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MASSACHUSETTS
SUPREME JUDICIAL COURT

Docket No. SJC-12952

COMMONWEALTH OF MASSACHUSETTS,

v.

JOSIAH ZACHERY,
Defendant - Appellant

REVISED BRIEF FOR THE DEFENDANT ON APPEAL FROM THE SUFFOLK COUNTY SUPERIOR COURT

SUFFOLK COUNTY

JENNIFER H. O'BRIEN
O'BRIEN LAW OFFICES
630 BOSTON ROAD
BILLERICA, MA 01821
(978) 262-9880
BBO# 633004
jobrien@obrienlawoffices.org

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Issues Presented

A. Whether the motion judge's denial of the defendant's motions to suppress evidence obtained during an investigatory stop, a warrantless search of Defendant's Charlie Card, and a search of the defendant's cellphone pursuant to a search warrant, was erroneous.

B. Whether the prosecutor's arguments were improper because he mocked defense counsel and the defense theory, argued facts not in evidence, and unnecessarily played upon the jury's sympathy inviting passion and empathy for the decedent.

C. Whether the judge abused his discretion by failing to sever the defendant's case from that of the codefendant.

D. Joinder of codefendants arguments.

Statement of the Case

The defendant was indicted on charges of first degree murder in violation of *G.L. c. 265 §1* (count one),[1] assault and battery with a dangerous weapon in violation of G.L c. 265 §15A(b) (count two), and carrying a firearm without a license in violation of G.L. c. 269 §10(a) (count three) (R.1-3).[2] On November 1, 2017, a jury trial began in Suffolk Superior Court (Lauriat, J., presiding)(R.4-22). On November 30, 2017, jurors returned verdicts of guilty on all counts, with

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[1] At trial, the Commonwealth pursued the theories of deliberate premeditation and extreme atrocity or cruelty (Tr.III-27).

[2] The motion transcripts are in 10 volumes and will be referred to as "(PTM)." The trial transcripts are in 17 volumes and will be referred to as "(Tr.Vol.)." The record appendix is attached hereto and will be referred to as "(R.)." The defendant's brief will be referred to as "(Def.Br.)."

count one being guilty only of the lesser included offense of second degree murder (R.4-22). As a result, the defendant was sentenced to life with the possibility of parole after 20 years (count one), 4-5 years to be served from and after count one (count two), and 3-4 years to be served concurrently with count two (count three) (R.4-22).[3] On December 4, 2017, the defendant filed a timely notice of appeal (R.4-22). On March 15, 2019, this court entered the case.

Statement of Facts

The Commonwealth alleged that on February 11, 2015, Henley was shoveling snow with other members of a road crew, when he summonsed the defendant to shoot another individual on his crew, Kenny Lamour, who was a member of a rival gang (Tr.IV-7-8). The defendant denied the allegations against him, highlighting the lack of any identification or forensic evidence proving that he was the shooter (Tr.IV-34-39; XIII-98-120).

The Shooting

On the morning of February 10, 2015, Henley texted Jamar Cokley, a ROCA supervisor,[4] telling him he was on

[3] The defendant was tried along with his codefendant, Donte Henley, who was charged only with first degree murder as a joint venture (Tr.III-27). He was convicted of second degree murder (Tr.XVII-18).

[4] ROCA is a non-profit program for high risk youths that focuses on providing them with job training and other opportunities (Tr.IV-8; VII-37).

his way to ROCA (Tr.VI-133,140-141; X-105-107). Cokley replied, "Yo, I have the kid from TA, or Thetford Ave, he's cool, calm and collective, please keep it cool." (Tr.VI-143-144). When Henley arrived at ROCA, he joined his fellow crew members who were already in a van driven by Cokley (Tr.V-86-88,104,108,140-141,162; VI-123). Lamour was among them (Tr.V-109,141; VI-151).

The crew did not know in advance they were going to Jamaica Plain to shovel, as the location changed daily (Tr.VI-116-118). After shoveling, some ROCA members, one of whom included Lamour, decided to return to the van to warm up (Tr.V-112-113-114,127,129,131-132,147, 164-165; VI-24). Before getting inside, Kerry Charlotin gave Lamour a light for his cigarette (Tr.VI-26). They subsequently heard a loud bang and commotion outside (Tr.V-116). Everyone fled the van, hearing additional gunshots as they ran (Tr.V-117-119,166-169; VI-26-27).

Roy Wilson was shoveling with earbuds in his ears when he was interrupted by Henley who tapped him and said, "Look, why are they running?" (Tr.V-147-149). He saw crewmembers running away from the van but never heard any shots (Tr.V-147-149). Wilson and Henley walked down the hill together, and when they and the other crewmembers got back to the van, they saw Lamour laid out on the sidewalk near the back of it (Tr.V-121,150).

Cokley saw 5-6 crewmembers running away from the van (Tr.VII-9-12). He heard shots and saw a person in black on the sidewalk by his van (Tr.VII-10-11,15). When Cokley returned to the van, he saw Lamour lying on the sidewalk (Tr.VII-15-16). Lamour was bleeding from the head, his eyes were closed, and he was unresponsive (Tr.VII-16).

At approximately 10:30 a.m., Boston police officer William Louberry, who was in a police cruiser, was responding to another call when he heard 2-4 shots (Tr.IV-54-57). He observed someone 10 yards away running on the sidewalk toward him pointing a gun at him (Tr.IV-57,59). Louberry took cover underneath his steering wheel console, as he tried to put his car in park (Tr.IV-59). He then exited his cruiser and drew his gun (Tr.IV-59). When the suspect was approximately 15-20 feet away from the cruiser, he let off a round in his area, but Louberry did not return fire (Tr.IV-61,64). The suspect continued to run up the street while Louberry pursued him, providing dispatch a description of him (Tr.IV-61-62). Louberry subsequently lost sight of the suspect completely (Tr.IV-62).

Two witnesses, who were stopped in cars at a nearby traffic light, saw a man on the sidewalk shoot another man who was standing behind a white van (Tr.IV-39-43; XI-138-140). They described the shooter, who ran away, as wearing a white or gray-colored hooded

sweater/sweatshirt with a dark jacket over it (Tr.IV-44-45,50).

Another witness, Stephen Dyball, told police that the person he saw running with a gun was a 6' tall white male wearing a brown Carhart jacket and a hooded sweatshirt (Tr.VIII-156,159,165). Police never followed up with Dyball regarding this identification (Tr.VIII-159,166). Stephen Prayzner reported seeing a black male in his early 20s or under, 5'10" to 6' tall, with a medium to thin build wearing dark clothing, put a large square framed gun into the front waistband of his pants (Tr.VIII-159-160,165).

The Investigation

The shooter was described by Louberry as a young black male 18-24 years old, 6 feet tall, wearing all black with a gray hoodie or sweater (Tr.VI-62-63,97). When police first came upon Charlotin, who was running for help at Cokley's request, they noted he matched the description given over the radio of the suspect, as he was dressed in black wearing a gray oatmeal colored hoodie, was covered in snow, was gloveless, and was out of breath, which led them to believe he had been running (Tr.V-172-176,178-179,184,194; VII-16-17,63-64,98-99). Charlotin was stopped, ordered to the ground, handcuffed, and searched, but police found only a folding knife on him (Tr.V-179-180-182; VI-28-31).

Police subsequently spotted the defendant, who was a black male wearing a gray sweatshirt and black pants with fresh snow on them, 2-3 blocks away, walking on the sidewalk carrying a shovel on his shoulder, so they decided to "check him out" (Tr.VII-67,100,129-130). At the time, he was walking in a normal fashion, didn't appear interested in Charlotin's arrest, and seemed as if trying to avoid them (Tr.VII-65-66,102,138-139). Police hopped over the snowbank, instructing the defendant to show his hands and drop the shovel (Tr.VII-130). The defendant, who was dressed in sneakers with ankle socks and not wearing gloves, complied (Tr.VII-66-67,71,130-131).[5] He told police he didn't have any gloves and that he had heard gunshots but they were far away so he didn't run (Tr.VI-84; VII-134). When asked what he was doing, he said he was shoveling for the elderly for free (Tr.VII-67,131). Police never checked the veracity of his story with nearby residents (Tr.VII-145). He was pat frisked for weapons with negative results, handcuffed, and placed inside a cruiser (Tr.VII-72-73,78-79,132,145).

