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

# APPENDIX

David H. Mirsky, Esquire
(MA B.B.O. # 559367)
Counsel of Record for Petitioner
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel.: 603-580-2132
dmirsky@comcast.net

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# APPENDIX A

# *Commonwealth v. Tejada*

Supreme Judicial Court of Massachusetts

October 7, 2019, Argued; January 23, 2020, Decided

SJC-11951.

**Reporter**
484 Mass. 1 *; 143 N.E.3d 397 **; 2020 Mass. LEXIS 59 ***; 2020 WL 373030

COMMONWEALTH *vs.* JOSE TEJADA.

**Prior History: [***1]** Essex. INDICTMENTS found and returned in the Superior Court Department on December 28, 2011.

A pretrial motion to suppress evidence was heard by *Mary K. Ames*, J., and the cases were tried before *Howard J. Whitehead*, J.

**Disposition:** Judgments affirmed.

## Core Terms

kill, interrogation, bias, neighbor, juror, deliberate, custodial, premeditation, suppress, intoxication, shooting, shot, involuntary, murder, weigh, cruiser, arrest, ethnic, seated

## Case Summary

**Overview**
HOLDINGS: [1]-The evidence was sufficient to establish that defendant intended to kill the victims, his wife and her two teenage children, because the jury could have found that he acted with deliberate premeditation when shooting them in response to them "talking down to him" and in response to his earlier dispute with his wife; notwithstanding the evidence of defendant's intoxication, the jury could have concluded that his use of a firearm at close range established an intent to kill; [2]-Statements made by defendant prior to being placed in the police cruiser did not require Miranda warnings because the initial interrogation in the parking lot was not custodial; [3]-There was no abuse of discretion in the trial judge's decision not to pose to the venire during juror voir dire defendant's requested question on anti-Hispanic bias because both defendant and the victims were Hispanic.

**Outcome**
Judgment affirmed.

## LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

*HN1*[] **Substantial Evidence, Sufficiency of Evidence**

Where a trial judge denies a defendant's motion for a

required finding, an appellate court views the evidence in the light most favorable to the Commonwealth and determines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. As long as there is sufficient evidence of one theory, the convictions willremain undisturbed on appeal.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Elements

*HN2*[] **Definitions, Deliberation & Premeditation**

To sustain a conviction for murder in the first degree on a theory of deliberate premeditation, the Commonwealth is required to prove that the defendant (1) caused the death of the victims; (2) intended to kill the victims; and (3) acted with deliberate premeditation.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

*HN3*[] **Mens Rea, Specific Intent**

To establish the intent to kill, the Commonwealth must prove that a defendant consciously and purposefully intended to kill the victims.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

*HN4*[] **Mens Rea, Specific Intent**

The use of a firearm at close range provides strong evidence of an intent to kill.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

*HN5*[] **Definitions, Deliberation & Premeditation**

To establish that a defendant acted with deliberate premeditation, the Commonwealth must show that the plan to kill was formed after deliberation and reflection. Such reflection can occur over days, hours, or even seconds.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

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

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

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

*HN6*[] **De Novo Review, Conclusions of Law**

When reviewing the denial of a motion to suppress, an appellate court accepts the motion judge's findings of fact absent clear error, but independently reviews the judge's ultimate findings and conclusions of law. If the appellate court determines that the statements should have been suppressed, the court then must decide whether their introduction at trial was harmless beyond a reasonable doubt.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > Notice & Warning

*HN7*[] **Self-Incrimination Privilege, Custodial Interrogation**

Miranda warnings are required when a reasonable person in the defendant's position would have believed he was in custody. A court considers four factors when determining whether an interrogation was custodial in nature: (1) the place of the interrogation; (2) whether the officers conveyed to the person being questioned any belief or opinion that the person was a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being

interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest. No single factor is dispositive.

Criminal Law & Procedure > ... > Miranda Rights > Self-Incrimination Privilege > Custodial Interrogation

*HN8*[] **Self-Incrimination Privilege, Custodial Interrogation**

Custodial interrogations are questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Whether an interrogation is custodial depends on whether the objective circumstances of the interrogation engender unduly compulsive pressures.

Criminal Law & Procedure > Trials > Jury Instructions > Requests to Charge

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

Criminal Law & Procedure > Appeals > Reversible Error

*HN9*[] **Jury Instructions, Requests to Charge**

Where a question is raised as to the voluntariness of a defendant's statement, a judge must conduct a voir dire hearing on the issue outside the presence of the jury, and must make a determination whether the statement was voluntary before it may be considered by a jury. A defendant also may request that the jury be instructed to consider the issue. When such an instruction is given, each juror must assess the voluntariness of a defendant's statements, and should not consider the statement as evidence unless satisfied beyond a reasonable doubt that it was voluntary. Even where a defendant does not request a voir dire on the voluntariness of his or her statement, if the evidence presented at trial raises a substantial claim of involuntariness, a judge's failure to conduct a voir dire, to make the necessary ruling and to instruct the jury properly on his or her own motion constitutes reversible error.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > Voluntariness

*HN10*[] **Interrogation, Voluntariness**

While intoxication may render a confession involuntary, mere evidence of drinking alcohol or using drugs does not trigger a trial judge's obligation to inquire into voluntariness sua sponte. Moreover, suicidal thoughts do not necessarily negate the voluntariness of a confession.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Questions to Venire Panel

*HN11*[] **Voir Dire, Questions to Venire Panel**

As a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, a trial judge should grant the motion.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

*HN12*[] **Voir Dire, Appellate Review**

An appellate court reviews a trial judge's decisions regarding the scope of jury voir dire for abuse of discretion.

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Appellate Review

Criminal Law & Procedure > Juries & Jurors > Voir Dire > Individual Voir Dire

*HN13*[] **Voir Dire, Appellate Review**

Where there is a substantial risk of extraneous issues that may influence a jury, upon request, the trial judge must inquire into the subject of that bias through individual questioning. A substantial risk exists whenever the victim and the defendant are of different races or ethnicities, and the crime charged is murder, rape, or sexual offenses against children. A trial judge need not probe into every conceivable bias imagined by counsel, and is warranted

in relying upon his or her final charge to the jury to purge any bias from the jurors prior to their deliberations. A defendant's bare allegation that there exists a widespread belief that could result in bias is not sufficient to cause a reviewing court to conclude that a trial judge abused his or her discretion by declining to conduct voir dire on the issue.

