

No. _____

In the
Supreme Court of the United States
October Term, 2020

JOSE ANTONIO LUGO-GUERRERO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

**PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

Karen A. Pickett
Pickett Law Offices, P.C.
Counsel of Record
125 High Street, 26th Floor
Boston, MA 02110
(617) 423-0485
Counsel for Jose Lugo-Guerrero

QUESTIONS PRESENTED

1. Whether This Court Should Grant This Petition Because The First Circuit's Judgment Affirming The District Court's Judgment Violates Mr. Lugo-Guerrero's Fifth and Sixth Amendment Rights To Enter A Guilty Plea Only If It Is Knowing And Voluntary.
2. Whether This Court Should Grant This Petition Because The Sentence Was Violative Of This Court's Opinion In *Dean v. United States*, 137 S.Ct. 1170 (2017).

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Jose Antonio Lugo-Guerrero (“petitioner” or “Mr. Lugo-Guerrero”) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit that affirmed the judgment of the United States District Court for the District of Massachusetts.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit is Appendix A to this petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on August 28, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had

jurisdiction pursuant to 18 U.S.C. § 3231, and the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment To United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment To The United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 924(c):

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i)

be sentenced to a term of imprisonment of not less than 5 years;

(ii)

if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii)

if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i)

is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii)

is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i)

be sentenced to a term of imprisonment of not less than 25 years; and

(ii)

if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i)

a court shall not place on probation any person convicted of a violation of this subsection; and

(ii)

no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

STATEMENT OF THE CASE

A. Procedural History¹

On November 8, 2017, the grand jury returned a First Superseding Indictment against Mr. Lugo-Guerrero charging him with Conspiracy to Distribute and Possess with Intent to Distribute Heroin, Fentanyl, and Cocaine in Violation of 21 U.S.C. § 846 (Count One) and Possession of a Firearm in Furtherance of a Drug

Trafficking Crime in violation of 18 U.S.C. § 924(c). (RA 12). On July 31, 2018, Mr. Lugo-Guerrero filed a Notice of Intent to Plead Guilty to the two counts. (RA 18).

On August 21, 2018, the district court held a Rule 11 hearing at which Mr. Lugo-Guerrero pleaded guilty. (RA 8; D.E. 421). On December 3, 2018, Mr. Lugo-Guerrero was sentenced to a term of imprisonment of 16 years. (RA 9; D.E. 498). Mr. Lugo-Guerrero filed a

1 Matters contained in the Appendix at the First Circuit will be designated by RA-page number.

Notice of Appeal that day. (RA 26). Judgment entered on the docket on December 7, 2018. (RA 19).

On August 28, 2020, the United States Court of Appeals granted the Government's motion for summary disposition and affirmed the district court's judgment. (Appendix).

B. Facts Relevant To Resolution Of The Petition

At the Rule 11 hearing (attended by an interpreter for Mr. Lugo-Guerrero) held on August 21, 2018, the court held a sidebar conference at which defense counsel stated that the Government had agreed to conduct a future proffer session with Mr. Lugo-Guerrero if he pleaded guilty "open-ended" and if the Government "concludes that it is worthy of substantial assistance, they will ask for a reduction at the time of sentencing. (RA 10, Docket Entry 556, p. 2). Counsel expressed that Mr. Lugo-Guerrero was "adamant about not wanting to plead unless he had this kind of agreement." (*Id.*, p. 2).

The district court conducted a hearing to explore the issue. Defense counsel noted that there had been one proffer session between the defendant and the Government. (RA 10, Docket Entry 555, p. 2). The prosecutor represented that the "only circumstances under which I would be willing to engage in another proffer session, consider another proffer session, would be after the defendant pleaded guilty." (*Id.*, p. 4).

The district court asked Mr. Lugo-Guerrero: "Does the defendant understand that the only thing that's being agreed to is that they would -- that the government would meet with you and learn what your proffer would be and that, if what you have to say is similar in kind to what you previously said, there's no assurance at all that the government would move offering a 5K motion? Do you understand that?" (*Id.*, p. 5). Mr. Lugo-Guerrero responded: "Yes." (*Id.*). After discussing with defense counsel that the Government was not required to file any

substantial assistance motion and the only “promise” was for a meeting, the court asked Mr. Lugo Guerrero: “Is that agreeable to the defendant?” (*Id.*, p 8). He responded” “Well, now -- no, because he went -- he told me something. He went to see me and told me something.” (*Id.*). When the court addressed defense counsel about the nature of the “promise,” defense counsel responded: “The fact is, if he complies with this and if he does what he intends to do in this case and the government is being fair about it, he’ll get something for it.” (*Id.*, p. 10).