Michael Dorion had shoveled earlier that morning, returning his shovel to his back porch at approximately 9:15 a.m. (Tr.VII-189). Later, he walked out and noticed there was a trail from his neighbor's yard

[5] It was not uncommon for ROCA members to shovel without gloves (Tr.V-12).

through the snow and fresh footprints on his back deck (Tr.VII-195-196; VIII-141,143). His shovel was found down the street (Tr.VII-197-198,204; VII-129-149). A black jacket was found under his porch and a glove was found in a nearby bush that was believed to have been left behind by the shooter (Tr.VII-199; VIII-144-145,163,182; IX-55-58,124). With the assistance of firefighters, several photos were taken of the top of his garage; the gun used to kill Lamour was found in the snow therein (Tr.VII-206-207; VIII-138,153; IX-66-67; X-148-149,151).

Lamour, who had been wearing earbuds when he was shot, had two deep abrasions, one on his right pinky finger and one on his right forearm, consistent with graze wounds that could have been caused by the same bullet (Tr.VIII-36-37,40). He died of a gunshot wound to the right side of his head and could have been alive from a matter of seconds to minutes after being shot (Tr.VIII-40-41,47-48,50).

The defendant was interrogated at the police station (Tr.VIII-169). Police confiscated his phone and his MBTA Charlie Card (Tr.VII-84,136; VIII-74,170,173). A Charlie Card is used for MBTA transportation and the defendant's card was scanned at the request of the police (Tr.IX-120,126). Using that data, they were able to obtain MBTA video surveillance depicting the defendant's route via public transportation to the

scene of the shooting (Tr.IX-126,137-139,143-144,146,149-151,158-159).

The "Bring Backs"

There were numerous civilian witnesses at home at the time of the shooting who were called upon to participate in "bring backs," where both Charlotin and the defendant were the suspects displayed outside a police cruiser amongst police officers. None of these witnesses saw the shooting nor were they able to identify the defendant as the shooter (Tr.IV-32-33; V-185-187; VII-80-83; VIII-64,91,93).

Kathleen Russo said the shooter was dressed in black shiny clothes with a strange tall hat underneath a hoodie that seemed to have a lot of laces (Tr.V-44). He was wearing either all black or a white or light colored sweatshirt with a dark jacket over it (Tr.VI-45,66). Charlotin had similarities to the person she saw running, but he had dreadlocks and the shooter did not (Tr.VI-55,69-70; VIII-68-69). The defendant was larger than the shooter and wasn't recognizable to her at all, as he had a thinner face and was not wearing any black shiny clothes (Tr.VI-55-56).

Benjamin Spear said the shooter was slight in build, wearing a baggy dark gray hoodie that was up and a black bomber jacket (Tr.VI-79-82). He said Charlotin was taller and bigger than the shooter and had dreadlocks (Tr.VI-86). The defendant was of a similar

build; he was not wearing a black bomber jacket but the dark gray hoodie he wore was "pretty much exactly the same" (Tr.VI-87; VIII-71). Spear was not able to make a positive identification of the shooter's face nor was he able to decipher his race (Tr.VI-87,96). Instead, his identification was based upon a comparison of the two individuals, as he stated, "This guy more so than the first" (Tr.VI-95-96; VIII-72,90).

Steve Abreau described the shooter as thin, somewhat tall, and dressed in all black (Tr.VII-150-151; VIII-72). Charlotin was dressed in dark clothing akin to the person Abreau saw, but he was unable to decipher if he was the shooter (Tr.VII-169). The defendant's build was similar to the shooter, but Abreau was unable to identify the face or race of the shooter (Tr.VII-170; VIII-72). He did note that the shooter had been wearing black pants and a black top, while the defendant was wearing black pants and a gray top (Tr.VII-170).

Beth Grampetro said the shooter was wearing a black jacket and a gray hooded sweatshirt underneath a black jacket (Tr.VII-174). She described him as 5'9" or 5'10," she never saw his face and as he was running, he put a gun in his jacket pocket before disappearing into a neighbor's yard (Tr.VII-175,186). She described the defendant as being similar in build to the shooter,

and also had a hoodie, but he was not wearing a black jacket (Tr.VII-185; VIII-73).[6]

When Louberry looked at the two individuals, he said Charlotin was not the shooter (Tr.IV-85-86). He confirmed that the defendant was of similar age, height, and weight, but the shooter had been wearing a black jacket and the defendant was not (Tr.IV-72).

Forensic Evidence

Police were able to get footprint impressions left in the snow from Dorion's porch, despite the snow and the fact that they had tracked footprints of their own through the scene (Tr.VIII-161; X-21,63-66,87). The Commonwealth's expert opined that the impressions came from a Nike Air Force One sneaker (Tr.X-65-70). She was unable to clarify the size of the sneaker or individualize them to the defendant's, but opined that they were similar in size and physical design to those worn by him (Tr.X-93-97).

The firearm found on Dorion's garage had one round in the chamber; an empty magazine was found in the snow

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[6] In her ruling on the defendant's motion to suppress, Judge Ames misstated that when Grampetro saw the defendant she said, "I definitely know him, he was the one running with the gun, he had a hood like that but had a black jacket on, he had the same build." (R.99). This was inaccurate, as the testimony at the motion hearing was that Grampetro said, "I definately know the one running with the gun had a hood like that but was wearing a black jacket. He was slender like him." (M.II-28).No one identified the defendant at the scene.

(Tr.IX-71). There were no usable latent fingerprints found on the firearm, magazine, or cartridge (Tr.IX-78-81; X-126-128). Gunshot residue tests were conducted on the defendant's hands, on the glove found near the crime scene, and on the jacket found under the porch, all of which yielded negative results (Tr.X-29-31; XI-56-57,71,76). The defendant's clothing was never tested for gunshot residue; the parties stipulated that the glove was never worn by the defendant (Tr.XI-76,135). There were five fingerprints recovered from the shovel but none of them belonged to either defendant (Tr.X-132-136).

Gang Evidence

The Commonwealth called an expert witness on gang related violence who testified extensively about gang feuds and the Boston Police Department gang database, explaining its point system (Tr.V-11-15,26-42,61). Henley and the defendant were members of Franklin Hill, while Lamour was a member of Thetford Ave; these gangs feuded with one another (Tr.V-39-52).

In December 2014, Henley told his mother about safety concerns that he had at ROCA, with a rival enemy from Thetford Ave who also worked there (Tr.XI-51-56). He brought his concerns to a ROCA case worker, telling him about an incident in which a Thetford Ave gang member confronted him at ROCA, and about a Thetford Ave gang member, Ritchie Williams, who brought a gun to

ROCA in October 2014 meant for him (Tr.XI-51-56). On that occasion, Williams was pat frisked with negative results, escorted out of the building in Henley's presence, and suspended (Tr.VII-34-35,39-40; XI-158-162).