## Headnotes/Summary

**Headnotes**

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

*Homicide* > *Constitutional Law* > Admissions and confessions > Voluntariness of statement > *Evidence* > Admissions and confessions > Voluntariness of statement > *Practice, Criminal* > Capital case > Motion to suppress > Admissions and confessions > Voluntariness of statement > Voir dire > Empanelment of jury

At the trial of three indictments charging murder in the first degree, the evidence was sufficient to permit the jury to find beyond a reasonable doubt that the defendant intended to kill the victims and did so with deliberate premeditation, and the jury were free to weigh the conflicting evidence regarding the defendant's intoxication and mental state as they saw fit. [4-7]

A Superior Court judge properly denied the criminal defendant's pretrial motion to suppress statements he gave to police in a public parking lot near the scene **[*2]** of multiple murders, where the initial interrogation was not custodial and did not require Miranda warnings; further, the evidence introduced at trial regarding the voluntariness of the defendant's statements did not raise a sufficiently substantial issue requiring the judge to address the matter sua sponte. [7-11]

At the trial of three indictments charging murder in the first degree, the judge did not abuse his discretion in denying the defendant's request to pose a question about anti-Hispanic bias during juror empanelment. [11-13]

**Counsel:** *David H. Mirsky* (*Joanne T. Petito* also present) for the defendant.

*David F. O'Sullivan*, Assistant District Attorney, for the Commonwealth.

**Judges:** Present: GANTS, C.J., LENK, LOWY, BUDD, & KAFKER, JJ.

**Opinion by:** LENK

## Opinion

**[**400]** LENK, J. The defendant was convicted of three counts of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. On appeal, he argues that (1) there was insufficient evidence to sustain his convictions; (2) his statements to police on the night of his arrest should have been suppressed; and (3) the trial judge erred by declining to ask a requested question about anti-Hispanic juror bias during voir dire. Separately, the defendant asks us to order a new trial or to reduce the degree of guilt pursuant to G. L. c. 278, § 33E. We affirm the convictions and decline to exercise our powers under G. L. c. 278, § 33E, to grant the requested relief.

*Background.* We recite the facts as the jury could have found them, **[***2]** reserving certain details for subsequent discussion. In the early morning hours of September 5, 2011, Lawrence police arrested the defendant after he said that he had killed his wife and her two teenage children. At approximately 2 A.M. that morning, a neighbor was returning home with his family when the defendant approached him in a parking lot and asked to be taken to the police station because "he had just killed three people." The neighbor (who did not know the defendant) agreed to telephone the police, and

waited with the defendant until they arrived. When the neighbor asked the defendant what had happened, the defendant responded that he had killed his family because they were "talking down to him." The neighbor was unsure whether to believe the defendant, who was shaking and whose eyes were "bugging out."

**[*3]** When the police arrived, the neighbor remained to translate for the defendant, whose native language is Spanish and who did not speak English. Police asked the defendant what had happened; through the neighbor's efforts at translation, the defendant repeated the substance of what he had told the neighbor, and provided an address to a nearby apartment building where he said the **[***3]** shootings had taken place. He also told the officers that he had tried to shoot himself, but had run out of bullets. When officers asked the defendant what he had done with the weapon, the **[**401]** defendant told them that he had discarded it after leaving the house to go for a walk. Although the defendant seemed anxious, he was cooperative and calm, and he maintained an even tone throughout the conversation.

Officers eventually decided to investigate the accuracy of the defendant's statements; they pat frisked and handcuffed him, placed him in the back seat of a police cruiser, and drove the few blocks to the address the defendant had provided. After knocking on the apartment door and receiving no response, police broke down the door. Inside the apartment, they found the three victims, all deceased, in an upstairs bedroom.

Police recovered a variety of forensic evidence from the scene and the defendant's person. First, officers observed bloody footprints on the stairs, going through the kitchen, and heading toward the back door; forensic analysis later determined that the footprints were consistent with the type of shoes the defendant had been wearing.[1] In addition, the defendant's hands tested **[***4]** positive for gunshot residue, and there were traces of the victims' blood on the defendant's clothing. In the grass behind the apartment building, police found a revolver containing six spent shell casings that matched bullets recovered from the scene. The revolver had traces of blood on it from at least two people. The defendant's wife's blood matched the major female profile.

*Prior proceedings.* Before trial, the defendant moved to suppress his statements to police. The motion was denied with respect to the defendant's statements while he was seated on the curb speaking with police; the motion was allowed with respect **[*4]** to statements made once the defendant was handcuffed and seated in the police cruiser.

Following the partial denial of the defendant's motion to suppress, a Superior Court jury convicted him of three counts of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty.

*Discussion.* On appeal, the defendant argues that there was insufficient evidence to sustain his convictions of murder in the first degree. The defendant contends also that his motion to suppress should have been allowed, because his statements to police were inadmissible **[***5]** as the product of a custodial interrogation where no Miranda warnings were given, and because his statements to police were involuntary. He argues further that the judge's decision not to ask the venire a requested question concerning juror bias constituted reversible error. In addition, the defendant asks that we exercise our authority under G. L. c. 278, § 33E, to reduce the degree of guilt or to order a new trial pursuant to our authority under G. L. c. 278, § 33E.

[↑] 1. *Sufficiency of the evidence.* The defendant argues that there was insufficient evidence to convict him of murder in the first degree under either a theory of deliberate premeditation or a theory of extreme atrocity or cruelty. *HN1*[↑] Where, as here, a trial judge denies a defendant's motion for a required finding, we view the evidence in the light most favorable to the Commonwealth and determine whether "any rational trier of fact could have found **[**402]** the essential elements of the crime beyond a reasonable doubt" (citation omitted). Commonwealth v. Latimore, 378 Mass. 671, 677, 393 N.E.2d 370 (1979). As long as there is sufficient evidence of one theory, the convictions remain undisturbed on appeal. See Commonwealth v. Nolin, 448 Mass. 207, 220, 859 N.E.2d 843 (2007).

