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In the
Supreme Court of the United States

WILLIAM S. TOPPI,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the
Commonwealth Court of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 2, 2022

QUESTIONS PRESENTED

1. Whether the sentencing judge and defense counsel were required to recuse themselves after exhibiting clear bias relating to Defendant's case.
2. Whether Defense counsels' performance fell measurably below that of a normal fallible attorney.
3. Whether the sentencing judge made false assertions to the defendant in eliciting the waiver of constitutional rights.
4. Whether Massachusetts Appeals Court Rule 23.0 formerly Rule 1:28 is unconstitutional.

LIST OF PROCEEDINGS

Supreme Judicial Court of Massachusetts
Docket No. FAR-28780
Commonwealth v. William Toppi
Date of Final Order: May 12, 2022

Commonwealth of Massachusetts Appeals Court
No. 21-P-332
Commonwealth v. William Toppi
Date of Final Order: March 25, 2022

Lowell Superior Court, Commonwealth of
Massachusetts
No. MICR2013-1572
Commonwealth v. William S. Toppi
Date of Final Order: July 16, 2020
Date of Plea: December 17, 2014

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, William S. Toppi, hereby petitions the United States Supreme Court for a Writ of Certiorari.



OPINIONS BELOW

The order of the Supreme Judicial Court of Massachusetts denying Further Appellate Review, dated May 12, 2022, is reproduced in the appendix to this petition at App.1a. The Commonwealth Court of Appeals issued a Memorandum and Order pursuant to Rule 23.0 on March 25, 2022, which is reproduced at App.2a. The order of the Lowell Superior Court dated July 16, 2020, denying a motion for a new trial, is reproduced at App.8a.



JURISDICTION

The Supreme Judicial Court of Massachusetts denied a petition for Further Appellate Review on May 12, 2022. (App.1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257.



CONSTITUTIONAL PROVISIONS INVOLVED

- Massachusetts Sentencing Guidelines: Step 4, Chapter 4—Determine Criminal History Category. (App.50a-55a)
- Massachusetts Sentencing Guidelines: Step 10, Chapter 10—Information About Determining the Nature of the Sentence Pursuant to the Sentencing Guidelines Grid. (App.56a-60a)
- Supreme Judicial Court Rules Code of Judicial Conduct. (App.61a)



STATEMENT OF THE CASE

This is a matter where William S. Toppi (“Toppi”) was indicted by a Middlesex County Grand Jury for breaking and entering and larceny. During pretrial proceedings, Toppi felt he was being forced to plead guilty based on the treatment he was enduring while held in jail on a high bail, after his initial summons.

Eventually, Toppi reluctantly agreed to plead guilty to end the torture he received while awaiting trial. During the plea hearing, Toppi’s defense counsel exhibited clear bias towards the case regarding a dog that was kicked during the commission of the offense. The sentencing judge also concurred with defense counsel on the issue, yet continued with sentencing Toppi. The sentencing judge stated that he would sentence Toppi within the “Massachusetts Sentencing Guidelines”, then deviated from what the guidelines called for. Toppi

served the sentence in full, including his probation period and an extended probation.

Toppi was unsatisfied with the proceedings in total. Toppi filed a Motion for New Trial (Rule 30), which was denied. Toppi appealed the denial of his Motion for New Trial to the Massachusetts Appeals Court, who denied Toppi's direct appeal. Toppi filed for Further Appellate Review in the Massachusetts Supreme Judicial Court, which was denied.

Toppi has exhausted all state remedies and now respectfully requests this Honorable Supreme Court of the United States to grant Certiorari.



REASONS FOR GRANTING THE PETITION

I. WHETHER THE SENTENCING JUDGE AND DEFENSE COUNSEL WERE REQUIRED TO RECUSE THEMSELVES AFTER EXHIBITING CLEAR BIAS RELATING TO DEFENDANT'S CASE.

