COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk, ss. **No. SJC-11400**

Commonwealth of Massachusetts

Appellee

v.

Kempess Sylvain

Defendant-Appellant

On Appeal from a Final Judgment Entered in
The Dorchester Division of the Boston
Municipal Court

Brief of Amici Curiae

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QUESTION PRESENTED

Should Massachusetts continue to apply retroactively the United States Supreme Court's decision in *Padilla vs. Kentucky*, 130 S.Ct. 1473 (2010), in light of the recent decision in *Chaidez vs. United States*, 586 U.S.___, 2013 U.S. LEXIS 1613 (February 20, 2013)?

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici adopt the statement of the case and the statement of the facts set forth in the parties' briefs.

ARGUMENT

I. THIS COURT'S INTERPRETATION OF THIS COMMONWEALTH'S DECLARATION OF RIGHTS IS EXCLUSIVELY AN ISSUE OF STATE LAW.

The constitutionally guaranteed standards for effective assistance of counsel under Article 12 exceed those of the Sixth Amendment. Commonwealth v. Marinho, 464 Mass. 115, 144 (2013) (citing Commonwealth v. Rainwater, 425 Mass. 540, 553 (1997) ("In fact, we 'grant more expansive protections under [art. 12 of the Massachusetts Declaration of Rights] than have been required of States under the Sixth

Amendment.'"). So long as this Court's interpretations of these requirements are at least equal to those of the Sixth Amendment, the decisions of the United States Supreme Court concerning what constitutes "effective assistance of counsel" under the Sixth Amendment are, at most, simply informative. Commonwealth v. Clarke, 460 Mass. 30, 34 (2011) abrogated by Chaidez v. United States, 133 S. Ct. 1103 (2013)("*Federal law* on the retroactive application of constitutional decisions was articulated in Teague v. Lane") (Emphasis supplied); Commonwealth v. Breese, 389 Mass. 540, 546-47 (1983) ("We look to decisions of the United States Supreme Court *for guidance* in determining whether a new rule affecting the rights of criminal defendants should be applied only prospectively.") (Emphasis supplied).

A. DENYING RETROACTIVE EFFECT TO ACKNOWLEDGMENT OF STANDARDS FOR EFFECTIVE ASSISTANCE OF COUNSEL PLACES DEPRIVATIONS OF DEFENDANTS' FUNDAMENTAL RIGHTS, DUE IN NO WAY TO DEFENDANTS THEMSELVES, BEYOND REMEDY.

If Kempess Sylvain discovered, long after his conviction had become final, that he had been represented by someone who had never been licensed as an attorney, and brought a motion to set aside his

plea, "it is now accepted . . . [he would be] entitled to have his . . . conviction set aside, even though the representation was without a fault and as proficient as could be expected from the best of lawyers." Commonwealth v. Thibeault, 28 Mass. App. Ct. 787, 789 (1990) (noting per se rule "acknowledged" in Commonwealth v. Thomas, 399 Mass. 165, 168 (1987)). If Kempess Sylvain had arrived at court and found his lawyer missing, and the court had ordered him to represent himself, the deprivation of his fundamental right to counsel would have invalidated any conviction, regardless of the quality of his self-representation, this error could not have been held harmless, and any decision of the judge concerning an alleged violation of the right to counsel would have been reviewed de novo through this Court's "independent determination." Commonwealth v. Means, 454 Mass. 81, 88 (2009) (citing Commonwealth v. Currie, 388 Mass. 776, 784 (1983)). Yet without retroactive application of *Padilla v. Kentucky*, representation this Court has found fell below that of an ordinarily fallible lawyer, failure to adequately advise concerning effect of a criminal conviction on a defendant's immigration status, Commonwealth v.

Marinho, *supra*, representation whose shortcomings were due entirely to his lawyer, which may have been far worse than either that of an advocate imposter or the defendant forced to represent himself, are beyond redress.