Communications between Zachery and Henley

Police searched the defendant's cellphone and found numerous text messages and calls with various individuals in the 1½ hours leading up to the shooting (Tr.XI-98-120). One of these individuals with whom the defendant communicated was Henley (Tr.XI-98). The Commonwealth alleged that the texts supported that Zachery traveled to the scene of the shooting with Henley's firearm at Henley's request, and shot Lamour after Henley told him where Lamour was shoveling and what he was wearing (Tr.XI-98-120).[7]

Prior Bad Act Evidence

Over objection, the Commonwealth introduced evidence of an unrelated shooting that occurred on September 9, 2014, where police responded to a call for shots fired in Roxbury (Tr.IX-95-97). There was video surveillance of that shooting which depicted two

[7]There were also several text messages and phone calls between the defendant and an individual only identified at trial as "Bro" (Tr.XI-99-124). Although from the text messages, it appeared that "Bro" picked up the defendant at the MBTA station, and police had photographs of the vehicle in which the parties traveled, he was inexplicably never investigated as a third party culprit or joint venturer.

individuals, one of whom was Henley, running down the street (Tr.IX-38-39;98-100). The other individual was unknown, but it was not the defendant (Tr.IX-40,41). According to the Commonwealth's ballistics expert, the firearm used in the 2014 shooting was the same as that used to kill Lamour (Tr.X-167,171-172; XII-12-21).

II. Summary of Argument

A. There were three motions to suppress that were erroneously denied (Def.Br.14-38). In each instance, the denial of such motion deprived the defendant of rights afforded him under both the United States Constitution and Article 14 of the Massachusetts Declaration or Rights (Def.Br.14-38).

B. The prosecutor made numerous improper arguments in both his opening statement and closing argument (Def.Br.38-46). Because he gratuitously invoked unnecessary passion in jurors, argued facts not in evidence, and mocked the theory of defense, a new trial is warranted (Def.Br.38-46).

C. Because the trial judge failed to sever the defendant's case from that of his codefendant, jurors were privy to prior bad act evidence that otherwise would have been inadmissible at the defendant's trial (Def.Br.46-49). The defendant was likewise prejudiced by the antagonistic defenses (Def.Br.46-49).

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D. The defendant joins the arguments of his codefendant, specifically those on pages 20-30, 33-48 of the codefendant's brief.

III. Argument

A. The motion judge's denial of the defendant's motions to suppress evidence obtained during an investigatory stop, a warrantless search of the defendant's Charlie Card, and a search of the defendant's cellphone pursuant to a search warrant, was erroneous.

The defendant filed numerous motions to suppress, all of which were denied.[8] This court must "accept the judge's subsidiary findings of fact absent clear error but conduct an independent review of his ultimate findings and conclusions of law" (citation omitted). Commonwealth v. Tremblay, 480 Mass. 645, 652 (2018). Here, the defendant challenges only the rulings of law other than that noted in Footnote 6 of this brief.

i. The motion judge erred in denying the defendant's motion to suppress evidence seized pursuant to an investigatory stop in the absence of reasonable suspicion.

An investigatory stop of an individual is forbidden by article 14 unless police have "reasonable suspicion" that such individual has committed, is committing, or is about to commit a crime." Commonwealth v. Cheek, 413 Mass. 492,494 (1992);

[8] The defendant also moved to suppress the identification, because the "bring backs were impermissibly suggestive, as well as his statements made during his police interrogation, claiming they were not voluntarily (R.4-22). He does not seek to disturb the judge's ruling on those motions.

Commonwealth v. Lyons, 409 Mass. 16,18 (1990). To be "reasonable" under this standard, the officer's suspicion must be grounded in "specific articulable facts and reasonable inferences [drawn] therefrom" rather than on a "hunch." Commonwealth v. Wren, 391 Mass. 705,707 (1984); Lyons, 409 Mass. at 19. Here, it was not.

There are significant factors to be considered in determining whether a particular investigatory stop meets constitutional measures. Commonwealth v. Doocey, 56 Mass. App. Ct. 550,555-556 (2002). An investigatory stop based on a physical description cannot be so general that it would include a large number of people in the area where the stop occurs. Commonwealth v. Depina, 456 Mass. 238, 245-246 (2010). In Cheek, the SJC determined that there could be no reasonable suspicion where the description of the suspect was a

"black male with black ¾ length good [jacket]" could have fit a large number of men in the Grove Hall section of Roxbury. Id. at 496. There, the SJC reasoned that the "officers possessed no additional physical description of the suspect that would have distinguished the defendant from another black male in the area such as the suspect's height and weight, whether he had facial hear, unique markings on his face or clothes, or other identifying characterizes. That the jacket matched was not enough to single him out. Moreover, the Commonwealth presented no evidence to establish that a ¾ length goose jacket, the sole distinctive physical characteristic of the garment, was somehow unusual or, at least, uncommon as an outer garment worn on a cold fall night." Id.

In Mock, the Appeals Court found no reasonable suspicion where the suspect was described as a black

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"black male with black ¾ length good [jacket]" could have fit a large number of men in the Grove Hall section of Roxbury. Id. at 496. There, the SJC reasoned that the "officers possessed no additional physical description of the suspect that would have distinguished the defendant from another black male in the area such as the suspect's height and weight, whether he had facial hear, unique markings on his face or clothes, or other identifying characterizes. That the jacket matched was not enough to single him out. Moreover, the Commonwealth presented no evidence to establish that a ¾ length goose jacket, the sole distinctive physical characteristic of the garment, was somehow unusual or, at least, uncommon as an outer garment worn on a cold fall night." Id.

In Mock, the Appeals Court found no reasonable suspicion where the suspect was described as a black

male carrying a bulky object under his clothing. Commonwealth v. Mock, 54 Mass. App. Ct. 276,277,282-283 (2000). In Doocey, the Appeals Court noted that the general description of a man dressed in all black would not provide distinguishing traces of sufficient particularity to allow for the identification of a suspect. Id. at 557-558. In Warren, an investigatory stop was not supported by reasonable suspicion where the description stated only that the suspects were two black males wearing dark clothing and one black male wearing a red hoodie. Commonwealth v. Warren, 475 Mass. 530, 334 (2016). In that case, the SJC reasoned that, lacking any information about facial features, hairstyles, skin tone, height, weight, or other physical characteristics, the victim's description "contribute[d] nothing to the officers' ability to distinguish the defendant from any other black male wearing dark clothes and a hoodie in Roxbury. Id. at 535.[9] In Scott, the SJC determined that the "general description of a tall, muscular, black male," even considered together with the defendant's proximity to the attacks at issue, did not amount to reasonable suspicion to conduct a threshold inquiry. Commonwealth v. Scott, 440 Mass. 642,648 (2004).

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[9] The SJC also noted that black males in Boston were disproportionately and repeatedly targeted for field interrogation observation encounters. Id. at 539.

In this case, the description was insufficiently particular to distinguish the suspect from any other black male in the area. Louberry merely described the suspect as being a 6 feet tall, black male between the ages of 18-24 wearing black pants, a black jacket, and a grey sweatshirt (M.I-90). Like the descriptions in Cheek, Mock, Scott, Doocey, and Warren, this description of a younger black male in dark clothing could have fit a large number of men in the area. A grey hoodie was no more unique than the ¾ length goose jacket in Cheek. Indeed, based on the same description, the police in this case also stopped a shorter, heavier black man with dreadlocks, who was similarly dressed in black and wearing a grey or cream colored hoodie (M.I-91).

Proximity is not enough to support reasonable suspicion where a general physical description lacks detail distinguishing the suspect from other persons in the area. In Cheek, the SJC found that

> "[a]lthough the officers properly may consider that the defendant was one-half mile from the scene of the reported stabbing, taken together with the other facts in this case, it was not enough to support a reasonable suspicion. That the defendant was walking in a residential area before midnight one-half mile from the scene of the crime does not make up for the lack of detail in the radio description, as it did not help to single him out from any other black male in the area." Id. at 496.

In Scott, the SJC found no reasonable suspicion, even though the defendant "was in the same vicinity where the attacks had occurred about two months earlier at

about the same time of night," where the suspect was described only as a tall, muscular, black male. Id. at 648.

Proximity becomes less relevant in the analysis where police lack detail concerning the direction of the perpetrator's path of flight. Warren, *supra* at 12-13. Without such detail, it is "less likely that a sighting of potential suspects c[an] be elevated beyond the level of a hunch or a speculation." Id. at 13. In Warren, the SJC found no reasonable suspicion where the stop occurred in an area that was in the opposite direction from where either of two reported paths of flight might have led. *See* Id.

