COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX COUNTY No. SJC-12405

COMMONWEALTH,
Appellee

v.

RASHAD A. SHEPHERD,
Appellant

On Appeal From a Judgment of Murder in the First Degree
Entered in the
Essex Division of the Superior Court Department

REPLY BRIEF OF THE APPELLANT RASHAD A. SHEPHERD

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The Commonwealth's responsive brief calls for rebuttal:

1. Justice requires §33E relief.

The Commonwealth concedes that Shepherd's racial disparity data is correct. C.Brief at 35. The Commonwealth acknowledges that Shepherd raises the issue that this Court's G.L. c. 278, §33E review of this case must consider the impact of the horrific racial disparity in felony murder convictions and life without parole ("LWOP") sentences on him, a Black man.[1] C.Brief at 50, n.47. Yet, the Commonwealth fails to address why the uncontroverted and shocking racial disparity data shouldn't cause this Court to reduce his conviction to second degree murder or grant him a new trial under §33E. C.Brief at 104-106.

Because of the eye-popping racial disparity data, as a matter of fairness and justice a state constitutional law equal protection analysis should result in the retroactivity of Commonwealth v. Brown, 477 Mass. 805 (2017) cert. denied, 139 S. Ct. 54 (2018). D.Brief at 31-38;

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[1]The Commonwealth uses the existence of this §33E-based fairness and justice argument as a reason for this Court to reject Shepherd's equal protection analysis. C.Brief at 49-50 & n.47.

infra pp. 18-27. However as a matter of common law, this Court may be unwilling to apply Brown retroactively under any formulation of equal protection analysis. In that situation, the discussion moves to the §33E issue of what justice requires.

This Court has previously stated that it will not entertain a Brown retroactivity argument dressed in §33E clothing. See Commonwealth v. Pfeiffer, 492 Mass. 440, 455 (2023); Commonwealth v. Cheng Sun, 490 Mass. 196, 224-225 (2022).

But Mr. Shepherd's §33E justice argument is not dependent upon Brown retroactivity.

To illustrate this point, let's assume a world where this Court never decided Brown and proof of constructive malice instead of actual malice is still sufficient for a conviction of first degree felony murder. Now, this Court learns for the first time that this historical felony murder doctrine has unquestionably, shockingly and overwhelmingly been used to impose death-by-incarceration on Black, Hispanic and Asian people. Under these circumstances, **justice requires** this Court to answer the question: is it right and just to imprison Shepherd – a

Black man – for a sentence of death-by-incarceration on proof of constructive malice felony murder?

This Court's answer should be "no".

1.1. This Court must address this horrific racial disparity.

Section 33E states that in a capital case the Court may "because of newly discovered evidence, *or for any other reason that justice may require*" either order a new trial or direct a lowered verdict. G.L. c. 278, §33E (emphasis added). This shocking racial disparity which impacted Shepherd as a Black man is a "reason" required by "justice" for this Court to give him §33E relief.

1.2. This Court shouldn't use old reasoning to deal with newly available facts.

The Commonwealth accepts – as should this Court – the data presented for the first time here proving that the historical felony murder rule produced an extreme and shocking racial disparity here in Massachusetts. C.Brief at 35. It appears from this data that prosecutors sought and obtained **easier-to-get felony murder convictions** primarily against Black and other non-White defendants.

Racial disparities in prosecutors' use of discretion in who to charge, what pleas to offer and how to try those cases is a primary

cause of the overwhelming disparity in felony murder convictions suffered by Black people and people of color. See Nazgol Ghandnoosh, Felony Murder: An On-Ramp for Extreme Sentencing, The Sentencing Project (March 2022) at 6, 21 (R.II:541, 556). Felony murder convictions have been imposed on a racially disparate basis "everywhere anyone has looked." Binder & Yankah, Police Killings as Felony Murder, 17 Harv. L. & Pol'y Rev. 157, 207-208 (2022)(reviewing data from Minnesota, Cook County Illinois, Pennsylvania and Colorado). One reason for this extreme racial disparity may be the availability to prosecutors of other offenses for charging unintended homicides, but these charging considerations seem to be exercised largely in favor of White defendants. See id. at 225-226.

In the past this Court has reasoned that if a prosecutor knew she had to prove actual malice (harder) instead of constructive malice (easier), the prosecutor may have sought to prosecute on a lesser or different offense. See Commonwealth v. Pfeiffer, 492 Mass. at 453 *quoting* Commonwealth v. Brown, 477 Mass. at 834 (a "felony-murder case might have been tried very differently if the prosecutor had known that liability for murder would need to rest on proof of actual malice.

For instance, a prosecutor might have asked for an involuntary manslaughter instruction if he or she had known that the jury could not rest a finding of murder on felony-murder liability."). This "unfair to the prosecution" reasoning is the primary basis upon which this Court has rejected previous arguments urging Brown retroactivity – **which, again, isn't the §33E issue here**.

But this Court didn't consider the horrific racial disparity of Massachusetts historical felony murder convictions in any of those prior cases. See Commonwealth v. Pfeiffer, 492 Mass. at 453-455; C.Brief at 38 (collecting prior cases). This Court now knows about the uncontroverted racial disparity data on felony murder convictions versus malice murder convictions. D.Brief at 24-30; R.II:188-191.

