No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019-2020

JERRY MEAS,
Petitioner,

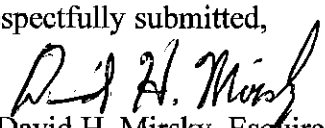
-v.-

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

APPENDIX

Respectfully submitted,



/s/David H. Mirsky, Esquire
(MA B.B.O. # 559367)
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TABLE OF CONTENTS

PAGE

Docket Entries, Meas v. Vidal, U.S. Court of Appeals for the First Circuit

No. 18-1856 ..... Appendix T

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 18-1856

JERRY MEAS,

Petitioner - Appellant,

v.

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY,

Respondents - Appellees.

Before

Howard, Chief Judge,
Torruella, Lynch, Thompson,
Kayatta and Barron, Circuit Judges.

ORDER OF COURT

Entered: January 14, 2020

Petitioner-Appellant Jerry Meas has filed a Petition for Panel Rehearing and Rehearing En Banc in the instant appeal. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
David H. Mirsky
Todd Michael Blume
Ryan Edmund Ferch
Jerry Meas

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 18-1856

JERRY MEAS,

Petitioner - Appellant,

v.

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY,

Respondents - Appellees.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

JUDGMENT

Entered: December 9, 2019

Petitioner-Appellant Jerry Meas seeks a certificate of appealability ("COA") to appeal from the denial and dismissal of his §2254 petition in the district court. After careful review of petitioner's submissions and of the record below, we conclude that that the district court's rejection of Meas's claim was neither debatable nor wrong, and that petitioner has therefore failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, Meas's application for a certificate of appealability is denied.

Meas has also filed a motion for appointment of counsel before this court. "[P]etitioners have no constitutional right to counsel in [habeas corpus] proceedings." Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011). After review of petitioner's motion, and, as indicated, of the record below, we are not persuaded that "the interests of justice" require appointment of counsel in this case. 18 U.S.C. §3006A(a)(2)(B). Consequently, the motion for appointment of counsel is denied.

The appeal is hereby terminated.

By the Court:

Maria R. Hamilton, Clerk

cc:
David H. Mirsky
Todd Michael Blume
Ryan Edmund Ferch
Jerry Meas

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Jerry Meas,	*	
	*	
Petitioner	*	
	*	
	*	Civil Action No. 1:15-cv-13234-GAO
	*	
Osvaldo Vidal et al,	*	
	*	
Respondent	*	

ORDER OF DISMISSAL

August 31, 2018

O'Toole, D.J.

In accordance with the Court's Order dated August 31, 2018, it is hereby ORDERED that the above-entitled action be and hereby is dismissed.

By the Court,

/s/ Taylor Halley

Deputy Clerk

APPENDIX D

Meas v. Vidal

United States District Court for the District of Massachusetts

August 31, 2018, Decided; August 31, 2018, Filed

CIVIL ACTION NO. 15-13234-GAO

Reporter
2018 U.S. Dist. LEXIS 148764 *; 2018 WL 4179459

JERRY MEAS, Petitioner, v. OSVALDO VIDAL, Superintendent, and MAURA HEALEY, Respondents.

Prior History: *Meas v. Vidal, 2017 U.S. Dist. LEXIS 221734 (D. Mass., Dec. 7, 2017)*

Core Terms

trial judge, cross-examination, magistrate judge, voir dire, spoke, bias, witness testimony, RECOMMENDATIONS, shooting, charges, habeas corpus, no indication, Sixth Amendment, convictions, questioning, reasons, shot

Counsel: **[*1]** For ***Jerry Meas***, Petitioner: David H. Mirsky, LEAD ATTORNEY, Mirsky & Petito, Attorneys at Law, Exeter, NH.

For Osvaldo Vidal, Maura Healey, Respondents: Ryan E. Ferch, LEAD ATTORNEY, Massachusetts Bay Transportation Authority, Boston, MA; Todd M. Blume, LEAD ATTORNEY, Office of the Attorney General, Boston, MA.

Judges: George A. O'Toole, Jr., United States District Judge.

Opinion by: George A. O'Toole, Jr.

Opinion

ORDER ADOPTING REPORT AND RECOMMENDATIONS

O'TOOLE, D.J.

Jerry Meas has filed a petition for a writ of habeas corpus under *28 U.S.C. § 2254*. This Court referred the case to a magistrate judge, who has issued a Report and Recommendation ("R&R") recommending that the Court deny the petition. I have reviewed the magistrate judge's R&R, the petitioner's objections thereto, and the other pleadings in this matter. For the following reasons, the petitioner's objections are overruled and the magistrate judge's R&R is adopted.

The petitioner's central contention is that the trial judge unconstitutionally restricted his cross-examination of a government witness in contravention of the *Sixth* and *Fourteenth Amendments*. At trial, defense counsel sought to cross-examine the witness about (1) criminal charges that were pending against the witness when he spoke to **[*2]** police following the shooting at issue and (2) the witness's status as a probationer when the witness testified against the petitioner at trial. After conducting a voir dire examination as to whether there was evidence of bias in favor of the prosecution, the trial judge limited the line of inquiry to the fact of the witness's subsequent convictions for the charges that

had been pending when he spoke with police after the shooting. On appeal, the Supreme Judicial Court analyzed the limitation under the *Sixth Amendment* and found no error, noting that the trial judge conducted a voir dire on the issue, there were no indications that the witness's trial testimony was inconsistent with any prior statements, the witness's testimony was not necessary to establish any material facts, and counsel was permitted to use the prior convictions to impeach the witness.

The Supreme Judicial Court's decision regarding the cross-examination was neither contrary to nor an unreasonable application of clearly established federal law. 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." **[*3]** See *Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*.[1] Here, the trial judge did not entirely foreclose inquiry regarding the witness's possible bias. See *id. at 680* (opining that a violation of the *Confrontation Clause* is shown where a defendant is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias"). The petitioner's theory was explored during a voir dire questioning of the witness, and the trial judge found no bias was established by that examination. During voir dire, the witness testified that he never mentioned his then-pending charges when he spoke to the police, that he did not think about his case when talking with the police, and that he did not receive any promises or rewards for his testimony. So far as appears, no contrary evidence was given. In front of the jury, the petitioner cross-examined the witness extensively, including by eliciting testimony regarding the witness's plea of guilty to various crimes between the time he spoke to police right after the shooting and the trial. The jury was thus exposed to facts from which jurors "could appropriately draw inferences relating to the reliability of the witness." See id. (quoting *Davis, 415 U.S. at 318*). There is no indication that the jury "would have received **[*4]** a significantly different impression" of the witness's credibility had the excluded line of additional questioning on the topic been permitted, particularly in light of his testimony during voir dire. See id.

The petitioner's remaining objections merit only brief attention. First, the magistrate judge correctly determined that the Massachusetts Attorney General is not a proper respondent to the petition. See *28 U.S.C. § 2243*; *Rules Governing § 2254 Cases in the United States District Courts, Rule 2(a)*; see also *Vasquez v. Reno, 233 F.3d 688, 691 (1st Cir. 2000)*. Second, with respect to the applicable legal standard under *28 U.S.C. § 2254(d)(1)*, I note the petitioner's additional case citations but disagree that the magistrate judge's description of applicable law rendered constitutional violations virtually unavailable. Third, with respect to *§ 2254(d)(2)*, the petitioner did not adequately present any arguments under that subsection to the magistrate judge and this Court need not address them now. See *Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987)* ("Parties must take before the magistrate, 'not only their "best shot" but all of their shots.'" (quoting *Singh v. Superintending Sch. Comm., 593 F. Supp. 1315, 1318 (D. Me. 1984)*)). Fourth, the "determination of a factual issue made by a State court shall be presumed correct" unless the petitioner has rebutted the presumption by clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*. The petitioner has failed to do so here, and I therefore credit **[*5]** the factual findings of the Supreme Judicial Court.

For the foregoing reasons, the petitioner has not shown he is entitled to federal habeas relief. Accordingly, the petition for writ of habeas corpus pursuant to *28 U.S.C. § 2254* is DENIED and the case is dismissed. Because the petitioner has not "made a substantial showing of the denial of a constitutional right," no certificate of appealability shall issue. See *28 U.S.C. § 2253(c)(1)*.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.

United States District Judge

End of Document

[1] Although the petitioner cites *Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)*, and *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, I agree with the magistrate judge and government that Van Arsdall provides the applicable test.

APPENDIX E

Meas v. Vidal

United States District Court for the District of Massachusetts

December 7, 2017, Decided; December 7, 2017, Filed

Civil Action No. 1:15-cv-13234-GAO

Reporter
2017 U.S. Dist. LEXIS 221734 *

Boston, MA.

JERRY MEAS, Petitioner, v. OSVALDO VIDAL, Respondent.

Judges: JENNIFER C. BOAL, United States Magistrate Judge.

Subsequent History: Adopted by, Objection overruled by, Writ of habeas corpus denied, Dismissed by, Certificate of appealability denied *Meas v. Vidal, 2018 U.S. Dist. LEXIS 148764 (D. Mass., Aug. 31, 2018)*

Opinion by: JENNIFER C. BOAL

Prior History: *Commonwealth v. Meas, 467 Mass. 434, 2014 Mass. LEXIS 125, 5 N.E.3d 864 (Mar. 12, 2014)*

Core Terms

cross-examination, bias, state court, shooting, defense counsel, trial judge, RECOMMENDATION, cases, convictions, scene, gun, habeas corpus, identification, questioning, license, courts, impeach, inside, plate, shot

Opinion

REPORT AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS

BOAL, M.J.

On August 27, 2015, ***Jerry Meas***, who is currently serving a life sentence in a Massachusetts correctional facility, petitioned this Court for a writ of habeas corpus pursuant to *28 U.S.C. § 2254*, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Docket No. 1 (the "Petition"). In his Petition, Meas alleges that the trial court violated his *Sixth* and *Fourteenth Amendment* rights by limiting certain cross-examination at trial. Respondent Osvaldo Vidal ("Respondent") opposes the Petition.[1] Docket No. 20.

Counsel: **[*1]** For ***Jerry Meas***, Petitioner: David H. Mirsky, LEAD ATTORNEY, Mirsky & Petito, Attorneys at Law, Exeter, NH.

For Osvaldo Vidal, Maura Healey, Respondents: Ryan E. Ferch, LEAD ATTORNEY, Massachusetts Bay Transportation Authority, Boston, MA; Todd M. Blume, LEAD ATTORNEY, Office of the Attorney General,

[1] The Petition also lists Massachusetts Attorney General Maura Healey as a respondent. Docket No. 1 at 2. However, a writ of habeas corpus should be "directed to the person having custody of the person detained." *28 U.S.C. § 2243*. Accordingly, Attorney General Healey is not a proper respondent because she does not have custody of the

For the reasons set forth below, I recommend[2] that the District Judge DENY the Petition.

I. PROCEDURAL HISTORY

On or about December 16, 2008, a jury found Meas guilty of murder in the first degree by deliberate premeditation and illegal possession of a firearm. **[*2]** [3] S.A. at 250-53. Meas was sentenced to life without parole and a concurrent four-to-five-year sentence for the gun violation. S.A. at 8, 3106-07.

Meas filed a direct appeal on eight grounds, including that the trial judge erred in precluding cross-examination of a cooperating prosecution witness, Fernando Badillo, on the subject of bias in favor of the prosecutor's office. S.A. at 21-23, 254. On March 12, 2014, the Massachusetts Supreme Judicial Court ("SJC") affirmed Meas' convictions. *Commonwealth v. Meas, 467 Mass. 434, 5 N.E.3d 864 (2014)*; S.A. at 433-48. The SJC held that the trial judge did not abuse his discretion in prohibiting questions about bias because (1) he did not bar questioning on the subject altogether, but rather allowed some questioning after holding a voir dire hearing on the subject; (2) the jury was not required to rely on Badillo's testimony to establish the salient facts, given other testimony and evidence; (3) the judge allowed Badillo's convictions to be raised for impeachment purposes; and (4) defense counsel's claims of bias were grounded only in speculation. *Meas, 467 Mass. at 450-51*.

On March 26, 2014, Meas filed a petition for rehearing, which the SJC denied. S.A. at 12, 426-32. Meas subsequently petitioned the U.S. Supreme Court for a writ of certiorari, which was denied. *Meas v. Massachusetts, 135 S.Ct. 150, 190 L. Ed. 2d 110 (2014).*

On August 27, 2015, Meas **[*3]** filed the instant Petition. Docket No. 1. On November 23, 2015, Respondent filed an answer. Docket No. 11. Meas filed a memorandum of law in support of his Petition on March 14, 2016. Docket No. 17. Respondent filed his opposition on May 16, 2016. Docket No. 20. On August 5, 2016, Meas filed a reply brief. Docket No. 26.

II. FACTUAL BACKGROUND[4]

The SJC found the following facts:

> Based on the Commonwealth's evidence, the jury could have found the following facts. During the evening of June 13, 2006, the defendant went to a cookout at Nou's home in Lowell. Fellow members of the Asian Boyz gang were present, including Chhay and [a juvenile with the street name "Silent"]. The defendant had a gun, which he passed around for people to see.
>
> The cookout was interrupted by a gunshot coming from the street in front of the house. Nou later told the police that two automobiles—a blue Honda Civic and a red Acura—had passed by his house. Nou relayed that someone in the red Acura had shot at him while he was holding his infant son. Nou recounted also that, a few weeks before, someone had shot at his house.
>
> Sometime after the gunshot sounded, Nou drove the defendant, Chhay, and Silent to the store to **[*4]** purchase cigarettes [in a black Honda Accord]. He parked to the right of the front door, and the defendant and Chhay went inside.
>
> The victim, who was driving a red Acura and was accompanied in the front seat by San, and in the back seat by Pen, stopped at the store and parked in front of its door. The black automobile was parked a few spaces over on the passenger's side of the red Acura.
>
> Inside the store, Badillo observed the defendant being loud and acting tough. Badillo described the defendant as an Asian male with long dark hair worn in a ponytail. Badillo observed that the defendant was wearing a bandana, black hat, black jacket, and dark-colored khaki pants.
>
> After the defendant left the store, he approached the victim's automobile, speaking to the victim as he approached. The victim told the defendant to "calm down."

Meas, 467 Mass. at 443-44 (internal citations and footnotes omitted).

Petitioner.

[2] On October 14, 2016, Judge O'Toole referred the instant case to the undersigned for a report and recommendation. Docket No. 27.

[3] Meas was also charged with being an armed career felon, but the Commonwealth entered a *nolle prosequi* on this charge. Supplemental Answer ("S.A.") at 235.

[4] Absent clear and convincing evidence to the contrary, the recitation of the facts by the SJC is presumed to be correct. See *28 U.S.C. § 2254(e)(1)*; *Gunter v. Maloney, 291 F.3d 74, 76 (1st Cir. 2002)*; *Evans v. Thompson, 518 F.3d 1, 3 (1st Cir. 2008)*.

> Another passenger of the Honda, who was wearing a hat with a "B" on it, went to the passenger's side of the victim's automobile and asked San, "What up, Blood?" The defendant then raised a firearm and shot the victim. He tried to shoot the gun again, but it did not discharge and only made clicking noises. The defendant and the **[*5]** other individual returned to the black Honda and drove down Chelmsford Street.

Id. at 436-37 (internal citations omitted).

> [T]wo additional witnesses at trial . . . observed the events surrounding the shooting. The store clerk, Carlos Urrego,[5] saw two Asian men, both wearing blue, approach the victim's automobile; saw the man on the driver's side, who was wearing a baseball cap and had long black hair, pull out what appeared to be a silver gun from his belt area; heard gunshots; and saw the two men run to an automobile parked behind the victim's. Urrego telephoned 911 and directed Badillo to get the license plate number. Badillo wrote down the license plate number of the black automobile and gave it to Urrego.
>
> Nou testified that he saw the defendant shoot the victim and heard two shots.[6] The shots scared Nou, so he backed up his automobile to get ready to leave, and the defendant and Chhay jumped in. Once inside the automobile, the defendant said, "We got them slobs."[7]
>
> San transported the victim to a nearby hospital. The victim was pronounced dead at 11:16 p.m. He died as a result of a gunshot wound to the left side of his neck that passed through his chest and right lung, and exited his right upper arm **[*6]** area. Police responded to a telephone call from the store at about 11 p.m. A police officer took a piece of paper from Badillo that had what Badillo believed was the license plate number of the black automobile. The officer secured the scene and broadcasted the license plate "over the air."

Id. at 445 (internal citations omitted).

> Within minutes of the shooting and in response to a 911 telephone call, Lowell police officers stopped a black Honda Accord with a very similar license plate number to that which had been provided to the police.
>
> ***
>
> The police decided to conduct showup identification procedures at the location where the black Honda Accord had been stopped. This area was near a liquor store parking lot, and flood lights from that store, as well as street lights, and lights from police cruisers on the scene, contributed to illuminating the location.
>
> ***
>
> At 11:20 p.m., Badillo was next taken to the showup. Badillo recalled receiving the advisements from the police and observing six to ten cruisers and six to eight police officers in the area of the identification. He was not pressured by the police to select anyone, and he identified the defendant based on the clothing he had observed earlier. **[*7]** Badillo stated that the defendant was "definitely him." Badillo was approximately two to three car lengths away when he made his identification of the defendant as the shooter.

Id. at 437-39 (internal citations omitted). The SJC found the following facts with respect to Badillo's testimony at trial:

> Prior to Badillo's testimony, defense counsel argued that he should be permitted to impeach Badillo with his prior convictions and evidence of bias. At the time of the shooting, Badillo had been charged with mayhem, assault and battery, and assault and battery causing serious bodily injury. Following the shooting, but before trial, Badillo, on May 25, 2007, pleaded guilty to the above-named charges and was placed on probation. Defense counsel asserted that Badillo was biased at the time he spoke with police about the shooting because of the pending charges. In addition, defense counsel argued that Badillo would be biased toward the prosecution during the trial testimony because he was on probation, which is subject to being revoked. The judge conducted a voir dire, at which Badillo testified that, when police questioned him about the shooting on June 13 and 14, 2006, he did not think that cooperation **[*8]** with the police would affect

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[5] Footnote 9 of the SJC'S decision, inserted here, stated: "Carlos Urrego was later brought to the location of the showup identification procedure, but he did not make any identifications."

[6] Footnote 10 of the SJC's decision, inserted here, stated: "Nou testified under a grant of immunity pursuant to G.L. c. 233, § 20E."

[7] Footnote 11 of the SJC's decision, inserted here, stated: "The term 'slob' is a derogatory term for a Blood gang member."

his pending case. The judge ruled that Badillo could only be impeached with his prior convictions, and defense counsel did so.

Id. at 449.

On cross-examination, Badillo confirmed that he had pleaded guilty to various crimes in May 2007. S.A. at 2321. Defense counsel cross-examined Badillo extensively on his memory of the night of the shooting, his location with respect to the automobiles, his subsequent identification of Meas at the showup, and his meetings with the district attorney's office. S.A. at 2311-21.

Several other witnesses who had been present at the scene of the crime testified for the prosecution at Meas' trial, including (1) Phalla Nou, Meas' friend who drove Meas away from the scene of the crime; (2) Vicheth San and (3) Vannika Pen, who were in the automobile with the victim at the time of the shooting; (4) Pedro Garcia Cardona, a bystander who was in the parking lot; and (5) Carlos Urrego, the clerk from the convenience store. *Meas, 467 Mass. at 439, 444-46*. In addition, the jury was shown video footage of Meas inside the store. *Id. at 444 n.5, 447*. The prosecution also presented evidence that the police recovered a gun from the automobile in which Meas was apprehended. *Id. at 446*. Testing indicated that three discharged cartridge casings **[*9]** from the scene of the crime, outside Nou's home, and Nou's automobile, and a spent projectile from inside the victim's car all came from the recovered gun. Id.

III. HABEAS CORPUS STANDARD OF REVIEW

The AEDPA presents a "formidable barrier" limiting the availability of habeas relief where state courts have adjudicated the merits of a prisoner's claims. *Burt v. Titlow, 571 U.S. 12, 134 S.Ct. 10, 16, 187 L. Ed. 2d 348 (2013)*. Meas may not obtain federal habeas relief under *28 U.S.C. § 2254(d)* unless he can show that the SJC's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *28 U.S.C. § 2254(d)(1)*. In other words, state court decisions merit substantial deference.

As the Supreme Court repeatedly has emphasized, such deference results in a federal habeas corpus standard that is "difficult to meet," with the petitioner carrying a heavy burden of proof. *Harrington v. Richter, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)*; accord *Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*. If a state court's decision "was reasonable, it cannot be disturbed." *Hardy v. Cross, 565 U.S. 65, 72, 132 S. Ct. 490, 181 L. Ed. 2d 468 (2011)*; see *Parker v. Matthews, 567 U.S. 37, 38, 132 S. Ct. 2148, 183 L. Ed. 2d 32 (2012)* (emphasizing federal habeas courts may not "second-guess the reasonable decisions of state courts" (internal quotation and citation omitted)). When applying this strict standard, a court must presume that the state court's factual findings are correct, unless **[*10]** the petitioner has rebutted that presumption with clear and convincing evidence. *28 U.S.C. § 2254(e)(1)*; *Miller-El v. Cockrell, 537 U.S. 322, 340-41, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*.

The state court is not required to cite, or even have an awareness of, governing Supreme Court precedents, "so long as neither the reasoning nor the result of [its] decision contradicts them." *Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002)*; cf. *Harrington, 562 U.S. at 100* ("*§ 2254(d)* does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and entitled to deference). For a habeas petitioner to prevail under this daunting standard, the state court judgment must contradict clearly established decisions of the Supreme Court, not merely law articulated by any federal court. *Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; see *Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009)*.

However, decisions from circuit courts "may help inform the AEDPA analysis to the extent that they state the clearly established federal law determined by the Supreme Court." *Grant v. Warden, Me. State Prison, 616 F.3d 72, 79 n.5 (1st Cir. 2010)* (quotation omitted). "In addition, factually similar cases from the lower federal courts may inform a determination of whether a state court decision involves an unreasonable application of clearly established Supreme Court jurisprudence, providing a valuable reference point when the relevant Supreme Court rule is broad and applies to a kaleidoscopic array of fact patterns." **[*11]** Id. (internal citations and quotations omitted).

The "contrary to" prong is satisfied when the state court "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," *Williams, 529 U.S. at 405*, or if "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result." *Id. at 406* (internal citation omitted).

The "unreasonable application" prong is satisfied if the state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id. at 413*. When making the "unreasonable application" inquiry, federal habeas courts must determine "whether the state court's application of clearly established federal law was objectively unreasonable." *Id. at 409*. An unreasonable application of the correct rule can include the unreasonable extension of that rule to a new context where it should not apply, as well as an unreasonable failure to extend the rule to a new context where it should apply. *Id. at 407*. It cannot, however, include a decision by a state court not "to apply a specific legal rule that has not been squarely established **[*12]** by [the Supreme Court]." *Knowles, 556 U.S. at 122*.

IV. DISCUSSION

Meas argues that his *Sixth* and *Fourteenth Amendment* rights were violated when the trial court precluded his counsel from cross-examining Badillo on potential bias towards the government stemming from Badillo's criminal history. Docket No. 17 at 2-3. The Court disagrees.

The *Sixth Amendment* provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *U.S. Const. amend. VI*. An accused person's *Sixth Amendment* right to confront witnesses against him is a fundamental right "made obligatory on the states by the *Fourteenth Amendment*." *Pointer v. Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965)* (quotation omitted).

"Confrontation means more than being allowed to confront the witness physically. . . . [A] 'primary interest secured by [the *Confrontation Clause*] is the right of cross-examination.'" *Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)* (quoting *Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965)*). Cross-examination is crucial because it is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Id. at 316*. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Id. (citation omitted). In particular, "the exposure of a witness' motivation in testifying is a proper and important function **[*13]** of the constitutionally protected right of cross-examination." *Id. at 316-17* (citations omitted).

Although cross-examining counsel has traditionally been allowed to impeach or discredit the witness by revealing possible biases or ulterior motives, cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." Id. The right to cross-examine is not absolute, however. "[T]rial 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, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*; see also *Abram v. Gerry, 672 F.3d 45, 49 (1st Cir. 2012)*. A criminal defendant does not have "license to cross-question a prosecution witness concerning every conceivable theory of bias, regardless of the prevailing circumstances." *Bui v. DiPaolo, 170 F.3d 232, 242 (1st Cir. 1999)*. Rather, in interpreting Van Arsdall, the First Circuit has concluded that the "*Confrontation Clause* is satisfied as long as the defendant is given a fair chance to inquire into a witness's bias." Id. (collecting cases). A defendant will not be deprived of his right to inquire into a witness' possible **[*14]** bias "if a trial court legitimately determines that his cross-examination is inappropriate." Id. (citing *Van Arsdall, 475 U.S. at 679*).

To determine if a trial court's limitation on cross-examination constitutes a violation of the *Confrontation Clause*, Van Arsdall sets forth a two-prong test. First, the reviewing court must determine whether the jury would have had a "'significantly different impression' of the witness's credibility" without the limitation. *DiBenedetto v. Hall, 272 F.3d 1, 10 (1st Cir. 2001)* (quoting *Van Arsdall, 475 U.S. at 679-80*). A trial judge cannot prohibit "otherwise appropriate cross-examination designed to show a prototypical form of bias" on the part of a witness that would expose the jury to facts from which they "could appropriately draw inferences relating to the reliability of the witness." *Van Arsdall, 475 U.S. at 680* (quoting *Davis, 415 U.S. at 318*). Defense counsel must be afforded the opportunity "to establish a reasonably complete picture of the witness's veracity, bias, and motivation." *Stephens v. Hall, 294 F.3d 210, 226 (1st Cir. 2002)* (citation omitted).

