**No. _____**

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**In the Supreme Court of the United States**

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JEREMIAH F. WOODEN,
*Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS,
*Respondent.*

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**Petition for Writ of Certiorari**
**to the Massachusetts Appeals Court**

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## Questions Presented

1. Whether, under the Sixth Amendment, plea counsel has a duty to advise of the impact of a conviction on his client's criminal record before his client tenders a guilty plea, especially where the circumstances minimize its true consequences, to ensure an informed decision about whether to forever forfeit his meritorious defenses.

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## Petition for a Writ of Certiorari

Petitioner Jeremiah F. Wooden respectfully prays for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

## Opinions Below

The opinion of the Massachusetts Appeals Court (Pet. App. A) is unpublished but available at 100 Mass. App. Ct. 1120, 180 N.E.3d 1020 (Table), 2022 WL 97432100. The decision of the Lynn District Court denying Mr. Wooden's Motion for New Trial, pursuant to Mass. R. Crim. P. 30(b), was made orally on the record and the relevant portion of the transcript is reproduced herein at Pet. App. B along with the docket notation. The order of the Massachusetts Supreme Judicial Court denying discretionary review (Pet. App. C) is reported at 489 Mass. 1105 (2022).

## Statement of Jurisdiction

The Massachusetts Appeals Court entered judgment on January 11, 2022, affirming the trial court's denial of Mr. Wooden's Motion for New Trial. The Massachusetts Supreme Judicial Court denied further appellate review on March 17, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## Relevant Constitutional Provisions

The Fifth Amendment provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury… nor be deprived of life, liberty, or property, without due process of law[.]"

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, … and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides in pertinent part: "No State shall… deprive any person of life, liberty… without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## Introduction

Miscarriages of justice undermine the foundation of the criminal legal system. How a case is handled by attorneys and our courts may lead to a corruption of, or lack of confidence in, the integrity of the process that results in a conviction. During the 2020 civil rights protests, the Justices of the Massachusetts Supreme Judicial Court rightfully called on "[all] members of the legal community to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit ourselves to the systemic change needed to make equality under the law an enduring reality to all[,]" which also included a call to judges "to create in our courtrooms, our corner of the world, a place where all are truly equal."[1] However, in the instant case, the Massachusetts Appeals Court, like our Supreme Judicial Court recently before it in *Commonwealth v. Henry*, 488 Mass. 484 (2021), rejected imposing a duty upon plea counsel to advise his client about the true consequences of a conviction on one's permanent record before tendering a guilty plea. Indeed, studies suggest that many individuals underestimate or are unaware of statutory penalties. See Kirk R. Williams, Jack P. Gibbs, and Maynard L. Erickson, "Public Knowledge of Statutory Penalties: The Extent and Basis of Accurate Perception," Pacific Sociological

[1] Available at https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and-the-bar-june-3-2020.

Review, 23(1), 1980; see also Andrew von Hirsch, Anthony Bottoms, Elizabeth Burney, and P-O. Wikstrom, "Criminal Deterrence and Sentence Severity: An Analysis of Recent Research," Oxford: Hart Publishing, 1999. The playing field is not even and counsel's role in providing knowledge is vital to equality. The public's view of a conviction obtained by guilty plea without the participant's knowledge of its true impact does not inspire confidence that justice is being delivered evenhandedly; rather, for example, based on race, financial means, or education, which are intertwined. Here, Mr. Wooden, an African American, could not afford to be bailed out and waived meritorious defenses to plea guilty to return home from custody. Unbeknownst to him and without counsel's advice, his pleas created convictions that would later be used as predicate offenses for enhanced punishment. Counsel's failure to advise in this instance should be held ineffective and his plea unknowing and unintelligent since it was made without being fully informed of its consequences to comport with our current and evolving notions of a criminal defense attorney's obligations. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); see also Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