We turn to consider whether there was sufficient evidence to establish murder in the first degree on a theory of deliberate premeditation. **[***6]** [2] *HN2*[↑] To

[1] At trial, a forensic analyst described the defendant's shoes as a "class match" for the footprints found at the scene. The analyst explained that a "class match" means that the defendant's shoes shared features such as size, design features, and wear with the footprints recovered at the scene. Although a "class match" is not a conclusive determination that only a particular shoe could have left the footprints, the analyst stated that a class match still has "great significance."

[2] Because we conclude, see *infra*, that there was sufficient evidence to establish deliberate premeditation, we need not

sustain the convictions under this theory, the Commonwealth was required to prove that the defendant (1) caused the death of the victims; (2) intended to kill the victims; and (3) acted with deliberate premeditation. See Model Jury Instructions on Homicide 44 (2018); Model Jury Instructions on Homicide 37 **[*5]** (2013). As there is no claim that the defendant did not cause the death of the victims, what remains is to consider whether the defendant intended to kill them, and whether he acted with deliberate premeditation.

The defendant's neighbor testified that the defendant told him that he had shot the victims because he had grown tired of them "talking down to him." Another witness testified that the defendant and his wife had argued in the hours prior to her death, when she insisted on taking the defendant's keys to prevent him from drinking and driving. The jury also heard evidence that the victims were shot at close range, and that the victims were found lying in close proximity to one another, in a single bedroom.[3]

*HN3*[↑] To establish the intent to kill, the Commonwealth must prove that the defendant "consciously and purposefully intended" to kill the victims. See Model Jury Instructions on Homicide, *supra* at 44; Model Jury Instructions on Homicide, *supra* at 37. Here, the jury could **[***7]** infer from the neighbor's testimony that the defendant shot his family because he had grown tired of them criticizing him or "talking down to him." *HN4*[↑] Moreover, as we previously have held, the use of a firearm at close range provides strong evidence of an intent to kill. See *Commonwealth v. Andrews, 427 Mass. 434, 440, 694 N.E.2d 329 (1998)* (shooting victim at close range warranted finding of intent to kill). Thus, the evidence was sufficient to establish that the defendant intended to kill his victims.

The defendant contends, however, relying upon *Commonwealth v. Mills, 400 Mass. 626, 627, 511 N.E.2d 572 (1987)*, that the evidence was insufficient because his intoxication and his mental state indicate that he lacked the mental capacity to form the intent to kill. The defendant's reliance on *Mills* is misplaced. Unlike *Mills, supra*, where the defendant sought, and was denied, an instruction on criminal responsibility, the defendant in this case did not pursue a defense of criminal responsibility **[**403]** or diminished capacity, nor did he seek an instruction on criminal responsibility.[4] Compare *id. at 627, 630*.

**[*6]** Moreover, the jury in fact 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, 505 N.E.2d 171 (1987)* (evidence of intoxication and mental impairment relevant **[***8]** to question whether defendant formed intent to kill); *Commonwealth v. Henson, 394 Mass. 584, 592, 476 N.E.2d 947 (1985)* (if there is evidence that defendant was under 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.[5] See *Commonwealth*

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address whether there was sufficient evidence to establish extreme atrocity or cruelty. See *Commonwealth v. Smith, 459 Mass. 538, 548, 946 N.E.2d 95 (2011)*; *Commonwealth v. Freeman, 430 Mass. 111, 123, 712 N.E.2d 1135 (1999)*; *Commonwealth v. Chipman, 418 Mass. 262, 270 n.5, 635 N.E.2d 1204 (1994)*.

[3] The Commonwealth acknowledges that a subsequent review of the forensic analysis indicated that the expert opinion estimating that the shots were fired from between three and nine inches away was inaccurate, and that a proper estimate would have been between three and twenty-four inches. Even absent this specific testimony, however, independent evidence that the gunshot wounds contained markings consistent with close- or intermediate-range gunfire was sufficient for the jury to conclude that the victims had been shot at close range.

[4] Although we have not required a judge to instruct on criminal responsibility absent a request, see *Commonwealth v. Genius, 387 Mass. 695, 697-699, 442 N.E.2d 1157 (1982)*, we have concluded that, in limited circumstances, evidence of intoxication or mental impairment may be so severe as to warrant a reduction in the verdict pursuant to *G. L. c. 278, § 33E*, where no instruction on the effect of intoxication was requested or given. See *Commonwealth v. King, 374 Mass. 501, 507-508, 373 N.E.2d 208 (1978)*. As discussed, see note 5, *infra*, in this case the conflicting evidence of the defendant's intoxication is insufficient to warrant relief under *G. L. c. 278, § 33E*.

[5] The defendant's neighbor testified that the defendant was agitated, that his eyes were "bugging out," that he might have been intoxicated, and that he had admitted to attempting suicide. One police officer noted that, when he was arrested, the defendant had been in possession of what the officers suspected was cocaine; there was no evidence that the defendant had cocaine in his system. The responding officers described the defendant as anxious but calm, and disputed that the defendant's eyes had been "widening." Another witness testified that, although the defendant had been drinking a few hours earlier, he had not appeared drunk at that time.

v. Vasquez, 419 Mass. 350, 352-353 (1995) (specific intent to kill, as demonstrated by defendant's repeated infliction of serious injuries, was not negated by evidence of voluntary intoxication). Notwithstanding the evidence of the defendant's intoxication, the jury could have concluded that the defendant's statements and his use of a firearm at close range established an intent to kill.