The second element of the Van Arsdall test is whether the error was harmless, and if so, reversal is not warranted.[8] *DiBenedetto, 272 F.3d at 10* (citing *Van*

[8] Where a trial court committed a constitutional error, courts in

Arsdall, 475 U.S. at 681).

The trial judge, in exercising his discretion, did not prohibit altogether inquiry concerning Badillo's **[*15]** bias. Rather, the trial judge gave defense counsel extensive opportunity to cross-examine Badillo in general, and did not foreclose questioning about his convictions in particular. The trial judge allowed defense counsel to cross-examine Badillo on numerous other subjects and to raise his convictions before the jury for impeachment purposes. Thus, the jury was exposed to facts surrounding Badillo's convictions and could use those facts to draw its own inferences regarding his credibility and potential bias.[9] The SJC correctly found that the trial judge did not abuse his discretion in precluding inquiry concerning possible bias. See S.A. 2321.

The trial judge also conducted a voir dire hearing at which Badillo testified that the pending charges against him and subsequent imposition of probation did not influence his cooperation. *Meas, 467 Mass. at 449*. There was no showing that Badillo's trial testimony was inconsistent with any of his prior statements.

In addition, the SJC correctly noted that the jury was not required to rely on Badillo's testimony to establish the salient facts concerning the shooting. Besides Badillo's testimony, there was ample other evidence, including several **[*16]** other witnesses' testimony, that corroborated the same information about which Badillo testified. In particular, Meas' friend Nou and the victim's friend San identified Meas as the shooter; video footage verified Meas' presence at the crime scene; and bullet casings and a spent projectile from the crime scene matched a gun found in the automobile in which Meas was arrested. See *Meas, 467 Mass. at 439, 444-47*. Accordingly, the SJC's decision was neither contrary to, nor an unreasonable application of, clearly established federal law.

V. RECOMMENDATION

For the foregoing reasons, I recommend that the District Judge assigned to this case DENY the Petitioner ***Jerry Meas***' Petition for Writ of Habeas Corpus.

VI. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of *Fed. R. Civ. P 72(b)*, any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See *Fed. R. Civ. P. 72* and *Habeas Corpus Rule 8(b)*. The parties are further advised **[*17]** that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with *Fed. R. Civ. P. 72(b)* will preclude further appellate review of the District Court's order based on this Report and Recommendation. See *Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir 1999)*; *Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997)*; *Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993)*.

/s/ Jennifer C. Boal

JENNIFER C. BOAL

United States Magistrate Judge

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the First Circuit disagree about the standard for the second prong of this two-prong test. In DiBenedetto and subsequent cases, courts have asked "whether the error was harmless beyond a reasonable doubt; if so, reversal is not warranted." *DiBenedetto, 272 F.3d at 10* (citing *Van Arsdall, 475 U.S. at 679-81*); see also *Knight v. Spencer, 447 F.3d 6, 13 (1st Cir. 2006)*; *Bly v. St. Amand, 9 F. Supp. 3d 137, 162 (D. Mass. 2014)*, appeal docketed, No. 14-1490 (1st Cir. May 7, 2014). Other recent cases have used the Brecht standard for habeas review of a constitutional trial error, asking instead if the error "had substantial and injurious effect or influence in determining the jury's verdict." See *Brecht v. Abrahamson, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*; *Montanez v. Mitchell, No. 12-11882-FDS, 2014 U.S. Dist. LEXIS 30603, 2014 WL 949602, at *4 (D. Mass. Mar. 10, 2014)*. However, a court need not reach the second element of the two-prong test unless it finds a constitutional error in the first prong. See, e.g., *Cameron v. Dickhaut, No. 08-10781-RGS, 2009 U.S. Dist. LEXIS 15503, 2009 WL 497396, at *5 n.3 (D. Mass. Feb. 27, 2009)*. In the instant case, this Court finds no constitutional error, and therefore need not resolve the question of which standard to apply.

[9] Meas relies heavily on Davis and *Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)*, to show that his *Sixth* and *Fourteenth Amendment* rights were violated. However, these cases are not precisely on point. In Davis, defense counsel was entirely precluded from questioning the witness about his conviction and probation. *415 U.S. at 313-14*. In Crawford, the witness invoked marital privilege, eliminating any opportunity for cross-examination. *541 U.S. at 40*. Therefore, *Davis* and *Crawford* are not sufficiently similar as to render erroneous the SJC's decision.

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APPENDIX F

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Commonwealth v. Meas

Supreme Judicial Court of Massachusetts

November 8, 2013, Argued; March 12, 2014, Decided

SJC-11043

Reporter
467 Mass. 434 *; 5 N.E.3d 864 **; 2014 Mass. LEXIS 125 ***; 2014 WL 929178

COMMONWEALTH vs. ***JERRY MEAS***.

Subsequent History: US Supreme Court certiorari denied by *Meas v. Massachusetts, 135 S. Ct. 150, 190 L. Ed. 2d 110, 2014 U.S. LEXIS 6504 (U.S., Oct. 6, 2014)*

Magistrate's recommendation at, Habeas corpus proceeding at *Meas v. Vidal, 2017 U.S. Dist. LEXIS 221734 (D. Mass., Dec. 7, 2017)*

Prior History: [*1]** Middlesex. Indictments found and returned in the Superior Court Department on June 29, 2006. A pretrial motion to suppress evidence was heard by Kenneth J. Fishman, J., and the cases were tried before him.

Core Terms

shooter, shooting, identification, showup, juror, showup identifications, bias, recording, suspects, seat, videotape, wearing, camera, blue, cross-examination, witnesses, front, gang, hat, police officer, advisement, inside, murder, parked, shot, identification procedure, circumstances, convictions, gunshot, defense counsel

Case Summary

Overview

HOLDINGS: [1]-A murder indictment's failure to state a theory did not violate due process because it was in the *Mass. Gen. Laws ch. 277, § 79* form, so it included all theories; [2]-A showup identification was admissible because the crime involved an unrecovered firearm, it was prompt, and those in it were linked to the crime; [3]-A surveillance tape's loss did not prejudice defendant because any exculpatory value was "fairly speculative"; [4]-It was no error to bar inquiry into a prosecution witness's bias because a prior voir dire hearing was held; [5]-It was no error not to discharge a juror whose husband's car was damaged by a rock marked with defendant's gang's color because she said she could be fair; [6]-Not giving a "particular care" instruction on immunized testimony was harmless because, considering the evidence and instructions, it did not substantially sway the judgment.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair

DAVID MIRSKY

Identification Requirement

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

***HN1*[] Due Process Protections, Fair Identification Requirement**

In reviewing a decision on a motion to suppress, the trial judge's subsidiary findings of fact are accepted absent clear error but an independent review of the judge's ultimate findings and conclusions of law is conducted. For exclusion of an identification, a defendant bears the burden of demonstrating, by a preponderance of the evidence, that a witness was subjected by the State to a confrontation that was unnecessarily suggestive and thus offensive to due process. In deciding whether a particular confrontation involving identification was "unnecessarily suggestive," the judge is to consider the totality of the circumstances surrounding it.

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Criminal Law & Procedure > Commencement of Criminal Proceedings > Eyewitness Identification > Showup Identifications

***HN2*[] Due Process Protections, Fair Identification Requirement**

It is true that one-on-one identifications are generally disfavored because they are viewed as inherently suggestive. However, a one-on-one pretrial identification raises no due process concerns unless it is determined to be unnecessarily suggestive. Whether an identification is "unnecessarily" or "impermissibly" suggestive involves inquiry into whether good reason exists for the police to use a one-on-one identification procedure, bearing in mind that exigent or special circumstances are not a prerequisite to such confrontation. Relevant to the good reason examination are the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track. Each case is fact dependent and the existence of "good reason" presents a question of law for an appellate court to resolve on the facts found by the motion judge.

Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

Criminal Law & Procedure > Commencement of Criminal Proceedings > Eyewitness Identification > Showup Identifications

***HN3*[] Due Process Protections, Fair Identification Requirement**

A showup is not necessarily impermissibly suggestive because police advise a witness that someone matching the description he or she has given has been apprehended. A witness ordinarily expects to be asked to make an identification of someone who either fits the description of a suspect or is suspected to have been involved in the reported crime.

Criminal Law & Procedure > ... > Discovery & Inspection > Discovery Misconduct > Appellate Review & Judicial Discretion

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Duty of Disclosure

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

***HN4*[] Discovery Misconduct, Appellate Review & Judicial Discretion**

A defendant who seeks relief from the loss or destruction of potentially exculpatory evidence has the initial burden to establish a reasonable possibility based on concrete evidence rather than a fertile imagination that access to the evidence would have produced evidence favorable to his or her cause. If the defendant meets this initial burden, then the trial judge, or the court

on appeal, must proceed to balance the Commonwealth's culpability, the materiality of the evidence, and the prejudice to the defendant in order to determine whether the defendant is entitled to relief. A reviewing court will not disturb a judge's decision regarding the proper remedy for the loss of evidence absent a clear abuse of discretion.

Criminal Law & Procedure > Trials > Witnesses > Impeachment

Evidence > ... > Credibility of Witnesses > Impeachment > Bias, Motive & Prejudice

Evidence > ... > Examination > Cross-Examinations > Scope

HN5 **Witnesses, Impeachment**

Cross-examination of a prosecution witness to show the witness's bias or prejudice is a matter of right under *U.S. Const. amend. VI* and Mass. Const. Decl. Rights art. 12. If, on the facts, there is a possibility of bias, even a remote one, a judge has no discretion to bar all inquiry into the subject. Defendants have a right to question witnesses about pending criminal charges in order to show a witness's motive in cooperating with the prosecution. A defendant similarly may question a witness about the witness's pending status as a probationer. Even if no promises have been made to a witness concerning pending charges or probation status, it is enough that a prosecution witness is hoping for favorable treatment to justify inquiry concerning bias. Determining whether the evidence demonstrates bias falls within the discretion of the trial judge. A judge does have discretion to limit cross-examination concerning possible bias when further questioning would be redundant, where there has been such "extensive inquiry" that the bias issue has been sufficiently aired, or where the offered evidence is too speculative. In addition, when a voir dire hearing establishes that no possibility of bias exists, a judge may prohibit cross-examination on bias.

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Inquiry

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Judicial Discretion

Criminal Law & Procedure > Juries & Jurors > Disqualification & Removal of Jurors > Outside Influences

HN6 **Disqualification & Removal of Jurors, Inquiry**

If, during trial or jury deliberations, a judge is advised of a claim of an extraneous influence on the jury, he or she is to first determine whether the material raises a serious question of possible prejudice. If a a juror indicates exposure to the extraneous material in question, an individual voir dire is required to determine the extent of that exposure and its prejudicial effect. Because the judge is in the best position to observe and assess the demeanor of the juror on voir dire, a determination that a juror was unaffected by extraneous information is within the sound discretion of the trial judge.

Criminal Law & Procedure > Trials > Witnesses > Credibility

Evidence > ... > Credibility of Witnesses > Impeachment > Bias, Motive & Prejudice

HN7 **Witnesses, Credibility**

Testimony offered by a witness in exchange for the government's promise of a plea bargain or immunity should be treated with caution, lest the jury believe that the government has special knowledge of the veracity of the witness's testimony. The danger increases when the jury are informed that the validity of the agreement depends on the truthful nature of the testimony. If properly handled, however, such an agreement does not constitute improper prosecutorial vouching for the witness. There are guidelines to be used when a witness testifies pursuant to a plea or immunity agreement that explicitly incorporates a witness's promise to testify truthfully, to minimize the possibility that the jury will believe the witness because the Commonwealth, in effect, has guaranteed the truth of the witness's testimony.

Criminal Law &

Procedure > Trials > Witnesses > Credibility

Evidence > ... > Credibility of Witnesses > Impeachment > Bias, Motive & Prejudice

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

HN8[] **Witnesses, Credibility**

Where an instruction informing a jury that a witness has testified in exchange for the government's promise of immunity or a plea bargain is warranted, the following rules apply. A prosecutor may generally bring out on direct examination the fact that a witness has entered into a plea agreement and understands his or her obligations under it, but any attempts to bolster the witness by questions concerning his or her obligation to tell the truth should await redirect examination, and are appropriate only after a defendant has attempted to impeach the witness's credibility by showing the witness struck a deal with the prosecution to obtain favorable treatment. A prosecutor in closing argument may then restate the witness's agreement, but commits reversible error if he or she suggests that the government has special knowledge by which it can verify the witness's testimony. To guard against an implied representation of credibility, a judge must specifically and forcefully tell the jury to study the witness's credibility with particular care. Where the jury are aware of the witness's promise to tell the truth, the judge also should warn the jury that the government does not know whether the witness is telling the truth.

Headnotes/Summary

Headnotes

Homicide > *Practice, Criminal* > Indictment > Loss of evidence by prosecution > Jury and jurors > Instructions to jury > Capital case > *Constitutional Law* > Indictment > Identification > Jury > *Due Process of Law* > Identification > Loss of evidence by prosecution > *Evidence* > Identification > Videotape > Exculpatory > Bias > *Identification* > *Witness* > Bias > Immunity > *Jury and Jurors*

Counsel: David H. Mirsky for the defendant.

Jessica Langsam, Assistant District Attorney (Elizabeth Dunigan, Assistant District Attorney, with her) for the Commonwealth.

Judges: Present: Ireland, C.J., Spina, Cordy, Duffly, & Lenk, JJ.

Opinion by: IRELAND

Opinion

[*435] [868]** IRELAND, C.J. On December 16, 2008, a jury convicted the defendant, ***Jerry Meas***, of murder in the first degree on a theory of deliberate premeditation and of unlawful possession of a firearm.[1] Represented by new counsel on appeal, the defendant argues error in (1) the form of the murder indictment; (2) the denial of his motion to suppress identification evidence; (3) the admission at trial of surveillance videotape recordings; (4) the judge's limitation on cross-examination of a witness on the issue of bias; (5) the judge's decision not to discharge a juror; and (6) the judge's instructions to the jury. We affirm the order denying the defendant's motion to suppress and affirm his convictions. We discern no basis to exercise our authority pursuant to G. L. c. 278, § 33E.

1. *Form of indictment.* Contrary to the defendant's contention, his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were not violated on the ground that the murder indictment did not specify any theory of **[*436]**

[1] The **[***2]** defendant also was indicted on a charge of being an armed career felon, see G. L. c. 269, § 10G (c). The Commonwealth filed a nolle prosequi with respect to that charge.

murder. Because the indictment in this case is in the statutory form prescribed by G. L. c. 277, § 79, it "encompasses all theories of murder in the first degree and is sufficient to charge murder by whatever means it may have been committed." *Commonwealth v. DePace*, 442 Mass. 739, 743, 816 N.E.2d 1215 (2004), cert. denied, *544 U.S. 980, 125 S. Ct. 1842, 161 L. Ed. 2d 735 (2005)*. The cases to which the defendant cites have no application here. The case of *Blakely v. Washington*, 542 U.S. 296, 304, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), concerns certain constitutional requirements for enhanced penalty sentencing, and *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), is similarly without **[**869]** force. See *Commonwealth v. DePace, supra* ("The *Apprendi* case was not concerned with the sufficiency of a grand jury indictment"). See also *Commonwealth v. Morales*, 453 Mass. 40, 52, 899 N.E.2d 96 (2009) **[***3]** (declining to overrule *Commonwealth v. DePace, supra*, and stating that form of indictment does not offend *Apprendi*).

2. *Suppression of identification evidence*. The defendant argues that the judge[2] erred in denying his motion to suppress the results of the showup identifications made in the aftermath of the shooting. He claims that the identification procedure was "unnecessarily and unconstitutionally suggestive." After conducting an evidentiary hearing, the judge denied the motion, concluding that there was good reason to use the showup identification procedure and that the identifications did not violate due process. We set forth the material evidence from the hearing as summarized in the judge's findings of fact.

On June 13, 2006, at approximately 11 P.M., the victim was shot and killed while seated in the driver's seat of his automobile, which was parked in front of a convenience store located at the corner of Chelmsford and Westford Streets in Lowell. With the victim at the time were his friend, Vicheth San, who sat in the front passenger seat, and his niece, Vannika Pen, who was in the rear passenger seat. Other witnesses **[***4]** to the shooting or events surrounding the shooting included Douglas Anderson, Fernando Badillo, and Pedro Garcia Cardona.

Before the shooting, the victim parked his automobile in a spot in front of the store. Nearby there was a black Honda **[*437]** Accord automobile in a parking spot. The Honda's driver, who was Cambodian, and an individual seated in the rear passenger seat of that vehicle stared at the occupants of the victim's automobile. Inside the store, Badillo observed the defendant being loud and acting tough. Badillo described the defendant as an Asian male with long dark hair worn in a ponytail. Badillo observed that the defendant was wearing a bandana, black hat, black jacket, and dark-colored khaki pants.

After the defendant left the store, he approached the victim's automobile, speaking to the victim as he approached. The victim told the defendant to "calm down."

Another passenger of the Honda, who was wearing a hat with a "B" on it, went to the passenger's side of the victim's automobile and asked San, "What up, Blood?" The defendant then raised a firearm and shot the victim. He tried to shoot the gun again, but it did not discharge and only made clicking noises. The defendant and the other **[***5]** individual returned to the black Honda and drove down Chelmsford Street.

Within minutes of the shooting and in response to a 911 telephone call, Lowell police officers stopped a black Honda Accord with a very similar license plate number to that which had been provided to the police. This stop occurred at the corner of Branch and School Streets, approximately four to five blocks, or one-quarter mile, from the store.

The four occupants of the Honda were ordered out of the automobile, pat frisked for weapons, and handcuffed. The officers knew the occupants as members of the "Asian Boyz" gang. In addition to the defendant, the occupants of the automobile included Phalla Nou, Yoeun Chhay, and a juvenile with the street name "Silent." Chhay was found with a serrated knife, and a loaded gun was located on the floor of the rear passenger's side of the Honda, where Silent had been seated. A shell **[**870]** casing was found on the floor of the rear driver's side, where the defendant had been seated.

The police decided to conduct showup identification procedures at the location where the black Honda Accord had been stopped. This area was near a liquor store parking lot, and flood lights from that store, **[***6]** as well as street lights, and lights from police cruisers on the scene, contributed to illuminating the **[*438]** location. The showups were purportedly conducted in accordance with "Eyewitness Identification Procedure Guidelines" prepared by the Middlesex County district attorney's office. There were at least six uniformed police officers in the area of the showup as well as

[2] The judge who ruled on the motion also was the trial judge.

multiple police cruisers. The four men from the black Honda were placed in a line and handcuffed behind their backs. For each of the five identification procedures that night, a "Show-Up Identification Checklist" form was used. One side of that form contained the following advisements to be given to witnesses before the presentation:

"1. You are going to be shown an individual.

"2. This may or may not be the person who committed the crime, so you should not feel compelled to make an identification.

"3. It is just as important to clear innocent people, as it is to identify possible perpetrators.

"4. Whether or not you identify someone, the police will continue to investigate.

"5. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.

"6. Please do not discuss this identification **[***7]** procedure or the results with other witnesses in this case or with the media.

"7. Focus on the event: the place, view, lighting, your frame of mind, etc. Take as much time as you need.

"8. People may not appear exactly as they did at the time of the [e]vent, because features such as clothing and hair style may change, even in a short period of time.

"9. As you look at this person, tell me if you recognize him/her. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification."

There were check boxes next to each of the enumerated advisements **[*439]** to enable the officer conducting the showup to indicate which advisement was given to the witness, and the form contained signature and date lines for the witness and the officer to fill in. The other side of the form required the officer to identify himself, other officers present, and the witness, and to indicate the number of persons shown to the witness and the circumstances warranting the showup, including the proximity of the crime and the match of the description provided. The form also provided space to indicate the characteristics of the showup, including its location, the lighting, and the **[***8]** position of the suspects, as well as the location of police officers to the suspects and whether the suspects were wearing handcuffs. The form further provided a space for statements made during the identification procedure by other people.

From 11:11 P.M. on June 13, 2006, to at least 12:15 A.M. on June 14, 2006, five showup procedures were conducted. The first witness was Anderson who identified Nou as the shooter. Thereafter, Anderson was not taken to the police station to provide a formal statement.

At 11:20 P.M., Badillo was next taken to the showup. Badillo recalled receiving the advisements from the police and observing **[**871]** six to ten cruisers and six to eight police officers in the area of the identification. He was not pressured by the police to select anyone, and he identified the defendant based on the clothing he had observed earlier. Badillo stated that the defendant was "definitely him." Badillo was approximately two to three car lengths away when he made his identification of the defendant as the shooter.

Cardona was the third witness to view the suspects, at 11:35 P.M., and he, too, signed an advisement form. He observed six cruisers at the showup scene and made his identification **[***9]** from ten yards away. Cardona had heard shots while parked at the store and had observed the shooter and the vehicles. Cardona identified the defendant as the shooter, having observed that the shooter was an Asian male with long hair who wore black pants and a blue bandana around his neck.

San was the next identifying witness, at 11:53 P.M. He signed an advisement form and identified the defendant as the shooter. He specifically indicated that the shooter was the individual **[*440]** who was wearing a white and black Dickies-brand hat. San also identified the other individual in the line with a hat (Nou) as the other person who had come out of the black Honda. San further identified the black Honda Accord that he sighted parked nearby. San observed two or three police officers and two or more police vehicles at the scene of the showup, and made his identifications at an approximate distance of fifteen yards from the suspects. Unlike the other witnesses, San recalled being told by police that he was going to be shown the individuals whom the police had caught and who were probably the individuals who had shot the victim. He also recalled signing the advisement form and having it read to him.

At **[***10]** 12:15 A.M., Pen was escorted to the location of the showup. Although she was able to describe what the men from the shooting wore, she retracted an initial identification of the defendant as the shooter because she was not sure about his face and purportedly did not want to pick out the wrong person. The identification checklist form indicates that she was unable to make an identification. Pen was clearly frightened.

After the showup identifications were completed, at some point after 12:45 A.M., the defendant and the other occupants of the black Honda were transported to the Lowell police station.

HN1[↑] In reviewing a decision on a motion to suppress, "we accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of [the judge's] ultimate findings and conclusions of law.'" *Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233 (2004)*, quoting *Commonwealth v. Jimenez, 438 Mass. 213, 218, 780 N.E.2d 2 (2002)*. For exclusion of an identification, "the defendant bears the burden of demonstrating, by a preponderance of the evidence, that the 'witness was subjected by the State to a confrontation that was unnecessarily suggestive and thus offensive to due process.'" *Commonwealth v. Johnson, 420 Mass. 458, 463, 650 N.E.2d 1257 (1995)*, **[***11]** quoting *Commonwealth v. Botelho, 369 Mass. 860, 866, 343 N.E.2d 876 (1976)*. See *Commonwealth v. Odware, 429 Mass. 231, 235, 707 N.E.2d 347 (1999)* ("Common-law principles of fairness are another basis to exclude witness identification testimony"). "In deciding whether a particular confrontation [involving identification] was 'unnecessarily suggestive,' the judge is to consider 'the totality of the circumstances surrounding it.'" **[*441]** *Commonwealth v. Botelho, supra at 867*, **[**872]** quoting *Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)*.

The defendant argues that no exigent circumstances existed justifying a showup identification procedure and that, instead, a lineup at the nearby police station should have been conducted. ***HN2***[↑] It is true that "[o]ne-on-one identifications are generally disfavored because they are viewed as inherently suggestive." *Commonwealth v. Martin, 447 Mass. 274, 279, 850 N.E.2d 555 (2006)*, citing *Commonwealth v. Johnson, supra at 461*. However, we have explained:

> "[A] one-on-one pretrial identification raises no due process concerns unless it is determined to be *unnecessarily* suggestive. Whether an identification is 'unnecessarily' or 'impermissibly' suggestive . . . involves inquiry whether good reason exists for the police to use a **[***12]** one-on-one identification procedure . . . bearing in mind that . . . '[e]xigent or special circumstances are not a prerequisite to such confrontation.'" (Emphasis in original.)

Commonwealth v. Austin, 421 Mass. 357, 361, 657 N.E.2d 458 (1995), quoting *Commonwealth v. Harris, 395 Mass. 296, 299, 479 N.E.2d 690 (1985)*. "Relevant to the good reason examination are the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track." *Commonwealth v. Austin, supra at 362*. Each case is fact dependent and the existence of "good reason" presents "a question of law for the appellate court to resolve on the facts found by the motion judge." *Id.*

Here, the police had very good justification for resorting to the showup procedure. The crime involved the use of a deadly weapon, a firearm, that was not recovered at the scene. Thus, the nature of the crime presented public safety concerns, as well as the need for efficient police investigation in its immediate aftermath. The showups **[***13]** were promptly conducted in relation to the time of the shooting, with the first occurring within minutes of the shooting and the last just over one hour after the shooting. **[*442]** See *Commonwealth v. Bowden, 379 Mass. 472, 479, 399 N.E.2d 482 (1980)*, quoting *Commonwealth v. Barnett, 371 Mass. 87, 92, 354 N.E.2d 879 (1976)*, cert. denied, *429 U.S. 1049, 97 S. Ct. 760, 50 L. Ed. 2d 765 (1977)* (concluding that "[s]howups of suspects to eyewitnesses of crimes have been regularly held permissible when conducted by the police promptly after the criminal event"). See also *Commonwealth v. **Barnett, supra** at 89, 91-94* (showup within one hour after crime; confrontation not impermissibly suggestive). The four individuals included in the showups were stopped in a vehicle that bore a similar licence plate and description to that reported to police as having been involved in the incident, and in the geographical vicinity of the location of the shooting. The prompt viewing of the suspects at the location of the motor vehicle stop guided police in determining whether they were dealing with the shooter or should pursue other leads to locate an armed fleeing suspect.