## Concise Statement of the Case

*A. The Offense*

On February 7, 2014, the police responded to two calls related to Ashton Terrace in Lynn, Massachusetts. They first responded to 22 Ashton Terrace for an altercation involving a group of women. While officers assisted in this incident, another officer spoke with Kayla Gardner down the street. Ms. Gardner alleged that walked from Essex Street to Chestnut Street and, when she arrived by 22 Ashton Terrace, she observed her ex-boyfriend, Jeremiah F .Wooden, outside with another unknown female party. Ms. Gardner stated that she was with Latrifah Campbell and, when Mr. Wooden saw them, they exchanged words and the unknown female party took off running. Ms. Gardner alleged that Mr. Wooden picked her up, dropped her on a snowbank, grabbed her by the neck and punched her in the mouth as he continued to drag her on the snow. At this point, she told officers that Ms. Campbell called the police for help. After Mr. Wooden let go, Ms. Gardner said he entered 22 Ashton Terrace.

The officers alleged that Mr. Wooden had active warrants and they heard someone running up or down the stairs as they went around the rear of the building. They entered via the back common stairway and located Mr. Wooden hiding in the corner behind debris in the back hallway of the third floor. They ordered him to stand up and he complied. They alleged that he

provided a false name and told his current girlfriend to tell them a false name, presumably knowing that he hard warrants under his true name. During booking for domestic assault and battery, four $20 bills were found in Mr. Wooden's front right pants pocket. $45 dollars, (one $20, one $10, two $5, and five $1 bills), were seized from the front left pants pocket along with a "clear plastic baggie" that contained "(7) individually wrapped twists of suspected heroin and 3 individually wrapped twists of suspected crack cocaine." A LG metro PCS cell phone had also been taken from his hands when he was walked in the booking area. The police alleged that the $125 were the "proceeds from Wooden's drug trade" while the cell phone was also seized "as it is believed to be a tool of Wooden's drug trade." The Application did not set forth any items indicative of drug dealing, such as ledgers, notes, scales, grinders, pagers or cutting agents, and there was no police awareness and indication of a transaction or buyer. In addition, it didn't set forth that there was any suspected drug dealing or past drug dealing by Mr. Wooden and there was no report that he was conducting any drug dealing when they responded to the above mentioned calls related to domestic disturbances.

B. *District Court Proceedings* (Complaint No. 1413 CR 000632)

A complaint issued against Jeremiah Wooden in the Lynn District Court, which alleged that he committed (1) assault and battery in violation of M.G.L. c.265, s.13A(a), (2) possession of cocaine with the intent to distribute

in violation of M.G.L. c.94C, s.32A(a), (3) possession of heroin with the intent to distribute in violation of M.G.L. c.94C, s.32(a) and criminal trespass in violation of M.G.L. c.266, s.120. He entered pleas of not guilty at his arraignment and Attorney Lance Sobelman was appointed his counsel. While a $5,000.00 bail was ordered, Mr. Wooden was unable to secure his release upon its payment and remained in custody. On March 18, 2014, Attorney Sobelman discussed the filing of a motion to dismiss and, shortly thereafter, drafted it along with his own affidavit and an affidavit for Mr. Wooden, which Mr. Wooden signed on March 27, 2014, after reviewing it. Attorney Sobelman avers that he reviewed the motion with Mr. Wooden before it was mailed and filed in the lower court on April 7, 2014. He believed that the motion had merit and the dismissal of charges, in so far as they alleged the distribution of illicit drugs, was warranted for lack of probable cause under the Fifth Amendment to the United States Constitution.

When the parties appeared in court for the motion hearing, Attorney Sobelman states that Mr. Wooden told him that he "wanted to get out of jail that day as he could not make bail." After negotiation, the parties submitted a joint written recommendation for the dismissal of Counts 1 and 4, which alleged domestic A&B and trespass, and guilty pleas to Count 2 and 3, which alleged the possession with the intent to distribute cocaine and heroin. After waiving the Motion to Dismiss in open court, the plea judge, (Flatley, J.,