First, Toppi has argued that defense counsel presented to the court specific and identifiable facts of the case that [c]learly establish a conflict of interest and bias. Toppi included in his Brief the following argument:

That defense counsel informed the court that she found it very offensive being a dog owner that the dog in the house had been kicked during the break. (App.17a)

Furthermore, the Court joined with the beliefs of defense counsel. The Court weighed in by:

Acknowledging the palpable anger of the victim and specifically stating that [kicking the dog] was a senseless and mean-spirited thing. (App.17a)

These statements of defense counsel and the court clearly present a conflict of interest and bias in the most basic sense of the rule. American jurisprudence has created and acknowledged that when a conflict of interest or bias exists, these [parties] must remove themselves from the equation. The plea hearing should not have proceeded to sentencing based on this conflict and bias in the case.

As it pertains to defense counsel, whether [she] found the actions of the defendant offensive (or not), these beliefs should NOT have been brought out in open court, especially in a change of plea proceeding. Defense counsel's personal beliefs that Defendant's actions were offensive (to her) have no place in a court proceeding where the client's sentence hangs in the balance (in that proceeding) . . . especially where the [sentencing] judge appears to be of the same mindset.

There is no excuse for these personal beliefs being expressed in Toppi's change of plea hearing. The Rule is clear. These facts reach the level necessary to grant relief. The court cannot overlook the egregious statements made on the record. To do so, would render Toppi's established rights nugatory.

[N]o right is more fundamental to the notion of a fair trial than the right to an impartial judge; *Bracy v. Gramley*, 81 F.3d 684, 696 (7th Cir. 1996) (Rovner, J., dissenting), 520 U.S. 899, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997); *see also*, Mass. Const. of 1780, pt. 1, art. 29. Thus, the Due Process Clause clearly requires a fair

trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular bias; *Bracy*, 520 U.S. at 904-05 (citation omitted) (*quoting Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). Because judicial bias infects the entire trial process it is not subject to harmless error review; *Maurino v. Johnson*, 210 F.3d 638, 645 (6th Cir. 2000) (*citing Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705; n. 8 (1966)); *see also, Rose v. Clark*, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (*citing Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio L. Rep. 236 (1927)).

It is the defendant's burden to prove a genuine conflict of interest by presenting demonstrative proof detailing both the existence and the precise character of th[e] alleged conflict of interest; we will not infer a conflict based on mere conjecture or speculation. *Commonwealth v. Shraiar*, 397 Mass. 16, 20 (1986). The defendant's principal argument on appeal is that the judge erred in denying his motion for a new trial based on two decisions by the Supreme Judicial Court: *Commonwealth v. Rondeau*, 378 Mass. 408 (1979), and *Commonwealth v. Patterson*, 432 Mass. 767 (2000). In *Rondeau*, *supra* at 414-415, the court explained that an actual conflict of interest denies the defendant his right to representation by an attorney with undivided loyalty. *See also, Commonwealth v. Zabek*, 86 Mass. App. Ct 520, 523-524 (2014).

Here, Toppi has demonstrated proof detailing both the precise nature of the conflict and that the conflict actually exists. Nothing more is required.

The Commonwealth's argument that defense counsel's statement [in this regard] was to "mitigate the sentence" is not a relevant factor and fails to address the crux of the problem. Once a genuine conflict exists, the defendant's conviction must be reversed. *Commonwealth v. Milley*, 67 Mass. App. Ct. 685, 688 (2006).

"An element of the fundamental right to counsel under art. 12 of the Massachusetts Declaration of Rights is the defendant's right to the full and undivided loyalty of his attorney. A defendant is entitled to the untrammeled and unimpaired assistance of counsel free from any conflict of interest."

Commonwealth v. Shraiar, 397 Mass. 16, 20 (1986), citing *Commonwealth v. Davis*, 376 Mass. 777, 780 (1978). Under art. 12, if a defendant establishes an actual conflict of interest,

... he is entitled to a new trial without a further showing; he need not demonstrate that the conflict adversely affected his lawyer's performance or resulted in actual prejudice.

Commonwealth v. Mosher, 455 Mass. 811, 819 (2010), and cases cited. *Commonwealth v. Croken*, 432 Mass. 266, 272 (2000).

Furthermore, where the sentencing court concurred with defense counsel's beliefs pertaining to kicking the dog, there is no room for discretion.

For these reasons, the conviction must be reversed and a certiorari granted.