The showup was not rendered impermissibly suggestive on account of the manner in which it was conducted. The **[***14]** fact that the suspects were viewed under ample illumination and while they were in handcuffs and obviously in custody does not, in the circumstances, create a level of unfairness that violates due process. See *Commonwealth v. Phillips, 452 Mass. 617, 628-629, **[**873]** 897 N.E.2d 31 (2008)*, and cases cited. Illumination was needed in view of the fact that the identifications took place during the late evening and into the early morning. See *id.* Further, the need for public safety and to avoid the escape of the suspects

was imperative. One of the suspects had been found with a serrated knife on his person, and a loaded gun was recovered in the vehicle the four suspects had occupied. All four men were known to the officers who had made the stop as gang members. The number of police officers and cruisers, while perhaps more than necessary, in the circumstances did not create an impermissibly suggestive showup identification procedure.

HN3[↑] A showup is not necessarily impermissibly suggestive because police advise the witness that someone matching the description he or she has given has been apprehended. See *id. at 628* (identification procedure not unnecessarily suggestive because witness may have heard on police radio **[***15]** that he was about to view suspect); *Commonwealth v. Williams, 399 Mass. 60, 67, 503 N.E.2d 1 (1987)* (no due process violation where police officer expressed **[*443]** confidence that he had "got the guys"). "A witness ordinarily expects to be asked to make an identification of someone who either fits the description of a suspect or is suspected to have been involved in the reported crime." *Commonwealth v. Phillips, supra.* See *Commonwealth v. Harris, 395 Mass. 296, 299-300, 479 N.E.2d 690 (1985)*, quoting *Commonwealth v. Perretti, 20 Mass. App. Ct. 36, 42, 477 N.E.2d 1061 (1985)*. As the judge reasoned, although there had been a statement to San expressing the conclusion of police that the shooter was probably among those that the witness was about to observe, that remark was tempered by the other advisements that had been provided to him. All of the remaining witnesses who had identified the defendant had been carefully and appropriately advised about the identification procedure without any suggestion or indication by police concerning who they believed was the shooter. Compare *Commonwealth v. Silva-Santiago, 453 Mass. 782, 797-798, 906 N.E.2d 299 (2009)* (establishing protocol to be followed before photographic array identification procedure).

Last, we reject **[***16]** the defendant's contention that various other factors rendered the showup identification procedure unreliable. It was not improper for Cardona and San to identify the shooter based on each man's memory of what clothing the shooter wore, particularly where the clothing was rather distinctive (e.g., bandana and the Dickies-brand hat). See *Commonwealth v. Amaral, 81 Mass. App. Ct. 143, 149, 960 N.E.2d 902 (2012)*. The fact that not all of the witnesses identified the defendant as the shooter does not render the positive identifications inadmissible and unreliable. Rather, the conflicting testimony was a matter to be pursued at trial and one for the jury to resolve.

We conclude that, in the circumstances, the police had good reason to conduct the showup identification procedure and the defendant has not met his burden of showing by a preponderance of the evidence that he was subjected to a showup identification procedure that was unnecessarily suggestive. The judge ruled correctly on the defendant's motion to suppress.

3. *Trial.* a. *Facts.* Based on the Commonwealth's evidence, the jury could have found the following facts. During the evening of June 13, 2006, the defendant went to a cookout at Nou's home **[***17]** in Lowell. Fellow members of the Asian Boyz gang were **[*444]** present, including Chhay and Silent.[3] **[**874]** The defendant had a gun, which he passed around for people to see.

The cookout was interrupted by a gunshot coming from the street in front of the house. Nou later told police that two automobiles — a blue Honda Civic and a red Acura — had passed by his house. Nou relayed that someone in the red Acura had shot at him while he was holding his infant son. Nou recounted also that, a few weeks before, someone had shot at his house.

Sometime after the gunshot sounded, Nou drove the defendant, Chhay, and Silent to the store to purchase cigarettes.[4] He parked to the right of the front door, and the defendant[5] and Chhay went inside.

The victim, who was driving a red Acura and was accompanied in the front seat by San, and in the back seat by Pen, stopped at the store and parked in front of its door. The black automobile was parked a few spaces over on the passenger's side of the red Acura. Nou[6]

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[3] The Asian Boyz gang is a "Crip" gang and is associated with the color blue. One of its rival gangs is the "Bloods," whose members wear red.

[4] Nou drove a four-door, black Honda Accord automobile.

[5] Inside the store, a patron, Fernando Badillo, saw the defendant. Badillo described him as an Asian man between eighteen and twenty-five years of age. The defendant had his hair in a ponytail and wore a blue hat with "Dickies" (the brand name) in white lettering, white sneakers, dark colored pants, and a dark blue **[***18]** sweater. Videotape surveillance, admitted in evidence over objection, shows the defendant inside the store.

[6] Phalla Nou was described as a bald Asian man, about twenty to twenty-five years of age. He was wearing a brown shirt.

thought the victim and San were "Bloods" because they were wearing red, the color of the rival gang, and he and San exchanged insults. Thereafter, the defendant[7] and Chhay[8] departed the store. Nou said something to them, after which Chhay went over to San and asked whether he was a Blood.

Because the facts concerning what next transpired, namely, the shooting, generally mirror those found by the judge on the motion to suppress identification evidence, we need not repeat **[*445]** them. There were, however, two additional witnesses at trial who had observed the events surrounding the shooting. The store clerk, Carlos Urrego,[9] saw two Asian men, both wearing blue, approach the victim's automobile; saw the man on the driver's side, who was wearing a baseball cap and had long black hair, pull out what appeared to be a silver gun from his belt area; heard gunshots; and saw the two men run to an automobile parked behind the victim's. Urrego telephoned 911 and directed Badillo to get the license plate number. Badillo wrote down the license plate number of the black automobile and gave it to Urrego.

Nou testified that he saw the defendant shoot the victim and heard two shots.[10] The shots scared Nou, so he backed up his automobile to get ready to leave, and the **[**875]** defendant and Chhay jumped in. Once inside the automobile, the defendant said, "We got them **[***20]** slobs."[11]

San transported the victim to a nearby hospital. The victim was pronounced dead at 11:16 P.M. He died as a result of a gunshot wound to the left side of his neck that passed through his chest and right lung, and exited his right upper arm area. Police responded to a telephone call from the store at about 11 P.M. A police officer took a piece of paper from Badillo that had what Badillo believed was the license plate number of the black automobile. The officer secured the scene and broadcasted the license plate "over the air."

The central facts concerning the stop of Nou's automobile and subsequent showup identifications were essentially the same as brought out on the suppression motion. Before the stop was made, however, the jury heard that the black automobile had been observed speeding and did not have its headlights on. The .38 caliber semiautomatic handgun recovered from the automobile had one round of ammunition in its chamber and three rounds in its magazine.[12] A discharged cartridge casing **[*446]** and a blue bandana also were recovered from **[***21]** the back seat of the automobile. Nou recognized the gun as the same one that the defendant had displayed at the cookout.

Concerning the showup identifications, evidence from the hearing on the defendant's suppression motion of Cardona's identification of the defendant as the shooter changed. At trial, Cardona testified that he had identified Chhay as the shooter. Also, there was evidence that Anderson was not the only witness who identified someone other than the defendant as the shooter.[13] Gaddaffi Henry, who had heard a gunshot when he was inside the store, selected Silent at the showup identification procedure. Henry, however, did not see the shooting. He testified that he heard the gunshot, went to the door after the gunshot, and observed a man with "long hair maybe" and "maybe [wearing] a white shirt" "running away" and getting into a black automobile.

After the showup identifications, Nou spoke with police. He at first "stalled" because he was "nervous and scared," but then told them what had happened. Nou told police **[***22]** that he thought that the automobile driven by the victim was the same one he had seen earlier when someone shot at him and his son. Nou was arrested and charged with accessory after the fact to murder. He pleaded guilty to this charge, was incarcerated and later released on parole. At the time of his trial testimony, Nou was on parole.

Police recovered a discharged cartridge casing on the

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[7] San described the defendant as an Asian male who wore a black hat with "Dickies" in white lettering, black clothing, and a blue rag around his neck. San was clear that it was the man with the "Dickies" hat who was the shooter.

[8] San described Yoeun Chhay as an Asian male who wore a blue hat with a "B" on it. Badillo described Chhay as an Asian male in a black shirt who was wearing a hat with the inscription "B" **[***19]** in white.

[9] Carlos Urrego was later brought to the location of the showup identification procedure, but he did not make any identifications.

[10] Nou testified under a grant of immunity pursuant to G. L. c. 233, § 20E.

[11] The term "slob" is a derogatory term for a Blood gang member.

[12] There was testimony from a firearms identification expert that the firearm had been test fired and was operable.

[13] Douglas Anderson identified Nou as the shooter.

ground outside the store and a discharged cartridge casing on the ground in front of Nou's home. From a seat inside the automobile the victim had been driving, police found a spent .38 caliber projectile. Testing indicated that the three discharged cartridge casings (from outside the store, from outside Nou's home, and in Nou's automobile) and the projectile recovered from the automobile the victim had been driving all came from the gun found inside Nou's automobile.

b. *The defendant's case.* The defendant did not testify. His trial counsel **[**876]** called two police officers as witnesses to confirm that a surveillance videotape recording from the store grounds had been lost by police. The defense argued that the police lost **[*447]** and manipulated evidence, ignored certain identification evidence that the defendant **[***23]** was not the shooter, conducted an "outrageous" showup identification procedure, and conducted an inadequate investigation. Defense counsel also asserted that Nou was a liar and that the absence of gunshot residue on the defendant's hands established that he was not the shooter.

c. *Admission of surveillance tapes.* 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; and 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 **[***24]** 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.[14] Consequently, the defendant objected to the admission of the videotape recordings depicting the footage from the other two angles. After conducting various voir dire examinations on the matter, the judge declined to exclude the challenged videotape recordings, concluding that the defense had not shown a reasonable probability that the lost recording of the third camera angle would have been exculpatory, and that even if it had been exculpatory, the defendant was not prejudiced by its loss because his trial counsel could cross-examine the Commonwealth's witnesses regarding it and possibly receive the benefit of a missing evidence instruction and instruction concerning inadequate police investigation pursuant to *Commonwealth v. Bowden, 379 Mass. 472, 485-486, 399 N.E.2d 482 (1980)*.[15]

[*448] *HN4*[↑] "A defendant who seeks relief **[***25]** from the loss or destruction of potentially exculpatory evidence has the initial burden . . . to establish a 'reasonable possibility based on concrete evidence rather than a fertile imagination that access to the [evidence] would have produced favorable evidence to his cause.'" *Commonwealth v. Cintron, 438 Mass. 779, 784, 784 N.E.2d 617 (2003)*, citing *Commonwealth v. Olszewski, 416 Mass. 707, 714, 625 N.E.2d 529 (1993)*, cert. denied, *513 U.S. 835, 115 S. Ct. 113, 130 L. Ed. 2d 60 (1994)*, and quoting *Commonwealth v. Neal, 392 Mass. 1, 12, 464 N.E.2d 1356 (1984)*. See *Commonwealth v. Williams, 455 Mass. 706, 718, 919 N.E.2d 685 (2010)*. If the defendant meets this initial burden, then "the judge, or the court on appeal, must proceed to balance the Commonwealth's culpability, the materiality of the evidence, and the prejudice to the defendant in order **[**877]** to determine whether the defendant is entitled to relief." *Id.* "We will not disturb a judge's decision regarding the proper remedy for the loss of evidence absent a clear abuse of discretion." *Commonwealth v. Carr, 464 Mass. 855, 870, 986 N.E.2d 380 (2013)*, citing *Commonwealth v. Cintron, supra.*

The judge did not abuse his discretion. The defendant argues that the lost videotape recording could have been used to impeach Badillo's testimony and was "potentially **[***26]** exculpatory" because not all of the witnesses had identified the defendant as the shooter. The portion of Badillo's testimony cited by the defendant concerns the direction from which the shooter came, not the identification of the defendant as the shooter. Badillo did not waver in his identification of the defendant, the "loud one" from the store, as the shooter. The judge correctly noted that, in light of the other identification

[14] 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.

[15] The defendant ultimately did receive the benefit of these instructions.

evidence implicating the defendant as the shooter,[16] it was "fairly speculative" that the missing tape would have been exculpatory. The defendant's claim is not predicated on the equivalent of "concrete evidence." *Commonwealth v. Cintron, supra.*

[*449] Even if the judge had concluded that the defendant had met his burden, the judge did not abuse his discretion in determining that the defendant was not prejudiced from the loss because "he was able, during cross-examination of the testifying police officers, to exploit the lost evidence by casting doubt on the thoroughness and accuracy of the police investigation," *Commonwealth v. Carr, supra at 871*, thereby setting up a *Bowden*defense. *Commonwealth v. Bowden, supra.* The defendant also benefited from a missing evidence instruction to highlight the loss of the evidence.

d. *Evidence of bias.* Prior to Badillo's testimony, defense counsel argued that he should be permitted to impeach Badillo with his prior convictions and evidence of bias. At the time of the shooting, Badillo had been charged with mayhem, assault and battery, and assault and battery causing serious bodily injury. Following the shooting, but before trial, Badillo, on May 25, 2007, pleaded guilty to the above-named charges and was placed on probation. Defense counsel asserted that Badillo was biased at the time he spoke with police about **[***28]** the shooting because of the pending charges. In addition, defense counsel argued that Badillo would be biased toward the prosecution during his trial testimony because he was on probation, which is subject to being revoked. The judge conducted a voir dire, at which Badillo testified that, when police questioned him about the shooting on June 13 and 14, 2006, he did not think that cooperating with the police would affect his pending case. The judge ruled that Badillo could only be impeached with his prior convictions, and defense counsel did so. The defendant contends on appeal that the judge's ruling was erroneous and violated several of his State and Federal constitutional rights.

HN5[↑] "Cross-examination of a prosecution witness to show the witness's bias or prejudice is a matter of right under the *Sixth Amendment to the Constitution of the United States* **[**878]** and art. 12 of the Declaration of Rights of the Commonwealth." *Commonwealth v. Allison, 434 Mass. 670, 681, 751 N.E.2d 868 (2001)*. "If, 'on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar *all* inquiry into the subject'" (emphasis added). *Id.*, quoting *Commonwealth v. Tam Bui, 419 Mass. 392, 400, 645 N.E.2d 689*, cert. denied, **[***29]** *516 U.S. 861, 116 S. Ct. 170, 133 L. Ed. 2d 111 (1995)*. Defendants have a "right **[*450]** to question . . . witness[es] about . . . pending criminal charges in order to show [a witness's] motive in cooperating with the prosecution." *Commonwealth v. Carmona, 428 Mass. 268, 270, 700 N.E.2d 823 (1998)*, quoting *Commonwealth v. Connor, 392 Mass. 838, 841, 467 N.E.2d 1340 (1984)*. A defendant similarly may question a witness about the witness's pending status as a probationer. *Davis v. Alaska, 415 U.S. 308, 317-318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)*. Even if no promises have been made to a witness concerning the pending charges or probation status, "it is enough 'that a prosecution witness is hoping for favorable treatment . . . to justify inquiry concerning bias.'" *Commonwealth v. Carmona, supra*, quoting *Commonwealth v. Henson, 394 Mass. 584, 587, 476 N.E.2d 947 (1985)*.

"Determining whether the evidence demonstrates bias . . . falls within the discretion of the trial judge." *Commonwealth v. LaVelle, 414 Mass. 146, 153, 605 N.E.2d 852 (1993)*. "A judge does have discretion to limit cross-examination concerning possible bias when further questioning would be redundant," *Commonwealth v. Tam Bui, supra*, "where there has been such 'extensive inquiry' that the bias issue 'has been sufficiently aired,'" *Commonwealth v. Avalos, 454 Mass. 1, 7, 906 N.E.2d 987 (2009)*, **[***30]** quoting *Commonwealth v. LaVelle, supra at 154*, or "where the offered evidence is 'too speculative,'" *Commonwealth v. Avalos, supra*, quoting *Commonwealth v. Tam Bui, supra at 402*. In addition, when a voir dire hearing establishes that no possibility of bias exists, a judge may prohibit cross-examination on bias. See *Commonwealth v. Haywood, 377 Mass. 755, 763, 388 N.E.2d 648 (1979)* (cross-examination on bias not necessary where voir dire established that witness's description of events did not change in favor of Commonwealth after charges arose against him).

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[16] There also was testimony from Detective James Latham of the Lowell police department that he reviewed the original videotape recording with all three camera views and isolated the footage from two camera views on separate videotape recordings that he gave to the prosecutor. Detective Latham testified that he had examined the third camera footage, but that he did not record it because there was "nothing of interest" on it. While Detective Latham's credibility was challenged during his cross-examination, defense counsel **[***27]** offered only speculation in claiming that the lost footage would have been exculpatory.

In the circumstances of this case, we conclude that the judge did not abuse his discretion in precluding inquiry concerning possible bias. Significantly, the judge did not altogether foreclose inquiry on the issue. Rather, he conducted a voir dire hearing, at which Badillo testified that the pending charges against him and subsequent imposition of probation did not influence his cooperation with police or the prosecutor. There was no showing that Badillo's trial testimony was inconsistent with any prior statements he made, although charges were pending when he initially made statements to the police after the shooting. Also, the jury **[*451]** were not required **[***31]** to rely on Badillo's testimony to establish the salient facts concerning the shooting. There was other witness testimony, including Nou's testimony, concerning the shooting, the defendant's presence at and involvement in the shooting, and the later showups. The judge allowed impeachment of Badillo with his convictions that pertained to the charges existing when he spoke with police after the shooting and that related to his probation. Defense counsel's claims of bias were grounded only in speculation. There was no error on the record before us.

e. *Decision not to discharge juror.* The defendant maintains that his State and Federal constitutional rights to **[**879]** an impartial jury were violated because the judge did not discharge a juror who reported that, over the preceding weekend, someone had thrown a rock with a light blue paint mark on it, and had broken the window of her husband's automobile when it was parked at their home. The defendant contends that the juror's notation of the color of the mark demonstrated that she "was already making a connection between the stone and defendant," because of the color associated with the gang to which the defendant belonged (Asian Boyz), and therefore **[***32]** her ability to be fair and impartial "was no longer unequivocally assured."

HN6[↑] If, during trial or jury deliberations, the judge is advised of a claim of an extraneous influence on the jury, he or she is to first "determine whether the material . . . raises a serious question of possible prejudice." *Commonwealth v. Jackson, 376 Mass. 790, 800, 383 N.E.2d 835 (1978)*. If a "a juror indicates exposure to the extraneous material in question, an individual voir dire is required to determine the extent of that exposure and its prejudicial effect." *Commonwealth v. Tennison, 440 Mass. 553, 557, 800 N.E.2d 285 (2003)*. Because the judge "is in the best position to observe and assess the demeanor of the juror[] on voir dire . . . [t]he determination that [a] juror was unaffected by extraneous information is within the sound discretion of the trial judge." (Citation omitted.) *Id. at 560*.

When the issue arose, the judge promptly brought it to the attention of counsel and conducted a voir dire examination of the juror before she had contact with any other jurors. During this examination, the juror explained that the incident had occurred over the weekend; the police did not think it was random because **[*452]** her husband's automobile was parked **[***33]** in their driveway and not on the street; and when she told police that she was serving as a juror, they told her to notify a court officer. The judge inquired further, and the juror stated that the incident would not have an effect on her ability to be fair and impartial and would "absolutely not" influence her verdict. The judge advised her that, if she felt "in the slightest way" that somehow the incident might affect her ability to be a fair juror, then she should notify the court. The juror agreed and indicated that she would not mention the incident to any other jurors. We conclude that the judge handled the situation correctly and did not abuse his discretion in declining to discharge the juror. See *Commonwealth v. Rosario, 460 Mass. 181, 194-195, 950 N.E.2d 407 (2011)* (no abuse of discretion in judge's decision not to discharge juror where judge properly conducted individual voir dire of juror and there was no reason to second guess judge's finding of no prejudice). Even if the juror made a connection between the blue marking on the rock and the Asian Boyz gang, she stated explicitly that she was able to be fair and impartial. There was no "solid evidence of a distinct bias." *Commonwealth v. Phim, 462 Mass. 470, 481, 969 N.E.2d 663 (2012)*, **[***34]** quoting *Commonwealth v. Bryant, 447 Mass. 494, 500, 852 N.E.2d 1072 (2006)*.

f. *Jury Instructions.* i. *Showup identification procedure.* During his final charge, the judge instructed the jury as follows:

> "You may also take into account that any identification that was made by picking the defendant out of [a] group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to a witness."

The defendant argues for the first time on appeal that this language was "factually **[**880]** incorrect" because it informed the jury that the showup identification procedure "was the same" as viewing multiple subjects in a photographic array or lineup. He also contends that the instruction amounted to improper vouching by the judge "for the credibility of the identification of the defendant at the showup" and that the instruction

"essentially t[old]" the jury to ignore the identifications of Nou and Silent as the shooter. The defendant misreads the instruction that **[*453]** informed the jury that, to the extent they determined that the individuals in the showup turned around one at a time (instead of all four suspects facing each witness, as the trial testimony differed on this point), **[***35]** such a presentation was *less* reliable than a lineup. The defendant requested this instruction, and it was a correct statement of law to which he was entitled. See Commonwealth v. Cuffie, 414 Mass. 632, 639-640, 609 N.E.2d 437 (1993). There was no error.

ii. *Requested jury instruction.* At trial, Nou testified that the defendant, whom he knew, had been the shooter. Nou also stated that, in connection with the victim's death, he had been charged with being an accessory after the fact to murder, had pleaded guilty to that charge, and had served his term of incarceration and was on parole. During his cross-examination, Nou stated that he had been given immunity from further prosecution in this case. During his redirect examination, Nou explained that he was testifying because he wanted to "do the right thing," that no one had made him any promises in exchange for testifying, and that he had promised to tell the truth. The judge then instructed the jury as follows:

> "[T]estimony has been offered by this witness who has been granted immunity under [G. L. c. 233, § 20E]. The statute provides in pertinent part that a justice of the Supreme Judicial Court, Appeals Court, or Superior Court shall, at the request **[***36]** of the Attorney General or a District Attorney and after a hearing, issue an order granting immunity to a witness provided that such justice finds that the witness did validly refuse or is likely to refuse to answer questions or produce evidence on the grounds that such testimony or such evidence might tend to incriminate him. A witness who has been granted immunity and who subsequently testifies cannot be prosecuted on account of the matter about which he or she has testified except for perjury or contempt committed while giving his or her testimony. A defendant cannot be convicted solely on the testimony of or the evidence produced by a witness who has been granted immunity under the provisions of [G. L. c. 233, § 20E]. Rather, the law requires that in order for a conviction to result in a case where immunized testimony is offered there must be some evidence from another **[*454]** source that supports the testimony of the immunized witness on at least one element of proof essential to convict the defendant."

The defendant argues that the judge erred in declining to give his requested jury instruction regarding the "particular care" the jury should use in examining Nou's immunized testimony **[***37]** and thus violated the central purpose of Commonwealth v. Ciampa, 406 Mass. 257, 266, 547 N.E.2d 314 (1989), to correct improper vouching inherent in communicating to a jury that a cooperating witness has received immunity. Because the defendant objected to the judge's decision not to give his requested instruction, we review for prejudicial error. See Commonwealth v. **Williams**, 439 Mass. 678, 682, 790 N.E.2d 662 (2003).

HN7[↑] "Testimony offered by a witness in exchange for the government's **[**881]** promise of a plea bargain or immunity should be treated with caution, lest the jury believe that the government has special knowledge of the veracity of the witness's testimony." Commonwealth v. Marrero, 436 Mass. 488, 500, 766 N.E.2d 461 (2002). "The danger increases when the jury are informed that the validity of the agreement depends on the truthful nature of the testimony." *Id.* "If properly handled, however, such an agreement does not constitute improper prosecutorial vouching for the witness." *Id.* "In the *Ciampa* decision, this court set forth guidelines to be used when a witness testifies pursuant to a plea or immunity agreement that explicitly incorporates a witness's promise to testify truthfully, to minimize the possibility that the jury will **[***38]** believe the witness because the Commonwealth, in effect, has guaranteed the truth of the witness's testimony." *Id.*, citing Commonwealth v. Ciampa, supra at 264-266.

In Commonwealth v. Washington, 459 Mass. 32, 44 n.21, 944 N.E.2d 98 (2011), we explained:

> HN8[↑] "Where a *Ciampa* instruction is warranted, the following rules apply. A prosecutor may generally bring out on direct examination the fact that a witness has entered into a plea agreement and understands his obligations under it, but any attempts to bolster the witness by questions concerning his obligation to tell the truth should await redirect examination, and are appropriate only after the defendant **[*455]** has attempted to impeach the witness's credibility by showing the witness struck a deal with the prosecution to obtain favorable treatment. Commonwealth v. Ciampa, 406 Mass. 257, 264, 547 N.E.2d 314 (1989). A prosecutor in closing argument may then restate the witness's agreement, but commits reversible

> error if she 'suggests that the government has special knowledge by which it can verify the witness's testimony.' *Id. at 265*. To guard against an implied representation of credibility, the judge must 'specifically and forcefully tell the jury to study the witness's credibility **[***39]** with particular care.' *Id. at 266*, citing *United States v. Mealy, 851 F.2d 890, 900 (7th Cir. 1988)*. Where the jury are aware of the witness's promise to tell the truth, the judge also should warn the jury that the government does not know whether the witness is telling the truth. . . ."

Here, where Nou was granted immunity and where the prosecutor on redirect examination elicited that Nou had promised to tell the truth, we agree with the defendant that the *Ciampa*instruction should have been given. However, having considered the weight of the evidence and the judge's instructions to the jury to consider whether any witness "ha[d] a motive for testifying in a certain way, displayed a bias, or ha[d] [an] interest in the outcome of the case," we can say "with fair assurance . . . that the judgment was not substantially swayed by the error." *Commonwealth v. Flebotte, 417 Mass. 348, 353, 630 N.E.2d 265 (1994)*, quoting *Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445, 446 N.E.2d 117 (1983)*.

g. *Review pursuant to G. L. c. 278, § 33E*. We have examined the record and discern no basis to exercise our authority pursuant to *G. L. c. 278, § 33E*, to set aside or reduce the verdict of murder in the first degree.