The district court addressed the defendant, stated that the Government may decide not to file a substantial assistance motion and asked: “if you’re going into this because you think so long as you are truthful you will get this motion, there’s no such agreement. Do you understand that?” (*Id.*, p. 11). The defendant himself did not respond. Defense counsel detailed the nature of the information he expected Mr. Lugo-Guerrero to provide and stated: “There’s no circumstance under which the government could say we’re not interested in that...Now, they may, and he understands that as well. But as a practical matter, I can’t believe that would be the position of the government.” (*Id.*, pp. 12-13).

The Court addressed the defendant and asked: “[D]o you understand that [the prosecutor] has agreed to meet with you and if you -- after you plead guilty and to hear you out and, if he thinks it appropriate to make a recommendation as to whether a substantial assistance agreement should be entered into but that’s the only agreement you have? Do you understand that?” (*Id.*, p. 17). Mr. Lugo-Guerrero responded: “Yes.” (*Id.*). The court then said: “So when I as in the plea agreement -- I will be asking if you have any other -- any agreement with the United States Government. And at this point you don’t have an agreement ...for a substantial assistance agreement. All you have is an agreement with the U.S. Attorney -- assistant U.S.

attorney to sit down and meet and hear you out? (Id., pp. 17-18). Mr. Lugo-Guerrero replied: “Yes.” (*Id.*, p. 18).

The district court then began the Rule 11 hearing itself. The court asked: “Do you understand that you have no agreement with the United States and this - - as to this sentence here?” (Plea Hearing Tr., p. 11). The defendant responded: “Yes.” (*Id.*).

The court advised Mr. Lugo-Guerrero of the charges against him explaining for the section 924(c) charge, the Government “would have to prove that you committed the conspiracy to distribute controlled substances as described in Count 1, and that you knowingly used or carried a firearm during and in relation to or possessed a firearm in furtherance of the commission of the crime. Do you understand these are the elements the government would have to prove beyond a reasonable doubt in order for you to be found guilty at trial?” (*Id.*, p. 14).

Mr. Lugo-Guerrero responded: “Yes.” (*Id.*).

When asked to provide the factual basis for the plea, concerning the firearms charge, the prosecutor stated:

On November 3, 2016, a cooperating witness, the defendant, and four codefendants drove in three cars from Boston to New Bedford intending to rob a drug dealer who had stolen half a kilogram of heroin from the defendant. The cooperating witness drove alone and, at the defendant’s direction, transported two firearms to New Bedford and transferred one to two codefendants before the attempted robbery. Communications regarding the incident were intercepted by law enforcement this day and revealed the plan to rob. As a result, law enforcement officers conducted surveillance and stopped the defendant and some of his codefendants before they attempted to enter the target house. As a result, the defendant aborted the planned robbery, and the participants returned to Boston.

(*Id.*, p. 17).

The prosecutor stated that the cooperating witness “would testify that there were two guns ...that she was provided by the defendant. She brought one to Tremont Street in Boston,

provided it to the defendant gave her back that gun and another gun to transport down to New Bedford....” When asked whether he understood the facts, Mr. Lugo-Guerrero stated: “Yes, but there are some things that aren’t so, you understand? The cooperator is saying things that are not true. There are some things that are true and some things that are not.” When asked whether he disagreed with the facts as to the transporting of the guns, Mr. Lugo-Guerrero replied: “One weapon transported only, but *the weapon was not mine*. The weapon belonged to[others]. I did ask him for a weapon once on one day, but I gave it back to him. And then they - - I asked him for another weapon, and they sold it to me and I purchased it. *But at that time that attempted robbery had already passed.*” (*Id.*, p. 18). Defense counsel stated: “the weapon, as I understand it in this case, was constructively possessed by him. He was overheard in a telephone conversation talking about its delivery to a place where another crime was going to be committed.” (*Id.*).

When asked whether he had “control over the guns that were being brought to the attempted robbery,” Mr. Lugo-Guerrero responded that “the access which I had is that I told - that for her to take it to New Bedford, for her to transport it to New Bedford...It looked as if it was a robbery, but, in fact, I just went to see if the person would pay me that money that they owed me because I was receiving threats because I owed money to a person. So I was in danger because of that.” (*Id.*, p. 21).