II. WHETHER DEFENSE COUNSEL'S PERFORMANCE FELL MEASURABLY BELOW THAT OF A NORMAL FALLIBLE ATTORNEY.

Second, defense counsel made false statements to the court pertaining to Toppi. Defense counsel painted Toppi as a "drug addict" based on a 23-year old case. (App.19a). Where counsel uses information garnered from defendant's record that was more than 20 years old . . . in the attempt to mitigate [the current] sentence, it cannot be said that [defense] counsel was acting in the best interest of the client. Using such dated material, without permission [of Toppi] makes Toppi out to be a drug addict during the time of the [present] offense. Said information was untrue and unethical to argue to the court. If defense counsel were encouraged and allowed to argue specific (false) facts, without verifying those facts, makes a mockery of the system.

"It is unquestioned that under prevailing professional norms at the time of trial, counsel has an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Defense counsel obviously failed to review or investigate Toppi's record and background before making false statements to the court.

The Commonwealth refused to address the majority of Toppi's claims.

Additionally, defense counsel told Toppi that [i]f he did not plead guilty [that day], he would not get a

trial for at least six months. This statement prompted Toppi to go forward with [a] plea.

Toppi provided facts that established that a third-party non-victim worked at Billerica Jail. Toppi was being held in a different jail (not Billerica) awaiting trial. However, when certain court dates were scheduled, Toppi would be transferred to Billerica Jail to be brought into Court. Toppi complained that he was being intimidated and harassed by this third-party non-victim while at Billerica Jail. Moreover, this third-party non-victim appeared at the change of plea (and other court proceedings) to make a "victim witness statement", where he was NOT a victim or a witness. These concrete facts establish and support Toppi's argument that he did not want to be subject to the abuse any further. By pleading guilty Toppi knew he would go to State Prison and not be transferred back to Billerica Jail and be further abused by this third-party non-victim . . . who just wanted revenge upon Toppi.

Oddly, the Docket Entries in Toppi's criminal matter do not reflect any Writs of Habeas Corpus ("Habe") being issued to bring Toppi from jail to any court hearing(s) or proceeding(s). It is without argument that Habe(s) were issued for Toppi's appearance in Court. However, the records from the Sheriff's Department were provided with the defendant's brief.

Even though the judge did not allow this third-party non-victim to make a victim witness statement, the fact that the third-party non-victim vehemently attempted to do so supports Toppi's argument. The prosecutor's request that this third-party non-victim be allowed to make a victim witness statement suggests ulterior motives on behalf of the Commonwealth as

well, to possibly obtain a longer sentence based on irrelevant information.

The Commonwealth merely states that this argument is meritless.

Furthermore, defense counsel specifically told Toppi to answer "yes or no" during the plea colloquy and not to elaborate his responses. Defense counsel told Toppi that [if] he elaborated, the court [may not] accept his plea. These instructions by defense counsel again "prompted" Toppi to do as instructed . . . otherwise he would be subject to further abuse he was receiving at the hands of the third-party non-witness who worked at Billerica Jail. These instructions by defense counsel cannot be said to fall into the accepted parameters of sound legal advice, given the unique circumstances present in [this] case.

To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 688, 694. To show deficiency, a defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. And to establish prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. Toppi believes he has met that standard.

For these reasons, coupled with the arguments presented *supra*, require that the conviction be reversed and a new trial ordered.

Lastly, Toppi presented a plethora of additional ineffective claims in his brief which imply that he was

not treated fairly throughout the criminal proceedings against him. The remaining claims are as follows:

1. Conducting the Lobby Conference without Toppi being present:

Toppi's Brief succinctly delineates that a criminal defendant [m]ust be present at all meaningful proceedings throughout the criminal process. It is readily apparent that Toppi was not present in the courthouse when the Lobby Conference occurred that determined his ultimate sentence.

2. Counsel presented facts to the court that were the subject of a pending suppression motion:

Counsel committed perjury when she placed him at the crime scene when addressing the court during the lobby conference. (App.18a). There was a Motion to Suppress filed and waiting to be heard to suppress any identification of Toppi at the scene of the crime. (App.64a)

3. Counsel mentioned Toppi's divorce proceedings to the Court:

Toppi took offense to defense counsel mentioning his pending divorce proceedings to the Court. (App.19a). These proceedings had no bearing on the criminal matter and Toppi believed defense counsel had personal issues surrounding the issue of divorce.

