No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019-2020

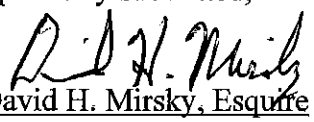
JERRY MEAS,
Petitioner,

-v.-

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respectfully submitted,



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QUESTIONS PRESENTED

1. Whether it is permissible under a criminal defendant's Sixth Amendment right of confrontation[1] for a trial judge to curtail materially relevant cross-examination based on the trial judge's own determination that the witness at issue is a credible witness.

2. Whether the federal courts below have rejected this Court's clearly established authority as to the standard for relief pursuant to 28 U.S.C. § 2254(d)(1). Williams v. Taylor, 529 U.S. 362, 389 (2000).

3. Whether the federal courts below have rejected this Court' clearly established authority as to the standard for relief pursuant to 28 U.S.C. § 2254(d)(2). Miller-El v. Dretke, 545 U.S. 231, 240 (2005), Miller-El v. Cockrell, 537 U.S. 322, 340 (2003), and Wiggins v. Smith, 539 U.S. 510, 528 (2003).

4. Whether the U.S. Court of Appeals for the First Circuit has applied an unreasonable standard for determining whether a Certificate of Appealability should issue under 28 U.S.C. § 2253(c), violating the requirements of Miller-El v. Cockrell, 537 U.S. 322, 338 (2003), Slack v. McDaniel, 529 U.S. 473, 484 (2000), and Barefoot v. Estelle, 463 U.S. 880 (1983).

5. Whether, where the state of conviction has the power to transfer a petitioner to custody in another state, it is proper for a petitioner proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to list as a respondent the Attorney General of the state of conviction. See Barry v. Bergen County Probation Dep't, 128 F.3d 152, 162-163 (3d Cir. 1997); See id., 128 F.3d at 162-163 (citing and quoting cf. Reimnitz v. State's Attorney of Cook

[1] "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965).

County, 761 F.2d 405, 409 (7th Cir. 1985)).

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Petitioner Jerry Meas respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

CITATIONS TO THE OPINIONS BELOW

The Supreme Judicial Court of Massachusetts ("SJC") affirmed Petitioner Jerry Meas's convictions and sentence in the Massachusetts Superior Court, which judgment was entered on March 12, 2014. See *Docket Entries*, Commonwealth v. Jerry Meas, Supreme Judicial Court of Massachusetts No. SJC-11043 *("SJC Docket Entries")* (Appendix Q), *at 2. (S.A.12).* The opinion of the SJC affirming Meas's convictions and sentence is reported as Commonwealth v. Meas, 467 Mass. 434, 5 N.E.3d 864, 2014 Mass. LEXIS 125 (March 12, 2014) (Appendix F). On March 26, 2014, Meas timely filed, and the SJC docketed, a *Petition for Rehearing (S.A.426-432). Petition for Rehearing*, Commonwealth v. Jerry Meas, Supreme Judicial Court of Massachusetts No. SJC-11043 (filed and docketed March 26, 2014, as paper #29) (Appendix G); Mass. R. App. P. 27(a);[2] *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12).* On April 3, 2014, the SJC denied Meas's *Petition for Rehearing.* See *Notice of Denial of Petition for Rehearing,* Commonwealth vs. Jerry Meas, Supreme Judicial Court of Massachusetts No. SJC-11043 (April 3, 2014) (Appendix H). *SJC Docket Entries* (Appendix Q), at 2. *(S.A.12).* On June 16, 2014, Meas timely filed in this Court a Petition for a Writ of Certiorari, which was denied on October 6, 2014. Meas v. Massachusetts, 574 U.S. 858 (October 6, 2014) (Appendix I); *Docket Entries*, Meas v. Massachusetts, U.S. Supreme Court No. 13-10630 (Appendix R); see Sup. Ct. R. 13(3).

[2] As effective July 1, 1991, prior to amendment of October 31, 2018 which became effective March 1, 2019.

The petitioner filed his Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Massachusetts ("U.S. District Court") on August 27, 2015. Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 1) (August 27, 2015) (Appendix K); *Docket Entries*, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO *("U.S. District Court Docket Entries")* (Appendix S), *at 2.* On December 7, 2017, U.S. Magistrate Judge Jennifer C. Boal entered her Report and Recommendations re Petition for Writ of Habeas Corpus, U.S. District Court No. 1:15-cv-13234-GAO, Meas v. Vidal, 2017 U.S. Dist. LEXIS 221734 (D. Mass. December 7, 2017) ("R&R") (Appendix E), in which the U.S. Magistrate Judge recommended that the U.S. District Judge assigned to this case deny Mr. Meas's petition for writ of habeas corpus. On December 21, 2017, the petitioner filed his Objection to Report and Recommendations re Petition for Writ of Habeas Corpus, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 31) (December 21, 2007)[3] ("Objection to R&R") (Appendix L). On August 31, 2018, U.S. District Judge George A. O'Toole entered (1) his Order Adopting Report and Recommendations, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO, 2018 U.S. Dist. LEXIS 148764 (D. Mass. August 21, 2018) ("Order Adopting R&R") (Appendix (D), denying the Petition for a Writ of Habeas Corpus and denying a Certificate of Appealability ("COA"), see 28 U.S.C. § 2253, and (2) his Order of Dismissal, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 35) (August 21, 2018) (Appendix C).[4] The petitioner filed his Notice

[3] *U.S. District Court Docket Entries* (Appendix S), *at 4.*
[4] *U.S. District Court Docket Entries* (Appendix S), *at 4.*

of Appeal from those orders on September 6, 2018. Notice of Appeal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 36) (September 6, 2018) (Appendix M).[5] On December 11, 2018, the petitioner filed in the U.S. Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 2253, his Motion and Memorandum in Support of Application for Certificate of Appealability, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 11, 2018) (Appendix N); see *Docket Entries,* Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 *("U.S. Court of Appeals for the First Circuit Docket Entries")* (Appendix T), at 4. On December 9, 2019, the First Circuit denied Meas's application for a COA. Judgment, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 9, 2019) (Appendix B);[6] on December 23, 2019, Meas timely filed, as to the denial of COA, his Petition for Panel Rehearing and Rehearing En Banc, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 23, 2019) (Appendix O), see Fed. R. App. P. 40(a)(1); Fed. R. App. P. 26(a), which petition the First Circuit denied on January 14, 2020. Order of Court, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (January 14, 2020) (Appendix A).[7]

STATEMENT OF JURISDICTION

This case was brought in the United States District Court for the District of Massachusetts ("U.S. District Court") as a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on August 27, 2015, seeking vindication of Meas's federal right of confrontation under the 6th and 14th Amendments to the U.S. Constitution as raised before the

[5] *U.S. District Court Docket Entries* (Appendix S), *at 4-5.*
[6] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*
[7] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*

