1, 2, and 3).

On January 18, 2005, the defendant admitted to sufficient facts to warrant a finding of guilt on the drug charge (Exhibits 2 and 3). Judge Diane Moriarty accepted an agreed-upon tender of plea without giving an alien warning (Exhibit 3).[2] During the colloquy, the prosecutor requested that the judge give an alien warning to the defendant. The judge then asked the defendant where he was born, and the defendant replied Cambridge, Massachusetts. The judge stated, "No alien warning." The plea colloquy continued, and the prosecutor requested that the Commonwealth's objection based on the failure to give the alien warning be noted for the record. The judge then told the prosecutor:

> "Don't do that again to me. It's not required if he's an American citizen. It's not required and its within my jurisdiction, so I'm telling you, don't do it again."

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[2] The prosecutor who handled this case provided the following facts. The Commonwealth has a copy of the tape reflecting these facts and will provide a copy, or prepare a transcript for defense counsel's stipulation, if this Court so requests, or if defendant questions the accuracy of the facts stated herein.

The prosecutor concluded by stating that it was contrary to the statute to not provide the defendant with an alien warning. The judge then ended by stating, "Then take me up."

The judge imposed a continuance without a finding until January 18, 2006, on the condition that the defendant remain drug free and undergo random drug testing (Exhibits 2 and 3). The defendant also signed a Waiver of Rights and Alien Rights Notice Form (Exhibit 3). The judge signed this form and certified that she had "addressed the defendant directly in open court," and also "informed and advised" the defendant that if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States" (Exhibit 3).

B. ***Commonwealth v. Jennifer Delgado***

On December 3, 2004, the Chelsea District Court issued a complaint charging the defendant, Jennifer Delgado, with two counts of unarmed burglary and assault, in violation of G. L. c. 266, § 14, two

counts of assault and battery with injury on a person sixty years of age or older, in violation of G. L. c. 265, § 13K(b), assault and battery to intimidate, in violation of G. L. c. 265, § 39(a), and furnishing a false name or social security number after arrest, in violation of G. L. c. 268, § 34A (Complaint No. 0414CR003407) (Exhibit 4). On December 28, 2004, the two counts of assault and battery with injury on a person sixty years of age or older were amended to reflect that there was no serious injury (Exhibit 5). On the same day, the two counts of unarmed burglary and assault were dismissed at the request of the Commonwealth (Exhibits 4, 5, and 6).

On January 18, 2005, the defendant plead guilty to the remaining charges (Exhibit 6). After the plea colloquy, the prosecutor objected to Judge Moriarty's failure to give an oral alien warning to the defendant.[3] The judge responded, "I've explained it to you. Do not do that to me again, so take me up." The

[3] The prosecutor who handled this case provided the following facts. The Commonwealth has a copy of the tape reflecting these facts and will provide a copy, or prepare a transcript for defense counsel's stipulation, if this Court so requests, or if defendant questions the accuracy of the facts stated herein.

prosecutor stated, "Yes, Your Honor." The judge then reiterated, "Do not do that to me again." The prosecutor stated, " I understand, Your Honor." The judge repeated:

> "You don't understand. . . You don't, so don't do that to me again. If you want to appeal me, appeal me on every case. Don't do that again."

The prosecutor concluded, "But in order to do that, your Honor, we do have to make a record." The judge refused to give the oral alien warning and exclaimed, "Well, make a record! I just told you I wouldn't do it. Take it up!"

The judge then sentenced the defendant to two separate two-and-one-half-year terms in prison with the balance suspended for two-and-one-half years on each count of the assault and battery on a person sixty years of age or older charges, and to a two-and-one-half-year term of probation on the assault and battery to intimidate charge (Exhibits 5 and 6). A guilty conviction was placed on file with respect to the furnishing of a false name or social security number charge (Exhibit 6). The defendant was also ordered to complete drug court (Exhibits 5 and 6).

The defendant also signed a Waiver of Rights and Alien Rights Notice Form (Exhibit 6). On this Form, the judge certified that she had "addressed the defendant directly in open court," and also "informed and advised" the defendant that if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States" (Exhibit 6).

C. *Commonwealth v. Luis A. Rodriguez*

On November 4, 2004, the Chelsea District Court issued a complaint charging the defendant, Luis A. Rodriguez, with receiving stolen property over $250, in violation of G. L. c. 266, § 60 (Complaint No. 0414CR003141) (Exhibit 7). On January 19, 2005, the Commonwealth and the defendant agreed to amend the charge to receiving stolen property under $250 (Exhibit 8). On the same day, the defendant admitted to sufficient facts to warrant a finding of guilt (Exhibit 9). Judge Moriarty accepted an agreed-upon

tender of plea without giving an alien warning (Exhibit 9).[4]

After the judge's plea colloquy, and before the clerk read the disposition, the prosecutor requested that the judge give an oral alien warning to the defendant. The judge responded, "What is it with the Commonwealth and the alien warnings?" The judge then asked the defendant, "You were born in Boston, right?" After the defendant responded that he was born in Brighton, Massachusetts, the judge said to the prosecutor, "There you go."

The judge then imposed a continuance without a finding until July 19, 2005, on the condition that the defendant complete forty hours of community service and submit to probation (Exhibits 8 and 9). The defendant also signed a Waiver of Rights and Alien Rights Notice Form (Exhibit 9). On this Form, the judge certified that she had "addressed the defendant directly in open court," and also "informed and

---

[4] The prosecutor who handled this case provided the following facts. The Commonwealth has a copy of the tape reflecting these facts and will provide a copy, or prepare a transcript for defense counsel's stipulation, if this Court so requests, or if defendant questions the accuracy of the facts stated herein.

advised" the defendant that if he "is not a citizen of the United States, a conviction of the offense with which [he] was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States" (Exhibit 9).

II. THIS COURT SHOULD EXERCISE ITS EXTRAORDINARY POWERS UNDER G. L. c. 211, § 3, TO REVIEW THE ACTIONS TAKEN BY THE CHELSEA DISTRICT COURT JUDGE, INSTRUCT THIS COURT TO PROVIDE THESE THREE DEFENDANTS WITH THE NECESSARY ORAL ALIEN WARNINGS PURSUANT TO G. L. c. 278, § 29D, AND ENJOIN THE COURT FROM DISREGARDING THE STATUTE IN FUTURE CASES.

A party seeking review by the Supreme Judicial Court under its power of general superintendence of all inferior courts to correct and prevent errors and abuses therein must demonstrate that: (1) a substantial claim of a violation of substantive rights occurred below; and (2) the error cannot be remedied through the ordinary appellate process. *See McGuiness v. Commonwealth*, 420 Mass. 495, 497 (1995). In this case, review by this Court under G. L. c. 211, § 3, is appropriate because the Chelsea District Court has put a substantial interest of the Commonwealth in jeopardy, the Commonwealth has no appellate remedy

available in the ordinary course,[5] and the disposition below raises important concerns for the administration of justice. *See Bradford v. Knights*, 427 Mass. 748, 750 (1998) (another basis for proceeding to the merits is where an important issue is raised that has implications for the administration of justice even though there was no violation of a substantive right). *Accord Commonwealth v. Taylor*, 428 Mass. 623, 629 (1999).

According to G. L. c. 278, § 29D, a court shall not accept a plea of guilty, nolo contendere, or an admission to sufficient facts to warrant a finding of guilt from a defendant in any criminal proceeding unless the court orally advises the defendant of the following: "'If you are not a citizen of the United States, you are hereby advised that the acceptance by

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[5] The Commonwealth has no right of appeal pursuant to G. L. c. 278, § 28E. General Laws c. 278, § 28E provides, in part:

> An appeal may be taken by and on behalf of the Commonwealth by the attorney general or a district attorney from the district court to the appeals court in all criminal cases and in all delinquency cases from a decision, order or judgment of the court []allowing a motion to dismiss an indictment or complaint . . . .

G. L. c. 278, § 28E.

this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.'" G. L. c. 278, § 29D.[6] The court must tell the defendant exactly what immigration consequences his or her plea may have by "explicit reference to all three" of these consequences. *Commonwealth v. Hilaire*, 437 Mass. at 814, citing *Commonwealth v. Soto*, 431 Mass. 340, 342 (2000). An alien warning must be given even if a defendant is admitting to sufficient facts for purposes of obtaining a continuance without a finding and ultimate dismissal of the charges. *See Commonwealth v. Villalobos*, 437 Mass. 797, 800-806 (2002). *See also Commonwealth v. Tim T.*, 437 Mass. 592, 596 (2002) (in event of a violation of conditions placed on defendant, the "admission" remains and may

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[6] The Commonwealth recognizes that judges face time pressures every day in busy criminal sessions. However, "the requirements imposed by the courts on a judge who accepts a guilty plea are many, but those imposed by the Legislature are few." *Hilaire*, 437 Mass. at 819. The Chelsea District Court had no power to overrule or ignore the Legislature's directive.

ripen into an adjudication of guilt and imposition of sentence).

"If the court fails to provide this warning, and the defendant later shows that he 'may' suffer one of the enumerated immigration consequences, then 'the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty'" or "an admission to sufficient facts." *Hilaire*, 437 Mass. at 813 and n.3. The statute also provides that "the defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States." G. L. c. 278, § 29D.

In this case, Judge Moriarty accepted a plea of guilty in *Commonwealth v. Jennifer* Delgado, as well as an admission to sufficient facts to warrant a finding of guilt in *Commonwealth v. Anthony Fontina* and *Commonwealth v. Luis Rodriguez*, without giving the defendants any requisite alien warnings.[7] *See* Background, *supra*. In *Delgado*, the judge not only refused to give the alien warning, but also told the

[7] The judge also placed various conditions on each of the three defendants when she sentenced them. *See* Background, *supra*.

prosecutor, "don't do that to me again" (numerous times in reference to the prosecutor asking for the warning), "[i]f you want to appeal me, appeal me on every case," and "[t]ake it up." *See id.* Moreover, upon the prosecutor's request for an alien warning in *Fontina*, the judge told the prosecutor to refrain from asking for an alien warning because the warning is not required if the defendant is an American citizen, and to "take [her] up" if there was a problem. In another instance, upon the prosecutor's request for an alien warning in *Rodriguez*, the judge responded, "What is it with the Commonwealth and the alien warnings?" *See id.*

If defendants Fontina, Delgado, or Rodriguez later experience any of the immigration consequences outlined in the statute, Delgado would be entitled to withdraw her guilty plea, and Fontina and Rodriguez would be entitled to vacate their admissions to sufficient facts, because they were not given oral alien warnings in accordance with the statute. *See Hilaire*, 437 Mass. at 814 (oral warning that "a finding of guilty in these cases could affect [the defendant's] status" fell far short of satisfying the

statute's requirements since judge did not explicitly refer to all three immigration consequences); *Soto*, 431 Mass. at 342 (judge failed to warn defendant of exclusion consequence, the precise consequence defendant later faced, and held that it was incumbent on judge to orally notify defendant of all three specific immigration consequences); *Commonwealth v. Rzepphiewski*, 431 Mass. 48, 50 n.3 (2000) (admission to sufficient facts to warrant a finding of guilt is the functional equivalent of a guilty plea, entitling defendant to receive alien warnings and to obtain same relief in event of adverse immigration consequences following a failure to give warnings); *Commonwealth v. Desorbo*, 49 Mass. App. Ct. 910, 911 (2000) (judge required to give alien warnings to defendant tendering plea of guilty, and Legislature has set out and placed in quotation marks the exact text of what judges should say on such occasions). Because the language of G. L. c. 278, § 29D, makes clear that the Chelsea District Court Judge should have orally advised the defendants of the three immigration consequences that might result from their guilty plea or admissions to

sufficient facts, this Court should grant the Commonwealth's petition for relief.

In addition, during the plea colloquies in *Fontina* and *Rodriguez*, the judge inappropriately asked the defendants where they were born. *See* Background, *supra*. *See also* G. L. c. 278, § 29D; *Hilaire*, 437 Mass. at 815 (judge cannot require defendant to disclose his legal status in the United States at time of plea). In *Fontina*, the defendant was asked where he was born, and he replied Cambridge, Massachusetts. *See* Background, *supra*. Moreover, after the judge asked the defendant in *Rodriguez* where he was born and he answered Brighton, Massachusetts, the judge stated, "There you go" to the prosecutor - as though that question and answer were sufficient to replace the alien warning. *See* Background, *supra*. Because the judge failed to follow this statutory requirement as well, this Court should enjoin the lower court from inquiring into defendants' immigration status in future cases.

The judge may contend that the defect in not giving an oral alien warning was cured by having the defendant sign a preprinted Waiver of Rights and Alien

Rights Notice Form. The *Hilaire* Court, however, has already determined that this signed Form containing a written alien warning does not satisfy the statutory requirement, because this Form simply confirms and reinforces that the alien warning was orally given to the defendant (Exhibits 3, 6, and 9). *See Hilaire*, 437 Mass. at 815. In addition, the language in the Form contradicts any claim that the defendant's signature on the waiver section of the Form is all that is required (Exhibits 3, 6, and 9). *See id.* Because the judge signed all three Forms, which state that she "addressed the defendant[s] directly in open court" and "informed and advised" the defendants that "if [they are] not [citizens] of the United States, a conviction of the offense with which [they were] charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States," she inappropriately certified that she had administered the oral alien warnings (Exhibits 3, 6, and 9). Accordingly, this Court should exercise its general superintendence powers over the Chelsea District Court to resolve this important issue that

also raises an important concern for the administration of justice.

The repeated failure to provide the alien warnings by Judge Moriarty, in the face of the Commonwealth's objections, suggests that this judge has a policy of not giving the legislatively-mandated warning. But setting policies for lower courts is the essence of this Court's superintendence power. *See, e.g., Commonwealth v. LaFaille*, 430 Mass. 44, 51 (1999); *Commonwealth v. Seguin*, 421 Mass. 243, 249 (1995), *cert. denied*, 516 U.S. 1180 (1996). Similarly, correcting illegal policies set by this judge would be a classic exercise of the superintendence power set forth in G. L. c. 211, § 3. If the Supreme Judicial Court does not ensure that the lower courts enforce and obey the laws as enacted by the Legislature, this would "leave no law to be enforced." *Commonwealth v. Jackson*, 369 Mass. 904, 923 (1976) (recognizing that, under the Separation of Powers Clause, a court must impose mandatory minimum sentences). *See also Vascovitch*, 40 Mass. App. Ct. 62, 63 (1996) (courts must obey laws as written).

Accordingly, exercise of this Court's supervisory authority is appropriate in these cases.

III. CONCLUSION

For the foregoing reasons, the Commonwealth's G. L. c. 211, § 3, petition for extraordinary relief should be granted. This Court should instruct the lower court to provide these three defendants with the necessary oral alien warnings pursuant to G. L. c. 278, § 29D, to conduct proper plea colloquies in these cases, and to refrain from inquiring into defendants' immigration status in future cases.

Respectfully Submitted,
FOR THE COMMONWEALTH

DANIEL F. CONLEY
District Attorney
For The Suffolk District

JOHN P.ZANINI
Legal Counsel
To The District Attorney
BBO# 563839

Seema Malik Brodie

SEEMA MALIK BRODIE
Assistant District Attorney
For The Suffolk District
BBO#: 652333
One Bulfinch Place
Boston, MA 02114
(617) 619-4070

January 26, 2005

EXHIBIT H

CRIMINAL COMPLAINT	0314CR000609

Trial Court of Massachusetts
Chelsea District Court

TO ANY JUSTICE OR CLERK-MAGISTRATE OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DEFENDANT
ESTRADA, JAIME
13 GUAM ROAD A
CHELSEA, MA 02150

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
04/04/1983	M	W	5'02"	135	BRO	BLK

INCIDENT REPORT #	SOCIAL SECURITY #
	- -
DATE OF OFFENSE	PLACE OF OFFENSE
03/17/2003	CHELSEA
COMPLAINANT	POLICE DEPARTMENT
MURHPY, JANICE	CHELSEA PD
DATE OF COMPLAINT	RETURN DATE AND TIME
03/18/2003	03/18/2003 8:30 AM

COUNT-OFFENSE
1. 265/15B/A ASSAULT W/DANGEROUS WEAPON c265 §15B(b)

on 03/17/2003 did, by means of a dangerous weapon, a BLUNT OBJECT, assault ERNESTO MUNIZ JR., in violation of G.L. c.265, §15B(b). (PENALTY: state prison not more than 5 years; or jail not more than 2½ years; or not more than $1000.)

COUNT-OFFENSE

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X [signature]	X [signature]	3/18/03	1

FIRST JUSTICE
Hon. Timothy H Gailey

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

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

137

CRIMINAL DOCKET

DOCKET NO. 0314CR000609

ATTORNEY NAME: Folino #50ICF

COURT DIVISION: Chelsea

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
ESTRADA, JAIME
13 GUAM ROAD A
CHELSEA, MA 02150

DEFT. DOB AND SEX: 04/04/1983 M

DATE OF OFFENSE(S): 03/17/2003

PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: MURHPY, JANICE

POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 03/18/2003

RETURN DATE AND TIME: 03/18/2003 08:30:00

DATE and JUDGE	DOCKET ENTRY
MAR 18 2003 TC	☑ Attorney appointed (SJC R. 3:10) ☐ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
MAR 18 2003 TC	Terms of release set: ☑ PR ☐ Bail: ☐ Held (276 §58A) ☐ See back for special conditions
TC	Arraigned and advised: ☑ Potential of bail revocation (276 §58) ☐ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
	Advised of right to jury trial: ☐ Does not waive ☐ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE: 1. 265/15B/A ASSAULT W/DANGEROUS WEAPON c265 §15B(

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				$50 ☑ WAIVED

DISPOSITION DATE and JUDGE: 9.3.03 Moriarty

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

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

SENTENCE OR OTHER DISPOSITION:
☐ Sufficient facts found but continued without guilty finding until:
☐ Probation 9-3-04 ☐ Pretrial Probation (276 §87) - until:
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim
☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

1 yr Prob
S/A victim
alien rights given

FINAL DISPOSITION — JUDGE — DATE: 11/18/04
☐ Dismissed on recommendation of Probation Dept.
☑ Probation terminated: defendant discharged

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

COUNT/OFFENSE:

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE:

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

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

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

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

☐ ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

DOCKET NUMBER: 0314CR000609 NAME: ESTRADA, JAIME

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	MAR 18 2003	ARR (1)	☒ Held ☐ Cont'd (1)	Gailey	131		
2	4/24/03	PTH (1)	☐ Held ☐ Cont'd				
3	15	M (1)	☒ Held ☒ Cont'd (1)	Gailey	181		
4	9-3-03	JT (4)	☐ Held ☐ Cont'd				
5	AUG -7 2003	mot	☐ Held ☐ Cont'd				
6	9-3-03	J (4)	☐ Held ☐ Cont'd				
7	9-3-04	Prob (8)	☐ Held ☒ Cont'd AT REQ OF PROB. DEPT				
8	9/10/04	Prob (8)	☐ Held ☒ Cont'd 9-30-04				
9	9-30-04	P (8)	☐ Held ☒ Cont'd 10-8-04				
10	10/8/04	P (8)	☐ Held ☒ Cont'd 10-18-04				

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

ENTRY DATE	OTHER DOCKET ENTRIES
APR 15	C/W'S MOT. TO REVOKE Δ'S RECOG PURSUANT
	TO MGL 276/58 Filed, ATTY Bell APPTD,
	AFTER Hearing, MOT. Denied <Gailey, J>
4-24-03	PTH held. Continued for trial <Gailey>
10/18/04	CONT TO 11/18/04 AT REQ OF PROB (8)
11-21-05	Sent Tape # 03/45312 to AOTC see also 03/0688
4-26-06	Sent tape # 03/45 # 312 & 03/0688 to AOTC
	(Requested by Reina Pineda) see also 03/0688

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
MAR 18 2003 JG	Legal Counsel Fee (211D §2A ¶2)	$150	9-3-03	✓
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)		9-3-03	✓
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

Docket No. 0314CR000609 **Name:** Estrada , Jamie

Date	Schedule History	Judge
6-16-06	deft's motion to dismiss conviction, or, in the alternative, to withdraw guilty plea, vacate the conviction and grant a new trial--- filed.	
6-20-06	Motion denied, Moriarty, J. @ Quincy Court	
7-6-06	Emergency Motion to Reconsider Motion to Dismiss Conviction, or in alternative,	
	to withdraw guilty plea, vacate conviction and grant new trial.	
7-6-06	Motion Allowed, Moriarty, J.	
8-24-06	Commonwealth's Notice of Appeal filed.	
8-24-06	Compiled & Sent paperwork to the Appeals Court. No Tape or Transcript Appeal on Motion only heard by judge Moriarty in Judges Lobby.	
10-12-06	Comm's motion to Clarify allowing the deft's emergency motion to reconsider motion to dismiss) Conviction, filed	

CRIMINAL COMPLAINT	0314CR000688

Trial Court of Massachusetts
Chelsea District Court

DEFENDANT
ESTRADA, JAIME
13 GUAM ROAD
CHELSEA, MA 02150

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
04/04/1983	M	W	5'02"	135	BRO	BLK

INCIDENT REPORT #	SOCIAL SECURITY #
	- -

DATE OF OFFENSE	PLACE OF OFFENSE
03/22/2003	CHELSEA

COMPLAINANT	POLICE DEPARTMENT
O'BRIEN, JAMES	CHELSEA PD

DATE OF COMPLAINT	RETURN DATE AND TIME
03/24/2003	WARRANT

COUNT-OFFENSE
1. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOUS c2

on 03/22/2003 did wilfully and maliciously destroy or injure the personal property, dwelling house or building of ERNESTO MUNIZ JR., the value of the property so destroyed or injured exceeding $250, in violation of G.L. c.266, §127. (PENALTY: state prison not more than 10 years; or jail not more than 2½ years and fine the greater of $3000 or three times the value of the property so destroyed or injured.)

COUNT-OFFENSE
2. 268/13B/A WITNESS, INTIMIDATE c268 §13B

on 03/22/2003 did, directly or indirectly, wilfully endeavor by means of a gift, offer or promise of something of value or by misrepresentation, intimidation, force or express or implied threats of force, to influence, impede, obstruct, delay or otherwise interfere with a witness in a stage of a trial, grand jury or other criminal proceeding, or with a person furnishing information to a criminal investigator relating to a violation of a criminal statute of this Commonwealth, in violation of G.L. c.268, §13B. (PENALTY: state prison not less than 2½ years, not more than 10 years; or house of correction not more than 2½ years; and not less than $1000, not more than $5000. District Court has final jurisdiction under G.L. c.218, §26.)

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X James O'Brien	X Robert E. O'Leary	3/24/03	2

	FIRST JUSTICE	COURT ADDRESS	
	Hon. Timothy H Gailey	Chelsea District Court 120 Broadway Chelsea, MA 02150	

A TRUE COPY ATTEST:	CLERK-MAGISTRATE/ASST. CLERK	ON (DATE)	
X			141

CRIMINAL DOCKET

DOCKET NO. 0314CR000688

ATTORNEY NAME: Bell $150 ICF

COURT DIVISION: Chelsea

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

ESTRADA, JAIME
13 GUAM ROAD
CHELSEA, MA 02150

DEFT. DOB AND SEX: 04/04/1983 M

DATE OF OFFENSE(S): 03/22/2003

PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: O'BRIEN, JAMES

POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 03/24/2003

RETURN DATE AND TIME: WARRANT

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

COUNT/OFFENSE 1. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOU

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				90 ☐ WAIVED

DISPOSITION DATE and JUDGE: 9-3-03 Mowatt

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

FINDING
- ☐ Not Guilty
- ☑ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation 9-3-04 ☐ Pretrial Probation (276 §87) - until:
- ☐ To be dismissed upon payment of court costs/restitution
- ☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
- ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

1 yr Prob
Conc wrd DT 03-609
alien rights given

FINAL DISPOSITION
- ☐ Dismissed on recommendation of Probation Dept.
- ☑ Probation terminated: defendant discharged

JUDGE: 8236A000010/30/03VWAF DATE: 11-18-04 40.00

COUNT/OFFENSE 2. 268/13B/A WITNESS, INTIMIDATE c268 §13B

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE: 9-3-03 Mowatt

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

FINDING
- ☐ Not Guilty
- ☑ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation 9-3-04 ☐ Pretrial Probation (276 §87) - until:
- ☐ To be dismissed upon payment of court costs/restitution
- ☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☐ Other:
- ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

1 yr Prob. Conc 03-609
alien rights given
$ 3 5C restitution joint & several
s/A victim
work/school full time

FINAL DISPOSITION
- ☐ Dismissed on recommendation of Probation Dept.
- ☑ Probation terminated: defendant discharged

JUDGE: DATE: 11-18-04

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE

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

FINDING
- ☐ Not Guilty
- ☐ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

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

1588A000004/22/04VWAF 50.00

FINAL DISPOSITION
- ☐ Dismissed on recommendation of Probation Dept.
- ☐ Probation terminated: defendant discharged

JUDGE: DATE:

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE

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

FINDING
- ☐ Not Guilty
- ☐ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

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

FINAL DISPOSITION
- ☐ Dismissed on recommendation of Probation Dept.
- ☐ Probation terminated: defendant discharged

JUDGE: DATE:

☐ ADDITIONAL COUNTS ATTACHED

A TRUE COPY ATTEST: X CLERK-MAGISTRATE/ASST. CLERK

ON (DATE)

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

KET NUMBER: 0314CR000688 NAME: ESTRADA, JAIME

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1		ARR(1)	☒ Held ☐ Cont'd	Gabley	181		
2	4/24/03	PTH(1)	☒ Held ☐ Cont'd (1)	Gabley	195		
3	5-20-03	PTH(1)	☐ Held ☐ Cont'd (1)	Cannon	242		
4	9/3/03	J(4)	☐ Held ☐ Cont'd				
5	9-3-04	PRob(8)	☐ Held ☒ Cont'd AT REQ OF PROB. DEPT				
6	9/10/04	Prob(8)	☐ Held ☒ Cont'd 9-30-04				
7	9/30/04	P(8)	☐ Held ☒ Cont'd 10-8-04				
8	10/8/04	P(8)	☐ Held ☒ Cont'd 10-18-04				
9	10/18/04	P(8)	☐ Held ☒ Cont'd AT REQ OF PROB				
10	11/18/04	P(8)	☐ Held ☐ Cont'd PTDD KW				

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

ENTRY DATE	OTHER DOCKET ENTRIES
3-24-03	WI WMS "L
4/15/03	WRWMS L
	C/W's MOT. TO Revoke Δ's Recog CW
	Docket # 0314CR0609 Fld + Denied
	<THG 7
	Special Cond's of Release: (1) NO CONTACT
	w/ Named VT. (7) STAY 1 Block Away
	For VT.'s Home <THG>
11-21-05	Sent Supp #03/45312 to AOTC 03CR0609 see also
04-26-06	Sent Supp #03/45312 to AOTC: see also 03/CR 0609

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

T595A000004/22/04LEGALCOUNS 150.00

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
TG	Legal Counsel Fee (211D §2A ¶2)	$150	9-3-04	
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A) $	LT-CS	9-3-04	
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

Docket No. 0314CR000688 **Name:** Estrada , Jamie

Date	Schedule History	Judge
6-16-06	deft's motion to dismiss conviction, or, in the alternative, to withdraw guilty plea, vacate the conviction and grant a new trial--- filed.	
6-20-06	Motion denied, Moriarty, J. @ Quincy Court	
7-6-06	Emergency Motion to Reconsider Motion to Dismiss Conviction, or in alternative,	
	to withdraw guilty plea, vacate conviction and grant new trial.	
7-6-06	Motion Allowed, Moriarty, J.	
8-24-06	Commonwealth's Notice of Appeal filed.	
8-28-06	Compiled paperwork & sent to Appeals Court. Motion heard by Judge Moriarty in her office. No Tapes or transcripts.	
10-13-06	Comm'r motion to Clarify allowing the deft's emergency motion to Reconsider motion to dismiss Conviction, filed see 0314CR0609	

EXHIBIT I

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO. 0314CR-000609	NO. OF COUNTS #1	Trial Court of Massachusetts District Court Department
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.	NAME OF DEFENDANT Jaime Estrada		COURT DIVISION Chelsea District Court 120 Broadway Chelsea, MA 02150

SECTION I TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1.	C.W.O.F 1 year. Probation. Stay-away victims.	YES / NO ✓	G: 18 months prob - S/A - work/school full-time
		YES / NO	
		YES / NO	
		YES / NO	
		YES / NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X [signature]	09/03/03	X [signature]	9/3/03

SECTION II Mark L. Farino **PLEA OR ADMISSION ACCEPTED BY THE COURT** Kaczmarek

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

SECTION III **PLEA OR ADMISSION REJECTED BY THE COURT**

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

1. G 1 yr prob
~~$300 restitution~~
S/A victim
work/school fulltime

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (if rejection decision made)	DATE
X Moriarty J	9-3-03	X [signature]	9/03/03

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X [signature] JAIME ESTRADA.	09/03/03

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X [signature] MARK L. FOUND, ESQUIRE	545293	09/03/03

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X [signature]	9-3-03

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO. 0314CR-000688	NO. OF COUNTS #2	Trial Court of Massachusetts District Court Department
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.	NAME OF DEFENDANT Jaime Estrada.		COURT DIVISION Chelsea District Court 120 Broadway Chelsea, MA 02150

SECTION I — TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1.	CWOF 1 yr. Probation Stay-away victims. Joint and Several Restitution $350	YES / NO ✓	G: 18 months prob. - $350 restitution, J&S - S/A victims - work/school full-time. (conc w/ ~~count~~ 03-609)
2.	CWOF - identical & concurrent w/ Ct. #1 alone.	YES / NO ✓	Same as count one.
		YES / NO	
		YES / NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X [signature] MARK L. FORINO	09/03/03	X [signature] Laczmarek	9/3/03

SECTION II — PLEA OR ADMISSION ACCEPTED BY THE COURT

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

SECTION III — PLEA OR ADMISSION REJECTED BY THE COURT

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

1 + 2 G 1 yr prob
$350 restitution
S/A victim work/school fulltime
Concurrent w 0314CR 609

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X [signature]	9-3-03	[signature]	9/3/03

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE	
X Jaime ESTRADA	09/03/03	

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE	
X MARK L. FOUND, ESQUIRE	545293	09/03/03	

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE	
X	9-3-03	

EXHIBIT J

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CHELSEA DISTRICT COURT
DOCKET NO.'s: 0314 CR 0609
0314 CR 0688

COMMONWEALTH

V.