4. *Conclusion.* **[***40]** We affirm the order denying the defendant's motion to suppress identification evidence and affirm his convictions.

So ordered.

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APPENDIX G

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Admitted in Massachusetts and New Hampshire

David H. Mirsky
Joanne T. Petito

March 26, 2014

VIA FAX AND U.S. EXPRESS MAIL

The Honorable Roderick L. Ireland
Chief Justice
Supreme Judicial Court
John Adams Courthouse, Suite 1400
One Pemberton Square
Boston, MA 02108-1724
FAX: 617-557-1145

Re: Commonwealth v. Jerry Meas
Supreme Judicial Court No. SJC-11043

Dear Chief Justice Ireland:

This is a Petition for Rehearing pursuant to Mass. R. A. P. 27. The decision in this case was issued on June 5, 2013. See Commonwealth v. Meas, 467 Mass. 434 (2014) (appended hereto). In support of this petition, the defendant states the following:

I. **The Supreme Judicial Court has overlooked or misapprehended the defendant's argument that the trial judge committed reversible 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. Compare Commonwealth v. Meas, 467 Mass. 434, 449-451 (2014).**

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 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."); see also id., 541 U.S. at 61-69. "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 v. Washington, supra, 541 U.S. at 68-69.

"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). "This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965)." Davis v. Alaska, supra, 415 U.S. at 315. "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)).

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.

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

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 v. Alaska, supra, 415 U.S. at 318 (citations and internal quotations omitted).

In Davis v. Alaska, supra, the United States Supreme Court held that a trial judge's preclusion of the defendant from cross-examining crucial prosecution witness Richard Green as to his delinquency adjudication for burglary and the fact that he was on probation for burglary was a violation of the Sixth Amendment's Confrontation Clause. See Davis v. Alaska, supra, 415 U.S. at 310-311. "[P]etitioner 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. The United States Supreme 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 v. Alaska, supra, 415 U.S. at 317 (quoting Douglas v. Alabama, supra, 380 U.S. at 419).

As in Davis v. Alaska, supra, in the case at bar 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 v. Alaska, supra, 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 v. Alaska, supra, 415 U.S. at 309-311, 317-319. As in Davis v. Alaska, supra, 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 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.

II. The Supreme Judicial Court has overlooked or misapprehended the defendant's argument that the defendant's right to an impartial jury was not unequivocally protected. Compare Commonwealth v. Meas, supra, 467 Mass. at 451-452.

In upholding the trial judge's failure to discharge a juror as to whom the trial judge himself concluded, the possibility of bias remained even after the judge's colloquy with the juror, see Tr. Vol. 11/10 (judge instructed Juror No. 13, "if at any point during the remainder of the trial, including during your deliberations, for some reason you have a change of heart, or even in the slightest way feel that somehow this incident might effect your ability to be a fair juror, you should just let the court officer know"), this Court has overlooked or misapprehended the admonition that the right to a fair trial under Article 12 and under the Sixth Amendment to the United States Constitution that it is reversible error to retain a juror where the trial judge is aware the juror harbors "a potential . . . bias against the defendant". See id. (citing and quoting Davis v. Allen, 11 Pick. 466, 467-468 (1831)("'Where there is abundant latitude for selection of jurors, none should sit who are

not entirely impartial.'"). In addition, this Court has failed to consider that if the juror "made a connection between the blue marking on the rock and the Asian Boyz gang", Meas, supra, 467 Mass. at 452, and if she had been afraid of the defendant, that could have provided her with a reason to try to stay on the jury to ensure his conviction. In determining it acceptable for a juror to remain seated on a jury after having viewed as a possibility the destruction of her personal property at her home by the defendant's purported associates, this Court has all but eliminated the requirement that it is reversible error to retain a juror where the trial judge is aware the juror harbors a **potential** bias against the defendant.

III. The Supreme Judicial Court has overlooked or misapprehended the defendant's argument that the defendant's conviction upon an indictment that failed to allege that the defendant committed first degree murder based on a theory of deliberate premeditation violated the defendant's rights to due process under the Fifth and Fourteenth Amendments. Compare Meas, supra, 467 Mass. at 435-436.

In rejecting the defendant's challenge to the indictment, this Court appears to have overlooked or misapprehended the authority cited in the defendant's Rule 16(l) letter, which states in pertinent part,

> that every ingredient of the offence must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. *United States* v. *Cook*, 17 Wall. 174.

United States v. Reese, 92 U.S. 214, 232 (1876).

Regardless of the content of G. L. c. 277, § 79, it is clear that the form of the indictment for first degree murder which this Court has permitted does not clearly express what was legally essential for the defendant to be convicted of first degree murder in the manner that occurred in this case.

Respectfully submitted,
JERRY MEAS

By his Attorney,

David H. Mirsky, Esquire
B.B.O. # 559367
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APPENDIX H

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

David H. Mirsky, Esquire
Mirsky & Petito
P.O. Box 1063
Exeter, NH 03833

RE: No. SJC-11043

COMMONWEALTH
vs.
JERRY MEAS

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Francis V. Kenneally, Clerk

Dated: April 4, 2014

To: Jessica Langsam, A.D.A.
David H. Mirsky, Esquire

APPENDIX I

Neutral
As of: February 21, 2020 9:30 PM Z

Meas v. Massachusetts

Supreme Court of the United States

October 6, 2014, Decided

No. 13-10630.

Reporter
2014 U.S. LEXIS 6504 *; 574 U.S. 858; 135 S. Ct. 150; 190 L. Ed. 2d 110; 83 U.S.L.W. 3188

Jerry Meas, Petitioner v. Massachusetts.

Prior History: *Commonwealth v. Meas, 467 Mass. 434, 2014 Mass. LEXIS 125, 5 N.E.3d 864 (Mar. 12, 2014)*

Judges: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied.

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APPENDIX J

28 USCS § 2254, Part 1 of 5

Current through Public Law 116-108, approved January 24, 2020, with a gap of Public Law 116-92 through Public Law 116-94.

United States Code Service > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001) > Part VI. Particular Proceedings (Chs. 151 — 190) > CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)

§ 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.

(b)

(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [*21 USCS § 848*], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [*28 USCS § 2254*].

History

HISTORY:

Act June 25, 1948, ch 646, *62 Stat. 967*; Nov. 2, 1966, *P. L. 89-711*, § 2, *80 Stat. 1105*; April 24, 1996, *P. L. 104-132*, Title I, § 104, *110 Stat. 1218*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Amendment Notes

APPENDIX K

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Instructions

1. To use this form, you must be a person who is currently serving a sentence under a judgment against you in a state court. You are asking for relief from the conviction or the sentence. This form is your petition for relief.

2. You may also use this form to challenge a state judgment that imposed a sentence to be served in the future, but you must fill in the name of the state where the judgment was entered. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file a motion under 28 U.S.C. § 2255 in the federal court that entered the judgment.

3. Make sure the form is typed or neatly written.

4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.

5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a brief or arguments, you must submit them in a separate memorandum.

6. You must pay a fee of $5. If the fee is paid, your petition will be filed. If you cannot pay the fee, you may ask to proceed in forma pauperis (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you. If your account exceeds $ _____ , you must pay the filing fee.

7. In this petition, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different court (either in the same state or in different states), you must file a separate petition.

8. When you have completed the form, send the original and ____ copies to the Clerk of the United States District Court at this address:

Clerk, United States District Court for
Address
City, State Zip Code

If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.

9. **CAUTION: You must include in this petition all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.**

10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Massachusetts
Name (under which you were convicted): Jerry Meas	Docket or Case No.:
Place of Confinement: Souza-Baranowski Correctional Center P.O. Box 8000 Shirley, MA 01464	Prisoner No.:
Petitioner (include the name under which you were convicted): Jerry Meas	Respondent (authorized person having custody of petitioner): v. Osvaldo Vidal, Superintendent and Maura Healey,
The Attorney General of the State of: Massachusetts	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Lowell Superior Court, 360 Gorham Street, Lowell, MA 01852; file retained at Middlesex Superior Court, 200 Trade Center, Woburn, MA 01801

(b) Criminal docket or case number (if you know): MICR2006-00825

2. (a) Date of the judgment of conviction (if you know): 12/15/2008

(b) Date of sentencing: 12/29/2008

3. Length of sentence: life without parole; 4 to 5 years concurrent

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case: first degree murder by deliberate premeditation - Mass. General Laws chapter 265, § 1; illegal possession of a firearm - Mass. General Laws chapter 269, § 10(a).

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☑ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☑ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Supreme Judicial Court of Massachusetts

(b) Docket or case number (if you know): SJC-11043

(c) Result: order denying motion to suppress identification evidence and convictions affirmed

(d) Date of result (if you know): 3/21/2014; petition for rehearing denied 4/3/2014

(e) Citation to the case (if you know): 467 Mass 434 (2014)

(f) Grounds raised: See attached sheet

(g) Did you seek further review by a higher state court? ☐ Yes ☐ No N/A

If yes, answer the following:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Result:

(4) Date of result (if you know):

Jerry Meas, Petitioner

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Attachment to Page 3

Response to Question 9

9. If you did appeal, answer the following:

. . .

(f) Grounds raised: (1) The show-up procedure utilized by the Lowell Police was unnecessarily and unconstitutionally suggestive, in violation of the 14th Amendment's Due Process Clause, and Article 12 due process, and all evidence of identifications made of the petitioner as the purported shooter of the decedent, at or subsequent to that procedure, should have been suppressed; (2) The trial judge committed reversible error by instructing the jury that the show-up procedure utilized to obtain the purported identification of the petitioner was particularly reliable; (3) The trial judge violated the petitioner's right of confrontation under the 6th and 14th Amendments by precluding the defendant 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; (4) The trial judge violated the 14th Amendment's Due Process Clause, by permitting the prosecution to present incomplete video surveillance evidence as to the crime scene where a material portion of that evidence was missing in circumstances indicating bad faith, or violated Massachusetts law in circumstances indicating bad faith or inept or bungling performance by the police, after that evidence had been taken into possession by the police, and where identification of the alleged perpetrator was in issue at trial; (5) The trial judge committed reversible error by refusing to instruct the jury they should examine a material cooperating and immunized witness's testimony with caution and great care, consider whether that testimony was affected by bias or prejudice against the petitioner or hope or expectation of consideration from the prosecution, where the witness was permitted conviction with a lesser degree of liability in this matter in exchange for his cooperation; (6) The trial judge violated the Sixth Amendment right to a trial by an impartial jury, and the Article 12 right to a trial by an impartial jury, by retaining a juror who had been subjected to vandalism at her home during the trial which vandalism the juror may have considered to be related to this case; (7) The petitioner's conviction of first degree murder by deliberate premeditation, on an indictment which did not allege that the defendant had committed first degree murder by deliberate premeditation, violated his right to Due Process under the Fifth and Fourteenth Amendments; (8) The petitioner's conviction should be reversed pursuant to Mass. General Laws chapter 278, §33E, because irregularities in the investigation and prosecution of this case indicate that the petitioner did not receive a fair trial.

(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court? ☑ Yes ☐ No

If yes, answer the following:

(1) Docket or case number (if you know): No. 13-10630

(2) Result: petition for writ of certiorari denied

(3) Date of result (if you know): 10/6/2014

(4) Citation to the case (if you know): 135 S. Ct. 150 (2014)

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☑ No

11. If your answer to Question 10 was "Yes," give the following information: N/A

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second petition, application, or motion, give the same information: N/A

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result: _____

(8) Date of result (if you know): _____

(c) If you filed any third petition, application, or motion, give the same information: N/A

(1) Name of court: _____

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No N/A

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion? N/A

(1) First petition: ☐ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: See attached sheet

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See attached sheet

(b) If you did not exhaust your state remedies on Ground One, explain why:

N/A

Jerry Meas, Petitioner

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Attachment to Page 6

Responses to Question 12, Ground One & Ground One Section (a)

GROUND ONE: 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.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

The trial judge foreclosed inquiry into the manifest possibility that a material cooperating government witness was biased in favor of the prosecution due to his status, first as a person charged with serious offenses, and subsequently as a probationer convicted of those offenses. The trial judge precluded the defendant's trial counsel from cross-examining this witness as to such potential bias based on the trial judge's determination that the witness's denial of bias, during a voir dire examination prior to his testimony, was credible. In the voir dire hearing the witness made blanket assertions 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. This witness's testimony for the prosecution was materially significant because he testified to viewing the petitioner in close proximity immediately prior to the shooting of the decedent and testified to purportedly seeing the petitioner in the act of shooting the decedent, and, although other witnesses also identified the petitioner as the shooter, doubt was raised as to the identity of the shooter as two witnesses had identified two other individuals as being the shooter. One of the other individuals identified as being the shooter was the prosecution's principal witness, another cooperating witness, who had been permitted to plead guilty to a substantially reduced charge for his participation in the alleged murder at issue in this case.

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☑ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☑ No

(2) If your answer to Question (d)(1) is "Yes," state: N/A

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two :

GROUND THREE: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

_____

_____

_____

_____

_____

_____

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☑ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them: _____

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☑ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. see attached sheet

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. _____

Jerry Meas, Petitioner

Petition for Relief From a Conviction or Sentence By a Person in State Custody

(Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus)

Attachment to Page 13

Response to Question 14

14.

. . . .

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

U.S. Supreme Court, 1 First Street, NE, Washington, DC 20543. Petition for writ of certiorari denied on October 6, 2014. Issue: Whether the Confrontation Clause of the Sixth Amendment to the United States Constitution and/or the right to a fair trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, are violated when a trial judge precludes a criminal defendant's trial counsel from cross-examining a 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 voir dire denial of bias in favor of the government was credible.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: Daniel E. Callahan III and Joanne M. Daley, Committee for Public Counsel Services, 42 Church St, Lowell MA 01852

(c) At trial: Same as (b)

(d) At sentencing: Same as (b) and (c)

(e) On appeal: David H. Mirsky, Mirsky + Petitto, Attorneys at Law, P.O. Box 1063, Exeter NH 03833

(f) In any post-conviction proceeding: N/A

(g) On appeal from any ruling against you in a post-conviction proceeding: N/A

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☑ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No N/A

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

This petition is timely filed under 28 U.S.C. § 2244(d)(1)(A) because it is being filed within one year after October 6, 2014 which is the date on which petitioner's petition for writ of certiorari was denied by the U.S. Supreme Court (and therefore the date on which the judgments became final by the conclusion of direct review).

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-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 subsection.

Therefore, petitioner asks that the Court grant the following relief: Reverse his convictions and grant him a new trial,

or any other relief to which petitioner may be entitled.

David H. Mirch
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct, ~~and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on (month, date, year).~~

Executed (signed) on 8-23-15 (date).

Jerry Mead
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

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Document:Meas v. Massachusetts, 2014 U.S. LEXIS 6504

Meas v. Massachusetts, 2014 U.S. LEXIS 6504

Copy Citation

Supreme Court of the United States

October 6, 2014, Decided

No. 13-10630.

Reporter

2014 U.S. LEXIS 6504 | 135 S. Ct. 150 | 190 L. Ed. 2d 110 | 83 U.S.L.W. 3188

Jerry **Meas**, Petitioner v. Massachusetts.

Prior History: Commonwealth v. **Meas**, 467 Mass. 434, 2014 Mass. LEXIS 125, 5 N.E.3d 864 (2014)

Judges: **[1]** Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the Supreme Judicial Court of Massachusetts denied.

Content Type: Cases

Terms: meas

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JERRY MEAS **Petitioner,** **v.** **OSVALDO VIDAL, et al.,** **Respondents**	**CASE NO. 1:15-CV-13234-GAO**

PETITIONER'S OBJECTION TO US MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Petitioner Jerry Meas objects to US Magistrate Judge Jennifer C. Boal's Report and Recommendation, issued on December 7, 2017, ("R&R"), recommending that his petition for a writ of habeas corpus be denied. This Court reviews the R&R *de novo* and without deference. United States v. Raddatz, 447 U.S. 667, 673-674 (1980); Gioiosa v. United States, 684 F.2d 176, 178 (1st Cir. 1982); 28 U.S.C. § 636(b)(1)(C).

Mr. Meas's petition for a writ of habeas corpus should be granted. The Petitioner objects to the R&R in which the US Magistrate Judge has made findings and conclusions to the contrary, which pertinent findings and conclusions are based on important errors of law both in misapplying and misconstruing the law and the proper role of the federal court in discharging the duties attendant with federal habeas review, and in misunderstanding, misreporting, or failing to acknowledge or consider, important aspects of the record. (R&R, at 1-12). The Petitioner objects to the R&R as a whole for the particular reason that the R&R is in error, and has failed to apply reasonably or correctly the prescription for granting federal habeas relief as stated in 28

U.S.C. § 2254(d)(1), which indicates that such relief is to be granted where a claim that was adjudicated on the merits in State court proceedings "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 . . . ." See 28 U.S.C. § 2254(d)(1). (R&R, at 1-12).

"If a claim was not adjudicated on the merits in a state court proceeding, then the issue is reviewed de novo." Norton v. Spencer, 351 F.3d 1, 4-5 (1st Cir. 2003), cert. denied, 542 U.S. 933 (2004). Thus, the Petitioner also objects to the R&R as a whole insofar as the federal constitutional claims addressed herein and in the Petitioner's filed materials in this case have been avoided or neglected by the Massachusetts Supreme Judicial Court in deciding the Petitioner's appeal from his convictions in the State trial court. (R&R, at 1-12).

The Petitioner objects to the R&R in that the R&R errs and fails by not addressing, and/or by rejecting, the Petitioner's assertion that it was impermissible under the Sixth Amendment's Confrontation Clause for the trial judge to preclude the requested cross-examination of cooperating prosecution witness Fernando Badillo, which was materially significant to the jury's determination of whether Badillo was biased in favor of the prosecution, and that it was also impermissible for the trial judge to preclude the requested cross-examination based on the trial judge's own determination that Badillo's testimony was credible when he denied being biased in favor of the prosecution during a voir dire hearing prior to his testimony. (R&R, at 1-12) The Petitioner also objects to the R&R on the basis that the R&R incorrectly assesses, and fails to recognize, the materiality of the requested and precluded cross-examination to the jury's determination of guilt or innocence. (R&R, at 1-12). For these reasons, and for all of the reasons stated herein, the Petitioner objects to the R&R and states that his petition for writ

of habeas corpus should be granted. The Petitioner further objects to the R&R as follows:

I. As a preliminary matter, the Petitioner objects to the R&R's determination that Massachusetts Attorney General Maura Healey is not properly listed as a respondent to the Petitioner's petition for writ of habeas corpus. (R&R at 1 n. 1).

The R&R errs and fails by determining that the Massachusetts Attorney General Maura Healey is not properly listed as a respondent to this petition for writ of habeas corpus. The Attorney General represents the Commonwealth of Massachusetts which retains responsibility for maintaining the Petitioner in custody, regardless of where the Petitioner may have been placed pursuant to conviction and sentence by a Massachusetts state court. This is particularly significant as it appears that the Petitioner has been relocated by Massachusetts to the subsidiary custody of another state.[1]

II. The Petitioner objects to the R&R's determinations as to the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(1) in that the R&R omits pertinent aspects of the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(1) and presents this standard as being so exceedingly difficult to satisfy as to render relief from material federal constitutional violations virtually unavailable. (R&R, at 6-8).

The R&R errs and fails by omitting the following in discussing the "HABEAS CORPUS STANDARD OF REVIEW" (R&R, at 6-8):

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

[1] The Petitioner's undersigned counsel understands that 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.

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." Id., 529 U.S. at 389. The R&R errs by construing the standard of review for determining habeas corpus relief under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), using terminology that indicates a chilling presumption against the protection of a petitioner's federal constitutional rights. (R&R, at 6-8). As indicated hereinabove, review is required to be meaningful, and prejudicial violations of federal constitutional rights must be recognized, addressed, and protected. See Williams v. Taylor, supra; see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)) ("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, supra, 507 U.S. at 637-638 619, 637 (1993) (quoting United States v. Lane, 474 U.S. 438, 449 (1986); Brecht v. Abrahamson, supra, 507 U.S. at 637-638 (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.'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

The Petitioner also objects to the standard stated in the R&R, and the standard actually applied in the R&R for determining the facts for purposes of habeas review (R&R, at 3 n. 4), which standard does not account for the possibility that facts and evidence may have been overlooked, ignored, misconstrued, or otherwise omitted, and the Petitioner objects to the determination of the facts of this case as set forth in the R&R (R&R, at 3-6, 8-12) in that the recitation of the facts by the SJC and by the US Magistrate Judge in the R&R omit facts and

evidence pertinent to the reasonable and correct determination of the Petitioner's rights to relief on habeas review, as indicated in this Objection, in the Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus (docket number 17), and in the Petitioner's Reply Memorandum in Support of Petition for Writ of Habeas Corpus (docket number 26) (referenced on docket as "MEMORANDUM OF LAW" without indication that it is a reply memorandum).

III. The Petitioner objects to the US Magistrate Judge's determinations in the R&R as to the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(2) as the R&R errs and fails by omitting pertinent aspects of the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(2), and by determining and presenting the standard applicable for habeas corpus review of the state court's determination of the facts as effectively precluding determinations of fact that omit or mischaracterize facts essential to recognizing or demonstrating the violation of a petitioner's federal constitutional rights. (R&R, at 3 n. 4, 6-8).

The R&R errs and fails by omitting the following in discussing the "HABEAS CORPUS STANDARD OF REVIEW" (R&R, at 6-8):

Pursuant to 28 U.S.C. § 2254(d)(2), 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)). "The standard is demanding but not insatiable . . . "'[d]eference does not by definition preclude relief.'" Id. (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)).

"Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it." Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir.), cert. denied, 543 U.S. 1038 (2004). "[W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's

claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." Taylor v. Maddox, supra, 366 F.3d at 1001 (citing see, e.g., Wiggins v. Smith, 123 S. Ct. 2527, 2538-2539 (2003)).

IV. The Petitioner objects to the US Magistrate Judge's determinations in the R&R that the trial judge did not abuse his discretion or commit constitutional error by precluding defense inquiry of cooperating prosecution witness Fernando Badillo's possible bias in favor of the prosecution, as the R&R does not mention or consider the precluded cross-examination as to Badillo's criminal record that was pertinent to the question of whether Badillo possessed a bias in favor of the prosecution. (R&R, at 8-12).

The R&R errs and fails by determining that the trial judge did not abuse his discretion or commit constitutional error by precluding defense inquiry of cooperating prosecution witness Fernando Badillo's possible bias in favor of the prosecution, as the R&R does not consider the precluded cross-examination as to Badillo's criminal record that was pertinent to the question of whether Badillo possessed a bias in favor of the prosecution. Although the R&R quotes the SJC's opinion in Commonwealth v. Meas, 467 Mass. 434 (2014) in stating the facts that

> Prior to Badillo's testimony, defense counsel argued that he should be permitted to impeach Badillo with his prior convictions and evidence of bias. At the time of the shooting, Badillo had been charged with mayhem, assault and battery, and assault and battery causing serious bodily injury. Following the shooting, but before trial, Badillo, on May 25, 2007, pleaded guilty to the above-named charges and was placed on probation. Defense counsel asserted that Badillo was biased at the time he spoke with police about the shooting because of the pending charges. In addition, defense counsel argued that Badillo would be biased toward the prosecution because he was on probation, which is subject to being revoked[,]

id., 467 Mass. at 449 (R&R, at 5), the R&R errs and fails by not considering the significance of this acknowledged precluded evidence of the possible bias of cooperating prosecution witness Fernando Badillo in favor of the prosecution, either in terms of the Petitioner's right of confrontation under the Sixth Amendment, or in terms of the materiality of that acknowledged precluded evidence to the jury's determination of guilt or innocence. (R&R, at 3-12).

Evidence Regarding the Trial Judge's Pre-Testimony Voir Dire of Badillo.

On voir dire, Fernando Badillo testified that he was at the 7-Eleven on June 13, 2006. He had been charged in District Court in April 2006 with mayhem, assault and battery with serious bodily injury resulting, and assault and battery. On May 25, 2007, Badillo pled guilty to those charges and as a result was placed on probation. He remained on that probation and was continuing to cooperate with the D.A.'s Office and the Lowell Police. *(Tr. Vol. 7/9-11). (S.A. 2270-2272).* **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 a serious sentence. *(Tr. Vol. 7/15-16). (S.A. 2276-2277).* **Based on the voir dire, the judge precluded the defendant 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).*

The R&R errs and fails by finding that the jury was exposed to sufficient facts surrounding Badillo's convictions "and could use those facts to draw its own inferences regarding his credibility and potential bias" (R&R at 11, 8-11), when the trial judge actually prevented the jury from making its own credibility determinations of Badillo by determining that

he was credible in a voir dire hearing before his testimony. (R&R, at 8-11). The R&R errs and fails by failing to recognize the fact that the trial judge in this case precluded the requested cross-examination into Badillo's potential bias in favor of the prosecution on the basis that the trial judge found Badillo's denial of bias to be credible without permitting the jury to determine Badillo's credibility as to his potential bias in favor of the prosecution. The R&R errs and fails by failing to recognize that the favorable treatment received by Badillo from the prosecutor's office and Badillo's status as a probationer were significant factors indicating his potential bias in favor of the prosecution. The R&R errs and fails by treating the precluded cross-examination, which was highly significant in terms of demonstrating potential bias in favor of the prosecution, as "repetitive" or "unduly harassing", and the R&R errs and fails by treating the precluded cross-examination as having been precluded based on purportedly valid concerns of the trial judge that precluded cross-examination would have resulted in "harassment, prejudice, confusion of the issues," or that it would have negatively impacted "the witness' safety" or that the precluded cross-examination would have resulted in "interrogation that is repetitive or only marginally relevant." (R&R, at 9, 9-12). To the contrary, the precluded cross-examination bore directly upon the issue of whether Badillo was biased in favor of the prosecution to the extent that his testimony was open to reasonable doubt regarding its accuracy and/or credibility. (R&R, at 9-12).