B. HOLDING THAT VIOLATIONS OF THIS COURT'S ACKNOWLEDGED STANDARDS FOR EFFECTIVE ASSISTANCE OF COUNSEL UNDER ARTICLE 12, AS ALSO REFLECTED IN NATIONAL AND STATE GUIDES TO PRACTICE, ARE BEYOND REDRESS WOULD BE A MANIFEST INJUSTICE.

The potential consequence of deportation is so severe, and so closely connected to the criminal process, that regardless whether it is more properly viewed as a "direct" or "collateral" consequence of a conviction, excluding deficient representation concerning it from the scope of an ineffective assistance claim would be, quite simply, wrong. Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1482, 176 L. Ed. 2d 284 (2010). It would be wrong because the United States Supreme Court itself had long recognized deportation as a severe, albeit noncriminal, penalty. Id at 1481 (*citing* Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)). It would be wrong because the United States Supreme Court had

recognized that non-citizen defendants themselves clearly viewed it as severe. *Id* at 1481-82 (*citing* INS v. St. Cyr, 533 U.S. 289, 322, 121 S.Ct. 2271 (2001)).

If a defendant were to discover, long after his conviction had become final, that his counsel's advice had contravened in every way extant national and state guides to practice on a critical issue in the case, this Court would measure whether the advice was "within the range of competence demanded of attorneys in criminal cases *at the time that it was given*." Commonwealth v. Mahar, 442 Mass. 11, 17 (2004) (emphasis supplied, internal citation omitted). Although this Court does not evaluate such advice "with the advantage of hindsight," nor should it ignore what was plainly visible, in the standards of state and national professional guides, at the time. Commonwealth v. Drew, 447 Mass. 635, 641 (2006) (*citing* Commonwealth v. Adams, 374 Mass. 722, 729-730 (1978)). Standards intended to protect one in defendant's position are evidence of attorney negligence. *Id.,* 447 Mass. at 641. This Court found those standards had established an obligation to inquire into and properly advise a defendant concerning possible immigration consequences as of

April 1, 1997, and adequacy of constitutionally required counsel thereafter requires no hindsight. Commonwealth v. Clarke, 460 Mass. 30, 43, n. 15 (2011).

C. THIS COURT'S RETROACTIVITY ANALYSIS FOR CONSTITUTIONAL RULES OF CRIMINAL PROCEDURE HAS NEVER EXPLICITLY WEIGHED MASSACHUSETTS-SPECIFIC CONSIDERATIONS.

Any precedential system relying on the principle of state decisis requires a mechanism for deciding the operative date of a rule of law, but nothing demands that the mechanism ignore the purpose, context or features of the rule. Until 1990, this Court applied a functional approach to retroactivity that explicitly considered "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Commonwealth v. Bray, 407 Mass. 296, 298 (1990) (citing Linkletter v. Walker, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965)). This functional approach to retroactivity questions was not limited to criminal procedure questions. *See* Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 97-

98 (1979) (holding change in law, that reasonable covenants against competition may run with the land when they serve "orderly and harmonious development for commercial use," retroactive to date of decision twelve years earlier to acknowledge reliance of those who prepared real estate contracts in the interim). While this Court explicitly adopted the Supreme Court's retroactivity framework in 1983, Commonwealth v. Breese, 389 Mass. 540, 548 (1983) ("We adopt the approach of the Supreme Court."), it never explicitly explained why it adopted the Supreme Court's quite different, formalist approach in Bray. And, of course, Bray never mentions the Massachusetts Constitution.

One reason *not* to reflexively apply the Supreme Court's formalist retroactivity framework is that this Court has repeatedly found that the Massachusetts Declaration of Rights provides a different degree of protection than does the United States constitution in a variety of criminal procedure contexts. Commonwealth v. Upton, 394 Mass. 363, 372 (1985) (Art. 14 provides greater protection than Fourth Amendment, rejecting totality of circumstances test for probable cause), Commonwealth v. Blood, 400 Mass. 61 (1987) (Art. 14 provides greater protection than does the