Supreme Judicial Court of Massachusetts ("SJC"), which on March 12, 2014, affirmed the petitioner's convictions and sentence in the Massachusetts Superior Court on the charges of first degree murder in the death of Bonla Dy, Mass. G. L. c. 265, § 1 (indictment no. 2006-825-001) ("Count 1"); and illegal possession of a firearm, Mass. G. L. c. 269, § 10(a) (indictment no. 2006-825-002) ("Count 2"). The SJC opinion affirming Meas's convictions and sentence is reported as Commonwealth v. Meas, 467 Mass. 434, 5 N.E.3d 864, 2014 Mass. LEXIS 125 (2014) (Appendix F). Meas timely filed a *Petition for Rehearing* in the SJC on March 26, 2014. *Petition for Rehearing*, Commonwealth v. Jerry Meas, Supreme Judicial Court of Massachusetts No. SJC-11043 (filed and docketed March 26, 2014, as paper #29) (Appendix G); Mass. R. App. P. 27(a); *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12)*. See Mass. R. A. P. 27(a) (petition for rehearing must be filed within fourteen days of the rescript). Upon consideration, the SJC denied the petition for rehearing on April 3, 2014. On June 16, 2014, Mr. Meas timely filed in this Court a Petition for a Writ of Certiorari, which was denied on October 6, 2014. See Meas v. Massachusetts, 574 U.S. 858 (October 6, 2014) (Appendix I); *Docket Entries*, Meas v. Massachusetts, U.S. Supreme Court No. 13-10630 (Appendix R); Sup. Ct. R. 13(3). Meas timely filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court on August 27, 2015. See 28 U.S.C. § 2244(d). The U.S. District Court denied Mr. Meas's petition for writ of habeas corpus and denied a Certificate of Appealability ("COA") on August 31, 2018. The First Circuit denied a COA on December 9, 2019, and denied Meas's petition for hearing and rehearing on banc on January 14, 2020. Judgment, Meas v. Vidal, U.S. Court of Appeals

for the First Circuit No. 18-1856 (December 9, 2019) (Appendix B).[8] Thus, jurisdiction of this case in the First Circuit was conferred by 28 U.S.C. § 1291, and was permitted under 28 U.S.C. § 2253(c). Jurisdiction of this case in this Court is conferred by 28 U.S.C. § 1254(1) and § 2253(c). Under 28 U.S.C. § 1254 this Court has jurisdiction to review the denial of an application for a COA. Hohn v. United States, 524 U.S. 236, 241-242 (1998).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

CONSTITUTIONAL PROVISIONS

1. Amendment V of the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI of the Constitution of the United States.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to

[8] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*

have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Amendment XIV of the Constitution of the United States.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

4. Article XII of the Declaration of Rights, Constitution of Massachusetts.

Art. XII. Prosecutions Regulated; Jury Trial.

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

STATUTES

5. 28 U.S.C. § 1254(1).

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

6. 28 U.S.C. § 1291.

§ 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court...

7. 28 U.S.C. § 2244(d).

§ 2244. Finality of determination.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of---

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.

8. 28 U.S.C. § 2253.

§ 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from---

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

9. 28 U.S.C. § 2254.

(See Appendix J)

10. 28 U.S.C. § 2254(a).

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

11. 28 U.S.C. § 2254(d)(1) and (2).

§ 2254. State custody; remedies in Federal courts . . . .

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim---

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

12. Massachusetts General Laws, chapter 265, section 1.

§ 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

13. Massachusetts General Laws, chapter 269, section 10(a).

§ 10. Weapons -- Dangerous Weapons -- Unlawfully Carrying.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession ; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter on hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; . . . .

shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months or more than two and one-half years in a jail or house of correction . . . .

14. Massachusetts General Laws, chapter 265, section 13A.

§ 13A. Assault and Assault and Battery.

(a) Whoever commits and assault or an assault and battery upon another shall be punished by imprisonment for not more than 2½ years in a house of correction or by a fine of not more than $1,000.

A summons may be issued instead of a warrant for the arrest of any person upon a complaint for a violation of any provision of this subsection if in the judgment of the court or justice receiving the complaint there is reason to believe that he will appear upon a summons.

(b) Whoever commits an assault or an assault and battery:

(i) upon another and by such assault and battery causes serious bodily injury:

(ii) upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant; or

(iii) upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault or assault and battery, shall be punished by imprisonment in the state prison for not more than 5 years or in the house of correction for not more than 2½ years, or by a fine of not more than $5,000, or by both such fine and imprisonment.

(c) For the purposes of this section, "serious bodily injury" shall mean bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

15. Massachusetts General Laws, chapter 265, section 14.

§ 14. Mayhem.

Whoever, with malicious intent to maim or disfigure, cuts out or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, or cuts off or disables a limb or member, of another person, and whoever is privy to such intent, or is present and aids in the commission of such crime, or whoever, with intent to maim or disfigure, assaults another person with a dangerous weapon, substance or chemical, and by such assault disfigures, cripples or inflicts serious or permanent physical injury upon such person, and whoever is privy to such intent, or is present and aids in the commission of such crime, shall be punished by imprisonment in the state prison for not more than twenty years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

RULES

16. Rules 10(a) and 10(c), Rules of the Supreme Court of the United States.[9]

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the

[9] **("Sup. Ct. R. 10(a)" and "Sup. Ct. R. 10(c)").**

reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . . .

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. . . .

17. Rule 13(3), Rules of the Supreme Court of the United States.[10]

Rule 13. Review on Certiorari: Time for Petitioning . . . .

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment. . . .

18. Rule 26(a), Federal Rules of Appellate Procedure.[11]

Rule 26. Computing and Extending Time.

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[10] ("Sup. Ct. R. 13(3)").
[11] ("Fed. R. App. P. 26").

(a) Computing Time. The following rules apply in computing any time period specified in these rules . . . .

(1) Period Stated in Days of a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

19. Rule 40(a)

(1), Federal Rules of Appellate Procedure.[12]

Rule 40. Petition for Panel Rehearing.

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. . . .

20. Rule 27(a), Massachusetts Rules of Appellate Procedure[13]

RULE 27. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the

[12] ("Fed. R. App. P. 40(a)(1)").
[13] ("Mass. R. App. P. 27(a)").

date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. . . . **[as effective July 1, 1991, prior to amendment of October 31, 2018 which became effective March 1, 2019.]**

STATEMENT OF THE CASE[14]

On June 29, 2006, a Middlesex County grand jury returned indictments charging Petitioner Jerry Meas with first degree murder in the death of Bonla Dy, G. L. c. 265, § 1 (indictment no. 2006-825-001) ("Count 1"), illegal possession of a firearm, G. L. c. 269, § 10(a) (indictment no. 2006-825-002) ("Count 2"), and armed career felon, G. L. c. 269, §10G(c) (indictment no. 2006-825-003) ("Count 3"). *(R.A. 1-6; S.A. 88-93).* After a mistrial on November 17, 2008, Meas was tried before Fishman, J., and a jury, on December 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, and 16, 2008. *Docket Entries,* Commonwealth v. Jerry Meas, *Middlesex Superior Court No. MICR2006-00825 ("Superior Court Docket Entries")* (Appendix P), *at 4. (R A. 171; S.A. 258).* On December 15, 2008, as to Count 1, Meas was found guilty of first degree murder by deliberate premeditation, and guilty as to Count 2.[15] *(R.A. 163-166; S.A. 250-253)* On December 29, 2008, as to Count 1, Meas was sentenced to MCI-Cedar Junction for life without parole; on Count 2, to MCI-Cedar Junction for 4 to 5

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[14] "*Defendant's Record Appendix*" refers to the Record Appendix filed in the Supreme Judicial Court as an attachment to *Defendant's Brief*, and is cited as *"R.A.(page number)"*. The trial transcript of days 1 through 11 of trial is cited as "*(Tr. (volume no.)/(page no.))*", volume is the day of trial. The record of the federal habeas corpus case is set forth in the Supplemental Answer of the respondents, and is cited as *"(S.A.(page number))"*.