In this case, Louberry said that the suspect fled toward Aldworth Street but didn't make it to the end thus police believed that he might be hiding in the backyard of a house on a side street (M.I-37). This defendant was stopped 5-6 minutes after the shooting, while walking down Centre Street two blocks away (M.I-44,56; II-11). Here, as in Cheek and Scott, that the defendant was allegedly walking in a residential area in the vicinity of the scene of the crime did not create reasonable suspicion where the description of a young black male in dark clothes did nothing to distinguish him from others in the area. As in Warren, proximity lacks force as a factor where the radioed description

of the path of flight was inconsistent with the place of the stop.

Another factor for consideration is that this crime took place at approximately 10:30 a.m., neither early morning nor late at night (M.I-44; II-11). This is important because when a crime takes place very late at night or very early in the morning, it may add to the reasonable suspicion analysis. *See* Doocey, *supra* at 558, 555-56.

In determining whether a particular investigatory stop meets constitutional measure, courts must also consider the actions of the suspect upon the initial police encounter, including evasive or unusual behavior, which includes, but is not limited to, furtive gestures. Doocey, *supra* at 556. Here, the defendant was not seen running. Instead, police originally became suspicious of him because he "was a little bit too calm walking around all those cops," and appeared disinterested despite Charlotin's arrest (M.I-46). Certainly the fact that a young black man would not want to get involved in a police matter where another young black man was being arrested would hardly qualify as suspicious or evasive. Police told the defendant to drop the shovel and he complied, enduring a pat frisk (M.I-98,101). Throughout the encounter, he never exhibited unusual, evasive, or furtive behavior.

Finally, the shooting did not occur in a high crime area. In fact, police admitted that it was a "fairly safe neighborhood" (M.I-110). In light of this, along with the other aforementioned factors, it is clear that the stop was unreasonable.

ii. **Without a warrant, and at the direction of the Boston Police Department, MBTA Police obtained both the activity on the defendant's Charlie card and MBTA surveillance still photos depicting him using it. The motion judge erred in failing to suppress all evidence obtained therefrom.**[10]

For the constitutional protections of the Fourth Amendment and art. 14, which protect individuals from unreasonable searches and seizures, to apply, "the Commonwealth's conduct must constitute a search in the constitutional sense." Commonwealth v. Almonor, SJC 12499 (April 23, 2019) at 10. *See also* Commonwealth v. Magri, 462 Mass. 360, 366 (2012). This occurs "when the government's conduct intrudes on a person's reasonable expectation of privacy." Commonwealth v. Augustine, 467 Mass. 230, 241 (2014). In United States v. Jones, 132 S.Ct. 945, 949 (2010), the Supreme Court held that the attachment of a GPS device to a defendant's vehicle constituted a search under the Fourth Amendment. In Justice Sotomayor's concurrence, she expressed serious concern about the ability of long-term GPS monitoring

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[10] The defendant filed an application to the single justice for leave to appeal the denial of this motion to suppress pursuant to Mass.R.Crim.P. 15(1)(2)(R.135-150). It was denied (R.151-152).

to generate a "precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." Id. at 955. She also added that the Fourth Amendment's goal is "to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance.'" Id. at 956 *quoting* U.S. v. Di Re, 332 U.S. 581,595 (1998).

In this case, applying the reasoning of the justices in Jones, a search in the constitutional sense occurred where: (1) the MBTA, a government entity, collected and stored the defendant's Charlie Card location information; (2) the defendant had a subjective expectation of privacy in his Charlie Card data; and (3) an individual's subjective expectation of privacy in his Charlie Card data is one that society is prepared to recognize as reasonable.

First, there was government action triggering the protections of the Fourth Amendment and article 14 where the MBTA, a government entity, collected and stored the defendant's Charlie Card info, and produced it at the request of the Boston Police Department. *See* Augustine, *supra* at 270; Commonwealth v. White, 475 Mass. 583, 588 (2016).

Second, the defendant had a subjective expectation of privacy. The use of a Charlie Card for most is not a luxury but rather a personal necessity. Those, like

the defendant, who regularly rely on public transportation in Massachusetts, but who do not use the Charlie Card and instead purchase a ticket, pay a surcharge.[11] Additionally, because minorities and persons of low income make up a significant portion of those using rapid transit and bus services in Massachusetts,[12] the Charlie Card search unjustly targets a particular class of individuals. A Charlie Card user does not take any affirmative or overt steps to communicate his physical location to the MBTA, but rather the data is conveyed to the MBTA automatically. The defendant undoubtedly had a subjective expectation of privacy in being able to move freely about the city. Like individuals who own cellphones "to communicate with others, not to share any detailed information, including [his] whereabouts, with the government, or any of their agents within law enforcement," Augustine, *supra* at 255 & n.38, the individuals who use Charlie Cards use them solely to get from one place to the other, as it may be their only means of getting around the city.

Third, the defendant's subjective expectation of privacy is one that society is prepared to recognize

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[11] *See* http://www.mbta.com/fares_and_passes/charlie/?id+5592

[12] *See* http://www.mbta.com/uploadedfiles/Documents/Focus40/Focus40RapidTransit.pdf at p. 13

as reasonable. According to the MBTA's on-line privacy policy, it retains personal information on each individual who uses a Charlie Card for 14 months and aggregate information indefinitely.[13] Without requiring the government to show probable cause or even reasonable suspicion that an individual is engaged in criminal activity is contrary to what our founding forefather's envisioned. Much like the GPS tracker in Jones, monitoring the comings and goings of individuals who use a Charlie Card impedes on an individual's reasonable expectation of privacy. Id. at 714-715 (noting that society does not reasonably expect police to be able to instantly locate individuals). Certainly individuals would reasonably expect that their everyday movements would not be tracked by the government. The Card also contains financial and personal information of individuals who pay their monthly fees using their credit cards, personal debit cards, or via an electronic withdrawal from their checking accounts. The lack of government manipulation of the Charlie Card is inconsequential because a search involves a person's *privacy* rights, not property rights thus "governmental conduct that invades reasonable expectations of privacy is ordinarily not permitted without a warrant,

[13] *See* http://www.mbta.com/customer support/privacy policy/#9.1 at paragraph 13

regardless of how such an invasion takes place." Almonor, *supra* at 22 [fn15], 9 (Lenk, J., concurring).

Undoubtedly, the search in this context was entirely for investigatory purposes and social norms do not invite police to access MBTA activity. In Florida v. Jardines, 133 S. Ct. 1409 (2013), the Supreme Court held that a dog sniff of the defendant's front porch for an investigatory purpose was a search, reasoning that while background social norms may invite visitors to a front door, these norms do not invite them there to conduct a search. Even if background social norms may have invited the MBTA to monitor Charlie Card activity, which they do not, these norms do not summon a police officer to have access to such activity to conduct a search.

There is little difference between cellphone and Charlie Card tracking. In Almonor, *supra*, the SJC found that the "ping" of the defendant's cellphone, which gave police real time GPS coordinates to the service provider constituted a search under art. 14. and thus required a warrant absent an exigency. Id. at 3-4. The Almonor Court noted that it, and the Supreme Court of the United States, "have been careful to guard against the 'power of technology to shrink the realm of guaranteed privacy' by emphasizing that privacy rights 'cannot be left at the mercy of advancing technology but rather must be preserved and protected as new

technologies are adopted as applied by law enforcement'" (quotation and citation omitted in original). Id. at 11-12 *quoting* Commonwealth v. Johnson, 481 Mass. 710,716 (2019). Kyllo v. United States, 533 U.S. 27,34,35 (2001); Commonwealth v. Connolly, 454 Mass. 808,836 (2009)(Gants, J., concurring)(noting need to "establish a constitutional jurisprudence that can adapt to changes in the technology of real-time monitoring").