presiding), accepted Mr. Wooden's guilty pleas and sentenced him to the agreed-upon concurrent sentence of one year in the house of corrections, 78 days to be served and deemed served, and the balance suspended for one year of supervised probation. He was released from custody that day. Trial counsel does "not recall the Court advising Mr. Wooden of the impact of the waiver of this motion" and while he "did discuss the motion to dismiss and possible defenses at trial with Mr. Wooden prior to his tender of plea… [a]t that time, Mr. Wooden seemed primarily concerned with getting out of jail as he could not make bail." He did not recall whether he or the plea judge notified Mr. Wooden that his pleas to the drug distribution charges could impact him for future sentencing such as being used as a predicate offense for an Armed Career Criminal indictment under M.G.L. c.269, s.10G. These convictions were later used as predicate offenses in June 2017 to convict and incarcerate Mr. Wooden on an Armed Career Criminal indictment out of the Salem Superior Court on Docket No. 1677 CR 00208.

Mr. Wooden avers that he would not have plead guilty to the charges of possession of cocaine and heroin with the intent to distribute if he had known of their impact on his criminal record and potential for future sentencing enhancements. Specifically, he states that neither Attorney Sobelman nor the plea judge advised him of this consequence. In addition, tender of plea form similarly failed to warn him. Mr. Wooden had the right enter 22 Ashton

Terrace's common areas as his girlfriend was a resident there and he was not denied entry so he believed that he would not be found guilty of criminal trespass. In addition, he communicated to Attorney Sobelman that the domestic assault and battery case would not likely proceed to a trial as he did not believe the victim intended to pursue charges, the witnesses necessary would not likely appear for court and, moreover, he did not commit the offense alleged. Attorney Sobelman told Mr. Wooden that he had a strong motion to dismiss and trial defense where the evidence did not support the allegations of an intent to distribute and he had never been arrested or targeted as a dealer in the past. While Mr. Wooden sought a plea because he could not financially afford to be bailed, and Attorney Sobelman indicated that could work out a plea on April 25, 2014, to achieve that result, Mr. Wooden states that he never advised him that certain laws, like the Armed Career Criminal statute, could provide for drastically enhanced sentences because of these guilty pleas. Believing he had strong defenses, Mr. Wooden averred that he would have chosen to remain incarcerated pending the litigation of the motion to dismiss and proceed to trial, if necessary, and would not have pleaded guilty simply to be released a few weeks sooner.

## Reasons for Granting the Writ

### I. This Petition should be granted because, under the Sixth Amendment, plea counsel should be held to have a duty to advise of the impact of a conviction on his client's criminal record before his client tenders a guilty plea, especially where, as here, the circumstances minimize its true consequence, to ensure an informed decision about whether to forever forfeit his meritorious defenses.

In the case at bar, Mr. Wooden moved to vacate his convictions[2] because his trial counsel provided ineffective assistance,[3] in violation of the Sixth Amendment, when he failed to advise him of the consequences of having two drug distribution convictions on his permanent criminal record before tendering his guilty pleas. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). The motion judge, (Nestor, J., presiding), denied relief finding that no duty has yet been imposed on trial counsel but, as the First Justice of the Lynn District Court with considerable experience from the bench, he noted that it was a "great" and "better practice." (Pet. Ex. B). The motion judge was correct that our community ideals should encompass such

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[2] The mechanism for vacating an unconstitutional guilty plea in Massachusetts is a motion, pursuant to Mass. R. Crim. P. 30(b), which provides the motion judge discretion to "grant a new trial at any time if it appears that justice may not have been done," including for violations of the Fifth and Sixth Amendments. See *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974); see also *Commonwealth v. Fanelli*, 412 Mass. 497 (1992).

[3] As with the Federal standard, set forth in *Strickland*, 466 U.S. at 685-86, to establish ineffective assistance of counsel under Massachusetts law, Mr. Wooden was required to show that (1) trial counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" and (2) he was prejudiced therefrom. *Saferian*, 366 Mass. at 96.

affirmative advice, especially where, as here, the circumstances minimized the significance of the convictions. This Court should grant certiorari to impose this obligation on defense counsel as it is commensurate with society's expectation of lawyers in this field.

### A. The community expects a criminal defense attorney to provide his client with advice about the pros and cons of conviction prior to the tender of a guilty plea and the absence of such advice, urged nationally by the American Bar Association, should be deemed deficient, unconstitutional performance.