HN5[↑] To establish that a defendant acted with deliberate premeditation, the Commonwealth must show that "the plan to kill was formed after deliberation and reflection" (citation omitted). See Commonwealth v. Johnson, 435 Mass. 113, 118-119, 754 N.E.2d 685 (2001). Such reflection can occur over "days, hours, or even seconds." Id. at 119. Here, the jury could have found that the defendant acted with deliberate premeditation when shooting his family in response to them "talking down to him" and in response to **[***9]** his earlier dispute with his wife. The jury also could have found that **[*7]** the defendant shot the victims from close range in the same room. From this, they could have concluded that the defendant shot the victims in succession, which was sufficient to establish deliberate premeditation. See *id.* (obtaining and repeatedly firing gun at close range was sufficient to establish deliberate premeditation); Andrews, 427 Mass. at 440 (firing multiple shots at unarmed victim at close range was sufficient to establish deliberate premeditation). There was no need for the jury to know the precise positions of the defendant and the victims in order to establish deliberate premeditation; the defendant's argument to the contrary is without merit.

[↑] 2. *Whether the defendant's statements prior to his arrest should have been suppressed.* **[**404]** The defendant argues that his statements to police near the scene were inadmissible because the officers failed to advise him of his Miranda rights. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The defendant also contends that his statements to police were involuntary, and that the judge's decision not to conduct a voir dire on the issue requires a new trial.

a. *Whether Miranda warnings were necessary.* HN6[↑] When reviewing the denial of a motion **[***10]** to suppress, we accept the motion judge's findings of fact absent clear error, but independently review the judge's ultimate findings and conclusions of law. Commonwealth v. Scott, 440 Mass. 642, 646, 801 N.E.2d 233 (2004). If we determine that the statements should have been suppressed, we then must decide whether their introduction at trial was harmless beyond a reasonable doubt. See Commonwealth v. Monroe, 472 Mass. 461, 472-473, 35 N.E.3d 677 (2015).

At the outset, it is necessary to clarify specifically which of his statements the defendant seeks to suppress. The statements the defendant made on the night of the shooting can be divided into three categories: (1) statements to his neighbor prior to the arrival of the police; (2) statements to police (with the assistance of his neighbor and, subsequently, a Spanish-speaking police officer who translated the defendant's statements into English); and (3) statements after the defendant was placed in a police cruiser. The defendant concedes that the first set of statements did not require Miranda warnings because they were not made to law enforcement; the third set of statements was suppressed. Thus, the defendant's challenge only extends to the second group of statements.[6]

**[*8]** HN7[↑] Miranda warnings are required when "a reasonable person in the defendant's position would have **[***11]** believed he was in custody" (citation omitted). Commonwealth v. Groome, 435 Mass. 201, 211, 755 N.E.2d 1224 (2001). We consider four factors when determining whether an interrogation was custodial in nature:

> "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that that person is a suspect; (3) the nature of the interrogation, including whether the interview was aggressive or, instead, informal and influenced in its contours by the person being interviewed; and (4) whether, at the time the incriminating statement was made, the person was free to end the interview by leaving the locus of the interrogation or by asking the interrogator to leave, as evidenced by whether the interview terminated with an arrest."

Id. at 211-212 (*Groome* factors). No single factor is dispositive. See Commonwealth v. Bryant, 390 Mass. 729, 737, 459 N.E.2d 792 (1984).

HN8[↑] Custodial interrogations are "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his [or her] freedom of action in any significant way."

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[6] We note that many of the statements the defendant made to the officers were duplicative of those he made to the neighbor prior to the arrival of the police. The specific statements that the defendant challenges are those pertaining to his use — and disposal — of a gun, and his explanation that he had attempted to shoot himself but had run out of bullets.

*Commonwealth v. Jung, 420 Mass. 675, 688, 651 N.E.2d 1211 (1995)*, quoting *Miranda, 384 U.S. at 444*. Whether an interrogation is custodial "depends on [whether] the objective circumstances of the interrogation" engender unduly "compulsive" pressures. **[**405]** *Commonwealth v. Morse, 427 Mass. 117, 124, 691 N.E.2d 566 (1998)*, quoting *Stansbury v. California, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994)*.

In this case, the motion judge's findings **[***12]** of fact were well grounded in the evidence. She found that four Lawrence police officers, responding to a radio dispatch alerting them to a man who claimed to have killed someone, located the defendant and his neighbor in a parking lot. After the neighbor told the officers that the defendant had asked the neighbor to call the police because he had killed someone, one of the officers asked the defendant what had happened, whom he had killed, and where he lived. The defendant, speaking in Spanish with the neighbor translating, told the officer that he had killed his family and provided an address where he said the shootings had taken place. In response **[*9]** to further questions, the defendant said that he had shot his family because they would not stop yelling at him, that he had tried to shoot himself but had run out of bullets, and that he had discarded the gun upon leaving the house to go for a walk.

The motion judge found that, throughout this initial exchange, the defendant was seated on a curb with multiple police officers standing around him. Although the officers were not sure they believed the defendant, they had noticed a small amount of blood on his clothes and acknowledged that **[***13]** they would not have let him leave had he requested to do so. The officers did not, however, order the defendant to remain seated or physically restrain him. Absent any independent corroboration of the defendant's claims, they decided to relocate to the address he provided in order to investigate whether anyone there needed assistance. At that point, the defendant was frisked, handcuffed, and placed in a police cruiser. Once the officers entered the apartment and found the victims, they arrested the defendant and, for the first time, advised him of his Miranda rights.

Weighing the *Groome* factors, we conclude, as did the motion judge, that, on balance, the initial interrogation in the parking lot was not custodial and thus did not require Miranda warnings. The first three factors all weigh against a determination that the defendant had been subject to a custodial interrogation at that point. The interrogation was in a public parking lot, not in a police station or other secluded area. There was no evidence that the defendant was "either mentally or physically intimidated." See *Bryant, 390 Mass. at 739*. Rather, the evidence indicated that the defendant was not "restrained" and did not "reasonably perceive[ ] himself **[***14]** to be restrained," thus cutting against a finding that the questioning exemplified the "compulsive aspect of custodial interrogation." See *id. at 739-740*, and cases cited.