The Trial Judge Committed Constitutional Error.

Massachusetts has committed "constitutional error of the first magnitude" by permitting a trial judge to preclude materially significant cross-examination of a cooperating government witness as to the witness's possible bias in favor of the prosecution, based on the trial judge's

determination that the witness's voir dire denial of such bias was credible, in violation of the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment.

The trial judge erroneously foreclosed inquiry into the manifest possibility of bias inherent in the Commonwealth's cooperating witness Fernando Badillo's status first as a person charged with serious offenses and subsequently as a probationer convicted of those offenses because the judge credited Mr. Badillo's statements during voir dire in which Mr. Badillo made blanket assertions 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).* This determination by the Supreme Judicial Court of Massachusetts (SJC) was "constitutional error of the first magnitude[,]" see Davis v. Alaska, 415 U.S. 308, 318 (1974) (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).

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 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."); see also id., 541 U.S. at 61-69. "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 v. Washington, supra, 541 U.S. at 68-69.

"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, supra, 415 U.S. at 315. "This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965)."[2] Davis v. Alaska, supra, 415 U.S. at 315. "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)).

> 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.

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

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 v. Alaska, supra, 415 U.S. at 318 (citations and internal quotations omitted).

In Davis v. Alaska, supra, the United States Supreme Court held that the trial judge's preclusion of the petitioner 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

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[2] "[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).

burglary was a violation of the Sixth Amendment's Confrontation Clause. See Davis v. Alaska, supra, 415 U.S. at 310-311. "[P]etitioner 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. The United States Supreme 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 v. Alaska, 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 "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 v. Alaska, 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". Davis v. Alaska, supra, 415 U.S. at 309-311, 317-319. As in Davis v. Alaska, supra, 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 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.

Accordingly, the trial judge committed reversible constitutional error by precluding the defendant from cross-examining Mr. Badillo, a material prosecution witness, as to his possible bias in favor of the prosecution.

Massachusetts has failed to protect foundational Sixth Amendment rights to confront (i.e., to cross-examine) a material cooperating government witness as to the very real possibility of bias in favor of the government.

V. The Petitioner objects to the US Magistrate Judge's determination that cooperating prosecution witness Fernando Badillo's testimony was not significant or material or relevant to the jury's determination of guilt. (R&R, at 11-12).

The R&R errs and fails by addressing the significance, materiality or relevance of Badillo's testimony by concluding that "the SJC correctly noted that the jury was not required to rely on Badillo's testimony to establish the salient facts concerning the shooting" and that "Besides Badillo's testimony, there was ample other evidence, including several other witnesses' testimony, that corroborated the same information about which Badillo testified" and that "In particular, Meas' friend Nou and the victim's friend San identified Meas as the shooter; video footage verified Meas' presence at the crime scene; and bullet casings and a spent projectile from the crime scene matched a gun found in the automobile in which Meas was arrested." (R&R, at 11-12).

In this regard, the following trial evidence is erroneously absent from the findings and conclusions stated in the R&R:

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 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 Henry nor 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 Sgt. Murray had viewed at the 7-Eleven on June 13, 2006. *(Tr. Vol. 5/20-21). (S.A. 1993-1994).* The defendant objected on the basis that the disk was incomplete, 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** (emphasis added)." 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** (emphasis added)." Id., 467 Mass. at 447 n. 14.

Badillo's Trial Testimony

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 defendant 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,[3] where the vacuum

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

cleaners are located. The black car might have been parked by the vacuum cleaners.[4] 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. *(Tr. Vol. 7/52-53). (S.A. 2313-2314).* When Badillo went to the scene away from the 7-Eleven, he knew he was going there to identify someone. He had pled guilty on May 25, 2007 to the offenses of mayhem, assault and battery with serious bodily injury resulting, and assault and battery. *(Tr. Vol. 7/57, 60). (S.A. 2318-2321).*

Lowell Police Officer Patrick Johnson testified:

Around 11:00 p.m. on June 13, 2006, Johnson spoke to Badillo at the 7-Eleven and took him to do a show-up identification at Queen and Branch Streets, where officers had stopped a vehicle and had four people standing in the middle of the street. **Badillo said it was definitely the man on the left.** *(Tr. Vol. 7/62-70). (S.A. 2323-2331).*

Lowell Police Sergeant Matthew Penrose testified:

On June 13, 2006, after 11:00 p.m. Penrose was told by a police Captain to participate in show-up with Vannika Pen; they brought her to Branch and Queen Streets. *(Tr. Vol. 7/106-111). (S.A 2367-2372).* The area was very well lit, there were streetlights, business lights, and cruiser take-down lights, which are white lights contained in the blue lights that illuminate straight forward. Those lights were trained on the individuals who were in the Queen Street lineup area.

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[4] The defendant 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.)

(Tr. Vol. 7/124-125). (S.A. 2385-2386). **Vannika Pen retracted an identification.** From the show-up they went back to the police station. *(Tr. Vol. 7/113-115). (S.A. 2374-2376).*

Christopher Kelly of the Lowell Police testified:

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 the defendant.** *(Tr. Vol. 8/65-66). (S.A. 2486-2487).*

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. **The person San identified as the shooter was Meas.** 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).*

Vicheth San[5] 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).* **San's account had changed since the suppression hearing, when he had said that the person wasn't coming out of the store.** *(Tr. Vol. 3/75). (S.A. 1775).*

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 the defendant. *(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).* Nou testified that Meas killed him. *(Tr. Vol. 9/94-95). (S.A. 2663-2664).* On the charge of accessory after the fact, murder, Nou was incarcerated for two years and was then 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 of Petitioner Jerry Meas

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.

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[5] This appears to be the same person as "Vicheth Seng".

(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).

The Sixth Amendment Confrontation Clause Violation Had Substantial and Injurious Effect or Influence in Determining the Jury's Verdict.

The Petitioner objects to the US Magistrate Judge's omission of the above-mentioned pertinent facts in considering in the R&R whether the preclusion of defense cross-examination of Badillo constituted substantial and injurious constitutional error.

"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)). Accordingly, 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 the petitioner actual prejudice. Fermando Badillo's testimony identifying Mr. Meas as the shooter was material to the jury's determination of guilt or innocence. 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 Lowell Police*

Detective Corey Erickson). Surveillance video from the 7-Eleven that night (Exhibit 32) shows that these two witnesses, Gaddafi Henry and Douglas Anderson, were present in the store at the time of the incident. *(Tr. Vol. 6/49-51). (S.A. 2134-2136)(testimony of Lowell Police 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 Lowell Police Sgt. Joseph 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 got out on May 2, 2008. *(Tr. Vol. 9/117). (S.A. 2686).*

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 Supreme Judicial Court of Massachusetts made the following findings:

"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.

Accordingly, the Petitioner objects to the US Magistrate Judge's determination that cooperation prosecution witness Fernando Badillo's testimony was not significant or material or relevant to the jury's determination of guilt, (R&R, at 11-12), and the Petitioner objects to the US Magistrate Judge's failure in the R&R to determine that the preclusion of defense cross-examination of Fernando Badillo as to the very real possibility that he possessed bias in favor of the prosecution was substantial and injurious constitutional error.

VI. The Petitioner objects to the R&R's characterization of the Petitioner's Sixth Amendment Confrontation Clause Claim which is materially inaccurate and inadequate. (R&R, at 2 (in "Procedural History"), and R&R, at 3-12),

The R&R errs and fails in that, in seeking to characterize the Petitioner's Sixth

Amendment Confrontation Clause claim, the R&R omits: (1) the Petitioner's assertion that it was impermissible under the Sixth Amendment's Confrontation Clause for the trial judge to preclude the requested cross-examination of cooperating prosecution witness Fernando Badillo, which was materially significant to the jury's determination of whether Badillo was biased in favor of the prosecution; (2) the Petitioner's assertion that it was also impermissible for the trial judge to preclude the requested cross-examination based on the trial judge's own determination that Badillo's testimony was credible when he denied being biased in favor of the prosecution during a voir dire hearing prior to his testimony; (3) the Petitioner's assertion that the requested and precluded cross-examination was material to the jury's determination of guilt or innocence; and (4) a recognition by the US Magistrate Judge that the Petitioner's Sixth Amendment Claim of the actual evidence that the Petitioner was precluded from presenting in his cross-examination of cooperating witness Fernando Badillo and the significance thereof to the question as to whether Badillo may have been biased in favor of the prosecution. (R&R, at 1-12). Although the R&R quotes the SJC's statement in Commonwealth v. Meas, supra, 467 Mass. 434, indicating that the precluded cross-examination involved evidence that before trial Badillo had been placed on probation resulting from his guilty pleas to the crimes of mayhem, assault and battery, and assault and battery causing serious bodily injury, and that Badillo would have been biased toward the prosecution during the trial testimony because he was on probation, which is subject to being revoked, id., 467 Mass. at 449, the R&R does not address the facts or significance of this precluded cross-examination to the Petitioner's Sixth Amendment Confrontation Clause claim, where such evidence is particularly relevant to potential bias in favor of the prosecution, where the prosecutor's office holds this power over Badillo's capacity and right to retain his

liberty. (R&R, at 1-12).

In light of the foregoing, this petition should be granted, whether the issue is reviewed de novo or under 28 U.S.C. § 2254(d)(1), because the Massachusetts Supreme Judicial Court's decision constituted reversible error and was both contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d)(1), and was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. See 28 U.S.C. § 2254(d)(2).

For all of the reasons stated above, the Petitioner respectfully urges this Honorable Court to grant his petition for a writ of habeas corpus.

Respectfully submitted,

JERRY MEAS
By his Attorney,

/s/ David H. Mirsky
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Dated: December 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 21, 2017, including Todd M. Blume, Assistant Attorney General, counsel for the respondents Osvaldo Vidal, et al., in this matter. There are no non-registered participants involved in this case.

/s/ David H. Mirsky
David H. Mirsky

APPENDIX M

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

JERRY MEAS **Petitioner,** **v.** **OSVALDO VIDAL, et al.,** **Respondents**	**CASE NO. 1:15-CV-13234-GAO**

NOTICE OF APPEAL

Now comes the petitioner in the above-entitled case and appeals pursuant to Fed. R. App. P. 3 and 4. Pursuant to Fed. R. App. P. 3(c), the petitioner states the following:

(1) PARTY TAKING APPEAL: Petitioner Jerry Meas

(2) JUDGMENT ORDER OR PART THEREOF APPEALED: the District Court's (O'Toole, D.J.) Order Adopting Report and Recommendations, entered and filed on August 31, 2018 (document 34), and denying the Petition for a Writ of Habeas Corpus (document 1), and Order of Dismissal, entered and filed on August 31, 2018 (document 35), dismissing the Petition for a Writ of Habeas Corpus (document 1).

(3) COURT TO WHICH APPEAL IS TAKEN: United States Court of Appeals for the First Circuit.

Respectfully submitted,

JERRY MEAS
By his Attorney,

/s/ David H. Mirsky

David H. Mirsky, Esquire
(MA B.B.O. # 559367)
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel. 603-580-2132

Dated: September 6, 2018

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on September 6, 2018, including Todd M. Blume, Assistant Attorney General, counsel for the respondents Osvaldo Vidal, et al., in this matter. There are no non-registered participants involved in this case.

/s/ David H. Mirsky

David H. Mirsky

APPENDIX N

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 18-1856

JERRY MEAS,
Petitioner-Appellant,

v.

OSVALDO VIDAL, et al,
Respondent-Appellee.

MOTION AND MEMORANDUM IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

Petitioner Jerry Meas respectfully moves that this Honorable Court grant him a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253. In its Order Adopting Report and Recommendations dated August 31, 2018 (US District Court No. 1:15-cv-13234-GAO, docket number 29), the District Court denied petitioner's petition for a writ of habeas corpus and denied a COA. The petitioner seeks a COA as to this Court's denial of his habeas corpus petition. The Petitioner states herein the grounds upon which his petition should have been granted.

GROUNDS RAISED IN THIS PETITION

In his petition for writ of habeas corpus, Petitioner Jerry Meas has raised the following federal constitutional grounds:

1. The trial judge violated the petitioner's right of confrontation under the 6th and 14th Amendments,[1] 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.

[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).

Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 1), *at Attachment to Page 6.*

PRIOR PROCEEDINGS[2]

On June 29, 2006, a Middlesex 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. *Superior Court Docket Entries, at 4. R A. 171. (S.A. 258).* On December 16, 2008, as to Count 1, Meas was found guilty of first degree murder by deliberate premeditation; he was also found guilty as to Count 2. *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 years, concurrent with Count 1. Count 3 was nol prossed. *R.A.177. (S.A.264).* The petitioner filed a notice of appeal in Superior Court on December 29, 2008. *R.A.167. (S.A.254).* On September 8, 2011, this case was entered in the Supreme Judicial Court of Massachusetts. *Supreme Judicial Court Docket Entries, at 1. (S.A.11).*

The Supreme Judicial Court of Massachusetts affirmed Petitioner Jerry Meas's

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[2] Citation to *Defendant's Record Appendix* refers to the Record Appendix filed in the Supreme Judicial Court as an attachment to *Defendant's Brief. Defendant's Record Appendix* is hereinafter 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. Citations to the foregoing in the Record of this case as set forth in the Respondents' Supplemental Answer are cited as *"(S.A.(page number))"*.

convictions and sentence in the Massachusetts Superior Court, which judgment was entered on March 12, 2014. *Supreme Judicial Court Docket Entries, at 2. (S.A.12).* The opinion of the Supreme Judicial Court of Massachusetts 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). On March 26, 2014, the petitioner timely filed a *Petition for Rehearing (S.A.426-432)* in the Supreme Judicial Court by fax and mail, which was docketed in the Supreme Judicial Court on March 26, 2014. *Supreme Judicial Court Docket Entries, at 2. (S.A.12).* The petitioner timely filed in the Supreme Court of the United States a petition for writ of certiorari, which was denied on October 6, 2014. See Meas v. Massachusetts, 135 S. Ct. 150, 190 L. Ed. 2d 110, 83 U.S.L.W. 3188, 2014 U.S. LEXIS 6504 (October 6, 2014).

The petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court on August 27, 2015. On December 7, 2017, US Magistrate Judge Jennifer C. Boal entered her Report and Recommendations re Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 29), in which she recommended that the US 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 Report and Recommendations re Petition for Writ of Habeas Corpus[3] (US District Court No. 1:15-cv-13234-GAO, docket number 31). On August 31, 2018, US District Judge George A. O'Toole entered his Order Adopting Report and Recommendations (US District Court No. 1:15-cv-13234-GAO, docket number 34) and his Order Dismissing Case (US District Court No. 1:15-cv-13234-GAO,

[3] The US Magistrate Judge's Report and Recommendations re Petition for Writ of Habeas Corpus is also referred to herein as "R&R".

docket number 35).[4] The petitioner filed his Notice of Appeal from those orders on September 6, 2018 (US District Court No. 1:15-cv-13234-GAO, docket number 36).

THE TEST FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

In order for the petitioner to be permitted to appeal his case to the United States Court of Appeals for the First Circuit, this Court must grant him a "certificate of appealability" (COA) under 28 U.S.C. § 2253. The test for issuance of a COA is designed to weed out only the most unworthy appeals. Under the Supreme Court's interpretation of § 2253, this Court must grant the petitioner a COA if reasonable jurists could find the correctness of the dismissal of the petitioner's petition to be merely debatable: this is so even if the Court is completely convinced that the District Court came to the correct conclusion in dismissing the petitioner's petition for a writ of habeas corpus. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003); 28 U.S.C. § 2253.

> A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part, Barefoot[v. Estelle, 463 U.S. 880 (1983)], supra, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El v. Cockrell, supra, 537 U.S. at 338.

WHAT THE PETITIONER IS SEEKING TO APPEAL

The petitioner is seeking to appeal the District Court's determination that the substance of

[4] The District Court adopted the R&R. See Order Adopting Report and Recommendations, supra, at 1-4. The petitioner's objections to the R&R are stated in Objection to Report and Recommendations re Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 31). The petitioner's objections to the R&R state specific grounds for appeal of the District Court's Order Adopting Report and Recommendations, supra, and Order Dismissing Case, supra, which grounds are summarized and reiterated in this Memorandum.

the petitioner's claims that the trial judge violated the petitioner's right of confrontation under the 6th and 14th Amendments lack merit. See Order Adopting Report and Recommendations, supra, at 1-4; Report and Recommendations re Petition for Writ of Habeas Corpus, supra, at 1-12. Specifically, the petitioner is seeking to appeal the determination of the District Court that it is permissible under the Confrontation Clause of the Sixth and Fourteenth Amendments for a trial judge to preclude the cross-examination of a pertinent cooperating government witness as to the witness's possible bias in favor of the government, where the possibility of bias is inherent in the witness's relationship to the prosecution, based on the trial judge's own personal determination that the cooperating witness was credible in denying bias during voir dire testimony. The petitioner is seeking to appeal this conclusion of the District Court on the basis that this conclusion would eviscerate the clearly established principle of federal constitutional law that where testimonial statements are at issue, 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 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 Report and Recommendations, supra, at 2. The petitioner notes in this regard that the District Court gave no rationale for its determination that,

> Although 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 Report and Recommendations, supra, at 2 n. 1. The cases of Crawford v. Washington, supra, 541 U.S. 36, and Davis v. Alaska, supra, 415 U.S. 308 (1974), are foundational U.S. Supreme Court cases giving life to fundamental aspects of the Sixth Amendment's Confrontation Clause, thus, it is contrary to the very existence of the Confrontation Clause to treat Van Arsdall as an automatically defining case extinguishing Sixth Amendment rights. The case of Delaware v. Van Arsdall, supra, itself, contradicts the way the District Court has used that case here: The District Court has misquoted 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 Delaware v. Van Arsdall is this:

> 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, confnsion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant** (emphasis added).

Delaware v. Van Arsdall, supra, 475 U.S. at 678-679; contra Order Adopting Report and Recommendations, supra, at 2 ("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).").

The petitioner further seeks to appeal the District Court's determination that the decision

of the Supreme Judicial Court of Massachusetts to reject the petitioner's claims under the Sixth Amendment Confrontation Clause was neither contrary to nor an unreasonable application of clearly established federal law because "the witness's testimony was not necessary to establish any material facts," because "there were no indications that the witness's trial testimony was inconsistent with any prior statements" and because "counsel was permitted to use the prior convictions to impeach the witness." Compare Order Adopting Report and Recommendations, supra, at 2, 1-3. The petitioner further seeks to appeal the District Court's rejection of the petitioner's assertion that the Supreme Judicial Court of Massachusetts made an unreasonable determination of the facts in light of the evidence presented at trial, and the petitioner further seeks to appeal the District Court's rejection out of hand of the petitioner's assertions that the R&R errs and fails (1) by omitting indication that pursuant to 28 U.S.C. § 2254(d)(2), 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 (2) by determining and presenting the standard applicable for habeas corpus review of the state court's determination of the facts as permitting 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, at 3 n. 4, 6-8.

The petitioner further seeks to appeal the District Court's determination that Massachusetts Attorney General Maura Healey is not properly listed as a respondent to the petitioner's petition for writ of habeas corpus. The Attorney General represents the Commonwealth of Massachusetts which retains responsibility for maintaining the Petitioner in

custody, pursuant to conviction and sentence by a Massachusetts state court. This is particularly significant as Massachusetts has relocated the petitioner to the State of Nevada.

STATEMENT OF FACTS[5]

A. Trial Evidence

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. The defendant 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).*

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 Cardona saw they caught four and the one he told them did the shooting. *(Tr. Vol. 8/38-39). (S.A. 2459-2460).*

Trial judge's voir dire of Commonwealth witness Fernando Badillo.

[5] Additional facts are set forth infra in the Discussion section.

On voir dire, Fernando Badillo testified that he was at the 7-Eleven on June 13, 2006. He had been charged in [Massachusetts State] District Court in April 2006 with mayhem, assault and battery with serious bodily injury resulting, and assault and battery. On May 25, 2007, Badillo pled guilty to those charges and as a result was placed on probation. He remained on that probation and was continuing to cooperate with the D.A.'s Office and the Lowell Police. *(Tr. Vol. 7/9-11). (S.A. 2270-2272).* 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 a serious sentence. *(Tr. Vol. 7/15-16). (S.A. 2276-2277).* Based on the voir dire, the judge precluded the defendant 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 Commonwealth 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 defendant 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,[6] where the vacuum cleaners are located. The black car might have been parked by the vacuum cleaners.[7] 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. *(Tr. Vol. 7/52-53). (S.A. 2313-2314).* When Badillo went to the scene away from the 7-Eleven, he knew he was going there to identify someone. He had pled guilty on May 25, 2007 to the offenses of mayhem, assault and battery with serious bodily injury resulting, and assault and battery. *(Tr. Vol. 7/57, 60). (S.A. 2318-2321).*

State court decision on the preclusion of cross-examination issue.

In Commonwealth v. Meas, 467 Mass. 434 (2014), the Supreme Judicial Court of Massachusetts ruled, *inter alia*, as follows:

> "Cross-examination of a prosecution witness to show the witness's bias or prejudice is a matter of right under the *Sixth Amendment to the Constitution of the United States and* art. 12 of the Declaration of Rights of the Commonwealth." Commonwealth v. Allison, 434 Mass. 670, 681 . . . (2001). "If, 'on the facts, there is a possibility of bias, even a remote one, the judge has no discretion to bar *all* inquiry into the subject" (emphasis added). *Id.*, quoting Commonwealth v. Tam Bui, 419 Mass. 392, 400 . . . , cert. denied, 516 U.S. 861 . . . (1995). Defendants have a "right to question . . . witness[es] about . . . pending criminal charges in order to show [a witness's] motive in cooperating with the prosecution." Commonwealth v. Carmona, 428 Mass. 268, 270 . . . (1998), quoting Commonwealth v. Connor, 392 Mass. 838, 841 . . . (1984). A defendant similarly may question a witness about the witness's pending status as a probationer. Davis v. Alaska, 415 U.S. 308, 317-318 . . . (1974). Even if no promises have been made to a witness concerning the

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

[7] The defendant 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.)

> pending charges or probation status, "it is enough 'that a prosecution witness is hoping for favorable treatment . . . to justify inquiry concerning bias.'" Commonwealth v. Carmona, supra, quoting Commonwealth v. Henson, 394 Mass. 584, 587 . . . (1985).
>
> "Determining whether the evidence demonstrates bias . . . falls within the discretion of the trial judge." Commonwealth v. LaVelle, 414 Mass. 146, 153 . . . (1993). "A judge does have discretion to limit cross-examination concerning possible bias when further questioning would be redundant," Commonwealth v. Tam Bui, supra, "where there has been such 'extensive inquiry' that the bias issue 'has been sufficiently aired,'" Commonwealth v. Avalos, 454 Mass. 1, 7 . . . (2009), quoting Commonwealth v. LaVelle, supra at 154, or "where the offered evidence is 'too speculative,'" Commonwealth v. Avalos, supra, quoting Commonwealth v. Tam Bui, supra at 402. In addition, when a voir dire hearing establishes that no possibility of bias exists, a judge may prohibit cross-examination on bias. See Commonwealth v. Haywood, 377 Mass. 755, 763 . . . (1979) (cross-examination on bias not necessary where voir dire established that witness's description of events did not change in favor of Commonwealth after charges arose against him).
>
> In the circumstances of this case, we conclude that the judge did not abuse his discretion in precluding inquiry concerning possible bias. Significantly, the judge did not altogether foreclose inquiry on the issue. Rather, he conducted a voir dire hearing, at which Badillo testified that the pending charges against him and subsequent imposition of probation did not influence his cooperation with police or the prosecutor. There was no showing that Badillo's trial testimony was inconsistent with any prior statements he made, **although charges were pending when he initially made statements to the police after the shooting**.[8] Also, the jury were not required to rely on Badillo's testimony to establish the salient facts concerning the shooting. There was other witness testimony, **including Nou's testimony**,[9] concerning the shooting, the defendant's presence at and involvement in the shooting, and the later showups. The judge allowed impeachment of Badillo with his convictions that pertained to the charges existing when he spoke with police after the shooting and that related to his probation. Defense counsel's claims of bias were grounded only in speculation. There was no error on the record before us.

Commonwealth v. Meas, supra, 467 Mass. at 449-451.

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[8] This means that Badillo had a bias in favor of pleasing the police and prosecution at the time he initially made statements, negating the significance of whether he changed his account.

[9] Nou was a cooperating government witness, convicted of accessory after the fact, murder, for conduct allegedly involved in this case, who avoided a first degree murder charge in this case.

DISCUSSION

1. It is at least debatable that the District Court has erred by determining that it is permissible under the Confrontation Clause of the Sixth and Fourteenth Amendments for a trial judge to preclude the cross-examination of a pertinent cooperating government witness as to the witness's possible bias in favor of the government, where the possibility of bias is inherent in the witness's relationship to the prosecution, based on the trial judge's own personal determination that the cooperating witness was credible in denying bias during voir dire testimony.