[15] *Superior Court Docket Entries* (Appendix P), *at 8.*

years, concurrent with Count 1. Count 3 was nol prossed.[16] *(R.A.177; S.A.264).* The petitioner filed a notice of appeal in Superior Court on December 29, 2008.[17] *(R.A.167; S.A.254).* On September 8, 2011, this case was entered in the SJC. *SJC Docket Entries* (Appendix Q), *at 1. (S.A.11).*

The SJC affirmed Petitioner Jerry Meas's convictions and sentence in the Massachusetts Superior Court, which judgment was entered on March 12, 2014. *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12).* The opinion of the SJC affirming Mr. Meas's convictions and sentence is reported as Commonwealth v. Meas, 467 Mass. 434, 5 N.E.3d 864, 2014 Mass. LEXIS 125 (March 12, 2014) (Appendix F). On March 26, 2014, the petitioner timely filed a *Petition for Rehearing (S.A.426-432)* in the SJC by fax and mail, which was docketed in the SJC on March 26, 2014. *Petition for Rehearing*, Commonwealth v. Jerry Meas, Supreme Judicial Court of Massachusetts No. SJC-11043 (filed and docketed March 26, 2014, as paper #29) (Appendix G); Mass. R. App. P. 27(a);[18] *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12).* On June 16, 2014, the petitioner timely filed in this Court a Petition for a Writ of Certiorari, which was denied on October 6, 2014. See Meas v. Massachusetts, supra, 574 U.S. 858 (Appendix I).

Mr. Meas filed the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 at issue here in the United States District Court for the District of Massachusetts on August 27, 2015. Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Meas v. Vidal,

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[16] *Superior Court Docket Entries* (Appendix P), *at 8.*
[17] *Superior Court Docket Entries* (Appendix P), *at 8.*
[18] As effective July 1, 1991, prior to amendment of October 31, 2018 which became effective March 1, 2019.

U.S. District Court for the District of Massachusetts No. 1:15-cv-13234-GAO (filed June 16, 2014) (Appendix K). On December 7, 2017, U.S. Magistrate Judge Jennifer C. Boal entered her R&R, supra, Meas v. Vidal, 2017 U.S. Dist. LEXIS 221734 (Appendix E), in which she recommended that the U.S. District Judge assigned to this case deny the instant petition for writ of habeas corpus. On December 21, 2017, the petitioner filed his Objection to R&R, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 31) (December 21, 2017) (Appendix L).[19] On August 31, 2018,U.S. District Judge George A. O'Toole entered his Order Adopting R&R, supra, Meas v. Vidal, 2018 U.S. Dist. LEXIS 148764 (Appendix D), and his Order of Dismissal, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 35) (Appendix C);[20] Meas filed his Notice of Appeal from the Order Adopting R&R, supra, and from the Order of Dismissal, supra, on September 6, 2018. Notice of Appeal, Meas v. Vidal, U.S. District Court No. 1:15-cv-13234-GAO (docket number 36) (September 16, 2018) (Appendix M).[21] On December 11, 2018, the petitioner filed in the U.S. Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 2253, his Motion and Memorandum in Support of Application for Certificate of Appealability, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 11, 2018) (Appendix N).[22] On December 9, 2019, the First Circuit denied Meas's application for a COA. Judgment, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 9, 2019) (Appendix B);[23] on December 23, 2019, Meas filed, as to

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[19] *U.S. District Court Docket Entries* (Appendix S), *at 4.*
[20] *U.S. District Court Docket Entries* (Appendix S), *at 4.*
[21] *U.S. District Court Docket Entries* (Appendix S), *at 4-5.*
[22] See *U.S. Court of Appeals for the First Circuit Docket Entries")* (Appendix T), *at 4.*
[23] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*

the denial of COA, his Petition for Panel Rehearing and Rehearing En Banc, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 23, 2019) (Appendix O), which petition the First Circuit denied on January 14, 2020. Order of Court, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (January 14, 2020) (Appendix A).[24]

Trial Evidence

Vicheth San testified: On June 13, 2006, Bonla drove Vannika Pen and Vicheth San to the 7-Eleven store in Lowell. *(Tr, Vol. 3/30-35; S.A.1729-1734).* Vicheth San saw Bonla talking to a person, a silver gun, and heard a gunshot. He did not see the face of the shooter. *(Tr. Vol. 3/44-46; S.A. 1743-1745).* The police took San and Pen to the police station, then to a place where they had guys standing outside in the road. *(Tr. Vol. 3/52-55; S.A. 1752-1755).* There the people were lined up, their backs were to San; he saw the front of them when the police told them to turn around. *(Tr. Vol. 3/67-68; S.A. 1767-1768).*

Lowell Police Sgt. Joseph Murray testified:

At about 11:00 p.m., on June 13, 2006, Murray received report of a shooting at the 7-Eleven and a vehicle stop at Queen and Branch Streets; there he observed a black Honda car with four people outside it, in the parking lot of Ramos Liquors. *(Tr. Vol. 5/4-6; S.A. 1977-1979).* There was one police car directly behind the black Honda and other cruisers in the area. *(Tr. Vol. 5/8; S.A. 1981).* At the 7-Eleven, responding officers indicated there were witnesses. Murray had officers keep these people at the scene, then arranged for them, one at a time, to be brought to the scene of the car stop to view the occupants of that car. *(Tr. Vol. 5/15; S.A. 1988).* Six people were brought to Queen and Branch for this show-up

[24] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*

identification procedure. *(Tr. Vol. 5/19). (S.A. 1992).* Of those six people, two selected individuals other than the defendant Jerry Meas as the shooter. A man named Douglas Anderson picked out Phalla Nou as the shooter. *(Tr. Vol. 6/75-76; S.A. 2160-2161).* A man named Gaddafi Henry picked out Bunnarro Seng as the shooter. (Tr. Vol. 6/76-77; *S.A. 2161-2162).* Neither Gaddafi Henry nor Douglas Anderson was brought to the station to make a full statement after the show-up. *(Tr. Vol. 6/80; S.A. 2165).* Surveillance video from the 7-Eleven that night (Exhibit 32) shows that present in the store at the time of the incident were Gaddafi Henry and Douglas Anderson. *(Tr. Vol. 6/49-51; S.A. 2134-2136).*