Providing effective assistance in compliance with the Sixth Amendment during the plea process entails diverse responsibilities and is requisite to a proper plea. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); see also Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article 12 of the Massachusetts Declaration of Rights. It is inextricably intertwined with ensuring that a change of plea is knowing, voluntary and intelligently since the advice of competent counsel is necessary for an informed decision. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1968) (right to due process under the Fifth Amendment). Competent counsel is expected to investigate mitigating factors relevant to sentencing. *Rompilla v. Beard*, 545 U.S. 374, 387-388 (2005). He also has a duty to explain plea negotiations and to advocate for his client at sentencing to achieve the best possible and fairest result. *Commonwealth v. Rancourt*, 399 Mass. 269, 278 (1987); citing *Hill v. United States*, 368 U.S. 424, 428 (1962); *Ashe v. North*

*Carolina*, 586 F.2d 334 (4th Cir. 1978), cert. denied, 441 U.S. 966 (1979); *United States v. Leavitt*, 478 F.2d 1101, 1104 (1st Cir. 1973). Failure to investigate, advise about plea negotiations or advocate at sentencing can constitute ineffective assistance of counsel. See *United States v. Colon-Torres*, 382 F.3d 76 (1st Cir. 2004) (remanded for evidentiary hearing); see *Commonwealth v. Montanez*, 410 Mass. 290, 298-299 (1991) (failure to present mitigating factors or ask for concurrent sentences can constitute ineffective assistance of counsel); *Tse v. United States*, 290 F.3d 462 (1st Cir. 2002) (incorrect assurance that defendant could not be sentenced for more than ten years can constitute ineffective assistance of counsel).

Massachusetts courts have failed to keep pace with the evolution of responsibilities and expectations that community norms have placed upon criminal defense counsel. For example, as it pertains to the advice of counsel regarding consequences of a conviction, the American Bar Association advocates that "[t]o the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." The ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f), (2016). More specifically, it advises the following:

> (a) Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek

> assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.
>
> (b) When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.
>
> (c) Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding possible dispositions, and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed.

American Bar Association, Fourth Edition of the Criminal Justice Standards for the Defense Function, Standard 4-5.4, (2017).

Our jurisprudence has conferred additional advisory duties upon defense counsel even when it resides outside of the area of criminal law. Most prominently, this Court, in *Padilla v. Kentucky*, 559 U.S. 356 (2010), placed upon criminal defense counsel the affirmative obligation to warn of **immigration consequences** stemming from a conviction prior to a defendant's change of plea. Other examples of collateral consequences for which counsel should provide accurate advice include **civil commitment**,[4]

[4] *Bauder v. Department of Corrections*, 619 F.3d 1272, 1275 (11th Cir. 2010); see also *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

**sex offender registration**,[5] **parole eligibility**,[6] and **ineligibility for good time credit**.[7] The intimate relationship between these consequences and the criminal process is the foundation of counsel's obligation for accurate advice to ensure a knowing and informed plea occurs.

Mr. Wooden has not even petitioned for plea counsel's duties to extend beyond the field of criminal defense. He asks that an attorney accepting criminal defense cases simply advise his client of the known consequences in the law for a conviction on the charges for which he is about to tender his guilty pleas. Such an obligation, as supported by the American Bar Association's standards, supra, fits squarely with the evolution of our Sixth Amendment jurisprudence as guided by *Strickland*, 466 U.S. at 685-86.

In particular, the *Strickland* court concluded that the proper standard for constitutionally adequate representation is "reasonably effective assistance," and that to prevail on a claim of constitutional ineffectiveness, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 687-688. A court faced with such a claim should probe "whether, *in light of all the circumstances*, the identified

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[5] *Taylor v. State*, 698 S.E.2d 384, 387 (Ga. Ct. App. 2010) (noting the ABA Standards for Criminal Justice, "the failure to advise a client that his guilty plea will require registration is constitutionally deficient performance")
[6] *Commonwealth v. Pridham*, 394 S.W.3d 867 (Ky. 2012); *Webb v. State*, 334 S.W.3d 126, 127 (Mo. 2011); *Frost v. State*, 76 So. 3d 862 (Ala. Crim. App. 2011).
[7] *Stith v. State*, 76 So. 3d 286 (Ala. Crim. App. 2011).