The District Court has rejected the established principle of federal constitutional law that where testimonial statements are at issue, 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 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 Report and Recommendations, supra, at 2. The petitioner notes in this regard that the District Court gave no rationale for its determination that

> Although 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 Report and Recommendations, supra, at 2 n. 1. The cases of Crawford v. Washington, supra, 541 U.S. 36, and Davis v. Alaska, supra, 415 U.S. 308 (1974), are foundational U.S. Supreme Court cases giving life to fundamental aspects of the Sixth Amendment's Confrontation Clause thus it is contrary to the very existence of the Confrontation

Clause to treat Van Arsdall as an automatically defining case extinguishing Sixth Amendment rights. Compare Delaware v. Van Arsdall, supra. The case of Delaware v. Van Arsdall, supra, itself, contradicts the way the District Court has used that case here. Specifically, this Court should note that the District Court has misquoted 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 Delaware v. Van Arsdall is this:

> 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** (emphasis added).

Delaware v. Van Arsdall, supra, 475 U.S. at 678-679 contra Order Adopting Report and Recommendations, supra, at 2 ("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).").

2. It is at least debatable that the District Court has erred by determining that the decision of the Supreme Judicial Court of Massachusetts to reject the petitioner's claims under the Sixth Amendment Confrontation Clause was neither contrary to nor an unreasonable application of clearly established federal law on the grounds that "the witness's testimony was not necessary to establish any material facts," because "there were no indications that the witness's trial testimony was inconsistent with any prior statements" and because "counsel was permitted to use the prior convictions to impeach the witness." Compare Order Adopting Report and Recommendations, supra, at 2, 1-3. It is at least debatable that the District Court erred by determining that cooperating prosecution witness Fernando Badillo's testimony was not significant or material or relevant to the jury's determination of guilt. (R&R, at 11-12).

> 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)). Accordingly, 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 the petitioner actual prejudice. Fernando Badillo's testimony identifying Mr. Meas as the shooter was material to the jury's determination of guilt or innocence. **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 Lowell Police Detective Corey Erickson).* Surveillance video from the 7-Eleven that night (Exhibit 32) shows that these two witnesses, Gaddafi Henry and Douglas Anderson, were present in the store at the time of the incident. *(Tr. Vol. 6/49-51). (S.A. 2134-2136)(testimony of Lowell Police Sgt. Murray).* Neither Gaddafi Henry nor Douglas Anderson were brought to the station to make a full statement after the show-up. *(Tr. Vol. 6/80). (S.A. 2165) (testimony of Lowell Police Sgt. Joseph 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 got out on May 2, 2008. *(Tr. Vol. 9/117). (S.A. 2686).*

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 Supreme Judicial Court of Massachusetts made the following findings:

> 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.

Accordingly, it is at least debatable that the District Court erred in determining that the trial testimony of cooperating prosecution witness Fernando Badillo was not significant or material or relevant to the jury's determination of guilt, (R&R, at 11-12), and it is at least debatable that the District Court erred in failing to determinine that the preclusion of defense cross-examination of Fernando Badillo as to the very real possibility that he possessed bias in favor of the prosecution was substantial and injurious constitutional error.

Although the R&R quotes the Supreme Judicial Court's opinion in Commonwealth v. Meas, 467 Mass. 434 (2014), in stating the facts that

> Prior to Badillo's testimony, defense counsel argued that he should be permitted to impeach Badillo with his prior convictions and evidence of bias. At the time of the shooting, Badillo had been charged with mayhem, assault and battery, and assault and battery causing serious bodily injury. Following the shooting, but before trial, Badillo, on May 25, 2007, pleaded guilty to the above-named charges and was placed on probation. Defense counsel asserted that Badillo was biased at the time he spoke with police about the shooting because of the pending charges. In addition, defense counsel argued that Badillo would be biased toward the prosecution because he was on probation, which is subject to being revoked[,]

id., 467 Mass. at 449 (R&R, at 5), the R&R errs and fails by not considering the significance of this acknowledged precluded evidence of the possible bias of cooperating prosecution witness Fernando Badillo in favor of the prosecution, either in terms of the petitioner's right of confrontation under the Sixth Amendment, or in terms of the materiality of that acknowledged precluded evidence to the jury's determination of guilt or innocence. (R&R, at 3-12).

On voir dire, Fernando Badillo testified that he was at the 7-Eleven on June 13, 2006. He had been charged in District Court in April 2006 with mayhem, assault and battery with serious

bodily injury resulting, and assault and battery. On May 25, 2007, Badillo pled guilty to those charges and as a result was placed on probation. He remained on that probation and was continuing to cooperate with the D.A.'s Office and the Lowell Police. *(Tr. Vol. 7/9-11). (S.A. 2270-2272).* 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 a serious sentence. *(Tr. Vol. 7/15-16). (S.A. 2276-2277).* **Based on the voir dire, the judge precluded the defendant 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).*

The R&R errs and fails by finding that the jury was exposed to sufficient facts surrounding Badillo's convictions "and could use those facts to **draw its own inferences**[10] regarding his credibility and potential bias (emphasis added)" (R&R at 11, 8-11), when the trial judge actually prevented the jury from making its own credibility determinations of Badillo by determining that he was credible in a voir dire hearing before his testimony. (R&R, at 8-11). The R&R errs and fails by failing to recognize the fact that the trial judge in this case precluded

[10] 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 requested cross-examination into Badillo's potential bias in favor of the prosecution on the basis that the trial judge found Badillo's denial of bias to be credible without permitting the jury to determine Badillo's credibility as to his potential bias in favor of the prosecution. The R&R errs and fails by failing to recognize that the favorable treatment received by Badillo from the prosecutor's office and Badillo's status as a probationer were significant factors indicating his potential bias in favor of the prosecution. The R&R errs and fails by treating the precluded cross-examination, which was highly significant in terms of demonstrating potential bias in favor of the prosecution, as "repetitive" or "unduly harassing", and the R&R errs and fails by treating the precluded cross-examination as having been precluded based on purportedly valid concerns of the trial judge that precluded cross-examination would have resulted in "harassment, prejudice, confusion of the issues," or that it would have negatively impacted "the witness' safety" or that the precluded cross-examination would have resulted in "interrogation that is repetitive or only marginally relevant." (R&R, at 9, 9-12). To the contrary, the precluded cross-examination bore directly upon the issue of whether Badillo was biased in favor of the prosecution to the extent that his testimony was open to reasonable doubt regarding its accuracy and/or credibility. (R&R, at 9-12).

The trial judge erroneously foreclosed inquiry into the manifest possibility of bias inherent in the Commonwealth's cooperating witness Fernando Badillo's status first as a person charged with serious offenses and subsequently as a probationer convicted of those offenses because the judge credited Mr. Badillo's statements during voir dire in which Mr. Badillo made blanket assertions 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). This determination by the Supreme Judicial Court of Massachusetts (SJC) was "constitutional error of the first magnitude[,]" see Davis v. Alaska, 415 U.S. 308, 318 (1974) (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).

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 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."); see also id., 541 U.S. at 61-69. "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 v. Washington, supra, 541 U.S. at 68-69.

"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, supra, 415 U.S. at 315. "This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965)." Davis v. Alaska, supra, 415 U.S. at 315. "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)).

> 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.

In Davis v. Alaska, supra, the Supreme Court held that the trial judge's preclusion of the petitioner 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 Davis, 415 U.S. at 310-311.

> [P]etitioner 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. The United States Supreme 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 v. Alaska, 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 "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 v. Alaska, 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". Id., 415 U.S. at 309-311, 317-319. As in Davis v. Alaska, supra, 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 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 R&R errs and fails by addressing the significance, materiality or relevance of Badillo's testimony by concluding that "the SJC correctly noted that the jury was not required to rely on Badillo's testimony to establish the salient facts concerning the shooting" and that "Besides Badillo's testimony, there was ample other evidence, including several other witnesses' testimony, that corroborated the same information about which Badillo testified" and that "In particular, Meas' friend Nou and the victim's friend San identified Meas as the shooter; video footage verified Meas' presence at the crime scene; and bullet casings and a spent projectile from the crime scene matched a gun found in the automobile in which Meas was arrested." (R&R, at 11-12).

In this regard, the following trial evidence is erroneously absent from the findings and conclusions stated in the R&R:

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 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 Gaddafi Henry and Douglas Anderson were present in the store at the time of the incident. *(Tr. Vol. 6/49-51). (S.A. 2134-2136).*

Missing Video Surveillance Evidence.

The Commonwealth sought to introduce a disk containing images Sgt. Murray had viewed at the 7-Eleven on June 13, 2006. *(Tr. Vol. 5/20-21). (S.A. 1993-1994).* The defendant objected on the basis that the disk was incomplete, 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** (emphasis added).

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** (emphasis added)." Id., 467 Mass. at 447 n. 14.

Badillo's Trial Testimony

At trial, Fernando Badillo testified, *inter alia*:

On June 13, 2006, at 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. *(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,[11] where the vacuum cleaners are located. The black car might have been parked by the vacuum cleaners.[12] 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. *(Tr. Vol. 7/52-53). (S.A. 2313-2314).* When Badillo went to the scene away from the 7-Eleven, he knew he was going there to identify someone. *(Tr. Vol. 7/57, 60). (S.A. 2318-2321).*

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

[12] The defendant 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.)

Lowell Police Sergeant Matthew Penrose testified:

On June 13, 2006, after 11:00 p.m. Penrose was told by a police Captain to participate in show-up with Vannika Pen; they brought her to Branch and Queen Streets. *(Tr. Vol. 7/106-111). (S.A 2367-2372).* The area was very well lit, there were streetlights, business lights, and cruiser take-down lights, which are white lights contained in the blue lights that illuminate straight forward. Those lights were trained on the individuals who were in the Queen Street lineup area. *(Tr. Vol. 7/124-125). (S.A. 2385-2386).* **Vannika Pen retracted an identification.** From the show-up they went back to the police station. *(Tr. Vol. 7/113-115). (S.A. 2374-2376).*

Christopher Kelly of the Lowell Police testified:

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 weapon was found on the defendant.** *(Tr. Vol. 8/65-66). (S.A. 2486-2487).*

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. **The person San identified as the shooter was Meas.** 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).*

Vicheth San[13] 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, then he saw a silver gun, and then he 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).* **San's account had changed since the suppression hearing, when he had said that the person wasn't coming out of the store.** *(Tr. Vol. 3/75). (S.A. 1775).*

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 the defendant. *(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).* Nou testified that Meas killed him. *(Tr. Vol. 9/94-95). (S.A. 2663-2664).* On the charge of accessory after the fact, murder, **Nou was incarcerated for two years and was**

[13] This appears to be the same person as "Vicheth Seng".

then 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 of the petitioner was negative.

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).*

3. It is at least debatable that the District Court has erred by omitting pertinent aspects of the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(1) and by presenting this standard as being so exceedingly difficult to satisfy as to render relief from material federal constitutional violations virtually unavailable. (R&R, at 6-8).

The R&R errs and fails by omitting the following in discussing the "HABEAS CORPUS STANDARD OF REVIEW" (R&R, at 6-8):

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." Id., 529 U.S. at 389. The R&R errs by construing the standard of review for determining habeas corpus relief under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), using terminology that indicates a chilling presumption against the protection

of a petitioner's federal constitutional rights. (R&R, at 6-8). As indicated hereinabove, review is required to be meaningful, and prejudicial violations of federal constitutional rights must be recognized, addressed, and protected. See Williams v. Taylor, supra; see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)) ("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, supra, 507 U.S. at 637-638 619, 637 (1993) (quoting United States v. Lane, 474 U.S. 438, 449 (1986); Brecht v. Abrahamson, supra, 507 U.S. at 637-638 (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.'" (quoting Kotteakos v. United States, supra, 328 U.S. at 776).

The petitioner also objected to the standard stated in the R&R, and the standard actually applied in the R&R for determining the facts for purposes of habeas review (R&R, at 3 n. 4), which standard does not account for the possibility that facts and evidence may have been overlooked, ignored, misconstrued, or otherwise omitted, and the petitioner objected to the determination of the facts of this case as set forth in the R&R (R&R, at 3-6, 8-12) in that the recitation of the facts by the Supreme Judicial Court and by the US Magistrate Judge in the R&R omit facts and evidence pertinent to the reasonable and correct determination of the Petitioner's rights to relief on habeas review, as indicated in Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 17), and in Petitioner's Reply Memorandum in Support of Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 26) (referenced on docket as "MEMORANDUM OF LAW" without indication that it is a reply memorandum).

The prescription for granting federal habeas relief as stated in 28 U.S.C. § 2254(d)(1), indicates that such relief is to be granted where a claim that was adjudicated on the merits in state court proceedings "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 . . . ." See 28 U.S.C. § 2254(d)(1). (R&R, at 1-12).

"If a claim was not adjudicated on the merits in a state court proceeding, then the issue is reviewed de novo." Norton v. Spencer, 351 F.3d 1, 4-5 (1st Cir. 2003), cert. denied, 542 U.S. 933 (2004). The petitioner objected to the R&R as a whole insofar as the petitioner's federal constitutional claims were avoided or neglected hy the Massachusetts Supreme Judicial Court in deciding the petitioner's appeal from his convictions in the State trial court. (R&R, at 1-12).

4. It is at least debatable that the District Court has erred by omitting pertinent aspects of the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(2). (R&R, at 3 n. 4, 6-8).

It is at least debatable that there is a substantial and materially significant body of facts, deriving from the trial evidence, that have not entered into the consideration of the Supreme Judicial Court, the US Magistrate Judge, or the District Court, in addressing the Sixth Amendment Confrontation Clause issues involved in this case. See This Memorandum, Discussion, supra. Thus, it is at least debatable that the District Court has erred (1) by failing to give effect to the standard of relief provided under 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 (2) by determining and presenting the standard applicable for habeas corpus review of the state court's determination of the facts as permitting 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, at 3 n. 4, 6-8. "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)).

> Obviously, where the state court's legal error infects the fact-finding process, the resulting factual determination will be unreasonable and no presumption of correctness can attach to it.

Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir.), cert. denied, 543 U.S. 1038 (2004).

> [W]here the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.

Id., 366 F.3d at 1001 (citing see, e.g., Wiggins v. Smith, [539 U.S. 510, ___,] 123 S. Ct. 2527, 2538-2539 (2003)).

5. It is at least debatable that the District Court has erred by determining that the Massachusetts Attorney General Maura Healey is not properly listed as a respondent to this petition for writ of habeas corpus. (R&R, at 1 n. 1)[14]

The Attorney General represents the Commonwealth of Massachusetts which retains responsibility for maintaining the petitioner in custody, regardless of where the petitioner may have been placed by the Commonwealth of Massachusetts pursuant to conviction and sentence by a Massachusetts state court. This is particularly significant as Massachusetts relocated the petitioner to the State of Nevada, while retaining control over the petitioner's right to liberty. The state attorney general of the state of conviction is a proper respondent as to a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. See Barry v. Bergen County Probation

[14] The petitioner objected to the R&R on this point. Attorney General Maura Healey remains listed as a respondent.

Dep't, 128 F.3d 152, 162-163 (3d Cir. 1997).

> "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 id., 128 F.3d at 162-163 (citing and quoting cf. Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 409 (7th Cir. 1985)).

In light of all of the foregoing, the petitioner respectfully asserts that a COA should be granted in this case.

Respectfully submitted,

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By his Attorney,

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Dated: December 11, 2018

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 11, 2018, including Todd M. Blume, Assistant Attorney General, counsel for the respondents Osvaldo Vidal, et al., in this matter. There are no non-registered participants involved in this case.

/s/ David H. Mirsky

David H. Mirsky

APPENDIX O

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 18-1856

JERRY MEAS,
Petitioner-Appellant,

v.

OSVALDO VIDAL, et al,
Respondent-Appellee.

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

For the Petitioner-Appellant:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

INTRODUCTION AND RULE 35(b)(1) STATEMENT

Petitioner Jerry Meas respectfully seeks a panel rehearing and rehearing en banc as to this Court's order and judgment dated December 9, 2019, denying the petitioner's request for a certificate of appealability (COA) to permit his appeal to this Court from the District Court's denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254. The petitioner is seeking a COA pursuant to 28 U.S.C. § 2253.

A. Violation of the Fundamental Sixth Amendment Right of Confrontation to Show the Bias in Favor of the Prosecution of a Material Witness.

In his petition for writ of habeas corpus,[1] Petitioner Jerry Meas has raised the issue of whether the trial judge presiding over his conviction of, *inter alia*, first degree murder, violated the petitioner's right of confrontation under the 6th and 14th Amendments,[2] 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 determination of the trial judge, and not the jury, that the cooperating government witness's denial of bias in favor of the government, during voir dire testimony, was credible. *Petition for Writ of Habeas Corpus* (US District Court No. 1:15-cv-13234-GAO, docket number 1), *at Attachment to Page 6.*

B. The Petitioner's Appeal Would Resolve a Significant Conflict in the Case Law Pertaining to a Criminal Defendant's Right to Cross-Examine a Government Witness to Show Bias.

The petitioner is seeking to appeal the determination of the District Court that the trial

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[1] The petitioner's petition for a writ of habeas corpus is address to the decision of the Supreme Judicial Court of Massachusetts in Commonwealth v. Meas, 467 Mass. 434, 447 (2014).

[2] "[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).

judge's preclusion of cross-examination to show bias of a material cooperating witness was permissible due to the trial judge's own personal determination that the cooperating witness was credible in denying bias during voir dire testimony. Contrary to the state court decision below and the decision of the District Court, 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 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 Report and Recommendations, supra, at 2. The petitioner notes in this regard that the District Court gave no rationale for its determination that,

> Although 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 Report and Recommendations, supra, at 2 n. 1. The foregoing is a material misquotation of Delaware v. Van Arsdall, which essentially defeats the right of confrontation. The District Court has misquoted 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 Delaware v. Van Arsdall is this:

> 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** (emphasis added).

Delaware v. Van Arsdall, supra, 475 U.S. at 678-679; contra Order Adopting Report and Recommendations, supra, at 2 ("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).").

C. The Denial of a Certificate of Appealability Here Appears to be Based on a Standard of Review That is More Stringent Than What the United States Supreme Court Requires.

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), where a "substantial showing of the denial of a constitutional right" is defined as the presentation of 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. This Court's December 9, 2019, order denying the petitioner's request for a COA contains no indication that the foregoing definition of a substantial showing of the denial of a constitutional right, contained in Cockrell, supra; Slack, supra; and Barefoot, supra, was applied in this case. Compare Judgment, at 1.

REASONS FOR GRANTING THE PETITION FOR REHEARING AND FOR REHEARING EN BANC

This Court's denial of the petitioner's request for the issuance of a COA should be reversed, a COA should be granted, and the District Court's denial of the petitioner's petition for a writ of habeas corpus should be reversed based on the merits of the petition. The petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court on August 27, 2015. On December 7, 2017, US Magistrate Judge Jennifer C. Boal entered her Report and Recommendations re Petition for Writ of Habeas Corpus (US District Court No. 1:15-cv-13234-GAO, docket number 29) ("R&R"), in which she recommended that the US District Judge assigned to this case deny the instant petition for writ of habeas corpus. In its Order Adopting Report and Recommendations dated August 31, 2018 (US District Court No. 1:15-cv-13234-GAO, docket number 29), the District Court denied petitioner's petition for a writ of habeas corpus and denied a COA.

I. The U.S. Supreme Court's Interpretation of the Standard for Determining Whether a COA Should Issue Was Not Fully and Fairly Applied.

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), where a "substantial showing of the denial of a constitutional right" is defined as the presentation of 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. Although Slack v. McDaniel, supra, is cited, this Court in its December 9, 2019, order applied only the bare language of that

standard, without indicating the U.S. Supreme Court's modification that a COA should issue where reasonable jurists could debate whether the petition should have been resolved in a different manner. Compare Judgment, at 1. Applying the complete standard stated in Miller-El v. Cockrell, supra, 537 U.S. at 338 (quoting Slack, 529 U.S. at 484 (quoting Barefoot v. Estelle, 463 U.S. at 893 n. 4), reasonable jurists could debate whether (or agree that) the District Court has erred by denying the instant petition for a writ of habeas corpus, particularly by misapplying Delaware v. Van Arsdall, supra.

Reasonable jurists could debate whether (or agree that) the District Court has erred by omitting pertinent aspects of the standard applicable for relief pursuant to 28 U.S.C. § 2254(d)(1) and by presenting this standard as being so exceedingly difficult to satisfy as to render relief from material federal constitutional violations virtually unavailable. (R&R, at 6-8).

Reasonable jurists could debate whether (or agree that) the District Court has erred by determining that the decision of the Supreme Judicial Court of Massachusetts to reject the petitioner's claims under the Sixth Amendment Confrontation Clause was neither contrary to nor an unreasonable application of clearly established federal law on the grounds that "the witness's testimony was not necessary to establish any material facts," because "there were no indications that the witness's trial testimony was inconsistent with any prior statements" and because "counsel was permitted to use the prior convictions to impeach the witness." Compare Order Adopting Report and Recommendations, supra, at 2, 1-3. Reasonable jurists could debate whether (or agree that) the District Court has erred by determining that cooperating prosecution witness Fernando Badillo's testimony was not significant or material or relevant to the jury's determination of guilt. (R&R, at 11-12).

II. A Criminal Defendant's Right to Confront the Witnesses Against Him Through Cross-Examination is Pre-Eminent and Fundamental.

In Davis v. Alaska, 415 U.S. 308 (1974), the U.S. Supreme Court held that the trial judge's preclusion of the petitioner 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 Davis, 415 U.S. at 310-311.

> [P]etitioner 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. The United States Supreme 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, 380 U.S. 415, 419 (1965)).

As in Davis v. Alaska, supra, in Mr. Meas'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 v. Alaska, 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". Id., 415 U.S. at 309-311, 317-319. As in Davis v. Alaska, supra, 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 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.

III. Reasonable Jurists Could Debate Whether the District Court has erred by omitting pertinent aspects of the standards applicable for federal habeas relief.

Reasonable jurists could debate whether the District Court has erred by upholding the R&R's omissions of the following applicable standards for federal habeas relief (R&R, at 6-8):

A. Standard for right to habeas relief under 28 U.S.C. § 2254(d)(1).

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." Id., 529 U.S. at 389. The R&R errs by construing the standard of review for determining habeas corpus relief under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), using terminology that indicates a chilling presumption against the protection of a petitioner's federal constitutional rights. (R&R, at 6-8). As indicated hereinabove, review is required to be meaningful, and prejudicial violations of federal constitutional rights must be recognized, addressed, and protected. See Williams v. Taylor, supra; see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)) ("[H]abeas 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.'" (quoting United States v. Lane, 474 U.S. 438, 449 (1986))); Brecht v. Abrahamson, supra, 507 U.S. at 637-638 (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.'" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

B. Standard for right to habeas relief under 28 U.S.C. § 2254(d)(2).

Reasonable jurists could debate whether the District Court has erred (1) by failing to give effect to the standard of relief provided under 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 (2) by determining and presenting the standard applicable for habeas corpus review of the state court's determination of the facts as permitting 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, at 3 n. 4, 6-8. "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 the partial reliance by a state court on an erroneous factual finding can indicate the unreasonableness of the state court's decision. See Wiggins v. Smith, 539 U.S. 510, 528 (2003) (partial reliance on an erroneous factual finding "further highlights the unreasonableness of the state court's decision.") (applying 28 U.S.C. § 2254(d)(2)).

IV. The Constitutional Violation was Sufficiently Prejudicial to Merit Relief.

> [H]abeas 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, supra, 507 U.S. at 637 (quoting United States v. Lane, supra, 474 U.S. at 449). Accordingly, 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, supra, 328 U.S. at 776).

The trial judge's unconstitutional preclusion of cross-examination as to Badillo was substantial and injurious constitutional error, causing the petitioner actual prejudice. See Brecht v. Abramson, supra. Badillo's testimony identifying Mr. Meas as the shooter was material to the jury's determination of guilt or innocence. 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 Lowell Police Detective Corey Erickson).* Surveillance video from the 7-Eleven that night (Exhibit 32) shows that these two witnesses, Gaddafi Henry and Douglas Anderson, were present in the store at the time of the incident. *(Tr. Vol. 6/49-51). (S.A. 2134-2136)(testimony of Lowell Police Sgt. Murray).* Neither Gaddafi Henry nor Douglas Anderson were brought to the station to make a full statement after the show-up. *(Tr. Vol. 6/80). (S.A. 2165) (testimony of Lowell Police Sgt. Joseph 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)*.

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 Supreme Judicial Court of Massachusetts made the following findings:

> 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** (emphasis added).

Commonwealth v. Meas, 467 Mass. 434, 447 (2014). 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** (emphasis added)." Id., 467 Mass. at 447 n. 14.

The R&R errs and fails by finding that the jury was exposed to sufficient facts surrounding Badillo's convictions "and could use those facts to **draw its own inferences**[3] regarding his credibility and potential bias (emphasis added)" (R&R at 11, 8-11), when the trial judge actually prevented the jury from making its own credibility determinations of Badillo by determining that he was credible in a voir dire hearing before his testimony. (R&R, at 8-11).

V. The Findings and Conclusions of the District Court Omit Material Evidence.

The following trial evidence is erroneously absent from the findings and conclusions stated in the R&R:

Though Suggestive, the Show-up Indicated Other Suspects.

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.

[3] 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.

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 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 Gaddafi Henry and Douglas Anderson were present in the store at the time of the incident.** *(Tr. Vol. 6/49-51). (S.A. 2134-2136).*

Lowell Police Detective Corey Erickson testified:

On June 13, 2006, after 11:00 p.m., Erickson and Detective Wayne took an individual, 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; four persons had their hands behind their back, their legs spread apart and were standing across the roadway. In these circumstances, Vicheth San identified Meas as the shooter. *(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).*

Video Surveillance Evidence Was Missing and Unavailable.

The Commonwealth sought to introduce a disk containing images Sgt. Murray had viewed at the 7-Eleven on June 13, 2006. *(Tr. Vol. 5/20-21). (S.A. 1993-1994).* The defendant objected on the basis that the disk was incomplete, 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).* See and compare Commonwealth v. Meas, supra, 467 Mass. at 447 ("At trial there was evidence that there were two security systems operating at the store at the time of the shooting. . . . **[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** (emphasis added).").