If this Court continues to use "unfair to the prosecution" reasoning to rationalize applying historical felony murder to Shepherd, this now looks like: "if prosecutors had known not to pursue **easier-to-get felony murder convictions against overwhelmingly Black and other non-White people**, they would have tried the cases very differently". Post-racial-disparity data, this "unfair to the prosecution" reasoning has the look-and-feel of excusing the race-based prosecutorial

discretion that pervaded the process of who to charge and how to prosecute them that indisputably resulted in over **82%** of historical felony murder convictions being suffered by Black and other non-White people.

Recent research suggests that the conscious or unconscious racial biases of all decision-makers in the criminal justice system – police, prosecutors and defense counsel, judges and jurors – when combined with the lowered burden of proof for historical felony murder drives the horrific racial disparity data presented here. See Cohen, Levinson & Hioki, Racial Bias, Accomplice Liability, and The Felony Murder Rule: A National Empirical Study, (February 6, 2023) Denver Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=4411658, at 47-48. This situation may make it easier to convict Black and Hispanic defendants of felony murder because they are readily assessed as group members, not individually as are White defendants. See id. at 43-44, 47-48.

Its time to re-think.

1.3. This Court should reduce Mr. Shepherd's conviction.

The §33E touchstone is to do justice. Second degree murder or a new trial, which would allow Shepherd the possibility of parole and/or unbiased prosecutorial discretion, is justice because:

- The jury acquitted Shepherd of home invasion. (R.I:29).
- The jury acquitted Shepherd of armed assault with intent to rob. (R.I:30).
- The jury rejected a first degree felony murder predicate offense of attempted armed robbery. (R.I:28).

Although the Commonwealth's trial theory was that Shepherd was the shooter, C.Brief at 104, the jury didn't convict him of having a gun or shooting anybody. The Commonwealth's legal argument that the verdict was not "out of proportion to his culpability" is weak. C.Brief at 106 citing Commonwealth v. Selby, 426 Mass. 168 (1997) (Selby convicted of armed assault with intent to murder as well as deliberately premeditated murder). The Commonwealth's factual argument that Shepherd even carried a gun is based on a video which simply doesn't have a gun in it, C.Brief at 105 citing to Exh 81, and an almost exclusive reliance on Jones's testimony. C.Brief at 105-106.

Here the Commonwealth barely squeaked out a first degree felony murder conviction on the lowest possible predicate – attempted unarmed robbery. The Commonwealth's free pass on the entire issue of malice courtesy of the historical felony murder rule was outcome-determinative. A lesser offense, such as second degree murder or involuntary manslaughter, had it been charged or had the jury been instructed on it, would have yielded a more proportionate punishment for the criminal conduct that the jury found Shepherd committed. LWOP is a disproportionate sentence for Shepherd on the facts of this case.

How did we get here?

Because the Commonwealth made a "deal with the devil" in the person of Monique Jones in order to proceed against Shepherd on historical felony murder. The parties agree that Jones was an "unconvincing and credulity-straining" witness. C.Brief at 99, n.96. She told the jury an incredible story in exchange for a sweetheart deal of a 5-7 year prison sentence. (T3:68). In fact, there was trial evidence that Jones shot the decedent herself. (T6:96, 99-101). She was no stranger to weapons: police found a gun and drugs in Jones's apartment

the month prior to this incident. (R.I:317, 554). After being released from prison, in November 2021 Jones was arrested for possession of a high-capacity, defaced-serial number handgun equipped with an illegal suppressor barrel and fully loaded with hollow-point bullets. (R.II:254-255).

Jones's testimony aside, the Commonwealth's remaining evidence against Shepherd was the surveillance video showing Shepherd together with Jones and Tyler at a restaurant earlier in the evening, surveillance video showing Shepherd together with Tyler near the decedent's home shortly before the shooting (in which no gun appears), ballistics evidence tending to show that a shot was fired from a doorway in the decedent's apartment, and cellphone evidence showing Shepherd's calls to both Tyler and Jones before and after the likely time of the shooting. C.Brief at 20, 22, 104-105; Exh.81. In other words: likely presence at the scene and association with the people – Tyler and Jones – who, according to their own cellphone records, C.Brief at 18, 21-22, were the planners of this tragic situation. C.Brief at 71 n.69 ("the true principal of the joint venture to commit these crimes, was Tyler, and not the defendant."). On this evidence if the

prosecutor had needed to prove Shepherd's malice at this 2016 trial, that would have been a much harder row to hoe than was proving historical felony murder.

So, let's swing back to the shocking racial disparity in felony murder convictions and relate that incontrovertible fact to this case. Could the case against Shepherd have been prosecuted a number of different ways that wouldn't have resulted in death-by-incarceration?

Absolutely.

Why wasn't it?

Because the prosecution chose not to exercise their wide discretion.

Why didn't the prosecution exercise their wide discretion?

The racial disparity data presented here suggests that prosecutors in this Commonwealth – and "everywhere anyone has looked", see Binder, supra at 208 – appear not to exercise their discretion to refrain from prosecuting Black and other non-White people for historical felony murder. Had Shepherd been White, the data suggests he would have been prosecuted differently and in a way less likely to result in a death-by-incarceration sentence.

The felony murder racial disparity data presented here is shocking and horrific. We didn't get to an 82% Non-White/18% White felony murder conviction rate by accident. This is not a mistake by any one person; this is systemic racism in action. See Commonwealth v. Long, 485 Mass. 711, 740 (2020)(Budd, J. concurring); Pena-Rodriguez v. Colorado, 580 U.S. 206, 221 (2017)(urging an imperative "to purge racial prejudice from the administration of justice..."); Buck v. Davis, 580 U.S. 100, 125 (2017)("'it is inappropriate to allow race to be considered as a factor in our criminal justice system'...").