JAIME ESTRADA

MOTION TO DISMISS CONVICTION, OR, IN THE ALTERNATIVE, TO WITHDRAW GUILTY PLEA, VACATE THE CONVICTION AND GRANT A NEW TRIAL

NOW COMES the Defendant, Jaime Estrada (hereinafter "Mr. Estrada"), by and through his undersigned counsel, and hereby requests this Honorable Court to DISMISS this conviction without prejudice based upon the unconstitutional entry of a guilty plea. In the alternative, Mr. Estrada respectfully requests this court to withdraw his guilty plea, vacate his conviction, and grant a new trial of the above-entitled matter pursuant to Mass.R.Crim.P. 30(b). As grounds for this motion Mr. Estrada submits as follows:

FACTUAL BACKGROUND

Mr. Estrada is a 23-year-old industrious young man who has legally resided in Massachusetts for about five years. He has studied and worked hard (two simultaneous jobs) throughout his life and has valiantly tried to wean himself from associating with those seeking to negatively influence his entry into adulthood.

On or about March 18, 2003, Mr. Estrada was arraigned and charged with one count of Assault and Battery With a Dangerous Weapon ("ABDW") in violation of G.L. c. 265 s. 15(B) as a result of a domestic dispute with a male acquaintance. **See Exhibit A.** On or about March 24, 2003 -- just six days later -- the lingering raw emotions from this ongoing dispute resulted in two additional charges: Malicious Destruction of Property >$250, in violation of G.L. c. 266 s. 127(A) and Intimidation of a Witness in violation of G.L. c. 268 s. 13(B). He was assigned a court-appointed attorney (Attorney Folino) who represented by him throughout his consolidated cases. With the exception of the last hearing, most of Attorney Folino's numerous requested continuances were merely to ask for additional brief continuances. At no point throughout the case did he prepare for trial or even suggest a strategy to aggressively counter the allegation against Mr. Estrada.

On or about September 3, 2003 -- without preparation by his attorney and upon coercion by said counsel -- Mr. Estrada appeared before this Honorable Court and was informed that he could either face trial that very day or enter a plea on the aforementioned charges. He was left with the unpalatable choice of accepting the latter and was given a one-year Guilty straight probation sentence. He successfully complied with the terms of probation and thought he put his problems behind him once and for all.

Nevertheless, on or about March 10, 2006, Mr. Estrada was detained at his house by Immigration and Customs Enforcement ("ICE") members of the Department of Homeland Security ("DHS"). Soon he was whisked away to ICE headquarters in Boston, interrogated and curtly informed that his case was being referred to an immigration judge

for a deportation hearing. He is being held without bond[1] and charged with being in violation of Immigration & Naturalization Act Section 212(a)(2)(A)(i)(I) for committing a Crime of Moral Turpitude, to wit: the ABDW charge. **See Exhibit B.**[2]

Mr. Estrada feels embittered by the entire process, since he deeply feels that he originally took the rap for a crime he did not commit and was coerced by his attorney to mechanically comply with a hurried and constitutionally infirm plea colloquy. He ordered a cassette copy of the short proceedings and even obtained a transcript to bolster his claims for a dismissal and/or new trial. **See Exhibit C**. Because bar counsel failed to file a Notice to Revise and Revoke the sentence under Mass.R.Crim.P. 29 and failed to advise his client of this proper legal course **(See Exhibit A)**, Mr. Estrada is now only left with no choice but to file a collateral attack under Mass.R.Crim.P. 30, infra, before this Honorable Court.

Moreover, he is clearly saddened and embarrassed by the turn of events and now remains in legitimate fear of being deported from the United States. In fact, his state of mind has drastically shifted from concern to sheer panic.

With respect to the instant case, Mr. Estrada contends that he was not informed by this Honorable Court of various significant constitutional rights he was apparently

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[1] Under 8 U.S.C. §§ 1101(a)(43)(48)(B), non-citizens are subject to mandatory deportation for numerous additional offenses under a broadened definition of 'aggravated felony' which now includes charges with a possible sentence of one year or more, whether actually imposed or suspended. See Argument, infra, at 7-8.

[2] Immigration authorities are also currently empowered to roam streets and neighborhoods, often entering people's houses at will in search of folks with prior convictions or mere expired stays in our country. They boast of their statistics and update their feats on a government web site. www.ice.gov.

waiving during the plea colloquy.[3] Specifically, he submits in the attached Affidavit that: (1) had he truly understood the significance of the plea colloquy and ALL of the rights that he would forever be giving up, he would never have agreed to take such a plea; and (2) that his court-appointed lawyer failed to explain the long-term consequences (i.e. that the DHS could arrest him and seek to deport him at any time as a result of a conviction of a year or more) . **See Exhibit D**. The complete litany of rights not waived by Mr. Estrada is explained further in this brief, infra, at 5-10.

STANDARD OF REVIEW

Mass.R.Crim.P. 12 (guilty plea procedure) is predicated on Boykin v. Alabama, 395 U.S.238 (1969) and its Massachusetts progeny. See e.g. Commonwealth v. Duquette, 386 Mass. 834, 845-846 (1982). Commonwealth v. Berthold, 441 Mass. 183 (2004).[4] In the alternative argument presented, Mass.R.Crim.P.30(b) allows for a new trial *at any time* and allows relief to cases where it "appears justice may not have been done." Commonwealth v. Fanelli, 412 Mass. 497, 504, 590 N.E. 2d 186 (1992) (emphasis added). In either event, this Honorable Court has the power to hear this case.

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[3] During the plea colloquy, a Tender of Plea form, (hereinafter "the Green Sheet") follows the strictures of G.L. c. 263 §6 (Waiver of Rights), G.L. c. 218 s. 26A (Defense Counsel's Certificate) and G.L. c. 278 s. 29D (Alien Rights Notice).

[4] The Berthold court held that a defendant is not entitled to withdraw pleas based on trial court's failure to advise him of specific immigration consequence that defendant did not face. Id. at 185-86. In the instant case, Mr. Estrada has been placed in removal proceedings by the DHS as a result of this conviction. **See Exhibit B.**

I. THE DEFENDANT CONTENDS THAT THE INSTANT CASE SHOULD BE DISMISSED OR AT LEAST REOPENED DUE TO THE INVALID RESULT CAUSED BY THE UNINTENTIONAL OMISSION OF OTHER CONSTITUTIONAL RIGHTS WHICH IN TURN INDICATE THAT "JUSTICE MIGHT NOT HAVE BEEN DONE"

A guilty plea (or admission to sufficient facts) is an event of signal significance in a criminal proceeding whereby a defendant waives constitutional rights that inhere in a criminal trial, including, *inter alia*, the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. Florida v. Nixon, 125 S.Ct. 551 (Dec. 13, 2004), citing Boykin, supra.

Mr. Estrada recognizes he has the burden of presenting some particular reason which credibly indicates that there was a defective plea colloquy. Commonwealth v. Pingaro, 44 Mass.App.Ct. 41 (1997). In the case at bar, the plea colloquy was devoid of a key warnings that must be given under Mass.R.Crim.P. 12(c). See also, Blackledge v. Allison, 431 U.S. 63 (1977); accord, Bordenkircher v. Hayes, 434 U.S. 357 (1978). An initial look at the Green Sheet is initially warranted before engaging in a factual discussion. Under G.L. c. 263 s. 6, the panoply of warnings is long and clear. Specifically, that portion of the Green Sheet reads as follows:

> I, the undersigned defendant, understand and acknowledge that I am voluntarily giving up the right to be tried by a jury or judge on these charges.
>
> I have discussed my constitutional and other rights with my attorney. I understand that the jury would consist of six jurors chosen at random from the community, and that I could participate in selecting those jurors, who would determine unanimously whether I was guilty or not guilty. I understand that by entering my plea of guilty or admission, I will also be giving up my right to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to testify or provide evidence against myself by asserting my privilege against self-incrimination; all with the assistance of my

defense attorney; and to be presumed innocent until proven guilty by the prosecution beyond a reasonable doubt.

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

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

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

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

Moreover, the sentencing judge has a duty to properly certify all of these rights in open court, as evinced by Section VI of the Green Sheet. The Judge's Certification reads as follows:

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

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

> I further certify that the defendant was informed and advised that if he or she in not a citizen of the United States, a conviction of this offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial or naturalization, pursuant to the laws of the United States.

Any omission or assurance integral to the satisfaction of constitutional standards constitutes enough grounds for a withdrawal of a plea an allowance of a new trial -- especially where the colloquy was so perfunctory or incomplete as to be in effect nugatory. Commonwealth v. Nolan, 19 Mass.App.Ct. 491, 496-497 (1985). The question then becomes whether or not the deviation from Mass.R.Crim.P.12 significantly affects the substance of a particular requirement. Id., at 496.

In the instant case, Mr. Estrada argues that the mere inadequacy of the record demonstrating the litany of rights he was not given at the plea colloquy should suffice. Compare, Commonwealth v. Dawson, 19 Mass.App. 221, 223 (1985).[5] Specifically, Mr. Estrada argues that the plea colloquy in his case failed to do *all* of the following:

1. Confirm whether or not the Defendant was under the effects of alcohol, drugs or medication within the past 24 hours so as to impair his cognitive understanding of the plea colloquy and its significance.
2. Query the Defendant whether or not there were any promises, rewards or inducements regarding his plea.
3. Challenge defense attorney regarding his own certification of the contents of the Green Sheet in accordance with G.L. 218 s. 26A.
4. Certify (independent of his lawyer's representations) whether or not he fully understood all of his rights as set forth in Section IV of the Green Sheet.

None of these significant rights were ever addressed in his plea colloquy as

---

[5] A defendant attacking a conviction has the choice of standing on the record made during the colloquy and sentencing or offering evidence to supplement the record. Commonwealth v. Glines, 40 Mass.App.Ct. 95 (1996); Commonwealth v. Foster, 369 Mass. 100, 108 nn. 6 & 7 (1975).

evinced by the transcript of said proceedings. **See Exhibit C.** In fact, the plea colloquy only consisted of a seemingly innocuous query[6] in which this Honorable Court asked a smattering of questions and then failed to certify the proper waiver of ALL rights for the record . **See Exhibit C.**

Although many courts have a customary practice in the way they recite and certify the plea colloquy process, all courts are nevertheless encouraged to follow some model guideline as they navigate through this integral part of the judicial process.[7] Sometimes, transcripts of other proceedings can shed light on the propriety or unevenness of how plea colloquies are conducted. Commonwealth v. Conaghan, 48 Mass.App.Ct. 304 (1999) (defendant may proffer materials in addition to 'required' affidavits that may include transcripts of other proceedings). **See Exhibit E.**[8] In short, some practices withstand collateral attack and some do not.

Without insulting this Honorable Court, there have been instances where other courts in the Commonwealth have painstakingly made up to 45 separate queries of the

---

[6] The Supreme Court has long expressed its disapproval of truncated proceedings during plea colloquies. Brookhart v. Janis, 384 U.S. 1, 6-7 (1966).

[7] Over twenty years ago, the court pointedly summed this up as follows: "We have here one of many appeals about attempted withdrawal of guilty pleas. These involve expenditures of time and effort by lawyers and judges ... [which] could be minimized if not wholly avoided, and justice better and more humanely administered in the first instance, if judges permitted themselves to be assisted by the carefully drafted and fully inclusive model questionnaires that have long been available [referring to 1 Smith, Criminal Practice and Procedure §1238 (2d ed. 1983) and 3 ABA, Standards for Criminal Justice (2d ed. 1982), standard 14-2.1(a) (Plea Withdrawal)]. Commonwealth v. Nolan, 19 Mass.App.Ct. 491, 501 (1985).

[8] In fact, Mr. Estrada has made a concerted effort to obtain a painstaking sampling of recent plea colloquies from many different jurisdictions throughout the Commonwealth.

defendant in order to make absolutely sure that the accused party was acutely aware of all of the rights they were waiving by accepting a plea of guilty. **See Exhibit F.**[9] The proper plea colloquy procedure is not limited to one county or another.

Mr. Estrada's assertions are further bolstered by well-settled law. Specifically, in Commonwealth v. Lamrini, 27 Mass.App.Ct. 662, 665-666 (1989), the court, commenting upon what the Supreme Judicial Court held in Commonwealth v. Lewis, 399 Mass. 761 (1987) wrote about the importance of the plea colloquy:

> The *Lewis* decision illustrates an important principle that should be remembered by judges when they preside at a change of plea hearing. It states that in some circumstances a guilty plea may be held to be invalid because the judge unintentionally omitted advising the defendant that by his plea he is waiving certain rights. Therefore, judges must bring to a hearing involving a change of plea the same mental intensity, concentration, and discipline that they regularly employ when presiding at a trial. They must be sure that a defendant is advised of the consequences that flow from a guilty plea. Judges handling pleas of guilty should allow themselves to be assisted by model guidelines during the course of their colloquy. Guilty pleas are too important to the defendant, to the Commonwealth, and to the proper administration of justice to "wing" it or to adopt idiosyncratic practices that only result in confusion and further appeals.

In Commonwealth v. Correa, 43 Mass.App.Ct. 714, 716-17 (1997) the court ruled, after viewing the transcript, that it showed inadequate inquiries by the judge. In Mr. Estrada's case, this Honorable Court must determine whether the limited yet significant omissions that clearly occurred during the plea colloquy are sufficient grounds to dismiss the case, or at a minimum, allow for a new trial. Nolan, 19 Mass.App.Ct. 491, 496-97.

Again, Mr. Estrada contends, *inter alia,* that had he been fully aware of *all* of the

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[9] The cases of Commowealth v. Garceau, (Suffolk Superior Court Docket No. 04-10005) and Commonwealth v. Rafael Santana (Worcester Superior Court Docket No. 04-2030) both illustrate separate, yet equally methodical plea colloquies conducted by respective judges.

rights he was unknowingly foregoing coupled with the long-term consequences of being convicted, he surely would have not entered said plea. When he ultimately discovered the magnitude of all of these problems, he sought counsel experienced in post-conviction matters to bring forth this motion. In sum, Mr. Estrada's assertion that the plea colloquy proceedings taken were defective is not without merit in light of the various significant omissions that stretch well beyond the heartland of a harmless error.

II. THE DEFENDANT CONTENDS THAT HIS ATTORNEY'S UNPREPAREDNESS LEADING UP TO THE TRIAL DATE LEFT HIM NO ALTERNATIVE BUT TO PLEAD GUILTY THEREBY MAKING SAID ATTORNEY'S CONDUCT RISE TO THE LEVEL OF "INEFFECTIVE ASSISTANCE OF COUNSEL".

A court shall grant a request to withdraw a guilty of plea "if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." See Fanelli, supra, at 504. With respect to an "Ineffective Assistance of Counsel" argument, the familiar standard is whether there has been "serious incompetence, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that otherwise available, substantial ground of defen[s]e." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Compare, United States v. Cronic, 466 U.S. 648 (1984) (reserved for situations in which counsel has entirely failed to function as the client's advocate).

If a constitutional infirmity exists that would create a substantial risk of a miscarriage of justice, then the court would be justified in granting a defendant's wish to withdraw his pleas. Commonwealth v. Nikas, 431 Mass. 453 (2000). See also, Commonwealth v. Mahar, 442 Mass. 11, 13-14, n. 4 (2004).

In the instant case, Mr. Estrada asserts via sworn affidavit that his former attorney: (1) never prepared a vigorous defense to contest the charge; (2) failed to meet with him except at the smattering of procedural hearings leading to the trial date; (3) offered false reassurances to Mr. Estrada that the case was under control; (4) coerced him into thinking that taking a plea would lead to a probation without further immigration consequences; and (5) failed to contest count(s) in which the victim could not identify the suspects. **See Exhibit D**.

Clearly, just a fraction of these allegations would be enough to prove the ineffective assistance of Mr. Estrada. Yet all of these factors, taken collectively, present irrefutable evidence that Mr. Estrada was not adequately represented and should now be entitled to withdraw his prior plea.[10] At a minimum, an evidentiary hearing providing said attorney to respond to these explosive allegations would be welcome if this Honorable Court were so inclined.

Lastly, since Mr. Estrada's plea records and transcripts still exist, the Commonwealth should not be prejudiced if this matter were reopened as an alternative remedial measure. See Fanelli, supra, 412 Mass. at 504.

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[10] Sadly, many criminal defense attorneys -- even seasoned ones -- fail to appreciate the long-term and extra-judicial immigration consequences a defendant faces after copping a plea. Since the system is unfortunately designed to allow for further interaction between the court-appointed attorney after a court finding has been made, the particular defendant is left without further recourse short of filing a collateral attack. In the immigration context, unlike criminal proceedings, the accused is not afforded the right to an attorney. One must seek *private* counsel, often through a family member or friend since by then the person is in DHS custody.

CONCLUSION

For the foregoing reasons, Mr. Estrada respectfully requests this Honorable Court to **DISMISS** this conviction without prejudice based upon the unconstitutional entry of a guilty plea. In the alternative, Mr. Estrada moves this Honorable Court to withdraw said plea, vacate his conviction, and grant a new trial of the above-entitled matter pursuant to Mass.R.Crim.P. 30(b).

Respectfully submitted,
JAIME ESTRADA,

By his attorney,

Robert B. Carmel-Montes, Esq.
The Carmel Law Group
One Center Plaza, Suite 240
Boston, MA 02108
Tel. 617.227.6355
BBO# 639476

DATED: 6.16.06

Motion denied
Abrupty
6-20-06

EXHIBIT K

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CHELSEA DISTRICT COURT
DOCKET NO.'s: 0314 CR 0609
0314 CR 0688

Copy of motion originally filed in this Court by Chelsea Court

COMMONWEALTH

V.

JAIME ESTRADA

EMERGENCY MOTION TO RECONSIDER MOTION TO DISMISS CONVICTION, OR, IN THE ALTERNATIVE, TO WITHDRAW GUILTY PLEA, VACATE THE CONVICTION AND GRANT A NEW TRIAL

NOW COMES the Defendant, Jaime Estrada (hereinafter "Mr. Estrada"), by and through his undersigned counsel, and hereby requests this Honorable Court to RECONSIDER its denial of the Motion to Vacate Conviction pursuant to Mass.R.Crim.P. 30(b) (hereinafter "the Rule 30 motion") and, *inter alia,* G.L. c. 218 s. 26A. As grounds for this motion Mr. Estrada submits as follows:

1. This Honorable Court's handwritten decision (which simply stated "Motion Denied") did NOT take into account serious allegation and arguments made by Mr. Estrada regarding the Ineffective Assistance of Counsel claim.

A thorough review of the transcript (in Exhibit C of the original motion) reveals that this Honorable Court did not advise Mr. Estrada of "*all* constitutional and statutory rights" (emphasis supplied). Specifically, the plea colloquy in his case failed to do ALL of the following:

A. Confirm whether or not the Defendant was under the effects of alcohol, drugs or medication within the past 24 hours so as to impair his cognitive understanding of the plea colloquy and its significance.
B. Query the Defendant whether or not there were any promises, rewards or inducements regarding his plea.
C. Challenge defense attorney regarding his own certification of the contents of the Green Sheet in accordance with G.L. 218 s. 26A.

D. Certify (independent of his lawyer's representations) whether or not he fully understood all of his rights as set forth in Section IV of the Green Sheet.

2. Mr. Estrada again respectfully argues that these are not superfluous issues. Rather, they go to the sanctimonious core of a judicial process in which a delicate series of questions afford a defendant his last chance to contest the charges against him.

3. Irrespective of the charges concerning Mr. Estrada, he is on the verge of being ripped apart from his parents, siblings and other loved ones.

4. Additionally, his liberty truly and figuratively hangs in the balance. He deserves a thorough hearing, or, in the alternative, a comprehensive reason or reasons as to why his exhaustive motion should be denied.

WHEREFORE, Mr. Estrada hereby respectfully requests this Honorable Court to **RECONSIDER** its denial of the Motion to Vacate Conviction pursuant to Mass.R.Crim.P. 30(b) and G.L. c. 218, § 26A. Alternatively, Mr. Estrada respectfully asks for this Honorable Court to order on its own motion (under Mass. R.Crim.P. 29) a *longer*, pre-trial probation as opposed to the original finding.

Respectfully submitted,
JAIME ESTRADA,

By his attorney,

Robert B. Carmel-Montes, Esq.
The Carmel Law Group
One Center Plaza, Suite 240
Boston, MA 02108
Tel. 617.227.6355
BBO# 639476

DATED: 7-6-06

CERTIFICATE OF SERVICE

I, Robert B. Carmel-Montes, Esq., do hereby certify that on this 7 day of July, 2006, I served a true and accurate copy of the **EMERGENCY MOTION TO RECONSIDER MOTION TO DISMISS CONVICTION, OR, IN THE ALTERNATIVE, TO WITHDRAW GUILTY PLEA, VACATE THE CONVICTION AND GRANT A NEW TRIAL** via IN HAND DELIVERY, to the Norfolk County District Attorney's Office, One Dennis Ryan Pkwy., 1515 Hancock Street, Quincy, MA 02169.

Signed under the pains and penalties of perjury,

EXHIBIT L

CRIMINAL COMPLAINT 0314CR000612

Trial Court of Massachusetts
Chelsea District Court

DEFENDANT
ESTRADA, GABRIEL
13 GUAM ROAD A
CHELSEA, MA 02150

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
06/24/1985	M	W	' "		XXX	XXX

INCIDENT REPORT #	SOCIAL SECURITY #
	- -

DATE OF OFFENSE	PLACE OF OFFENSE
03/17/2003	CHELSEA

COMPLAINANT	POLICE DEPARTMENT
MURPHY, JANICE	CHELSEA PD

DATE OF COMPLAINT	RETURN DATE AND TIME
03/18/2003	03/18/2003 8:30 AM

COUNT-OFFENSE
1. 265/15B/A ASSAULT W/DANGEROUS WEAPON c265 §15B(b)

on 03/17/2003 did, by means of a dangerous weapon, a BLUNT OBJECT, assault ERNESTO MUNIZ JR., in violation of G.L. c.265, §15B(b). (PENALTY: state prison not more than 5 years; or jail not more than 2½ years; or not more than $1000.)