No Weapon was Found on Mr. Meas

Christopher Kelly of the Lowell Police testified:

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 weapon was found on the defendant.** *(Tr. Vol. 8/65-66). (S.A. 2486-2487).*

Gunshot residue testing of the petitioner was negative.

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).*

Phalla Nou Had an Undeniable Motive to Shift Blame Away From Himself

Phalla Nou testified:

Nou got locked up for accessory to Bonla's murder. *(Tr. Vol. 9/94). (S.A. 2663).* Nou testified that Meas killed him. *(Tr. Vol. 9/94-95). (S.A. 2663-2664).* On the charge of accessory after the fact, murder, **Nou was incarcerated for two years and was then sent home on parole.** *(Tr. Vol. 9/116). (S.A. 2685).*

CONCLUSION

In light of the foregoing, Jerry Meas respectfully requests this Honorable Court to grant his petition for panel rehearing and rehearing en banc, as to this Court's order and judgment dated December 9, 2019, denying Mr. Meas's request for a COA, and to issue a COA as to this case to permit his appeal to this Court from the District Court's denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. §2254.

Respectfully submitted,
JERRY MEAS
By his Attorney,

/s/ David H. Mirsky
David H. Mirsky, Esquire
(MA B.B.O. # 559367)
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel. 603-580-2132
Dated: December 23, 2019

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on December 23, 2019, including Todd M. Blume, Assistant Attorney General, counsel for the respondents Osvaldo Vidal, et al., in this matter. There are no non-registered participants involved in this case.

/s/ David H. Mirsky

David H. Mirsky

United States Court of Appeals
For the First Circuit

No. 18-1856

JERRY MEAS,

Petitioner - Appellant,

v.

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY,

Respondents - Appellees.

Before

Howard, Chief Judge,
Lynch and Thompson, Circuit Judges.

JUDGMENT

Entered: December 9, 2019

Petitioner-Appellant Jerry Meas seeks a certificate of appealability ("COA") to appeal from the denial and dismissal of his §2254 petition in the district court. After careful review of petitioner's submissions and of the record below, we conclude that that the district court's rejection of Meas's claim was neither debatable nor wrong, and that petitioner has therefore failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, Meas's application for a certificate of appealability is denied.

Meas has also filed a motion for appointment of counsel before this court. "[P]etitioners have no constitutional right to counsel in [habeas corpus] proceedings." Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011). After review of petitioner's motion, and, as indicated, of the record below, we are not persuaded that "the interests of justice" require appointment of counsel in this case. 18 U.S.C. §3006A(a)(2)(B). Consequently, the motion for appointment of counsel is denied.

The appeal is hereby terminated.

Exhibit A

By the Court:

Maria R. Hamilton, Clerk

cc:
David H. Mirsky
Todd Michael Blume
Ryan Edmund Ferch
Jerry Meas

APPENDIX P

0681CR00825 Commonwealth v Meas, Jerry

Case Type	Indictment	**Case Status**	Open
Status Date:	04/09/2014	**File Date**	06/29/2006
Case Judge:		**DCM Track:**	C - Most Complex
Next Event:			

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Attorney/Bar Code	Phone Number
Dunigan, Esq., Elizabeth A. (633996)	
Langsam, Esq., Jessica Lynne (646676)	

More Party Information

Meas, Jerry - Defendant

Alias

Attorney/Bar Code	Phone Number
Mirsky, Esq., David H (559367)	
Onek, Esq., Peter M (552993)	

More Party Information

Party Charge Information

Meas, Jerry - Defendant

Charge # 1 : **265/1-0 - Felony** MURDER c265 §1

Original Charge 265/1-0 MURDER c265 §1 (Felony)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/15/2008
Disposition Guilty

Meas, Jerry - Defendant

Charge # 2 : **269/10/J-1 - Felony** FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)

Original Charge 269/10/J-1 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) (Felony)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/15/2008
Disposition Guilty

Meas, Jerry - Defendant

Charge # 3 : **269/10G/B-0 - Felony** FIREARM VIOL WITH 2 PRIOR VIOLENT/DRUG CRIMES c269 §10G(b)

Original Charge 269/10G/B-0 FIREARM VIOL WITH 2 PRIOR VIOLENT/DRUG CRIMES c269 §10G(b) (Felony)
Indicted Charge
Amended Charge

Charge Disposition
Disposition Date 12/29/2008
Disposition Nolle Prosequi

Events

Date	Session	Location	Type	Event Judge	Result
07/13/2006 02:00 PM	Criminal 6 Rm 730		Arraignment		Rescheduled
07/17/2006 02:00 PM	Criminal 6 Rm 730		Arraignment		Held as Scheduled
08/15/2006 02:00 PM	Criminal 6 Rm 730		Pre-Trial Conference		Held as Scheduled
10/12/2006 02:00 PM	Criminal 6 Rm 730		Status Review		Held as Scheduled
11/16/2006 02:00 PM	Criminal 6 Rm 730		Hearing RE: Discovery Motion(s)		Held as Scheduled
12/07/2006 02:00 PM	Criminal 6 Rm 730		Status Review		Held as Scheduled
12/14/2006 02:00 PM	Criminal 6 Rm 730		Pre-Trial Hearing		Rescheduled
01/18/2007 02:00 PM	Criminal 6 Rm 730		Hearing		Held as Scheduled
01/23/2007 02:00 PM	Criminal 6 Rm 730		Hearing RE: Discovery Motion(s)		Rescheduled
02/16/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Rescheduled
03/27/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Not Held
04/13/2007 02:00 PM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Rescheduled
05/11/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Rescheduled
06/15/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Not Held
06/22/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Held as Scheduled
06/27/2007 10:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Held as Scheduled
09/21/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Not Held
10/19/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Rescheduled
10/29/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Held as Scheduled
11/09/2007 09:00 AM	Criminal 6 Rm 730		Evidentiary Hearing on Suppression		Held as Scheduled
11/15/2007 02:00 PM	Criminal 6 Rm 730		Final Pre-Trial Conference		Rescheduled
11/29/2007 09:00 AM	Criminal 6 Rm 730		Jury Trial		Rescheduled
04/08/2008 09:00 AM	Criminal 6 Rm 730		Jury Trial		Rescheduled
06/26/2008 02:00 PM	Criminal 7 (Lowell)		Final Pre-Trial Conference		Rescheduled
07/21/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Rescheduled
11/04/2008 02:00 PM	Criminal 7 (Lowell)		Final Pre-Trial Conference		Held as Scheduled
11/06/2008 02:00 PM	Criminal 7 (Lowell)		Final Pre-Trial Conference		Rescheduled
11/12/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
11/13/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
11/14/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
11/17/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
11/24/2008 02:00 PM	Criminal 7 (Lowell)		Hearing		Held as Scheduled
12/01/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/02/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/03/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/04/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/05/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/08/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/09/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/10/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/11/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial

Date	Session	Location	Type	Event Judge	Result
12/12/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/15/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/16/2008 09:00 AM	Criminal 7 (Lowell)		Jury Trial		Trial ends in a Mistrial
12/29/2008 09:00 AM	Criminal 7 (Lowell)		Hearing for Sentence Imposition		Held as Scheduled

Ticklers

Tickler	Start Date	Days Due	Due Date	Completed Date
Pre-Trial Hearing	07/17/2006	0	07/17/2006	04/09/2014
Final Pre-Trial Conference	07/17/2006	346	06/28/2007	04/09/2014
Case Disposition	07/17/2006	360	07/12/2007	04/09/2014

Docket Information

Docket Date	Docket Text	File Ref Nbr.
06/29/2006	Indictment returned	1
06/29/2006	Order of notice of finding of murder indictment	
06/29/2006	Notice & copy of indictment sent to Chief Justice & Atty General	
06/29/2006	Notice & copy of indictment sent to Sheriff	
07/03/2006	Order of notice of finding of murder indictment returned w/service	2
07/17/2006	Deft arraigned before Court and pleads not guilty (Fishman J)	
07/17/2006	RE Offense 1:Plea of not guilty	
07/17/2006	RE Offense 2:Plea of not guilty	
07/17/2006	RE Offense 3:Plea of not guilty	
07/17/2006	Bail set: The defendant is order to be held without bail (Fishman J)	
07/17/2006	Continued to 8/15/2006 for hearing on PTC and Assignment of tracking order (Kenneth J. Fishman, Justice)	
07/17/2006	Commonwealth files Statement of the case, filed in court	3
07/17/2006	Affidavit of indigency filed; approved (Kenneth J. Fishman, Justice)	4
07/17/2006	Order Assessing statutory fee for appointment of counsel	5
07/17/2006	Mittimus issued to Middlesex County Jail (Cambridge)	
07/17/2006	Mittimus returned with service	6
07/18/2006	Assigned to track "C" see scheduling order	
07/20/2006	Commonwealth files Notice of Discovery I	7
08/09/2006	Commonwealth files Notice of Discovery II	8
08/15/2006	Pre-trial conference report filed	9
08/15/2006	Deft files Motion for Leave to Issue Subpoenas, filed in Court	10
08/15/2006	Motion (P#10) allowed, without opposition. (Kenneth J. Fishman, Justice). Copies mailed 8/16/2006	
08/15/2006	ORDER: After hearing, it is hereby ORDERED that the Lowell Sun newspaper, 15 Kearney Square, Lowell, Ma 01852, DBA Media News Group, Inc., turn over copies of any and all photographs taken by Lowell Sun photographers at the scene of the defendant's arrest on June 13,	11

Docket Date	Docket Text	File Ref Nbr.
	2006. (Kenneth J. Fishman, Justice)	
10/12/2006	MOTION by Deft: For funds to employ an expert	12
10/12/2006	MOTION (P##12) allowed (Elizabeth M. Fahey, Justice)	
10/12/2006	MOTION by Deft: For funds for preparation of transcript	13
10/12/2006	MOTION (P#13) allowed (Elizabeth M. Fahey, Justice).	
10/12/2006	MOTION by Deft: For funds to employ an expert	14
10/12/2006	MOTION (P#14) allowed (Elizabeth M. Fahey, Justice).	
11/10/2006	Commonwealth files Notice of discovery III	15
11/27/2006	MOTION by Deft: For for funds for preparation of transcript	16
11/27/2006	MOTION (P#16) allowed (Elizabeth M. Fahey, Justice). Copies mailed 11/28/2006	
12/15/2006	Commonwealth files Notice of Discovery IV	17
01/19/2007	Deft files Motion to Suppress, with affidavit in support	18
04/10/2007	Commonwealth files Notice of Discovery V	19
06/19/2007	Commonwealth files Notice of discovery I	20
07/09/2007	Commonwealth files Notice of discovery II	21
08/24/2007	Finding by Court: FINDINGS OF FACTS, RULING OF LAW, AND ORDER ON DEFENDANT'S MOTION TO SUPRESS: ORDER for the forgoing reasons, the defendant's motion to suppress is DENIED (Paul A. Chernoff, Justice)	22
08/30/2007	MOTION by Deft: For disclosure of identification procedures	23
08/30/2007	MOTION by Deft: For discovery	24
08/30/2007	MOTION by Deft: For disclosure of prior and subsequent bad acts	25
08/30/2007	MOTION by Deft: For exculpatory evidence criminal records of commonwealth witnesse	26
08/30/2007	MOTION by Deft: For exculpatory evidence of change in witness testimony	27
08/30/2007	Deft files Notice of specific requests for exculpatory evidence and required compliance with Kyle V.Whitley	28
10/05/2007	Defendant's MOTION to suppress identification with a memorandum and affidavit attached	29
10/18/2007	Commonwealth files pre-trial potential list of witnesses	30
10/22/2007	MOTION by Deft: supplemental motion for funds to employ an expert with an affidavit attached	31
10/22/2007	MOTION (P#31) allowed (Kenneth J. Fishman , Justice). Copies given in hand	
11/16/2007	Commonwealth files notice of discovery III, regarding lab reports	32
11/23/2007	Deft files supplemental memorandum in support of motion to suppress identification	33
11/23/2007	Commonwealth files memorandum in opposition to defendant's motion to suppress identification	34
02/07/2008	MOTION by Commonwealth: Notice if discovery IV, Regarding additional crime laboratory reports	35
02/26/2008	Findings Of Fact, Conclusions Of Law, And Order On Defendant's Motion To Suppress Identification --ORDER-- For the foregoing reasons, it is hereby ORDERED that the defendant's Motion to Suppress Identification is DENIED. This issue of admissibility of any attempted future incourt identification of the defendant by the witnesses Pen, Badillo, and Cardona is reserved for the trial judge. (Kenneth J. Fishman, Justice) Both sides notified.	36

Docket Date	Docket Text	File Ref Nbr.
04/02/2008	Commonwealth files Commonwealth's notice of discovery regarding crime lab and forensics	37
04/15/2008	Commonwealth files Notice of discovery regarding autopsy photographs	38
10/27/2008	Commonwealth files Notice Regarding a Commonwealth Witness	39
10/28/2008	Commonwealth files Notice of discovery VI	40
10/30/2008	Commonwealth files Notice of Discovery VII	41
11/04/2008	MOTION by Deft: For funds to employ expert	42
11/04/2008	MOTION (P#42) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/5/2008	
11/04/2008	Filed: Joint Pre-Trial Memorandum	43
11/04/2008	Commonwealth files Notice to defense of additional information gleanded during pre-trial meeting with witness	44
11/10/2008	Commonwealth files List of witnesses	45
11/10/2008	MOTION by Commonwealth: In limine to admit lay and expert testimony regarding gang affiliation, motion for voir dire, and proposed jury instructions	46
11/10/2008	MOTION by Commonwealth: To exempt Sarah Saroeun from the court's sequentration order	47
11/10/2008	MOTION by Commonwealth: In limine to exclude reference to alleged prior bad acts of commonwealth witnesses including prior convictions	48
11/10/2008	MOTION by Commonwealth: In limine to admit autopsy photograph of the victim	49
11/10/2008	MOTION by Commonwealth: For a view	50
11/10/2008	MOTION by Commonwealth: In limine to introduce a photograph of the victim when he was alive	51
11/10/2008	Commonwealth files Notice to defense of qualifications of gang affiliation expert	52
11/10/2008	MOTION by Commonwealth: In limine to impeach the defendant with his prior convcitons	53
11/10/2008	MOTION by Deft: In limine to sequester witnesses	54
11/10/2008	MOTION by Deft: To preserve defendant's rights on court's denial of motion to suppress	55
11/10/2008	MOTION by Deft: In limine re: Miranda Warnings	56
11/10/2008	MOTION by Deft: In limine for exclupatory evidence of change in witness testimony	57
11/10/2008	MOTION by Deft: In limine re: Prior police contact with defendant	58
11/10/2008	MOTION by Deft: In limine to limit argument by prosecutor	59
11/10/2008	MOTION by Deft: Order of witnesses to called by the commonwealth	60
11/10/2008	MOTION by Deft: In limine Re: Photographs	61
11/10/2008	MOTION by Deft: In limine and request for hearing RE: Exclusion of defendant's prior convictions	62
11/10/2008	MOTION by Deft: In limine to preclude lay opinion testimony of identification from video recording	63
11/10/2008	MOTION by Deft: To preclude statements allegedly made by the defendant and others	64
11/10/2008	MOTION by Deft: For voir dire of expert testimony	65
11/10/2008	MOTION by Deft: In limine regarding identification testimony	66
11/10/2008	MOTION by Deft: In limine to preclude in court identifications	67

Docket Date	Docket Text	File Ref Nbr.
11/10/2008	MOTION by Deft: For voir dire if proposed identification witnesses	68
11/10/2008	MOTION by Deft: In limine specialized testimony	69
11/10/2008	MOTION by Deft: In limine to exclude reference to gang membership	70
11/10/2008	MOTION by Deft: In limine Re: Gang terminology	71
11/10/2008	MOTION by Deft: To propound questions to prospective jurors	72
11/10/2008	MOTION by Deft: To propound questions regarding pre-trial publicity	73
11/12/2008	Hospital records from Saints Memorial Medical Center received (2)	
11/12/2008	Commonwealth files Second notice to defense of additional information gleaned during pre-trial meetings with witnesses	74
11/13/2008	MOTION by Deft: To reduce charge from First - Degree murder to second - degree murder	76
11/13/2008	MOTION (P#76) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION by Deft: To interview witnesses	77
11/13/2008	MOTION (P#77) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#68) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#63) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#62) allowed except for the adult offense (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#56) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#57) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#55) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/13/2008	MOTION (P#54) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/14/2008	MOTION by Deft: For order for records	78
11/14/2008	MOTION (P#78) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/14/2008	Order Issued to Massachusetts Office of Public Safety, Parole Board	79
11/14/2008	Order issued to Massachusetts Department of Correction	80
11/14/2008	Order issued to Wisconsin Department of Correction, Parole Commission	81
11/14/2008	Order issued to Middlesex County Sheriff's Office	82
11/14/2008	Commonwealth files Application for grant of immunity for witness Phalla Nou - dob: 4/3/82	83
11/14/2008	Affidavit of Jerry Meas in support of defendant's motion in Limine to preclude testimony	84
11/17/2008	MOTION by Deft: To preclude testimony of Phalla Nou	85
11/17/2008	MOTION (P#85) denied (Kenneth J. Fishman, Justice). Copies mailed	
11/17/2008	MOTION (P#70) denied (Kenneth J. Fishman, Justice). Copies mailed	
11/17/2008	MOTION (P#67) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	
11/17/2008	MOTION (P#46) allowed (Kenneth J. Fishman, Justice). Copies mailed 11/18/2008	

Docket Date	Docket Text	File Ref Nbr.
11/17/2008	Order issued to Lowell Superior Court Probation Department	86
11/17/2008	Mistrial 11/17/2008 case continue for trial at 9:00 am on 12/1/2008	
11/18/2008	Commonwealth files List of witnesses	75
11/18/2008	Order issued Worcester County Sheriff's Office	87
11/19/2008	Commonwealth files Fourth Notice to Defense of Additional Information Gleaned during Pre-Trial Meetings with Witnesses	88
11/19/2008	Commonwealth files Fourth Notice to Defense of Additonal Information Gleaned during Pre-Trial Meetings with Witnesses	89
11/21/2008	Commonwealth files Motion in limine for PreTrial Rulings and guidance regarding certain expected witness testimony at Trial	90
11/25/2008	Finding by Court: MEMORANDUM AND ORDER REGARDING "YOUTUBE' EVIDENCE OF GANG AFFILIATION:After hearing the arguments of counsel and an in camera review the video, it is hereby that, provide the Commonwealth can establish the requisite foundation for the admission of the evidence, the Commonwealth will premitted to play so much of the first of three videos, without sound, as depicts a picture of a sign reading" Entering Lowell Inc. 1226 Asian Bkoyz Gang, and photographs in which the defendant is claimed to appear. The remaining portions of the first video, the other two videos, and images of the YouTube pages are excluded from admission: Accordingly, based on the foregoing, the Commonwealth's motion to introduce " YouTube " Evidence related to gang affiliation is allowed in part, and denied in part, consistent with this decidion (Kenneth J. Fishman, Justice)	91
11/25/2008	Records received from Massachusetts Office of Public Safety, Parole Board re: Phalla Nou (DOB 4/3/82)	
11/26/2008	Other records from Office of the Sheriff county of Worcester received	
11/26/2008	Other records from MCI Concord received	
12/01/2008	Commonwealth files List of witnesses	92
12/07/2008	MOTION by Deft: For relief	93
12/07/2008	Commonwealth files Opposition to defendant's motion to prelcude admission of digital and VHS recording from the 7-11	94
12/08/2008	Commonwealth files Request fir Jury instruction regarding lost evidence	95
12/08/2008	MOTION by Commonwealth: In limine regarding outstanding evidentiary issues	96
12/09/2008	Commonwealth files Notice to defense of event occuring on December 8th and December 9th 2008	97
12/09/2008	MOTION by Commonwealth: In limine regarding eliciting evidence pertaining to status of former Lowell Police Detective DAvid Annis	98
12/11/2008	MOTION by Commonwealth: In limine to Preclude testimony of Lowell Police Officer and Civilain Employee	99
12/11/2008	Deft files For Jury Instructions	100
12/12/2008	Commonwealth files Proposed Jury Instructions	101
12/15/2008	MOTION by Commonwealth: In limine to limit cross-examination of the medical examiner	102
12/15/2008	MOTION by Deft: For required finding of not guilty	103
12/15/2008	MOTION (P#10) denied, Filed in court at close of commonwealth's, case in chief and Denied: Motion renewed at close of all the evidence and Denied by the court. (Kenneth J. Fishman, Justice). Copies mailed 103	
12/15/2008	MOTION by Deft: For a required finding of not guilty as to count 101	104

Docket Date	Docket Text	File Ref Nbr.
12/15/2008	MOTION (P#104) denied, filed in court at close of commonwealth's case in chief and denied; Motion renewed at close of all the evidence and denied. (Kenneth J. Fishman, Justice). Copies mailed	
12/15/2008	RE Offense 1:Guilty verdict	
12/15/2008	RE Offense 2:Guilty verdict	
12/15/2008	001 Verdict of guilty	105
12/15/2008	002 Verdict of guilty	106
12/29/2008	RE Offense 3:Nolle prosequi	107
12/29/2008	Defendant sentenced to 001:Life, without parole. (Kenneth A. Fishman, Justice)	
12/29/2008	Defendant sentenced to 002: M.C.I. Cedar Junction for not more than Five Years or less than Four years concurrent with sentence imposed this day in 2006-825-001. (Kenneth A. Fishman, Justice)	
12/29/2008	003: Nolle pros	
12/29/2008	Commonwealth 's Sentencing Memorandum	108
12/29/2008	Mittimus returned with service	109
12/29/2008	MOTION by Deft: for Impoundment	110
12/29/2008	MOTION (P#110) allowed (Frances A. McIntyre, Justice). Copies mailed 1/5/2009	
12/29/2008	Notified of right of appeal under Rule 64	
12/29/2008	Notified of right of appeal under Rule 64	
12/29/2008	NOTICE of APPEAL FILED by Jerry Meas	111
12/29/2008	Sentence credit given as per 279:33A: 929.	
01/02/2009	Exhibits filed in Room 207	
01/05/2009	Court Reporter Rattigan, Linda is hereby notified to prepare one copy of the transcript of the evidence of Motion to Suppress on 06/22/2007 & 06/27/07; trial 11/12/08-11/17/08 and trial 12/1/08 - 12/16/08 and sentence 12/29/08. (November 12m13m14 & 17, 2008 should not have been ordered as this was a mistrial	
01/05/2009	Court Reporter Cunha, Beatrice is hereby notified to prepare one copy of the transcript of the arr. 7/17/06 :evid. hrg 10/29/08; trial 12/12/2008.	
01/05/2009	Court Reporter Gates, Eleanor M. is hereby notified to prepare one copy of the transcript of the evidence of Motion to Supress 11/09/2007	
01/15/2009	Transcript of testimony received One Volume of November 10, 2007 from court reporter, Gates, Eleanor M.	
01/26/2009	Transcript of testimony received Two Volumes of June 22, 2007 and December 1. 2008 from court reporter, Rattigan, Linda	
02/03/2009	Transcript of testimony received Two Volumes of July 17, 2006 and December 12, 2008 from court reporter, Cunha, Beatrice	
02/17/2009	Transcript of testimony received One Volume of December 2, 2008 from court reporter, Rattigan, Linda	
02/23/2009	Transcript of testimony received One Volume of December 3, 2008 from court reporter, Rattigan, Linda	
03/03/2009	Transcript of testimony received One Volume of Decenber 5, 2008 from court reporter, Rattigan, Linda	
03/16/2009	Transcript of testimony received One Volume of December 8, 2008 from court reporter, Rattigan, Linda	
03/23/2009	Transcript of testimony received One Volume of Deember 9, 2008 court reporter, Rattigan, Linda	

Docket Date	Docket Text	File Ref Nbr.
04/21/2009	Transcript of testimony received One Volume of December 16, 2008 from Transcript of proceedings from Court Reporter Snell, Amanda	
05/12/2009	Transcript of testimony received One Volume of December 11, 2008 from court reporter, Rattigan, Linda	
05/26/2009	Transcript of testimony received One Volume of December 10, 2008 from court reporter, Rattigan, Linda	
03/02/2010	second notice sent ot Linda Rattigan, 6-24 date	
05/07/2010	Transcript of testimony received One Volume of June 27, 2007 from court reporter, Rattigan, Linda	
07/20/2010	Transcript of testimony received One Volume of December 15, 2008 from court reporter, Snell, Amanda	
06/13/2011	Transcript of testimony received On Volume of December 4, 2008 from Transcript of proceedings from Court Reporter Houde, Nicole (per diem) produced by Elizabeth Hayes	
08/25/2011	Notice of assembly of record; two sets Two volumes in each set of court reporter Beatrice Cunha 7-17-06,12-12-08 mailed to the appeals court this day	
08/25/2011	Notice of assembly of record; two sets ten volumes in each set of court reporter Linda Rattigan 6-22,27,07,12-1,2,3,5,8,9,10,11,08, to the appeals court this day	
08/25/2011	Notice of assembly of record; two sets One volumes in each set of court reporter Eleanor gates 11-9-07 mailed to the appeals court this day	
08/25/2011	Notice of assembly of record; two sets One volume in each set of court reporter Nicole Houde 12-4-08 mailed to the appeals court this day	
08/25/2011	Notice of assembly of record; two sets Two volumes in each set of court reporter Amanda Snell 12-15,16-08 mailed to the appeals court this day	
08/25/2011	Notice of assembly of record; two certified copies of docket entries two sets of the transcript of evidence and P#111 Notice of appeal and list of exhibits sent the clerk of the appeals court this day	112
08/25/2011	Notice of assembly of record; sent to David Skeels, Esq and Jim Sahakian, ADA	
09/09/2011	Notice of Entry of appeal received from the Supreme Judicial Court SJC-11043	113
10/06/2011	Appearance of Deft's Atty: Peter M Onek	
10/25/2011	Court Reporter Rattigan, Linda is hereby notified to prepare one copy of the transcript of the evidence of 11/04/08 Novemeber 14, 24, 2008 and December 29, 2008	
10/25/2011	Transcript of testimony received Four Volumes of November 4, 14, & 24, 2008 and December 29, 2008 from Transcript of proceedings from Court Reporter Rattigan, Linda	
10/25/2011	Court Reporter Cunha, Beatrice is hereby notified to prepare one copy of the transcript of the evidence of 10/29/2007	114
10/26/2011	Transcript of testimony received One Volume of October 29, 2007 from Transcript of proceedings from Court Reporter Cunha, Beatrice	
11/07/2011	Notice of assembly of record; one set , fourvolumes in each set of court reporter Linda Rattigan 11-4,14,24,2008,12-29-08, mailed to the appeals court this day	
11/07/2011	Notice of assembly of record; one set one volume in each set of court reporter Beatrice Cunha 12-29-08,mailed to the appeals court this day	
11/28/2011	Court Reporter Rattigan, Linda is hereby notified to prepare one copy of the transcript of the evidence of 11/12,13,17,2008 Trial	