Judge Ames' reason for denying this defendant's motion to suppress was twofold: (1) that the Charlie Card is distinguishable from CSLI information because after using it to gain entry to the transit system, a person is free to ride anywhere within the transit system without detection while CSLI allows police to track an individual's movement continuously; and (2) because the data the defendant seeks to suppress was transmitted to and stored by a third party, he had no expectation of privacy with respect to it (R.25-30). The judge's findings were wrong.

First, it matters not whether the tracking is sporadic or continuous because, as Justice Lenk stated in her concurring opinion in Almonor, "the very thing in which individuals hold an expectation of privacy [is their] location." Id. at 7 [fn3]. Furthermore, the judge ignores the "cumulative nature" of the information collected, as it is that which implicates

the expectation of privacy. *See* Augustine, *supra* at 253.

In United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010), the court introduced a "mosaic theory" of the Fourth Amendment, whereby searches could be analyzed as a collective sequence of steps rather than as individual steps. Id. at 562. The mosaic could count as a collective Fourth Amendment search despite that the individual steps taken in isolation did not. Id. at 566. In applying the "mosaic theory" test in Maynard to GPS surveillance of a motor vehicle, the D.C. Circuit held that surveillance of a vehicle's location over 28 days aggregated into so much surveillance that the collective sequence triggered Fourth Amendment protection. Id. at 561-562. In Jones, *supra*, five of the concurring justices endorsed some form of Maynard's mosaic theory. Id. Here, as was the case in Maynard, "[p]rolonged surveillance reveals types of information not exposed by short term surveillance, such as what a person does repeatedly…These types of information can each reveal more about a person than does any individual trip viewed in isolation. Id. at 561-561. This is true since "[t]he whole of one's movements over the course of a month is not constructively exposed to the public, because…that whole reveals far more than the individual movements it comprises. The difference is not one of degree but kind, for no single journey reveals the

habits and patterns that mark the distinction between a day in the life and a way of life." Id. at 561-562.

In Commonwealth v. Rousseau, 465 Mass. 372,381 (2013), the SJC agreed with Justice Sotomayor's conclusion in Jones that "longer term GPS monitoring" of the defendant's public movement violated the defendant's reasonable expectation of privacy, without regard to whether there was a physical trespass." Jones, *supra* at 964 (Alito, J., concurring); Id. at 955 (Sotomayor, J., concurring). The SJC, in holding that a mere passenger in a motor vehicle monitored by GPS had standing to challenge a search, reasoned that "the government's contemporaneous electronic monitoring of one's comings and goings in public places invades one's reasonable expectation of privacy," and that monitoring the passenger over a 31 day period constituted a "comprehensive record" of his movements. Id. at 382. The same holds true here as, while monitoring one swipe of the Charlie Card may not constitute a search or seizure, the "cumulative nature of the information collected [from a year's worth of swipes] implicates a privacy interest on the part of the individual who is the target of the tracking." Jones, *supra* at 955.[14]

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[14] Police's request for the defendant's card travel history was open-ended rather than limited to a particular time frame and, as a result, they received a year's worth of travel history (M.I-129-132,137-138).

Second, Judge Ames' reliance on a rigid "third party doctrine" is misplaced and contrary to both Massachusetts and federal law in the digital age. The SJC, in Augustine, noted that the 30 plus years that have passed since Miller and Smith were decided, have rendered those cases "inapposite" in the digital age Id. at 245. Other Massachusetts cases have also shied away from a strict third party doctrine, noting that art. 14 affords more substantive protections than those under the United States Constitution. *See* Commonwealth v. Cote, 407 Mass. 827,834 (1990)(SJC agreed that "under art. 14, exposure of information to another party might not compel the rejection of a claim of a reasonable expectation of privacy"); Commonwealth v. Buccella, 434 Mass. 473, 484 n.9 (2001)("[w]e did recognize that analysis of an expectation of privacy following entrustment to a third party might be different under art. 14 of the Massachusetts Declaration of Rights").

The United States Supreme Court has likewise strayed from applying a stringent third party doctrine in the modern age. *See* Bond v. United States, 529 U.S. 334, 338-339 (2000)(a law enforcement agent's squeezing of a petitioner's overhead luggage violated the Fourth Amendment, despite that passengers expect that their luggage will be handled or moved by a third party, because they would not expect the luggage to be handled

in an exploratory manner); Ferguson v. City of Charleston, 532 U.S. 67 (2001)(court deviated from the Miller line of cases with respect to the third party doctrine in considering whether the Fourth Amendment restricted a state hospital from passing on to police, urine samples of pregnant patients who tested positive for drugs); City of Ontario v. Quon, 130 S. Ct. 2619, 2624-2625 (2010)(court unanimously assumed that a pager customer retains an expectation of privacy in communications residing with the service provider).

As Justice Sotomayor stated in Jones,

> "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." Id. at 957.

Because we now live in a digital age, a strict third party doctrine analysis is inappropriate because, like CSLI data, the "cumulative nature of the information" of Charlie Card data enables the government "to track and reconstruct a person's past movements." Augustine, *supra* at 253-254.

iii. The motion judge erred in denying the defendant's motion to suppress evidence obtained from the search of the defendant's cell phone via a search warrant.

a. The four corners of the affidavit in support of the search warrant failed to establish probable cause that the phone was used prior to or during the commission of the crime, was relevant to the crime, and/or likely to produce evidence of it.

In order to establish a showing of probable cause under the requirements of the Fourth Amendment and art. 14 to obtain a search warrant for CSLI or text messages, the affidavit in support thereof must demonstrate "probable cause to believe 'that a particularly described offense has been, is being, or is about to be committed, and that the [text messages or CSLI] will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit such offense.'" Augustine, *supra* at 256, *quoting* Connolly, *supra* at 825. "Before police may search or seize any item as evidence, they must have 'a substantial basis for concluding that' the item searched or seized contains 'evidence connected to the crime' under investigation." White, *supra* 588, *quoting* Commonwealth v. Escalera, 462 Mass. 636, 642 (2012). Because the affidavit upon which this search warrant was issued was not based upon evidence, but instead upon mere conclusory allegations, it was issued in error.

In order to establish that information from a cellular telephone is likely to produce evidence of a crime, "it is not enough to rely on the ubiquitous presence of cellular telephones and text messaging in daily life, or generalities that friends or coventurers often use cellular telephone to communicate."

Commonwealth v. Jordan, 91 Mass. App. Ct. 743,750 (2017). *See also* White, *supra*. Here, the affidavit failed to establish probable cause for the belief that the defendant's cellphone would be relevant to the investigation but instead merely rested on the general proposition that people use cellphones to communicate.

In Jordan, *supra*, the Appeals Court upheld the order suppressing text message and contact content of Defendant's phone but reversed the order suppressing CLSI subscriber information. Id. at 754. In Jordan, the defendant's presence at and flight from the scene of a shooting on Boylston Street in Boston was confirmed by at least six witnesses, and video surveillance depicted him holding a cellphone to his ear as he walked toward his vehicle immediately after the shooting. Id. at 747. Based on those facts, the affiant believed that the cell site towers could confirm that the defendant was on Boylston Street at the time of the murder and the Appeals Court agreed. Id.

Here, there was no evidence that a cellphone was used prior to or during the commission of the crime. The Commonwealth was in the unique position of having numerous video and still frame images depicting the defendant at the MBTA station at various intervals en route to the scene of the crime, but the affidavit was completely silent about him ever using his cellphone. Moreover, although there were several eyewitnesses who

observed the suspect at various stages of the purported crime, not a single one saw him holding or using a cellphone.

This affiant sought the warrant under the guise that it would contain evidence of gang motives for committing it (R.74). Because Lamour and the defendant were from rival gangs who, by the affiant's own admissions, "are known, historically, to have a feud with each other," motive was already firmly established (R.74). There was no need to seek evidence for an additional motive, nor was there cause to believe that one would be found on the defendant's phone.