COUNT-OFFENSE

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X Sgt J Murphy	X Karen A. Pinto	3/18/03	1

FIRST JUSTICE: Hon. Timothy H Gailey

COURT ADDRESS: Chelsea District Court, 120 Broadway, Chelsea, MA 02150

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

168

CRIMINAL DOCKET

DOCKET NO. 0314CR000612

ATTORNEY NAME: Orzell ~~[illegible]~~

COURT DIVISION: Chelsea

[ ] INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT:
ESTRADA, GABRIEL
13 GUAM ROAD A
CHELSEA, MA 02150

DEFT. DOB AND SEX: 06/24/1985 M

DATE OF OFFENSE(S): 03/17/2003

PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: MURPHY, JANICE

POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 03/18/2003

RETURN DATE AND TIME: 03/18/2003 08:30:00

DATE and JUDGE	DOCKET ENTRY
MAR 18 2003 TG	[x] Attorney appointed (SJC R. 3:10) [ ] Atty denied and Deft Advised per 211D §2A [ ] Waiver of counsel found after colloquy
MAR 18 2003 TG	Terms of release set: [x] PR [ ] Bail: [ ] Held (276 §58A) [ ] See back for special conditions
[illegible] TG	Arraigned and advised: [x] Potential of bail revocation (276 §58) [ ] Right to bail review (276 §58) [ ] Right to drug exam (111E §10)
	Advised of right to jury trial: [ ] Does not waive [ ] Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE	FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
amended to st assault 1. 265/15B/A ASSAULT W/DANGEROUS WEAPON c265 §15B(I					50 [x] WAIVED

DISPOSITION DATE and JUDGE: 9.3.03 Moriarty

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

FINDING:
[ ] Not Guilty
[ ] Guilty
[ ] Not Responsible
[ ] Responsible
[ ] No Probable Cause
[ ] Probable Cause

SENTENCE OR OTHER DISPOSITION:
[x] Sufficient facts found but continued without guilty finding until: 9.3.04
[ ] Probation [ ] Pretrial Probation (276 §87) - until: $350 restitution, joint + several
[ ] To be dismissed upon payment of court costs/restitution
[ ] Dismissed upon: [ ] Request of Comm. [ ] Request of Victim — S/A victim
[ ] Request of Deft [ ] Failure to prosecute [ ] Other: full time school/work.
[ ] Filed with Deft's consent [ ] Nolle Prosequi [ ] Decriminalized (277 §70C) — alien rights given

FINAL DISPOSITION — JUDGE — DATE: 9/3/04
[x] Dismissed on recommendation of Probation Dept.
[ ] Probation terminated: defendant discharged

COUNT/OFFENSE	FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
					[ ] WAIVED

DISPOSITION DATE and JUDGE:

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

FINDING:
[ ] Not Guilty
[ ] Guilty
[ ] Not Responsible
[ ] Responsible
[ ] No Probable Cause
[ ] Probable Cause

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

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

COUNT/OFFENSE	FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
					[ ] WAIVED

DISPOSITION DATE and JUDGE:

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

FINDING:
[ ] Not Guilty
[ ] Guilty
[ ] Not Responsible
[ ] Responsible
[ ] No Probable Cause
[ ] Probable Cause

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

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

COUNT/OFFENSE	FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
					[ ] WAIVED

DISPOSITION DATE and JUDGE:

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

FINDING:
[ ] Not Guilty
[ ] Guilty
[ ] Not Responsible
[ ] Responsible
[ ] No Probable Cause
[ ] Probable Cause

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

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

[ ] ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS:
Chelsea District Court
120 Broadway
Chelsea, MA 02150

DOCKET NUMBER: 0314CR000612 NAME: ESTRADA, GABRIEL

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	MAR 18 2003	ARR (1)	☒ Held ☐ Cont'd (1)	Gahley	151		
2	4/24/03	PTH (1)	☒ Held ☒ Cont'd (1)	Gahley	195		
3	9-3-03	JT (4)	☐ Held ☐ Cont'd				
4	MAY 20 2003	ADV (1)	☒ Held ☐ Cont'd (1)	Curran	39		
5	7/29/03	PTH (1)	☒ Held ☐ Cont'd (1)	Klubock	372		
6	9/3/03	J (4)	☐ Held ☐ Cont'd				
7	9-3-04	CWOF (8)	☐ Held ☐ Cont'd				
8	APR 13 2004	ADV (1)	☒ Held ☐ Cont'd (1)	Gahley	189		
9	6/8/04	SH (4)	☐ Held ☐ Cont'd				
10	7-23-04	SH	☐ Held ☐ Cont'd NO VOP c. 9-3-04	CW	Dism. w/o finding		

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

ENTRY DATE	OTHER DOCKET ENTRIES
MAY 20 2003	ATTY O'Neill Discharged, ATTY Cross APPTD, Cont TO
	7/29/03 FOR PTH w/ NEW ATTY, Case Remains
	ON FOR JURY TRIAL 9/3/03 (Curran, J)
APR 13 2004	ADV. BY Prob Dept. FOR VOP, ATTY Burns
	APPTD, NO Request FOR Detention, Cont-
	TO 6/8/04 FOR Furth SH (4) (Gahley, J)
9/3/04	Dismissed W/O finding
7-14-06	Def's motion to vacate admission as sufficient facts, Filed

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
MAR 18 2003 TG	Legal Counsel Fee (211D §2A ¶2)	$150	9-3-03	✓
MAR 18 2003 TG	Legal Counsel Contribution (211D §2)	$100	9-3-03	✓
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)		9-3-03	✓
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			
APR 13 2004 TG	VCF ON Surr	$150	—	

Docket No. 0314CR000612 **Name:** Estrada , Gabriel

Date	Schedule History	Judge
7/14/2006	deft's motion to vacate admission to sufficient facts filed. Memo of law filed.	
8/15/2006	Deft's Motion allowed by Judge Moriarty- Case scheduled for PTH on 8-25-06	
	all parties notified.	
8/24/06	Comm's Notice of Appeal filed. P.TH Cancelled pending ruling on appeal. atty Ryan Schiff notified	
10/12/06	Comm's motion to clarify order dated Aug 15, 2006 allowing the defendant's motion to vacate Dismissed filed. 06-P-1328	
7/3/07	Appeals Court: So much of the order as allowed the deft's motion to vacate his admissions is reversed. The remainder of the order is affirmed. Case remanded back to Chelsea District Court for consideration of the deft's claim of ineffectual assistance of counsel. - Grasso, J.	(Rec. 9/7/07)
9/5/07	Memorandum filed by D. Moriarty, J. notice sent to ADA. John Lacey and deft's atty Ryan H Schiff.	
9/27/07	Deft's Motion to Enlarge Time for filing Memo of Law filed - requesting 10-19-07 rather than 10-5-07 -	
11/5/07	Deft's Supplemental Memo of Law in Support of Motion to Vacate Admissions to Sufficient Facts filed	
12/20/07	Deft's Motion for Order Enforcing Appeal Court's Award of Attorney's Fees filed	
1-8-08	Notice of Recusal filed by Judge Deanne Moriarty Notice of Recusal sent to ADA Lacey & ATTY SCHIFT	
3-13-08	Deft's Supplemental Motion for ordering Appeals Court's Award of Costs & Attorney's Fees forwarded up for hearing April 24, 2008 before T.H.G.	

ADA Christine Muller for Comm.

Docket No 0314CR000612 **Name: Estrada, Gabriel**

Date	Schedule History	Judge
4/4/08	Hearing scheduled for April 24, 2008 rescheduled for June 5, 2008 at 2:00 P.M. by	.
	Agreement all parties.	
June 5,08	Tape CT 45 07 1919 2:30 pm	
	m. for new trial	
6-24 of	2 Pm	
July-08	Findings of Fact, Rulings of Law, and Order For Judgment filed	
12/3/08	Copy mailed to atty Ryan Schuff	
~~12/3/08~~	Faxed to dyrs atty	
12/8/08	WR mc	

CRIMINAL COMPLAINT	0314CR000689

Trial Court of Massachusetts
Chelsea District Court

DEFENDANT
ESTRADA, GABRIEL
13 GUAM ROAD
CHELSEA, MA 02150

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE CHELSEA DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
06/24/1985	M	W	' "		XXX	XXX

INCIDENT REPORT #	SOCIAL SECURITY #
	- -

DATE OF OFFENSE	PLACE OF OFFENSE
03/22/2003	CHELSEA

COMPLAINANT	POLICE DEPARTMENT
O'BRIEN, JAMES	CHELSEA PD

DATE OF COMPLAINT	RETURN DATE AND TIME
03/24/2003	WARRANT

COUNT-OFFENSE
1. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOUS c2

on 03/22/2003 did wilfully and maliciously destroy or injure the personal property, dwelling house or building of ERNESTO MUNIZ JR., the value of the property so destroyed or injured exceeding $250, in violation of G.L. c.266, §127. (PENALTY: state prison not more than 10 years; or jail not more than 2½ years and fine the greater of $3000 or three times the value of the property so destroyed or injured.)

COUNT-OFFENSE
2. 268/13B/A WITNESS, INTIMIDATE c268 §13B

on 03/22/2003 did, directly or indirectly, wilfully endeavor by means of a gift, offer or promise of something of value or by misrepresentation, intimidation, force or express or implied threats of force, to influence, impede, obstruct, delay or otherwise interfere with a witness in a stage of a trial, grand jury or other criminal proceeding, or with a person furnishing information to a criminal investigator relating to a violation of a criminal statute of this Commonwealth, in violation of G.L. c.268, §13B. (PENALTY: state prison not less than 2½ years, not more than 10 years; or house of correction not more than 2½ years; and not less than $1000, not more than $5000. District Court has final jurisdiction under G.L. c.218, §26.)

COUNT-OFFENSE

COUNT-OFFENSE

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X James O'Brien	X Robert O'Leary	3/24/03	2

	FIRST JUSTICE	COURT ADDRESS
	Hon. Timothy H Gailey	Chelsea District Court 120 Broadway Chelsea, MA 02150

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

CRIMINAL DOCKET

DOCKET NO. 0314CR000689

ATTORNEY NAME: Stacy Gross IN Absentia 4.24.03 Beams APR 13 2004

COURT DIVISION: Chelsea

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

ESTRADA, GABRIEL
13 GUAM ROAD
CHELSEA, MA 02150

DEFT. DOB AND SEX: 06/24/1985 M

DATE OF OFFENSE(S): 03/22/2003

PLACE OF OFFENSE(S): CHELSEA

COMPLAINANT: O'BRIEN, JAMES

POLICE DEPARTMENT (if applicable): CHELSEA PD

DATE OF COMPLAINT: 03/24/2003

RETURN DATE AND TIME: WARRANT

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

COUNT/OFFENSE 1. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOL

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				$90 ☐ WAIVED

DISPOSITION DATE and JUDGE: 9.3.04 Moriarty

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

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

SENTENCE OR OTHER DISPOSITION
☑ Sufficient facts found but continued without guilty finding until: 9.3.04 alien rights given
☐ Probation ☐ Pretrial Probation (276 §87) - until:
☐ To be dismissed upon payment of court costs/restitution
☐ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim
☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

$350 restitution joint & several
3/A victim
full time school / work

FINAL DISPOSITION
☑ Dismissed on recommendation of Probation Dept.
☐ Probation terminated: defendant discharged

JUDGE DATE: 9/3/04

COUNT/OFFENSE 2. 268/13B/A WITNESS, INTIMIDATE c268 §13B

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE: 9.3.04 Moriarty

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

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

SENTENCE OR OTHER DISPOSITION
☐ Sufficient facts found but continued without guilty finding until: 9084A000012/11/03VWAF 60.00
☐ Probation ☐ Pretrial Probation (276 §87) - until:
☐ To be dismissed upon payment of court costs/restitution
☑ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim
☐ Request of Deft ☐ Failure to prosecute ☐ Other:
☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

FINAL DISPOSITION
☑ Dismissed on recommendation of Probation Dept.
☐ Probation terminated: defendant discharged

JUDGE 9/3/04 DATE

2861A000006/24/04VWAF 30.00

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE

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

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

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

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

JUDGE DATE

COUNT/OFFENSE

FINE	SURFINE	COSTS	RESTITUTION	V/W ASSESSMENT
				☐ WAIVED

DISPOSITION DATE and JUDGE

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

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

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

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

JUDGE DATE

☐ ADDITIONAL COUNTS ATTACHED

A TRUE COPY ATTEST: X CLERK-MAGISTRATE/ASST. CLERK

ON (DATE)

COURT ADDRESS
Chelsea District Court
120 Broadway
Chelsea, MA 02150

174

DOCKET NUMBER: 0314CR000689 NAME: ESTRADA, GABRIEL

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	4.24.03	ARR	☒ Held ☐ Cont'd (1)	Galey	193		
2	5.20.03	PTH (1)	☐ Held ☒ Cont'd (1)	Klubock	378		
3	7/29/03	PTH (1)	☒ Held ☒ Cont'd (1)	Curran	741		
4	9/3/03	J (4)	☐ Held ☐ Cont'd				
5	9.3 04	CWOF (8)	☐ Held ☒ Cont'd				
6	APR 13 2004	ADV (1)	☒ Held ☐ Cont'd (1)	Galey	189		
7	6/8/04	SH (4)	☐ Held ☐ Cont'd				
8	7.23 04	S H	☐ Held ☐ Cont'd NO VOP				
9	9-3-04	CW (8)	☐ Held ☐ Cont'd Dismissed W/O finding				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
3.24.03	WI WMS "a"
3/27/03	LWRWMS CM
"	Comm's ORAL mot to remand to Hdg. / no action
	Done By (Galey J)
"	Comm's mot to vacate allowed ; New Summons for
	ARR. 4-24-03 THG
4.24.03	Defendant arraigned. Atty Stacy Gross appointed
	in absentia (Galey)
4.24.03	Atty. Gross notified of appointment "c"
APR 13 2004	ATTY BURNS APPTD, NO DETENTION REQUEST (GAHLEY J)

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
	Legal Counsel Fee (211D §2A ¶2)	150	9-3-04	
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)	65	9-3 04	
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			
APR 13 2004 JG	LCF on Surr	$150		

Docket No. 0314CR000689 **Name:** Estrada , Gabriel

Date	Schedule History	Judge
7/14/2006	deft's motion to vacate admission to sufficient facts filed. Memo of law filed.	
7/31/06	Motion and Copies sent to Judge Moriarty	

Docket No. 0314CR000689 **Name:** Estrada , Gabriel

Date	Schedule History	Judge
7/14/2006	deft's motion to vacate admission to sufficient facts filed. Memo of law filed.	
8/15/2006	Deft's Motion allowed by Judge Moriarty- Case scheduled for PTH on 8-25-06	
	all parties notified.	
8/21/06	Comm.'s Notice of Appeal filed. C.T.H Cancelled pending ruling on appeal. Atty. Ryan Schiff Notified	
10/13/06	Comm's motion to Clarify order dated Aug 15, 2006 allowing the dft's motion to vacate Decision filed	
7/3/07	Appeals Court 06-P-1328.	
	So much of the order as allowed the dft's motion to vacate his admissions is reversed. The remainder of the order is affirmed. Case remanded back to Chelsea District Court for Consideration of the dft's Claim of Ineffective Assistance of Counsel - Grasso, J.	
9/5/07	Memorandum filed by D. Moriarty, J.	
	Notice sent to ADA John Lacey and dft's atty Ryan M Schiff.	
9/27/07	Dft's Motion to Enlarge Time for filing Memo of Law filed, requesting 10-19-07 rather than 10/5/07	
11/6/07	Dft's Supplemental Memo of Law in Support of Motion to Vacate Admissions to Sufficient Facts filed.	
	SEE 0314CR612	
12/20/07	Dft's Motion for Order Enforcing Appeal Court's Award of Attorney's Fees filed	
1-8-08	Notice of Recusal filed by Judge Dianne Moriarty	
	Notice of Recusal sent to ADA Lacey & Atty Schiff	
3-13-08	Dft's Supplemental Motion for ordering Appeals Court's Award for Costs & Attorney's Fees marked up for Hearing 4/24/08 Before T. H. Cauley.	
	ADA Christine Miller for Comm.	

Docket No 0314CR000689 **Name: Estrada, Gabriel**

Date	Schedule History	Judge
4/4/08	Hearing scheduled for April 24, 2008 rescheduled for June 5, 2008 at 2:00 P.M. by	.
	Agreement all parties.	
June 5,08	Tape · C.T 45 07 1919- 2:30 Pm M- for new trial	
6-24 08	2 Pm	
July-08	Findings of Fact, Rulings of Law, and Order of Judgment filed	
12/3/08	Copy mailed to atty Ryan Schiff	
12/3/08	Faxed to dft's atty ✓	

EXHIBIT M

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO. 0314CR0612	NO. OF COUNTS 1	Trial Court of Massachusetts District Court Department
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.	NAME OF DEFENDANT Gabriel Estrada		COURT DIVISION Chelsea District Court 120 Broadway Chelsea, MA 02150

SECTION I — TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)	YES / NO	PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1	CWOF - 1 year Stay away from victim	YES ___ NO X	reduce to straight assault - 2 year CWOF - S/A victims - work/school full time
		YES ___ NO ___	
		YES ___ NO ___	
		YES ___ NO ___	
		YES ___ NO ___	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X [signature]	9/3/03	X [signature]	9/3/03

SECTION II — PLEA OR ADMISSION ACCEPTED BY THE COURT

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

Kaczmarek

SECTION III — PLEA OR ADMISSION REJECTED BY THE COURT

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

1. CWOF 1 yr
Rest $350 jt/several
S/A
full time work/school

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X [signature]	9-3-03		

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Gabriel Estrada	9/3/03

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X Nancy F. [illegible]	564422	9/3/03

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X [illegible]	9-3-03

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO. 0314CR0689	NO. OF COUNTS 2	**Trial Court of Massachusetts District Court Department**
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.	NAME OF DEFENDANT Gabriel Estrada		COURT DIVISION **Chelsea District Court 120 Broadway Chelsea, MA 02150**

SECTION I TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" if Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1	CWOF - 1 year - Restitution - Joint & Several $350.00 - stay away	YES / X NO	2 year CWOF - $350 (J&S)
2	CWOF - 1 year	YES / X NO	" " Conc w/ ~~count~~ 03-612)
		YES / NO	
		YES / NO	
		YES / NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X [signature]	9/3/03	X [signature]	9/3/03

SECTION II PLEA OR ADMISSION **ACCEPTED** BY THE COURT Kaczmarek

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

SECTION III PLEA OR ADMISSION **REJECTED** BY THE COURT

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

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X [signature] Moriarty, J	9-3-03		

DC-CR 22 (8/96)

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L.c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L.c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Gabriel Estrada	9/3/03

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X Nancy F. Ge	564422	9/3/03

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X D Murphy J.	9-3-03

EXHIBIT N

Commonwealth of Massachusetts

Suffolk, ss.

Chelsea District Court
Docket Nos. 0314CR689
0314CR612

Commonwealth

v.

Gabriel Estrada

Motion to Vacate Admission to Sufficient Facts and Incorporated Memorandum of Law

---

Defendant Gabriel Estrada moves, under Rule 30(b) of the Massachusetts Rules of Criminal Procedure, that this Honorable Court vacate his admission to sufficient facts and order a new trial.

In support of this motion, the defendant states as follows:

Introduction

On September 3, 2003, Gabriel Estrada made admissions to sufficient facts to charges of assault, destruction of property, and intimidation of a witness. The cases were then continued without a finding for a period of one year. Even though Estrada has lived in the United States since he was thirteen years old, and an admission to sufficient facts is not a conviction under Massachusetts law, his admissions in this case have, under federal immigration law, subjected him to deportation and revocation of his lawful immigration status.

This Court conducted Estrada's plea colloquy jointly with that of his brother and co-defendant Jaime Estrada. During the colloquy, the Court asked the

defendants identical questions. His brother recently moved this Court to vacate his guilty plea on the grounds that the colloquy was fatally infirm. This Court allowed the motion.

In this motion, Gabriel Estrada joins the arguments made by his brother and raises two additional arguments that are, if anything, stronger than those presented by his brother. Specifically, Estrada asserts, in addition to the arguments presented by his brother, that his admissions should be vacated for the following reasons:

- The transcript of his plea colloquy demonstrates that he was not apprised of the elements of the offenses in relation to which he admitted to sufficient facts.
- Trial counsel provided ineffective assistance of counsel by failing to explain to Estrada that the Commonwealth's only witness to the property-destruction and witness-intimidation offenses had initially told the police he could not identify the perpetrators and that this statement could have been used to impeach the witness's credibility at trial.

For these reasons, as well as those set forth in Jaime Estrada's motion, this court should vacate Gabriel Estrada's admissions to sufficient facts.

Factual and Procedural Background

A. The March 17, 2003, incident.

On March 17, 2003, Gabriel Estrada, a 17-year-old high school student, was

arrested, along with his brother Jaime Estrada and two other young men, and charged with assault with a dangerous weapon. *See* Exhibit 1. The police alleged that Estrada was with a group of young people that confronted another group, which included a nineteen-year-old man named Ernesto Muniz, Jr. *Id.* According to Muniz, the group of young people began swearing at him and his friends, and some of them pulled out machetes and knives. *Id.* When Muniz told them that he would fight if they dropped their weapons, the group of young people "left the area." *Id.* After arriving at the scene, the police took Muniz and two other alleged victims to the library, where the police had detained three "young [H]ispanic males." *Id.* The police report does not indicate why these young men were detained or whether there was any reason to believe that they were involved in the altercation. At the library, two of the alleged victims identified Gabriel Estrada as a participant in the altercation who had held "a Corona bottle and acted as if he was going to hit" the alleged victims with it. *Id.*

B. The March 22, 2003, incident.

On March 22, 2003, five days after the first incident, police officers responded to Muniz's home. That night, Muniz told the police that "he heard the sound of glass smashing outside of his window and observed three or four Hispanic male parties smashing the windows out of his uncle's vehicle." *See* Exhibit 2. Muniz said "that although he could not identify the subjects, he [did] believe that they were associated with others who were apparently arrested approx. one week ago for

R. 13

threatening him with a machete." *Id.*

The next day, Munoz stopped a police cruiser and told a very different story. He claimed that the people responsible for the damage to his uncle's car "were the same four guys who assaulted him on [March 17, 2003]." *See* Exhibit 3. Even though this claim is not borne out by the initial police report (*see* Exhibit 2), Munoz also insisted that he had told the "officer who responded to the initial call . . . [that] he knew who the parties involved were" and that they were the same people who had been arrested for the March 17 incident. *See* Exhibit 3.

C. Estrada's admission to sufficient facts.

On September 3, 2003, Gabriel Estrada, during a single joint plea colloquy with his brother and another co-defendant, admitted to sufficient facts in relation to both the March 17 and March 22 incidents. Estrada's assault with a dangerous weapon charge was reduced to simple assault, on the Commonwealth's motion, because he was "not identified as having [a] weapon[ ]." See Exhibit 4 at 7. During the plea colloquy, the Court never explained the elements of assault to Estrada and defense counsel never represented that she had explained the elements to him. *See id.* The prosecutor did provide a description of the facts underlying each of the alleged incidents. But the recitation of facts for the March 17, 2003, incident did not at any point indicate that Gabriel Estrada was present or did anything that could constitute the crime of assault. *See id.* The prosecutor also did not allege sufficient facts in relation to the March 22, 2003, incident, to make out the essential

elements for the intimidation of a witness charge. *See id.* at 8.

The prosecutor's factual summary for the March 22, 2003, incident differed dramatically from the statement Muniz gave to the police on the evening of the alleged incident. While Muniz initially told the police that he was unable to identify the suspects but believed that they "were associated with others who were apparently arrested" for the March 17 incident (*see id.* at 8), the prosecutor stated in court that Muniz "observed these four defendants smashing all the windows in his car with bottles." *See id.*

Estrada's attached affidavit demonstrates that, prior to his change of plea hearing, his attorney told him that the Commonwealth's case was strong and advised him to make an admission to sufficient facts. *See* Exhibit 5. She never told him that Muñoz had made starkly inconsistent statements to the police and that those inconsistencies could have been used to undermine Muñoz's credibility had Estrada not waived his right to a jury trial. *See id.* Trial counsel's attached affidavit does not contradict Estrada's assertions. While she does recall reviewing the police reports with Estrada and telling him that Muñoz had identified him as the perpetrator, she has no memory of either discussing with her client the fact that Munoz had made contradictory statements to the police or that Muñoz "could have been cross examined via the discrepancy between these two (2) police reports." *See* Exhibit 6.

D. Estrada's background.

At the time he admitted to sufficient facts, Estrada was a 17-year-old student at Chelsea High School and had been in the United States for less than five years. Because his English was limited, he required an interpreter to understand court proceedings and to communicate with his attorney. See Exhibit 5. When Estrada was thirteen years old, he came to the United States from El Salvador with his brother to join their parents, who were living in Massachusetts. *See id.* Estrada has established deep roots in this country. He has greatly improved his English and has had steady employment since finishing high school. He lives with Sandy Lopez, his girlfriend of four years, who is a lawful permanent resident the United States. *See id.* He also remains very close to his parents and spends a great deal of time with his eight-year-old brother and four-year-old sister, both whom were born in this country and are therefore United States citizens. *See id.* Because of his convictions* in this case, Estrada is subject to deportation and cannot renew his legal authorization to live and work in this country.

---

* Although "[a]n admission to sufficient facts followed by a continuance without a finding is not a 'conviction' under Massachusetts law" (*Commonwealth v. Villalobos*, 437 Mass.797, 802 (2002) (citation omitted)), it is a "conviction" under federal immigration law, which defines the term to include any admission to "sufficient facts to warrant a finding of guilt" that is combined with any "form of punishment, penalty or restraint on the [defendant's] liberty." 8 U.S.C. § 1101(a)(48)(A).

Legal Argument

A. Because the transcript of Estrada's plea colloquy reveals that he was not apprised of the elements of the offenses in relation to which he admitted to sufficient facts, his admissions cannot be deemed voluntary and intelligent.

Under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, "[a] guilty plea is valid only if it is made voluntarily, knowingly, and intelligently." *Commonwealth v. Andrews*, 49 Mass.App.Ct. 201, 203 (2000); *Brady v. United States*, 397 U.S. 742, 748 (1970). The same requirements apply when a defendant makes an admission to sufficient facts. *See Commonwealth v. Hillaire*, 51 Mass.App.Ct. 818, 830-831 (2001) (noting that "an admission to sufficient facts [is] the functional equivalent of a guilty plea and requires a colloquy to determine whether the admissions were intelligent and voluntary" [citations omitted]). For an admission to be knowing and intelligent, the defendant must have "knowledge of the elements of the charges against him." *Commonwealth v. Correa*, 43 Mass. App. Ct. 714, 717 (1997). Because the transcript of Estrada's plea colloquy demonstrates that he was not informed of the elements of the assault and witness intimidation charges, this Court should vacate his admissions to those charges.

When a defendant challenges the voluntary or intelligent nature of his guilty plea or admission, it is the Commonwealth's burden to prove, through "a contemporaneous record of the plea," that the defendant's plea was entered voluntarily and intelligently. *Commonwealth v. Quinones*, 414 Mass 423, 431-432

(1993); *Correa*, 43 Mass. App. Ct. at 716 . If, as is the case here, the defendant's attack on his plea or admission is based solely on the "contemporaneous record . . . made in the case through the stage of the colloquy and conviction," "it is not open to the Commonwealth to introduce extraneous evidence tending to show that the defendant in fact acted freely and intelligently in tendering the plea." *Commonwealth v. Nolan*, 19 Mass.App.Ct. 491, 492 (1985).

To establish that the plea was "intelligently and voluntarily made," the Commonwealth must produce a record establishing that, at the time he made his plea,"the defendant ha[d] knowledge of the elements of the charges against him." *Correa*, 43 Mass. App. Ct. at 717. As the Supreme Court has explained, a plea cannot "be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Morgan v. Henderson*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)).

This requirement must be met through a record affirmatively demonstrating that there was either: "'(1) an explanation of the essential elements by the judge at the guilty plea hearing; (2) a representation that counsel has explained to the defendant the elements he admits by his plea; [or] (3) defendant's statements admitting to facts constituting the unexplained element or stipulations to such facts.'" *Commonwealth v. Robbin*, 431 Mass. 442, 450 (2000) (quoting

Commonwealth v. McGuirk, 376 Mass. 338, 343-344 (1978)); *see also Commonwealth v. Pixley*, 48 Mass.App.Ct. 917, 918 (2000). If the record of the plea colloquy fails to establish that the defendant had knowledge of the elements of the crime, the defendant is not required to show that "he suffered any specific harm, or that he would not have pleaded guilty had he been given a proper colloquy." *Commonwealth v. Colon*, 439 Mass. 519, 529 (2003). Rather, "he is entitled to withdraw his plea . . . without any further showing." *Id.*

Here, the transcript of Estrada's plea colloquy demonstrates that he did not have "knowledge of the elements of the charges against him" when he admitted to sufficient facts. *Correa*, 43 Mass. App. Ct. at 717. First, the court did not at any point during the plea colloquy inform Estrada of the elements of the charge against him. *See* Exhibit 4. Second, Estrada's attorney did not make any representation on the record that she had explained the elements of the crime to her client. *See id.* And, finally, the prosecutor's recitation of the facts failed to make out the required elements for the crimes of assault or intimidation of a witness. While the prosecutor did give an extended description of the March 17, 2003, incident's facts, she did not, at any point, allege that Gabriel Estrada participated in the altercation—or that he was even present when it occurred. In fact, the only time the prosecutor mentioned Gabriel Estrada in relation to this incident was when she explained that the Commonwealth was reducing the charges against Estrada and David Flores from assault with a dangerous weapon to simple assault because they

"were not identified as having weapons." *See* Exhibit 4 at 7. Likewise, when describing the facts of the March 22, 2003, incident, the prosecutor failed to allege facts sufficient to make out the intimidation of a witness charge. While the prosecutor did say that the alleged victim "observed these four defendants smashing all the windows in his car with bottles" (*see id.* at 8), she did not set forth any facts indicating that "the defendant did so with the purpose of influencing the complainant as a witness." *See Commonwealth v. McCreary*, 45 Mass.App.Ct. 797, 799 (1998).

The conclusion that defendant's admission was not intelligently and voluntarily made finds further support in the fact the prosecutor's recitation of the facts was not sufficient for the judge to be "satisfied that there [was] a factual basis for the charges" of assault and witness intimidation. Mass. R. Crim. P. 12(c)(5)(A); *see also Commonwealth v. Morrow*, 363, 607-608 (1973) ("[I]t is desirable that a factual basis for the guilty plea be shown, by specific admissions of the defendant or other factual presentation made before the plea is accepted by the judge. This showing can be of significant assistance to the judge in the performance of his duty to ensure that the plea is voluntarily and intelligently made.").