In short, is this first degree felony murder conviction and death-by-incarceration sentence justice for Shepherd?

No.

Justice for Shepherd requires this Court to act on its promise issued in 2020 to "look afresh" at the criminal justice system under its authority in order to "root out any conscious and unconscious bias". See Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020).

Justice requires this Court to reduce Shepherd's conviction or grant him a new trial.

2. This Court should reject the Commonwealth's arguments against disparate impact-based equal protection.

The pivotal big-picture issue for this Court to resolve is whether in this case it should recognize horrifically racially disparate impact as a basis for state constitutional equal protection relief. With this focus, Shepherd responds to the Commonwealth's arguments as follows.

2.1. Horrific disparate impact should be the state constitutional law equal protection standard.

Shepherd asks this Court to find that the egregious and extreme disparate impact of historical felony murder convictions and LWOP sentences on Black, Hispanic, Asian and other non-White people violates state constitutional guarantees of equal protection.[2] D.Brief at

[2]The Commonwealth argues that there is no basis for grouping Black, Hispanic and Asian people together for purposes of an equal protection analysis. C.Brief at 34, n.39. However all of the Commonwealth's case citations concern racial discrimination in peremptory strikes. When the focus is on assessing a situation which affects people of color as a group, instead of a situation where the focus is assessing racial discrimination against individual jurors, this Court and the Appeals Court have accepted "non-white", "minorities" and "people of color" as a cognizable protected class. See Smith v. Commonwealth, 420 Mass. 291, 298 (1995) (finding "nonwhites" a cognizable art. 1 group for the purposes of art. 12 fair cross section challenge); Commonwealth v. Alves, 96 Mass. App. Ct. 540, 547 (2019), rev. denied, 484 Mass. 1103 (2020) (reversing for-cause exclusion of jurors "of color" in fair cross section challenge). Such aggregation makes sense here, where it makes no sense in the context of assessing racial discrimination in individual peremptory strikes.

31-38. The Commonwealth argues this Court should continue to require a showing of intentional discrimination even in cases of horrific racial disparity because (1) otherwise the floodgates would open and every new rule would have a disparate racial impact and thus be constitutionally required to be retroactive, C.Brief at 45-48, 51; and (2) the horrific racial disparity of persons suffering historical felony murder convictions and LWOP sentences has nothing to do with the constitutionally protected fundamental rights or liberty interests of those affected. C.Brief at 48-49.

Neither reason is true.

The Commonwealth posits that recognizing disparate impact-based equal protection will inevitably result in compelled retroactive application of all new rules because of the over-representation of Black people and/or people of color generally in the criminal justice system and prison inmate population. C.Brief at 47. But this Court can integrate the concept of disparate impact into state constitutional equal protection by expanding the definition of "intentional discrimination" to include only the sort of extreme racial disparity proven here, which could not have happened absent some level of conscious or unconscious

bias. This Court has previously adopted such a data-oriented approach in its equal protection analysis of discriminatory traffic stops. See Commonwealth v. Long, 485 Mass. at 719. In this way, reasoned and intellectually honest distinctions can be made between the horrific racial disparity in historical felony murder convictions and LWOP sentences, and other future changes to the criminal law that are unlikely to reach similarly dizzying levels of racial disparity.

The Commonwealth asserts that a refusal by this Court to redress this issue does not burden any fundamental rights or liberty interests. C.Brief at 48-49. Shepherd, a Black man, has been disparately impacted by the historical felony murder rule and sentenced to death-by-incarceration. The fundamental right significantly interfered with by this Court's application of the historical felony murder rule to Shepherd is his right to liberty. See Chapman, Petitioner, 482 Mass. 293, 298 (2019). There can be no greater harm to him than that.

Further, the Commonwealth's citation to Commonwealth v. Rossetti, 489 Mass. 589, 621 (2022) (Budd C.J., concurring) unfairly characterizes this Court as one which, absent a showing of "particularized victimization of racial injustice", would never consider

"remediation of damage caused by historical racial injustice". C.Brief at 49-50. In Rossetti, Chief Justice Budd wrote that the Court was compelled to faithfully effectuate "unwise and unjust" legislative intent even when mandatory minimum sentences had unduly harsh consequences on "Black and brown folks". See Commonwealth v. Rossetti, 489 Mass. at 621. This Court is not similarly constrained here. It can reconsider its common law conclusions when confronted with the compelling data proving the egregiously racially disparate impact of its prior decision-making. This Court will certainly view this question in light of its commitment to racial justice. See id. at 622 (Wendlandt, J., dissenting).

2.2. Temporal disparity isn't relevant.

The Commonwealth argues that temporally disparate classes of people are not similarly situated for purposes of equal protection. C.Brief at 41-42, 48. But the argument here is **not** that those persons tried before and after September 2017 are the "temporal" classes of persons that should be treated the same. The argument here is that leaving in place historical felony murder convictions and LWOP sentences has a grotesquely disparate impact on persons of color, and

on Black people in particular. The cases cited by the Commonwealth for its "temporal" argument where this Court ruled it was permissible to treat different classes differently after a change in the law are inapposite because such cases didn't involve disparate racial impact. Cf. Commonwealth v. Freeman, 472 Mass. 503, 506 (2015)(temporal classification by date of arraignment, no issue of racial disparity); Commonwealth v. Purdy, 408 Mass. 681, 683-684 (1990)(temporal classification by date of statutory amendment, no issue of racial disparity); Commonwealth v. Galvin, 466 Mass. 286, 290 n.10 (2013)(same); Commonwealth v. Tate, 424 Mass. 236, 238-241 (1997)(same).