4. Counsel misstates the Sentencing Guidelines to the Court, which increased the potential and actual sentence:

During the lobby conference, defense counsel stated that the applicable Sentencing Guideline range was 6–30 months of incarceration. (App.16a). Toppi states that the [correct] guideline range was 0–24 months. The Judge ultimately sentenced Toppi to 2 yrs. to 2 and 1/2 yrs. in State Prison . . . which is inline with the [in]correct guideline range defense counsel stated to the Court. (App.51a-52a)

5. The Commonwealth attempted to introduce a dismissed case to influence the judge at sentencing through the third-party non-victim employee of Billerica Jail:

Toppi had a second pending criminal case at the same time [these] proceedings were ongoing. However, the [o]ther pending criminal matter was dismissed prior to the change of plea hearing in this matter. The third-party non-victim (who was attempting to give a victim witness impact statement in this case) was in a relationship with the victim of the dismissed case.

Toppi acknowledges that the issues presented in (a)–(e), *supra*, are *de minimus* matters in the grand scheme of this appeal. However, when the Court reviews the claims presented by Toppi for the “cumulative effect” of all errors, these *de minimus* matters now become relevant when determining whether or not to grant certiorari relief.

The plea hearing should not have proceeded forward based on the clear bias and conflict defense counsel exhibited and the sentencing judge agreed

with. Defense counsel's performance fell measurably below that of a normal fallible attorney.

III. WHETHER THE SENTENCING JUDGE MADE FALSE ASSERTIONS TO THE DEFENDANT IN ELICITING THE WAIVER OF CONSTITUTIONAL RIGHTS.

Toppi has argued in his brief, that the sentencing judge falsely asserted to the defendant that the court was persuaded to follow the guidelines in this case. (App.30a).

Defense counsel was improperly allowed, by the court, to apply a false history category level to the defendant as the starting base point, which the court then adopted and used in sentencing. The sentencing judge deviated from the guidelines further by lobbying the terms of probation with the defendant, thus altering the sentencing structure by applying the committed sentence on the lesser charge. This disparity in sentencing is not allowed under the guidelines. In making this false assertion, the court could no longer assume the defendant understood the question before he answered it. (App.27a).

The sentencing judge, again, falsely asserted to the victim that, "I'm basically following traditional jurisprudence here." (App.41a).

This unique sentence cannot be associated with any traditional jurisprudence. This disparity in sentencing was unique to this case and is not allowed under the guidelines. (App.57a).

The defendant provided a news article with his brief that determined that the sentencing judge was an expert on the subject of Plea Bargaining, being chosen to speak and lecture on the subject.

(<https://www.hurriyetdailynews.com>). As an expert, it cannot be said that the judge was unaware of how to apply the proper sentencing structure under the guidelines. “The role of expert testimony is to assist jurors in interpreting evidence that lies outside their common experience.” *Commonwealth v. Shanley*, 455 Mass. 752, 761, 919 N.E.2d. 1254 (2010). *Hinds SJC-12953*.

The role of the sentencing judge [as an expert] was to explain to the defendant the sentencing guidelines he purported to be following, that lies outside [of the defendant’s] common experience. Using the *Daubert-Lanigan* standard, expert testimony must both “rest[] on a reliable foundation” and be “relevant to the task at hand”. *Daubert*, 509 U.S. at 597. *Hinds SJC-12953*. The Massachusetts Sentencing Guidelines both rested on a reliable foundation, and were relevant to the task at hand. The judge acknowledged as much by stating “very smart individuals created the calculations based on guidelines that judges historically use to impose a proper or a fair sentence.” (App.41a) As an expert on plea bargaining (<https://www.hurriyetdailynews.com>) the judge knew how to fully adhere to the guidelines and apply a proper sentencing structure that would be in line with those guidelines, instead of [picking his sentence out of the air.] (App.41a).

In *Hinds SJC-12953*, The Supreme Judicial Court ruled that Judge Ricciardone asked that an expert’s testimony persuade him of factual conclusions, rather than merely demonstrate a reliable methodology. Because this was prejudicial, the SJC reversed the defendant’s convictions and remanded the matter for a new trial and further proceedings. *Commonwealth v. Hinds*, 487 Mass. 212, [217-228] SJC-12953.