Furthermore, although there was evidence at trial that ROCA crew members may not have known the location they were assigned to shovel until the morning they appeared for work (Tr.V-110-111), there was no such information contained in the four corners of the affidavit. *See* Id. *quoting* Commonwealth v. O'Day, 440 Mass. 296,297 (2003)(The court's "inquiry 'always begins and ends with the four corners of the affidavit.'"). A blanket conclusion by the affiant, that "It is extremely likely that [the defendant] was directed or alerted to the work crew location, and extremely unlikely that he arrived there by coincidence," without any information to support that which led to this conclusion, was fatal to the search warrant (R.73). Haplessly missing was any evidence that

contradicted that the defendant either knew where ROCA crew members would be working that day from his own experience, that another individual saw the crew that morning and reported it in person to the defendant, or that the ROCA crew worked at the same location every time it snowed.

b. The four corners of the affidavit failed to establish a sufficient nexus between the alleged criminal activity and the defendant's cell phone.

Police must also establish a nexus between the defendant's phone and the commission of the crime. In this case, the only nexus between Lamour and the defendant was that they were in rival gangs and that there was another member of the defendant's gang in the ROCA crew (R.72,74). Without the defendant's phone extractions, there was zero evidence suggesting that Henley and the defendant planned or carried out the crime together. The nexus cannot be established simply because there is probable cause to believe the defendant was involved in a crime and, "if the defendant planned and committed multiple crimes with two coventureres, it was likely he did so, at least in part, using his cellular telephone, and that evidence of these communications would be found on the device." White, *supra* at 591. "If this were sufficient...it would be a rare case where probable cause to charge someone with a crime would not open the person's cellular telephone to seizure and subsequent search."

Id. *See also* California v. Riley, 134 S.Ct. 2473, 2492 (2014)(only "inexperienced or unimaginative law enforcement officers ... could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone").

Here, police stopped the defendant based upon their belief that he had committed a crime. He also happened to have a cellphone in his pocket, which police confiscated upon his arrest. The resulting search of the cellphone was entirely exploratory in nature. This is exactly the type of fishing expedition Massachusetts courts have disavowed. Commonwealth v. Broom, 474 Mass. 486, 496-497 (2016)(only connection between fatal aggravated rape and defendant's cellular phone was conclusory statement in search warrant affidavit that "cellular telephones contain multiple modes used to store vast amounts of electronic data" and that there was "probable cause to believe that the [defendant's] cell phone and its associated accounts . . . will likely contain information pertinent to this investigation.").

As the court stated in White, *supra* at 590,

> "'Information establishing that a person [may be] guilty of a crime does not necessarily constitute probable cause to search" or seize the person's cellular telephone, even where the police believe, based on their training and experience in similar cases, that the device is likely to contain relevant evidence.' (citation omitted) *quoting* Commonwealth v. Pina, 453 Mass. 438, 441 (2009). Rather, police may not seize or search his or her cellular telephone to look for evidence unless they have information establishing the existence of particularized evidence likely to be found there."

Here, they had no such information, thus the warrant was issued in error.

c. The warrant application failed to present sufficient particularity where the affidavit and warrant prescribed a general search of the entire phone, and "all stored data within" unrestricted by time frame, rather than a targeted search of certain types of communications.

Given the properties that render a smartphone distinct from closed containers in the physical world, a search of its many files must be done with special care and satisfy a more narrow and demanding standard than that applicable to physical items and places. Commonwealth v. Dorelas, 473 Mass. 496,502 (2016) *citing* Hawkins v. State, 290 Ga. 785, 786-787 (2012)(cellular telephone is "roughly analogous" to container, but large volume of information contained in cellular telephone "has substantial import as to the scope of the permitted search," which must be done with "great care and caution."). "Officers must be clear as to what it is they are seeking on the [smartphone] and conduct the search in a way that avoids searching files of types not identified in the warrant." Id. *quoting* United States v. Waiser, 275 F.3d 981,986 (10th Cir. 2001). Indeed, "a cell phone search would typically expose to the government far more than the most exhaustive search of a house." Riley v. California, 134 S.Ct. 2473, 2491 (2014).

State and federal law prohibit exploratory searches at the hands of law enforcement, requiring particularity. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). "Particularity is necessary in order to identify the place to be searched and the things to be seized; it both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance." Commonwealth v. Pope, 354 Mass. 625,630 (1968). These requirements are designed to define and limit the scope of the search and seizure, and every effort should be made to draft applications for search warrants in accordance with them. Commonwealth v. Valerio, 449 Mass. 562,567 (2007).

In this case, the warrant application failed to present sufficient particularity where it prescribed a general search of the entire phone, rather than a targeted search of certain types of communications. *See* Dorelas, 473 Mass. At 510 (Lenk, J., dissenting). The affiant merely outlined the case for probable cause against the defendant generally and averred that, according to his training and experience, people commonly use cellphones for communication. Based on this, the affiant requested a broad all-encompassing warrant to search the entirety of the phone, "all stored data within the target phone, (including: call logs,

text messages, emails, picture files, video files, contact lists, and address books)." (R.74). *See* United States v. Falon, 959 F.2d 1143,1147 (1st Cir.1992)("[I]t would require extraordinary proof to demonstrate that an individual's entire life is consumed by [the alleged criminal activity] and that all records found in the home were subject to seizure."). Furthermore, the warrant required no temporal limit, as the affiant averred that it would be "impractical and imprudent to restrict the electronic search by time frame" (R.74). *See* United States v. Winn, 79 F.Supp. 3d 904,921 (S.D. Ill.2015)("Most importantly, the warrant should have specified the relevant time frame."). "Particularity should mean more than just a general directive to the police to look until they find something…the fact that technology now enables an individual to store huge sums of information in his or her pocket 'does not make the information any less worthy of the protection for which the Founders fought.'" Dorelas at 511 *quoting* Riley, 134 S.Ct. at 2495. Here, undoubtedly police sought to search the defendant's phone until they found something of value, which is precisely what occurred. Even if there had been probable cause to support a search of a specific file or files, there was no probable cause to support a search of "all stored data within the target phone" with no temporal limitation. It essentially authorized a search of the entirety of the defendant's

phone thus the suppression of any evidence found on the phone, as well as any fruits derived therefrom, was warranted.

B. <u>The prosecutor's arguments were improper because he mocked defense counsel and the defense theory, argued facts not in evidence, and unnecessarily played upon the jury's sympathy inviting passion and empathy for the decedent</u>.

The prosecutor's arguments were riddled with improprieties. Since they were not objected to, they must be viewed under the substantial risk of a miscarriage of justice standard. <u>Commonwealth v. Grandison</u>, 433 Mass. 135, 141-142 (2001). Because the arguments were so egregious, it deprived him of the due process rights afforded him under the Fifth and Fourteenth Amendments to the Constitution and art. 12 of the Massachusetts Declaration of Rights. <u>U.S. v. Hardy</u>, 37 F.3d 753 (1st Cir.1994); <u>U.S. v. Manning</u>, 23 F.3d 570 (1st Cir.1994).