Fourth Amendment, finding reasonable expectation of privacy from warrantless electronic surveillance in conversation in private home), Commonwealth v. Mavredakis, 430 Mass. 848, 849 (2000) (Art. 12's protection against compelled self-incrimination broader than Fifth Amendment and requires defendant be advised of counsel's efforts to provide legal advice); Commonwealth v. Mosher, 455 Mass. 811, 819 (2010) (defendant who establishes actual conflict of interest is entitled to a new trial without need to demonstrate it actually affected lawyer's performance or caused prejudice because Art. 12 provides broader protection in this respect than the Sixth Amendment)

Another reason *not* to reflexively apply the Supreme Court's formalist retroactivity framework is that this Court has distinguished retroactivity of its constitutional interpretations from that of common law rules or rules issued under its superintendence authority. Commonwealth v. Dwyer, 448 Mass. 122, 147 (2006) (decision changing protocol for access to records of third party "informed by" Art. 12, but not "constitutionally compelled," so prospective only); Commonwealth v. King, 445 Mass. 217, 248 (2005) (modification of fresh complaint doctrine, as exercise

of superintendence power, prospective only); Commonwealth v. Clemente, 452 Mass. 295, 305 (2008) (*Adjutant* rule permitting consideration of victim's acts of violence not known to defendant in self-defense prospective only); Commonwealth v. Dagley, 442 Mass. 713, 721 n. 10 (2004) ("When announcing a new common-law rule, a new interpretation of a State statute, or a new rule in the exercise of our superintendence power, there is no constitutional requirement that the new rule or new interpretation be applied retroactively, and we are therefore free to determine whether it should be applied only prospectively").

Another reason *not* to apply the Supreme Court's formalist retroactivity framework is that this Court has already found the consequence of potential deportation so severe that the failure to advise a defendant concerning it, to advise a defendant of potential non-trial dispositions and to seek a more favorable negotiated plea bargain constitutes deficient representation. Commonwealth v. Marinho, 453 Mass. 115, 123-128 (2013).

Another reason *not* to apply the Supreme Court's formalist retroactivity framework is that this Court

effectively applies new rules of criminal procedure retroactively in cases of ineffective assistance when it overlooks waiver or failure to object to consider an issue not raised at trial or on direct appeal if the constitutional theory upon which it is premised was not "sufficiently developed" to afford a defendant a genuine opportunity to raise the claim. Commonwealth v. Bowler, 407 Mass. 304, 308 (1990) See also Commonwealth v. Rembiszewski, 391 Mass. 123, 126 (1984) (Exception applies when a constitutional issue is not raised at trial or on direct appeal and "the constitutional theory on which the defendant has relied was not sufficiently developed at the time of trial or direct appeal to afford the defendant a genuine opportunity to raise his claim at those junctures of the case."). This Court, notwithstanding considerations of finality, will do so despite a strong claim that the defendant's conviction is "firmly settled." Commonwealth v. Drew, 447 Mass. 635, 639 (2006)("distinguishing this case from those that were "firmly settled" is that the defendant's pro se third motion for a new trial, which raised claims of ineffective assistance of trial and appellate counsel,

was filed in 1992, only six years after his direct appeal was decided").

Another reason *not* to apply the Supreme Court's formalist retroactivity framework is that this Court has already found that these duties of counsel are simply the "application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts." Commonwealth v. Clarke, 460 Mass. 30, 43 (2011).

II. SHOULD THIS COURT EVEN CONSIDER THE TEAGUE FRAMEWORK, IT SHOULD BE REJECTED BECAUSE IT PROMOTES NEITHER FINALITY NOR PREDICTABILITY, AND OBSCURES BEHIND PROCEDURAL DISTINCTIONS BASIC DECISIONS CONCERNING THE MEANING AND SCOPE OF FUNDAMENTAL RIGHTS.