In the matter at hand, the defendant presented factual conclusions that verified Ricciardone was an expert on plea bargaining, and that he made false assertions in purporting to follow the guidelines. Because this was prejudicial, the conviction must be overturned. In simple terms, according to the Canons of Judicial Conduct,

Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

(App.63a). When this Canon is violated, all other Canons are voided.

IV. LIST OF MISCONDUCT

1. FAVORITISM—No attorney's available on the list on the day of appointment. Ricciardone appoints DeWitt who is a board member of Middlesex County CPCS. This fee-generating appointment was favoritism in violation of Supreme Judicial Court Rule 1:07, (1). There was no written statement or notation on the docket for this appointment, as required by the Rule. Canons of Conduct Rule 2.13 Administrative appointments.

2. CONTROL OF PROCEEDINGS—Ricciardone's appointment of DeWitt was reciprocated by her ensuring that all critical stages of the case would be held with Ricciardone. Bail reduction hearing was held with Ricciardone, who was the same judge as arraignment, lobby, and plea. SHAM BAIL HEARING to justify holding the defendant to maintain control of his person and what he knows. General Laws, Part 3 Title 1 Chapter 211C Commission on Judicial Conduct (5)

Grounds for discipline shall include: (b) willful misconduct in office. (d) conduct prejudicial to the administration of justice or conduct unbecoming a judicial officer. (e) any conduct that constitutes a violation of the codes of judicial conduct or professional responsibility.

3. FRAUD—Ricciardone allows a third motion for funds. DeWitt used the funds for her associates who never conducted any investigations and counsel had no intentions of ever going to trial. No investigations were ever conducted. Codes of Conduct and *Commonwealth v. Mills*, 436 Mass. 387, 394 (2002) Canons of Judicial Conduct: Rule 2.15 (a), (d).

4. COERCION—After the third motion for funds, Ricciardone transferred the defendant to the Billerica jail where it was known and established that he could be in danger through the third party victim/witness that the commonwealth advocated on behalf of during the lobby and plea. Canon 1.

5. IMPROPER ASSERTIONS—Ricciardone deceives the defendant and victim by purporting to follow traditional jurisprudence in going by the sentencing guidelines, when in fact, he is not. Canon 1.

6. IMPROPER SENTENCE—Ricciardone sentences the defendant on larceny without a hearing to determine actual amount of loss. Probation on count one. Not allowed under the Massachusetts Sentencing Guidelines. (App.57a).

7. RULE 30 VIOLATION—Ricciardone was required, by law, to recuse himself from hearing the motion as he was accused of being dishonest, and the dishonesty is apparent in the record. Ricciardone invited the defendant to a hearing on the matter without even one day's notice. Rule 30 states, (7) PLACE AND TIME

OF HEARING-The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner. No good cause was given.

8. RECUSAL—The defendant filed a motion to recuse the judge after giving the judge an opportunity to do so on his own as required by law. Ricciardone denied the motion citing the Lena Standard, which did not apply under the circumstances. See defendant's motion for proper standards. Canons of Judicial Conduct. Rule 2.11(a).

9. UNLAWFUL DENIAL OF RULE 30 MOTION—After first inviting the defendant to a hearing without a day's notice, Ricciardone denies the motion without a hearing when the defendant questions his integrity. Ricciardone stated that; "After further review of the submissions and attached exhibits, I find that the defendant has failed to raise a substantial issue warranting further hearing." Ricciardone also stated that; "Toppi's factual disagreements and accusations leveled at those involved here . . . fail to provide rational support that . . . his plea was anything but knowing, intelligent, and voluntary when made. Accordingly, I cannot conclude that justice was not done."

- (1) Ricciardone was being dishonest when he told the defendant that he was following the guidelines. The defendant had no knowledge of that.
- (2) Ricciardone never explained the sentencing structure of the guidelines before lobbying with the defendant. The defendant did not intelligently choose his options.

- (3) Ricciardone denied any change in bail, controlling the defendant's person and transferring him to a jail where it was known and established he could be in danger. The defendant's plea was not voluntary, as he was being tortured.