2.3. Applicability of Strict Scrutiny or Rational Basis

If this Court finds the shocking racial disparity shown here to be a sufficient basis for state constitutional equal protection relief, this Court is also likely to find that strict scrutiny is both the appropriate standard and that this standard is satisfied. There is no compelling state interest that transcends the harm caused, to justify continuing in any form the historical felony murder rule that so clearly perpetuates the systemic racism in our criminal justice system. In the unlikely

event that the rational basis standard is relevant here, the Commonwealth's justifications of punishment, deterrence, protection of the public, and affirming the expectations of victims' families, C.Brief at 51, are not legitimate public purposes transcending the harm caused to leave historical felony murder convictions and LWOP sentences unchanged.

- Punishment

The Commonwealth's interest in punishment does not justify a conviction and LWOP sentence for Shepherd and the other overwhelmingly Black, Hispanic and Asian persons convicted of historical felony murder without proof of malice. Here, the individuals serving death-by-incarceration for historical felony murder lack the core driver of culpability for an individual convicted of murder: malice. Yet, they serve the same draconian sentence as persons actually convicted of malice murder. The Commonwealth has a diminished state interest in punishing historical felony murder because of the violation of the "most fundamental principle of the criminal law – [that] criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result."

Commonwealth v. Brown, 477 Mass. at 831 (internal quotations omitted); see also Enmund v. Florida, 458 U.S. 782, 800 (1982)(internal quotations omitted)("American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,'...and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.") .

- Deterrence and protection of the public

Denying relief for persons already serving historical felony murder LWOP sentences doesn't have any deterrent effect. Any relief given by this Court here, by its terms, only affects persons already incarcerated and has absolutely no effect on any person's future conduct.

Also, the threat of death-by-incarceration can have little effect on those who did not commit malice murder. Indeed, "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." Atkins v. Virginia, 536 U.S. 304, 319 (2002)(internal quotations omitted). There is no empirical evidence that supports a deterrence theory for felony murder. See Beth

Caldwell, The Twice Diminished Culpability of Juvenile Accomplices to Felony Murder, 11 U. C. Irvine L. R. 905, 915 (2021).

Defending a historical felony murder LWOP sentence based on the rationale of "protecting the public" necessarily assumes that a person is irredeemable and must therefore "be isolated from society in order to protect the public safety." See Ewing v. California, 538 U.S. 11, 24 (2003). But there is no evidence to suggest that individuals convicted of historical felony murder require that degree of isolation from society. To the contrary, penal research has demonstrated that individuals paroled on a homicide conviction rarely commit another homicide. See Barbara Levine & Elsie Kettunen, Paroling people who committed serious crimes: What is the actual risk? at page 4 (2014) https://www.safeandjustmi.org/wp-content/uploads/2014/12/Paroling_people_who_committed_serious_crimes.pdf (accessed October 16, 2023) (finding that those paroled in Michigan on homicide offenses virtually never return to prison within three years for another homicide); J.J. Prescott et al., Understanding Violent-Crime Recidivism, 95 Notre Dame L. Rev. 1643, 1697-1698 (2020) (the vast majority - usually more

than 99% – of those convicted of homicide do not commit another homicide upon release).

The Commonwealth pointedly ignores rehabilitation. C.Brief at 51 citing Commonwealth v. Plasse, 481 Mass. 199, 205 (2019)(including rehabilitation as a goal). But a sentence that guarantees a person will die in prison ignores that goal, "makes an irrevocable judgment about that person's value and place in society," and "forswears altogether the rehabilitative ideal." Graham v. Florida, 560 U.S. 48, 74 (2010). That judgment is particularly inappropriate in the context of felony murder. The irrebuttable presumption that someone who wasn't proven to kill with malice is incapable of rehabilitation is, almost by definition, unconscionably cruel. This, combined with the racial disparities endemic to Massachusetts historical felony murder convictions, have the disparate impact of rejecting rehabilitation out-of-hand for the **82.40%** of individuals convicted of historical felony murder in Massachusetts who are people of color, and particularly for the **59.25%** of such persons who are Black.

- Expectations of families

The Commonwealth argues against modifying past felony murder convictions and LWOP sentences because this would violate the "justifiably settled expectations" of victims' families. C.Brief at 51. But, "[s]urvivors of violent crime are not of one mind regarding extreme punishment, and some have supported second look efforts." Nazgol Ghandnoosh, A Second Look at Injustice, The Sentencing Project (2021) at 8 https://www.sentencingproject.org/app/uploads/2022/10/A-Second-Look-at-Injustice.pdf. While the criminal justice system must serve survivors of crime, it must also "curb excessive terms of imprisonment that are counter-productive to public safety and are infused, to some degree, with racial bias." Id. at 15. This situation is one where the extreme systemic racial bias inherent in historical felony murder convictions and LWOP sentences must overcome any interest in finality.

3. This Court should reject the Commonwealth's downplaying of the judicial bias in this trial and order a new, fair trial.

The Commonwealth minimizes the trial judge's biased conduct of this trial as being not as bad as all that. C.Brief at 57. But it cites to an Appeals Court case which this Court reversed because, as here, it was

indeed that bad. See Commonwealth v. Sylvester, 388 Mass. 749, 750 (1983) S.C. 13 Mass. App. Ct. 360, 365 (1982).