acts or omissions were outside the *wide range* of professionally competent assistance." Id. at 690 (emphasis supplied). Massachusetts's Supreme Judicial Court recognized the role of courts and the wider legal profession in maintaining standards as well as their application on a case-by-case basis evolving over time, noting:

> Although in its *Strickland* decision the Supreme Court listed certain "basic duties" of an attorney such as avoiding conflicts of interest and keeping a client informed of developments in the prosecution, it declined to define the constitutional obligations of counsel in more specific terms, *Id.* at 688, stating: "More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the **legal profession's maintenance of standards** sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions… The proper measure of attorney performance remains simply reasonableness under **prevailing professional norms**."

*Commonwealth v. Clarke*, 460 Mass. 30, 38 (2011) (duty of plea counsel to warn of immigration consequences) (emphasis supplied).

Accordingly, this Court should grant this certiorari to announce that criminal defense counsel has an obligation, prior to his client tendering a guilty plea, to advise on the consequences of a charge becoming a conviction on one's permanent criminal record. This holding is commensurate with the prevailing norms as noted by the American Bar Association and the expectations of defendants who rely upon their counsel to be informed about

the actions that they take in court. Otherwise, it cannot be assured that their pleas were informed, knowing and intelligent.

### B. *Padilla* is not a bar to establishing a duty upon criminal defense attorneys that matches the prevailing norms and the circumstances of the change of plea in this case highlight the need for the advice of competent counsel before making a decision that carries a lifetime of consequences.

In its decision below, the Appeals Court relied upon *Commonwealth v. Henry*, 488 Mass. 484 (2021), a case decided by the Supreme Judicial Court while Mr. Wooden's case was pending, holding that it "reaffirmed the principle 'that defense counsel is not constitutionally required to warn of [collateral] consequences [of a guilty plea]." Pet. Ex. B; quoting 488 Mass. at 497-498; quoting *Commonwealth v. Sylvester*, 476 Mass. 1, 6 (2006); citing *Commonwealth v. Shindell*, 63 Mass. App. Ct. 503, 508 (2005). However, even though the time has come for the imposition of a duty upon plea counsel as discussed in the preceding section, the *Henry* court did not issue an overarching rejection of the notion that counsel may have a duty to warn under certain circumstances. Compare *Commonwealth v. Indelicato*, 40 Mass. App. Ct. 944 (1996) (cases may arise where trial counsel's incomplete advice "as to the consequences of a guilty plea would be thought so central as to undermine the plea's validity"). Rather, the *Henry* court carefully held that it was "unlikely" that Henry's failure to receive an advisory from his attorney "deprived him of an otherwise available, substantial ground of defense" and

that he did "not demonstrate that this counsel's failure to inform him of certain possible, but contingent, consequences of a guilty plea was behavior that was less than would be expected of an ordinary fallible attorney." 488 Mass. at 497-498. Henry's claim is distinguishable from the instant case and neither forecloses relief for Mr. Wooden nor definitively rules upon the question of counsel's duty to warn prior to a change of plea.

First, Henry's claim was rooted exclusively in Justice Scalia's dissent in *Padilla*, 559 U.S. at 391, arguing that the risk of the severe consequences of a sentencing enhancement was analogous to the risk of deportation. However, the Supreme Judicial Court did not find a basis under this rationale, noting that "*Padilla* did not address any distinction between the direct and collateral consequences of pleading guilty and limited its holding to the 'unique nature of deportation.'" *Henry*, supra. Henry did not argue, as Mr. Wooden, that the standards for the profession should include a duty to warn because of the public's lack of knowledge of the seriousness of the convictions for which individuals regularly escape jail time or that the Legislative intent for enhanced penalties is best served by such an advisory.

While the *Henry* court noted its view "generally" on the duty to inform of collateral or contingent consequences, it did not create a bright-line rule to bar relief where it instead found any detriment "unlikely[.]" *Henry*, supra. This omission is commensurate with the court's prior reasoning in *Clarke*,

460 Mass. at 8, when it stated that more specific guidelines were not necessary for determining whether an action may establish a viable claim of constitutional ineffectiveness and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."