There were several improper arguments made by the prosecutor. For example, during his closing, he argued, **"Mr. Wheeler hammered on that phrase moral certainty like it's supposed to scare you, like its suppose to scare you out of decisions that jurors make in trials every day."** (Tr.XIII-121). Not only was he scoffing defense counsel, but the statement made light of the importance of jurors' obligation to be convinced of the defendant's guilt by a moral certainly before convicting him. The prosecutor later needlessly mocked

the defendant's attorney, and his theory of defense, by stating, "Now, Mr. Wheeler has very honorably represented Mr. Zachery and done what he could, but his argument amounts to let's pretend. Let's pretend there's no evidence. Let's pretend the content of those text messages isn't there. Let's pretend that the MBTA video doesn't show Josiah Zachery." (Tr.XIII-126). Not only was this an impermissible attack on the defense strategy, but it also constituted burden shifting, as it was a comment on the defendant's failure to rebut certain evidence in his closing argument. Likewise, since the lack of forensic evidence was the crux of defense counsel's argument, it improperly suggested that jurors could or should ignore it. Commonwealth v. Scesny, 472 Mass. 185, 26-27,37 [fn28] (2015)(improper for prosecutor to describe the defendant's third party culprit evidence as not material, relevant, or "real," and therefore not to be considered as evidence). Commonwealth v. McLaughlin, 431 Mass. 506 (2000)(improper for prosecutor, at a murder trial in which the defendant raised the defense of insanity, to ridicule the theory of defense); Commonwealth v. Olszewski, 401 Mass. 749, 760 (1988)(improper argument to contend that if both the law and the facts are against you, the typical strategy is to "pick on the cops"); Commonwealth v. Simmons, 20 Mass. App. Ct. 366, 371 (1985)(improper to suggest that the only time when

the defendant would attack the credibility of the Commonwealth witnesses was when there was no other defense available).

The prosecutor then twice sarcastically asked jurors whether it was true that the defendant's attorney was "really" asking them to believe that he was not the individual on video who was using the Charlie Card at the MBTA station (Tr.XIII-127,130). Never did defense counsel make such an argument.

The prosecutor also argued facts not in evidence with respect to the footprints found on the porch, this time in his opening statement. Specifically, he stated, **"Through the part of the yard that was shoveled and up onto the back porch left sneaker prints in the fresh snow on that back porch. Sneaker prints of the exact same size, make, model and tread pattern of the sneakers of Josiah Zachery was wearing."** (Tr.IV-23). At trial, the Commonwealth's expert was unable to individualize the foot impressions to the defendant's shoes (Tr.X-93). *See* Commonwealth v. Joyner, 467 Mass. 176, 188-189 (2014), *quoting* Commonwealth v. Lewis, 465 Mass. 119, 129 (2013)("In closing argument, a prosecutor may not 'misstate the evidence or refer to facts not in evidence.").

Finally, the prosecutor's opening and closing were riddled with a highly improper appeal to the jury's

compassion for the decedent. The defendant concedes that certain arguments that are otherwise unacceptable are permitted when the case involves a charge of murder by cruelty and atrocity, Commonwealth v. Barros, 425 Mass. 572,581 (1997), however, prosecutors must be mindful to limit their arguments so as to assure jurors' verdicts are made only after calm consideration of the evidence. Commonwealth v. Montez, 450 Mass. 736,749 (2008).

In his opening statement, the prosecutor stated, **"and down Kenny went in the gutter, gasping for breath. Lungs filling up with blood as well, bleeding and dying"** (Tr.IV-15). He revisited this theme in his closing argument when he argued,

> **"I'm not going to show you the pictures again of Kenny Lamour's body in the gutter, the way he died bleeding into his hoodie, lungs filling up with blood. I'm not going to show you again now during my closing the picture of the bullet hole that these two men put in Kenny Lamour's head. No, once is enough seeing that stuff unless for any reason you feel like you need to look at it again to refresh your memory, it's going to be there."** (Tr.XIII-133-143).[15]

The flippant remark, that "once is enough" to see the pictures of Lamour bleeding into his hoodie in the gutter with a bullet hole in his head served no

[15] References to Lamour dying "in the gutter" were made for dramatic effect both in the prosecutor's opening and closing on four occasions (Tr.IV-15, XIII-133,145). Lamour was shot behind a parked van, landing in the street on top of a pile of snow (Tr.VII-15-16).

legitimate purpose other than to needlessly highlight this disturbing image in order to inflame jurors.

Massachusetts Courts have on many occasions, warned that arguments aimed at the emotions and sentiments of jurors are completely inappropriate and may warrant reversal. Commonwealth v. Lewis, 81 Mass. App. Ct. 119, 126 (2012) *quoting* Commonwealth v. Santiago, 425 Mass. 491, 500 (1997). *See also* Commonwealth v. Camacho, 472 Mass. 587,608 (2015)(despite charge of murder by cruelty and atrocity, prosecutor's closing remarks overstepped the bound of appropriate rhetoric when he argued, "Think about landing face down on that dirty, beer-stained barroom floor. You are completely helpless...you're lying there bleeding, in pain, in terror...Think about the last moments of [the victim's] life, whether he lived for seconds, as the doctor told you, or lived for minutes, it was a horrible, brutal, vicious death...The pain, the suffering."). A prosecutor's duty does not confer a license for impermissible argument." Commonwealth v. Earltop, 372 Mass. 199, 205 (1977). The argument in this case was more than merely "a few passing references," *see* Commonwealth v. Wilson, 427 Mass. 336,351 (1998), "the Commonwealth appears to have dwelled gratuitously on the circumstances of the murder in order to appeal to the jury's sympathy." Camacho,

supra at 37. *See also* Santiago, *supra* at 494-495; Commonwealth v. Niemic, 472 Mass. 665 (2015).

The prosecutor ended his closing argument with an over the top appeal to sympathy for the victim and the victim's family as follows:

"And ask yourselves as to Donte Henley was he particularly indifferent to the suffering of the victim. Donte Henley standing there pretending to be just one more shocked and surprised member of the work crew, literally standing there watching as Kenny Lamour's lungs fill up with blood as he's trying to breathe and watching him die in the cold gutter. Kenny Lamour frozen in time at 21 years old. Because of these defendants, and by these defendants, he was frozen in time, as far as they were concerned, not as somebody's brother, not as somebody's son, not as somebody who like everybody else on the crew was trying to enroll in Roca to get some skills and get some opportunities. They froze him in time as the kid from TA, the kid to be punched up. The kid from Thetford Ave., from the gang. Nobody's sugar coating anybody in this case, it's part of who Kenny was. But to Josiah Zachery and Donte Henley that was the only part of Kenny Lamour's life that mattered and that's why they killed him. And that's why they killed him." (Tr.XIII-145-146).

Undoubtedly the references to Lamour as "somebody's brother" and "somebody's son," who was "frozen in time at 21 years old," were made solely to elicit empathy for Lamour and his family. *See* Commonwealth v. Worcester, 44 Mass. App. Ct. 258,263 (1998)(reversible error where prosecutor argued, "When you take a knife and you stick it into [the victim], he is in just as much pain as any of us would be, and when a young guy like [the victim], thirty years old from Boston, dies, is killed, his family, his friends, grieve as much as any of ours would"); State v. Santiago, 66 A.3d 520 (Conn. App., 2013)(reversible

error for prosecutor to ask for "justice for [victim] and his family" and argue, because of this defendant, "[t]here are sons who lost a father and there's a wife who lost a husband"). Santiago, *supra* at 494(reversible error where prosecutor repeatedly referenced the victim's age and the fact that she was pregnant at the time of her death).

