No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020-2021

JOSE TEJADA,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the right to a fair trial by an impartial jury under the Sixth and Fourteenth Amendments requires a trial judge, during jury selection and upon a criminal defendant's request, to ask each prospective juror whether the juror believed that Hispanic persons from cities such as Lawrence, Massachusetts (the city where the alleged offenses were located), are more likely to commit crimes of violence than any other ethnicity or people.

2. Whether the Equal Protection Clause of the Fourteenth Amendment requires a trial judge, during jury selection and upon a criminal defendant's request, to ask each prospective juror whether the juror believed that Hispanic persons from cities such as Lawrence, Massachusetts (the city where the alleged offenses were located), are more likely to commit crimes of violence than any other ethnicity or people.

3. Whether the Due Process Clause of the Fourteenth Amendment requires a trial judge, during jury selection and upon a criminal defendant's request, to ask each prospective juror whether the juror believed that Hispanic persons from cities such as Lawrence, Massachusetts (the city where the trial and alleged offenses were located), are more likely to commit crimes of violence than any other ethnicity or people.

4. Whether a suspect's rights against compelled self-incrimination under the Fifth and Fourteenth Amendments require the suppression of statements made in response to police interrogation where the suspect's arrest was imminent, where the police admitted that the suspect would not have been permitted to leave the scene of the interrogation and where the statements at issue pertained to material aspects of the jury's decision.

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Petitioner Jose Tejada respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

CITATIONS TO THE OPINIONS BELOW

The Supreme Judicial Court for the Commonwealth of Massachusetts ("SJC") affirmed petitioner Jose Tejada's convictions and sentence in the Massachusetts Superior Court in a criminal case, which judgment was entered on January 23, 2020. The opinion of the SJC affirming Mr. Tejada's convictions and sentence, at issue in this petition, is reported as Commonwealth v. Tejada, 484 Mass. 1, 2020 Mass. LEXIS 59 (2020) (Appendix A). The petitioner timely filed a *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27* (Appendix B) in the SJC on February 19, 2020.[1] See *Docket Entries*, Commonwealth v. Jose Tejada, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11951 (Appendix E) (hereinafter, "*SJC Docket Entries*"), *at 3*; *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27*, Commonwealth v. Jose Tejada, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11951 (filed February 19, 2020) (Appendix B); Mass. R. App. P. 27(a); compare Sup. Ct. R. 13(3). On March 16, 2020, the SJC denied the petitioner's *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27.* See *Notice of Denial of Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27,* Commonwealth vs. Jose Tejada, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11951 (March 16, 2020) (Appendix C); *SJC Docket Entries* (Appendix E), at 3. This petition follows.

STATEMENT OF JURISDICTION

The SJC affirmed petitioner Jose Tejada's convictions and sentence in the Massachusetts

[1] The SJC had allowed the petitioner's motion for enlargement of time to file the motion for reconsideration to February 28, 2020. *SJC Docket Entries* (Appendix E), at 2.

Superior Court in a criminal case, which judgment was entered on January 23, 2020. The opinion of the SJC affirming Mr. Tejada's convictions and sentence is reported as Commonwealth v. Tejada, 484 Mass. 1, 2020 Mass. LEXIS 59 (2020) (Appendix A). Upon receiving an enlargement of time to file his *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27* to February 28, 2020. *SJC Docket Entries* (Appendix E), at 2-3. Mr. Tejada timely filed a *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27* on February 21, 2020 (Appendix B). *See* Mass. R. App. P. 27(a) (petition for rehearing must be filed "within fourteen days after the date of decision of the appellate court"). Upon consideration by the Supreme Judicial Court, said motion for reconsideration of decision was denied on March 16. 2020. The SJC's order of March 16, 2020, denying Mr. Tejada's *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27*, supra, which is the SJC's *Notice of Denial of Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27*, supra, is contained in the Appendix to this Petition as Appendix C. *See SJC Docket Entries*, (Appendix E), at 2-3. Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(a). Based on the March 16, 2020, denial of the motion for reconsideration of the decision, under Rules 13(1) and 13(3) of the Rules of the Supreme Court of the United States, Mr. Tejada's petition for a writ of certiorari was originally due within 90 days after the denial of the motion for reconsideration, or by June 14, 2020. However, in its Order dated March 19, 2020, issued in light of ongoing concerns relating to COVID-19, the U.S. Supreme Court extended the deadline to file any petition for a writ of certiorari due on or after March 19, 2020, "to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." U.S. Supreme Court COVID-19 Order dated March 19, 2020 (Appendix P), at 1. Accordingly, Mr. Tejada's petition for a writ of certiorari is currently due on Thursday, August 13, 2020.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

CONSTITUTIONAL PROVISIONS

1. Amendment V of the Constitution of the United States

No person . . . shall be compelled in any criminal case to be a witness against himself[.]

2. Amendment VI of the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Amendment XIV of the Constitution of the United States

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

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

Art. XII. Prosecutions Regulated; Jury Trial.

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by

himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

STATUTES

5. 28 U.S.C. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. . . .

6. 28 U.S.C. §2254(d). (See Appendix Q).

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

§ 1. Murder.

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

8. Massachusetts General Laws, chapter 265, section 2.

§ 2. Murder – Penalty.

(a) Except as provided in subsection (b), any person who is found guilty of murder in the first degree shall be punished by imprisonment in the state prison for life and shall not be eligible for parole pursuant to section 133A of chapter 127. . . .

(c) Any person who is found guilty of murder in the second degree shall be punished by imprisonment in the state prison for life and shall be eligible for parole after the term of years fixed by the court pursuant to section 24 of chapter 279. . . .

9. Massachusetts General Laws, chapter 127, § 133A.

§ 133A. Eligibility for Parole; Permits; Violations.

Every prisoner who is serving a sentence for life in a correctional institution of the commonwealth, . . . , except prisoners serving a life sentence for murder in the first degree who had attained the age of 18 years at the time of the murder . . . shall be eligible for parole at the expiration of the minimum term fixed by the court under section 24 of chapter 279. . . .

10. Massachusetts General Laws, chapter 279, section 24.

If a convict is sentenced to the state prison, except as an habitual criminal, the court shall not fix the term of imprisonment, but shall fix a maximum and a minimum term for which he may be imprisoned. . . . In the case of a sentence to life imprisonment, except in the case of a sentence for murder in the first degree, and in the case of multiple life sentences arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction, the court shall fix a minimum term which shall be not less than 15 years nor more than 25 years.

11. Massachusetts General Laws, chapter 278, section 33E.

§ 33E. Capital Cases --- Appeals.

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

RULES

12. Rule 10, Rules of the Supreme Court of the United States ["Sup.Ct.R. 10"]

Rule 10. Considerations Governing Review on Certiorari

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

Court considers: . . . . **(b)** a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; **(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. . . .

13. Rules 13(1) and 13(3), Rules of the Supreme Court of the United States.

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

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely filed when it is filed with the Clerk of this Court within 90 days after entry of the judgment. . . .

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

14. Rule 27(a), Massachusetts Rules of Appellate Procedure (as amended, effective March 1, 2019) ("Mass. R. App. P. 27(a)").

RULE 27 MOTION FOR RECONSIDERATION OR MODIFICATION OF DECISION.

Time for Filing; Content; Answer; Action by Court if Granted. Within 14 days after the date of the decision of the appellate court, any party to an appeal may file a motion for

reconsideration or modification of decision unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present. Oral argument in support of the motion will not be permitted, except by order of the appellate court which decided the appeal. The motion shall be decided by the quorum or panel of the appellate court which decided the appeal. (effective March 1, 2019).

"**RULE 27. PETITION FOR REHEARING**

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. . . ."

(as amended, effective July 1, 1991, revised effective March 1, 2019 (as indicated above).

STATEMENT OF THE CASE[2]

On December 28, 2011, in Essex County Superior Court, indictments were returned charging petitioner Jose Tejada with first degree murder, G. L. c. 265, § 1, in the deaths of Milka Rivera, Sachary Montanez, and Max Ariel Montanez (indictments ESCR2011-1390-001, 002, 003) (R.A.1- 6) *Docket Entries*, Commonwealth v. Jose Tejada, Essex Superior Court No.

[2] Citation to *Defendant's Amended Record Appendix* refers to the Amended Record Appendix filed in the SJC as an attachment to *Defendant's Amended Brief. Defendant's Amended Record Appendix* is hereinafter cited as "(R.A.(page number))". The *Addendum* to *Defendant's Amended Brief*, containing copies of the margin order, the docket entry reflecting the margin order, and the motion judge's reconstructed findings and rulings, *Memorandum of Decision and Order on Defendant's Motion to Suppress Statements*, is cited as "(A.(page number))".