Regardless of whether the officers would have allowed the defendant to leave, there is no indication that he was considered a suspect during the initial conversation in the parking lot. Moreover, there is no evidence that the officers ever communicated to the defendant that he was a suspect or that he was not free to leave. See *Morse, 427 Mass. at 123-124* (officer's subjective view that individual being questioned was suspect relevant only to extent that officer communicated this belief to individual). In addition, there was no evidence that the officers were accusatory or aggressive; upon arriving on the scene and being unsure whether a crime had been committed, they simply asked the questions necessary to assess the situation.

**[*10]** The fourth *Groome* factor — whether the defendant was free to leave — possibly weighs in the defendant's favor. As the **[**406]** defendant argues, the officers testified that they would not have let the defendant leave had he tried to do so. In addition, a person in the defendant's position, i.e., having admitted to killing someone, reasonably **[***15]** might believe that he or she was in custody. Assuming without deciding, however, that the defendant is correct, this single factor does not transform the interrogation into a custodial inquiry. See *Commonwealth v. Cawthron, 479 Mass. 612, 624, 97 N.E.3d 671 (2018)* (where environment was not coercive and other *Groome* factors weighed against finding of custody, fact that defendant was not free to leave was insufficient to establish custodial interrogation).

Accordingly, those statements made by the defendant to police prior to being placed in the police cruiser did not require Miranda warnings.

b. *Whether the statements were voluntary.* The defendant also argues that his statements to the police were involuntary, and that the trial judge's decision not to conduct a voir dire to ascertain whether the statements were voluntary requires a new trial.

*HN9*[↑] Where a question is raised as to the voluntariness of a defendant's statement, a judge must conduct a voir dire hearing on the issue outside the

presence of the jury, and must make a determination whether the statement was voluntary before it may be considered by a jury. See Commonwealth v. Harris, 371 Mass. 462, 468-469, 358 N.E.2d 982 (1976). A defendant also may request that the jury be instructed to consider the issue. When such an instruction is given, each juror must assess **[***16]** the voluntariness of a defendant's statements, and should not consider the statement as evidence unless satisfied beyond a reasonable doubt that it was voluntary. See Commonwealth v. Watkins, 425 Mass. 830, 836, 683 N.E.2d 653 (1997). Even where a defendant does not request a voir dire on the voluntariness of his or her statement, if the evidence presented at trial raises "a substantial claim of involuntariness," a judge's failure "to conduct a voir dire, to make the necessary ruling and to instruct the jury properly ... *on his [or her] own motion* constitutes reversible error" (emphasis added). Harris, supra at 470-471.

After the denial of his motion to suppress, at trial the defendant did not request a voir dire on the voluntariness of his statement. Thus, we must consider whether the evidence introduced at trial raised a sufficiently "substantial" issue of voluntariness so as to **[*11]** have required the judge to address the issue sua sponte. We conclude that it did not.

In *Harris*, the "substantial claim" pertaining to voluntariness was evidence that the defendant "confessed to the police only after having been beaten." Id. at 472. Here, there was no evidence of overt coercion. The defendant argues, however, that there was evidence he had been drinking and might have been **[***17]** intoxicated, that he was agitated while waiting for police, and that he professed suicidal thoughts. Together, he maintains, this evidence raised a substantial question whether his statements were voluntarily made.

HN10[↑] While "intoxication may render a confession involuntary," "mere evidence of drinking alcohol or using drugs" does not trigger a trial judge's obligation to inquire into voluntariness sua sponte. Commonwealth v. Brady, 380 Mass. 44, 49, 410 N.E.2d 695 (1980). Moreover, suicidal thoughts "do not necessarily negate the voluntariness of a confession." See Commonwealth v. Lopes, 455 Mass. 147, 168, 914 N.E.2d 78 (2009). None of the witnesses testified that the defendant had had difficulty interacting with the witness or **[**407]** answering questions. In addition, witnesses offered competing statements as to the defendant's demeanor.[7] Unlike the clear evidence of overt coercion in Harris, 371 Mass. at 470-472, the inconsistent evidence regarding the defendant's intoxication and agitated demeanor did not amount to a "substantial claim" that his statements were involuntary. The judge thus was not required, absent a request from the defendant, to conduct a voir dire on the issue of voluntariness.

Moreover, the judge instructed the jury that they were not to accept the defendant's statements as evidence unless they were satisfied that the statements **[***18]** had been made voluntarily. The jury were free to weigh the competing evidence and to decide for themselves whether they were satisfied that the defendant's statements were voluntary. We discern no error.

[↑] 3. *Requested question about juror bias.* The defendant maintains that the trial judge's denial of his request to pose a question about anti-Hispanic bias during juror empanelment requires a **[*12]** new trial. HN11[↑] "[A]s a practical matter, when a motion that prospective jurors be interrogated as to possible prejudice is presented, we believe the trial judge should grant that motion." See Commonwealth v. Espinal, 482 Mass. 190, 201, 121 N.E.3d 1189 (2019), quoting Commonwealth v. Lumley, 367 Mass. 213, 216, 327 N.E.2d 683 (1975). Nonetheless, in these circumstances, the judge did not abuse his discretion in declining to do so.

During juror voir dire, the defendant requested 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." Stating that he had no evidence that such a bias existed, and concerned that the impact of the question might be to cause ethnic bias, the judge declined to pose the question. The judge did agree, however, to ask jurors whether the fact that the defendant would **[***19]** require an interpreter could affect their ability to remain impartial; he reasoned that this question might "overlap" with the issue of ethnic bias.

HN12[↑] We review a trial judge's decisions regarding the scope of jury voir dire for abuse of discretion. See Commonwealth v. Lopes, 440 Mass. 731, 736, 802

[7] The defendant's neighbor testified that the defendant was not calm and acknowledged that he "might have been on something." Another witness, however, testified that the defendant did not seem drunk when he left his sister-in-law's house (approximately one and one-half hours before the shootings), and a police officer testified that the defendant had appeared calm during his interaction with police.