A. THE DISTINCTION BETWEEN A "NEW RULE" AND AN "OLD RULE" OF CONSTITUTIONAL CRIMINAL PROCEDURE IS UNINFORMATIVE.

Whether a rule of constitutional criminal procedure as applied in federal habeas review is "new" or "old" has become virtually impossible to predict. Compare Chaidez v. United States, 133 S.Ct. 1103, 1108 (2013) (Padilla v. Kentucky a "new rule" because it determined *whether* Strickland analysis for reasonably competent counsel applied to misadvice concerning

collateral consequences of deportation rather than *what* the advice should have been) with Commonwealth v. Clarke, 460 Mass. 30, 43-44 (2011) (Padilla v. Kentucky not a "new rule" because evolving professional norms over the past fifteen years had established that reasonably competent counsel would have determined client's immigration status in to avoid misadvice concerning collateral consequences of deportation). This Court erred, according to the U.S. Supreme Court, not by misunderstanding the substantive duty of counsel but by misunderstanding what "rule" it was applying.

As this Court has noted, "[t]he language used by the [Supreme] Court, however, is not conclusive in determining whether a rule is new." Commonwealth v. Melendez-Diaz, 460 Mass. 238, 244 (2011). A decision may announce a "new rule" despite being "controlled by," "dictated by" or "within the logical compass" of a prior decision, yet the "existence of conflicting authority" is not dispositive of the new rule inquiry. *Id.*

B. TEAGUE'S RETROACTIVITY CONSIDERATIONS, BASED UPON JUSTICE HARLAN'S CONCERNS ABOUT EXPANSION OF PROCEDURAL PROTECTIONS IN THE CRIMINAL PROCESS, ARE INCONSISTENT WITH THE VALUES OF THE DECLARATION OF RIGHTS.

The retroactivity theory behind Teague is essentially that of Justice Harlan which, he candidly admitted, "was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field." Williams v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., conc. and diss.). While he argued new constitutional rules should be applied to cases on direct review lest the Supreme Court "fis[h] one case from the stream of appellate review" and undermine the effect of stare decisis, "this Court's function in reviewing a decision allowing or disallowing a writ of habeas corpus is, and always has been, significantly different from our role in reviewing on direct appeal the validity of nonfinal criminal convictions." Id at 682.

Finality, Harlan argued, "[t]he interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision,"

particularly in the case of federal collateral attacks on state criminal court judgments,

> may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Williams v. United States, 401 U.S. 667, 683 (1971) (citing Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 463 (1963); Note, *Developments in the Law-Federal Habeas Corpus*, 83 Harv. L. Rev. 1040, 1042-1062 (1970).).

Utterly unlike the prudential considerations of comity and federalism to be weighed by the Supreme Court when *it* engages in collateral review of state criminal convictions, and the "competing interests" between finality and readjudicating convictions to be weighed by "those defining the scope of the writ," namely, *Congress*, is the position of *this Court* when it considers applying the law in effect at the time it considers a case. As Harlan conceded "[a]ssuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction tends to

assure a uniformity of ultimate treatment among prisoners," which is exactly what this Court provides as it imposes no time bar on bringing a motion for new trial. MA R. Crim. Pro 30. He acknowledged it "provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests," just as does this Court's general superintendence power, MA. Gen. L. Ch. 211, § 3, when petitioners 'demonstrate both a substantial claim of violation of [his or her] substantive rights and error that cannot be remedied under the ordinary review process.' In re Birchall, 454 Mass. 837, 846, 913 N.E.2d 799, 809 (2009)(overturning defendant's incarceration for civil contempt in summary process and requiring clear and convincing standard of proof, notwithstanding finding no due process violation his case and denying him habeas relief).

Justice Harlan explained that at some point, "for most cases, the time when a conviction has become final," the "rights of the parties should be considered frozen" and "[a]ny uncertainty engendered by this approach should, I think, be deemed part of the risks of life," United States v. Donnelly's Estate, 397 U.S. 286, 296, 90 S. Ct. 1033, 1039, 25 L.

Ed. 2d 312 (1970)(Harlan, J., concurring). This is fundamentally incompatible with Art. 12. It is incompatible with a procedural system has not, for nearly fifty years, limited when a convicted person may seek a new trial. Commonwealth v. Francis, 411 Mass. 579, 585-86 (1992) (noting legislature's repeal of G.L. c. 278, § 29, forerunner to MA R. Crim. Pro. 30, to eliminate one year filing period). It is incompatible with a system that rejects "waiver" of such claims. Id., 411 Mass. at 586 (rejecting argument that defendant waived claim to apply 1977 ruling of Commonwealth v. Ferreira, 373 Mass. 116 (1977) to his 1967 trial by waiting until 1989 to bring motion for new trial).