ESCR2011-1390 (1177CR01390) (hereinafter, *"Essex Superior Court Docket Entries"*) (Appendix D), at 1-4.[3]

On April 26, 2013, the petitioner filed his *Motion and Memorandum to Suppress Statements*, Commonwealth v. Jose Tejada, Essex Superior Court No. ESCR2011-1390 (1177CR01390) (April 26, 2013) (R.A.7-20) (Appendix F); see *Essex Superior Court Docket Entries* (Appendix D), at 4. (docket entry #19, dated 4/26/2013). On February 24, 2014, by the motion judge, the Honorable Mary K. Ames, J., Associate Justice of the Superior Court, the petitioner's motion to suppress statements was allowed as to statements made while defendant was seated, handcuffed in the police cruiser, but was otherwise denied, in a margin order reflected in written notation (A.1) and docket entry (A.2) (Appendix G); see *Essex Superior Court Docket Entries* (Appendix D), at 4.[4]

On August 11, 12, 14, 15, 20, 21, 22 and 25, 2014, the petitioner was tried before Whitehead, J., and a jury.[5] On August 25, 2014, the jury found the petitioner guilty on each indictment of first degree murder, by deliberate premeditation and by extreme atrocity or cruelty.

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[3] See *Verdict Slip*, Commonwealth v. Jose Tejada, Essex Superior Court Indictment No. ESCR2011-1390-001 (First Degree Murder, Milka Rivera) (Appendix L); *Verdict Slip*, Commonwealth v. Jose Tejada, Essex Superior Court Indictment No. ESCR2011-1390-002 (First Degree Murder, Sachary Montanez) (Appendix M); *Verdict Slip*, Commonwealth v. Jose Tejada, Essex Superior Court Indictment No. ESCR2011-1390-003 (First Degree Murder, Max Ariel Montanez) (Appendix N).

[4] The order on the motion to suppress statements referenced rulings and findings "as stated on the record" (Appendix G) which were not located by the Superior Court or by either party.

[5] On August 25, 2014, the petitioner filed his *Motion for Required Finding of Not Guilty at Close of Commonwealth's Case,* Commonwealth v. Jose Tejada, Essex Superior Court No. ESCR2011-1390 (1177CR01390) (August 25, 2014) (R.A.25-27) (Appendix J) and his *Motion for Required Finding of Not Guilty at Close of All the Evidence,* Commonwealth v. Jose Tejada, Essex Superior Court No. ESCR2011-1390 (1177CR01390) (August 25, 2014) (Appendix K), which were both denied on August 25, 2014. *Essex County Superior Court Docket Entries* (Appendix E), at 5. (The trial judge permitted the motions for required finding to be filed on the day of closing arguments. (Tr. Day 7/195, 198-199; Tr. Day 8/11-12))

See Verdict Slip (Milka Rivera), supra (Appendix L); Verdict Slip (Sachary Montanez), supra (Appendix M); Verdict Slip (Max Ariel Montanez), supra (Appendix N). On August 26, 2014, on the three convictions of first degree murder, the petitioner was sentenced to three consecutive sentences of life imprisonment without the possibility of parole. Hearing on Disposition (August 26, 2014), at 10-11; see *Essex Superior Court Docket Entries* (Appendix D), at 5 (docket entries 42-44, dated erroneously as 8/25/2014). On August 27, 2014, the petitioner filed his notice of appeal from his convictions and sentence. *Notice of Appeal*, Commonwealth v. Jose Tejada, Essex Superior Court No. ESCR2011-1390 (1177CR01390) (August 27, 2014) (R.A.34) (Appendix O), *Essex County Superior Court Docket Entries* (Appendix D), at 5 (docket entry #46). The case was entered in the SJC on September 25, 2015. *Supreme Judicial Court Docket Entries* (Appendix E), at 1. On October 9, 2018, the motion judge, Ames, J., filed reconstructed findings and rulings as to the petitioner's Motion to Suppress Statements. *Memorandum of Decision and Order on Defendant's Motion to Suppress Statements*, Commonwealth v. Tejada, Essex Superior Court Criminal Action No. ESCR2011-1390, by Ames, J. (October 9, 2018) (A.10-21) (Appendix H).[6]

Request for jury question on anti-Hispanic bias.

Prior to jury selection, on August 11, 2014, the petitioner filed a *Motion for Examination of Jurors* (R.A.21-24) (Appendix I), containing the request that prospective jurors be asked, "Do you believe that Hispanics, from cities such as Lawrence, are more likely to commit crimes of violence than any other ethnicity of people?" *Motion for Examination of Jurors* (Appendix I), at 3 (R.A.23), and the petitioner requested in court on the record that prospective jurors be asked,

[6] After the filing of reconstructed findings and rulings, the petitioner filed *Defendant's Amended Brief*. *See SJC Docket Entries* (Appendix E), at 2 (entry #30, dated 12/24/2018).

"[D]o you believe that Hispanics in a city such as Lawrence are more likely to commit crimes of violence than other ethnicity or[7] people[?]", and the trial judge refused. (Tr. Day 1/14,14-15) (R.A.23,21-24) . Mr. Tejada objected to this refusal. (Tr. Day 1/15,13-15)

> The trial judge asked prospective jurors,
>
> Are any of you aware of any bias, prejudice or preconceived notions of any kind that would affect your ability to be a fair and impartial juror in the case?

(Tr. Day 1/36) The trial judge also asked prospective jurors words to the effect of,

> [T]he defendant requires an interpreter. Does this affect your ability to be fair and impartial."[8]

Juror No. 70, Mr. Hindy, answered this question, "I don't think so. I don't know Spanish." Juror No. 70, Mr. Hindy, answered, "I believe so" to the question, "Could you be a fair and impartial juror?" Juror No. 70, Mr. Hindy, was seated in Seat No. 11. (Tr. Day 1/194-197) Juror No. 100, Mr. Brian (phonetic), answered the interpreter question,

> THE JUROR: I work for a lot of people -- a lot of Spanish people come in. The only problem I have is they don't speak English. That is my only problem.
> THE COURT: I don't know. I suspect Mr. Tejada doesn't speak English or he wouldn't have an interpreter. Would that make a difference to you?
> THE JUROR: No. it wouldn't. It's just –
> THE COURT: Okay. But in what respect? Would it play any role?
> THE JUROR: I -- half of my customers are Spanish. They try to talk to me in Spanish. I don't understand.

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[7] The transcript reads, "do you believe that Hispanics in a city such as Lawrence are more likely to commit crimes of violence than any other ethnicity or people?", Tr. Day 1/14, while in the petitioner's *Motion for Examination of Jurors* (R.A.21-24) (Appendix I), at 3, the requested question reads, "Do you believe that Hispanics, from cities such as Lawrence, are more likely to commit crimes of violence than any other ethnicity of people?" Id. (R.A.23)

[8] See Tr. Day 1/15, 41, 45, 54, 56, 65, 72, 75, 78, 82, 85, 88, 92, 99, 111, 116, 120, 123, 129, 134, 138, 141, 144, 153, 157, 166, 193, 207, 212, 229, 233-234, 235, 239; Tr. Day 2/30, 34, 37, 41, 50, 54, 60-61, 63, 68, 71.

(Tr. Day 2/28-31) The trial judge excused this juror for cause. (Tr. Day 2/28-32) Juror No. 10, Ms. Steadman, was excused after admitting she had "biases against Spanish-speaking people." (Tr. Day 1/63)

Motion to Suppress Statements[9]

On September 5, 2011, around 2:00 a.m., Lawrence Police Officer Ariskelda Ruffen[10] heard a report that someone had confessed to a murder and was called to Beacon and Diamond Street; at that location, 2 Hispanic males were present, and, in uniform, Lawrence Police Sergeant John Dushame, and Officers Alan Laird and David Augusta. (8/29/2013 Hrg./6-10,73; 9/11/2013 Hrg./98) Tejada said in Spanish, "they kept yelling at me, and they wouldn't shut up." (8/29/2013 Hrg./10-11) Tejada was just a little out of it. Ruffen, not a trained interpreter, acted as a translator. (8/29/2013 Hrg./12-15,42) She did not Mirandize[11] Tejada. She was standing next to Diogenes Luciano,[12] who had been interpreting. Tejada was sitting right in front of Ruffen, next to Laird, then Augusta, then Sergeant Dushame. Augusta was standing behind Laird, and next to Augusta was Dushame. There was a semi-circle in front of Tejada; if he wanted to get up and walk away, he would have had to go through at least four police officers, and he would have had to get past Ruffen. Ruffen testified both that, "He wasn't in custody." and that "If he wanted to get up and go, that would be the primary officer's decision." (8/29/2013 Hrg./12-15,50-58) Ruffen further testified:

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[9] The motion was allowed as to statements made while the defendant was seated, handcuffed in the police cruiser, and was otherwise denied. Memo and Order, at 3 (A.12; R.A.38);(Tr. Day 1/7)
[10] This witness ("Ruffen or Ruffen/Inoa") changed her last name from Ruffen to Inoa. Tr. Day 3/181-182.
[11] See Miranda v. Arizona, 384 U.S. 436 (1966).
[12] Incorrectly, "Luciano Diogenes" in 9/11/2013 Hrg. See, e.g., id. at 7,14.