3.1. Defense counsel's objection to the incomplete *Ciampa* instruction preserved the issue.

The Commonwealth makes factual errors in transcribing defense counsel's Ciampa objection. C.Brief at 52 n.50. The objection actually reads:

> I think that the Court on the model jury instructions might have narrowed or diminished some of the instructions to the detriment of the defense. I'm going to ask the Court first of all to re-instruct on the model jury instruction on the cooperating witness. (T7:95).

In the Model Superior Court instruction on point, the missing concept was the portion concerning the Commonwealth not knowing whether the witness was telling the truth. See Massachusetts Superior Court Criminal Practice Jury Instructions §7.8. (Add.36). This Court looks to the substance of defense counsel's objection rather than her use of specific language in determining whether the objection preserves the issue for appeal. See Commonwealth v. Depina, 456 Mass. 238, 249 n.8 (2010). Counsel clearly conveyed to the trial judge that she wanted the

complete model instruction. See Commonwealth v. Monteiro, 51 Mass. App. Ct. 552, 560 (2001)(objection at conclusion of charge requesting a more extensive model instruction held properly preserved). The Commonwealth's cases are inapposite: trial counsel neither concealed the basis for her objection nor omitted mention of the Ciampa charge altogether. Cf. Commonwealth v. Costa, 88 Mass. App. Ct. 750, 754 n.5 (2015); Commonwealth v. Keevan, 400 Mass. 557, 564 (1987).

3.2. Judge's prejudicial "lifestyle" jury instruction.

Contrary to the Commonwealth's argument, C.Brief at 55-56, the jury knew the lifestyle instruction referred to Jones because:

- This instruction occasioned an impassioned, specific and sharply worded objection from defense counsel (T7:97);
- This instruction couldn't have "necessarily included the defendant" C.Brief at 55, nor was it "protective of the defendant" C.Brief at 56, because unlike the disparagement of Jones by both defense counsel and the prosecutor, (T7:12, 50), neither of them said a word during closing argument denigrating Shepherd's "lifestyle". (T7:10-33, 33-51).

Defense counsel even contrasted Shepherd having a steady job with Jones's situation. (T7:15).

The Commonwealth also unfairly downplays the effect on the jury of the judge's lifestyle instruction. C.Brief at 56. The judge said the jury was "not here to judge someone's lifestyle". (T7:60). "Lifestyle", as noted by trial counsel, referred to Shepherd's entire trial defense which the judge prejudicially told the jury not to "judge". (T4:4-5; T7:97).

3.3. The biased questioning of witnesses, pervasive judicial grandstanding during trial and free-range jury instructions using the trial judge as an example should result in a new, fair trial.

The parties agree that this Court will apply "the rule of reason" to the judicial conduct here. See Commonwealth v. Campbell, 371 Mass. 40, 45 (1976). Although "numbers alone" of judicial questions do not control the outcome, a finding of a "partnership between the prosecution and the judge" is a factor that leads towards reversal. United States v. Fernandez, 480 F.2d 726, 736-737 (2nd Cir. 1973).

The totality of the trial judge's conduct left the impression with the jury that he was in partnership with the prosecution. D.Brief at 45-62. This wrong was not corrected by his anemic instruction which failed to warn the jury not to be influenced by anything he had said or

done. (T7:55). The Commonwealth's defense of this instruction, C.Brief at 73 citing Commonwealth v. Dias, 373 Mass. 412, 417 (1977), is inapposite because that case involved only "several inquires" by the judge to one witness, id. at 416, in contrast to the wide-ranging misconduct that occurred here. The trial judge's conduct violated the rule of reason, prejudiced Shepherd and demands reversal for a new, fair trial.

CONCLUSION

For the reasons set forth above and in Mr. Shepherd's initial brief, this Court should vacate his felony murder conviction and order a new trial, or enter a verdict of second-degree murder.

Respectfully submitted,
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By his attorney,

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Dated: October 16, 2023

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ESSEX COUNTY No. SJC-12405

COMMONWEALTH,
Appellee
v.
RASHAD A. SHEPHERD,
Appellant

CERTIFICATE OF SERVICE

The undersigned Claudia Leis Bolgen, Esquire, counsel for Rashad A. Shepherd hereby states under the pains and penalties of perjury that on this 16th day of October, 2023, through the Massachusetts Court System Odyssey File and Serve e-file internet system, I served:

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with a PDF copy of the Reply Brief of the Appellant Rashad A. Shepherd.

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CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k)

The undersigned Claudia Leis Bolgen, Esquire, hereby certifies that pursuant to Mass. R. App. P. 16(k), the attached brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to Mass. R. App. P. 13, 16, and 18-21.

I further certify that this brief was prepared in Wordperfect 2021 using 14-point "Century Schoolbook" font, and according to Wordperfect's word count tool, contains 4493 non-excluded words.

/s/ Claudia Leis Bolgen
Claudia Leis Bolgen

Addendum Table of Contents

G L. c. 278, § 33E

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

CRMJ MA-CLE 7-1

Massachusetts Continuing Legal Education, Inc.

2018
Massachusetts Superior Court Criminal Practice Jury Instructions
Chapter 7

INSTRUCTIONS REGARDING SPECIAL ISSUES: EVIDENTIARY ISSUES

Hon. Peter B. Krupp [FNa]
Massachusetts Superior Court, Boston

3rd Edition 2018

only for you to consider on the question of (explain—e.g., whether defendant was the person who committed the crime with which he or she is now charged).