Missing Video Surveillance Evidence

The Commonwealth sought to introduce a disk containing images Murray had viewed at the 7-Eleven on June 13, 2006. *(Tr. Vol. 5/20-21; S.A. 1993-1994).* Meas objected on the basis that the disk was incomplete, and did not afford the view of the entire video which was no longer available and had never been made available. *(Tr. Vol. 5/21-22; S.A. 1994-1995).*

> At trial there was evidence that there were two security systems operating at the store at the time of the shooting. One system comprised surveillance cameras inside the store that digitally recorded color images. The other system recorded black and white images on a videotape from three camera views. One camera captured the front door of the store looking outside; a second camera, on the left as one faced the store, captured the gasoline pump area outside the store; a third camera, on the right as one faced the store, captured a pay telephone and an area containing vacuums outside the store. The Commonwealth introduced two videotape recordings (copies of the originals) in evidence, one showing the angle of the front of the store looking outside and the other showing the gasoline pump area. The videotape recording showing the third camera view was lost by police. Because this recording had been lost, defense counsel argued that the defendant was prejudiced because the lost third angle could have been used to cross-examine Badillo.

Commonwealth v. Meas, supra, 467 Mass. at 447. The third angle could have been used to cross-examine Badillo because "The area where Badillo asserted that the shooter came from

when the shooter went to the victim's automobile would have been in the view of the third camera." Commonwealth v. Meas, supra, 467 Mass. at 447 n. 14.

Voir Dire Testimony of Cooperating Witness Fernando Badillo Prior to his Trial Testimony

On voir dire, prosecution witness Fernando Badillo testified that he was at the 7-Eleven on June 13, 2006. Badillo had been charged in District Court in April 2006 with mayhem,[25] assault and battery with serious bodily injury resulting,[26] and assault and battery.[27] On May 25, 2007, Badillo pled guilty to those charges and as a result was placed on probation. Badillo remained on that probation and was continuing to cooperate with the D.A.'s Office and the Lowell Police. *(Tr. Vol. 7/9-11, 27-28; S.A. 2270-2272, 2288-2289).* Badillo claimed that when first questioned by the police on June 13 or 14, 2006, he was not concerned at all that he had a pending case, did not have it in his mind that it would be to his benefit to cooperate with police because he had a pending matter, was not concerned that if he did not cooperate with the police that that might in some way affect his pending case, wasn't thinking about his case at all. Badillo claimed that throughout his cooperation with the police and D.A.'s office in this case he had not had at all in mind either his pending case or the fact that he was on probation for that case. *(Tr. Vol. 7/11-13; S.A. 2272-2274).* The charge of mayhem was for biting someone's ear off, for which Badillo knew he could receive

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[25] In Massachusetts, the offense of mayhem carries a maximum penalty of 20 years of imprisonment in state prison. Mass. Gen. L. 265, § 14.

[26] In Massachusetts, the offense of assault and battery with serious bodily injury resulting carries a maximum penalty of 5 years imprisonment in state prison and a $5000 fine. Mass. Gen. L. 265, §§ 13A(b) and (c).

[27] In Massachusetts, the offense of assault and battery carries a maximum penalty of 2½ years of imprisonment in a house of correction. Mass. Gen. L. 265, § 13A(a).

a serious sentence. *(Tr. Vol. 7/15-16). (S.A. 2276-2277).* Based on the voir dire, the judge precluded Meas from cross-examining Badillo as to the pending case to show any bias or change in Badillo's account. *(Tr. Vol. 7/17-20; S.A. 2278-2281).*

Trial Testimony of Cooperating Witness Fernando Badillo

At trial, Fernando Badillo testified:

On June 13, 2006, Badillo went to the 7-Eleven between 9:30 and 10:00. A red car showed up; the guys that were in the store ran to the car; one came to the driver's side, said something, pulled a gun and opened fire. He jumped in a black Honda car. Badillo identified the petitioner as the shooter. *(Tr. Vol. 7/31-32, 35-37; S.A. 2292-2293, 2296-2298).* When the person came to the red car, he came from a place off to the left of the store,[28] where the vacuum cleaners are located. The black car might have been parked by the vacuum cleaners.[29] When the person came toward the red car, he came from the side that was the vacuum cleaner area, out by Chelmsford Street and Westford Street.[30] *(Tr. Vol. 7/52-*

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[28] When Badillo here refers to the left of the store at this point, he means the left as you face out the front door. Badillo was inside the store next to the cash register at this time. *(Tr. Vol. 7/37; S.A. 2298).*

[29] The petitioner renewed his motion to preclude admission of the VHS tape (see *R.A. 69-140; S.A. 156-227)* based on the testimony of Mr. Badillo "that he was parked over by the vacuum cleaner area and that the automobile came from the vacuum cleaner area. . . . That is where camera three was focused, according to the testimony of Mr. Gannem. And according to what came in as far as the photograph showing a camera in that angle. . . ." *(Tr. Vol. 8/3); S.A. 2424).* Badillo said that the automobile came from that direction. (Id.)

[30] "[The] third camera, on the right as one faced the store, captured a pay telephone and an area containing vacuums outside the store. . . . The videotape recording showing the third camera view was lost by police." Commonwealth v. Meas, supra, 467 Mass. at 447. The third angle could have been used to cross-examine Badillo because "[t]he area where Badillo asserted that the shooter came from when the shooter went to the victim's automobile would have been in the view of the third camera." Commonwealth v. Meas, supra, 467 Mass. at 447 n. 14.

53; S.A. 2313-2314). When Badillo went to the scene away from the 7-Eleven, he knew he was going there to identify someone. Badillo had pled guilty on May 25, 2007 to the offenses of mayhem [(Mass. Gen. L. 265, § 14)][31] assault and battery with serious bodily injury resulting [(Mass. Gen. L. 265 §§ 13A(b) and (c))],[32] and assault and battery [(Mass. Gen. L. 265 § 13A(a))].[33] *(Tr. Vol. 7/57, 60; S.A. 2318-2321).* The charge of mayhem was for biting someone's ear off, for which Badillo knew he could receive a serious sentence.[34] *(Tr. Vol. 7/15-16; S.A. 2276-2277).*

Lowell Police Detective Michael Bergeron testified:

On June 13, 2006, Bergeron received information as to a black Honda Accord and a possible plate number, then thought he saw one. *(Tr. Vol. 4/78-81, 83-86; S.A. 1915-1918, 1920-1923).* Officers Harris and Kelly stopped the car. Meas was in it. *(Tr. Vol. 4/83-90; S.A. 1920-1927).* Bergeron assisted in the show-up procedure. Exhibit 28 *(R.A.186; S.A. 273)* shows the four individuals Bergeron stopped that night, in handcuffs, standing across Queen Street. Those handcuffs were not removed during the show-up. *(Tr. Vol. 4/110, 121-122; S.A. 1947, 1958-1959).*

Christopher Kelly of the Lowell Police testified:

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[31] In Massachusetts, the offense of mayhem carries a maximum penalty of 20 years of imprisonment in state prison. Mass. Gen. L. 265, § 14.