Only Tejada was sitting; there were 4 or 5 people standing in front of him. As a responding officer, Ruffen had no authority over whether Tejada could leave. (8/29/2013 Hrg./12-15,54-60) At Dushame's request, Ruffen asked Tejada where he lived, he said 15 Maginnis. She asked Tejada to direct her there, whether he would go with her, he said yes. Laird had checked Tejada for weapons, patted him down and placed handcuffs on him. Laird put him in the back of Ruffen's cruiser. Ruffen traveled to 15 Maginnis. Tejada spoke about having shot his girlfriend. (8/29/2013 Hrg./18,22-26) When Ruffen took over the questioning, she did not Mirandize Tejada, had not heard him Mirandized, and had not asked whether he had been Mirandized. She gave him Miranda rights in Spanish at the station. (8/29/2013 Hrg./32,50-54)

Lawrence Police Officer Alan Laird testified:

On September 5, 2011, during the 1:00 a.m. to 9:00 a.m. shift, Laird received a call as to someone confessing to a man about a possible death; he went to Diamond Springs Apartments. Dushame and Augusta also arrived. Laird spoke to Luciano, who told Laird this man had approached him and said to call the police because he had killed someone. A Spanish-speaking male, Tejada, was sitting on a curb, Laird was speaking in English, and Luciano was purportedly translating it. (8/29/2013 Hrg./73-74; 9/11/2013 Hrg./4-8,11-12) When Laird asked the man who he killed, Luciano said, "It's his family." Laird asked where it was that he killed his family, and Luciano said 15 Maginnis. Laird asked how people were killed by him, and he made with his hand "a gesture of a gun, and he put it to his head." They asked Tejada questions about the location of the weapon, and "he said he threw it, he had thrown it." (9/11/2013 Hrg./10,12-13)

There was blood on Tejada's jeans and on his hands. They pat frisked him, to make sure he didn't have any weapons. He was then handcuffed and put in Ruffen's cruiser. Ruffen took him to 15 Maginnis. Once it was identified that this was the house, they started banging on the

door, and they eventually made entry. Laird, Dushame, and Officers Michaud and Augusta went in. Inside they saw a large amount of blood; 3 people were deceased. (9/11/2013 Hrg./16-23)

At Diamond Street, prior to asking Tejada questions, Laird did not Mirandize him. When Laird pat frisked him, he was in custody, he was not free to leave. He was still on the curb after Laird pat frisked him and put him back on the curb. Sergeant Dushame and Officer Augusta were there. Laird asked him how he killed his family, and he responded. Laird asked him who he killed, and he responded. Laird asked him where, Laird asked him how, he told Laird, with a gun. Laird asked him where the gun was and he told Laird he threw it away. Laird and Ruffen/Inoa asked the suspect where he threw the handgun, that was after he went in the house and saw the bodies on the floor; Laird continued to ask him questions after Laird left the house. (9/11/2013 Hrg./27-37,40-43,53-55)

Sergeant John Dushame testified:

In the evening of September 5, 2011, Dushame heard by radio that someone had confessed to killing someone, and went to 6 Diamond Street in South Lawrence. There he saw one man standing, Luciano, and one man on the curbing. Luciano said the man sitting, Tejada, approached him and told him he just killed some people. Luciano stated "he doesn't have the weapon anymore. He threw it away." (9/11/2013 Hrg./55-57,62-63) Dushame was in charge at the scene; he asked Tejada what happened and Tejada indicated he did not speak English; he spoke Spanish. Luciano said he would translate. Luciano said Tejada said something like, "I had enough, I would I killed them." (9/11/2013 Hrg./63-64) Tejada was disoriented and sweating, there appeared to be bloodstains on his shorts, droplets of blood. Dushame drove to 15 Maginnis Avenue, knocked and banged on the door and received no reply; with him were Laird, Augusta,

and Officer Michaud; the door was kicked in. Dushame located the firearm, a revolver, in the back of the house using his flashlight. (9/11/2013 Hrg./68-72,74)

As Dushame originally approached the Diamond Street scene, Tejada was sitting on the curb, to Dushame's left, and the interpreter, Luciano, was standing to Dushame's right. There was a semi-circle around Tejada, who was the only one sitting. Dushame was in full uniform, wearing a gun. Laird and Augusta were in full uniform. Luciano told Dushame some people were killed and the gun that was used to kill them was thrown away, and Dushame saw blood on Tejada's shorts. That fellow with blood on his pants was not free to go at that point;[13] he was going to be held there while Dushame continued his investigation. Then Dushame asked Tejada, "[W]here did this happen?" and Tejada answered him and Dushame went to that scene. Before Dushame asked that question, he did not Mirandize Tejada; nobody Mirandized Tejada. (9/11/2013 Hrg./83-87,89-90)

Dushame asked that Tejada be brought to 15 Maginnis Avenue, where Tejada did not get out of the car. Ruffen/Inoa asked him, "[I]s this the place?" It was confirmed as the address. Before Tejada was asked this he was not Mirandized. Tejada was not free to leave in the police car. (9/11/2013 Hrg./91-93) Clearly Tejada was not free to leave if somebody had just told Dushame he had killed somebody. If Tejada had tried to get up off the curb, Dushame would not have allowed him to get up. (9/11/2013 Hrg./91-93,97-98)

Lawrence Police Officer David Augusta testified:

On September 5, 2011, Augusta was a patrol officer, working the 1:00 a.m. to 9:00 a.m. shift. He heard a call and was sent to the parking lot of 6 Diamond Street as backup. When

[13] Dushame: "I wasn't going to let him go, no." (9/11/2013 Hrg./89)

Augusta got to the Diamond Street scene, Laird, Dushame, and two Hispanic men were there. In the driveway to that parking lot there was a man, Tejada, sitting on a concrete barrier, a Spanish gentleman, Laird and Dushame. Tejada said he had shot someone, they asked where, he gave an address, they asked how many, he said, "all of them; my wife and children"; they asked with what, he said with a gun. They asked him how many times, he said, "I emptied the gun. There was no more bullets in it." (9/11/2013 Hrg./98-103) When Tejada said that he had shot people at 15 Maginnis, Augusta asked him, "[W]here did you shoot them?" He mentioned "in the bedrooms". Knowing how the apartments were laid out, Augusta said, "upstairs in the bedroom, you know, the bedroom top back". "He said, upstairs in the third bedroom to the left." This was before Dushame had gone to 15 Maginnis. When Augusta arrived at the Diamond Street scene, Laird and Dushame were out of the car. They were standing at the concrete barrier. They were within five feet to the left of the person. Augusta was 3 to 5 feet away and had a gun. The interpreter was at the left. The officers were to the right. Augusta was to the rear. Tejada had blood on his pants. At 15 Maginnis, more questioning went on. Before that second question, Augusta did not hear the fellow on the curb being Mirandized by anybody and did not Mirandize him. Dushame left at some point, he went to 15 Maginnis. Augusta stayed at the scene with Laird. Ruffen/Inoa arrived to help translate. Augusta didn't know if Luciano was speaking truthful to him, because Augusta didn't speak Spanish. (9/11/2013 Hrg./101-115,124-127)