I instruct you emphatically that such evidence of the defendant's alleged prior conduct may not, indeed must not, be considered by you as proof that (he/she) has a bad character, or as evidence that (he/she) has a propensity to commit the crimes that have been charged in this case. You also may not infer that if (he/she) committed the earlier acts, (he/ she) must have also committed the particular acts with which (he/she) is now charged.

Before considering whether the evidence of the defendant's alleged prior conduct tends to prove (his/her) identity as the perpetrator of the crimes with which (he/she) is now charged, you must first be satisfied that the alleged prior event(s), and the circumstances of the crime(s) here charged have such similarities as to be meaningfully distinctive. The Commonwealth must prove that there is a uniqueness of technique, a distinctiveness, or a particularly distinguishing pattern of conduct common to the current and the former incidents, that would tend to prove that the defendant was the person who committed the crimes with which (he/she) is now charged.

It is not enough if you determine from the evidence relating to the alleged earlier incident, that there is only some general, although less than unique or distinct, similarity between the two incidents. You should also consider the time interval between the alleged earlier incident and the current incident in determining what weight, if any, you may wish to give such evidence on the issue of the identity of the perpetrator of the present crimes.

If you find that the evidence of the defendant's alleged prior conduct, because of the uniqueness or distinctiveness of those acts, and the circumstances of the present crimes, does tend to prove that the defendant is the person who committed the crimes with which (he/she) is now charged, then you may consider that evidence, along with all the other evidence presented in this case, in determining whether the Commonwealth has proved the defendant guilty beyond a reasonable doubt in the present case.

Whether such evidence assists you in determining whether the Commonwealth has proved beyond a reasonable doubt that the defendant is the person who committed the crime with which (he/she) is now charged is entirely up to you.

Finally, let me emphasize to you again that under no circumstances are you to consider any evidence of the defendant's alleged prior conduct by itself as any direct proof that (he/she) committed the crimes which with (he/she) is now charged. That is not the purpose for which the evidence is offered, and it would be improper for you to consider this evidence as any evidence that the defendant has a bad character, or as any evidence that (he/she) has a propensity to commit the crimes with which (he/she) is presently charged.

§ 7.7 IMMUNIZED WITNESSES [FN37]

You heard testimony from (witness name(s)) who (was/were) granted immunity from prosecution. A grant of immunity means that the prosecutor has promised the witness that (he/she) will not be prosecuted for certain crimes in return for (his/her) testimony. [FN38] **You may take the fact that a witness was granted immunity into consideration in assessing the witness's credibility.** [FN39] **You must scrutinize the testimony of such a witness with great care and consider whether the grant of immunity influenced the witness's testimony and whether it affects your assessment of the witness's truthfulness.** [FN40] **You may also take into consideration whether a witness has been promised some benefit that may have affected (his/her) testimony.** [FN41]

A defendant cannot be convicted solely on the basis of evidence or testimony provided by a witness who has been granted immunity. The law requires some corroboration from another source on at least one element of proof essential to convict the defendant in order for immunized testimony, if you find it to be credible, to support a conviction. [FN42]

[If Witness Pled Guilty Before Testifying: **You have heard testimony that (witness's name) pled guilty to the charge(s) of (describe). You may consider (his/her) guilty plea(s) in assessing (his/her) credibility, but you are not to consider (his/ her) guilty plea(s) as evidence against the defendant in any way.** [FN43]**]**

§ 7.8 WHERE PLEA AGREEMENT CONDITIONED ON TRUTHFULNESS (ACCOMPLICE TESTIMONY)

You heard testimony from (witness name(s)), who had an agreement with the prosecution that, in exchange for (his/her) truthful testimony, the prosecution will (summarize plea agreement). [FN44]

You should examine that witness's credibility with particular care. In evaluating (his/her) credibility, along with all the other factors I have already mentioned, you may consider that agreement and any hopes that the witness may have about receiving future advantages from the Commonwealth. You must determine whether the witness's testimony has

been affected by (his/her) interest in the outcome of the case and any benefits that (he/she) has received or hopes to receive. [FN45]

You should also consider the fact that the district attorney does not know whether the witness is telling the truth. [FN46]

You must disregard any suggestion that the Commonwealth or the district attorney believes or does not believe any part of the witness's testimony. Whether the witness is truthful or not, in whole or in part, is solely for the jury to determine. [FN47]

§ 7.9 MULTIPLE INCIDENTS OR THEORIES IN ONE COUNT

§ 7.9.1 Multiple Incidents in One Count—Specific Unanimity [FN48]

The charged offense(s) of (identify count(s)) is/are alleged to have occurred "on diverse dates" [FN49] between (identify date range). In other words, defendant is charged with committing this/these offense(s) on several different occasions. As to this/these offense(s), you may find the defendant guilty only if you unanimously agree the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense on at least one specific occasion within the specified time frame. The Commonwealth does not need to pinpoint the exact date or precise occasion that the offense occurred. It is not necessary for the Commonwealth to prove, or for you all to agree, that the offense was also committed on other occasions. But you may not mix nonunanimous findings about several different incidents to come up with a general verdict of guilty. You must be unanimously agreed that the Commonwealth has proved that the defendant committed the offense on at least one (specific occasion within the specified time frame/of the specific occasions charged in the indictment or specified in the bill of particulars). [FN50]

§ 7.9.2 Multiple Theories of Culpability in One Count [FN51]

The offense of (offense) may be committed in two different ways.