V. WHETHER MASSACHUSETTS APPEALS COURT RULE 23.0 FORMERLY RULE 1:28 IS UNCONSTITUTIONAL.

The United States Constitution is the supreme law of the land under which we live our lives. However, its translation into the legal rules under which we live occurs through the actions of our government entities, both state and federal. The fundamental principles that determine the powers and duties of our government, also guarantee certain rights to its people, and to all people within it.

The true meaning of law stands within our judiciary. What judges decide in the course of their judgments is meted out daily in the various cases that come before the courts. An independent judiciary is of paramount importance in ensuring the rule of law, and respect for the law. This independence leaves judges free to make impartial decisions based solely on fact and law. Judges are entrusted with immense power. This power is given in the form of judicial discretion. The power to make decisions based on their individual evaluations, that are governed by the principles of law, as well as the dictates of their own judgment and conscience. This discretion, however, is not unlimited. Discretion is abused when it is used arbitrarily and when it is unreasonable.

There can be no greater offense to the judiciary system than when its trust is violated by those entrusted, with its power.

The First Amendment grants to the people, the right to petition, for redress of grievances. This right guarantees that the petitioner will not be punished for doing so. Rule 23.0, Undermines the reviewing process. “summary decisions . . . are primarily directed to the parties”; they are “not circulated to the entire court”; and “. . . may not fully address the facts of the case or the panel’s decisional rationale.” Notice: Toppi Memorandum, Appeals Court 21-P-332. (App.2a)

Decisions from the appeals court should merit the panel’s full decisional rationale to fully comply with the law. Rule 23.0 “may be cited for . . . persuasive value but . . . not as binding precedents.” Toppi Memorandum, Appeals Court 21-P-332. However, Rule 23.0 is binding to the individual who is faced with this type of “decisional rationale”. It is not binding to the people, meriting only a persuasive value. This disparity on an individual’s rights is unconstitutional. Judge’s legal conclusions are to provide insight into their analysis, both for the parties to understand, and formally, so an appellate court can examine the trial court’s reasoning on appeal. Judge’s are obliged to cite precedent upon which they rely, not on what they find persuasive. Effectuating Rule 23.0, obscures the appeal panel’s full thinking; and, thus, undermines the reviewing process itself.

In this case, in its decision NOT to review the defendant’s appeal, the panel employed Summary Judgment: Rule 23.0, formerly known as Rule 1:28. This Rule dictates that, either there was “no substantial question of law presented” or there was a “clear error of law” involved. (App.2a)

In its decision, the appellate court panel affirmed that the defendant claimed the (plea judge) "accepted his plea in violation of his Federal and State constitutional rights." (Toppi Memorandum, Appeals Court (App.2a) The defendant argued in his brief that the (plea judge) falsely asserted to the defendant that [he] was "persuaded to follow the guidelines". (App.30a). The (plea judge) then lobbied the terms of probation with the defendant in open court, asserting that the defendant would face a ten-year sentence if he were to violate probation for breaking and entering. The defendant argued on appeal, that under the Massachusetts Sentencing Guidelines, that type of disparity in the sentencing structure is not allowed. (App.57a).

This false assertion made by the judge in eliciting the waiver of constitutional rights was a clear violation of the Canons of Judicial Conduct; Rule 1: Upholding the Integrity of the Court. And, 1.1 Compliance with the law. (App.63a) In a factual context, employing Rule 23.0 principles, either the judge violated the rules and the law, or he didn't. However, without a full review of the defendant's arguments, Rule 23.0 "may not fully address the facts of the case or the panel's decisional rationale". (App.2a). This rule opens the door to discretionary abuse, which is readily apparent in this case.

The panel further affirmed that the defendant argued that, "among other things, plea counsel perpetrated a fraud upon the court". (Toppi Memorandum Appeals Court (App.2a). The defendant argued in his brief that counsel used an in court identification to place her client at the crime scene committing a crime. Counsel stated that a "neighbor . . . identified my client

from a Facebook photo that the police didn't see . . . " (App.18a). The defendant provided a Motion to Suppress with his brief that counsel filed on behalf of her client. With that brief, was a sworn affidavit from counsel that stated, "During the investigation, the investigating officer assessed the defendant's Facebook page and showed a picture from the Facebook page of the defendant's [sic] standing next to his vehicle." (App.69a).