This fellow on the ground, Tejada, wasn't free to go anywhere because Augusta was investigating a crime, and they were certainly not going to let him leave without finding out for sure. Augusta had not Mirandized him at that point; nobody else had Mirandized him. Augusta knew he didn't speak English, and continued to ask him questions. Augusta asked him who he killed and he answered that question; then Augusta asked him where. The first question was who

he killed. The second question was where, he told Augusta, and Dushame went to the address he gave. He told Augusta he had done it with a gun. Tejada had not been pat frisked. Augusta asked him where the gun was. He said he threw it but did not recall where. There appeared to be "blood splatter" on his shorts. Augusta asked him what the spots were and he said probably blood. Then Augusta asked, from the shooting? And he responded, yes, and Augusta asked him where in the apartment did he shoot the victim, and he answered, "Upstairs." Augusta asked him, How many times did he shoot. At that point Augusta had asked him about 10 or 11 questions without the benefit of Miranda. Augusta did not Mirandize him. Dushame did not tell anyone to Mirandize him. Tejada was never Mirandized in Augusta's presence. (9/11/2013 Hrg./131-138)

In its decision on the petitioner's case, the SJC noted

> [T]he jury . . .were instructed to consider whether the defendant's intoxication and his mental state would have prevented him from forming the intent to kill. See Commonwealth v. Grey, 399 Mass. 469, 470-471 . . . (1987) (evidence of intoxication and mental impairment relevant to question whether the defendant formed intent to kill); Commonwealth v. Henson, 394 Mass. 584, 592 . . . (1985) (if there is evidence that defendant was under the influence of alcohol or drugs at time of crime, judge should instruct jury to consider that evidence on question whether Commonwealth has proved specific intent beyond reasonable doubt). While there was conflicting evidence as to the defendant's condition, the jury were free to weigh that evidence as they saw fit.

Commonwealth v. Tejada, supra, 484 Mass. at 6 (footnote omitted).

Trial.

Diogenes Luciano testified:

On September 5, 2011, while parking at 6 Diamond Street, a man walked towards him, yelling in Spanish that Luciano needed to take him to the police station because he had just killed 3 people. (Tr. Day 3/8-12) Luciano called the police; officers arrived in 5 to 10 minutes. Luciano asked the man if he had a weapon on him, he said no. The man was sitting on the ground; Luciano told him to sit. Luciano asked him what happened; he told Luciano "that he got tired of

it." He said he was tired "[o]f them talking down to him, like he was a nobody." (Tr. Day 3/14-17)[14] The man identified the 3 people as his wife and kids. When asked where this happened, he gave the address of the residence, 15 Maginnis Street. The officers asked the man questions using Luciano to translate: "If he had any weapons on him, what he did with the weapon." He said he threw it away. (Tr. Day 3/17-19) The man indicated what he had done by putting his index finger and middle finger up to his head, indicating a gun, and said he shot all 3 of them. He said he tried shooting himself but he ran out of bullets. (Tr. Day 3/26) The man was shaky and didn't talk to Luciano in a normal, conversational tone, he was shaky, the way he was speaking. He was yelling and blubbering, he wasn't calm, it looked like he was possessed, like he might have been on something. His eyes were the size of golf balls. Luciano was concerned because he didn't know if the man was on drugs or if he was drinking. He was talking really fast, almost like he was on drugs. (Tr. Day 3/27-30) While sitting the man was roaming around a little bit; he was looking around nervously; he was shaking still, on the ground. (Tr. Day 3/30-31)

Lawrence Police Det. David Augusta testified:

On September 5, 2011, he was dispatched to the area of 6 Diamond; Laird and Dushame were there, speaking with 2 men in the parking lot, one standing, one sitting. (Tr. Day 3/46-48) Augusta questioned the man sitting on the curb subsequent to Dushame; the man didn't speak English and was talking in Spanish, so Dushame used Luciano to translate. (Tr. Day 3/48-50)

The prosecutor questioned Augusta:

Q And does Mr. Luciano speak to Sergeant Dushame as you're arriving?
A Yes.

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[14] Tejada objected to Luciano's testimony as to police asking him to ask Tejada what had happened, to preserve the objections raised in Tejada's motion to suppress statements. The objections were overruled. (Tr. Day 3/17-18)

Q What does he say?
A He --

MR. MORRIS: Objection, Judge.

(Tr. Day 3/50) At sidebar, the trial judge stated:

> The problem again though is, to the extent that...Mr. Luciano is telling him what the defendant says, that's hearsay.

(Tr. Day 3/51) Defense counsel agreed, and added that the objection was also intended to preserve the defendant's rights as to his denied motion to suppress statements. (Tr. Day 3/52)

Sergeant Dushame testified:

Dushame worked on September 5, 2011, as patrol supervisor. Around 2:00 a.m., he responded to 6 Diamond Street. Luciano and Tejada were there. Laird arrived right behind Dushame. Dushame was unable to talk to the man on the ground (Tejada). Luciano volunteered to translate. Officer Dave Augusta was also there. There were no Spanish speaking officers. Following conversation, Dushame went to 15 Maginnis Avenue, in the Beacon Court projects. Dushame knocked on the front and back doors and got no response from that house. Other officers came 5 or 10 minutes later. (Tr. Day 3/110-117) Dushame determined that he would have to kick the door. Dushame, Laird and Augusta then proceeded into the house. (Tr. Day 3/118-121) As soon as Dushame got to the top of the stairs, he saw blood, and a female lying face first, in a thick puddle of blood, an older female, and on top of them was a young male, facing away, hunched over between the door and bed. (Tr. Day 3/125-127) Dushame located a revolver, a .357, admitted as Exhibit 23, in the backyard that night, in the grass just outside the back door, close to apartment 11. (Tr. Day 3/145-147,158-160) When Dushame arrived at 6 Diamond Street, at 2:00 a.m., there was a fellow standing and a fellow sitting. (Tr. Day 3/161-162) The person sitting (Tejada) appeared anxious, nervous. (Tr. Day 3/161-163) Dushame was

in full uniform: a badge, gun, tool belt, utility belt, handcuffs, pepper spray; it was pretty clear he was a police officer. Tejada didn't try to get up and run away; he stayed there and talked to Dushame. He didn't avoid any questions. Ruffen/Inoa brought Tejada to the station; they found suspected cocaine powder on Tejada. (Tr. Day 3/163-164,167-168)

Officer Ruffen/Inoa testified:

She was bilingual. On September 5, 2011, she was called at 2:00, 2:15 a.m., to assist; she translated between Officers Laird and Augusta, and Tejada, who was seated with them. When she arrived, Dushame was leaving. There were two males, one standing and one sitting. Ruffen/Inoa took over the translation. (Tr. Day 7/182-184) The officers asked Tejada to continue speaking; he was in conversation with a non-police officer (Luciano) when Ruffen/Inoa got there; Tejada started saying, "She-They were yelling at me."[15] With Ruffen/Inoa translating, Tejada said in Spanish, "They were yelling at me." Tejada said,

> They wouldn't shut up, so I pulled out a .357 and I shot them. Then I pointed the gun to my head, pulled the trigger, but there were no bullets left.

(Tr. Day 3/185-186) Tejada picked up his left arm and pointed it to the side of his head. Tejada stated: He left, went for a walk, and on his way out, he threw the gun. (Tr. Day 3/185-188) Possibly Tejada was drunk on alcohol. (Tr. Day 3/189-190)

Rosa Tejada testified:

In 2011, Rosa Tejada, daughter of Jose Tejada, was in contact with Jose Tejada. She knew Milka Rivera, Sachary and Max, and would spend time at Milka's house. On September 4 into September 5, Milka called Rosa, looking for Jose Tejada. Around 1:30, Jose called Rosa and

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[15] Tejada objected and noted that he was preserving the issue raised by way of a prior motion [the motion to suppress statements]. The trial judge overruled Tejada's objection. (Tr. Day 3/184-185)

said he was at home. She saw him for about 15 minutes that night; at about 8:30 he came to her house. Rosa had not seen her dad with a gun before the police interviewed her. A Spanish-speaking officer asked her whether she had seen her father with a gun; she did not tell him that she had seen him with a gun at Milka's house. When she saw Jose at 8:30 that night for 15 minutes, he looked normal. He called again at 1:30 a.m., was fine, sounded fine. He just wanted to say "bye". (Tr. Day 4/157-163)