Because the Commonwealth cannot meet its burden of demonstrating that Gabriel Estrada's admission to sufficient facts was intelligent and voluntary, this Court must, under the state and federal constitutions, vacate his admissions to the charges of assault and intimidation of a witness.

B. **Because Estrada's plea colloquy failed to determine (1) whether he was admitting to sufficient facts as a result of any threats, assurances, or promises; or (2) whether he was under the influence of alcohol, drugs, or medication that might impair his ability to understand what rights he was waiving, this Court should vacate his admission to sufficient facts.**

Gabriel Estrada's brother and co-defendant Jaime Estrada pled guilty at the same time Gabriel Estrada made his admission to sufficient facts. The co-defendants had a single joint plea colloquy, where the Court asked the same questions of the defendants. *See* Exhibit 4. Recently, Jaime Estrada filed a Motion to Dismiss Conviction, or, in the Alternative, to Withdraw Guilty Plea, Vacate the Conviction and Grant a New Trial, asserting that his plea was invalid because the Court's plea colloquy failed, among other things, to determine (1) whether he was pleading guilty as a result of any threats, assurances, or promises; and (2) whether he was under the influence of alcohol, drugs, or medication that might impair his ability to understand what rights he was waiving by pleading guilty. See Docket Nos. 0314CR609 & 0314CR688. This Court initially denied that motion but then allowed a July 6, 2006, motion to reconsider. *See* Exhibit 7. Gabriel Estrada joins Jaime Estrada's motions and the arguments made in support of those motions.

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C. **Trial counsel's failure to explain to Estrada that Ernesto Muñoz had initially told the police that he could not identify the people involved in the March 22, 2003, incident and that Muñoz's inconsistent statements could have been used to powerfully impeach his credibility had Estrada proceeded to trial deprived Estrada of his right to the effective assistance of counsel.**

When Ernesto Munoz called the police to report the March 22, 2003, property destruction, he told the police that he "could not identify" the "three or four Hispanic male[s]" he saw breaking the windows in his uncle's car, but that he "believe[d] they were *associated with others*" who had been arrested for threatening him approximately one week earlier. *See* Exhibit 2 (emphasis added). It was not until the next day—after Muñoz had an opportunity to fabricate a story—that he stopped a police cruiser and claimed that the people responsible for the previous night's property destruction "were the same four guys who assaulted him on [March 17, 2003]." *See* Exhibit 3. Even though this claim is plainly contradicted by the initial police report filed by Officer Eugene T. Bonita (*see* Exhibit 2), Muñoz insisted that he had told the "officer who responded to the initial call . . . [that] he knew who the parties involved were" and that they were the same people who had been arrested for the March 17 incident. *See* Exhibit 3.

Trial counsel never explained to Estrada that Muñoz had made these contradictory statements, that the contradictions were significant, or that the contradictions could be used to undermine Muñoz's credibility at trial. *See* Exhibit 5. Instead, counsel told Estrada that the Commonwealth's evidence was strong and

advised him to admit to sufficient facts. *See id.* By urging her 17-year-old, non-English-speaking client to forgo a trial without explaining the significance of Muñoz's inconsistent statements or the fact that the inconsistencies could have been used to impeach Muñoz at trial, counsel failed to provide "advice [that] 'was within the range of competence demanded of attorneys in criminal cases.'" *Commonwealth v. Chetwynde*, 31 Mass.App.Ct. 8, 12 (1991) (citing *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)). Because "'there is a reasonable probability that, but for counsel's errors, [Estrada] would not have [admitted to sufficient facts] and would have insisted on going to trial'" (*Commonwealth v. Pike*, 53 Mass.App.Ct. 757, 762 (2002) (quoting *Hill*, 474 U.S. at 59)), this Court should vacate Estrada's admission to sufficient facts in relation to the March 22, 2003, incident.

When evaluating ineffective assistance of counsel claims, Massachusetts courts must engage in a two-part inquiry, asking "(i) 'whether there has been a serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinarily fallible lawyer'; and (ii) 'whether [such ineffectiveness] has likely deprived the defendant of an otherwise available, substantial ground of defense.'" *Commonwealth v. Pike*, 53 Mass.App.Ct. 757, 760 (2002) (citing *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974)). When a defendant's ineffectiveness claim is directed at counsel's representation incident to a guilty plea or admission to sufficient facts, the court must determine whether counsel provided "advice [that] 'was within the range of

competence demanded of attorneys in criminal cases'" *(Chetwynde*, 31 Mass.App.Ct. at 12 (citing *Hill*, 474 U.S. at 56)) and whether "the defendant was so misled by his counsel's advise that he prematurely waived his right to a jury trial." *Commonwealth v. Berrios*, 64 Mass.App.Ct. 541, 549 (2005) (further appellate review granted at 446 Mass. 1101 (2006)) (citing *Chetwynde*, 31 Mass.App.Ct. at 15). A defendant can establish that he prematurely gave up his jury-trial right by showing 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.'" *Pike*, 53 Mass.App.Ct. at 762 (citing *Hill*, 474 U.S. at 59).

Here, the Commonwealth's case for the destruction of property and witness intimidation charges rested entirely on Munoz's assertion that Estrada and the others arrested for the March 17 altercation had caused the damage to the car. This claim, however, was directly contradicted by the statement Munoz gave to the police immediately after the incident. At that time, Munoz was unsure even about how many people had broken the windows in the car, saying not, as he would later claim, that four people had been involved but rather that he had "observed *three or four* Hispanic male parties smashing the windows out of his uncle's vehicle." *See* Exhibit 2 (emphasis added). In contrast to his later claims, he also made clear that "he could not identify the suspects" but that he "believe[d] that they were *associated with others* who" had been arrested in relation to the March 17 altercation. *See id* (emphasis added). On their own these statements would have powerfully

impeached Munoz's later claims that there were definitely four suspects, that he could identify these suspects, and that they were the same people arrested for the March 17 incident, rather than "others" associated with them.

The strongest impeachment, however, would have been based on Munoz's claim that he told the officer who responded to the initial call that "he knew who the parties involved were" and that they were the same people who had been arrested for the March 17 incident. *See* Exhibit 3. This claim was in direct conflict with Officer Boinita's police report, and the defense could have called the officer as a witness to impeach Munoz. The Commonwealth then would have been forced either to admit that Munoz lied or to argue that Officer Bonita had filed a false police report. Either way, this impeachment would have powerfully undermined Munoz's credibility, and the Commonwealth's case, in the eyes of a jury.

Rather than alerting Estrada to these deficiencies in the Commonwealth's case, trial counsel told her client that the prosecution's case was strong and that he had little chance of victory at trial. See Exhibit 5. Counsel's advice was incorrect and, more importantly, prevented Estrada from making a knowing and voluntary decision about whether to admit to sufficient facts or to go to trial. Estrada was 17 years old, had no prior experience with the criminal justice system, and spoke very little English. As his affidavit makes clear, Estrada did not understand how cross-examination of Munoz would have worked and did not know that Munoz had made these radically inconsistent statements. *See id.* If counsel had told him that Munoz had made these inconsistent statements and that those statements could have been

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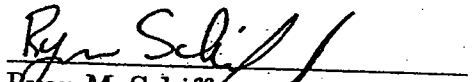
used to undermine Muñoz's credibility, Estrada would have gone to trial and challenged charges that he asserts were false. *See id.* The reason he did agree to admit to sufficient facts was because his attorney made him feel that the prosecution's case was overwhelming and that he had no other choice. *See id.*

Because Estrada's trial counsel provided advice that precluded him from making a knowing and voluntary decision about whether to make an admission to sufficient facts, this Court should vacate his admission to sufficient facts.

Conclusion

For the reasons stated above, this Court should vacate Gabriel Estrada's admissions to sufficient facts in this case.

Gabriel Estrada
By His Attorney:



Ryan M. Schiff
B.B.O. No. 658852
SALSBERG & SCHNEIDER
95 Commercial Wharf
Boston, MA 02110
(617) 227-7788

Dated: July 14, 2006

Certificate of Service

I, Ryan M. Schiff, hereby certify that on this date the above motion was served upon the Commonwealth by mailing a copy, via first-class mail, to the Suffolk County District Attorney's Office, 120 Broadway, Chelsea, MA 02150.

Ryan M. Schiff

Date: July 14, 2006

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EXHIBIT O

TRIAL COURT OF THE COMMONWEALTH
DISTRICT COURT DEPARTMENT
CHELSEA DIVISION
120 BROADWAY
CHELSEA, MA 02150
TEL: 617-660-9200
FAX: 617-660-9215

KEVIN G. MURPHY
Clerk / Magistrate

ROBERT E. O'LEARY
1st Asst. Clerk/Magistrate

HAROLD J. LANDRY
Asst. Clerk/Magistrate

BRUCE GLAZER
Asst. Clerk/Magistrate

EDWARD F. O'NEIL, III
Asst. Clerk/Magistrate

JAMES M. BURKE
Asst. Clerk/Magistrate

BRIAN V. SULLIVAN
Asst. Clerk/Magistrate

KAREN A. WHITE
Asst. Clerk/Magistrate

Judge Diane E. Moriarty
Quincy District Court
One Dennis Ryan Parkway
Quincy, MA 02169

July 31, 2006

In Re: Commonwealth v. Gabriel Estrada
Docket No. 0314CR000689 + 0314CR612

Dear Judge Moriarty:

Enclosed, please find the defendant's *Motion to Vacate Admission to Sufficient Facts and Incorporated Memorandum of Law*. Also I am sending a copy of the docket entries as well as a copy of the tender of plea. If you need any further information please let me know.

Sincerely yours,

Bob O'Leary

Robert E. O'Leary
1 St Assistant Clerk
Chelsea District Court

motion to vacate dismissals after Δ completed probation period on CWOF is allowed. Δ is granted a new trial on all charges based on not any [illegible] Δ if he had any drugs or alcohol in his system not because he did not plea to the charge willingly knowingly and voluntarily
Moriarty
8-15-06

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EXHIBIT P

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

Chelsea District Court
NOS. 0314CR000609
0314CR000688

COMMONWEALTH

v.

JAIME ESTRADA

COMMONWEALTH'S NOTICE OF APPEAL

Now comes the Commonwealth and notifies this Honorable Court of its intention to appeal this Court's allowance of the defendant's motion entitled "Emergency Motion to Reconsider Motion to Dismiss Conviction, or, in the Alternative, to Withdraw Guilty Plea, Vacate the Conviction and Grant a New Trial." The motion was filed on July 6, 2006 and granted at sometime thereafter. The Commonwealth will appeal this ruling pursuant to Mass. R. Crim. P. 30(c)(8).

Please assemble the record and transfer it to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 30(c)(8) and Mass. R. App. P. 9.

FOR THE COMMONWEALTH:

Raquel Ruano

Raquel Ruano
Assistant District Attorney
For the Suffolk District
120 Broadway
Chelsea, Massachusetts 02150
BBO #658735

August 23, 2006

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

Chelsea District Court
NOS. 0314CR000612
0314CR000689

COMMONWEALTH

v.

GABRIEL ESTRADA

COMMONWEALTH'S NOTICE OF APPEAL

Now comes the Commonwealth and notifies this Honorable Court of its intention to appeal this Court's allowance of the defendant's motion entitled "Motion to Vacate Admission to sufficient Facts and Incorporated Memorandum of Law," which was filed on July 14, 2006. The motion was granted on August 15, 2006. The Commonwealth will appeal this ruling pursuant to Mass. R. Crim. P. 30(c)(8).

Please assemble the record and transfer it to the Massachusetts Appeals Court pursuant to Mass. R. Crim. P. 30(c)(8) and Mass. R. App. P. 9.

FOR THE COMMONWEALTH:

Raquel Ruano

Raquel Ruano
Assistant District Attorney
For the Suffolk District
120 Broadway
Chelsea, Massachusetts 02150
BBO #658735

August 23, 2006

EXHIBIT Q

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT DEPARTMENT
CHELSEA DISTRICT
CRIMINAL DIVISION
NO. 0314CR000609,
0314CR000688

COMMONWEALTH

v.

JAMIE ESTRADA,
Defendant

MOTION TO CLARIFY ORDER ALLOWING THE DEFENDANT'S EMERGENCY MOTION TO RECONSIDER MOTION TO DISMISS CONVICTION

The Commonwealth requests that this Court clarify the record concerning the above-entitled defendant and the two above-captioned cases because there is confusion concerning this Court's order. On July 6, 2006, the defendant apparently filed an "Emergency Motion to Reconsider Motion to Dismiss Conviction, or, in the Alternative, to Withdraw Guilty Plea, Vacate the Conviction and Grant a New Trial" (Ex. 2).[1] This motion was never docketed with the clerk (Ex. 1). This Court appears to have allowed this motion on an unknown date, endorsing the last page of the motion (Ex. 2). The endorsement has Your Honor's signature (Ex.

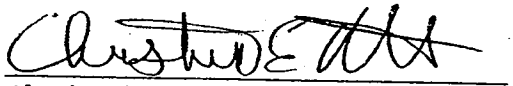
[1] The two exhibits attached to the current motion are: Exhibit 1, docket for case 0314CR000609 and docket for case 0314CR000688 and Exhibit 2, Emergency Motion to Dismiss Conviction.

2). Portions of the endorsement are illegible (Ex. 2). As the Commonwealth reads it, it ordered, "Allowed. Moriarty, J. not ask if defendant under inf. of drugs but defendant did say he under ...." (Ex. 2). The remaining portion is illegible (Ex. 2).

This Court's order was never entered into either case docket (Ex. 1). Furthermore, there is no indication on the defendant's Board of Probation Record of this Court's Order as to either case.[2] Therefore, the Commonwealth request clarification that the attached order is indeed an order of this Court and the exact words of the order. Furthermore, the Commonwealth requests that this Court forward its order to the Chelsea Clerk's Office for docketing and clarification as to whether the order applies to both of the cases listed above.

Respectfully submitted,
For the Commonwealth,

DANIEL CONLEY,
District Attorney
For the Suffolk District



Christina E. Miller
Assistant District Attorney
One Bulfinch Place

[2] The Commonwealth will forward the defendant's Board of Probation Record at the Court's request, but does not want to attach it to the current motion where it would violate the CORI law to include it in a public filing.

Boston, Massachusetts 02114
(617) 619-4040
BBO # 641803

October 11, 2006

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

TRIAL COURT DEPARTMENT
CHELSEA DISTRICT
CRIMINAL DIVISION
NO. 0314CR000612,
0314CR000689

COMMONWEALTH

v.

GABRIEL ESTRADA,
Defendant

MOTION TO CLARIFY ORDER DATED AUGUST 15, 2006, ALLOWING THE DEFENDANT'S MOTION TO VACATE DISMISSAL

The Commonwealth requests that this Court clarify the record concerning the above-entitled defendant and the two above-captioned cases because there is confusion concerning this Court's order. On July 14, 2006, the defendant filed a motion to vacate admission to sufficient facts (Ex. 1).[1] This Court appears to have allowed this motion on August 15, 2006, endorsing the cover letter attached by First Assistant Clerk Robert E. O'Leary when he mailed the defendant's motion to you (Ex. 2). The endorsement has Your Honor's signature and dated "8-15-06" (Ex. 2). There

[1] The two exhibits attached to the current motion are: Exhibit 1, docket for case 0314CR000612 and docket for case 0314CR000689 and Exhibit 2, letter from First Assistant Clerk Robert E. O'Leary to Your Honor dated July 31, 2006 with apparent endorsement dated August 15, 2006.

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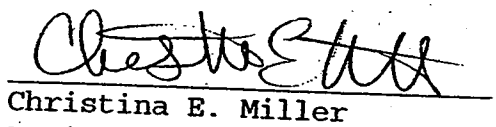
is also writing next to docket number 0314CR000689, which is typed, "+ 0314CR612" (Ex. 2).

This Court's order was never entered into either case docket (Ex. 1). Furthermore, there is no indication on the defendant's Board of Probation Record of this Court's Order as to either case.[2] Therefore, the Commonwealth request clarification that the attached order is indeed an order of this Court. Furthermore, the Commonwealth requests that this Court forward its order to the Chelsea Clerk's Office for docketing and clarification as to whether the order applies to both of the cases listed above.

Respectfully submitted,
For the Commonwealth,

DANIEL CONLEY,
District Attorney
For the Suffolk District



Christina E. Miller
Assistant District Attorney
One Bulfinch Place
Boston, Massachusetts 02114
(617) 619-4040
BBO # 641803

October 11, 2006

[2] The Commonwealth will forward the defendant's Board of Probation Record at the Court's request, but does not want to attach it to the current motion where it would violate the CORI law to include it in a public filing.

The Commonwealth of Massachusetts

DISTRICT ATTORNEY OF SUFFOLK COUNTY
DANIEL F. CONLEY

Appellate Unit
One Bulfinch Place
Boston, MA 02114-2997

Telephone: (617) 619-4070
Fax: (617) 619-4069

The Honorable Diane E. Moriarty, Justice
Massachusetts Trial Court,
Quincy District Court Division
One Dennis Ryan Parkway
Quincy, MA 02169

Re: *Commonwealth v. Gabriel Estrada*, Chelsea District Court no. 0314CR000689 and 0314CR000612, Appeals Court no. 2006-P-1328; and
Commonwealth v. Jamie Estrada, Chelsea District Court no. 0314CR000609 and 0314CR000688, Appeals Court no. 2006-P-1327

Dear Justice Moriarty,

Enclosed please find copies of two motions filed by the Commonwealth. First, a Motion to clarify Order Allowing the Defendant's Emergency Motion to Reconsider motion to dismiss conviction, which has been filed with the Chelsea Clerk's Office in the above-referenced cases for Jamie Estrada. Second, a Motion to Clarify Order Dated August 15, 2006, allowing the defendant's Motion to Vacate Dismissal, which has been filed with the Chelsea Clerk's Office in the above-referenced cases for Gabriel Estrada. These matters have been entered into the Massachusetts Appeals Court. The Commonwealth is seeking clarification so that it does not misrepresent the findings of this Court to the Appeals Court.

Thank you for your time and attention to this matter.

Regards,

Christina E. Miller,
Assistant District Attorney

Enc.
cc: Ryan M. Schiff, Esq., Attorney for Gabriel Estrada
Robert B. Carmel, Attorney for Jamie Estrada

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EXHIBIT R

COMMONWEALTH v. JAIME ESTRADA July 3, 2007

MASSACHUSETTS APPEALS COURT 128 DECISIONS

Docket No.: 06-P-1327
Date: July 3, 2007
Panel: Grasso, Berry & Cohen, JJ.
Case Name: COMMONWEALTH
v.
JAIME **ESTRADA**

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Commonwealth appeals from a District Court judge's allowance of the defendant's motion to vacate his admissions to sufficient facts and resultant convictions of assault by means of a dangerous weapon; intimidation of witness; and malicious destruction of property. On review of the record, we conclude that the judge committed clear error in vacating the defendant's convictions. We reverse the order allowing the defendant's motion to vacate the convictions, and reinstate the convictions.

1. Background. On September 3, 2003, the defendant tendered an admission to sufficient facts in District Court. The Commonwealth recommended the imposition of guilty findings and eighteen months of probation, concurrent on all charges; the defendant asked the judge to continue the matters without a finding of guilt for one year, to be dismissed thereafter. After colloquy, the judge accepted the defendant's admissions, entered guilty findings and imposed one year of probation, concurrent on all charges. The judge properly advised the defendant of all

three consequences of the alien warning. See G.L. c. 278, § 29D. The defendant completed his probationary period, and probation terminated on November 14, 2004.

On June 16, 2006, prompted by concerns of deportation, the defendant moved for a new trial and to vacate his convictions. He asserted that his admissions were constitutionally inadequate because (1) the judge failed to inquire whether the defendant was under the influence of any drug, medication, liquor or other substance that would impair his ability to enter his admissions intelligently and voluntarily; [1] and (2) his admissions were coerced by his attorney, whose unpreparedness amounted to ineffective assistance of counsel. On June 20, 2006, the judge denied the defendant's motion without a hearing.

On July 6, 2006, without notice to the Suffolk County prosecutor,[2] the defendant filed an emergency motion to reconsider

in Norfolk County, where the judge was then sitting, in which he asserted that his liberty "truly and figuratively hangs in the balance." That same day, the judge allowed the

Page 2

motion, noting that she did "not ask if defendant under inf[luence] of drugs but defendant did say he under[stood his rights and was waiving them]." [3] The Commonwealth subsequently learned of the defendant's motion, and its allowance, by happenstance when the defendant's brother and codefendant served a similar motion and attached thereto a copy of the defendant's emergency motion with the judge's endorsement of allowance.[4] This appeal followed.

2. Discussion. We have reviewed the transcript of the colloquy of the defendant's admissions and discern no proper basis on which the judge could have allowed a motion to vacate the defendant's convictions. That Federal immigration law may work an unfortunate and harsh result is not a basis for vacating convictions that are otherwise lawful in all respects. There is no merit to the contention that the judge's failure to inquire whether the defendant was under the influence of alcohol, drugs or medication at the time of the admissions, standing alone, warrants vacating the admissions. Such questioning is not required by rule. See Mass.R.Crim.P. 12(c), as amended, 399 Mass. 1215 (1987). Nor is it mandated to establish the

Page 3

intelligence of a plea or admission, i.e., the defendant's understanding of the nature of the charges and the consequences of his admissions. See Commonwealth v. Hiskin, 68 Mass.App.Ct. 633, 638 (2007). Absent some indication that the defendant's judgment is impaired by alcohol, drugs or medication at the time of his plea or admission, particular questions from the judge probing that possibility are not essential to establishing intelligence and voluntariness. Indeed, a judge may ordinarily infer the defendant's understanding and awareness from observations made during the colloquy and has an independent obligation not to accept a plea or admission from a defendant who lacks the capacity to make such a tender. See Commonwealth v. Robbins, 431 Mass. 442, 445 (2000) (test of competence to plead guilty similar to that for standing trial).

The defendant has never claimed that he was under the influence of any substance during the colloquy. Contrast Commonwealth v. Gonzalez, 43 Mass.App.Ct. 926, 926 (1997). Moreover, the transcript of the colloquy reflects that the defendant was competent to tender his admissions freely and understandingly and that he was not impaired by alcohol, drugs or medication. The defendant answered all questions rationally and appropriately. He signified his understanding of the right to trial by jury, and that he was giving up his right to trial by a jury or a judge; his privilege against self-incrimination, his

right to confront and cross-examine witnesses and to present his own evidence. He admitted that the prosecutor's factual recitation was true; acknowledged that no one forced him to admit; and that he was doing so freely, willingly and voluntarily.[5] In such circumstances, the defendant failed to present a credible reason to vacate his admissions. See Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992).

Likewise lacking in merit are the defendant's unsupported contentions that his plea was coerced and the result of counsel's unpreparedness. The record is devoid of objective indicia or credible extrinsic proof that the defendant's admissions were the product of counsel's coercion and unpreparedness. See Hiskin, supra at 640.

Order allowing motion to vacate convictions reversed.FN6
By the Court

Grasso, Berry & Cohen, JJ.
July 3, 2007

[1] The defendant did not file an affidavit in support of his motion, choosing to stand on the contemporaneous record of the proceeding. He maintained that notwithstanding the assertions in the "green sheet" accompanying his admission, the judge had an obligation to inquire orally regarding each of those assertions, and particularly regarding the consumption of drugs, medication or liquor; and any promises or inducements regarding his admission.

[2] The defendant served a copy of his motion on the Norfolk County district attorney's office, which was not a party.

[3] The defendant has never asserted by affidavit or otherwise that he was under the influence of drugs, medication or alcohol at the time he tendered his admissions.

[4] See Commonwealth v. Gabriel Estrada, 69 Mass.App.Ct. ____ (2007) (published opinion in case of the defendant's brother).

[5] Absent a credible showing that the defendant's admissions were the product of coercion or threats, a judge may infer their voluntariness from the defendant's responses to the questions posed and the favorable consequences of his plea. See Commonwealth v. Correa, 43 Mass.App.Ct. at 714, 719 (1997).

[6] The defendant's request for attorney's fees and costs is denied. See Mass.R.Crim.P. 15(d) and 30(c)(8)(B), as appearing in 435 Mass. 1501 (2001).

Citation: 69 Mass. App. Ct. 514 (2007)
Parties: COMMONWEALTH VS. GABRIEL ESTRADA
Docket #: 06-P-1328
County: Suffolk
Hearing Date: May 14, 2007
Decision Date: July 3, 2007
Judges: GRASSO, BERRY, & COHEN, JJ.

Practice, Criminal, Admission to sufficient facts to warrant finding, Voluntariness of statement, Assistance of counsel. Evidence, Admitted fact, Voluntariness of statement.

This court declined to resolve a mootness issue that the Commonwealth raised on appeal from a criminal defendant's successful motion to vacate his admissions to sufficient facts, where the extent of adverse collateral consequences to the defendant of his admissions (in respect to his potential deportation) was unclear, and where it was clear that the judge had erred in vacating the defendant's intelligent and voluntary admissions. [516-517]

The District Court judge erred in granting a criminal defendant's motion to vacate his admissions to sufficient facts based on the failure to make inquiry during the colloquy whether the defendant was under the influence of alcohol, drugs or medication at the time of the admissions, where the defendant failed to present a credible reason to vacate his admissions due to substance-induced incompetence. [517-519]

On a criminal defendant's motion to vacate his admissions to sufficient facts, the contemporaneous record supported the District Court judge's conclusion that the defendant's admissions were intelligent and voluntary, and the judge was free to reject as self-serving the defendant's subsequent assertions of involuntariness. [519-521]

This court remanded an appeal from a criminal defendant's motion to vacate his admissions to sufficient facts for resolution of the defendant's ineffective assistance of counsel claim arising from counsel's failure to explain the impeachment possibilities that arose from two police reports that mentioned the victim's identifications of the perpetrators. [521-522]

COMPLAINTS received and sworn to in the Chelsea Division of the District Court Department on March 18, 2003, and March 24, 2003, respectively.

A motion to vacate admission to sufficient facts, filed on July 14, 2006, was heard by Diane E. Moriarty, J.

Christina E. Miller, Assistant District Attorney, for the Commonwealth.

Ryan M. Schiff for the defendant.

69 Mass. App. Ct. 514 (2007) Page 515

GRASSO, J. Before us are cross appeals arising from a District Court judge's ruling on the defendant's motion for new trial and to vacate his admissions to sufficient facts. The Commonwealth appeals from the judge's order vacating the defendant's admissions for failure to inquire during the colloquy "if he had any drugs or alcohol in his system." The defendant appeals from the judge's ruling that his admissions were intelligent and voluntary, and from the judge's failure to rule on his claim of ineffective assistance of counsel.

We conclude that the judge erred in vacating the admissions because of the failure to make inquiry whether the defendant was under the influence of alcohol, drugs or medication. We also conclude that the defendant's admissions were intelligent and voluntary. Because the judge did not rule on the ineffective assistance of counsel claim, and that claim should be resolved in the trial court in the first instance, we

remand for consideration of that claim.

1. Background. On September 3, 2003, the defendant admitted to sufficient facts in the District Court on charges of assault, intimidation of a witness, and malicious destruction of property.[1] The Commonwealth and the defendant jointly recommended that the matters be continued without a finding, to be dismissed thereafter.[2] The recommendations differed only as to the appropriate continuance period; the Commonwealth recommended two years, and the defendant one year.

After a colloquy that included a factual recitation from the prosecutor, the judge concluded that sufficient facts existed to warrant a finding of guilt. She accepted the defendant's dispositional recommendation and continued the matters without a finding for one year. The judge properly advised the defendant of all three consequences of the alien warning. See G. L. c. 278, s. 29D. See also G. L. c. 278, s. 18, added by St. 1992, c. 379, s. 193 (admission to sufficient facts "shall be deemed a tender

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[1] The defendant tendered his admissions along with three codefendants, including his brother Jaime Estrada.