While Henry failed in establishing negligence and prejudice, Mr. Wooden's case succeeds in those areas considering the circumstances surrounding his decision to change his plea and waive meritorious defenses, which could have led to the dismissal of the distribution charges or acquittal at trial. Here, trial counsel was derelict in his duties when he became solely focused on securing Mr. Wooden's release from pretrial detention at the expense of his client's knowledge of the permanent record that he would be creating because of his pleas. Mr. Wooden had never been arrested in the past for distributing drugs and was unaware of the consequence of such convictions on his record. Indeed, the offer to be released from custody immediately, that very day, to simply serve a probationary term minimized the severity of these convictions. Unbeknownst, once his pleas were accepted, they could be used as enhancements in a new proceeding simply by entering certified copies of the convictions into evidence. See M.G.L. c. 233, s.76; Mass. R. Crim. P. 40(a)(21); Mass. G. Evid. 803(8) and 803(22). Nothing further would be required. There would be no opportunity for him to later show the

insufficiency of the Commonwealth's case. Thus, while acting within his client's wishes to determine if a satisfactory plea agreement could be negotiated, trial counsel failed to convey to his client, too poor to be bailed, the seriousness of these new convictions on his permanent record. See American Bar Association, The ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2(f), (2016).

Moreover, unlike in *Henry*, Mr. Wooden was prejudiced by his counsel's deficient performance because he unknowingly waived a meritorious motion to dismiss and a strong trial defense simply to be released from custody sooner. Informed, this case would have turned out differently where conviction on the drug offenses was not a foregone conclusion because the evidence of an intent to distribute was lacking. This case is on all fours with *Commonwealth v. Humberto H.*, 466 Mass. 562, 570-571 (2013). Here, Mr. Wooden was not known as a drug dealer and his actions that day did not suggest any activity of the sort. The application for complaint did not state a weight of drugs seized or a street value of the heroin and cocaine upon which this Court could infer whether it was intended for personal use or for distribution. Like *Humberto H.,* the quantity appears small, as it was seized from inside the pockets of Mr. Wooden's pants at booking, escaping detection at the point of his arrest. While the application notes that a total of 10 smaller bags were seized from inside a larger bag, they are not described

showing a consistency for sale or breakdown in equal parts in quantities representative of being held for sale. The small amount of cash seized from him in varying small denominations, $125 in total, is not indicative of proceeds of the drug trade alone. No scales or other tools of drug distribution were found on him such as ledgers, empty baggies, grinders, cutting agents or pagers. A cellular phone, which most, if not all individuals had in their possession at the time of this offense is not indicative of distribution where there were no messages or calls that suggested its use in that trade. Like in *Humberto H.*, *supra*, while the evidence raises, at best, a suspicion of distribution, the complaint cannot stand in the absence of probable cause and should have been dismissed. See *Costello v. United States*, 350 U.S. 359, 363 (1956). The insufficiency becomes even more severe had the case proceeded to a trial requiring proof beyond a reasonable doubt, which was not a close question on the available evidence.

Accordingly, Mr. Wooden was prejudiced by trial counsel's failure to advise him of the true consequences of his guilty pleas, and it evinces the necessity for this Court to grant certiorari to establish this duty, which is already recognized by the community, to ensure the integrity of all convictions.

## Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. WARYASZ
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Dated: June 2, 2022

100 Mass.App.Ct. 1120
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH

v.

Jeremiah F. WOODEN.

21-P-26
|
Entered: January 11, 2022.

By the Court (Green, C.J., Singh & Hand, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** In 2017, a jury convicted the defendant of two counts of assault by means of a dangerous weapon, resisting arrest, assault and battery on a police officer, and carrying a firearm without a license. The defendant also pleaded guilty to being an armed career criminal in violation of G. L. c. 269, § 10G (a), predicated on two serious drug offenses as defined in G. L. c. 269, § 10G (e), to which the defendant had pleaded guilty in 2014. He now appeals from the order denying his motion to vacate convictions and withdraw his 2014 guilty pleas.