Angel Heredia testified: He lived in Lawrence with Milka Rivera's sister, Lourdes Rivera. On September 4, 2011, at Heredia's house, Heredia was sleeping, Jose Tejada called, Lourdes Rivera answered, Jose said he was drinking; she told him to come to Heredia's house, which he did at 9:45 or 10:00. Milka had called, she wanted Heredia and Lourdes to take the keys away from Jose, which they did not do. About 10 minutes later, Milka came and took the keys. She was at the house for about maybe 10 minutes. She asked Tejada for the keys, she told him, "You don't have no papers. You don't have no license and I don't want you driving. You're already here. You're drinking. When you're done, call a cab and go home." (Tr. Day 4/164-170) Tejada called a cab; he left around 11:15. Tejada was not able to drive. According to his testimony, Heredia did not think Tejada was drunk and would have let him drive home. When Tejada arrived, he was drinking from a bottle of Hennessy. In about 1 hour and 10 minutes they finished the Hennessy; Heredia testified that he had maybe two shots, and that Tejada drank the rest. Tejada did not have a gun on him. (Tr. Day 4/170-176)

Trooper Glenn Cote of the firearms identification unit testified: that in September 2011, he and Richard Haselton of the ballistics unit examined a .357 magnum Smith & Wesson revolver, Item 2-1, recovered in the rear at 15 Maginnis Avenue; that 6 discharged cartridge casings were recovered from the cylinder of the weapon (Tr. Day 7/3-7,11-17,51); and that based

on comparison, they determined that all six discharged cartridge casings were fired by Item 2-1. (Tr. Day 7/26-27) Cote testified: that Item 5-1 was a copper jacket and lead core from Milka Rivera; that they determined Item 5-1 was fired by Item 2-1; that Item 5-3 was a copper jacket and lead core, and four lead fragments, from Max Ariel Montanez; and that they formed the opinion that Item 5-3 was fired by Item 2-1. (Tr. Day 7/50-55)

On September 6, 2011, Dr. Jennifer Hammers, formerly of the state Medical Examiner's Office, performed autopsies on Sachary Montanez and Max Ariel Montanez. (Tr. Day 4/61) Dr. Hammers could not tell exactly how Sachary Montanez and Max Ariel Montanez were shot and could not make an opinion with regard to that. (Tr. Day 4/142-143) Dr. Kimberly Springer testified: she was a medical examiner. (Tr. Day 5/6-7) She conducted an autopsy on Milka Rivera. (Tr. Day 5/10) Dr. Springer could not make any estimate of how far away the firearm was from the entrance wound at the time Milka Rivera was shot. (Tr. Day 5/24) Without knowing where the gun was positioned, Springer could not make a determination on how Milka Rivera was positioned at the time she was shot. (Tr. Day 5/38) Jana Thomas, a civilian with the State Police Crime Laboratory, testified as to her opinion in looking at the physical effects of the hole as well as the chemical nitrite test, as to Milka Rivera's robe, the shot was a contact shot. (Tr. Day 7/94-96,153-155) Jessica Hart of the Crime Lab DNA Unit testified that the DNA profile from a red-brown stain from the barrel, cylinder, trigger and hammer of Item 2-1 indicated a mixture, and that Milka Rivera's DNA profile matched the major female profile in the mixture. (Tr. Day 7/178-180)

During closing argument, the prosecutor stated: "When the police officers arrive, they don't know if this is some crazy person who has just acknowledged having killed people. So they call an ambulance to come. . . ." (Tr. Day 8/34)

Arguments Below Regarding the Questions Presented

Violation of 6th and 14th Amendment rights to a fair trial by an impartial jury, to 14th Amendment Due Process, and to 14th Amendment Equal Protection by refusal of defendant's request that prospective jurors be asked whether they believed that Hispanics in a city such as Lawrence were more likely to commit crimes of violence than other people.

In *Defendant's Amended Brief, at 40-46*, the petitioner argued the following.

In jury selection, Hispanic[16] ethnicity is equivalent to a protected racial status for the purposes of determining whether an Equal Protection violation, under Batson v. Kentucky, 476 U.S. 79 (1986), has occurred. Hernandez v. New York, 500 U.S. 355, 369, 371-372 (1991) (plurality opinion), 372-374 (O'Connor, J., concurring, joined by Scalia, J.), 375 (Blackmun, J., dissenting), 379 (Stevens, J., dissenting, joined by Marshall, J.). An affirmative answer to the petitioner's requested voir dire question of prospective jurors,

> [D]o you believe that Hispanics in a city such as Lawrence are more likely to commit crimes of violence than other ethnicity or people[?]

(Tr. Day 1/14, 14-15) (R.A.23), would have revealed jurors inclined by bias to view the defendant's conduct as constituting first degree murder not mitigated by any evidence of impaired mental processes. The 6th Amendment affords a criminal defendant the right to a trial by an impartial jury, Commonwealth v. Prunty, 462 Mass. 295, 304 (2012). "The presence of even one biased deliberating juror is sufficient to deprive a defendant of this right and require a new trial", Id., 462 Mass. at 304. Where the evidence indicates even the possibility that a juror may be biased, the juror must be excused. See Commonwealth v. Vann Long, 419 Mass. 798, 803-804 (1995); 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

[16] The term "Hispanic" and the term "Latino" have been used interchangeably. Hernandez v. New York, 500 U.S. 352, 355 (1991).

impartial.'").

> "[T]he central purpose of the *Fourteenth Amendment* was to eliminate racial discrimination emanating from official sources in the States." McLaughlin v. Florida, 379 U.S. 184, 192 . . . (1964). In the years before and after the ratification of the *Fourteenth Amendment*, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. . . .

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017); and that

> The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, [the United States Supreme Court] has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. . . . In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*."

Pena-Rodriguez, 137 S. Ct. at 867-868 (citing Ham v. South Carolina, 409 U.S. 524 (1973); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Turner v. Murray, 476 U.S. 28 (1986)), thus "[A] motion to have jurors asked about racial prejudice should usually be granted." Commonwealth v. Ramirez, 407 Mass. 553, 555 (1990). In Massachusetts,

> [F]ailure to honor such a request will be reversible error only when a 'substantial risk' of bias has been shown.

Commonwealth v. De La Cruz, 405 Mass. 269, 274 (1989) (quoting Commonwealth v. Hobbs, 385 Mass. 863, 873 (1982)).

There was evidence that bias against Hispanic people was present in this jury pool, citing portions of jury selection. The requested question should also have been asked because the alleged facts of this case are disturbing and likely to inflame passions and increase any bias that may have been present. Compare Commonwealth v. Flebotte, 417 Mass. 348, 353-354 (1994). A substantial risk of bias was evident, and the judge's refusal to ask the requested question was reversible error. See Pena-Rodriguez, 137 S. Ct. at 867.

In Defendant's Reply Brief, at 16-25, the petitioner argued the following.

> The United States Supreme Court has stated:
>
> > The duty to confront racial animus in the justice system is not the legislature's alone. . . . In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*."

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867-868 (2017) (citing Ham v. South Carolina, 409 U.S. 524 (1973); Rosales-Lopez v. United States, 451 U.S. 182 (1981); Turner v. Murray, 476 U.S. 28 (1986)). "The unmistakable principle underlying these precedents is that discrimination on the basis of race, 'odious in all aspects' is especially pernicious to the administration of justice." Pena-Rodriguez v. Colorado, supra, 137 S. Ct. at 868 (quoting Rose v. Mitchell, 443 U.S. 545, 555 (1979)).

> The jury is to be "a criminal defendant's fundamental protection of life and liberty against race or color prejudice."

Pena-Rodriguez v. Colorado, supra, 137 S. Ct. at 868 (quoting McClesky v. Kemp, 481 U.S. 279, 310 (1987) (quoting Strauder v. West Virginia, 100 U.S. 303, 309 (1880)). Accordingly,

> [p]ermitting racial prejudice in the jury system damages "both the fact and the perception" of the of the jury's role as "a vital check against the wrongful exercise of power by the State."

Pena-Rodriguez v. Colorado, 137 S. Ct. at 868 (quoting Powers v. Ohio, 499 U.S. 400, 411 (1991)). Thus, in Pena-Rodriguez, supra, the Supreme Court held that the 6th Amendment required that the so-called no-impeachment rule precluding impeachment of a jury verdict based on evidence of juror's statement as to the content of juror deliberations must give way in order to protect a criminal defendant against the possibility that his conviction resulted from a juror's reliance on racial stereotypes or animus. Id., 137 S. Ct. at 860-871.

> "We think that it would be far more injurious [than being detrimental to court administration] to permit it to be thought that persons entertaining a disqualifying

> prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute."

Rosales-Lopez v. United States, supra, 451 U.S. at 191 (quoting Aldridge v. United States, 283 U.S. 308, 314-315 (1931).

> In our judgment, it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued. Failure to honor his request, however, will be reversible error only where the circumstances of the case indicate that there is **a** reasonable possibility that racial or ethnic prejudice might have influenced the jury (footnote omitted).