[2] At the time of his admission, the defendant was an eighteen year old high school student with no prior criminal record who had been in the United States fewer than five years. He came to the United States from El Salvador at age thirteen with his brother to join their parents who were already living in Massachusetts.

of a plea of guilty for purposes of procedures set forth in this section"); Commonwealth v. Villalobos, 437 Mass. 797, 800-801 (2002) (admission to sufficient facts is equivalent to plea of guilty for purposes of G. L. c. 278, s. 29D). Thereafter, the defendant completed his probation supervision without event, and on September 3, 2004, all charges against him were dismissed without findings of guilt ever having entered.

On July 14, 2006, concerned over Federal immigration consequences and encouraged by the judge's allowance of a motion to vacate his brother Jaime Estrada's admissions to similar charges, the defendant moved to vacate his admissions.[3] He asserted that his admissions were constitutionally inadequate because (1) the judge failed to inquire whether he was under the influence of any alcohol, drugs or medications; (2) his admissions were not intelligent and voluntary; and (3) his prior attorney rendered ineffective assistance of counsel by failing to discuss the possibility of impeaching the Commonwealth's only witness to the malicious destruction of property and witness intimidation offenses.

On August 15, 2006, without hearing from the Commonwealth, the judge allowed the defendant's motion "based on not asking [the defendant] if he had any drugs or alcohol in his system, not because he did not plea [sic] to the charge knowingly, willingly and voluntarily." The judge expressly rejected the defendant's alternate contention, that his admissions were not intelligent and voluntary, and the judge did not rule on his claim of ineffective assistance of counsel.

2. Discussion. That Federal immigration law may work an unfortunate and harsh result is not a basis for vacating admissions or convictions that are otherwise lawful in all respects. See Commonwealth v. Villalobos, 52 Mass. App. Ct. 903, 904-905 (2001); S.C., 437 Mass. at 803-804 ("[d]ifficulties such as those presented here will continue to arise so long as the immigration warnings required by our State statute do not encompass changes in Federal immigration law"). We discern

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[3] In a memorandum and order of this date pursuant to our rule 1:28, we also reverse the judge's order vacating Jaime's admissions because of the failure to inquire whether he was under the influence of alcohol, drugs or medication. Commonwealth v. Estrada, post 1110 (2007).

no lawful basis for the judge's vacating the admissions taken here.

a. Mootness. Relying on Burns v. Commonwealth, 430 Mass. 444, 446-447 (1999), the Commonwealth contends that the judge lacked the authority to vacate the defendant's admissions because guilty findings never entered and the matters were dismissed before the defendant moved to vacate the admissions. The dismissal of the charges "rendered moot any defects in the underlying proceedings." Id. at 447. See Commonwealth v. Villalobos, 437 Mass. at 802 (admission to sufficient facts followed by continuance without finding is not conviction).[4] The defendant argues that the Commonwealth waived its mootness claim by failing to assert it below; he points, as well, to dictum in Keane v. Commonwealth, 439 Mass. 1002, 1002 (2003), that "collateral consequences [] may give him a continuing personal stake in the outcome [] despite the dismissal of the underlying complaint."

Where the extent of the adverse collateral consequences to the defendant is unclear,[5] and it is clear that the defendant's admissions were intelligent and voluntary and that the judge erred in vacating the admissions, we decline to resolve the mootness issue.

b. Colloquy regarding alcohol, drugs or medications. A judge has an obligation not to accept an admission or plea from a defendant who lacks the capacity to make such a tender. See Commonwealth v. Robbins, 431 Mass. 442, 445 (2000) (test of competence to plead guilty similar to that for standing trial). Likewise, defense counsel and the prosecutor have an obligation to alert the judge to any impediments to the defendant's ability to enter an admission or plea intelligently and voluntarily.

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[4] The Commonwealth concedes that had the defendant attacked the colloquy because of an alleged defect in the immigration warnings, his claim would not be moot. Unlike Mass.R.Crim.P. 30, as appearing in 435 Mass. 1501 (2001), which requires a conviction for institution of a new trial motion, G. L. c. 278, s. 29D, authorizes institution of a motion to withdraw a plea or admission at any time upon a showing that the plea or admission has one of the enumerated immigration consequences.

[5] The defendant's affidavit states: "An immigration lawyer has told me that I could be deported at any time because of these cases. They have also kept me from being able to renew my immigration papers that let me live and work here."

See Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 502 (1985). However, a judge's failure to inquire whether a defendant is under the influence of alcohol, drugs or medication at the time of an admission or plea, standing alone, does not warrant vacating the admission or plea. Such questioning is not required by rule. See Mass.R.Crim.P. 12(c), as amended, 399 Mass. 1215 (1987). Nor is it essential to establishing the intelligence or voluntariness of an admission or plea.[6]

Absent some indication that the defendant's judgment is impaired by alcohol, drugs or medication at the time of his admission or plea, particular questions from the judge probing that possibility, while helpful, are not essential to establishing the intelligence and voluntariness of the admission or plea.[7] Much more probative are the judge's observations of the defendant during the colloquy, particularly the defendant's interactions with his attorney and the judge and the manner in which the defendant follows and responds to questions posed. Ordinarily, the judge may infer from these observations the defendant's understanding and competence to enter an admission or plea.

Here, the defendant has never claimed, in his affidavit or elsewhere, that he was under the influence of any substance during the colloquy. Contrast Commonwealth v. Gonzalez, 43 Mass. App. Ct. 926, 926 (1997). Moreover, the transcript of the colloquy reflects that the defendant was competent to tender his admissions freely and

understandingly, unimpaired by alcohol, drugs or medication. The defendant answered all questions rationally and appropriately. He signified his understanding of

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[6] We do not suggest that questioning a defendant regarding his consumption of alcohol, drugs or medication, or mental impairments has no role in determining the intelligence and voluntariness of his admission or plea. Such questioning is good practice and can facilitate that determination. We emphasize, however, that "inquiries directed to such a conclusion should not be `discharged as a mere matter of rote.' " Commonwealth v. Schofield, 391 Mass. 772, 775 (1984), quoting from Ciummei v. Commonwealth, 378 Mass. 504, 510 (1979). See Commonwealth v. Nolan, 19 Mass. App. Ct. at 502 (mechanically following model unwise, and could interfere with probing exchange).

[7] The mere fact that the defendant "had any drugs or alcohol in his system" does not render the defendant incompetent or his plea involuntary. What is important is whether the defendant's understanding is so impaired by alcohol, drugs or medication as to render him incapable of rational judgment. See Ciummei v. Commonwealth, 378 Mass. at 509-510.

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the right to trial by jury and that he was giving up his right to trial, his privilege against self-incrimination, his right to confront and cross-examine witnesses, and his right to present evidence. He admitted that the prosecutor's factual recitation was true, and acknowledged that no one forced him to admit to the charges.

In such circumstances, the defendant failed to present a credible reason to vacate his admissions because of incompetence due to consumption of alcohol, drugs or medication, and the judge erred in ruling otherwise. See Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992).

c. Intelligence and voluntariness of the admissions. The judge was correct in concluding that the defendant's admissions were intelligent and voluntary. "A defendant's plea is intelligent when made with understanding of the nature of the charges (understanding of the law in relation to the facts) and the consequences of his plea (the legal consequences and constitutional rights he forgoes by pleading guilty rather than proceeding to trial); it is voluntary when free from coercion, duress, or improper inducements." Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 638 (2007).

Even beyond the inadequacy of the defendant's factual showing, the contemporaneous record establishes the intelligence and voluntariness of his admissions. The prosecutor's extended factual recitation related that the defendant, acting together with his brother Jaime, and with Jose Melendez and David Flores, committed the crimes charged. On March 17, 2003, a group of eight individuals, including the four codefendants, showed up at the victim's house and began throwing beer bottles. When the occupants came out to see what was going on, Melendez went behind one of them with a beer bottle as if to hit him in the head, and Jaime brandished a weapon, possibly a machete.[8] On March 22, 2003, approximately four days after the defendants were arraigned on the assault charges, the victim, Ernesto Muniz, heard his car alarm and looked out the window. He saw "these four defendants" smashing all the windows in his car

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[8] In light of the fact that neither the defendant nor David Flores was identified as having weapons, the prosecutor reduced the charge against them to simple assault.

69 Mass. App. Ct. 514 (2007) Page 520

with bottles. Some time after the defendants were arraigned on the witness intimidation and malicious destruction of property charges, they appeared at the victim's door to

apologize and to offer to pay for the damage.

Subsequently, in response to the judge's specific questions, each of the codefendants (including the defendant) acknowledged that he had heard the prosecutor's factual recitation and that the facts recited by the prosecutor were true. Likewise, in response to the judge's question, the defendant acknowledged that no one forced him to admit to the charges; that he did so freely, willingly, and voluntarily; that he understood that he was giving up all the rights of which the judge had advised him; and that he had an opportunity to discuss the matter with his attorney and was satisfied with his attorney's advice and recommendations. By his admission to the facts recited, the defendant admitted to facts constituting the unexplained elements and thereby established the intelligence of his admissions. See Commonwealth v. Sherman, 68 Mass. App. Ct. 797, 799, 802-803 (2007).

We reject the contention that the prosecutor's recitation was insufficient because it did not make specific reference to the defendant by name. The recitation made plain that the four individuals before the court, including the defendant, were part of a larger group that threw beer bottles at the house and then assaulted the emerging occupants. In making his admissions, the defendant could not have misunderstood that he was one of the individuals referenced in the prosecutor's factual recitation.

Likewise, nothing in the record of the proceeding or the extraneous materials submitted by the defendant required the judge to credit the defendant's assertions that his admissions were not voluntary. See Commonwealth v. Hiskin, 68 Mass. App. Ct. at 641. The judge was free to reject as self-serving and contradictive of previous professions during the colloquy the newly advanced assertion that he did not commit the crimes charged and admitted guilt only because his attorney painted a picture that offered him no other choice.[9] See id. at 640-641. Absent a credible showing that the admissions were the product

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[9] The defendant's challenge to the intelligence and voluntariness of his admissions does not rest entirely on the contemporaneous record. See Corn-

of coercion or threats, the judge could properly infer voluntariness from the defendant's responses to the questions posed and the favorable consequences of his plea. See Commonwealth v. Correa, 43 Mass. App. Ct. 714, 719 (1997).

d. Ineffective assistance of counsel. A defendant is entitled to competent counsel in connection with a plea or admission. See Commonwealth v. Berrios, 447 Mass. 701, 708 (2006). Although the judge expressly rejected the claim that the defendant's admissions were not intelligent and voluntary, she did not ad-dress whether defense counsel provided ineffective assistance by failing to explain the impeachment possibilities arising from two police reports that mention the victim's identifications of the perpetrators.[10] In general, the failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance of counsel.[11] See Commonwealth v. Bart B., 424 Mass. 911, 916 (1997); Commonwealth v. Hudson, 446 Mass. 709,

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monwealth v. Hiskin, 68 Mass. App. Ct. at 638. His affidavit asserts that he did not do the acts alleged and wanted to fight the charges, but that his attorney made him feel that he had no other choice than to admit to sufficient facts because all the evidence pointed to his guilt.

[10] In support of his ineffective assistance of counsel claim, the defendant's affidavit recites that his attorney never explained the possibility of impeaching the victim's testimony based on a discrepancy in two police reports regarding whether the victim said that he could identify the perpetrators in the incident involving the vehicle. The first report recites that the victim had been unable to identify the perpetrators; the other states that the victim identified them and had made clear to

the officer who took the first report that he could identify those individuals.

The affidavit of the defendant's former attorney relates that, with the services of an interpreter, she discussed the police reports; the facts and circumstances of the charges; the victim's identification of the defendant and his three codefendants during a nonsuggestive in-court identification; and trial strategy. The affidavit disclaims a specific recollection of discussing the discrepancy between the reports and the cross-examination possibilities that these offered.

[11] We note that unless adopted by the victim, the police reports in question are not statements of the victim so much as they are memorializations of the victim's encounter with the reporting officers. As such, their use for impeachment has inherent limitations and would require calling the police officer who authored the first report to impeach the victim extrinsically. See Commonwealth v. Pina, 430 Mass. 66, 74-77 (1999). In view of the statement attributed to the victim in the second report, it is obvious that the apparent inconsistency in the reports may owe as much to deficiencies in the reporter's memorialization of the victim's statements as to inconsistencies in the victim's statements regarding his ability to identify the perpetrators.

715 (2006). Here, however, the narrower question is whether in tendering his admissions the defendant was deprived of the advice of competent counsel. See Commonwealth v. Hiskin, 68 Mass. App. Ct. at 641 (considered advice of competent counsel does not render admission involuntary). In such posture, the case does not fit neatly within the narrow exception to the general principle that a claim of ineffective assistance of counsel should be resolved in the trial court in the first instance. See Commonwealth v. Zinser, 446 Mass. 807, 810-811 (2006). Accordingly, we remand for resolution of the defendant's ineffective assistance of counsel claim. On remand, the judge may decide that claim based solely on her review of the motion and accompanying submissions, or, in the exercise of her discretion, she may hold an evidentiary hearing should the adequacy of the defendant's factual showing of ineffectiveness so warrant. See Commonwealth v. DeVincent, 421 Mass. 64, 67-68 (1995); Commonwealth v. Denis, 442 Mass. 617, 628 (2004).

The portion of the order allowing the defendant's motion to vacate his admissions is reversed; and the portion of the order denying the defendant's motion on grounds of intelligence and voluntariness is affirmed. The case is remanded to the trial court for consideration of the defendant's claim of ineffective assistance of counsel.

So ordered.

End Of Decision

EXHIBIT S

CRIMINAL COMPLAINT	0102CR002402

Trial Court of Massachusetts
Roxbury District Court

DEFENDANT
WEST, MATTHEW
11 FOREST STREET
BROOKLINE, MA 02167

TO ANY JUSTICE OR CLERK-MAGISTRATE
OF THE ROXBURY DISTRICT COURT

The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date and at the location stated herein the defendant did commit the offense(s) listed below.

DATE OF BIRTH	SEX	RACE	HEIGHT	WEIGHT	EYES	HAIR
06/23/1969	M	B	5'10"	210	GRN	BLK

INCIDENT REPORT #	SOCIAL SECURITY #
	023-56-4279

DATE OF OFFENSE	PLACE OF OFFENSE
05/28/2001	ROXBURY

COMPLAINANT	POLICE DEPARTMENT
,	BOSTON PD AREA B-2

DATE OF COMPLAINT	RETURN DATE AND TIME
05/29/2001	

COUNT-OFFENSE
1. 265/13A/B A&B c265 §13A

on 05/28/2001 did assault and beat OFFICER LEWIS, in violation of G.L. c.265, §13A. (PENALTY: house of correction not more than 2½ years; or not more than $500.)

COUNT-OFFENSE
2. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOUS c:

on 05/28/2001 did wilfully and maliciously destroy or injure the personal property, dwelling house or building of OFFICER LEWIS, the value of the property so destroyed or injured exceeding $250, in violation of G.L. c.266, §127. (PENALTY: state prison not more than 10 years; or jail not more than 2½ years and fine the greater of $3000 or three times the value of the property so destroyed or injured.)

COUNT-OFFENSE
3. 268/32B RESIST ARREST c268 §32B

on 05/28/2001 did knowingly prevent or attempt to prevent a police officer, as defined in G.L. c. 268, §32B(c), who was acting under color of his or her official authority, from effecting an arrest, by: (1) using or threatening to use physical force or violence against the police officer or another; or (2) using some other means which created a substantial risk of causing bodily injury to such police officer or another, in violation of G.L. c. 268, §32B. (PENALTY: jail or house of correction for not more than 2½ years; or not more than $500; or both.)

COUNT-OFFENSE
4. 272/53/F DISORDERLY CONDUCT c272 §53

on 05/28/2001 was a disorderly person, in that he or she did, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, engage in fighting or threatening, or in violent or tumultuous behavior, or did create a hazardous or physically offensive condition by an act that served no legitimate purpose of the defendant, in violation of the common law and G.L. c.272, §53. (PENALTY: jail or house of correction not more than 6 months; or not more than $200; or both.)

COMPLAINANT	SWORN TO BEFORE CLERK-MAGISTRATE	ON (DATE)	TOTAL COUNTS
X Annette Richardson	X Douglas A Cox	5/29/01	4

	FIRST JUSTICE	COURT ADDRESS
	Hon. Milton L. Wright	Roxbury District Court 85 Warren Street Roxbury, MA 02119

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

225

CRIMINAL DOCKET

DOCKET NO. 0102CR002402

ATTORNEY NAME: Nagley

COURT DIVISION: Roxbury

☐ INTERPRETER REQUIRED

NAME, ADDRESS AND ZIP CODE OF DEFENDANT

WEST, MATTHEW
11 FOREST STREET
BROOKLINE, MA 02167

DEFT. DOB AND SEX: 06/23/1969 M

DATE OF OFFENSE(S): 05/28/2001

PLACE OF OFFENSE(S): ROXBURY

COMPLAINANT:

POLICE DEPARTMENT (if applicable): BOSTON PD AREA B-2

DATE OF COMPLAINT: 05/29/2001

RETURN DATE AND TIME:

DATE and JUDGE	DOCKET ENTRY
MAY 29 2001	☐ Attorney appointed (SJC R. 3:10) ☐ Atty denied and Deft Advised per 211D §2A ☐ Waiver of counsel found after colloquy
MAY 29 2001	Terms of release set: ☐ PR ☐ Bail: ☐ Held (276 §58A) ☐ See back for special conditions
06 MAY 29 2001 MAY 29 2001	Arraigned and advised: ☐ Potential of bail revocation (276 §58) ☐ Right to bail review (276 §58) ☐ Right to drug exam (111E §10)
	Advised of right to jury trial: ☐ Does not waive ☐ Waiver of jury trial found after colloquy
	Advised of trial rights as pro se (Supp. R. 4)
	Advised of right of appeal to Appeals Ct (R. 28)

COUNT/OFFENSE 1. 265/13A/B A&B c265 §13A

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: OCT 02 2001 Manarly J

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

FINDING:
- ☐ Not Guilty
- ☒ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☒ Probation ☐ Pretrial Probation (276 §87) - until: 90 days SS 18 month 4/2/03
- ☐ To be dismissed upon payment of court costs/restitution
- ☒ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☒ Other: Probation anger Management
- ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

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

COUNT/OFFENSE 2. 266/127/A DESTRUCTION OF PROPERTY +$250, MALICIOL

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: OCT 02 2001 Manarly J

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

FINDING:
- ☐ Not Guilty
- ☒ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☒ Probation ☐ Pretrial Probation (276 §87) - until: 18 months probation 4/2/03 restitution to be determined
- ☐ To be dismissed upon payment of court costs/restitution
- ☒ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☒ Other: Probation ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

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

COUNT/OFFENSE 3. 268/32B RESIST ARREST c268 §32B

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: OCT 02 2001 Manarly J

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

FINDING:
- ☐ Not Guilty
- ☒ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation ☐ Pretrial Probation (276 §87) - until: 18 months probation 4/2/03
- ☐ To be dismissed upon payment of court costs/restitution
- ☒ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☒ Other: Probation ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

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

COUNT/OFFENSE 4. 272/53/F DISORDERLY CONDUCT c272 §53

FINE | SURFINE | COSTS | RESTITUTION | V/W ASSESSMENT ☐ WAIVED

DISPOSITION DATE and JUDGE: OCT 02 2001 Manarly J

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

FINDING:
- ☐ Not Guilty
- ☒ Guilty
- ☐ Not Responsible
- ☐ Responsible
- ☐ No Probable Cause
- ☐ Probable Cause

SENTENCE OR OTHER DISPOSITION
- ☐ Sufficient facts found but continued without guilty finding until:
- ☐ Probation ☐ Pretrial Probation (276 §87) - until: 6 months probation 4/2/02
- ☐ To be dismissed upon payment of court costs/restitution
- ☒ Dismissed upon: ☐ Request of Comm. ☐ Request of Victim ☐ Request of Deft ☐ Failure to prosecute ☒ Other: Probation ☐ Filed with Deft's consent ☐ Nolle Prosequi ☐ Decriminalized (277 §70C)

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

☐ ADDITIONAL COUNTS ATTACHED

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

COURT ADDRESS
Roxbury District Court
85 Warren Street
Roxbury, MA 02119

DOCKET NUMBER: **0102CR002402** NAME: **WEST, MATTHEW**

SCHEDULING HISTORY

NO.	SCHEDULED DATE	SCHEDULED EVENT	RESULT	JUDGE	TAPE NO.	START	STOP
1	7-25-01	PTH	☐ Held ☐ Cont'd				
2	9-11-01	C+E	☐ Held ☐ Cont'd				
3	10-2-01	C+C	☐ Held ☐ Cont'd				
4		~~Motion hearing~~	☐ Held ☐ Cont'd OCT 0 2 2001	Mmarty J	01/1198	1210	
5		~~C/E~~	☐ Held ☐ Cont'd				
6	11/19/02	Sur.	☐ Held ☐ Cont'd (Appt. of Coun.)				
7			☐ Held ☐ Cont'd				
8			☐ Held ☐ Cont'd				
9			☐ Held ☐ Cont'd				
10			☐ Held ☐ Cont'd				

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

ENTRY DATE	OTHER DOCKET ENTRIES
MAY 2 9 2001	N G Plea advised of Bail Violation Penalty
OCT 0 2 2001	Moriarty, J Tender of Plea, Colloquy given
	Restitution to be determined in 60 days by Commonwealth
	1/2/02.
10/23/02	Sur Notice filed
11/19/02	Δ stipulates as to VOP - BF Term +
	Discharged @ Req of P.O.
4-2-03	~~Probation discharged, case dismissed~~
9-24-07	Deft's motion to vacate Conviction filed + Allowed,
	(Moriarty, J.) attest: [signature], C.M.

ADDITIONAL ASSESSMENTS IMPOSED OR WAIVED

DATE IMPOSED and JUDGE	TYPE OF ASSESSMENT	AMOUNT	DUE DATES and COMMENTS	✓WAIVED
MAY 2 9 2001	Legal Counsel Fee (211D §2A ¶2)		~~$100.00 OR 20 HOURS COMMUNITY SERVICE~~	✓
	Legal Counsel Contribution (211D §2)			
	Court Costs (280 §6)			
	Drug Analysis Fee (280 §6B)			
	OUI §24D Fee (90 §24D ¶9)			
	OUI Head Injury Surfine (90 §24[1][a][1] ¶2)			
	Probation Supervision Fee (276 §87A)			
	Default Warrant Assessment Fee (276 §30 ¶2)			
	Default Warrant Removal Fee (276 §30 ¶1)			

DOCKET CONTINUATION	NAME OF CASE Matthew West	DOCKET NUMBER CR2402

NO.	DATE	DOCKET ENTRIES
	10-9-01	ORDER received from Judge Moriarty VACATING ORDER Allowing D's motion to Vacate Conviction, and Finding & denying the defendant's Motion
	03/24/08 1	Notice of appeal filed on this date.

EXHIBIT T

TENDER OF PLEA OR ADMISSION WAIVER OF RIGHTS	DOCKET NO. 0102CR002402	NO. OF COUNTS 4	Trial Court of Massachusetts District Court Department
INSTRUCTIONS: This form must be typed or printed clearly, completed prior to the Pretrial Hearing, signed by both counsel and submitted to the court by the defendant at or before the Pretrial Hearing.	NAME OF DEFENDANT Matthew West		COURT DIVISION Roxbury District Court 85 Warren Street Roxbury, Ma. 02119

SECTION I TENDER OF PLEA

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

COUNT NO.	DEFENDANT'S DISPOSITIONAL TERMS (Check "Yes" if Prosecution agrees – Check "No" If Prosecution disagrees)		PROSECUTOR'S RECOMMENDATION (Required if Prosecutor disagrees with terms)
1	G - 1 year probation Anger management	YES NO	G. 1 yr 3 mos to serve bal susp for 2
2	G - 1 year probation	YES NO ✓	SAME AS ABOVE ↑
3	G - 1 year probation	YES NO ✓	
4	G - 6 mos probation	YES ✗ NO	
		YES NO	

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

SIGNATURE OF DEFENSE COUNSEL	DATE	SIGNATURE OF PROSECUTING OFFICER	DATE
X [signature]	10/2/01	X [signature]	10/2/01

SECTION II PLEA OR ADMISSION **ACCEPTED** BY THE COURT

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

SECTION III PLEA OR ADMISSION **REJECTED** BY THE COURT

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

G 90 days SS 18 mo
anger management
(2) G 18 mo prob - restitution
(3) G 18 mo prob
(4) G 6 mo prob 4/2/02

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

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

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

SIGNATURE OF JUDGE ACCEPTING OR REJECTING PLEA OR ADMISSION	DATE	SIGNATURE OF DEFENSE COUNSEL (If rejection decision made)	DATE
X [signature]	10-2-01	[signature]	10/2/01

SECTION IV DEFENDANT'S WAIVER OF RIGHTS (G.L. c. 263, § 6) & ALIEN RIGHTS NOTICE (G.L. c. 278, § 29D)

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

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

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

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

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

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

SIGNATURE OF DEFENDANT	DATE
X Matthew Mill	10-2-01

SECTION V DEFENSE COUNSEL'S CERTIFICATE (G.L. c. 218, § 26A)

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

SIGNATURE OF DEFENSE COUNSEL	B.B.O. NO.	DATE
X Susan M. Raybuck	644414	10/2/01

SECTION VI JUDGE'S CERTIFICATION

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

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

I further certify that the defendant was informed and advised that if he or she is not a citizen of the United States, a conviction of the offense with which he or she was charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

SIGNATURE OF JUDGE	DATE
X D Moriarty	10-2-01

EXHIBIT U

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ROXBURY DISTRICT COURT
CRIMINAL NO.: 9810 CR ~~2849~~ 2402 1
~~9810 CR 1866~~

9-24-07

A TRUE COPY ATTEST

~~ASST.~~ CLERK MAGISTRATE

COMMONWEALTH)
)
v.)
)
MATTHEW WEST)

DEFENDANT'S MOTION TO VACATE CONVICTION

Now comes the defendant, MATTHEW WEST and moves this Honorable Court to vacate the convictions in the above-captioned cases. As grounds therefore, the defendant avers that;

(1) The guilty plea was not made knowingly, intelligently, and voluntarily. Moreover, the plea colloquy was inadequate in that it was not in accordance with Commonwealth v. Fernandes, 390 Mass. 714 (1984), Commonwealth v. Foster, 368 Mass. 100 (1975).

(2) The guilty plea was not compliant with M.R.C.P. 12(c)(3).

(3) The guilty plea should be vacated pursuant to Mass.R.Crim .P. 30(B) because "justice may not have been done."

In further support, the defendant attaches and incorporates the Memorandum of Law with supporting affidavits and exhibits.

WHEREFORE, the defendant's motion should be allowed.