N.E.2d 97 (2004). **HN13**[↑] Where there is a "substantial risk of extraneous issues that might influence the jury," however, we have said that, upon request, the judge must inquire into the subject of that bias through individual questioning. Id. at 736-737. A substantial risk exists "whenever the victim and the defendant are of different races or ethnicities, and the crime charged is murder, rape, or sexual offenses against children." Espinal, 482 Mass. at 196.

"A judge need not," however, "probe into every conceivable bias imagined by counsel," id. at 198, and "is warranted in relying upon his [or her] final charge to the jury to purge any bias from the jurors prior to their deliberations," Commonwealth v. Estremera, 383 Mass. 382, 388, 419 N.E.2d 835 (1981). "A defendant's 'bare allegation' that there exists a 'widespread belief' that could result in bias is not sufficient to cause us to conclude that the judge abused his [or **[**408]** her] discretion by declining to conduct voir dire on the issue" (citation omitted). Espinal, 482 Mass. at 200.

In the present case, both the defendant and the victims are **[***20]** Hispanic. Thus, the case did not present the type of "substantial risk of extraneous issues" that we held in *Espinal* obligates a judge to probe ethnic or racial bias by voir dire as a matter of law (citation omitted). See id. at 196. We discern no abuse of discretion in the judge's determination not to conduct the requested voir **[*13]** dire in this case.[8]

The defendant points to the fact that multiple jurors were excused based on the judge's questions as proof that the jury pool was tainted with anti-Hispanic bias. Evidence that one question proved effective in uncovering bias does not by itself demonstrate that a different question would have proved more effective, or that jurors who did not disclose any bias were being untruthful. See Commonwealth v. Entwistle, 463 Mass. 205, 221, 973 N.E.2d 115 (2012), cert. denied, *568 U.S. 1129, 133 S. Ct. 945, 184 L. Ed. 2d 736 (2013)* (where some jurors indicated that they could not be impartial in response to voir dire questions on pretrial publicity, there was no reason to conclude that jurors who stated they could remain impartial were being dishonest).

In sum, there was no abuse of discretion in the judge's decision not to pose to the venire during juror voir dire the requested question on anti-Hispanic bias.

4. *Review under G. L. c. 278, § 33E.* The defendant urges us to order a new trial or to **[***21]** reduce the degree of guilt pursuant to our authority under G. L. c. 278, § 33E. Having reviewed the entire case pursuant to our statutory obligation, we conclude that there is no basis to grant the requested relief.

*Judgments affirmed.*

End of Document

[8] Indeed, the judge opted to ferret out racial or ethnic bias by asking each potential juror whether the juror could be impartial notwithstanding that the defendant required an interpreter. See Commonwealth v. Colon, 482 Mass. 162, 181 n.16, 121 N.E.3d 1157 (2019) (judge excused juror who, during individual voir dire, stated that defendant's reliance on interpreter would affect juror's ability to remain impartial).

# APPENDIX B

**Commonwealth of Massachusetts**
**Supreme Judicial Court**
**For the Commonwealth**

ESSEX, SS. No. SJC-11951

COMMONWEALTH,
Appellee

vs.

JOSE TEJADA,
appellant

MOTION FOR RECONSIDERATION OF DECISION
PURSUANT TO Mass.R.A.P.27[1]

Now comes the defendant-appellant, Jose Tejada, by and through his counsel, David H. Mirsky, Esquire, and moves this Honorable Court pursuant to Mass. R. A. P. 27, to reconsider its decision of January 23, 2020, Commonwealth v. Tejada, 484 Mass. 1 (2020), and to reverse his convictions, or, in the alternative, to reduce his convictions to second degree murder or manslaughter and order his sentences to run concurrently.

In support of this motion, Mr. Tejada states the following:

**1. This Court has overlooked or misapplied the controlling U.S. Supreme Court authority of Miranda v. Arizona, 384 U.S. 436 (1966), itself, as to what determines whether an**

[1] A motion for reconsideration pursuant to M.R.A.P. 27 "shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended[.]" Mass. R. A. P. 27(a).

**individual is undergoing "custodial interrogation" and, accordingly, whether the individual is entitled to the protection of the procedural safeguards which Miranda provides.**

**A. When Miranda rights must be provided.**

> [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)). 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).

Tejada was not provided with his Miranda rights until after he was brought to the police station. When she took over the questioning, Ruffen/Inoa did not Mirandize Tejada, had not heard him Mirandized, and had not asked whether he had been Mirandized. Augusta did not Mirandize him. (9/11/2013 Hrg./32,50-54,125-126) Prior to asking Tejada questions, Laird did not Mirandize him. Dushame, who was in charge, did not Mirandize him and did not order anyone to Mirandize him. (9/11/2013 Hrg./34,63,89-90)

**B. Statements allegedly made during un-Mirandized custodial interrogation should have been suppressed.**

Under Miranda v. Arizona, 384 U.S. 436 (1966), "custodial interrogation" means "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." Miranda, 436 U.S. at 444. The custodial interrogation at issue in Miranda is considered by the U.S. Supreme Court to be "inherently coercive." See New York v. Quarles, 467 U.S. 649, 654 (1984)("The *Miranda* Court . . . presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." (footnote omitted)). Here, in Commonwealth v. Tejada, supra, 484 Mass. at 7-10, this Court has failed to apply Miranda in circumstances where the U.S. Supreme Court requires it, i.e., where the individual has been "deprived of his freedom of action in [a] significant way." Id., 436 U.S. at 444.

Instead, this Court has rejected Miranda by determining that being deprived of one's freedom of action in a significant way by the police is not enough to bring

the Miranda protections into application. This Court'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 Commonwealth v. 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). Thus, this Court's determination that the environment of Tejada's interrogation was not coercive is incorrect as a matter of law. Further, the environment of Tejada's interrogation, by any definition, was coercive.

Mr. Tejada was in custody for Miranda purposes when the police arrived to find him sitting on the ground in response to his report of killing.[2] The police presumed Mr.

[2] This Court'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".