[Describe different theories of culpability].

You may find the defendant guilty only if you unanimously agree that the Commonwealth has proved beyond a reasonable doubt that the defendant committed the offense in one of those two ways. Therefore, you may not find the defendant guilty unless you all agree that the Commonwealth has proved beyond a reasonable doubt that the defendant (first theory of culpability), or you all agree that the Commonwealth has proved beyond a reasonable doubt that the defendant (second theory of culpability).

In the jury room, you will have a verdict slip on which to record your verdict. The foreperson will mark the verdict slip to indicate either that you have unanimously found the defendant not guilty, or that you have unanimously found the defendant guilty because (first theory of culpability), or that you have unanimously found the defendant guilty because (indicate second theory of culpability). [FN52]

§ 7.10 FIRST COMPLAINT

In sexual assault cases we allow testimony by one person the complainant told of the alleged assault. We call this "first complaint" evidence. The complainant may have reported the alleged sexual assault to more than one person. However, our rules normally permit testimony only as to the complainant's first report. [The next witness will testify/ You have (just) heard testimony] [FN53] about [complainant's name]'s "first complaint." You may consider this evidence only for specific limited purposes: to establish the circumstances in which [complainant's name] first reported the alleged offense, and then to determine whether [complainant's name]'s statement to [first complaint witness's name] either supports or fails to support [complainant's name]'s own testimony about the crime. You may not consider this testimony as evidence that the assault in fact occurred. The purpose of this "first complaint" evidence is to assist you in your assessment of the credibility and reliability of [complainant's name]'s testimony here in court. In assessing whether this "first complaint" evidence supports or detracts from [[complainant's name]'s credibility or reliability, you may consider all the circumstances in which the first complaint was made. The length of time between the alleged crime and the report of [complainant's name] to [first complaint witness's name] is one factor you may consider in evaluating [complainant's name]'s testimony, but you may also consider that sexual assault complainants may delay reporting the crime for a variety of reasons. [FN54]

§ 7.101 Supplemental Instruction

(a) ***Where a Nonsexual Crime Is Also Being Charged***

We have had (number) (witness/witnesses) who (was/were) granted immunity from prosecution. You may take that into consideration in assessing the witness's credibility. You may also take into consideration whether a witness has been promised some benefit that may have induced (him/her) to testify.

Massachusetts Superior Court Criminal Practice Jury Instructions ch. 7, at § 7.8 (MCLE, Inc. 2d ed. 2013). An immunized witness instruction need not be given "[w]here it is unlikely that the jury were misled into accepting the veracity of the witnesses solely because of their immunization." *Commonwealth v. Fuller*, 421 Mass. 400, 413 (1995); *see also Commonwealth v. Miller*, 475 Mass. 212, 229 (2016); *Commonwealth v. Webb*, 468 Mass. 26, 31-35 (2014).

FN38. The Massachusetts immunity statute provides both "transactional" and ""use" immunity. *See* G.L. c. 233, §§ 20C-20E, 20G. If a witness testifies under only a federal grant of "use" immunity, *see* 18 U.S.C. § 6001 et seq., or under a prosecutorial agreement short of transactional immunity, *see, e.g., Commonwealth v. Brewer*, 472 Mass. 307, 313 (2015) (witness testified under agreement with the U.S. attorney), this instruction may have to be adapted accordingly.

FN39. *Commonwealth v. DePina*, 476 Mass. at 628.

FN40. Adapted from the relevant portion of the instruction found to be ""complete and comprehensive" and set out "for possible use by other judges in future cases" in the appendix to *Commonwealth v. Marrero*, 436 Mass. 488, 501, 504 (2002).

FN41. *Commonwealth v. Smiledge*, 419 Mass. 156, 161 n.1 (1994).

FN42. G.L. c. 233, § 20I; *Commonwealth v. Vacher*, 469 Mass. 425, 440 (2014). This paragraph is not required as long as "the charge as a whole" is adequate "to inform the jury of the dangers of exclusive reliance on immunized witness testimony." *Commonwealth v. DePina*, 476 Mass. at 628.

FN43. *Commonwealth v. Webb*, 468 Mass. at 34-35 (failure to instruct jury "they were not to consider the witnesses' guilty pleas to Federal charges as part of the proof against the defendant" not "an error requiring reversal"); *see United States v. Foley*, 783 F.3d 7, 17-18 (1st Cir. 2015) (and cases and instruction cited).

FN44. A cautionary instruction is also necessary where the witness has "no binding pretrial agreement," but testifies under "more amorphous arrangements" with the Commonwealth. *Commonwealth v. Davis*, 52 Mass. App. Ct. 75, 78 n.7 (2001) (witness testified "[i]n exchange for nonspecific, 'consideration' from the district attorney's office"); *see Commonwealth v. Lindsey*, 48 Mass. App. Ct. 641, 645 & n.4 (2000) (witness's "reward for 'truthful' testimony [was] left indefinite"). However, no special instruction is required where the witness does not have any agreement with the Commonwealth. *Commonwealth v. Torres*, 479 Mass. 641, 654-55 (2018) (instruction not required where complaining witness does not have cooperation agreement with government, but separately seeks statutory benefit as crime victim); *Commonwealth v. Smiley*, 431 Mass. 477, 486-87 (2000); *see Commonwealth v. Correia*, 65 Mass. App. Ct. 597, 600-04 (2006).