III. PRECLUDING RETROACTIVE APPLICATION OF DECISIONS SETTING FORTH INEFFECTIVE ASSISTANCE OF COUNSEL CONDEMNS ALL DEFENDANTS IN THE COMMONWEALTH TO THE LOWEST STANDARD OF PRACTICE.

Ineffective assistance claims being inherently case-specific, until this Court determines that a practice at issue in a defendant's case constituted ineffective assistance, it is virtually impossible to say with any certainty that a particular practice by counsel constitutes ineffective assistance. Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)

(claims require "discerning examination and appraisal of the specific circumstances of the given case"). Checklists of motions that could have been brought do not impress this Court. *Id.*, 366 Mass. at 98-99. There is no such thing as "per se" ineffective assistance of counsel. Commonwealth v. Fabian F., 83 Mass. App. Ct. 394, 398 (2013)(failure to seek de novo trial, available by right, after juvenile's adjudication as delinquent on rape charge not ineffective under totality of circumstances); Commonwealth v. Gabriel G., 83 Mass. App. Ct. 1117 (2013) (*unpub.)*.

Even brief and simple steps long routine for counsel, or that have become part of professional practice guidelines, cannot be said with certainty to be elements of reasonably competent representation until this Court accepts and decides a case (even deciding without citing a precedent) in which the failure to take these steps is held ineffective assistance. See, e.g., Commonwealth v. Alvarez, 433 Mass. 93, 101-02 (2000) (holding, without citation, that "competent counsel would *certainly investigate*" significant medical history of defendant claiming lack of criminal responsibility as its explanation and confirmation "would be of *such obvious value* to the

defense that *one would expect* counsel to explore it both *promptly and thoroughly*") (emphasis supplied).

Procedural rules aggravate this phenomenon. The "preferred method for raising a claim of ineffective assistance of counsel is through a motion for a new trial." Commonwealth v. Zinser, 446 Mass. 807, 810 (2006). (*Padilla*-based motions to withdraw pleas based on ineffective assistance must satisfy this standard since "[p]ostconviction motions to withdraw pleas are treated as motions for a new trial." Commonwealth v. DeMarco, 387 Mass. 481, 482 (1982)). "It is well established that a judge has discretion to deny a new trial motion on the affidavits." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012) (citing Commonwealth v. Stewart, 383 Mass. 253, 257 (1981)). Indeed, "the rule encourages the denial of a motion for a new trial on the papers, without hearing, where no substantial issue is raised." *Id.*

A defendant seeking a new trial based on a claim of ineffective assistance, denied on the papers, faces the almost insurmountable hurdle of demonstrating manifest injustice by the motion judge in finding no substantial issue on a question for which there are no per se rules. If such decisions do not apply

retroactively to cases on collateral review (which this Court has repeatedly stressed is the preferred procedure for presenting ineffective assistance claims), then the quality of representation to which all defendants in the Commonwealth are condemned is that of the least competent lawyer whose former client's case this Court accepts and decides first. Until that happens, no matter how deficient the representation, no matter how thoroughly it falls short of Article 12's standard, any such defendant has no remedy. Lawyers who might be concerned at a finding of having provided deficient representation can rest assured, so long as any case they handle becomes "final" before this Court accepts the case in which it holds that what competent practitioners have long done is indeed a required component of effective assistance. The Commonwealth need not worry about either the quality of representation a defendant receives (to the extent that competent representation might reduce the risk of a miscarriage of justice) or its impact on finality, so long as the conviction is "final" before this Court renders such as decision.