[32] In Massachusetts, the offense of assault and battery with serious bodily injury resulting carries a maximum penalty of 5 years imprisonment in state prison and a $5000 fine. Mass. Gen. L. 265, §§ 13A(b) and (c).

[33] In Massachusetts, the offense of assault and battery carries a maximum penalty of 2½ years of imprisonment in a house of correction. Mass. Gen. L. 265, § 13A(a).

[34] In Massachusetts, the offense of mayhem carries a maximum possible sentence of 20 years of imprisonment in state prison. Mass. Gen. L. 265, § 14.

On June 13, 2006, just before 11:00 p.m., Kelly and Officer Desmarais received report of a male in the 7-Eleven parking lot holding a firearm, seen getting into a dark Honda Accord; they were given a plate number. *(Tr. Vol. 8/56; S.A. 2477).* They stopped a vehicle in the parking lot on the corner of Branch and Queen Streets. *(Tr. Vol. 8/58-60; S.A. 2479-2481).* No weapons were found on Meas. *(Tr. Vol. 8/65-66; S.A. 2486-2487).*

Pedro Garcia-Cardona testified:

Cardona was at the 7-Eleven, parked next to the vacuum. He saw a guy come in, park the car, another one parked behind it bumper to bumper, then the guy went around the other two cars to the driver side and shot him. *(Tr. Vol. 8/34-35; S.A. 2455-2456).* The police took a long time to arrive; they took Cardona to the station, then took him where they had four Cambodians arrested, Queen Street. At Queen Street he saw they caught four and the one he told them did the shooting. *(Tr. Vol. 8/38-39). (S.A. 2459-2460).*

Lowell Police Detective Corey Erickson testified:

On June 13, 2006, after 11:00 p.m., Erickson and Detective Wayne took Vicheth San to the area of Queen and Branch Streets. *(Tr. Vol. 10/78-82; S.A. 2795-2799).* Erickson got there at 11:47 p.m. A police cruiser was stopping traffic; some individuals were in the street. Meas was on the left, Yoeun Chhay was standing next to Meas, Phalla Nou was standing next to Chhay, and Bunnaro Seng was on the far right. San identified Meas as the shooter. The four persons had their hands behind their back, their legs spread apart and were standing across the roadway. *(Tr. Vol. 10/82-86; S.A. 2799-2803).* Douglas Anderson was a witness from the 7-Eleven. *(Tr. Vol. 10/102; S.A. 2819).* There were 6 individuals brought to Queen and Branch Streets: Gaddaffi Henry identified Bunnarro Seng as the shooter; Anderson

identified Phalla Nou as the shooter, was not brought to the police station and wasn't sought until three weeks prior to this testimony. *(Tr. Vol. 10/118-121; S.A. 2835-2838).*

Phalla Nou testified:

On June 13, 2006, Nou had a cookout. *(Tr. Vol. 9/92-93; S.A. 2662-2662).* Present were members of a gang group called the Asian Boyz, including Meas. *(Tr. Vol. 9/93-98; S.A. 2662-2667).* Nou got locked up for accessory to murder, Bonla's murder. *(Tr. Vol. 9/94; S.A. 2663).* The defendant killed him. *(Tr. Vol. 9/94-95; S.A. 2663-2664).* On the charge of accessory after the fact, murder, Nou did two years and got sent home on parole. *(Tr. Vol. 9/116; S.A. 2685).* He got out on May 2, 2008. *(Tr. Vol. 9/117; S.A. 2686).*

Gunshot residue testing conducted on Meas at 2:25 a.m., and processed by the State Police Crime Lab, was negative; such residue is capable of indicating presence at a shooting. *(Tr. Vol. 8/88-90, 107; Tr. Vol. 9/52-56, 59-60, 62-63; S.A. 2509-2511; S.A. 2621-2625, 2628-2629, 2631-2632).*

Arguments Below Regarding the Grounds Raised in this Petition

In his federal habeas petition, Meas raised the following constitutional grounds:

1. The trial judge violated the petitioner's right of confrontation under the 6th and 14th Amendments, by precluding the petitioner's trial counsel from cross-examining a material cooperating government witness as to the witness's possible bias in favor of the government, based on the trial judge's determination that the witness's denial of bias in favor of the government, during voir dire testimony, was credible.

Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, Meas v. Vidal, U.S. District Court for the District of Massachusetts No. 1:15-cv-13234-GAO (filed June 16, 2014) (Appendix K), *at Attachment to Page 6.*

In *Defendant's Brief (S.A. 14-81)*, docketed in the SJC on April 11, 2013, with the

attached *Defendant's Record Appendix (S.A. 82-285)*, as paper #17, *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12),* Meas argued eight listed issues, including, *inter alia*,

> Whether the trial judge committed reversible error by precluding the defendant's trial counsel from cross-examining cooperating prosecution witness Fernando Badillo as to the possibility of bias in favor of the District Attorney's Office based on his status as a probationer in the District Attorney's jurisdiction at the time of his testimony and/or due to the pendency at the time of his cooperation of charges brought against him by the District Attorney's Office.

Defendant's Brief, at 1, 1-3 (S.A.21, 21-23). Meas argued that the trial judge committed reversible error, violating the petitioner's right of confrontation under the Sixth and Fourteenth Amendments, by precluding his trial counsel from cross-examining cooperating prosecution witness Fernando Badillo as to the possibility of bias in favor of the prosecuting authority, the Middlesex County District Attorney's Office, based on Badillo's status as a probationer in the District Attorney's jurisdiction at the time of Badillo's testimony and/or due to the pendency, at the time of Badillo's cooperation, of charges brought against Badillo by the District Attorney. *Defendant's Brief, at 37-40. (S.A. 57-60).* The petitioner argued,

> A substantial basis for possible bias in Mr. Meas's case was fully in issue based on Badillo's status first as a criminal defendant facing pending charges at the hands of the same prosecuting authority, and subsequently as a probationer facing the ever -present potential for revocation initiated by the same prosecuting authority responsible for the prosecution of Mr. Meas. The trial judge committed error by precluding the jury from deciding looming questions of Badillo's credibility as to whether he harbored a motive to curry favor with the prosecutor responsible for prosecuting Badillo himself in unresolved matters. The foreclosure of the defendant's inquiry into the manifest possibility of bias violated the defendant's right of confrontation under the Sixth and Fourteenth Amendments, and Article 12 [of the Declaration of Rights, Constitution of Massachusetts].