MATTHEW WEST,
By his attorney,

Dated: September 19, 2007

Timothy R. Flaherty
BBO# 557477
43 Bowdoin Street
Boston, MA 02114
(617) 227-1800
(617) 227-1844 FAX

In the best interest of justice motion to vacate is allowed
9-24-07

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ROXBURY DISTRICT COURT
CRIMINAL NO.: 0102CR2402A-D

COMMONWELATH)
)
v.)
)
MATTHEW WEST)

AFFIDAVIT OF MATTHEW WEST

I, MATTHEW WEST, state the following facts are true to the best of my information and belief:

1. I am the defendant in the above entitled matter;
2. On October 2, 2001 the lawyer who represented me told me to admit to the crimes I was charged with.
3. I was told that if I did not plead I would go to jail.
4. I felt that I had no choice but to plead guilty.
5. The judge's explanations to me in open court were confusing.
6. I was never told about the potential sentence enhancement or additional penalty I could face for pleading guilty to a violent offense or of the potential aggravated felony status of the convictions.
7. The plea was never explained to me by the judge in open court.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

MATTHEW WEST

Dated: September 19, 2007

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ROXBURY DISTRICT COURT
CRIMINAL NO.: 0102CR2402A-D

COMMONWELATH)
)
v.)
)
MATTHEW WEST)

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S MOTION TO VACATE

The undersigned affiant hereby on oath, deposes and states the following:

1. My name is Timothy R. Flaherty;
2. I am a member of the Massachusetts bar and in good standing;
3. I represent MATTHEW WEST;
4. A guilty plea was entered against MATTHEW WEST in Criminal Complaint # 0102CR2402A-D, in the Roxbury District Court on October 2, 2001, for the offenses of assault and battery, malicious destruction of property over $250, resisting arrest and disorderly conduct;
5. The plea colloquy was not conducted in accordance with Commonwealth v. Fernandes, 390 Mass. 714 (1984) and Commonwealth v. Foster, 368 Mass. 100 (1975).
6. The plea was not compliant with M.R.C.P. 12(c)(3);
7. The conviction should be vacated in the interest of justice.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

Timothy R. Flaherty

September 19, 2007

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ROXBURY DISTRICT COURT
CRIMINAL NO.: 0102CR2402A-D

COMMONWELATH)
)
v.)
)
MATTHEW WEST)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO VACATE CONVICTION AND GRANT A NEW TRIAL.

INTRODUCTION

On October 2, 2001 a guilty finding was entered relative to four charges on the above referenced docket. The defendant was sentenced to 90 days in the House of Corrections suspended for a term of 18 months on charges of assault and battery, malicious destruction of property over $250, and resisting arrest. On the remaining charge of disorderly conduct, the defendant was sentenced to 6 months probation. He was further ordered to make restitution and attend anger management counseling. Each sentence was ordered to run concurrent with all others.

The defendant has moved to vacate the guilty findings in the above-captioned matter. The defendant asserts that his admission was not entered into knowingly, intelligently, and voluntarily, and was therefore procured in violation of his rights protected by the United States Constitution, Article 12 of the Declaration of Rights, and Federal and State case law. Accordingly, the defendant has moved for a new trial pursuant to Mass. R Crim. P. 30(b). Further, the plea colloquy was inadequate in that it

was not in accordance with Commonwealth v. Fernandes, 390 Mass. 714 (1984), Commonwealth v. Foster, 368 Mass. 100 (1975).

Moreover the defendant was never informed of sentencing consequences in open court as required by Mass. R. Crim. P. 12(c)(3).

Finally, the Court always has broad discretion to vacate a conviction afterwards pursuant to Mass. R. Crim. P. 30(b) if justice was not done. Commonwealth v. Fernandez, 390 Mass 714, 716 (1984).

ARGUMENT

I. THE RECORD MUST SHOW THAT THE DEFENDANT INTELLIGENTLY, KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHTS

The defendant asserts that his plea was not voluntarily made. The Commonwealth has the burden to show that the contemporaneous record affirmatively demonstrates that the defendant waived his rights, knowingly and voluntarily. Boykin v. Alabama, 395 U.S. 238,242 (1969); Commonwealth v. Foster, 368 Mass. 100, 187 (3975); Commonwealth v. Duest, 26 Mass.App.Ct. 137, 144 (1988).

Where involuntariness is alleged and it is shown that the judge did not inquire specifically as to whether threats were made or inducements offered that might have rendered involuntary the defendant's decision to plead guilty, the plea colloquy will not satisfy constitutional requirements even though the defendant expressly waives his intra-trial rights and the judge adequately inquires abut the factual basis of the charge. Commonwealth v. Fernandes, 390 Mass. 714 at 718-719, (1984). In Fernandez, the defendant admitted that the statement of facts was

accurate. The judge asked, "Why are you doing this? Is this the way it happened?". The defendant's response was, "Yes". The Supreme Judicial Court found that this was not close enough to satisfy constitutional requirements. The colloquy did not focus on the question where any threats or inducements that might have led the defendant to admit the facts recited by the prosecutor. Therefore, the colloquy did not satisfy the due process requirement that there be a real probe of the defendant's mind to determine whether the plea was being extracted from the defendant under undue pressure.

In the present case the docket reflects that the Judge conducted the colloquy but the audio recording has not been located. Upon information and belief, because of the age of this matter, the audio recording has been destroyed.

Although the record indicates that the Judge conducted the colloquy, there is no showing that the defendant understood the questions asked of him and that he made a knowing, intelligent and voluntary waiver. The proper specific inquiry would have been to ask the defendant if any threats or promises were made that would effect his decision to plead guilty. There is no showing that the specific inquiry of the defendant on the issue of voluntariness was sufficient to satisfy constitutional requirements. The failure to conduct a complete colloquy is a constitutional violation and entitles him to a new trial. Commonwealth v. Pavao, 423 Mass. 798, 804 (1996).

II. THE RECORD DOES NOT SHOW THAT THE DEFENDANT WAS EVER INFORMED OF THE SENTENCING CONSEQUENCES IN OPEN COURT AS REQUIRED BY MASS. R. CRIM P. 12 (c)(3)(B).

The defendant claims he was never informed of any additional punishments based upon subsequent offenses as proscribed by Mass. R. Crim. P. 12(c)(3)(B). Specifically, the defendant was not made aware that by pleading guilty to assault and

battery, coupled with his prior record, he could subject himself to future enhanced sentences based upon a subsequent conviction pursuant to a career offender designation. U.S.S.G. section 4B1.1. (See Exhibit A, Presentence Report). If he had known this, he never would have pleaded to the assault and battery.

As a result of the instant conviction to the offense of assault and battery, and a subsequent conviction for selling a small amount of cocaine to a government cooperating witness as a part of a wide-ranging federal investigation into conduct totally unrelated to the defendant, Mr. West is subject to a severely enhanced penalty under U.S.S.G. section 4B1.1 as a so-called career offender. Under the federal guidelines, absent the career offender enhancement, Mr. West is subject to a term of imprisonment of 15 to 21 months. If, however, the instant conviction is not vacated and he remains subject to the career offender enhancement the federal guidelines call for a sentence of 262 to 327 months.

(See Exhibit B, Presentence Report). The defendant is currently in federal custody, being held at the Plymouth County House of Correction awaiting sentencing on the above referenced matter. The convictions in this case are necessary for career offender enhancements.

III. A JUDGE MAY ALWAYS VACATE A CONVICTION WHEN JUSTICE MAY NOT HAVE BEEN DONE

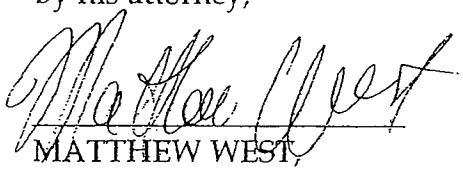
The Court always has discretion to not accept a plea of guilty or admission to sufficient facts if "justice may not have been done." Mass. R. Crim. P. 30(B). This supervisory power continues after the plea is entered. Commonwealth v. Whitfield, 16 Mass.App.Ct. 448 (1983). In the case at bar, the defendant asserts that the plea was not knowing, intelligent, and voluntary.

In the fast paced, hectic arena of the District Court proceedings, it is sometimes difficult to adhere with strict precision to a guilty plea colloquy. A reading of the record of the guilty plea does not demonstrate that the colloquy was properly conducted and shows that this may have been a complicated and confusing plea. In light of the totality of the circumstances it appears that justice may not have been done and that the defendant's plea may not have been voluntarily made.

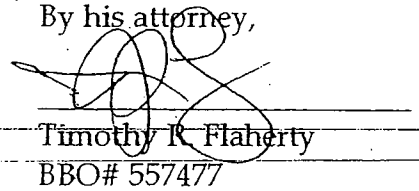
CONCLUSION

For the foregoing reasons, the court must vacate the defendant's conviction and order a new trial on the above enumerated offense.

MATTHEW WEST,
By his attorney,



MATTHEW WEST,
By his attorney,



Timothy R. Flaherty
BBO# 557477
43 Bowdoin Street
Boston, MA 02114
(617) 227-1800
(617) 227-1844 FAX

Dated: September 19, 2007

EXHIBIT V

Transcript
Commonwealth v. Matthew West, No. 0102CR2402
Quincy District Court, Courtroom A
Monday, September 24, 2007
Justice Diane Moriarty

[9:33 a.m.]

COURT: Yes?

COURT OFFICER: He wants to speak to you on a case, did you want to confirm it now before?

COURT: On a?

COURT OFFICER: It's got nothing to do with a jury trial matter.

COURT: On a case with the D.A. that's pending?

DEFENSE: It's, actually it's an old case from Roxbury, Judge, and I apologize for bringing it here today, but it is a matter of a little bit of urgency, if you have a minute for me. This is a case from 2001 in Roxbury District Court that you presided over.

COURT: You're not going to expect me to remember this, correct?

DEFENSE: I know that you won't, Judge.

COURT: Thank you.

DEFENSE: You may, I tried to get to you last week and I understand that you were in training. And I appeared before Judge Wright in the Roxbury District Court on it-

COURT: Yeah.

DEFENSE: And he was inclined to act on the motion but he instructed me to speak with you. The papers are in Roxbury, but in sum, Judge, here's what the situation is.

COURT: I told him if he didn't plead guilty, he'd go to jail?

DEFENSE: No, the attorney, according to him-

COURT: Good. Okay.

DEFENSE: Here's what the situation is with respect to Mr. West, Judge. He is scheduled for sentencing today in the federal court in front of Judge Young. He was convicted several months ago after jury trial in the Federal District Court of possession with

intent to distribute a small amount of cocaine. His case is an offshoot of the Boston Police corruption case involving Roberto Polito. Mr. West was alleged to have hosted the unlicensed stripper parties, and the federal government believed that he maintained the guest list. They then selected him -- well, my argument is they selected him for prosecution, a government witness solicited purchase of cocaine from him. He on two occasions sold a total of 750 dollars of cocaine to the government witness. They concluded the investigation with the Boston Police, and then came to see West. He admitted his involvement, but refused to cooperate. They subsequently indicted him and detained him, and he went to trial on that basis. Because of this plea in the Roxbury District Court, which was an assault and battery, he is subject to a career offender-

COURT: Who's the lawyer? Do you remember?

DEFENSE: The papers are there, I looked at it, I'm not sure who the lawyer was, Judge. It was bar counsel I think. But because of this conviction in the Roxbury District Court, his sentence guidelines go from 15 to 21 months to 262 months. Judge, you're-

COURT: This isn't -- was not his only felony charge, right? He's had previous-

DEFENSE: When he was 22 years old, he served time in Virginia for distribution of cocaine. This happened when he was about 35 or so-

COURT: Okay.

DEFENSE: -this assault and battery. He was trouble free, Judge, since his release from incarceration in Virginia.

COURT: And how long did he do in Virginia?

DEFENSE: He got -- he got a pretty heavy sentence. He sold, you know, four grams of cocaine to an undercover. He got ten years, was told he'd be paroled in eight months, but he did four years. When he got out, he then got a job at UNICCO Service Company. He bought a home in Saugus. He's engaged to be married to Tatiana Hall. He's got a ten-year-old daughter and a one-year-old son that was born just after he was arrested on this. He -- this case speaks to what's wrong with the federal sentencing guidelines, Judge, and I think Judge Young recognizes that. Judge Young ruled in a case that was decided in the First Circuit in 2006, *U.S. v. Teague*, that he concluded that even though a person was a career offender, that he should be sentenced according to the post-*Booker* statutory guidelines, and not be subject to what he called an excessive penalty. And I think this is a similar case. And what I'm just trying to do is give Judge Young something to hang his hat on so he can sentence the defendant appropriately with the guideline provisions that apply to him. Essentially what happens is, because of this conviction, the government-

COURT: I know.

DEFENSE: Yeah.

COURT: I know.

DEFENSE: I didn't know-

COURT: But I didn't -- I don't, did you get a copy of the colloquy?

DEFENSE: There's no audiotape of the colloquy.

COURT: Timmy Flaherty says I didn't do it right.

DEFENSE: Well-

COURT: I'm not sure about that. I always made sure that I did it.

DEFENSE: The one unusual thing on the docket, Judge, is that-

COURT: Is there a green sheet?

DEFENSE: There's a green sheet.

COURT: Yeah.

DEFENSE: But on the docket it says, "Colloquy given in court to defendant," and I don't usually see that in dockets. Which -- and I don't know the reason for it. It was just unusual to me. So I don't-

COURT: Was that -- that might have been the new clerk.

DEFENSE: Yeah, it could have been.

COURT: Do you know who the new clerk -- we had a ton of new clerks come in in Roxbury at the time, so I don't know-

DEFENSE: Essentially, Judge, the only basis-

COURT: -but the green sheet has my signature on it, right?

DEFENSE: I'm sure it does, yeah.

COURT: Mmmhmm.

DEFENSE: The only basis for the defendant moving to vacate the conviction is that he wasn't advised of the possible sentencing enhancement potential were he to plea to the assault and battery as a crime of violence. And essentially the facts are-

COURT: I mean, I don't have to give him that for something that might occur in the future. I only have to give him what he can do for state time, right?

DEFENSE: You might be right, Judge, you may be right, but-

COURT: Well, but the reason I'm asking you these questions is I just got turned over on doing this. They said I didn't make -- I did the appropriate colloquy. I didn't have to ask them if they've had any drugs or alcohol. I didn't have to tell them that they might in the future have a problem with federal guideline sentencing.

DEFENSE: Mmmhmm.

COURT: Because I just allowed a motion to withdraw a plea in Chelsea based on similar -- he also had I.N.S. problems, and the Appeals Court two months ago told me that I didn't have to do any of those things. That's what my problem is.

DEFENSE: Well in the interest of justice, Judge, I think you have discretion to vacate, and I would only suggest that the fact-

COURT: Except now you want to, hmm. What is the D.A. -- Did you file with the D.A.?

DEFENSE: I did, yeah, Jonathan Tynes, the supervising D.A. over there-

COURT: What did he say?

DEFENSE: He says-

COURT: He didn't file an opposition, because, I tell you, they took me up in Chelsea.

DEFENSE: Yeah, he tells me that, for the record, what he would do is he would just object for the record, but he would not make a strenuous argument, and that's what his position was in front of Judge Wright. I think-

COURT: I wish I had evidence of that.

DEFENSE: Tynes and I have discussed this.

COURT: Yeah, I know.

DEFENSE: I can give you the sentencing guide -- the pre-sentence report on Matt West. I have a copy of it with me where they go through the whole thing.

COURT: Yeah, let me take a look at it. I don't like to do this. I'm looking at this, this was an easy sentence for me. 90 days suspended.

DEFENSE: I know, Judge.

COURT: Six months probation.

DEFENSE: He completed – he got anger management, completed -- I mean, you understand what they're doing with this kid.

COURT: I do. What information were they looking for that he wouldn't give them?

DEFENSE: Who the other cops were at the parties.

COURT: The other cops? They're going to find that out anyways.

DEFENSE: They've got it all audio and videotaped. What they did was, they came to him and they said, "Look. You're going to do 25 years-

COURT: Why didn't he just give it to them?

DEFENSE: He's not that type of guy, Judge. He wouldn't tell them -- essentially-

COURT: Someone was going to give it to them.

DEFENSE: What happened -- and the facts were produced at trial. What happened essentially is that the government witnesses solicited him on a couple of occasions. We didn't interpose an entrapment defense at trial because it wouldn't fly with his record.

COURT: Yeah. Yeah.

DEFENSE: But essentially he asked him, can you get us some party favors? And he said, with the girls? I don't do that, that's up to you. And then the informant touched his nose, and my client responded on the audiotape, you mean powders? Well, I can't do that, but I can network it for you. So essentially, the evidence against him is, he received some cocaine from an unidentified person and refused to give the source to the government. He handed it over to the informant, and transferred the money back to the source. And for that he's facing, you know, essentially 22 years. And that's -- you know, they were looking for him -- my first conversation with the AUSA was, they would recommend-

COURT: Was this straight assault and battery on mine?

DEFENSE: He was -- there was assault and battery, maybe disorderly-

COURT: It's assault and battery, malicious destruction of property over.

DEFENSE: Yeah.

COURT: So it's the malicious destruction of property over that's the problem for you?

DEFENSE: No, I think it's the assault and battery, Judge. A crime of violence-

COURT: Even though it's a misdemeanor?

CLERK: I was just going to say, it's a misdemeanor.

COURT: It's a misdemeanor, right?

DEFENSE: I think it's-

COURT: It's not the-

DEFENSE: It qualifies as a crime of violence. I mean I would ask you to vacate-

COURT: Is that what the issue is? You think-

DEFENSE: I believe it's-

COURT: Because, see, I thought it was all felony stuff that triggered the sentencing.

DEFENSE: The way the career offender enhancement section reads, it's two prior felony convictions-

COURT: Right.

DEFENSE: Either one for drugs and one for violence, or two of each, and this assault and battery, I believe, qualifies as a predicate offense for a crime of violence, even though-

COURT: It's not a felony.

DEFENSE: Yeah.

COURT: Because it's not a felony.

DEFENSE: Not in Massachusetts it's not a felony, but I think it's regarded for purposes of career offender enhancements as a felony conviction, or crime of violence that satisfies the predicate. The facts of this case, the assault and battery conviction, were that he and his fiancée were parking a car in Roxbury, and-

COURT: It was a domestic case.

DEFENSE: Well, essentially what happened was, they bumped a -- the pre-sentence makes it look like domestic but it wasn't. They bumped a bumper of a car in front of them, and the guy in that car came out and came after the fiancée. West intervened. A neighbor called the police to defend West, because there was a social club across the street. A bunch of guys piled out, and when the cops arrived there was more yelling and shouting. West got locked up. Titiana was pushing a cop. And, you know, it was one of those things.

COURT: Well, I'm just looking -- he's the got the juvenile stuff, he was convicted, but he's got an ABPO in Cambridge.

DEFENSE: But it's beyond the -- it's beyond the applicable time provisions because it's -- the career offenders go back only ten years for the enhancements. So the ones that count are the most recent: Virginia and Suffolk.

COURT: This '92 one?

DEFENSE: According to-

COURT: Ten years?

DEFENSE: But he was released-

COURT: Yeah, I see that.

DEFENSE: You see where he was released in 1996. So it's just within the ten-year time period.

[extended period of silence]

COURT: They didn't charge him with ABPO. Right?

DEFENSE: Yeah they didn't, and it was-

COURT: Which is really what it sounds like it was.

DEFENSE: Right. And I think -- I'm not sure if they were originally charged that way and then they reduced it, but that recitation of facts doesn't read the same way the police report does. The police report is, oddly enough, not as bad against the defendant as the recitation by the probation officer is. The police report, you know, says that he was flailing about, and then it's almost an admission of excessive force because they did kind of bundle him and mace him repeatedly, and then when he was in the cell area he refused medical treatment but he was obviously in agony, and that's when he was-

COURT: So if this is reduced, what does he get? Do you know?

DEFENSE: Yeah, he does 15 to 21 months. The -- let me get the sentencing memorandum.

COURT: 15 to 21 months?

DEFENSE: The guidelines call, well, I mean it's discretionary-

COURT: I know. Who's the sentencing judge?

DEFENSE: Young.

COURT: Well, Young won't give him the lower end.

DEFENSE: Well, he'll give him something less than 262 to 327. Young tried the case-

COURT: Right. So he knows. And what's the government asking for?

DEFENSE: Well, they're looking for the current enhancement of 262 to 327. And frankly, Judge, in my conversation with-

COURT: Do you have, it that what they asked for?

DEFENSE: That's what they're going to ask for today. The AUSA keeps calling me saying have you been able to -- he said, I know you're not going to vacate Virginia, but have you done anything in Mass., and I said, well, we're still working on it. I think he frankly, Judge, is uneasy with this. I think everyone's uneasy with it.

COURT: Well, when this goes up they're going to overturn me, you understand that?

DEFENSE: I don't think they're going to appeal it.

COURT: It was the same office.

DEFENSE: Not the same D.A.

COURT: I hope you're right about that.

DEFENSE: I think I am.

COURT: Because now they're going to try it all over again. That's not going to make them happy. Right?

DEFENSE: He'll plea, right after he's sentenced.

COURT: He will?

DEFENSE: He'll plea to committed time on advice and instruction of counsel.

COURT: Okay. [writing] Tell him it was an early Christmas present.

DEFENSE: You are a just and wise woman.

COURT: [laughs]

DEFENSE: [laughs]. Thank you.

COURT: You're welcome.

DEFENSE: Matt West thanks you.

[9:51 a.m.]

EXHIBIT W

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

ROXBURY DISTRICT COURT
CRIMINAL NO.: 9810 CR~~2519~~ 2402 [illegible]
~~[illegible]~~

9-24-07

A TRUE COPY ATTEST

ASST. CLERK MAGISTRATE

COMMONWEALTH)
)
v.)
)
MATTHEW WEST)

DEFENDANT'S MOTION TO VACATE CONVICTION

Now comes the defendant, MATTHEW WEST and moves this Honorable Court to vacate the convictions in the above-captioned cases. As grounds therefore, the defendant avers that;

(1) The guilty plea was not made knowingly, intelligently, and voluntarily. Moreover, the plea colloquy was inadequate in that it was not in accordance with Commonwealth v. Fernandes, 390 Mass. 714 (1984), Commonwealth v. Foster, 368 Mass. 100 (1975).

(2) The guilty plea was not compliant with M.R.C.P. 12(c)(3).

(3) The guilty plea should be vacated pursuant to Mass.R.Crim .P. 30(B) because "justice may not have been done."

In further support, the defendant attaches and incorporates the Memorandum of Law with supporting affidavits and exhibits.

WHEREFORE, the defendant's motion should be allowed.

MATTHEW WEST,
By his attorney,

Dated: September 19, 2007

Timothy R. Flaherty
BBO# 557477
43 Bowdoin Street
Boston, MA 02114
(617) 227-1800
(617) 227-1844 FAX

In the best interest of justice motion to vacate is allowed. [illegible] 9-24-07

EXHIBIT X

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 06-10281-WGY
	)	
MATTHEW WEST	)	

GOVERNMENT'S STATUS REPORT ON DEFENDANT'S PRIOR STATE CONVICTION

The United States of America, by and through Assistant United States Attorney John T. McNeil, respectfully submits this report on the status of the defendant's efforts to vacate a prior conviction in the Roxbury District Court which qualifies as a predicate for the application of the career offender enhancement at sentencing.

On the date of sentencing in this matter, September 24, 2007, the defendant informed the Court that his 2001 convictions in the Roxbury District Court had been vacated that morning by Quincy District Court Justice Diane Moriarty.[1] A copy of the order allowing the defendant's motion was provided to the government several minutes before the sentencing hearing. See Exhibit 2. Because the state court's action appeared irregular, the government requested a continuance of the sentencing hearing in this matter to determine the procedure employed for vacating the conviction and the state court's basis for doing so.

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[1]On October 2, 2001, the defendant pleaded guilty to assault and battery, resisting arrest, malicious destruction of property, and disorderly conduct before Justice Moriarty in the Roxbury District Court. See PSR ¶46 ; Exhibit 1 (docket sheet and complaint). Assault and battery and resisting arrest qualify as "crimes of violence" for the applicability of the career offender guideline and statute. See PSR ¶37. Since the time of West's plea, Justice Moriarty has moved to Quincy District Court.

As set forth below, the record reveals that Justice Moriarty vacated West's 2001 convictions after a brief ex parte hearing, and, in her own words, as "an early Christmas present" for the defendant. She granted West's motion despite acknowledging that she would be overturned by the appeals court, and despite telling defense counsel that she was overturned twice in July 2007 for granting nearly identical motions in other cases. She was persuaded to grant the motion in part because West's counsel assured her that West would plead guilty to the very same charges as soon as his federal sentencing in this case is concluded. The transcript of the hearing reflects the tawdry reality of the "cottage industry" in vacating prior state convictions where guilty pleas are "treated like a Las Vegas marriage, to be annulled when they become burdensome or inconvenient." United States v. Marsh, 486 F.Supp.2d 150, 159 (D.Mass. 2007). The status of this matter is as follows:

On or about September 19, 2007, the defendant filed a motion in the Roxbury District Court to vacate his 2001 convictions. See Exhibit 2. On September 21, 2007, the defendant pressed his motion orally in the Roxbury District Court. See Exhibit 3 at 4. The Suffolk District Attorney's Office, representing the Commonwealth, objected to the motion. Id. The judge presiding in that session of the Roxbury District Court declined to act on the motion. Id.

On the morning of September 24, 2007, counsel for the defendant appeared in Quincy District Court where Justice Moriarty was sitting. See Exhibit 4 (hearing transcript). Justice Moriarty heard the motion ex parte; the Suffolk County District Attorney's Office was not notified of the hearing, nor was it present. Id.; Exhibit 3 at 4.

During the brief hearing, the defendant candidly admitted that the only reason he was seeking to vacate his prior conviction was because it qualified him as a career offender in the

instant case. See Exhibit 4 at 4-5, 8. Counsel pressed the argument that, "this case speaks to what's wrong with the federal sentencing guidelines." Id. at 2. He not only told Justice Moriarty that the Roxbury conviction was a predicate for the career offender applicability, resulting in a sentence of 262 months, but that if the court vacated the conviction West would face only 16-21 months under the United States Sentencing Guidelines. Id. at 4-5, 8. Defense counsel also provided a copy of West's Presentence Report from the instant case to Justice Moriarty. Id. Counsel also admitted that he had no evidence that West's prior plea colloquy was incomplete; moreover, Justice Moriarty stated "I always made sure that I did it." Id. at 3. Rather, counsel for West argued that at the time of his plea he did not appreciate that pleading guilty could subject him to a career offender penalty if he re-offended and was federally prosecuted. Id. at 4. Counsel also argued that this Court was critical of the career offender sentencing guidelines, and that this Court was looking for "something to hang its hat on" to reduce the defendant's federal sentence. Id. at 2.

Justice Moriarty responded that vacating a plea for not advising a defendant of the future consequences of a conviction was improper and, "I just got turned over [on appeal] on doing this." Id. at 4.[2] She also warned defense counsel that, "when this goes up [on appeal], they're going to overturn me." Id. at 8. Defense counsel told Justice Moriarty that he did not believe that the Commonwealth would appeal her decision. Id. Counsel also assured her that West would plead guilty to the Roxbury charges again right after he is sentenced in federal court. Id.

Justice Moriarty granted the motion, stating, "Tell him [West] it was an early Christmas

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[2] Justice Moriarty was reversed by the Massachusetts Court of Appeals on July 3, 2007, in two cases in which she held ex parte hearings and vacated prior state convictions. See Commonwealth v. Gabriel Estrada, 868 N.E.2d 1259, 69 Mass. App. Ct. 514 (2007); Commonwealth v. Jaime Estrada, 869 N.E. 2d 632, 69 Mass. App. Ct. 1110 (2007) (table).

present." Id. at 9.

On October 1, 2007, the Commonwealth filed a petition with the Single Justice of the Massachusetts Supreme Judicial Court seeking to vacate Justice Moriarty's order and seeking an order from the Single Justice directing Justice Moriarty not to conduct ex parte motions to withdraw guilty pleas. See Exhibit 3. The Commonwealth notified the Single Justice that this Court has set a sentencing hearing for October 10, 2007, and is unlikely to grant an additional continuance. The Commonwealth requested a decision from the Single Justice before that date.

In the event that the Single Justice rules on the Commonwealth's petition before the sentencing date scheduled in this case, the government will provide notice to the Court and to the Probation Office. In the event that this Court goes forward with the defendant's sentencing before the Single Justice acts, the government will file a motion for an upward departure/deviation.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

Date: October 2, 2007

By: /s/ John T. McNeil
JOHN T. MCNEIL
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

Suffolk, ss.

Boston, Massachusetts
October 2, 2007

I, John T. McNeil, Assistant United States Attorney, do hereby certify that this document, filed through ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non registered participants on this date.