Rosales-Lopez, supra, 451 U.S. at 191. "Of course, the judge need not defer to the defendant's request where there is no rational possibility of racial prejudice." Rosales-Lopez, supra, 451 U.S. at 191 n. 7. There was at least a "reasonable possibility that racial or ethnic prejudice might influence the jury", and the trial judge's refusal to ask the requested question was reversible error. Rosales-Lopez v. United States, supra, 451 U.S. at 191. See Pena-Rodriguez, 137 S. Ct. at 867-868.

In the petitioner's *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27* (Appendix B), at 7-10, the petitioner argued the following.

The SJC has itself recognized a strong basis for the petitioner's assertion of the need to examine prospective jurors for potential anti-Hispanic bias, having recognized that in recent years "[t]he growing Hispanic and Latino population . . . has encountered varied sources of discrimination." Commonwealth v. Colon, 482 Mass. 162, 179-180 (2019).[17] In this case, there

[17] "More than half of the country's population growth between 2000 and 2010 was attributable to an increase in the Hispanic population. In Massachusetts, an increase in the Hispanic population accounts for the entirety of the State's population growth in that same period. . . . The growing Hispanic and Latino population, in turn, has encountered varied sources of discrimination. See, e.g., Commonwealth v. Buckley, 478 Mass. 861, 878 . . . (2018) (Budd, J., concurring) (Hispanic

was demonstrated anti-Hispanic bias in this jury pool. Adding to the potential bias in this case were the alleged facts, involving an alleged triple homicide of a mother and her two children, which are disturbing and likely to inflame any underlying prejudice. There was a reasonable and rational possibility of anti-Hispanic bias in this jury pool, requiring reversal. Rosales-Lopez v. United States, supra, 451 U.S. at 191.

Violation of 5th and 14th Amendment rights against compelled self-incrimination by state rejection of Miranda's plain and plainly applicable definition of what constitutes custodial interrogation.

> In *Defendant's Amended Brief*, the petitioner argued the following.
>
> [I]n the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against self-incrimination",

Rhode Island v. Innis, 446 U.S. 291, 297 (1980) (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)), that those safeguards include

> the now familiar *Miranda* warnings -- namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires" -- or their equivalent[,]

Innis, 446 U.S. at 297 (quoting Miranda, 384 U.S. at 479. Statements allegedly made during un-Mirandized custodial interrogation should have been suppressed.

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

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drivers are stopped more often by police than Caucasian drivers); Bradley v. Lynn, 443 F. Supp. 2d 145, 148 (D. Mass. 2006) (finding disparate and adverse impace on Hispanic candidates for entry-level firefighter positions); Kane v. Winn, 319 F. Supp. 2d 162, 179 (D. Mass. 2004) (citing statistics that Latinos are overrepresented in country's prison population, and 'Latino youths are incarcerated at twice the rate of [Caucasian] American youths')." Colon, supra, 482 Mass. at 179-180 (footnotes omitted).

Commonwealth v. Jung, 420 Mass. 675, 688 (1995) (quoting Miranda, 436 U.S. at 444).

> "To find custodial interrogation, the court must . . . determine from the perspective of a reasonable person in the suspect's shoes whether there was (1) a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest and (2)express questioning or its functional equivalent," United States v. Ventura, 85 F.3d 708, 712 (1st Cir. 1996), which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Commonwealth v. Morse, 427 Mass. 117, 123 (1998) (quoting Ventura, 85 F.3d at 711 (quoting Innis, 446 U.S. at 301)). A suspect is in custody for purposes of receiving Miranda protection where "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest", California v. Beheler, 463 U.S. 1121, 1125 (1983)(per curiam) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977). "[T]he safeguards prescribed by Miranda become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (quoting California v. Beheler, supra, 463 U.S. at 1125). Where, as here, the officers' conduct and questioning (and the circumstances) manifested to Tejada that they perceived him as culpable and not free to leave, their manifested perceptions indicate custody. Compare Stansbury v. California, 511 U.S. 318, 325 (1994).

In New York v. Quarles, 467 U.S. 649 (1984), the Supreme Court noted that

> Although it involves police questions in part relating to the whereabouts of a gun, Orozco v. Texas, 394 U.S. 324 (1969), is in no sense inconsistent without our disposition of this case. . . .

Quarles, 467 U.S. at 659-660 n. 8. In petitioner's case, as in Orozco, there was "no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime[.]" Quarles, 467 U.S. at 659-660 n.8 (applying Orozco, supra.)

Tejada's alleged statements and the .357 gun (Exhibit 23 or Item 2-1) were used to show

consciousness of guilt of first degree murder and to support the prosecution's argument that the decedents were killed in a methodical manner indicative of first degree murder. This evidence was materially significant and its admission was not harmless error. See Commonwealth v. Ghee, 414 Mass. 313, 318-319 (1993) (harmless error analysis applies to Miranda violations).

In *Defendant's Reply Brief*, at 11-16, the petitioner argued the following.

When the U.S. Supreme Court has assigned a burden of proof as to the establishment of a Miranda violation, such a burden has been placed on the government. Compare Thompson v. Keohane, 516 U.S. 99, 101-116 (1995)(determination of whether individual was "in custody" for Miranda purposes warrants independent review by a federal habeas court, overriding 28 U.S.C. § 2254(d) presumption of correctness normally accorded to state court determinations in habeas proceedings.); Tague v. Louisiana, 444 U.S. 469, 470 (1980)(during in-custody interrogation, once Miranda warnings have been given, "'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (quoting Miranda v. Arizona, 384 U.S. at 475)).

Unlike the situation in Quarles, the police questioning which is challenged here was not focused on trying to establish the precise location of a gun in order to prevent a specific ongoing danger involving a gun, but rather, the police asked Mr. Tejada a series of questions focused on establishing "incriminating facts. without first warning [the suspect] of his right to remain silent" as in the case of Orozco v. Texas, 394 U.S. 324, 326, 324-327 (1969), which the Supreme Court held to be "a flat violation of the *Self-Incrimination Clause of the Fifth Amendment* as construed in Miranda." Orozco v. Texas, supra, 394 U.S. at 324-326.

In the petitioner's *Motion for Reconsideration of Decision Pursuant to Mass.R.A.P.27*, at

1-7, the petitioner argued the following.

The SJC's failure to apply Miranda's definition of custodial interrogation to include circumstances in which the individual has been deprived of his freedom of action in a significant way, has led to further error, in the unreasonable factual determination that Tejada's interrogation by police was "not coercive". Compare Tejada, supra, 484 Mass. at 7-10 (citing Commonwealth v. Cawthron, 479 Mass. 612, 624 (2018)). The interrogation of Tejada by police here occurred in circumstances that are inherently coercive. See New York v. Quarles, supra, 467 U.S. at 654 (construing Miranda). The petitioner was in custody for Miranda purposes as soon as the police arrived to find him sitting on the ground in response to his report of killing.[18] The police presumed Mr. Tejada to be a "crazy" person who had announced he had killed three people, he never had any opportunity to exit the police presence or to require the police to leave his presence. (Tr. Day 8/34) Through his communication with Luciano, Mr. Tejada surrendered himself to police custody, and the police took custody of him, not intending or allowing him to leave, ending in his being handcuffed and placed in the cruiser. It was a single continuous act of custody. From the moment of police arrival, Tejada was "deprived of his freedom of action in [a] significant way." Miranda, supra, 384 U.S. at 444.

REASONS FOR GRANTING REVIEW

I. Massachusetts has rejected a jury voir dire question tailored to reveal, conclusively, anti-Hispanic bias. This case is therefore viable for the granting of a petition for writ of certiorari under U.S. Supreme Court Rule 10(c), as deciding an important question of federal law in a way that conflicts with relevant decisions of this Court and/or as deciding an important question of federal law that has not been, but should be, settled by this Court;

[18] The SJC's finding that "there is no indication that he was considered a suspect during the initial conversation in the parking lot", Commonwealth v. Tejada, supra, 484 Mass. at 9, is an unreasonable and erroneous determination of fact, as the police were only present at the scene of the parking lot to respond to Tejada's report that he had killed people, thus making him an instant "suspect".

this case is also viable under U.S. Supreme Court Rule 10(b), as deciding an important question of federal law in a way that conflicts with the decisions of other state courts of last resort.

> At trial Mr. Tejada requested, by motion, and in open court prior to jury selection,
>
> that the judge ask each member of the venire whether the juror believed that "Hispanics, from cities such as Lawrence, are more likely to commit crimes of violence than any other ethnicity [or] people."[19]

Commonwealth v. Tejada, 484 Mass. 1, 12 (2020).[20] This request was denied.