Mr. Lugo-Guerrero began to describe the reason he was going to New Bedford. The court stated: “What I need to know right now is just to make sure you’re pleading guilty to using or constructively possessing a gun in furtherance of a crime, and the crime is the conspiracy to distribute controlled substances. So I’m trying to just make sure that you understand that is what you’re pleading guilty to and that’s what happened, that you were carrying or using or having

access to this gun in connection with a drug distribution conspiracy.” (*Id.*, pp. 23-24). Mr. Lugo-Guerrero responded: “Yes, but I never used the weapon to distribute drugs, neither did I ever touch the weapon. I gave the order so she would take the - - transport the weapon, but I never touched it as such. In truth, the weapon isn’t mine, although I can declare myself guilty but that wasn’t my weapon.” (*Id.*, p. 24).

The court then stated: “you need to have possession of the weapon...I don’t need all the details of why you went there. I need to make sure that it was part of either distributing the drugs or getting the money for the drugs or some part of the drug conspiracy.” (*Id.*). Mr. Lugo-Guerrero replied: “*No. If I have to declare myself guilty, I’ll declare myself guilty.* It doesn’t matter.” (*Id.*) (Emphasis added). The court stated: “the facts don’t seem to be in dispute. He controlled the gun...I’m trying to the other part of this crime is not just having the gun, but it is using the gun in furtherance of the drug conspiracy charge.” (*Id.*, p. 25). Defense counsel asked: “Did you cause a gun to be transferred to another person for the purpose of committing a crime?” Mr. Lugo-Guerrero replied that: “It was, for example to take care of ourselves, to collect the money, because it wasn’t like we went to steal.” The court asked whether the money was related to the drug sale and Mr. Lugo-Guerrero replied: “Yes.” (*Id.*) The court stated: “That’s what I needed to know...based on all of that, are you, in fact, guilty of the facts charged?” (*Id.*) Mr. Lugo-Guerrero answered affirmatively, and the court accepted his guilty plea.

At the sentencing hearing, Mr. Lugo-Guerrero was allowed to address the court and detailed his discussions with the Government. He stated: “The attorney told me that if I cooperated I was going to get something in return for the exchange. I did cooperate, and I didn’t get anything in exchange. I did confess about my life. I did confess. I brought all of these cases

to their attention, and I didn't get anything in return, only death threats. My family is in danger..." (Sentencing Tr., p. 29).

REASONS FOR GRANTING THE PETITION

This Court should grant the petition because the record establishes that Mr. Lugo-Guerrero's plea was not knowing and voluntarily as required by the Fifth and Sixth Amendments. This error is particularly evident in the court's acceptance of his plea to the section 924(c) charge where Mr. Lugo-Guerrero was not properly advised of the elements of that charge.

Mr. Lugo-Guerrero also asserts pro se that the district court should have considered the burden of the 924(c) consecutive sentence when fashioning his sentence pursuant to *Dean v. United States*, 113 S.Ct. 1170 (2017).

A. This Court Should Grant The Petition Because Mr. Lugo-Guerrero's Plea Was Not Knowing And Voluntary And Thus His Conviction Violates The Fifth And Sixth Amendments

1. The Constitutional And Rule 11 Framework

In *Boykin v. Alabama*, 395 U.S. 238 (1969), this Court held that, to comport with the requirements of the Fifth and Sixth Amendments, a guilty plea must be knowing and voluntary. *See also Bousley v. United States*, 523 U.S. 614, 618 (1998) ("A plea of guilty is constitutionally valid only to the extent that it is voluntary and intelligent.") (internal quotations and citation omitted).

The First Circuit has explained:

A plea does not qualify as intelligent unless a criminal defendant first receives real notice of the charges against him, the first and most universally recognized requirement of due process. Ensuring that the defendant understands the elements of the charges that the prosecution would have to prove at trial is also a core concern of Rule 11. Accordingly, Rule 11 requires that a court, before accepting a guilty plea, inform the defendant of, and

determine that the defendant understands the nature of each charge to which the defendant is pleading.

Furthermore, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. Rule 11 therefore requires a factual basis for the plea before entering judgment. This additional procedural requirement protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

United States v. Delgado-Hernandez, 420 F.3d 16, 19 (1st Cir. 2005) (internal quotations and citations omitted).

As set forth below, Mr. Lugo-Guerrero's plea was neither voluntary or intelligent because the record shows that: (1) he pleaded guilty believing that his extensive cooperation would result in a reduction in his sentence; and (2) he did not understand the nature of the section 924(c) charge against him and did not admit to sufficient facts to allow the district court to accept the guilty plea to that charge.