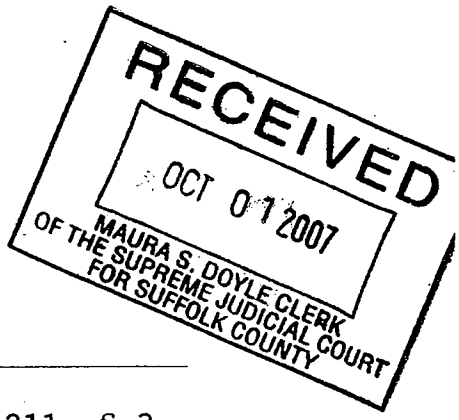
/s/ John T. McNeil

JOHN T. McNEIL
Assistant U.S. Attorney

EXHIBIT Y

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

SUFFOLK, ss. No. SJ-2007-463



COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

MATTHEW WEST,
Defendant-Respondent

COMMONWEALTH'S PETITION PURSUANT TO G.L. c. 211, § 3 FOR RELIEF FROM AN EX PARTE ORDER VACATING A CONVICTION BECAUSE IT WAS INCREASING THE DEFENDANT'S FEDERAL SENTENCE

The Commonwealth of Massachusetts respectfully requests that this Court vacate an ex parte order issued by Quincy District Court Justice Diane Moriarty vacating a conviction because it was increasing a defendant's sentence in federal district court. The district judge acknowledged on the record that her order would be overturned on appeal and that she had just been overturned by the Appeals Court for a substantially similar ruling, but nonetheless vacated the conviction, without hearing from the Commonwealth, to reduce the defendant's federal sentence. As the

federal sentencing will occur before the Commonwealth can obtain relief from the Appeals Court, this Court's exercise of its authority under G.L. c. 211, § 3 is necessary to prevent the district court from frustrating proceedings in federal court.

I. BACKGROUND

On May 29, 2001, the Roxbury District Court issued a complaint against the defendant, Matthew West, for (1) assault and battery, in violation of G.L. c. 265, § 13A; (2) malicious destruction of property over $250, in violation of G.L. c. 266, § 127; (3) resisting arrest, in violation of G.L. c. 268, § 32B; and (4) disorderly conduct, in violation of G.L. c. 272, § 53 (No. 0102CR2402) (Exhibits 1, 3). On October 2, 2001, the defendant pled guilty to all charges before Justice Diane Moriarty (Exhibits 1, 4). The district court sentenced the defendant to ninety days in a house of correction, suspended for eighteen months on the assault and battery (Exhibit 1). The court sentenced the defendant to probation for the other charges (Exhibit 1).

By 2005, the defendant was a close associate of Boston Police Officer Roberto Pulido, one of a group of Boston Police officers currently being prosecuted in federal court for guarding drug shipments (Exhibit 7, at 1). As part of the federal investigation into these police officers, a government cooperating witness purchased cocaine from the defendant on November 25 and December 17, 2005 (Exhibit 1, at 6).

On September 13, 2006, a federal grand jury indicted the defendant for two counts of distributing cocaine, in violation of 21 U.S.C. § 841(a)(1) (No. 06-10281) (Exhibit 6, at 2; Exhibit 7, at 6). On March 22, 2007, a federal jury convicted the defendant of both charges (Exhibit 6, at 7; Exhibit 8). Sentencing was set for September 24, 2007 (Exhibit 6, at 7).

On September 19, 2007, the defendant filed a motion in the Roxbury Division of the Boston Municipal Court to withdraw his guilty plea, claiming (1) that the plea colloquy was inadequate; (2) that the defendant had not been warned of future federal sentencing consequences; and (3) that the interests of justice required withdrawal (Exhibits 9-10). On

Friday, September 21, defense counsel and Assistant District Attorney Jonathan Tynes went before Justice Milton Wright, whereupon ADA Tynes objected to the motion (Tr. 4). Justice Wright declined to act on the motion because Justice Moriarty was the plea judge (Tr. 1, 4).

On Monday, September 24, defense counsel appeared before Justice Moriarty, sitting in Quincy District Court in Norfolk County (Tr. 1). The Suffolk County District Attorney's Office had no knowledge of this hearing and was not represented.[1] The district judge asked defense counsel to relate the Commonwealth's position, but expressed no reservations about hearing the matter ex parte (Tr. 4).

Defense counsel was forthright about his purposes. He stated, "this case speaks to what's wrong with the federal sentencing guidelines" (Tr. 2). He explained to the judge that the Roxbury conviction was dramatically increasing the defendant's

[1] The Commonwealth believes that a Norfolk County Assistant District Attorney was in the courtroom, but it appears that the hearing was conducted at side bar. The Norfolk Assistant District Attorney was not authorized to represent the Commonwealth in a Suffolk case in any event.

presumptive sentence under the federal sentencing guidelines (Tr. 1-2).

The district judge expressly stated, "I always made sure that I did it [the plea colloquy]" (Tr. 3). She also stated that she did not have to warn the defendant of collateral consequences, such as future federal sentencing enhancements (Tr. 4). She acknowledged that the Appeals Court, two months earlier, had reversed her in two cases for vacating sentences under related circumstances: "I just got turned over on doing this. . . . I didn't have to tell them they might in the future have trouble with federal guideline sentencing" (Tr. 4). *See Commonwealth v. Gabriel Estrada*, 69 Mass. App. Ct. 514 (2007); *Commonwealth v. Jaime Estrada*, 69 Mass. App. Ct. 1110 (2007) (table) (attached as Exhibit 5).

Defense counsel then expounded more on the harsh sentence that his client was facing under federal law (Tr. 6-8). The district judge stated, "Well, when this goes up, they're going to overturn me" (Tr. 8). Defense counsel proffered that his client would plea guilty as soon as the federal sentencing was completed

(Tr. 8). The judge then granted the motion, endorsing it as follows:

> In the best interest of justice, motion to vacate is allowed.

(Exhibit 9). She then instructed defense counsel, "Tell him [the defendant] it was an early Christmas present" (Tr. 9).

That same day, the defendant appeared in federal court for sentencing and revealed that the Roxbury conviction had been vacated (Exhibit 6, at 8). Federal District Court Judge William Young expressed his concern with what had occurred in state court:

> Even on your, even on your calculus he's facing a sentence of 15 to 21 months. And if you look at my decision most recently in *United States v. Birkett*[, No. 06-10139, 2006 U.S. Dist. LEXIS 60969, at *23 n.6 (D. Mass. Aug. 21, 2007)], I did an upward departure where it wasn't a prior conviction, but I analogized to the prior conviction situation, and I cited with approval the statement by my colleague, Judge Saylor, on the federal bench that this vacating of state convictions has become virtually a cottage industry.[2]

He then granted the United States a continuance until October 10, 2007, to address this new development,

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[2] Judge Young was referring to *United States v. Marsh*, 486 F. Supp. 2d 150, 159 (D. Mass. 2007) (discussing the "deeply troubling" practice of vacating prior state convictions to manipulate federal sentences).

over the defendant's objection (Exhibit 6, at 8). It is unlikely that Judge Young will allow a further continuance.

II. THE COMMONWEALTH IS ENTITLED TO RELIEF UNDER G.L. c. 211, § 3, AS ANY RELIEF AFTER FEDERAL SENTENCING IN OCTOBER WILL FAIL TO REMEDY THE DISTRICT COURT'S PURPOSEFUL INTERFERENCE WITH FEDERAL SENTENCING.

General Laws c. 211, § 3, grants to the Massachusetts Supreme Judicial Court "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." This Court applies a two-part test to identify those exceptional circumstances under which the Supreme Judicial Court will exercise this oversight power. *Forte v. Commonwealth*, 418 Mass. 98, 99 (1994); *Ventresco v. Commonwealth*, 409 Mass. 82, 83 (1991). The party seeking relief must demonstrate (1) a substantial claim of violation of his substantive rights, and (2) error that cannot be remedied effectively under the ordinary review process. *Forte*, 418 Mass. at 99; *Campiti v. Commonwealth*, 417 Mass. 454, 455 (1994).

The Commonwealth has an appellate remedy in the form of a direct appeal to the Appeals Court of the

district court's ruling. *See* Mass. R. Crim. P. 30(c)(8). That remedy, however, is not an effective remedy. The defendant's federal sentencing will occur on October 10 (Exhibit 6, at 8). Even with maximum expedition, the Appeals Court could not hear and decide an appeal of the district court's decision in two weeks. As this Court explained in *Planned Parenthood League v. Operation Rescue*, 406 Mass. 701, 708 (1990):

> [C]ertain substantive rights may not survive the delays inherent in the normal appellate process. In certain circumstances, the practical effect may be that these rights are lost during the process of appeal and review to which a party ordinarily must turn for protection. The dilemma posed by such a situation presents an appropriate case for c. 211, § 3, review.

With the Roxbury conviction, the defendant is a career offender under U.S.S.G. 4B1.1 with a base level offense of 34 in federal court. U.S.S.G. 4B1.1(b)(B). Under U.S.S.G. 4B1.1(b), his criminal history category is VI, resulting in a guideline range of 262 to 327 months.

Without the Roxbury conviction, the defendant's base offense level is based on the quantity of cocaine he sold, and is 12. U.S.S.G. 2D1.1(a)(3) & (c)(14).

Under U.S.S.G. 4A1.1, his criminal history score is II, resulting in a guideline range of 12 to 18 months.

The federal sentencing guidelines, of course, are now advisory. *United States v. Booker*, 543 U.S. 220 (2005). In the First Circuit, however, the guideline sentence must be the sentencing judge's starting point. *United States v. Jimenez-Beltre*, 440 F.3d 514, 517-18 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 928 (2007). Any departure from the guidelines must be justified by a reason proportionate to the amount of the departure. *United States v. Thurston*, 456 F.3d 211, 215 (1st Cir. 2006); *see United States v. D'Amico*, Nos. 05-1468, 05-1573, 2007 U.S. App. LEXIS 18695, at *27 n.10 (1st Cir. Aug 7, 2007) (this standard survives *Rita v. United States*, 127 S. Ct. 2456 (2007)). Thus, the district court's action will affect the defendant's federal sentence directly.

The district judge could hardly have made it more plain that her reason for vacating the Roxbury conviction was to reduce the defendant's federal sentence. She expressly rejected the defendant's two legal grounds for withdrawing the guilty plea (Tr. 3, 4). Almost the entirety of defense counsel's argument

regarded the federal sentencing consequences (Tr. 1-2, 6-8). The judge even characterized her ruling as "an early Christmas present" for the defendant (Tr. 9).

Accordingly, once the federal sentencing occurs, the district judge's purpose in vacating the defendant's sentence will be accomplished, regardless of the Appeals Court's eventual decision. Any appellate remedy then will be ineffective to eliminate the harm to the government from the district judge's interference with the federal sentencing of the defendant.[3]

Furthermore, the fact that the district judge stated on the record that her decision would be overturned on appeal demonstrates that appellate remedies and even awareness that her actions are illegal are inadequate to deter her from issuing decisions prejudicial to the Commonwealth (Tr. 8). Similarly, her reversal in two separate cases for vacating guilty pleas for defendants facing

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[3] By contrast, if the defendant later obtains a vacation of the Roxbury sentence on a valid ground, he would be able to seek resentencing under 28 U.S.C. § 2255. *Mateo v. United States*, 398 F.3d 126, 133-36 (2005).

deportation was inadequate to persuade her to follow the law (Tr. 4). *Gabriel Estrada*, 69 Mass. App. Ct. 514; *Jaime Estrada*, 69 Mass. App. Ct. 1110 (Exhibit 5). Only this Court's correction in time to prevent the district judge from reducing the defendant's federal sentence will be adequate to persuade her to follow the law in the future.

III. THE DISTRICT JUDGE'S HOLDING AN EX PARTE HEARING, AFTER DOING SO ON TWO PRIOR OCCASIONS, REQUIRES THAT HER RULING BE VACATED.

Any ex parte communication between a judge and one party "is 'contrary to the basic values of fairness governing litigation under our adversary system.'" *Commonwealth v. Green*, 52 Mass. App. Ct. 98, 101 (2001) (quoting *Olsson v. Waite*, 373 Mass. 517, 533 (1977)); *accord Perez v. Boston Housing Auth.*, 379 Mass. 703, 741-42 (1980). Furthermore, both Code of Judicial Conduct canon 3(B)(7) and Mass. R. Prof'l Responsibility 3.5(b) prohibit ex parte communications on substantive matters.

Here, the district judge heard a motion to vacate a conviction without any representation from the Suffolk County District Attorney's Office. Asking defense counsel for his characterization of the

Commonwealth's position is not a legally valid substitute for the presence of opposing counsel (Tr. 4). The Commonwealth was never informed of the time and place of the hearing nor afforded an opportunity to argue the matter. This, in and of itself, should be enough to require that the district court's decision be vacated.

Aggravating this matter, however, is the fact that the same district judge has vacated convictions ex parte twice before. In *Gabriel Estrada*, she vacated an admission to sufficient facts "without hearing from the Commonwealth." 69 Mass. App. Ct. at 516. In *Jaime Estrada*, she allowed a motion to vacate an admission to sufficient facts "without notice to the Suffolk County prosecutor" (Exhibit 5, at 2 & n.2). In the later case, the Commonwealth was never informed of the judge's decision and learned of it "by happenstance" (Exhibit 5, at 3). The district judge was well aware of these cases at the time she issued the ex parte order in the instant case, as she mentioned them on the record (Tr. 4).

This district judge's repeated record of allowing ex parte motions to vacate convictions requires the correction of this Court.

IV. THE DISTRICT JUDGE HAD NO LEGAL BASIS FOR VACATING THE DEFENDANT'S CONVICTION.

The defendant provided three reasons for vacating his conviction: (1) an inadequate plea colloquy; (2) failure to warn the defendant of possible future federal sentencing consequences; and (3) the interests of justice. The district judge rejected the first two grounds and granted the motion on the third theory (Tr. 3, 4; Exhibit 9). On any of the three theories, the decision had no legal basis.

A. A District Judge May Not Vacate A Conviction To Interfere With Federal Sentencing.

As explained above, it is evident that the district judge's purpose in vacating the conviction was to reduce the defendant's federal sentence. One may sympathize with the district judge's opinion that the federal sentencing guidelines are too harsh (whether or not one shares that opinion), but a judge's "personal views regarding the wisdom or propriety of a given law are irrelevant and undermine the principle of separation of powers." *Commonwealth*

v. Quispe, 433 Mass. 508, 513 (2001) (judge dismissed a case to avoid immigration consequences); *accord Commonwealth v. Rodriguez*, 441 Mass. 1002, 1004 (2004). The federal sentencing scheme created by Congress and the federal judiciary is not subject to a state judge's approval or disapproval.

Furthermore, actions such as the one taken here evince an unacceptable disrespect for the federal judiciary. Judge Young, subject to review by the judges of the First Circuit, has plenary authority to depart from the federal guidelines sentence if he believes they result in an unfair result. Having presided over the defendant's trial, he is in the best position to determine an appropriate sentence for the defendant.

The disrespect of certain members of the state judiciary toward federal sentencing has not gone unnoticed by Massachusetts's federal judges. As Judge Dennis Saylor stated,

> Vacating state court convictions for strategic purposes, particularly to avoid federal sentencing consequences, has lately become commonplace, if not routine. *See Julie Austin, Note, Closing a Resentencing Loophole: A Proposal to Amend* 28 U.S.C. § 2255, 79 S. Cal. L. Rev. 909 (2006)

> (discussing problem in context of habeas corpus proceedings, and noting that Massachusetts convictions are "particularly vulnerable" to challenge). Under the hydraulic pressures of lengthy prospective sentences in the federal system, the impulse by defendants to vacate prior convictions is entirely understandable.
>
> Yet the process is nonetheless deeply troubling. A felony conviction is, and ought to be, a profoundly significant event. Its importance goes well beyond its immediate consequences, such as punishment; sentencing decisions in every jurisdiction in the United States are driven in great measure by the criminal history of the defendant. Felony convictions should neither be imposed nor overturned lightly, and under no circumstances should they be treated like a Las Vegas marriage, to be annulled when they become burdensome or inconvenient.
>
> Vacating long-standing convictions for strategic purposes also serves to erode public confidence in the criminal justice system. If the process is perceived to be readily manipulable, or even dishonest, the damage to that confidence is likely to be substantial indeed.

United States v. Marsh, 486 F. Supp. 2d 150, 159 (D. Mass. 2007). The federal sentencing judge here stated in August that he "emphatically agrees." *Birkett*, 2006 U.S. Dist. LEXIS 60969, at *23 n.6. Comity argues strongly for not permitting state convictions to be vacated to manipulate federal sentencing.

B. The Defendant Has Not Overcome The Presumption Of Regularity In The Plea Colloquy.

The defendant's claim that the plea colloquy was defective can be easily rejected. Where, as here, the defendant "leaves his guilty plea unchallenged for a lengthy period of time, so that the contemporaneous record of the plea is lost," the presumption of regularity attaches, and the defendant's plea colloquy is presumed to have been proper. *Commonwealth v. Lopez*, 426 Mass. 657, 661-62 (1998); *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631, 638 (2001). A defendant's self-serving, conclusory affidavit is not adequate to overcome this presumption. *Lopez*, 426 Mass. at 661-62; *accord Commonwealth v. Grant*, 426 Mass. 667, 669 (1998). This is particularly true where "a defendant seeks to question his plea colloquy only after becoming aware, usually several years after the fact, of the collateral consequences of State convictions to possible sentence enhancement under Federal law." *Lopez*, 426 Mass. at 663; *accord Commonwealth v. Pingaro*, 44 Mass. App. Ct. 41, 50 n.13 (1997).

Furthermore, the defendant here does not even assert in his affidavit that the plea colloquy failed in any of its essential elements. Rather, he merely states that "[t]he judge's explanations to me in open court were confusing" (Exhibit 9). In addition, the fact that defense counsel represented that the defendant would plead as soon as his federal sentencing was complete (Tr. 8-9) is strong evidence that any confusion did not affect the defendant's decision to plead guilty. *See Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 583 (flaw in colloquy harmless where it was evident that the defendant would have pled guilty regardless), *rev. denied*, 435 Mass. 1107 (2001).

Finally, and most important, the district judge stated on the record that, "I always made sure that I did it" (Tr. 3). Her finding that her colloquy was proper is unrebutted by any credible evidence, and thus must be maintained.

C. The Defendant Did Not Need To Be Advised Of Any Collateral Consequences, Such As The Possibility Of A Federal Sentencing Enhancement On A Future Crime, To Tender A Voluntary And Intelligent Guilty Plea.

The defendant argues that his guilty plea was not voluntary and intelligent because he "was not made aware that by pleading guilty to assault and battery, coupled with his prior record, he could subject himself to future enhanced sentences based upon a subsequent conviction pursuant to a career offender designation" (Exhibit 10, at 3-4). As the district judge found, the defendant did not need to be warned of this possible collateral consequence (Tr. 4).

"Generally, under Massachusetts law, failure to inform a defendant of collateral or contingent consequences of a plea does not render a plea involuntary." *Commonwealth v. Shindell*, 63 Mass. App. Ct. 503, 505, *rev. denied*, 444 Mass. 1106 (2005); *accord Commonwealth v. Fraire*, 55 Mass. App. Ct. 916, 917 (2002). Consequences are collateral when they are "not a sentence to a period of incarceration for the crime in question but something that flows or may flow secondarily from conviction or incarceration." *Commonwealth v. Rodriguez*, 52 Mass. App. Ct. 572, 578-

79, *rev. denied*, 435 Mass. 1107 (2001). "The fact that an entity outside the court decides . . . is the very definition of a collateral consequence." *Shindell*, 63 Mass. App. Ct. at 505; *accord Fraire*, 55 Mass. App. Ct. at 918 ("it is the fact that such consequences are handed down by a body entirely separate from the court that accepts the guilty plea" that makes them collateral). A federal sentencing enhancement for a future crime falls comfortably into the definition of collateral consequences. Three entities outside the court are required to invoke the consequence in this case: the federal prosecutors in indicting the defendant, the federal jury in finding the defendant guilty, and the federal district court in sentencing the defendant and choosing to enhance. Of course, the defendant's decision to engage in drug dealing was also a precondition of this consequence. As the instant sentencing enhancement is a collateral consequence, the defendant did not need to be aware of it to tender an intelligent and voluntary plea in 2001.

The magnitude of the consequence is immaterial. Collateral consequences include such weighty

consequences as potential life imprisonment as a sexually dangerous person, *Commonwealth v. Cruz*, 62 Mass. App. Ct. 610, 613 (2004), *rev. denied*, 443 Mass. 1103 (2005), eligibility for parole, *Commonwealth v. Santiago*, 394 Mass. 25, 30 (1985), loss of sentence deductions, *Commonwealth v. Brown*, 6 Mass. App. Ct. 844, 844 (1978), having to register as a sex offender, *Shindell*, 63 Mass. App. Ct. at 238, and (except to the extent statutorily altered by G.L. c. 278, § 29D) deportation, *Commonwealth v. Villalobos*, 437 Mass. 797, 804 (2002).

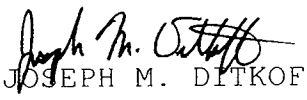
Furthermore, the Appeals Court has repeatedly held that defense counsel's failure to advise a defendant of a collateral consequence is not a basis for withdrawing a guilty plea. *Commonwealth v. Monteiro*, 56 Mass. App. Ct. 913, 913-14 (2002); *Fraire*, 55 Mass. App. Ct. at 917-18. Indeed, even affirmatively incorrect advice on a collateral matter is an inadequate basis for withdrawal. *See Commonwealth v. Hason*, 27 Mass. App. Ct. 840, 842-43 (1989). None of the three theories advanced by the defendant justify vacating the instant guilty plea.

V. CONCLUSION

For the forgoing reasons, this Court should vacate the district court's order and reinstate the defendant's conviction. Furthermore, this Court should instruct the district judge not to conduct ex parte hearings on motions to withdraw guilty pleas.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
For the Suffolk District



JOSEPH M. DITKOFF
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One Bulfinch Place
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October 1, 2007

EXHIBIT Z

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,SS

ROXBURY DISTRICT COURT
DOCKET #0102cr2402

COMMONWEALTH

V.

ORDER

MATTHEW WEST

Upon review of a transcript of the September 24, 2007 motion hearing in the above-entitled case and from an improved physical condition, I hereby vacate my order allowing the Defendant's Motion to Vacate Conviction and, instead, deny the defendant's motion.

Dated: October 9, 2007

So Ordered,

Diane E. Moriarty
Associate Justice

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT - QUINCY DIVISION
DENNIS F. RYAN PARKWAY
QUINCY, MASSACHUSETTS 02169
(617) 471-1650

MARK S. COVEN
FIRST JUSTICE

ARTHUR H. TOBIN
CLERK- MAGISTRATE

MICHAEL A. WALSH
CHIEF PROBATION OFFICER

October 9,2007

Criminal Clerk
~~Boston Municipal Court~~
Roxbury Division
85 Warren Street
Roxbury, Ma.02119

HAND-DELIVERED

Re: Commonwealth v. Matthew West
Docket # 0102cr2402

Dear Sir or Madam:

Relative to the above-captioned criminal action, enclosed herewith please find my Order.

Kindly docket same.

Thank you in advance for your consideration in this regard.

Very truly yours,
Diane E. Moriarty, Associate Justice

cc.(With enclosure)

cc:Suffolk County Assistant District Attorney Jonathan Tynes
Via Fax (617)619-4160 and U.S. Mail

Suffolk County District Attorney's Office- Appellate Division
Via Fax (617)619-4160 and U.S. Mail

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT - QUINCY DIVISION
DENNIS F. RYAN PARKWAY
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MARK S. COVEN
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MICHAEL A. WALSH
CHIEF PROBATION OFFICER

cc:Timothy Flaherty, Esquire
Via Fax (617)227-1844 and U.S. Mail

Clerk, Supreme Judicial Court for Suffolk County
Via Fax (617) 657-1034 and U.S. Mail

Assistant United States Attorney, John T. McNeil
Via Fax (617)748-3974 and U.S. Mail

EXHIBIT A1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.
06-10281-WGY

UNITED STATES OF AMERICA

V.

MATTHEW WEST

SENTENCING EXCERPT

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

JOHN T. MCNEIL, Assistant United States Attorney, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, on behalf of the Government

FLAHERTY LAW OFFICES (By Timothy R. Flaherty, Esq.), 43 Bowdoin Street, Boston, Massachusetts 02114, on behalf of the Defendant

1 Courthouse Way
Boston, Massachusetts

October 10, 2007

THE COURT: Mr. Matthew West, in consideration of the factors under 18 United States Code, Section 3553(a),

the information from the United States Attorney, your attorney, and the probation officer, this Court sentences you, on each of the counts of conviction, to 15 years in the custody of the United States Attorney General.

The Court imposes upon you thereafter ten years of supervised release; the Court imposes no fine due to your inability to pay a fine; and the Court imposes a $200 special assessment.

Let me explain that sentence to you. The sting operation here involved, undisputed, $750 worth of cocaine to an undercover employed by the government. I'm not persuaded that your main line of business was dealing drugs. In fact, however, none of this was a mistake. You are, there is no doubt here that you are a career offender. You have offended time and time again. You have dealt drugs in the past. You've dealt cocaine. You are and have been involved in vicious assaults on law enforcement officers.

This Court has not imposed a 262 month sentence, but instead has departed below that sentence to a sentence of 180 months. Why? It certainly is not wrong to treat you as a career offender. This Court is satisfied that such an offense -- such a sentence, 15 years, in the custody of the United States Attorney General, does in fact promote respect

for the law and acts as a general deterrence.

The Court notes that such a sentence corresponds to the statutory mandatory minimum for armed career criminal, is above the average for those convicted in this district for career offenses, and given all the 3553(a) factors is a just and an appropriate sentence.

You will have credit toward that sentence from September 15th, 2006.

You have the right to appeal from any findings or rulings the Court or the Jury has made against you. Should you appeal and should your appeal be successful in whole or in part and the case remanded you'll be resentenced before another judge.

Mr. Flaherty, should an appeal be determined upon, I want you to order such transcript as you may need from the Court before filing, this Court, before filing your notice of appeal because I'll turn it around immediately.

Do you understand?

MR. FLAHERTY: I do.

THE COURT: Now, I must make a comment. Now, that's the sentence of Mr. West. Those are the reasons for the sentence for Mr. West. But there are general institutional factors at play here and it's appropriate that this Court comment on them because they are working, they have worked a change in this Court's procedures, and I'll

use this occasion to announce these changes.

I've read the entire record provided to me of proceedings in the courts of the Commonwealth with respect to Mr. West as these events have unfolded. And this Court does not sit in any respect to review the proceedings of the courts of the Commonwealth of Massachusetts. For eight years I served as a justice in those courts. I took hundreds of pleas as a justice of the Massachusetts Superior Court. I have no pride of place by observing, and I believe it to be the fact, I cannot recall an instance where I

allowed or a higher court allowed a plea to be withdrawn because I was somehow mistaken in the plea colloquy. And I believe that to be the standard. Surely it is the standard of the justices of the Massachusetts Superior Court.

Now, as a judge of the United States District Court, and I reflect only on my own conduct, nothing more, only on my own conduct, I confess that having gone over this record, I am guilty of a stunning naiveté with respect to proceedings in the district courts of the Commonwealth. And I confess it never occurred to me that a justice of one of the state courts would hold the determinations by the United States District Court in so little respect. I have written in United States v. Green that the unconstitutional mandatory sentencing guidelines that we follow in the federal court had reduced the judges of this Court to

5

mechanistic automatons. And that statement, while accurate when written, is no longer accurate today. As this sentence itself reveals, the sentence I imposed on Mr. West is the sentence of this Court, this judge, acting with respect to Mr. West individually.