> The trial judge asked prospective jurors,
>
> Are any of you aware of any bias, prejudice or preconceived notions of any kind that would affect your ability to be a fair and impartial juror in the case?

(Tr. Day 1/36) The trial judge also asked prospective jurors words to the effect of,

> [T]he defendant requires an interpreter. Does this affect your ability to be fair and impartial."[21]

Juror No. 70, Mr. Hindy, answered this question, "I don't think so. I don't know Spanish." Juror No. 70, Mr. Hindy, answered, "I believe so" to the question, "Could you be a fair and impartial juror?" Juror No. 70, Mr. Hindy, was seated in Seat No. 11. (Tr. Day 1/194-197) Juror No. 100, Mr. Brian (phonetic), answered the interpreter question,

> THE JUROR: I work for a lot of people -- a lot of Spanish people come in. The only problem I have is they don't speak English. That is my only problem.

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[19] The trial judge referenced the defendant's request as, "No. 13 is do you believe that Hispanics in a city such as Lawrence are more likely to commit crimes of violence than other ethnicity or people[?], Tr. Day 1/14 (referencing defendant's Motion for Examination of Jurors, at ¶ 13, which states, "Do you believe that Hispanics, from cities such as Lawrence, are more likely to commit crimes of violence than any other ethnicity or people?"). (R.A.23)

[20] An answer of "yes" to this question would have required the excusal for cause of the prospective juror at issue, and thus would have ensured that the defendant would not have been tried by a jury composed of one or more individuals who harbored an anti-Hispanic bias against him.

[21] See Tr. Day 1/15, 41, 45, 54, 56, 65, 72, 75, 78, 82, 85, 88, 92, 99, 111, 116, 120, 123, 129, 134, 138, 141, 144, 153, 157, 166, 193, 207, 212, 229, 233-234, 235, 239; Tr. Day 2/30, 34, 37, 41, 50, 54, 60-61, 63, 68, 71.

THE COURT: I don't know. I suspect Mr. Tejada doesn't speak English or he wouldn't have an interpreter. Would that make a difference to you?

THE JUROR: No. it wouldn't. It's just –

THE COURT: Okay. But in what respect? Would it play any role?

THE JUROR: I -- half of my customers are Spanish. They try to talk to me in Spanish. I don't understand.

(Tr. Day 2/28-31) The trial judge excused this juror for cause. (Tr. Day 2/28-32) Juror No. 10, Ms. Steadman, was excused after admitting she had "biases against Spanish-speaking people." (Tr. Day 1/63)

The SJC held that the trial judge was not obligated "to probe ethnic or racial bias by voir dire as a matter of law" because "both the defendant and the victims are Hispanic." Commonwealth v. Tejada, 484 Mass. 1, 12 (2020) (citing and quoting Commonwealth v. Espinal, 482 Mass. 190, 190 (2019)). The SJC further held that "the fact that multiple jurors were excused based on the judge's questions" was not "proof that the jury pool was tainted with anti-Hispanic bias." Tejada, supra, 484 Mass. at 12-13. The SJC based its decision to uphold the rejection of a question tailored specifically to reveal anti-Hispanic bias of a depth that would cause a juror to presume the defendant's guilt of the alleged offenses, based on the petitioner's purported failure to demonstrate either that his requested question would have proved more effective than other, significantly less direct questioning, or that jurors who did not disclose any bias [without being asked directly to disclose such bias] were being untruthful." Compare Tejada, supra, 484 Mass. at 13.

The rejection of Mr. Tejada's requested voir dire question, and the Massachusetts Supreme Judicial Court's upholding of this rejection, violated the defendant's Sixth and Fourteenth amendment right to a fair trial by an impartial jury by permitting his conviction by a jury which may have been composed of one or more persons harboring an anti-Hispanic bias

against him,[22] and where such bias would reveal a presumption of guilt, where the asking of the rejected voir dire question would have precluded such a result. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867-869 (2017) (reversing convictions of harassment and unlawful sexual contact, pursuant to the Sixth Amendment right to a fair trial by an impartial jury and Fourteenth Amendment Due Process, based on evidence of juror's anti-Hispanic bias); Ham v. South Carolina, 409 U.S. 524 (1973) (the Fourteenth Amendment's Due Process Clause requires a trial judge to permit a minority criminal defendant who makes a timely request to have prospective jurors interrogated during the voir dire with respect to racial bias). Accord Hernandez v. State of Maryland, 357 Md. 204, 231-232 (1999) ("Hispanic or Latino persons should be considered to be a cognizable group for purposes of inquiring on *voir dire*, upon request, whether any veniremember is prejudiced against that particular cognizable group. . . . [and] . . . [w]here a voir dire question has been properly requested and directed to bias against the accused's race, ethnicity, or cultural heritage, the trial court ordinarily will be required to propound such a question, regardless of the existence of special circumstances."); Pinder v. State, 27 Fla. 370 (1891) (murder conviction reversed and a new trial ordered, in a case where both defendant and alleged victim were African American, based on trial judge's refusal to ask prospective jurors whether they could give African American defendant a fair and impartial trial).

The SJC's holding that the trial judge was not obligated "to probe ethnic or racial bias by voir dire as a matter of law" because "both the defendant and the victims are Hispanic", Commonwealth v. Tejada, supra, 484 Mass. is in conflict with both important U.S. Supreme

[22] Hispanic (or "Latino") ethnicity is equivalent to a protected racial status for the purposes of determining whether an Equal Protection violation, under Batson v. Kentucky, 476 U.S. 79 (1986), has occurred. Hernandez v. New York, supra, 500 U.S. 355.

Court precedent and with decisions of certain highest state appellate courts.

> "[T]he central purpose of the *Fourteenth Amendment* was to eliminate racial discrimination emanating from official sources in the States." McLaughlin v. Florida, 379 U.S. 184, 192 . . . (1964). In the years before and after the ratification of the *Fourteenth Amendment*, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial. . . .

Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017).

> The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, [the United States Supreme Court] has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. . . . In an effort to ensure that individuals who sit on juries are free of racial bias, the Court has held that the Constitution at times demands that defendants be permitted to ask questions about racial bias during *voir dire*."

Pena-Rodriguez, 137 S. Ct. at 867-868 (citing Ham v. South Carolina, 409 U.S. 524 (1973); Rosales-Lopez v. United States, 451 U.S. 182 (1981) (plurality opinion); and Turner v. Murray, 476 U.S. 28 (1986)).[23]

The U.S. Supreme Court found implicitly in Ham v. South Carolina, supra, 409 U.S. 524, that the right to question a prospective juror as to racial or ethnic bias against a defendant's racial or ethnic group is reversible error even where there is no circumstance of a defendant and an alleged victim being of different races. See id. (drug conviction reversed based on trial judge's

[23] One might argue that a grant of certiorari is appropriate in this case because the jury voir dire question issue is one that has not been, but should be, settled by the Supreme Court. Compare Sup.Ct. Rule 10(c), because Pena-Rodriguez did not explicitly overrule cases (Rosales-Lopez and Turner v. Murray) which would not in themselves have required a reversal in this case. Compare Pena-Rodriguez, supra, at 868. However, that argument would, incorrectly, ignore the full force of the Pena-Rodriguez proscription against anti-Hispanic bias in the jury setting. See Pena-Rodriguez, supra, 137 S. Ct. at 860-871 (holding that 6th Amendment required that the so-called no-impeachment rule precluding impeachment of a jury verdict based on evidence of juror's statement as to the content of juror deliberations must give way in order to protect a criminal defendant against the possibility that his conviction resulted from a juror's reliance on racial stereotypes or animus).

refusal to ask prospective jurors two questions directed specifically at revealing prejudice against the defendant based on his race).[24]

The proscription against trial by a jury where one or more jurors are infected with racial or ethnic bias is longstanding principle in our legal system. See Burr's Case, [1 Burr's Trial 416 (U.S. 1807)] (opinion by Chief Justice John Marshall) ("light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that **those strong and deep impressions which close the mind**[25] against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.").