While admittedly a lack of objection may give some indication of the level of prejudice, it is not entirely dispositive. Commonwealth v. Toro, 395 Mass. 354, 360 (1985). Because there was no objection, the judge gave only the standard instructions informing jurors that arguments of counsel are not evidence and that their verdicts should not be swayed by sympathy for the victim (Tr.XIII-148,154,166). This was not enough to overcome the improper argument. *See* Commonwealth v. Sevieri, 21 Mass. App. Ct. 745, 754 (1986); Commonwealth v. Hoites, 58 Mass. App. Ct. 255,259-261 (2003).[16]

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[16] The Supreme Judicial Court has consistently endorsed the practice of judges exercising discretion to intervene, *sua sponte*, to prevent and correct improper closing arguments. *See, e.g.,* Commonwealth v. Sherman, 294 Mass. 379, 391 (1936); Commonwealth v. Pettie, 363 Mass. 836, 841 (1973); Commonwealth v. Montecalvo, 367 Mass. 46, 56-57 (1975); Commonwealth v. Little, 453 Mass. 766, 777-778 (2009) (Spina, J., dissenting). Judicial intervention to prevent improper closing arguments has been described as a duty. *See* Commonwealth v. Witschi, 301 Mass. 459, 462 (1938) ("It is the duty of a judge sitting with a jury to guard against improper arguments to the jury. Whether he [or she] shall do this by stopping counsel in the course of such an argument, by instructing the jury to disregard such an argument, or by combining both

The errors most certainly went to the heart of the case rather than to collateral matters, thus jurors were incapable of purging from their consideration the incongruous arguments made by the prosecutor when assessing the evidence.[17] By purposefully arguing in such a way so as to rouse tremendous passion and empathy for the decedent in an already unsettling case, it made jurors incapable of deciding it sensibly, rationally, and based only upon the evidence introduced at trial. Commonwealth v. Vasquez, 65 Mass. App. Ct. 305, 312 (2005), *quoting* Lawless, Prosecutorial Misconduct §9.21 (3d ed. 2003), ("Arguments aimed at arousing the passions or sympathies of the jury are the paradigm example of prosecutorial misconduct during closing argument. Such arguments distract juries from their

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methods, rests largely in the discretion of the judge"). Unfortunately there was no intervention here.

[17] The Commonwealth may argue, as it often does, that because the defendant was found guilty of second degree murder, rather than first degree murder, any errors did not affect the jury's verdict. This reasoning is flawed, as it is equally plausible that but for the error, the defendant would have been found not guilty of all the charges against him. *See* Commonwealth v. Arana, 453 Mass. 214 (2009)(new trial awarded after first complaint rule violated where it was clear jury disbelieved portion of the victim's testimony, as evidenced by acquittal on certain charges, and there was a chance that without the error, jury might have disbelieved portion of second victim's testimony); Commonwealth v. Dwyer, 448 Mass. 122 (2006)(despite jury's split verdict, prejudice from erroneous introduction of prior uncharged conduct was overwhelmingly prejudicial).

true fact-finding function and are highly improper"). Berger v. United States, 295 U.S. 78, 88 (1935).

C. The judge abused his discretion by failing to sever the defendant's case from that of the codefendant.

Prior to trial, the defendant filed a motion to sever the defendant's case from that of the co-defendant, which was subsequently denied by the judge (R.4-22). During trial, defense counsel repeatedly requested that the cases be severed (Tr.V-64-72, IX-27-34,86-88,93-94; XI-19-20). The defendant contends that the judge's actions in denying his repeated requests for severance, and for a mistrial when it became clear a severance was necessary, constituted an abuse of discretion.

The defendant was prejudiced by evidence that Henley was involved in another shooting using the murder weapon in this case. Although instructions were given to jurors telling them the evidence could only be used against Henley on the issue of knowledge of or access to firearms, and that they may "not consider any evidence of this prior incident for any purpose against Mr. Zachery," because the two were tried as joint ventures, it was impossible for jurors to ignore such evidence against the defendant (Tr.IX-104-105; XI-25; XIII-60-61). There was simply no way to sanitize the prior bad act evidence from the defendant where the Commonwealth alleged that they acted in concert to kill

Lamour using a firearm that was involved in another shooting with Henley.

The failure to sever was also prejudicial because Henley's theory of the case was not a matter of "merely pursuing inconsistent trial strategies" but instead was one that was entirely antagonistic to the defendant. Henley admitted that he requested the firearm from the defendant but only because he wanted to arm and protect himself, never intending "to do anything else beyond that" (Tr.XIII-76,92).[18] The defendant never admitted it was he who brought the gun to the scene or shot Lamour, but instead focused only on the lack of identification and scientific evidence (Tr.XIII-98-120). Obviously if Henley admitted that he requested a firearm from the defendant, and that the defendant complied with his request, the defendant's identification defense became preposterous. The end result was being faced with arguing against two assistant district attorneys, who agreed the defendant was the shooter, but merely disagreed about whether Henley wanted him to kill Lamour.[19]

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[18] Although Henley's attorney was careful not to call the defendant by name in his closing, instead referring only to him as "the shooter," and to his phone as "the Zachery phone," it was clear that he was referencing the defendant (Tr.XIII-80-81,88,94).

[19] Following Henley's attorney's closing argument, defense counsel again asked the court to sever the cases noting the irreconcilable differences in defenses

A motion to sever is addressed to the sound discretion of the trial judge. Commonwealth v Collado, 42 Mass. App. Ct. 464,468 (1997). Commonwealth v. Moran, 387 Mass. 644,659 (1982). "Failure to sever a codefendant's trial constitutes an abuse of discretion when the codefendants' defenses are so antagonistic that '[t]he only realistic escape for either defendant [is] to blame the other.'" Commonwealth v. DeJesus, 71 Mass. App. Ct. 799,809 (2008) *quoting* Moran, *supra* at 659. Here, Henley contended that he merely wanted to protect himself and it was the defendant who unilaterally decided to kill Lamour. As such, severance was required. Because the defendant's theory of defense was hindered by the joinder of trials, it encumbered upon on his Constitutional rights. *See* U.S. v. Nixon, 418 US 683,709 (1974)(defendant has a Constitutional right to present his theory of defense).

Although joinder expedites administration of justice, promotes courtroom efficiency, and reduces the burden on citizens who are called as witnesses to testify, "[s]uch considerations, however, must yield at some point to the rights of the accused. That point is reached when the prejudice resulting from a joint trial is so compelling that it prevents a defendant

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and that Henley's attorney essentially threw the defendant under the bus (Tr.XIII-96-97).

from obtaining a fair trial." Moran, *supra* at 659. The effect of improper joinder here was that this defendant was prevented from presenting a viable defense and jurors found both defendants guilty as a result of contradictory defenses.

D. Joinder of Arguments

For judicial economy, the defendant hereby joins the arguments contained in the brief of his codefendant, Donte Henley, specifically those arguing error in admitting evidence of prior misconduct that connected Henley to an earlier shooting and error in admitting certain testimony of the Commonwealth's gang expert and his limiting instruction on the jury's use of the gang evidence at pages 20-30 and 33-48 of his codefendant's brief.

IV. Conclusion

WHEREFORE the defendant respectfully requests that this Honorable Court vacate the judgments against him and remand the matter for a new trial.

Respectfully submitted,
Josiah Zachery
By his attorney,

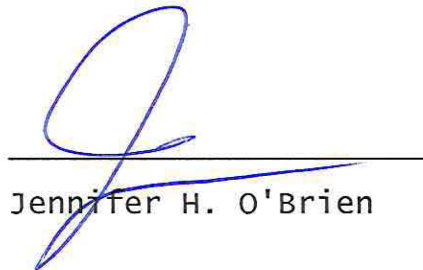
Jennifer H. O'Brien
O'BRIEN LAW OFFICES
630 Boston Road
Billerica, MA 01852
(978) 262-9880
BBO# 633004
jobrien@obrienlawoffices.org

Date: 9/12/19

CERTIFICATE OF COMPLIANCE

I, Jennifer H. O'Brien, hereby certify that the enclosed 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); Mass.R.A.P. 16(e); Mass.R.A.P. 16(f); Mass.R.A.P. 16(h); Mass.R.A.P. 18; and Mass. R.A.P. 20. In compliance with Mass.R.A.P 20(2)(A), this brief is typed using monospaced font, Lucida Console of 12 point, and does not exceed 50 pages.

Date: 9/17/19



Jennifer H. O'Brien

<u>CERTIFICATE OF SERVICE</u>

I, Jennifer H. O'Brien, attorney for the Defendant, hereby certify under the pains and penalties of perjury that I have this date caused a true copy of the defendant's brief and record appendix to be served upon the parties listed below by first class mail, postage pre-paid as follows:

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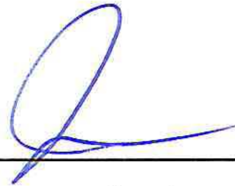

Jennifer H. O'Brien