The defendant contends that his 2014 plea counsel was ineffective for failing to inform him that, if he later committed an offense under G. L. c. 269, §§ 10 (a), (c), or (h), his guilty pleas could subject him to prosecution as an armed career criminal under G. L. c. 269, § 10G (a). Plea counsel's ineffective assistance, the defendant argues, rendered his 2014 pleas involuntary. We affirm.

Discussion. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b). We review the motion judge's conclusion only to determine whether there has been a significant error of law or other abuse of discretion" (quotations and citations omitted). Commonwealth v. Sylvain, 473 Mass. 832, 835 (2016). "[W]hen evaluating the defendant's request to withdraw a guilty plea on the basis of ineffective assistance of counsel," Commonwealth v. Wentworth, 482 Mass. 664, 677 (2019), we review to determine whether the defendant has "show[n] that his attorney's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and that he suffered prejudice because of his attorney's unprofessional errors." Commonwealth v. Lavrinenko, 473 Mass. 42, 51 (2015), quoting Commonwealth v. Clarke, 460 Mass. 30, 45 (2011). "[A] plea is valid only when the defendant offers it voluntarily, with sufficient awareness of the relevant circumstances ... and with the advice of competent counsel" (quotation and citation omitted). Commonwealth v. Roberts, 472 Mass. 355, 362 (2015).

The motion judge did not err in denying the defendant's motion. "Generally, in Massachusetts, a failure to inform a defendant of the collateral or contingent consequences of a plea does not render the plea involuntary." Commonwealth v. Henry, 488 Mass. 484, 497 (2021). The possibility that future criminal conduct might invite prosecution of the defendant as an armed career criminal is a collateral consequence of the defendant's guilty pleas. See id. Put differently, the predicate offense required under G. L. c. 269, § 10G (a), was satisfied upon the defendant's tender of plea, but a conviction was still contingent upon a separate and later criminal offense -- the defendant's unlawful possession of a firearm -- and a successful prosecution of that offense. See Commonwealth v. Ronald R., 450 Mass. 262, 266 (2007) ("A collateral proceeding is 'separate from but not entirely divorced from the underlying judgment.' Therefore, a proceeding may be collateral even though it involves the same participants before the same judge" [citation omitted]). See also Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 578-579 (2001) (defining collateral consequence as "something that flows or may flow secondarily from conviction or incarceration").

***2** The defendant argues that "an ordinary fallible defense attorney" would have known that the defendant's guilty pleas could serve as predicate offenses under G. L. c. 269, § 10G

## APPENDIX A

  

(a).[2] He urges us to carve out an exception to established law and hold that a defense attorney has a professional duty to advise a defendant, prior to the tender of a plea, that the defendant may be subject to a possible sentencing enhancement in the event of a future conviction under G. L. c. 269, §§ 10 (a), (c), or (h). The defendant cites to no case where such a duty has been recognized. Indeed, and contrary to his claim, the Supreme Judicial Court's recent decision in Henry, 488 Mass. at 497-498, reaffirmed the principle "that defense counsel is not constitutionally required to warn of [collateral] consequences [of a guilty plea]." Commonwealth v. Sylvester, 476 Mass. 1, 6 (2016), citing Commonwealth v. Shindell, 63 Mass. App. Ct. 503, 508 (2005).

Because we conclude that plea counsel's failure to advise the defendant of possible adverse collateral consequences does not render his guilty pleas involuntary, his claim of prejudice necessarily fails. Contrast Commonwealth v. Najjar, 96 Mass. App. Ct. 569, 576 (2019) ("where a defendant lacks actual knowledge of what the plea connotes or of the direct consequences of the plea, it is unknowing in a constitutional sense, and must be vacated").

Order denying motion to vacate convictions affirmed.

**All Citations**

100 Mass.App.Ct. 1120, 180 N.E.3d 1020 (Table), 2022 WL 97432

Footnotes

1 The panelists are listed in order of seniority.

2 Plea counsel stated in his affidavit accompanying the defendant's motion to vacate convictions that he does not remember whether the defendant was informed that his guilty pleas could be "used as a predicate offense for an Armed Career Criminal indictment" under G. L. c. 269, § 10G. The defendant avers that plea counsel did not so advise him.