Again, employing the either, or, standard of Rule 23.0; either counsel committed perjury when she improperly referenced her own suppressed evidence, or she didn't. However, without a full review of the defendant's arguments, Rule 23.0 "may not fully address the facts of the case or the panel's decisional rationale." (App.2a). In choosing the phrase, "among other things" in [their] memorandum, the panel made conclusory declarations about the defendant's factually valid arguments. All of the legal standards that the appeals court panel cited in their memorandum were never effectuated. The legal standard, and cases cited, which are required by law, were of no moment. Like Rule 23.0, they were only persuasive, and not binding toward this particular individual, or any other individual, who has, his or her, case determined using Rule 23.0. It is unconstitutional.

Employing the Rule 23.0, either, or, standard, the panel stated that; "Were we to attempt to address the defendant's claims, our conclusions would be no different." (App.5a). The panel used the defendant's ineffective counsel [claim] as an example. [They] cited the proper standard of review, with cases cited. The proper standard was of no moment, as the panel relied solely on the, either, or, standard of Rule 23.0. The panel affirmed that; "Having reviewed the transcripts

of the lobby conference and the plea hearing, as well as the submissions from plea counsel, we encountered nothing . . . " (App.6a).

The defendant filed his appeal, pro-se, after being told he DID NOT have a right to counsel. [He] has no knowledge of what the appeals court panel is referring to in regards to [submissions from plea counsel]. Neither will anyone who will rely on *Commonwealth v. Toppi*, for its persuasive value.

Finally, the panel purported that plea counsel advocated [forcefully] for a lower sentence, and, [endeavored] "to have the sentence attached to the lesser of the indictments." (App.6a). It was plea counsel who improperly cited the [in]correct history category level initially, which the court then adopted and applied. It cannot be said that after improperly elevating the sentencing guidelines history category level, [plea] counsel was ever advocating for a lesser sentence. Indeed, counsel could have "endeavored" to have the sentence "attached to the lesser of the indictments" when [she] filed [her] motion to revise and revoke immediately following the plea hearing.

Even a casual glance at the Massachusetts Sentencing Guidelines would verify the defendant's claims. (App.57a). And, a review of the record would verify that counsel committed a [fraud upon the court]. (App.64a).

Rule 23.0, formerly Rule 1:28, is unconstitutional and outdated. As computer databases became more accessible, parties began to cite Rule 1:28 decisions more frequently. Eventually, The Appeals Court changed the rule prohibiting the citation of unpublished decisions, holding in *Chase v. Curran*, 71 Mass. App. Ct. 258 (2008), that unpublished decisions after February

25th 2008, could be cited “for their persuasive value but not as binding precedent.” Indeed, the commonwealth cited such a case in their brief, in regards to the defendant’s appeal. These cases are being published on the court’s website as well. However, the manner in which they are prepared and the cursory treatment of the issues, remains the same.

Rule 23.0 decisions contain only a brief statement of the underlying facts. They represent only a minority view of the court, as they have NOT been reviewed and approved by any judges, except the three who decided the case. This leaves the door open to abuse of the rule, which occurred in this case. The facts [as stated] in these opinions may be so incomplete, as they are here, that they mislead the public about the basis for the decision, who will then misinterpret its scope and effect.



CONCLUSION

Conclusion: The Appeals Court Panel’s use of Rule 23.0 was arbitrary and capricious. It was used to punish a citizen who petitioned the court for a redress of grievances in violation of the First Amendment. It allowed the panel to;

- a. rely on factors that Congress has not intended it to consider,
- b. fail to consider important aspects of the claims,
- c. offer an explanation for its decision that ran counter to the evidence presented, and,

- d. offered an explanation so implausible that it could not be ascribed to any standards of law that the panel itself cited.

This court should grant certiorari review to change this practice and maintain the integrity of the judicial system. And, to prevent a miscarriage of justice.

If granted certiorari review, the defendant will NOT be attempting to proceed pro-se. He has no illusions of the difficulty of filing a brief or arguing such an important constitutional issue before this Honorable Supreme Court. He will be represented by a pro-bono attorney, or attorneys, who would be honored and capable of such an endeavor.

Respectfully submitted,

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