Tejada to be a "crazy" person who had announced he had killed three people, from the moment the police first arrived at the scene of his arrest, and as such Tejada 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 Mr. Tejada, not intending or allowing him to leave, ending in his being handcuffed and placed in the cruiser. It was a single continuous act. From the moment of police arrival, Tejada was "**deprived of his freedom of action in [a] significant way** (emphasis added)." Miranda, supra, 384 U.S. at 444.

As Dushame approached, Tejada was in a physically subordinate position, sitting on the curb to Dushame's left, the only person sitting, and Luciano was standing to Dushame's right. Dushame was in full uniform, wearing a gun. Dushame testified: "I wasn't going to let him go, no." (9/11/2013 Hrg./68,83-85,89) Dushame would not have allowed Tejada to get up. Laird and Augusta were also in full uniform. (9/11/2013 Hrg./85-86,89,97-98) When Augusta arrived, Laird and Dushame were standing at the concrete barrier, within 5 feet to the left of Tejada. Augusta was 3 to 5 feet away and had a gun. Luciano was at the left. The

officers were to the right. Augusta was to the rear. Tejada wasn't free to go anywhere. (9/11/2013 Hrg./111-115,124-126,131-132) Laird stood Tejada up and pat frisked him, Tejada was not free to leave; after pat frisking Tejada, **Laird put Tejada back on the curb**. There was a semi-circle in front of Tejada; to get up and walk away, he would have had to go through at least four police officers. (8/29/2013 Hrg./6-10,12-15,53-58,64);(9/11/2013 Hrg./83-87,89) Tejada was in custody for Miranda purposes when the police arrived to find him sitting on the ground in response to his report of killing; he never had an 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 the custody of police, who, on the face of the circumstances and in fact, had no intention of allowing him to leave, ending in Tejada's being handcuffed and placed in the cruiser. It was a "deprivation of his freedom of action in [a] significant way. See Miranda, 384 U.S. at 444.

The U.S. Supreme Court has made clear through its decisions that to find that Miranda custody was not present in a police interrogation encounter requires an overt expression by the police that the individual has the freedom to leave the situation. 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."). Mr. Tejada's case does not fit within this framework.

**2. This Court's decision to uphold the trial judge's refusal of the 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 was reversible error.**

In deciding whether the trial judge committed reversible error by refusing the defendant's request prior to jury selection 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, see Defendant's Amended Brief, at 1, 12-14, 40-46;

Defendant's Reply Brief, at 6, 16-22, this Court omits reference to controlling federal law, and to the known prevalence of anti-Hispanic bias. Compare Tejada, supra, 484 Mass. at 11-13.

On Tejada's requested question, the judge stated:

> No. 13 is do you believe that Hispanics in a city such as a Lawrence are more likely to commit crimes of violence than any other ethnicity or people.
>
> I don't know as there's any reason to think that people do believe that. And my concern is that if you ask a question like that, it may put in the minds of the jurors a bias that they might not have. So I would be reluctant to give that.
>
> I've asked these kinds of questions before, and I have not found them productive, to be frank.

(Tr. Vol. I/14-15)

The U.S. Supreme Court has stated,

> "The argument is advanced on behalf of the Government that it would be detrimental to the Administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious 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, 451 U.S. 182, 191 (1981) (plurality opinion) (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) (emphasis added).

Rosales-Lopez, supra, 451 at 191. "Of course, the judge need not defer to the defendant's request where there is **no rational possibility** of racial prejudice (emphasis added)." Rosales-Lopez, supra, 451 U.S. at 191 n. 7.

This Court has itself recognized a strong basis for the defendant'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).[3] In this case, there was also actual anti-

[3] "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 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]

Hispanic bias in this jury pool. See Tr. Day 1/63) (Juror No. 10 excused after acknowledging she had "biases against Spanish-speaking people"); Tr. Day 1/77-78, 150-154, 177-180, 194-196, 196, 233-234, 234; Tr. Day 2/28-32 (less than unequivocal, equivocal, or negative answers to question whether fact that the defendant required an interpreter would affect prospective juror's ability to be fair and impartial). 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.

As there was a reasonable and rational possibility of anti-Hispanic bias in this jury pool, the judge's refusal to ask the question was reversible error. Rosales-Lopez v. United States, supra, 451 U.S. at 191.

Respectfully submitted,
JOSE TEJADA

By his Attorney,

February 19, 2020

David H. Mirsky, Esquire
B.B.O. # 559367
Mirsky & Petito, Attorneys at Law
P.O. Box 1063
Exeter, NH 03833
Tel. 603-580-2132
Email: dmirsky@comcast.net

American youths')." Colon, supra, 482 Mass. at 179-180 (footnotes omitted).

**Commonwealth of Massachusetts**
**Supreme Judicial Court**
**For the Commonwealth**

ESSEX, SS. No. SJC-11951

COMMONWEALTH,
Appellee,

v.

JOSE TEJADA,
Appellant

CERTIFICATE OF COMPLIANCE

I, David H. Mirsky, hereby certify, pursuant to Mass. R. A. P. 16(k), that the attached MOTION FOR RECONSIDERATION OF DECISION PURSUANT TO Mass.R.A.P.27, in the above-captioned case is in compliance with Mass. R. A. P.27(b); in that it does not exceed 10 pages of text in monospaced font, as defined in Mass. R. A. P.20(a)(4)(B).

February 19, 2020

/s/David H. Mirsky, Esquire

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

CERTIFICATE OF SERVICE

I, David H. Mirsky, attorney for the defendant-appellant Jose Tejada, in the above-captioned case, certify that on February 19, 2020, I served a copy of the foregoing MOTION FOR RECONSIDERATION OF DECISION PURSUANT TO M.R.A.P. 27 by

Filing electronically through the Supreme Judicial Court E-filing system to:

Francis V. Kenneally
Clerk of the Supreme Judicial Court
John Adams Courthouse, Suite 1400
One Pemberton Square
Boston, MA 02108-1724;

And by serving electronically through the Supreme Judicial Court E-filing system to:

David F. O'Sullivan, A.D.A.
Office of the District Attorney/Essex
10 Federal Street
Salem, MA 01970.