Defendant's Brief, at 39-40. (S.A. 59-60). In *Defendant's Reply Brief (S.A.404-424),*

docketed in the SJC on October 21, 2013, as paper #25,[35] Meas argued,

> The trial judge's preclusion of the defendant's trial counsel form cross-examining probationer and cooperating prosecution witness Fernando Badillo as to the possibility of bias in favor of the District Attorney's Office violated the defendant's Sixth Amendment right of confrontation; [and] the procedure used to make this ruling violated the defendant's right under the Sixth and Fourteenth Amendments to a fair trial by an impartial jury.

Defendant's Reply Brief, at 5 (S.A. 413); id., at 5-9 (S.A. 413-417). Meas argued that the Sixth Amendment right of Confrontation secures the right of cross-examination, that denial of the right of effective cross-examination is constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it, and that a witness's vulnerable status as a probationer is admissible to afford a basis for an inference of undue pressure on the witness and that preclusion of such cross-examination by the trial court required reversal. *Defendant's Reply Brief, at 5-6 (S.A. 413-414)* (citing Davis v. Alaska, 415 U.S. 308 (1974)).

> The petitioner argued that the trial judge
>
> violated the defendant's right to a fair trial by an impartial jury under the Sixth Amendment and under the Due Process Clause of the Fourteenth Amendment[] by giving the power to determine the credibility of witnesses to the trial judge when the right to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments presumes that determinations of credibility will be made by the jury alone.

Defendant's Reply Brief, at 6 (S.A. 414). Meas argued that the 5th and 14th Amendment Due Process requirements of proof beyond a reasonable doubt, and the Sixth Amendment right to a trial by jury, precluded the trial judge from foreclosing Meas's cross-examination of Badillo based on the judge's determination that Badillo's denial of bias during voir dire testimony was credible. *Defendant's Reply Brief, at 5-8, 7 n. 1 (S.A. 413-416)* (citing,

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[35] *SJC Docket Entries* (Appendix Q), *at 2. (S.A.12).*

Sullivan v. Louisiana, 508 U.S. 275 (1993); In re Winship, 397 U.S. 358 (1970)).

In his *Petition for Rehearing,* Meas asserted (1) that it was impermissible for the trial judge to preclude the requested cross-examination based on the trial judge's determination that Badillo's testimony was credible, *Petition for Rehearing, at 1-2 (S.A. 426-427)* (Appendix G) (citing see Crawford v. Washington, 541 U.S. 36, 62 (2004); (2) that

> [s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness[,]

Davis v. Alaska, 415 U.S. at 316; (3) that the denial of the right of effective cross-examination would be "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Davis, 415 U.S. at 318 (citations and internal quotations omitted); (4) that, as in Davis v. Alaska, supra, in the petitioner's case defense counsel

> should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[,]

see Davis, 415 U.S. at 318, in particular the fact that the prosecution witness at issue may have been testifying with a bias "to curry favor with the Commonwealth by way of what [he was] possibly facing", Davis, 415 U.S. at 309-311, 317-319; and (5) that, as in Davis, the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Badillo's testimony, where the accuracy and truthfulness of that testimony were key elements in the prosecution's case. See id., 415 U.S. at 317-318. *Petition for Rehearing, at 1-5. (S.A.426-430)* (Appendix G).

REASONS FOR GRANTING REVIEW

1. The First Circuit, in upholding the U.S. District Court's denial of Mr. Meas's petition for a writ of habeas corpus, decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

A. Constitutional violation.

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him."

Davis v. Alaska, 415 U.S. 308, 315 (1974) (quoting U.S. Const. amend. VI).[36]

> Confrontation means more than being allowed to confront the witnesses physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination."

Id. (quoting Douglas v. Alabama, 380 U.S. 415, 418 (1965)). In Davis, this Court held that a trial judge's preclusion of the defendant from cross-examining crucial prosecution witness Richard Green as to Green's delinquency adjudication for burglary and the fact that Green was on probation for burglary was a violation of the Sixth Amendment's Confrontation Clause. See id., 415 U.S. at 310-311. The petitioner in Davis v. Alaska, supra,

> sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light.

Id., 415 U.S. at 319. This Court concluded that

> the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act."

Davis, supra, 415 U.S. at 317 (quoting Douglas v. Alabama, supra, 380 U.S. at 419).

> As in Davis v. Alaska, supra, in Mr. Meas's case, defense counsel

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[36] "[T]he Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Pointer v. Texas, 380 U.S. 400, 403 (1965).

> should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness[,]

see Davis, supra, 415 U.S. at 318, in particular the fact that cooperating prosecution witness Fernando Badillo may have been testifying with a bias "to curry favor with the Commonwealth by way of what [he was] possibly facing". See Davis v. Alaska, supra, 415 U.S. at 309-311, 317-319. As in Davis, supra, the jurors here were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on the prosecution testimony at issue where the accuracy and truthfulness of said testimony were key elements in the prosecution's case. See id., 415 U.S. at 317-318.

The trial judge precluded the requested cross-examination of prosecution witness Badillo based on the trial judge's own personal determination that Badillo had been credible in denying any bias during his voir dire testimony, which is directly contrary to this Court's clearly established rule that the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. See Crawford v. Washington, 541 U.S. 36, 68-69 (2004). The U.S. District Court rejected the petitioner's references to the paramount constitutional importance of the Sixth Amendment right of confrontation in Davis v. Alaska, 415 U.S. 308 (1974), and Crawford v. Washington, supra, 541 U.S. 36, stating

> While a defendant has a right under the Sixth Amendment to confront witnesses against him, **a trial judge "retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limitations on such cross-examination."** See Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986).

Order Adopting R&R, supra, 2018 U.S. Dist. LEXIS 148764 (Appendix D), at *2-*3 (emphasis added). The U.S. District Court gave no rationale for its determination that,

> [a]lthough the petitioner cites Davis v. Alaska, 415 U.S. 308 (1974), and Crawford v. Washington, 541 U.S. 36 (2004), I agree with the magistrate judge and government that [Delaware v.]Van Arsdall[, 475 U.S. 673, 678-679 (1986)] provides the applicable test.

See Order Adopting R&R, supra, 2018 U.S. Dist. LEXIS 148764 (Appendix D), at *3 n. 1.

In its Order Adopting R&R, supra, 2018 U.S. Dist. LEXIS 148764 (Appendix D), at *2-*3 (quoted above) the U.S. District Court materially misquoted this Court's opinion in Delaware v. Van Arsdall, supra, by truncating the crucial sentence to remove the limitation on a trial court's "wide latitude" that Van Arsdall prescribes. The correct quotation of Van Arsdall is:

> Of particular relevance here, **"[we] have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination**." Davis, supra, at 316-317 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)). It does not follow, of course, that the *Confrontation Clause of the Sixth Amendment* prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain **wide latitude** insofar as the *Confrontation Clause* is concerned **to impose reasonable limits** on such cross-examination **based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant**.