End of Document

| CRIMINAL DOCKET DOCKET ENTRIES | DEFENDANT NAME Jeremiah F Wooden | DOCKET NUMBER 1413CR000632 |
|---|---|---|

| DATE | DOCKET ENTRIES |
|---|---|
| 11/5/2020 | motion for new trial @ 11/18/2020 before J. Nestor 2:30 P.m. |
| 11/18/20 | motion heard session 2 (Ineffective counsel) Nestor J. Motion Denied after hearing. |

APPROVED ABBERIVATIONS
ARR = Arraignment PT= Pretrial hearing CE = Discovery compliance & jury selection T = Bench trial JT = 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 & was defaulted WAR = Warrant Issued WARD = Default warrant issued WR = Warrant or default warrant recalled PR = probation revocation hearing

Date/Time Printed: 11-05-2020 09:54:56


Version 2.0 - 11/06

APPENDIX B

as a predicate anyways, so even if this charge in Indelicato was taken away, it wouldn't have affected the outcome of the case. But if we're talking about the interplay of federal law and state law and state law attorneys not having to know every federal law, it's not about state law attorneys not knowing about state law. We're talking here about a plea of drug distribution under Mass. state law and one career criminal possible enhancement in the future under the same state law. So, that's the difference and my sister misrepresented that to the Court.

THE COURT: Okay. I just find no requirement that an attorney knew that. It is better practice? Sure. But I just find no requirement. And also, just as a totality of the record, you know, given his record, it strikes me that this may well have been a strategic decision. Frankly, it looks like he got a good deal. So, the motion is denied.

MR. WARYASZ: Thank you, Your Honor.

COMMONWEALTH: Thank you.

THE COURT: Thank you both.

COMMONWEALTH: Thank you.

COURT OFFICER: All rise.

*Court is adjourned. Time 3:39:46.*

Gmail **Michael Waryasz <mwaryasz@gmail.com>**

# FAR-28659 - Notice: FAR denied

1 message

**SJC Full Court Clerk** <SJCCommClerk@sjc.state.ma.us> Thu, Mar 17, 2022 at 4:53 PM
To: mwaryasz@gmail.com

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28659

COMMONWEALTH
vs.
JEREMIAH F. WOODEN

Lynn District, ES No. 1413CR000632
A.C. No. 2021-P-0026

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on March 17, 2022, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: March 17, 2022

To: Catherine L. Semel, A.D.A.
Kathryn L. Janssen, A.D.A.
Michael A. Waryasz, Esquire

**APPENDIX C**

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. JEREMIAH F. WOODEN
FAR-28659

## CASE HEADER

| | |
|---|---|
| Case Status | FAR denied |
| Status Date | 03/17/2022 |
| Nature | Crim: drug case |
| Entry Date | 01/20/2022 |
| Appeals Ct Number | 2021-P-0026 |
| Response Date | 02/03/2022 |
| Appellant | Defendant |
| Applicant | Defendant |
| Citation | 489 Mass. 1105 |
| Case Type | Criminal |
| Full Ct Number | |
| TC Number | |
| Lower Court | Lynn District, ES |
| Lower Ct Judge | Matthew J. Nestor, J. |

| INVOLVED PARTY | ATTORNEY APPEARANCE |
|---|---|
| Commonwealth<br>Plaintiff/Appellee | Catherine L. Semel, A.D.A.<br>Kathryn L. Janssen, A.D.A. |
| Jeremiah F. Wooden<br>Defendant/Appellant | Michael A. Waryasz, Esquire |

## DOCKET ENTRIES

| Entry Date | Paper | Entry Text |
|---|---|---|
| 01/20/2022 | | Docket opened. |
| 01/20/2022 | #1 | FAR APPLICATION filed for Jeremiah Wooden by Attorney Michael Waryasz. |
| 03/17/2022 | #2 | DENIAL of FAR application. |

As of 03/23/2022 3:20pm