The Supreme Court has recently made clear that defendants are entitled to effective assistance of

counsel even in the plea bargaining process, Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012); Missouri v. Frye, 132 S.Ct. 1399 (2012), and – what this court had held in 2004 – that even after a complete trial and conviction, it is not too late to provide a remedy for deficient representation during the plea bargaining process. Lafler v. Cooper, 132 S.Ct. at 1388 (rejecting argument that "fair trial wipes clean any deficient performance by defense counsel during plea bargaining"); Commonwealth v. Mahar, 442 Mass. 11, 14-15 (2004) (fair trial after rejection of offer due to ineffective assistance of counsel "does not ameliorate the constitutional harm that occurred in the plea consideration process"). If this Court adheres to Teague's non-retroactivity rule for instances of deficient representation, an unconstitutional plea bargaining process, in which defendants have been denied their fundamental right to effective assistance of counsel Article 12, will be insulated from redress. See Commonwealth v. Hodge, 386 Mass. 165, 170 (1982) (actual conflict of interest deprives defendant of effective assistance of counsel under Art. 12 regardless of whether it adversely affected counsel's

performance even if it would not under the Sixth Amendment).

IV. THE NEW RULE/OLD RULE RETROACTIVITY ANALYSIS WORKS WITH EXTRAORDINARY UNFAIRNESS WHEN APPLIED TO RULES ABOUT EFFECTIVE ASSISTANCE OF COUNSEL THAT WERE RESOLVED BY PLEA AGREEMENTS.

When a decision sets forth what it means to provide effective assistance of counsel, in a practical sense it adds to the checklist of practices by which competent lawyers may ensure their own professional competence.[1] If that rule is "new," then all the defendants whose convictions are final and whose counsel provided them what was subsequently recognized as ineffective assistance of counsel have no recourse. Even before the statement of the rule, if the rule was "sufficiently developed" so that competent counsel would already have been on notice of it, the failure to object can waive the ground based upon the as yet-unannounced "new rule." Commonwealth v. Bowler, *supra*. But whether a rule is "new" or

[1] That this Court rejects a "checklist" argument for ineffective assistance does not mean that practitioners do not rely on such checklists. Indeed, there is a compelling argument for such practices among those who operate in complex systems. *See* ATUL GAWANDE, THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT.

"old," because of the case-specific nature of the effective assistance of counsel inquiry, it is virtually impossible to determine whether it is necessarily part of competent representation until *this Court* renders a decision relying upon a practice. Whether the rule was "sufficiently developed" so that competent counsel were already on notice of it, or not sufficiently developed so counsel cannot be required to have been "clairvoyant," the judicial statement of the rule unavoidably crystallizes understanding of a fundamental right. Whether found a new rule or an old rule, the practices of the ablest practitioners are confirmed and those of others have a clear point by which to measure themselves. None of this review regularly occurs, however, after a case is resolved through a plea agreement.

CONCLUSION

For the foregoing reasons, this Court should reject the rule of *Teague v. Lane* and hold that deprivations of effective assistance of counsel under Article 12, such as Kempess Sylvain's, may be remedied when raised in post conviction proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David M. Siegel, hereby certify, in accordance with Mass. R.A.P. 16(k), 445 Mass. 1601 (2005), that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R.A.P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R.A.P. 16(f)(reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h)(length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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April 22, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date I have today mailed two copies each of the brief, first class prepaid postage, to Cailin M. Campbell, Assistant District Attorney, Office of the District Attorney/Suffolk, One Bulfinch Place, Boston, MA 02114; John P. Zanini, Appellate Unit Chief, Office of the District Attorney/Suffolk, One Bulfinch Place, Boston, MA 02114; Laura Mannion Banwarth, 65 Main Street, Second Floor, Plymouth, MA 02360; Wendy Suzanne Wayne, Committee for Public Counsel Services, Public Defender Division, 21 McGrath Highway, Somerville, MA 02143; Christopher N. Lasch, 2255 East Evans Avenue, Suite 335, Denver, CO 80208.

_____

David Siegel

ADDENDUM

MASSACHUSETTS DECLARATION OF RIGHTS

Art. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

UNITED STATES CONSTITUTION

Amend. VI. 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 defence.