Delaware v. Van Arsdall, supra, 475 U.S. at 678-679 (emphasis added); contra Order Adopting R&R, supra, 2018 U.S. Dist. LEXIS 148764 (Appendix D), at *2-*3.

The U.S. District Court has further misinterpreted Delaware v. Van Arsdall, supra, by portraying Van Ardall as containing a "test" different than the test imposed in Davis v. Alaska, supra, for determining whether a limitation on cross-examination is permissible under the Sixth Amendment's Confrontation Clause. To the contrary, in Olden v. Kentucky, 488 U.S. 227 (1988), this Court stated that it considers Van Arsdall, supra, as reaffirming this Court's prior holding in Davis v. Alaska, 415 U.S. 308 (1974). See Olden v. Kentucky, supra, 488 U.S. at 231 (reaffirming the ruling in Davis v. Alaska, supra, that "**subject to 'the**

broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . ., the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.'" (quoting Davis v. Alaska, supra, 415 U.S. at 316 (emphasis added))). In Olden v. Kentucky, supra, this Court stated,

> [I]n Delaware v. Van Arsdall, 475 U.S. 673 (1986), we reaffirmed Davis[v. Alaska, supra,] and held that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 475 U.S. at 680, quoting Davis, supra, at 318.

Olden v. Kentucky, supra, 488 U.S. at 231; Davis v. Alaska, supra, 415 U.S. at 316.[37]

The trial judge foreclosed inquiry into the manifest possibility of bias inherent in Commonwealth cooperating witness Fernando Badillo's status as a person charged with serious offenses and as a probationer convicted of those offenses because the trial judge

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[37] The basic rule governing the Sixth Amendment right of confrontation, the rule that was violated by Massachusetts in Commonwealth v. Meas, supra, and which continues to be violated in the lower federal courts here, is the following:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. . . . **A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand** (emphasis added).

Davis v. Alaska, supra, 415 U.S. at 316.

himself credited Mr. Badillo's dubious voir dire testimony that neither his status as a probationer, nor the pendency of charges at the time of his cooperation, had any effect on his thinking or testimony. (Tr. Vol. 7/11-13) *(S.A. 2272-2274).* The determination by the SJC to uphold this erroneous foreclosure of inquiry, see Commonwealth v. Meas, supra, 467 Mass. at 449-451; see id. at 435-455 & footnotes 1-16, was "constitutional error of the first magnitude[,]" see Davis, 415 U.S. at 318 (citations and internal quotations omitted), and therefore, the decision in this case was "wrong as a matter of law" or at the very least "unreasonable in its application of law". See Williams v. Taylor, 529 U.S. 362, 385 (2000).

B. Entitlement to federal habeas relief.

> Habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting United States v. Lane, 474 U.S. 438, 449 (1986)). Thus, the test for whether habeas relief must be granted because of constitutional error of the trial type "is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, supra, 507 U.S. at 637-638 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The trial judge's preclusion of the petitioner from presenting to the jury known facts about Badillo's dependent and personally beneficial relationship with the government was substantial and injurious constitutional error, causing Meas actual prejudice. Badillo's testimony identifying Mr. Meas as the shooter was material to the jury's determination of guilt or innocence.

There was actual prejudice suffered by Mr. Meas at trial here. The trial evidence raised questions as to the identity of the shooter. There were 6 individuals brought to Queen

and Branch Streets: Gaddaffi Henry identified Bunnarro Seng as the shooter; Douglas Anderson identified Phalla Nou as the shooter, and was not brought to the police station and wasn't sought by police until three weeks prior to trial date December 12, 2008. *(Tr. Vol. 10/1, 118-121). (S.A. 2718, 2835-2838) (testimony of Detective Corey Erickson).* Surveillance video from the 7-Eleven store that night (Exhibit 32) shows that these two witnesses, Gaddafi Henry and Douglas Anderson, were present in that store at the time of the incident. *(Tr. Vol. 6/49-51). (S.A. 2134-2136)(testimony of Sgt. Murray).* Neither Henry nor Anderson were brought to the station to make a full statement after the show-up. *(Tr. Vol. 6/80). (S.A. 2165) (testimony of Sgt. Murray).*

The question of the credibility of the identification evidence was further placed in issue by the government's favorable treatment of Phalla Nou, who testified at trial that Mr. Meas had killed the decedent, Bonla Dy, *Tr. Vol. 9/94) (S.A. 2663).* Phalla Nou possessed a strong motivation to shift blame to someone other than himself, and a strong basis for possessing a bias in favor of the prosecution. Having been identified as the shooter at the show-up procedure, Phalla Nou was charged only with accessory to murder, Bonla's murder. *(Tr (Tr. Vol. 9/94-95). (S.A. 2663-2664).* On the charge of accessory after the fact, murder, Nou served only two years of incarceration before being sent home on parole. *(Tr. Vol. 9/116). (S.A. 2685).* Phalla Nou was released from incarceration on May 2, 2008. *(Tr. Vol. 9/117). (S.A. 2686).*[38]

[38] It is an established view of this Court that rewarded informant testimony is inherently unreliable. See Kansas v. Ventris, 556 U.S. 586, 594 n.* (2009) (noting that "it appears the jury took to heart the trial judge's cautionary instruction on the unreliability of rewarded informant testimony by acquitting Ventris of felony murder.").

Significant forensic evidence indicated the petitioner's innocence. Gunshot residue testing conducted on Meas at 2:25 a.m., and processed by the State Police Crime Lab, was negative; such residue is capable of indicating presence at a shooting. *(Tr. Vol. 8/88-90, 107; Tr. Vol. 9/52-56, 59-60, 62-63). (S.A. 2509-2511; S.A. 2621-2625, 2628-2629, 2631-2632).*

Badillo's account of events could not be corroborated by store surveillance video because the Lowell police had lost that evidence. In this regard, the SJC stated:

> At trial there was evidence that there were two security systems operating at the store at the time of the shooting. One system comprised surveillance cameras inside the store that digitally recorded color images. The other system recorded black and white images on a videotape from three camera views. One camera captured the front door of the store looking outside; a second camera, on the left as one faced the store, captured the gasoline pump area outside the store; a third camera, on the right as one faced the store, captured a pay telephone and an area containing vacuums outside the store. The Commonwealth introduced two videotape recordings (copies of the originals) in evidence, one showing the angle of the front of the store looking outside and the other showing the gasoline pump area. The videotape recording showing the third camera view was lost by police.

Commonwealth v. Meas, supra, 467 Mass. at 447. "The area where Badillo asserted that the shooter came from when the shooter went to the victim's automobile would have been in the view of the third camera." Id., 467 Mass. at 447 n. 14.

It was impermissible under the Sixth Amendment's Confrontation Clause for the trial judge to preclude the requested cross-examination based on the trial judge's determination that Badillo's testimony was credible. See Crawford v. Washington, 541 U.S. 36, 62, 61-69 (2004). "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Crawford, supra, 541 U.S. at 68-69.

The U.S. District Court, in adopting the R&R, see Order Adopting R&R, Meas v.