2. Mr. Lugo-Guerrero's Plea Was Not Voluntary Or Intelligent Because The Record Reveals That He Misunderstood The Nature Of Substantial Assistance

As an initial matter, Mr. Lugo-Guerrero notes that the Government objectively did not "promise" anything that it did not deliver. Indeed, the Government did meet with him but did not file a substantial assistance motion.

But the issue is whether, based on statements by counsel and the court, Mr. Lugo-Guerrero understood that his cooperation would not result in a reduced sentence. First, the Court in addressing Mr. Lugo-Guerrero stated that there was no "assurance" of the Government filing a substantial assistance motion if "what you have to say is similar in kind to what you previously said." (RA 10, Docket Entry 555, p. 5). Such a statement would reasonably be understood by

the defendant to mean that a motion would be filed if the additional information was not similar in kind.

Second, a review of the record reveals that Mr. Lugo-Guerrero’s counsel was encouraging the guilty plea because of counsel’s expectation that a motion would be filed. After discussing with defense counsel that the Government was not required to file any substantial assistance motion and the only “promise” was for a meeting, the court asked Mr. Lugo Guerrero: “Is that agreeable to the defendant?” (*Id.*, p 8). He responded” “Well, now - - no, because he went - - he told me something. He went to see me and told me something.” (*Id.*). When the court addressed defense counsel about the nature of the “promise,” defense counsel responded: “The fact is, if he complies with this and if he does what he intends to do in this case and the government is being fair about it, *he'll get something for it.*” (*Id.*, p. 10) (emphasis added).

The district court then addressed the defendant, stated that the Government may decide not to file a substantial assistance motion and asked: “if you’re going into this because you think so long as you are truthful you will get this motion, there’s no such agreement. Do you understand that?” (*Id.*, p. 11). The defendant himself did not respond. Defense counsel detailed the nature of the information he expected Mr. Lugo-Guerrero to provide and stated: “There’s no circumstance under which the government could say we’re not interested in that...Now, they may, and he understands that as well. *But as a practical matter, I can’t believe that would be the position of the government.*” (*Id.*, pp. 12-13) (emphasis added).

Mr. Lugo-Guerrero’s reliance on his counsel’s belief that he would receive the benefit of a substantial assistance motion was made clear at his sentencing where he told the court: “The attorney told me that if I cooperated I was going to get something in return for the exchange. I did cooperate, and I didn’t get anything in exchange...” (Sentencing Tr., p. 29).

Although “a mere prediction by counsel of the likely, though ultimately unfulfilled, favorable consequences of a guilty plea will not taint an otherwise valid sentence,” *Knight v. United States*, 611 F.2d 918, 922 (1st Cir. 1979) (internal quotations and citation omitted), in this case, Mr. Lugo-Guerrero asserts that counsel’s representations on the record show that his plea was motivated by counsel’s understanding that there was a likelihood a substantial assistance motion would be filed. It was more than a “mere prediction” and was made in open court itself. In these circumstances, Mr. Lugo-Guerrero asserts that the district court failed to make the requisite finding that his plea was intelligent and voluntary.

3. Mr. Lugo-Guerrero’s Plea Was Not Voluntary Or Intelligent When He Was Not Properly Advised Of The Elements Of Constructive Possession Of A Firearm And Did Not Admit To These Elements

In order to convict Mr. Lugo-Guerrero on the section 924(c) offense, the Government “would have to prove at trial (1) that he committed the underlying drug-trafficking crime, (2) that he knowingly possessed a firearm, and (3) that he did so in furtherance of the specified drug-trafficking crime.” *Delgado-Hernandez*, 420 F.3d at 24. Here, Mr. Lugo-Guerrero asserts that he was not properly advised of the elements of constructive possession or “in furtherance of the specified drug-trafficking crime,” and moreover, he did not admit to either. Both due process under the Fifth Amendment and Rule 11 itself required the Court to determine that he understood the “nature of each charge to which the defendant is pleading guilty,” Rule 11(b)(1)(G), and to determine “that there is a factual basis for the plea.” Rule 11(b)(3). Here, neither happened to support the plea to Count Two.