Second, it never occurred to me that, and for this I take the blame, that a judge of the state court -- well, I said that wrong. It never occurred to me that there could be a deviation from the laws of the Commonwealth. The laws of the Commonwealth do not -- Mr. Flaherty acknowledges it -- do not require an offender pleading guilty to be advised of all the collateral consequences either in the state system or federally. There is no state requirement of that and no suggestion in the constitutional jurisprudence

that that renders a plea less than knowing and voluntary.

And last, and really perhaps most important, it simply never occurred to me, I bear full responsibility for this, it never occurred to me that a conviction such as the conviction that was vacated and then reinstated here could be accomplished through an ex parte hearing. I never thought of that.

And so I'm changing my procedures forthwith, as follows. I'm probably the slowest judge, maybe in the nation, between the time of plea or conviction and the time of sentencing. And I adopted those policies in the days

when under the mandatory sentencing guidelines I thought, under those guidelines, plus the erroneous view of the First Circuit, that once the three strikes sentence had been imposed, if one of those strikes were later called a ball, the Court could not revisit the issue. And I addressed that in a case called United States v. Brackett and the stunning injustice of such an approach. But that was the law.

That's not the law now. The Supreme Court has corrected that misapprehension and held that an offender sentenced under any version of a three strikes law is entitled to resentencing if one of those strikes is later called a ball and the offender moves promptly for reconsideration in the federal court.

That being so, while I will continue to continue sentencings where an offender, well, for other reasons, while I will continue to continue sentencings for other reasons, I'm not engaging in any continuance of any sentence in this Court so that the offender may seek to revisit prior

state convictions. That will not be a ground of continuance.

Second, where a prior strike is later called a ball and a resentencing is appropriate, I'll be expecting to ask the nature of proceedings in the state court and to obtain some genuine evidence of the nature of those proceedings such as a transcript that shows that the Commonwealth was at

least heard by the state judge who acted on the matter. And, again, if that's true, I have no reason to second-guess it. I will fully honor the considered determinations of my state court colleagues. I always have and I always will. But if it comes to my attention in the future that a sentence has been vacated ex parte, I shall give the status of the proceedings the weight that seems to me appropriate at that time.

All right. That's all that's necessary here. Mr. West is remanded to the custody of the Marshals.

MR. MCNEIL: Your Honor, just two quick points --

THE COURT: Yes.

MR. MCNEIL: -- if I may.

First of all, I didn't want to interrupt your Honor, but I believe the Department of Justice guidelines requires, because of the extent of the departure, that I lodge an objection based on the unreasonability of the extent of the departure in this case.

THE COURT: Your rights are of course saved.

And I realize that I neglected to set forth the specific requirements of Mr. West's supervised release. And they are that he is prohibited from possessing a firearm or

other dangerous weapon; he'll submit to the collection of a DNA sample; participate in a program of substance abuse, not to exceed 104 drug tests per year.

He's remanded to the customary of the Marshals.

Yes?

MR. MCNEIL: Just one other point, your Honor. And I think, just a general, very quick point on what the Court had just mentioned. You know, this case has exposed a kind of underbelly of what has been going on in the state courts.

THE COURT: I've taken the full responsibility for my conduct in this case and I have explained the reasons why my institutional approach to sentencing is changing forthwith and the grounds thereof. It's not for me in any way to review the proceedings in state courts and I'm making no further comment on them, nor am I inviting any further argument.

MR. MCNEIL: Thank you, your Honor.

THE COURT: We'll recess. I know I have, I'm overdue for a matter, but I need a brief recess. We'll recess.

THE CLERK: All rise. Court is in recess.

(Whereupon the matter concluded.)

C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing portions are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

DONALD E. WOMACK
Official Court Reporter
P.O. Box 51062
Boston, Massachusetts 02205-1062
womack@megatran.com

EXHIBIT B1

Quincy judge in flap over sentence

The Boston Globe

US says she called ruling a 'present' to drug defendant

By Shelley Murphy, Globe Staff | October 4, 2007

Outraged federal prosecutors accused a state judge yesterday of trying to help a convicted drug dealer involved in a Boston police corruption case evade federal sentencing guidelines by tossing out one of his prior convictions, then advising his lawyer to "tell him it was an early Christmas present."

US Attorney Michael J. Sullivan said District Court Judge Diane E. Moriarty dismissed Matthew West's 2001 conviction for assault and battery during a session in Quincy District Court on the morning of Sept. 24, without any prosecutors present.

Prosecutors said they were stunned when West showed up in federal court for his sentencing on cocaine charges later that afternoon and his lawyer announced that his old conviction had been dismissed, meaning that instead of facing 21 to 27 years in prison on the federal charges, he would face less than two years.

"This conduct by the state judge calls into question the integrity of judicial proceedings," said the statement from Sullivan, whose office got West's sentencing hearing postponed until Oct. 10 while staff members investigate Moriarty's ruling. He added that it appeared Moriarty was participating in an effort by West's lawyer to keep a federal judge from considering West's prior record at sentencing.

But West's lawyer, Timothy R. Flaherty, fired back that federal prosecutors have been trying to punish West unfairly because he refused to cooperate in an ongoing investigation into police corruption and are now trying to intimidate Moriarty for exercising her discretion to dismiss the old conviction.

"They have taken her jocular remarks totally out of context, attempting to assign some sinister motive behind her order, which was made entirely within her lawful discretion and in the very best interest of justice," Flaherty said.

Joan Kenney, a spokeswoman for the Massachusetts trial court, said it would be inappropriate to comment because the case is pending.

A single justice of the Massachusetts Supreme Judicial Court is weighing a petition that the state filed Monday, seeking to reverse Moriarty's ruling.

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West, 38, of Saugus, was convicted by a federal jury in March of two counts of cocaine distribution for arranging the sale of 21 grams of the drug to an FBI informant. The same informant was involved in an FBI sting that led to cocaine-trafficking charges against three Boston police officers, who were arrested in July 2006 on charges of protecting truckloads of cocaine for agents posing as drug dealers. One of the officers, Carlos Pizarro, recently pleaded guilty, and the other two, Roberto Pulido and Nelson Carrasquillo, are awaiting trial on federal charges.

Pulido, the alleged ringleader, was accused of running after-hours parties with West in Hyde Park, where uniformed Boston police officers mingled with drug dealers and prostitutes.

Flaherty said prosecutors pressured West to cooperate in the ongoing probe, insisting he must know which officers attended the parties, but he has refused.

"They want him to testify against police officers," Flaherty said. "The US attorney's office tried to intimidate Matt West, and he wouldn't cooperate, and now they want to punish him for it. And now they're trying intimidate Judge Moriarty, who is a well-respected, learned, and just member of the trial court."

Under federal sentencing guidelines, a defendant with at least two prior convictions for certain offenses may be treated as a so-called career offender when facing new charges in federal court, paving the way for a much lengthier sentence.

Federal prosecutors said Flaherty urged Moriarty to vacate West's 2001 conviction after a Roxbury District Court judge refused to rule on his petition after a hearing in which Suffolk County prosecutors objected to it. They said Flaherty then appealed to Moriarty during an ex parte hearing, with no prosecutors present. Flaherty disputed that, saying that a Norfolk County prosecutor was present before Moriarty.

Flaherty said he urged a Roxbury District Court judge on Sept. 21 to dismiss West's assault and battery conviction, then was directed by the court to file his motion with Moriarty, who had presided over the original case.

Flaherty said West was accused of shoving someone after coming to the aid of his girlfriend, who was attacked following an auto accident. He said West never should have pleaded guilty to the assault charge and was not aware it would carry dire consequences.

In a filing in federal court, Assistant US Attorney John T. McNeil said a transcript of the hearing before Moriarty indicated that she knew it was improper to vacate a plea for not advising a defendant of the future consequences of his conviction. According to a transcript cited by McNeil, Moriarty also said her decisions had been reversed for similar rulings, and predicted, "when this goes up [on appeal] they're going to overturn me."

But, according to McNeil's filing, Flaherty told Moriarty that if the appeals court later reversed her decision, then West would plead guilty to the old charges again, rather than go to trial.

"The transcript of the hearing reflects the tawdry reality of the 'cottage industry' in vacating prior state convictions," wrote McNeil. He cited another federal judge, who said that state convictions that are vacated because of looming federal sentences were "like a Las Vegas marriage, annulled when they become burdensome."■

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U.S. attorney rips Quincy judge over 'present' to criminal

By Mike Underwood | Thursday, October 4, 2007 | http://www.bostonherald.com | Local Coverage

U.S. Attorney Michael Sullivan slammed a Quincy judge for giving an alleged career criminal an early "Christmas present" by quashing an earlier conviction, allowing the crook to dodge a tougher sentence in a pending federal court case.

Matthew West was due to be sentenced as a "career offender" in federal court because of prior convictions for violence and drug offenses here and in Virginia.

But in an "outrageous maneuver" on the morning of the sentencing on Sept. 24, West's attorney obtained an order from Quincy District Court Justice Diane Moriarty vacating a 6-year-old conviction for assault and battery, meaning West no longer qualified as a career offender.

The move was made without notifying Suffolk District Attorney Daniel F. Conley, his office said. West had been previously convicted in Roxbury.

Moriarty was caught on audio tape telling West's attorney his client should consider it "an early Christmas present."

"This conduct by the judge calls into question the integrity of judicial proceedings," said Sullivan, adding it prevented a federal judge from dishing out a proper conviction later that day.

West would have faced 262 months behind bars if sentenced as a career offender in federal court, but after his past conviction was vacated he faces only 21 months in prison at most.

The move was part of a plea bargain that would see West plead guilty to drugs possession charges when he returned to the district court, according to Sullivan's office.

Sullivan said the commonwealth has filed a motion in state court seeking to vacate Moriarty's order.

"This is a tactic that we see from time to time which defendants use to lower the federal sentences they face by having convictions vacated," said Jake Wark, spokesman for Conley.

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Judge reverses herself on conviction

The Boston Globe

Prosecutors fought to have defendant face tougher penalty

By Shelley Murphy, Globe Staff | October 10, 2007

In an abrupt about-face yesterday, a Quincy District Court judge rescinded her decision to toss out the prior assault conviction of a drug dealer who was snared in a Boston police corruption investigation.

Judge Diane Moriarty had been berated by federal prosecutors for dismissing the 2001 assault conviction of Matthew West during a Sept. 24 hearing, saying it was "an early Christmas present."

Federal prosecutors complained that it allowed West to dodge federal sentencing guidelines that call for tougher sentences for repeat offenders.

Yesterday, Moriarty issued a one-sentence ruling saying that, based on review of the transcript of the September hearing and "an improved physical condition," she was vacating her order that would have overturned West's prior conviction for assault and battery.

The judge could not be reached by telephone yesterday at the Quincy courthouse. But a statement released by the Massachusetts District Court Administrative Office last night indicated that Moriarty was ill when she issued the decision.

"While in session on Sept. 24, 2007, Judge Moriarty experienced significant chest pain, nausea, and lethargy," the statement said.

"She continued to work until shortly after noontime, when her condition caused her to leave the courthouse and be taken to the emergency room of a local hospital, where she was admitted."

Joan Kenney, a spokeswoman for the Massachusetts trial court, said she didn't know Moriarty's current condition or whether she has taken a leave from the bench.

A single justice of the Massachusetts Supreme Judicial Court held a hearing yesterday on a request by Suffolk District Attorney Daniel Conley's office to reinstate West's conviction. The higher court was still weighing the decision when Moriarty reversed herself and rescinded the earlier decision.

As a result of the reinstated conviction, West, 38, of Saugus, could face up to 27 years in prison when he is sentenced today by US District Judge William G. Young on cocaine distribution charges,

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instead of less than two years.

Under federal sentencing guidelines, a defendant with two or more prior convictions for certain crimes involving drugs or violence may be considered a career offender and face significantly more time in prison than a first-time offender.

In West's case, his 2001 assault-and-battery conviction in Roxbury and an earlier cocaine distribution conviction in Virginia, when he was 22, qualified him as a career offender under federal guidelines.

At age 16, West was convicted in two separate cases of assault and battery with a dangerous weapon, but those juvenile offenses did not trigger the harsher sentence.

"I have the utmost respect for Judge Moriarty, and I think she had it right the first time," said West's lawyer, Timothy R. Flaherty, who argued that West was not properly advised of his rights when he pleaded guilty to assault and battery in 2001 for shoving someone following a car accident in Roxbury.

Flaherty, whose motion to vacate West's prior record was granted by the judge in the morning, said, "Judge Moriarty appeared fine to me, but I don't know what happened after I left."

West was convicted by a federal jury in March of two counts of cocaine distribution for arranging the sale of 21 grams of the drug to an FBI informant.

The same informant was involved in an FBI sting that led to cocaine trafficking charges against three Boston police officers, who were arrested in July 2006 on charges of protecting truckloads of cocaine for agents posing as drug dealers.

West was accused, along with one of the indicted officers, Roberto Pulido, of running an after-hours club in Hyde Park, where uniformed officers fraternized with drug dealers and prostitutes. Flaherty accused prosecutors of pushing for an unjustly harsh sentence for West because he refused to cooperate in the probe or identify corrupt officers.

But US Attorney Michael J. Sullivan said that West was indicted and convicted on the strength of the evidence against him and deserved to serve more time in prison because of his criminal record.

"It will significantly undermine the public's confidence in the criminal justice system if they believe state convictions can be so easily manipulated by a defendant," said Sullivan, adding that prosecutors did not believe there was any legal basis for Moriarty to vacate West's prior conviction.

"It was just to frustrate a federal judge from having the benefit of the full state record," the US attorney said.■

More from Boston.com

More:

Judge chastised for vacating assault conviction

The Boston Globe

'Deviation from laws of Commonwealth'

By Jonathan Saltzman, Globe Staff | October 11, 2007

A prominent federal judge issued an angry rebuke yesterday against his counterpart in the state district court, adding another extraordinary twist in the now failed attempts of a repeat convict to sidestep a lengthy prison term under the career criminal statute.

"It never occurred to me that there could be [such] a deviation from the laws of the Commonwealth," US District Court Judge William Young said at a sentencing hearing. His ire was directed not at the convicted drug dealer before him, but at Quincy District Court Judge Diane E. Moriarty, who last month vacated a previous state conviction against the defendant without prosecutors present.

Moriarty's Sept. 24 decision to rescind a previous assault conviction against Matthew West, who was awaiting sentencing on a federal drug charge, would have spared him designation as a career criminal and a longer prison term. According to transcripts, she told West's lawyer to tell his client that "it was an early Christmas present."

While Young never mentioned Moriarty by name, his criticism clearly referred to her decision, which would have reduced West's maximum prison time from 27 years to less than two.

Young said it never occurred to him that a state judge would display "so little respect" for court proceedings by ruling without consulting Suffolk County prosecutors.

"I confess that having gone over the record, I am guilty of a stunning naïveté," said Young, a Superior Court judge from 1978 to 1985, who sentenced West yesterday to 15 years in prison for his March conviction on two federal counts of distributing cocaine.

The rare public rebuke was the latest development in the topsy-turvy case in which Moriarty rescinded her reversal Tuesday, under pressure from federal prosecutors. A spokeswoman for the state court system said Tuesday night that Moriarty had experienced "significant chest pain, nausea, and lethargy" in court when she tossed out West's conviction and was taken to the emergency room later that day.

Yesterday, Joan Kenney, a spokeswoman for the state courts, said Moriarty took a medical leave Tuesday. Kenney did not say why or for how long.

As a result of Moriarty's initial dismissal of the conviction, Young said he would change procedures for sentencing federal defendants who

are waiting to see whether they can get minor state convictions thrown out to avoid being labeled career criminals.

Moriarty vacated West's 2001 assault conviction after his lawyer argued that West had not understood the implications of his guilty plea if he was later convicted of a federal crime.

Her ruling would have enabled West, snared in a high-profile Boston police corruption investigation last year, to avoid a much harsher sentence under the three-strikes provision for career criminals. But after US Attorney Michael J. Sullivan accused Moriarty of subverting judicial proceedings, she abruptly reinstated the conviction. In a one-sentence order Tuesday, she said she had changed her mind after reviewing a transcript of the hearing and after experiencing "an improved physical condition." She did not elaborate.

Moriarty, who ran unsuccessfully for mayor of Boston in 1993 as a Republican and was appointed to the bench in 1998, could not be reached for comment.

The sentence Young issued yesterday was less than the nearly 22 years recommended by Assistant US Attorney John T. McNeil. But it was far longer than the one or two years that West would probably have received if Moriarty had not reversed herself, said his lawyer, Timothy R. Flaherty. West was convicted in March of selling about 18 grams of cocaine to an FBI informant.

Young said he had no doubt that West was a career criminal who deserved a long sentence.

"I'm not persuaded that your main line of business was dealing drugs," Young told the defendant. But, he went on, "you . . . have been involved in vicious assaults on law enforcement officers. . . . It certainly is not wrong to treat you as a career offender."

West's criminal record included two previous convictions for selling cocaine and three assaults on police officers, although not all of them took place in the time span required to trigger designation as a career criminal, prosecutors said.

A cocaine distribution conviction in Virginia when West was 22, the 2001 assault-and-battery conviction in Roxbury for shoving someone after a car accident, and his March cocaine conviction triggered the career criminal statute.

The FBI informant to whom he arranged the sale of cocaine was involved in a federal sting that led to cocaine trafficking charges against three Boston police officers. The officers were arrested in July 2006 on charges of protecting truckloads of cocaine for agents posing as drug dealers. Flaherty said prosecutors wanted a stiff sentence for West because he refused to cooperate in the investigation.

Flaherty told Young that Moriarty vacated his client's conviction out of a sense of fair play. The amount of cocaine involved in West's federal conviction would have carried only a three-year sentence in state court, he said. Flaherty said he conveyed to Moriarty the objections he knew that Suffolk County prosecutors had. He also said a Norfolk County prosecutor was present.

William J. Leahy - chief counsel for the state public defender agency, who was not involved in the case - said yesterday that state judges are right to consider requests to vacate relatively minor convictions because federal prosecutors leverage those cases to obtain excessive sentences.

"The sentencing system currently in effect in the federal courts is disgraceful," he said.

Young, however, said the actions of Moriarty, who presided over West's 2001 assault case in Roxbury District Court, reflected "institutional issues" for the state courts to deal with.

As a result of Moriarty's actions, Young said, he will no longer postpone sentencing federal defendants who are seeking to have state convictions thrown out, a relatively common request.

Such defendants can ask the federal court to resentence them later if they succeed in getting state convictions dismissed. But Young said he would now insist on transcripts from those proceedings to make sure that state prosecutors had a chance to object.

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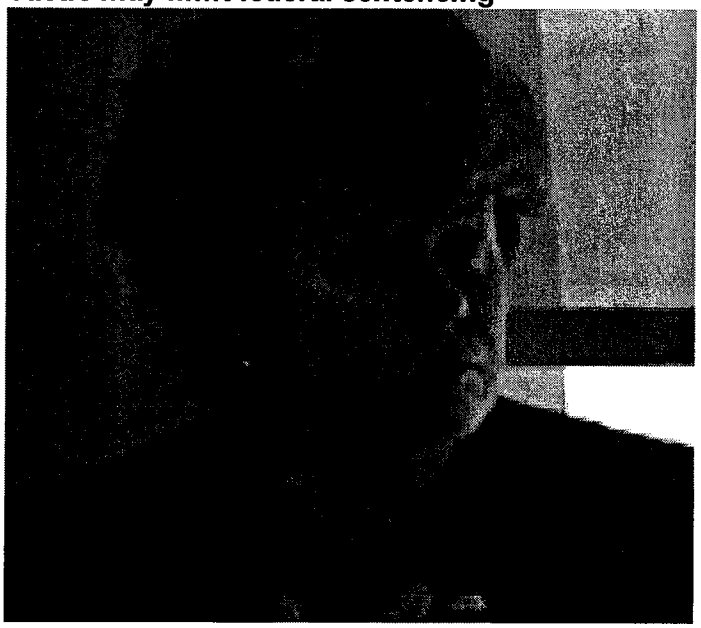
The push to void old convictions vexes DAs

The Boston Globe

Tactic may limit federal sentencing



By Shelley Murphy, Globe Staff | October 17, 2007

It is a tactic that law enforcement authorities say has gone too far: Defense lawyers are rushing into state courts to toss out old convictions for clients who face new federal charges, in sometimes-successful attempts to avoid sentencing guidelines designed to severely punish career criminals.

Suffolk District Attorney Daniel Conley said that routinely one of his assistants is summoned to court because a defense attorney is trying to vacate an old criminal conviction on behalf of a federal defendant facing a tougher sentence because of past misdeeds.

The legal wrangling repeatedly pits state and federal prosecutors trying to enforce a congressional mandate for career criminals to get long sentences against defense lawyers hoping to avoid penalties they argue are harsh.

In the middle are the judges, some frustrated by federal sentencing guidelines they view as too rigid and, in some instances, unfair. Sometimes, state judges have granted the request, wiping out old criminal convictions and preventing federal judges from treating such defendants as repeat offenders.

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"It's a serious problem," said US Attorney Michael J. Sullivan, who estimated that his office handles dozens of cases each year in which federal defendants move to toss their old state convictions. "There's no question that there are a number of people out there that try to undermine the federal sentence by having a state conviction vacated."

The practice was spotlighted last week when prosecutors berated Quincy District Judge Diane Moriarty, who had vacated the 2001 assault conviction of a drug dealer just hours before he was to appear in federal court for sentencing. "Tell him it was an early Christmas present," she told the defendant's lawyer, according to a transcript. Moriarty later reinstated the conviction, and the drug dealer received a 15-year sentence for a crime that otherwise would have carried less than two years.

Judges and lawyers say the practice has been going on for years.

Defense lawyers say they have an obligation to attack old convictions because federal prosecutors are using them as a weapon to obtain the maximum penalty against the defendant, even when the punishment far exceeds the crime.

"This is not some type of technicality or lawyer's trick," said Miriam Conrad, a federal public defender. She said defendants often plead guilty in district court cases that are resolved hastily without consideration because that strategy results in probation or short jail sentences. She said that when those old convictions suddenly come back to haunt defendants in federal court, her office reexamines the prior cases to see whether they were valid.

But Conley said a problem arises when judges toss old convictions solely to get around federal sentencing guidelines.

"They should be done with a great deal of scrutiny and not done cavalierly," said Conley, adding that prior misconduct should be considered at sentencing.

The case of Elvin Mercado is particularly vexing to federal prosecutors.

Mercado, a reputed leader of a Lawrence-based gang, Immortal Outlaws, had initially been sentenced to 15 1/2 years on federal heroin trafficking charges because of a prior record for drug dealing. But in February, a federal judge slashed Mercado's sentence and set him free after just four years because he no longer qualified as a repeat offender. A Lowell District Court judge had vacated Mercado's two 1994 heroin convictions after his lawyer argued that Mercado, then 17, had been suffering from mental illness and a heroin addiction at the time and had not been properly advised of his rights.

US District Judge Nancy Gertner, who teaches a Yale Law School course on sentencing, said the rigidity of the federal sentencing guidelines, which can trigger "extraordinary consequences" for someone with a history of relatively minor offenses, is putting pressure on state judges to reexamine old convictions.

A federal defendant with two or more prior convictions for certain crimes involving drugs or violence is considered a career offender - often meaning many more years behind bars for subsequent convictions. Gertner said the career offender category is overly broad because it makes no distinction between a defendant who, for example, received probation for two minor convictions committed years ago and a defendant with a violent history who recently shot his wife.

"If [federal] judges were truly exercising discretion in sentencing career offenders, it might take the heat off state courts," said Gertner. She added that federal judges should, and sometimes do, use their authority to depart from federal sentencing guidelines in cases where prior records do not merit such harsh sentences.

The US Sentencing Commission is reexamining the career offender

guidelines, Gertner said.

Federal sentencing guidelines are advisory, but judges rely on them to determine the sentencing range for a defendant, based on the crime and the person's history. Prior convictions may also trigger minimum prison terms, which can double a sentence and, in some drug cases, bring a prison term of life without parole.

Lawyers "certainly have the right to bring the motion and say that the conviction was not valid," said Dorchester District Court First Justice Sydney Hanlon. "The way you look at it is affected by how old it is and the context in which it's brought up."

Hanlon estimated that she receives several motions each month to vacate convictions. Often, defendants contend that they pleaded guilty without being aware of all their rights. For example, defendants, through their lawyers, may contend judges never questioned them about their understanding of the elements of the crime.

Hanlon said she has granted motions to set aside convictions from the 1980s and early 1990s because she knows that certain district court judges did not properly advise defendants of their rights then. Requests to vacate more recent convictions are less successful, she said.

Gordon L. Doerfer, who retired in August as a justice on the Massachusetts Appeals Court, said motions to vacate convictions are "hard cases to win" and the burden is on the defendant to prove the conviction was not valid.

The appeals court has ruled that a defendant cannot get a conviction vacated just for being unaware that the prior record could be a detriment in a subsequent criminal case.

Middlesex District Attorney Gerard T. Leone Jr., a former federal prosecutor, said his office tries to uphold convictions. "What's unacceptable is to consider overturning a state conviction just because you're trying to avoid a federal charge and a corresponding sentencing guideline," Leone said.

But William Leahy, chief counsel for the state's public defender agency, said lawyers do not try to toss convictions without good cause.

"Nobody is saying that state judges should consciously attempt to undermine the federal sentencing system," he said. "What judges should do is carefully scrutinize that underlying conviction to be sure . . . the process that led to it was fair."

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From the October 29, 2007 Massachusetts Lawyers Weekly.

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Hearsay

Judging the judge

No one on the Commission on Judicial Conduct is talking, but a recent exchange between a state judge and a criminal defendant seeking to avoid a stiff federal sentence has some lawyers wondering aloud if disciplinary action before the CJC is in the judge's future.

District Court Judge **Diane E. Moriarty** managed to rile U.S Attorney **Michael J. Sullivan**, Suffolk County District **Attorney Daniel F. Conley** and U.S. District Court Judge **William G. Young** on Sept. 24 when she vacated the 2001 sentence of Michael West.

The decision to vacate was made after Boston defense attorney **Timothy R. Flaherty** told Moriarty his client was facing nearly two decades behind bars as a result of the 2001 sentence for assault and battery. Without that conviction, Flaherty told the judge, West was looking at less than two years in jail.

A transcript of the hearing indicates that, amid laughs, Moriarty said to Flaherty: "OK. Tell him it was an early Christmas present." However, before Supreme Judicial Court Justice **Margot G. Botsford** even got to hear the case as a single justice, Moriarty reversed her earlier decision.

Two law enforcement officials familiar with the case tell Lawyers Weekly that plans are under way to file a formal complaint against Moriarty with the CJC.

A former CJC staffer, who asks not to be identified, cites the absence of a Suffolk County prosecutor at the hearing as a potential violation of judicial canons governing a litigant's right to be heard. And, the staffer says, the judge's statements could also be found to have violated

canons prohibiting a judge from showing bias and a lack of impartiality.

Sullivan believes that the judge's conduct calls into question the integrity of judicial proceedings.

"[It] provides the appearance that a state court judge has, by giving a defendant a 'Christmas present,' participated in an effort to keep a federal court judge from considering ... a proper and valid prior state court conviction," he says in a written statement. "It is deeply troubling that a judge would do this."

In his federal courtroom, Young said at West's sentencing it never occurred to him that a state judge would display "so little respect" for court proceedings by ruling without consulting Suffolk County prosecutors, The Boston Globe reported.

CJC Executive Director Gillian E. Pearson would not confirm whether a complaint had been filed.

Boston attorney **Joseph D. Steinfield**, who has represented the commission as special counsel on several occasions, says the case demonstrates the care judges must take when speaking from the bench.

"Judges are in a tough spot in terms of what they should and should not say," he notes. "And while the job of the ... commission is not to serve as monitors of judicial remarks, when you have a federal judge and others speaking out like you have here, it is certainly understandable that someone could think the commission should take a look at it."

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY
No. OE

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VOLUME I

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