There was evidence that bias against Hispanic people was present in this jury pool. Juror No. 10, Ms. Steadman, was excused after acknowledging she had "biases against Spanish-speaking people." (Tr. Day 1/63) Regarding the trial judge's question as to whether the fact that the defendant required an interpreter would affect the ability to be fair and impartial, there were responses containing less than unequivocal expressions of non-bias. Juror No. 19, Mr. Gleeson, answered this question, "No. I don't think so." (Tr. Day 1/77-78) Juror No. 48, Ms. Zujewski, answered this question, "No. I don't think so." (Tr. Day 1/150-154) Juror No. 61, Mr. Muise, answered this question, "I don't believe so" and answered "I think so, yes" to the question,

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[24] The requested questions pertaining to potential prejudice against the petitioner's race were:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?; [and]
2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

Ham v. South Carolina, supra, 409 U.S. at 525-526 n. 2.

[25] Anti-Hispanic bias that would cause a juror to answer "yes" to the requested voir dire question qualifies as one of those "strong and deep impressions that close the mind".

"Could you be a fair and impartial juror?" (Tr. Day 1/177-180) Juror No. 70, Mr. Hindy, answered this question, "I don't think so. I don't know Spanish." (Tr. Day 1/194-196) Juror No. 70, Mr. Hindy, answered, "I believe so" to the question, "Could you be a fair and impartial juror?" (Tr. Day 1/196) Juror No. 92, Mr. Louis, answered this question, "I'm not sure." (Tr. Day 1/233-234) This juror, Juror No. 92, Mr. Louis, was excused as to that issue. (Tr. Day 1/234) Juror No. 100, Mr. Brian, answered this question,

> I work for a lot of people -- a lot of Spanish people come in. The only problem I have is they don't speak English. That is my only problem."

(Tr. Day 2/28-30) The trial judge responded, "I don't know. I suspect Mr. Tejada doesn't speak English or he wouldn't have an interpreter. Would that make a difference to you?" to which the juror responded, "No. it wouldn't. It's just --" to which the trial judge responded, "Okay. But in what respect? Would it play any role?" and the juror responded, "I -- half of my customers are Spanish. They try to talk to me in Spanish. I don't understand." (Tr. Day 2/28-31) Juror No. 100, Mr. Brian, asserted that the fact that the defendant required an interpreter would not cause him to have any bias in this case; the trial judge excused Juror No. 100, Mr. Brian, for cause. (Tr. Day 2/28-32)

The jury voir dire question issue also qualifies for U.S. Supreme Court review on certiorari under Rule 10(b), of the Rules of the Supreme Court of the United States, as other state jurisdictions have found either explicitly and implicitly, that the fact that both a defendant and the alleged victims in a criminal case were of the same race or ethnicity, is not determinative of whether it is reversible error for a trial judge to refuse to ask a prospective juror a voir dire question that would reveal directly the juror's racial or ethnic bias. See Hernandez v. State of Maryland, 357 Md. 204, 231-232 (1999) ("Hispanic or Latino persons should be considered to

be a cognizable group for purposes of inquiring on *voir dire*, upon request, whether any veniremember is prejudiced against that particular cognizable group. . . . [and] . . . [w]here a voir dire question has been properly requested and directed to bias against the accused's race, ethnicity, or cultural heritage, the trial court ordinarily will be required to propound such a question, regardless of the existence of special circumstances."); Compare Hill v. State, 112 Miss. 260 (1916) (where both defendant and alleged murder victim were African American, murder conviction reversed because trial judge refused to allow prospective juror to answer defense counsel's question on voir dire, "whether he had any prejudice against the negro as a negro that would induce him to return a verdict [of guilty] on less or slighter evidence than he would return a verdict of guilty against a white man under the same circumstances[.]", because "[t]he right to a fair and unprejudiced jury is at the very foundation of the right of trial by jury. If there are any doubts as to the qualification of a venireman, they should be solved against the one challenged. A party submitting his case to the arbitrament of a jury, is entitled to a jury, every member of which is a qualified juror-- above all doubt or question" (quoting Theobald v. Transit Co., 191 Mo. 395 (1905) (quoting approvingly the rule announced by U.S. Supreme Court Chief Justice Marshall in Burr's Case, [1 Burr's Trial, 416 (1807)] ("light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that **those strong and deep impressions which close the mind** against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." (emphasis added)); Pinder v. State, 27 Fla. 370 (1891) (murder conviction reversed because trial judge refused to allow prospective jurors to be asked a question tailored to reveal bias against African Americans "Could you give the defendant, who is a negro,

as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence"), where defendant and persons involved were African American); State v. McAfee, 64 N.C. 339 (1870) (rape conviction reversed because trial judge refused to ask a prospective juror whether he could do equal and impartial justice between the state and "a colored man"; Supreme Court of North Carolina agreed with defendant that it was a proper question to be put to a juror in order to test his qualifications and noted that such a question was permitted as defendant could have challenged the juror for cause had the question been answered negatively).

II. Massachusetts has violated Mr. Tejada's rights against compelled self-incrimination under the Fifth and Fourteenth Amendments in a manner that is viable for review on certiorari pursuant to Sup.Ct. Rule 10(b) because the highest state court decision is contrary to relevant decisions of the U.S. Supreme Court.

When the U.S. Supreme Court has assigned a burden of proof as to the establishment of a Miranda violation, such a burden has been placed on the government. Compare Thompson v. Keohane, 516 U.S. 99, 101-116 (1995)(determination of whether individual was "in custody" for Miranda purposes warrants independent review by a federal habeas court, overriding 28 U.S.C. § 2254(d) presumption of correctness normally accorded to state court determinations in habeas proceedings.); Tague v. Louisiana, 444 U.S. 469, 470 (1980) (during in-custody interrogation, once Miranda warnings have been given, "'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (quoting Miranda v. Arizona, 384 U.S. at 475)).

Mr. Tejada was in custody under Miranda and its progeny. Mr. Tejada knew he was neither free to leave nor free to direct the police to leave his presence. The police had no

intention of allowing him to leave. The factual circumstances show that he had no possible way to leave the scene without police approval. All in all, because he made significant statements to police affecting the verdicts of first degree murder without having first been provided his Miranda warnings, Mr. Tejada's statements at issue made in response to that questioning should have been suppressed. See Miranda v. Arizona, 384 U.S. at 444 ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody **or otherwise deprived of his freedom of action in any significant way** (emphasis added)."); compare Orozco v. Texas, 394 U.S. 324, 325 (1969)("At about 4 a.m. four police officers arrived at petitioner's boardinghouse, were admitted by an unidentified woman, and were told that petitioner was asleep in the bedroom. All four officers entered the bedroom and began to question petitioner. From the moment he gave his name, according to the testimony of one of the officers, petitioner was not free to go where he pleased but was "under arrest."). The formal arrest that occurred here encompasses the entire event, demonstrating custody from the outset. To contradict the custodial nature of the police involvement with the petitioner here would have required a signal to the petitioner by the police that he actually was not in police custody, a signal the police had not intention or purpose to provide to the petitioner in this case. See Maine v. Thibodeau, 475 U.S. 1144 (1986)(individual not in custody where police dropped the individual off at home at the end of the encounter); California v. Beheler, 463 U.S. 1121, 1122, 1121-1126 (1983)(individual not in custody where police specifically told individual that he was not under arrest); Beckwith v. United States, 425 U.S. 341 (1976)(individual not in custody where he met

IRS agents at his house and left to get items from work which he voluntarily provided to the agents); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (individual not in custody where he "came voluntarily to the police station, where he was immediately informed that he was not under arrest" and "[a]t the close of a ½ hour interview" the individual "did in fact leave the police station without hindrance.").

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,
JOSE TEJADA,

By his Attorney,

Date: August 12, 2020

/s/David H. Mirsky, Esquire
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020-2021

JOSE TEJADA,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

CERTIFICATE OF SERVICE

I, David H. Mirsky, hereby certify that on this 12th day of August, 2020, I served the Petition For Writ of Certiorari and Motion to Proceed In Forma Pauperis on all parties to be served. In accordance with Rule 29(3) of the Supreme Court Rules, said service has been made by first class mail, postage prepaid, to Thomas E. Bocian, Deputy Chief, Appeals Division, Office of Attorney General Maura Healey, Commonwealth of Massachusetts, One Ashburton Place, 19th Floor, Boston, MA 02108. I also certify that I mailed a copy to the petitioner Jose Tejada.

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AFFIDAVIT OF TIMELY FILING BY MAIL

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

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

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

3. The petition for certiorari enclosed herewith is being mailed today, August 12, 2020, by United States mail, first class, postage prepaid, in a package delivered to the United States Post Office in Exeter, New Hampshire 03833 and addressed to:

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

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

Made this 12th day of August, 2020, at Exeter, NH under the penalties of perjury.

David H. Mirsky