“Constructive possession is commonly defined as the power and intention to exercise control, or dominion and control, over an object not in one’s actual possession.” *United States v. Zalvalda-Maldonado*, 23 F.3d 4, 7 (1st Cir. 1994). Failing to instruct on the intention

requirement of 18 U.S.C. § 924(c) (even in light of evidence showing a defendant's knowledge of a firearm) has been held to be "plain error." *See United States v. Benford*, 875 F.3d 1007 (10th Cir. 2017). Here, the court never informed Mr. Lugo-Guerrero of this intent requirement - - *i.e.*, that he needed to intend to exercise dominion or control over a firearm. "[A] defendant's ignorance of the mens rea element of the offense with which he is charged renders his guilty plea involuntary as a matter of constitutional law." *United States v. Dewalt*, 92 F.3d 1209, 1211 (D.C. Cir. 1996). Moreover, "intention" cannot be presumed merely by Mr. Lugo-Guerrero's statement that he had "control" over the weapon. (Plea Tr., p. 19).

Similarly, although the district court did discuss that the weapon had to be possessed "in furtherance of" the charged drug conspiracy, the nature of this element was not sufficiently explained to Mr. Lugo-Guerrero when the district court found that "collecting money was *related to* the drug sale." (Plea Tr., p. 25). But Mr. Lugo-Guerrero stated only that the gun was brought because of threats he had received and it was "to take care of ourselves, to collect the money, because it wasn't like we went to steal." (*Id.*) Here, even assuming the court adequately described the nature of the "in furtherance" element, accepting Mr. Lugo-Guerrero's plea was plain error because he "was...in the position of pleading voluntarily with an understanding of the charge but without realizing that his conduct did not actually fall within the charge." *Delgado-Hernandez*, 420 F.3d at 28 (internal quotation and citation omitted).

In this case, based on the variety of errors in the acceptance of the plea, it cannot be said that the plea was intelligent and voluntary. The five-year consecutive sentence on the section 924(c) especially burdened Mr. Lugo-Guerrero. The appellant asserts that without these errors, there is "a reasonable probability that...he would not have entered the [guilty] plea." *Id.* (internal quotations and citations omitted).

B. Mr. Lugo-Guerrero Asserts *Pro Se* That This Court Should Grant The Petition Because The District Court Did Not Apply *Dean v. United States*, 137 S.Ct. 1170 (2017) When Sentencing Him Under Section 924(c)(1)(A)

At the First Circuit, Mr. Lugo-Guerrero was allowed to raise certain issues *pro se*. The Court considered these issues and rejected them. Mr. Lugo-Guerrero has asked counsel to set forth the following *pro se* argument in support of this Court's granting this petition:

"The Court should apply plain error Rule 52(b) when Petitioner has a counsel who does not challenge the record upon what relief should be consulted. Then the facts this caselaw would make a significant challenged when there is reason to believe a person is subject to a lesser included charge. Therefore at this time *Dean* would apply to Petitioner sentence when the facts his sentence would be under lesser charge. Now when the facts should rely on 18 U.S.C. § 3553(a) factors for relief. It's clear Petitioner is a first time offender and should have been held to this disparity under *Dean*.

The facts are addressed upon these Circuit Court of Appeals decisions. *See U.S. v. Garner*, 712 Fed. Appx. 572 (7th Cir. 2017) (Garner was charge with 21 U.S.C. § § 841(a), 846 and 18 U.S.C. § 924(c)(1)(A), then he turn to *Dean v. United States*, for the relief and resentencing to follow).

Petitioner further turn to another Circuit Court opinion. *See United States v. Brown*, 2019 U.S. App. Lexis 24429 (2nd Cir. 2019) (Remand back under *Dean v. United States*). *See United States v. Badoni*, 694 Fed. Appx. 592 (9th Cir. 2017) (Badoni receive his count three dismiss in light of § 924(c)(1)(iii) being drop under *Dean*, following § 35553(a) factors).

Furthermore Petitioner should develop encouragement to move the court when it is was a decision out of 1st Circuit which did not go these other circuit court ways. *See United States v. Ackies*, 918 F.3d 190 (1st Cir. 2019).

CONCLUSION

For the reasons set forth above, Mr. Lugo-Guerrero respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

JOSE ANTONIO LUGO-GUERRERO

By his counsel,

/s/Karen A. Pickett

Karen A. Pickett
Pickett Law Offices, P.C.
Counsel of Record
125 High Street, 26th Floor
Boston, MA 02110
(617) 423-0485
kpickettlaw@gmail.com

Dated: November 25, 2020

APPENDIX

Judgment of United States Court of Appeals For The First Circuit

A001