Docket Date	Docket Text	File Ref Nbr.
01/03/2012	Transcript of testimony received Three Volumes of November 12, 13, & 17, 2008 from Transcript of proceedings from Court Reporter Rattigan, Linda	
01/10/2012	Notice of assembly of record; one set three volumes in each set of court reporter linda rattigan 11-12,13,17,2008 mailed to the SJC #11043 this day	
03/29/2012	Appearance of Deft's Atty: David H Mirsky	
11/13/2013	Letter to Maura Looney @ SJC: Dear Ms.Looney: Enclosed please Exhibits in the Case of Commonwealth vs.Jerry Meas, excluding the Gun, Clip, and Knife. Please let me know if I can be of further assistance. (Mary T.Aufiero, Deputy Assistant Clerk)	115
04/09/2014	Rescript received from SJC; judgment AFFIRMED	116

Case Disposition

Disposition	Date	Case Judge
Disposed	04/09/2014	

APPENDIX Q

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. JERRY MEAS
SJC-11043

CASE HEADER			
Case Status	Decided, cert. denied	**Status Date**	10/20/2014
Nature	Murder1 appeal	**Entry Date**	09/08/2011
Appellant	Defendant	**Case Type**	Criminal
Brief Status		**Brief Due**	
Quorum	Ireland, C.J., Spina, Cordy, Duffly, Lenk, JJ.		
Argued Date	11/08/2013	**Decision Date**	03/12/2014
AC/SJ Number		**Citation**	467 Mass. 434
DAR/FAR Number		**Lower Ct Number**	
Lower Court	Middlesex Superior Court	**Lower Ct Judge**	Kenneth J. Fishman, J.
Route to SJC	Direct Entry: Murder 1		

ADDITIONAL INFORMATION

Transcripts received: 16 volumes. Transcripts dates: 7/17/06 (volume is missing), 6/22/07, 6/27/07, 11/9/07, 12/1/08, 12/2, 12/3, 12/4, 12/5, 12/8, 12/9, 12/10, 12/11, 12/12, 12/15 and 12/16. (Scanned)

Transcripts received: 5 volumes. Transcripts dates: 10/29/07, 11/4/08, 11/14/08, 11/24/08, 12/29/08. (Scanned)

Transcripts received: 3 volumes.Transcripts dates: 11/12/08, 11/13/08 and 11/17/08. (Scanned)

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellee Red brief & appendix filed 1 Extension, 40 Days	Jessica Langsam, A.D.A. James W. Sahakian, A.D.A.
Jerry Meas Defendant/Appellant Blue brief & appendix filed 18 Reply Br. 1 Extension, 454 Days	David H. Mirsky, Esquire Peter M. Onek, Esquire Inactive David M. Skeels, Esquire Inactive

BRIEFS

Appellant Meas Brief
Appellant Meas Reply Brief
Appellee Commonwealth Brief

DOCKET ENTRIES

Entry Date	Paper	Entry Text
09/08/2011	#1	Entered. Notice to counsel.
10/05/2011	#2	APPEARANCE of Peter M. Onek, Esquire for Jerry Meas.
12/28/2011	#3	MOTION to extend to 03/06/2012 filing of brief of Jerry Meas by Peter M. Onek, Esquire. (ALLOWED.)
03/05/2012	#4	MOTION FOR STAY OF APPEAL, filed for Jerry Meas by Peter M. Onek, Esquire. (Allowed until the filing of appearance of successor counsel.)

DOCKET ENTRIES

03/29/2012	#5	APPEARANCE of David H. Mirsky, Esquire for Jerry Meas.
03/29/2012	#6	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Further status due in 60 days.)
05/31/2012	#7	STATUS LETTER from David H. Mirsky, Esquire: See letter on file.(Status noted. Further status due in 30 days)
06/14/2012	#8	MOTION TO WITHDRAW APPEARANCE for Jerry Meas by Peter M. Onek, Esquire. (Allowed)
07/25/2012	#9	STATUS LETTER from David H. Mirsky, Esquire. See status on file.(Status noted. Further status due in 30 days.)
08/27/2012	#10	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Further status due in 30 days.)
09/27/2012	#11	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Further status due in 30 days.)
10/31/2012	#12	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Further status due in 30 days.)
12/03/2012	#13	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Further status due in 30 days.)
12/31/2012	#14	STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Status noted. Brief and appendix due February 22, 2013).
02/20/2013	#15	MOTION to extend to 04/05/2013 filing of brief of Jerry Meas by David H. Mirsky, Esquire. (Allowed)
04/11/2013	#16	MOTION to extend to 04/11/2013 filing of brief of Jerry Meas by David H. Mirsky, Esquire. (Allowed)
04/11/2013	#17	SERVICE of brief & appendix for Defendant/Appellant Jerry Meas by David H. Mirsky.
06/07/2013		Notice of 09/10/2013, 9:00 AM argument at John Adams Courthouse, Rm 1 (jac1) sent.
06/07/2013	#18	NOTICE of September argument sent.
07/03/2013	#19	MOTION to extend to 08/30/2013 filing of brief of Commonwealth by Jessica Langsam, A.D.A.
07/08/2013		ALLOWANCE of Paper #19 to 08/19/2013 for filing of brief of Plaintiff/Appellee Commonwealth. Notice to counsel.
07/19/2013		Notice of 10/11/2013, 9:00 AM argument at John Adams Courthouse, Rm 1 (jac1) sent.
07/19/2013	#20	NOTICE of October argument sent.
08/29/2013	#21	MOTION to extend to 08/29/2013 filing of brief of Commonwealth by Jessica Langsam, A.D.A.. *ALLOWED.
08/29/2013	#22	SERVICE of brief & supplemental appendix for Plaintiff/Appellee Commonwealth by Jessica Langsam.
09/11/2013	#23	MOTION to extend to 10/18/2013 filing of reply brief of Jerry Meas by David H. Mirsky, Esquire. (Allowed. No further extensions. Case will be argued on November 8.)
09/13/2013	#24	ORDERED for argument on November 8. Notice sent. (Also sent 9/24.)
10/21/2013	#25	SERVICE of appellant's reply brief for Jerry Meas by David H. Mirsky, Esquire.
11/07/2013	#26	SUPPLEMENTAL CITATION United States v. Cook, 17 Wall. 174., filed for Jerry Meas by David H. Mirsky, Esquire. *DISTRIBUTED TO QUORUM.
11/08/2013		Oral argument held. (Ireland, C.J., Spina, J., Cordy, J., Duffly, J., Lenk, J.).
03/12/2014	#27	RESCRIPT (Full Opinion): We affirm the order denying the defendant's motion to suppress identification evidence and his convictions. (By the Court)
03/21/2014	#28	MOTION to extend to April 25, 2014, filing of Petition for Rehearing, filed for Jerry Meas by David H. Mirsky, Esquire. (DENIED.)
03/26/2014	#29	PETITION FOR REHEARING, filed for Jerry Meas by David H. Mirsky, Esquire.
04/03/2014	#30	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
04/04/2014		RESCRIPT ISSUED to trial court.
06/26/2014	#31	Notice: Certiorari petition filed in U.S. Supreme Court.

DOCKET ENTRIES

10/20/2014 #32	Notice: Certiorari denied by U.S. Supreme Court.

As of 10/13/2015 20:00

APPENDIX R

No. 13-10630

Title:	Jerry Meas, Petitioner v. Massachusetts
Docketed:	June 19, 2014
Lower Ct:	Supreme Judicial Court of Massachusetts
Case Nos.:	(SJC-11043)
Decision Date:	March 12, 2014
Rehearing Denied:	April 4, 2014

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jun 16 2014	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 21, 2014)
Jun 25 2014	Waiver of right of respondent Massachusetts to respond filed.
Jul 3 2014	DISTRIBUTED for Conference of September 29, 2014.
Oct 6 2014	Petition DENIED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
David H. Mirsky	P.O. Box 1063 Exeter, NH 03833 dmirsky@comcast.net	(603) 580-2132
Party name: Jerry Meas		
Attorneys for Respondent:		
Susanne G. Reardon Counsel of Record	Office of the Attorney General One Ashburton Place Boston, MA 02108 susanne.reardon@state.ma.us	(617) 963-2832
Party name: Massachusetts		

APPENDIX S

CASREF,HABEAS,VICTIM

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:15-cv-13234-GAO

Meas v. Vidal et al
Assigned to: Judge George A. OToole, Jr
Referred to: Magistrate Judge Jennifer C. Boal
Case in other court: USCA - First Circuit, 18-01856
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 08/27/2015
Date Terminated: 08/31/2018
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

Petitioner

Jerry Meas

represented by **David H. Mirsky**
Mirsky & Petito, Attorneys at Law
PO Box 1063
Exeter, NH 03833
603-580-2132
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

Osvaldo Vidal

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Respondent

Maura Healey represented by **Ryan E. Ferch**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Todd M. Blume
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/27/2015	1	PETITION for Writ of Habeas Corpus pursuant to 28:2254, filed by Jerry Meas. (Attachments: # 1 Civil Cover Sheet)(Castilla, Francis) (Entered: 08/27/2015)
08/27/2015	2	NOTICE OF ATTORNEY PAYMENT OF FEES as to 1 Petition for Writ of Habeas Corpus (28:2254) by Petitioner Jerry Meas. Filing fee $ 5, receipt number 0101-5720237. Payment Type : HABEAS CORPUS. (Mirsky, David) (Entered: 08/27/2015)
08/27/2015	3	ELECTRONIC NOTICE of Case Assignment. Judge George A. OToole, Jr assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Jennifer C. Boal. (McDonagh, Christina) (Entered: 08/27/2015)
09/02/2015	4	Judge George A. OToole, Jr: ORDER entered. SERVICE ORDER re 2254 Petition. Order entered pursuant to R.4 of the Rules governing Section 2254 cases for service on respondents. Answer/responsive pleading due w/in 21 days of receipt of this order. (Danieli, Chris) (Entered: 09/02/2015)
09/16/2015	5	MOTION to Appoint Counsel by Jerry Meas. (Attachments: # 1 Exhibit Application to Proceed without Prepaying Fees or Costs and Inmate Transaction Report)(Mirsky, David) (Entered: 09/16/2015)
09/24/2015	6	NOTICE of Appearance by Ryan E. Ferch on behalf of Maura Healey, Osvaldo Vidal (Ferch, Ryan) (Entered: 09/24/2015)
09/24/2015	7	Assented to MOTION for Extension of Time to November 23, 2015 to File an Answer or Response to Petition for Writ of Habeas Corpus by Osvaldo Vidal. (Ferch, Ryan) (Entered: 09/24/2015)
09/25/2015	8	Judge George A. OToole, Jr: ELECTRONIC ORDER entered granting 7 Motion for Extension of Time (Lyness, Paul) (Entered: 09/25/2015)
09/25/2015	9	Reset Deadlines as to Responses due by 11/23/2015 (Lyness, Paul) (Entered: 09/25/2015)
10/22/2015	10	Judge George A. OToole, Jr: ELECTRONIC ORDER entered granting 5 Motion to Appoint Counsel Appointed David Mirsky, Esquire (Lyness, Paul) (Entered: 10/22/2015)
11/23/2015	11	

		RESPONSE/ANSWER to 1 Petition for Writ of Habeas Corpus (28:2254) by Osvaldo Vidal. (Ferch, Ryan) (Entered: 11/23/2015)
12/09/2015	12	Assented to MOTION Briefing Schedule with due dates of 2/12/2016 for filing of Petitioner's memorandum in support of petition and 4/11/2016 for filing of Respondents' memorandum in opposition re 1 Petition for Writ of Habeas Corpus (28:2254) by Jerry Meas.(Mirsky, David) (Entered: 12/09/2015)
12/15/2015	13	NOTICE OF MANUAL FILING by Maura Healey, Osvaldo Vidal, Supplemental Answer 3 Bound Volumes. Original's located in Clerk's Office re 1 Petition for Writ of Habeas Corpus (28:2254) (Halley, Taylor) (Entered: 12/15/2015)
01/07/2016	14	Judge George A. OToole, Jr: ELECTRONIC ORDER entered granting 12 Motion. A due date of 2/12/16 for the filing of the petitioner's memorandum in support of petition for writ of habeas corpus, and a due date of 4/11/16 for the fling of the respondents' memorandum of law in opposition to petition for writ of habeas corpus. (Lyness, Paul) (Entered: 01/07/2016)
02/02/2016	15	Assented to MOTION for Extension of Time to 3/15/2016 (and to 5/16/2016 for respondents' memorandum in opposition) to File *Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus* by Jerry Meas.(Mirsky, David) (Entered: 02/02/2016)
02/03/2016	16	Judge George A. OToole, Jr: ELECTRONIC ORDER entered granting 15 Motion for Extension of Time to File (Halley, Taylor) (Entered: 02/03/2016)
03/14/2016	17	MEMORANDUM OF LAW by Jerry Meas to 1 Petition for Writ of Habeas Corpus (28:2254). (Mirsky, David) (Entered: 03/14/2016)
03/18/2016	18	(Ex Parte) MOTION for Interim Payment of Attorney's Fees by Jerry Meas. (Attachments: # 1 Exhibit 1)(Lyness, Paul) (Entered: 03/23/2016)
05/16/2016	20	MEMORANDUM OF LAW by Osvaldo Vidal in Opposition re 1 Petition for Writ of Habeas Corpus (28:2254). (Ferch, Ryan) (Entered: 05/16/2016)
05/18/2016	21	Assented to MOTION for Leave to File *Reply Memorandum (on or before July 8, 2016)* by Jerry Meas.(Mirsky, David) (Entered: 05/18/2016)
05/19/2016	22	Judge George A. O'Toole, Jr: ELECTRONIC ORDER entered granting 21 Motion for Leave to File Reply Memorandum on or before July 8, 2016 ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Halley, Taylor) (Entered: 05/19/2016)
07/05/2016	23	Assented to MOTION for Extension of Time to 8/12/2016 to file Reply Memorandum in Support of Petition for Writ of Habeas Corpus by Jerry Meas. (Mirsky, David) (Entered: 07/05/2016)
07/06/2016	24	Judge George A. OToole, Jr: ELECTRONIC ORDER entered granting 23 Motion for Extension of Time to 8/12/2016 to file Reply Memorandum in

		Support of Petition for Writ of Habeas Corpus by Jerry Meas. (Halley, Taylor) (Entered: 07/06/2016)
07/06/2016	25	Reset Deadlines: Appellant Reply Brief due on 8/12/2016. (Halley, Taylor) (Entered: 07/06/2016)
08/05/2016	26	MEMORANDUM OF LAW by Jerry Meas in re 20 Memorandum re Petition, 17 Memorandum of Law, 1 Petition for Writ of Habeas Corpus (28:2254). (Mirsky, David) (Entered: 08/05/2016)
10/14/2016	27	Judge George A. OToole, Jr: ELECTRONIC ORDER entered. REFERRING CASE to Magistrate Judge Jennifer C. Boal Referred for: Events Only (e). Further information: Hearing and Report and Recommendations..(Lyness, Paul) (Entered: 10/14/2016)
05/18/2017	28	NOTICE of Appearance by Todd M. Blume on behalf of Maura Healey, Osvaldo Vidal (Blume, Todd) (Entered: 05/18/2017)
12/07/2017	29	Magistrate Judge Jennifer C. Boal: ORDER entered. REPORT AND RECOMMENDATIONS re: 1 Petition for Writ of Habeas Corpus (28:2254) filed by Jerry Meas. **Recommendation:** This Court recommends that the District Judge assigned to this case deny Petitioner Jerry Meas' Petition for Writ of Habeas Corpus. Objections to R&R due by 12/21/2017. (York, Steve) (Entered: 12/07/2017)
12/19/2017	30	Assented to MOTION for Extension of Time to January 26, 2018 to File Objection to US Magistrate Judge's Report and Recommendation by Jerry Meas. (Mirsky, David) (Entered: 12/19/2017)
12/21/2017	31	Objection to 29 REPORT AND RECOMMENDATIONS re 1 Petition for Writ of Habeas Corpus (28:2254) filed by Jerry Meas Recommendation: **Recommendation:** This Court recommends that the District Judge assigned to this case deny Petition by Jerry Meas . (Mirsky, David) (Entered: 12/21/2017)
12/28/2017	32	Judge George A. O'Toole, Jr: ELECTRONIC ORDER entered finding as moot 30 Motion for Extension of Time (Halley, Taylor) (Entered: 12/28/2017)
08/31/2018	34	Judge George A. O'Toole, Jr: ORDER entered adopting Report and Recommendations re 29 Report and Recommendations. (Halley, Taylor) (Entered: 08/31/2018)
08/31/2018	35	Judge George A. O'Toole, Jr: ORDER entered. ORDER DISMISSING CASE(Halley, Taylor) (Entered: 08/31/2018)
09/06/2018	36	NOTICE OF APPEAL as to 34 Order on Report and Recommendations, 35 Order Dismissing Case by Jerry Meas Fee Status: IFP granted. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District**

		Court Clerk to deliver official record to Court of Appeals by 9/26/2018. (Mirsky, David) (Entered: 09/06/2018)
09/06/2018	37	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 36 Notice of Appeal. (Paine, Matthew) (Entered: 09/06/2018)
09/07/2018	38	USCA Case Number 18-1856 for 36 Notice of Appeal filed by Jerry Meas. (Paine, Matthew) (Entered: 09/07/2018)
12/09/2019	40	USCA Judgment as to 36 Notice of Appeal filed by Jerry Meas (Paine, Matthew) (Entered: 12/10/2019)
12/30/2019	41	MANDATE of USCA as to 36 Notice of Appeal, filed by Jerry Meas. Appeal 36 Terminated. (Pacho, Arnold) (Entered: 12/31/2019)
01/21/2020	42	MANDATE of USCA as to 36 Notice of Appeal filed by Jerry Meas. (The Mandate isued on December 30, 2019 Was Issued in Error by the Court of Appeals for the First Circuit) (Paine, Matthew) (Entered: 01/22/2020)

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APPENDIX T

General Docket
United States Court of Appeals for the First Circuit

Court of Appeals Docket #: 18-1856 **Docketed:** 09/10/2018
Nature of Suit: 3530 General (Habeas Corpus) **Termed:** 12/09/2019
Meas v. Vidal, et al
Appeal From: District of Massachusetts, Boston
Fee Status: in forma pauperis

Case Type Information:
1) civil
2) private
3) habeas corpus

Originating Court Information:
District: 0101-1 : 1:15-cv-13234-GAO **Lead:** 1:15-cv-13234-GAO
Ordering Judge: George A. O'Toole, U.S. District Judge
Trial Judge: Jennifer C. Boal, Magistrate Judge
Date Filed: 08/27/2015

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
08/31/2018	08/31/2018	09/06/2018	09/06/2018

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

JERRY MEAS (State Prisoner: 1187185) Petitioner - Appellant	David H. Mirsky Direct: 603-580-2132 Fax: 603-580-2132 [COR LD NTC CJA Appointment] Mirsky & Petito PO Box 1063 Exeter, NH 03833-0000 Jerry Meas [Prisoner (not prose)] Ely State Prison PO Box 1989 4569 N State Rt Ely, NV 89301
v.	
OSVALDO VIDAL, Superintendent Respondent - Appellee	Todd Michael Blume Direct: 617-727-2200 Fax: 617-573-5358 [NTC Government - Other] MA Attorney General's Office 19th Fl 1 Ashburton Pl Boston, MA 02108-0000 Ryan Edmund Ferch Direct: 617-222-4449 [NTC Government - Other] MBTA Law Department 10 Park Plaza Suite 7760 Boston, MA 02116-0000
MAURA T. HEALEY Respondent - Appellee	Todd Michael Blume Direct: 617-727-2200 [NTC Government - Other] (see above) Ryan Edmund Ferch

Direct: 617-222-4449
[NTC Government - Other]
(see above)

JERRY MEAS

Petitioner - Appellant

v.

OSVALDO VIDAL, Superintendent; MAURA T. HEALEY

Respondents - Appellees

09/10/2018	☐ 18 pg, 346.94 KB	CIVIL CASE docketed. Notice of appeal (doc. #36) filed by Appellant Jerry Meas. Docketing Statement due 09/24/2018. Appearance form due 09/24/2018. [18-1856] (CMP) [Entered: 09/10/2018 02:26 PM]
09/13/2018	☐ 1 pg, 72.29 KB	ORDER directing petitioner to file a request for a certificate of appealabilty in this court by 10/15/2018. Date of denial by district court: August 31, 2018. [18-1856] (CMP) [Entered: 09/13/2018 09:20 AM]
09/13/2018	☐ 5 pg, 85.86 KB	MOTION for appointment of counsel filed by Appellant Jerry Meas. Certificate of service dated 09/13/2018. [18-1856] (DHM) [Entered: 09/13/2018 06:49 PM]
09/17/2018	☐ 1 pg, 63.29 KB	CERTIFICATE of service for motion [6198007-2] filed by Appellant Jerry Meas. Certificate of service dated 09/17/2018. [18-1856] (DHM) [Entered: 09/17/2018 03:19 PM]
09/21/2018	☐ 2 pg, 996.29 KB	NOTICE of appearance on behalf of Appellant Jerry Meas filed by Attorney David H. Mirsky. Certificate of service dated 09/21/2018. [18-1856] (DHM) [Entered: 09/21/2018 04:20 PM]
09/21/2018	☐ 4 pg, 1.59 MB	DOCKETING statement filed by Appellant Jerry Meas. Certificate of service dated 09/21/2018. [18-1856] (DHM) [Entered: 09/21/2018 04:22 PM]
10/01/2018	☐ 5 pg, 82.93 KB	ASSENTED TO MOTION to extend time to request a certificate of appealability filed by Appellant Jerry Meas. Certificate of service dated 10/01/2018. [18-1856] (DHM) [Entered: 10/01/2018 05:12 PM]
10/05/2018	☐ 1 pg, 9.29 KB	ORDER granting motion to extend time to request certificate of appealability filed by Appellant Jerry Meas. Memorandum supporting issuance of CAP due 12/14/2018. [18-1856] (GAK) [Entered: 10/05/2018 11:22 AM]
12/11/2018	☐ 30 pg, 328.57 KB	MOTION for certificate of appealability filed by Appellant Jerry Meas. Certificate of service dated 12/11/2018. [18-1856] (DHM) [Entered: 12/11/2018 03:23 PM]
12/12/2018	☐ 1 pg, 9.88 KB	ORDER advising petitioner the request for a certificate of appealability will be submitted to this court for a decision. Date of denial by district court: August 31, 2018. [18-1856] (GAK) [Entered: 12/12/2018 11:09 AM]
12/12/2018	☐	CASE submitted. Panel: Jeffrey R. Howard, Chief Appellate Judge; Sandra L. Lynch, Appellate Judge; Rogeriee Thompson, Appellate Judge. [18-1856] (KPC) [Entered: 12/27/2019 10:19 AM]
12/09/2019	☐ 2 pg, 11.79 KB	JUDGMENT entered by Jeffrey R. Howard, Chief Appellate Judge; Sandra L. Lynch, Appellate Judge and Rogeriee Thompson, Appellate Judge. Denied [18-1856] (CMP) [Entered: 12/09/2019 11:55 AM]
12/23/2019	☐ 21 pg, 9.95 MB	PETITION for rehearing and rehearing en banc filed by Appellant Jerry Meas. Certificate of service dated 12/23/2019. [18-1856] (DHM) [Entered: 12/23/2019 10:48 AM]
12/30/2019	☐ 1 pg, 9.2 KB	MANDATE issued. [18-1856]. CLERK'S NOTE: Docket entry was docketed in the wrong case. Please disregard. (DPO) [Entered: 12/30/2019 09:26 AM]
01/14/2020	☐ 1 pg, 9.89 KB	ORDER entered by Jeffrey R. Howard, Chief Appellate Judge; Juan R. Torruella, Appellate Judge; Sandra L. Lynch, Appellate Judge; Rogeriee Thompson, Appellate Judge; William J. Kayatta, Jr., Appellate Judge and David J. Barron, Appellate Judge, denying petition for panel rehearing/rehearing en banc filed by Appellant Jerry Meas. [18-1858] (CMP) [Entered: 01/14/2020 10:51 AM]
01/21/2020	☐ 1 pg, 9.26 KB	MANDATE issued. [18-1856] (CMP) [Entered: 01/21/2020 02:39 PM]

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