FN45. This paragraph is adapted from Supplemental Instruction 5 in § 2.260, *Criminal Model Jury Instructions for Use in the District Court* (MCLE, Inc. 3rd ed. 2009 & Supp. 2011, 2013, 2014, 2016, 2017, 2018). It is based on *Commonwealth v. Ciampa*, 406 Mass. 257, 266 (1989), which held that when a prosecution witness testifies under a plea agreement that is introduced into evidence and is contingent on the witness telling the truth, then the judge must charge the jury to use particular care in evaluating such testimony to dissipate the "vouching" inherent in such an agreement. *See also Commonwealth v. Burgos*, 462 Mass. 53, 74 (2012) (on review under G.L. c. 278, § 33E: "[i]t would have been preferable for the judge to give a fuller and more cautionary instruction to the jury about their evaluation of" the two witnesses who testified under cooperation agreements). For an alternate instruction, see O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions* §§ 15.02, 15.04 (Thomson West 6th ed. 2008).

FN46. This sentence is encouraged, but not required. *Commonwealth v. Roman*, 470 Mass. 85, 97-100 (2014); *see Commonwealth v. Fernandes*, 478 Mass. 725, 746 & n.17 (2018); *Commonwealth v. Meuse*, 423 Mass. 831, 832 (1999) (if

jury is aware of prosecution witness's promise to tell the truth, "the judge should warn the jury that the government does not know whether the witness is telling the truth").

FN47. Adapted from the relevant portion of the instruction found to be ""complete and comprehensive" and set out "for possible use by other judges in future cases" in the appendix to *Commonwealth v. Marrero*, 436 Mass. 488, 501, 504 (2002).

FN48. Adapted from Instruction 2.320 of the *Criminal Model Jury Instructions for Use in the District Court* (MCLE, Inc. 3rd ed. 2009 & Supp. 2011, 2013, 2014, 2016, 2017, 2018). *See* *Commonwealth v. Shea*, 467 Mass. 788, 797-98 (2014) (and cases cited); *Commonwealth v. Ramos*, 31 Mass. App. Ct. 362, 366 (1991).

FN49. Use the charging language, which may differ.

FN50. A specific unanimity instruction must be given when, in connection with a single charge, the Commonwealth presents evidence of "separate, discrete incidents, any one of which would suffice by itself to make out the crime charged." *Commonwealth v. Shea*, 467 Mass. at 798 (quoting *Commonwealth v. Santos*, 440 Mass. 281, 284-85 (2003)). The charge need not be given if "the spatial and temporal separations between acts are short, that is, where the facts show a continuing course of conduct, rather than a succession of clearly detached incidents." *Commonwealth v. Shea*, 467 Mass. at 798 (quoting *Commonwealth v. Santos*, 440 Mass. at 285) (no substantial miscarriage of justice not to give instruction where there was no objection to absence of specific unanimity instruction, and incidents occurred between aisle of courtroom and stairwell outside courtroom, and were "separated by 'probably not even a minute'"); *Commonwealth v. Thatch*, 39 Mass. App. Ct. 904, 904-05 (1995) (rescript) (instruction not required in rape case in which anal intercourse immediately followed two digital penetrations); *see also* *Commonwealth v. Wadlington*, 467 Mass. 192, 206-07 (2014) (instruction not required for armed robbery charge alleging two possible victims); *Commonwealth v. Sanchez*, 423 Mass. 591, 598-600 (1996) (instruction not required where child complainant testified to continuous pattern of abuse but was unable to isolate discrete instances).

FN51. Adapted from Instruction 2.320 of the *Criminal Model Jury Instructions for Use in the District Court* (MCLE, Inc. 3rd ed. 2009 & Supp. 2011, 2013, 2014, 2016, 2017, 2018).

FN52. In *Commonwealth v. Plunkett*, 422 Mass. 634, 640 (1996), the court stated that "in cases involving more than one theory on which the defendant may be found guilty of a crime, separate verdicts on each theory should be obtained" on the verdict slip, and the judge must, on request, instruct the jury that they must agree unanimously on the theory of culpability. *See also* *Commonwealth v. Shea*, 460 Mass. 163, 175 (2011); *Commonwealth v. Accetta*, 422 Mass. 642, 646-47 (1996). This instruction is not required where there are different theories of a defendant's liability as a principal or a joint venturer. *Commonwealth v. Santos*, 440 Mass. 281, 290 (2003), *overruled on other grounds in* *Commonwealth v. Anderson*, 461 Mass. 616, 633-34 (2012); *see also* *Commonwealth v. Arias*, 78 Mass. App. Ct. 429, 436 (2010) (no substantial miscarriage of justice where trial court did not give separate jury questions on theories of attempted battery and threatened battery to establish assault element of crime of assault by means of a dangerous weapon).

FN53. The first complaint limiting instruction "should be given to the jury contemporaneously with the first complaint testimony, and again during the final instructions." *Commonwealth v. King*, 445 Mass. 217, 248 (2005). In certain cases, the first complaint testimony may be uncertain and it may be prudent to give the first complaint instruction immediately after, instead of immediately before, the first complaint evidence is presented. When a first complaint limiting instruction is given just a little earlier in the trial (e.g., when the victim testified), it is "preferable" to give the first complaint instruction for a later witness (e.g., when the first complaint witness testifies), although it may not be reversible error to give an abbreviated version with a later witness. *See, e.g.,* *Commonwealth v. Lewis*, 91 Mass. App. Ct. 651, 663 (2017) ("although a contemporaneous [first] complaint instruction is recommended, it is 'not a strict requirement'" (citations omitted)).