Vidal, 2018 U.S. Dist. LEXIS 148764 (Appendix D), at *1, *1-*5 (D. Mass. August 21, 2018), erred by affirming the R&R's finding that the jury was exposed to sufficient facts surrounding Badillo's convictions "and could use those facts to **draw its own inferences**[39] regarding his credibility and potential bias" (R&R, supra, 2017 U.S. Dist. LEXIS 221734 (Appendix E), at *15, *12-*15 (emphasis added)), when the trial judge actually prevented the jury from making its own credibility determinations of Badillo by making and imposing a judicial determination that Badillo was credible in a voir dire hearing before his testimony. See Meas, 467 Mass. at 449-451.

2. The federal courts below have rejected this Court's clearly established authority as to the standard for relief pursuant to 28 U.S.C. § 2254(d)(1).

> The U.S. District Court, in adopting the R&R, rejected the petitioner's assertion that
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> > The text of 28 U.S.C. § 2254(d)(1) "is fairly read simply as a command that a federal court not issue the habeas writ unless the state court was wrong as a matter of law or unreasonable in its application of law in a given case." Williams v. Taylor, 529 U.S. 362, 385, 123 S. Ct. 2527 (2000). "In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail." Williams v. Taylor, supra, 529 U.S. at 389.

Objection to R&R (Appendix L), supra, at 3-4; contra R&R, supra, 2017 U.S. Dist. LEXIS 221734 (Appendix E), at *9-*12. Compare This Petition, Reasons for Granting Review, Section 1, supra.

3. The federal courts below have rejected this Court' clearly established authority as to the standard for relief pursuant to 28 U.S.C. § 2254(d)(2).

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[39] The Sixth Amendment's Confrontation Clause specifically does not require defendants to rely on a jury's ability to draw inferences as to the imagined answers to questions that have not been asked. See, e.g., Davis v. Alaska, supra; Crawford v. Washington, supra.

The U.S. District Court erred by failing to give effect the provision of 28 U.S.C. § 2254(d)(2), that a petitioner "may obtain relief by showing a state court conclusion to be 'an unreasonable determination of the facts in light of the evidence presented at the State court proceeding[,]'" see Miller-El v. Dretke, 545 U.S. 231, 240 (2005) (quoting 28 U.S.C. § 2254(d)(2)); and by interpreting as reasonable under § 2254(d)(2) determinations of fact that omit or mischaracterize facts essential to recognizing or demonstrating the violation of a petitioner's federal constitutional rights. Compare R&R, supra, 2017 U.S. Dist. LEXIS 221734 (Appendix E), at *3 n.4, *9-*12. "The standard [for relief pursuant to 28 U.S.C. § 2254(d)(2)] is demanding but not insatiable . . . "'[d]eference does not by definition preclude relief.'" Miller-El v. Dretke, supra, 545 U.S. at 240 (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). Even partial reliance by a state court on an erroneous factual finding can indicate an unreasonable state court's decision. See Wiggins v. Smith, 539 U.S. 510, 528 (2003) (partial reliance on erroneous factual finding "further highlights the unreasonableness of the state court's decision.") (applying § 2254(d)(2)). The denial of Meas's petition was based on an unreasonable determination of the fact. Compare R&R, supra (Appendix E), and Order Adopting R&R, supra (Appendix D), with trial facts stated in This Petition.

4. The First Circuit has applied an unreasonable standard for determining whether a Certificate of Appealability should issue under 28 U.S.C. § 2253(c).

The right to a COA exists "only if the applicant has made a substantial showing of the denial of a constitutional right". 28 U.S.C. § 2253(c)(1), which is a showing sufficient to demonstrate that "'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner[.]'" Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v.

Estelle, 463 U.S. 880, 893 n. 4 (1983))); see 28 U.S.C. § 2253. Though Slack is cited, the First Circuit does not apply the rule that a COA should issue if reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner. Nor has the First Circuit applied the rules that obtaining a COA "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." Welch v. United States, 136 S. Ct. 1257, 1263-1264 (2016) (quoting Miller-El v. Cockrell, 537 U.S. at 337). Compare Judgment, Meas v. Vidal, U.S. Court of Appeals for the First Circuit No. 18-1856 (December 9, 2019) (Appendix B).[40]

Reasonable jurists could debate whether (or agree that) the denial of the petition was error. See This Petition, Reasons for Granting Review.

5. As Massachusetts engages in the practice of moving its prisoners out of state, the Massachusetts Attorney General is a proper respondent to a § 2254 petition.[41] Sup. Ct. R. 10(a). Sup. Ct. R. 10 (c).

The attorney general of the state of conviction, which is Massachusetts, is a proper respondent to a petition for writ of habeas corpus filed under 28 U.S.C. § 2254.

> "The important thing is not the quest for a mythical custodian, but that the petitioner name as respondent someone (or some institution) who has both an interest in opposing the petition if it lacks merit, and the power to give the petitioner what he seeks if the petition has merit---namely, his unconditional freedom."

See Barry v. Bergen County Probation Dep't, 128 F.3d 152, 162-163 (3d Cir. 1997) (quoting cf. Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 409 (7th Cir. 1985)).

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[40] See *U.S. Court of Appeals for the First Circuit Docket Entries* (Appendix T), *at 4.*

[41] Massachusetts has moved the petitioner to Ely State Prison, P.O. Box 1989, 4569 North State Rt., Ely, Nevada 89301, while retaining ultimate control over the petitioner.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

JERRY MEAS,

By his Attorney,

Date: March 16, 2020

/s/David H. Mirsky, Esquire
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019-2020

JERRY MEAS,
Petitioner,

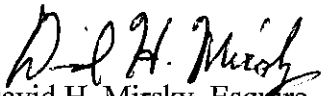
-v.-

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CERTIFICATE OF SERVICE

I, David H. Mirsky, hereby certify that on this 16th day of March, 2020, I served the petitioner's Petition for a Writ of Certiorari, Appendix, and Motion to Proceed In Forma Pauperis on all parties to be served. In accordance with Rule 29(3) of the Supreme Court Rules, said service has been made by first class mail, postage prepaid, to the office of Todd M. Blume, Assistant Attorney General, Office of the Attorney General, Commonwealth of Massachusetts, One Ashburton Place, Boston, MA 02108. I also certify that I mailed a copy to the petitioner Jerry Meas.



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AFFIDAVIT OF TIMELY FILING BY MAIL

David H. Mirsky, on oath, deposes and says:

1. I am a member of the Bar of this Court.

2. I submit this affidavit in accordance with Rule 29 of this Court.

3. The petition for certiorari and appendix enclosed herewith are being mailed today, March 16, 2020, by United States mail, first class, postage prepaid, in a package delivered to the United States Post Office in Exeter, New Hampshire 03833 and addressed to:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543.

4. The mailing is within the permitted time for filing the petition for certiorari.

Made this 16th day of March, 2020, at Exeter, NH under the penalties of perjury.

/s/David H. Mirsky