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

# APPENDIX C

**sjccommclerk@sjc.state.ma.us** 3/16/2020 10:20 AM

# SJC-11951 - Notice of Docket Entry

To dmirsky@comcast.net

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. SJC-11951

COMMONWEALTH
vs.
JOSE TEJADA

NOTICE OF DOCKET ENTRY

Please take note that the following entry was made on the docket of the above-referenced case:

March 16, 2020 - DENIAL of Motion for Reconsideration. (By the Court)

Francis V. Kenneally, Clerk

Dated: March 16, 2020

To:
David F. O'Sullivan, A.D.A.
David H. Mirsky, Esquire
Essex Superior Court

# APPENDIX D

# 1177CR01390 Commonwealth vs. Tejada, Jose L

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 12/28/2011
- DCM Track:
- C - Most Complex
- Initiating Action:
- MURDER c265 §1
- Status Date:
- 12/28/2011
- Case Judge:
-
- Next Event:
-

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

## Party Information

**Commonwealth**
- Prosecutor

Alias

**Party Attorney**
- Attorney
- Curran, Esq., Jean Marie
- Bar Code
- 552941
- Address
- Essex District Attorney
  Ten Federal St
  Salem, MA 01970
- Phone Number
- (978)745-6610

More Party Information

**Tejada, Jose L**
- Defendant

Alias

**Party Attorney**
- Attorney
- Mirsky, Esq., David H
- Bar Code
- 559367
- Address
- Mirsky & Petito, Attorneys at Law
  PO Box 1063
  Exeter, NH 03833
- Phone Number
- (603)580-2132
- Attorney
- Morris, Esq., John P
- Bar Code
- 653918
- Address
- Attorney at Law Inc.
  60 Washington St
  Suite 201
  Salem, MA 01970
- Phone Number
- (978)740-4480

More Party Information

## Party Charge Information

- **Tejada, Jose L**
- - 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
Disposition
08/25/2014
Guilty Verdict

- **Tejada, Jose L**
- - Defendant

Charge # 2:
265/1-0 - Felony MURDER c265 §1

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

**Charge Disposition**
Disposition Date
Disposition
08/25/2014
Guilty Verdict

- **Tejada, Jose L**
- - Defendant

Charge # 3:
265/1-0 - Felony MURDER c265 §1

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

**Charge Disposition**
Disposition Date
Disposition
08/25/2014
Guilty Verdict

## Events

| Date | Session | Location | Type | Event Judge | Result |
|---|---|---|---|---|---|
| 01/19/2012 09:30 AM | Criminal 1 - K | | Arraignment | | Held as Scheduled |
| 02/24/2012 09:30 AM | Criminal 1 - K | | Pre-Trial Conference | | Held as Scheduled |
| 04/11/2012 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Rescheduled |
| 05/17/2012 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Rescheduled |
| 06/25/2012 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Held as Scheduled |
| 08/17/2012 09:30 AM | Criminal 1 - K | | Non-Evidentiary Hearing on Suppression | | Rescheduled |
| 08/23/2012 09:30 AM | Criminal 1 - K | | Status Review | | Held as Scheduled |
| 08/28/2012 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Held as Scheduled |
| 09/25/2012 09:30 AM | Criminal 1 - K | | Non-Evidentiary Hearing on Suppression | | Rescheduled |
| 11/08/2012 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Held as Scheduled |
| 01/11/2013 09:30 AM | Criminal 1 - K | | Non-Evidentiary Hearing on Suppression | | Rescheduled |
| 03/08/2013 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Held as Scheduled |
| 04/26/2013 09:30 AM | Criminal 1 - K | | Non-Evidentiary Hearing on Suppression | | Held as Scheduled |
| 06/28/2013 09:00 AM | Criminal (Lawrence) | | Evidentiary Hearing on Suppression | | Not Held |
| 06/28/2013 09:30 AM | Criminal 1 - K | | Evidentiary Hearing on Suppression | | Rescheduled |

| Date | Session | Location | Type | Event Judge | Result |
|---|---|---|---|---|---|
| 08/29/2013 09:00 AM | Criminal / Civil (Lawrence) | | Evidentiary Hearing on Suppression | | Not Held |
| 08/29/2013 09:30 AM | Criminal 1 - K | | Evidentiary Hearing on Suppression | | Not Held |
| 08/29/2013 02:00 PM | Criminal (Lawrence) | | Evidentiary Hearing on Suppression | | Held as Scheduled |
| 09/11/2013 02:00 PM | Criminal (Lawrence) | | Evidentiary Hearing on Suppression | | Held as Scheduled |
| 09/23/2013 02:00 PM | Criminal (Lawrence) | | Non-Evidentiary Hearing on Suppression | | Held as Scheduled |
| 10/24/2013 09:30 AM | Criminal 1 - K | | Status Review | | Held as Scheduled |
| 11/21/2013 09:30 AM | Criminal 1 - K | | Status Review | | Held as Scheduled |
| 12/03/2013 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Held as Scheduled |
| 12/18/2013 12:00 PM | Criminal (Lawrence) | | Hearing | | Rescheduled |
| 01/10/2014 09:30 AM | Criminal 1 - K | | Hearing on Compliance | | Rescheduled |
| 02/10/2014 02:00 PM | Criminal 1 - K | | Evidentiary Hearing on Suppression | | Held as Scheduled |
| 02/26/2014 09:30 AM | Criminal 1 - K | | Trial Assignment Conference | | Held as Scheduled |
| 06/30/2014 09:30 AM | Criminal 1 - K | | Final Pre-Trial Conference | | Held as Scheduled |
| 08/11/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/11/2014 09:30 AM | Criminal 1 - K | | Jury Trial | | Not Held |
| 08/12/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/14/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/15/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/20/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/21/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/22/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/25/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |
| 08/26/2014 09:00 AM | Criminal 3 - I | | Jury Trial | | Held as Scheduled |

## Ticklers

| Tickler | Start Date | Due Date | Days Due | Completed Date |
|---|---|---|---|---|
| Pre-Trial Hearing | 01/19/2012 | 01/19/2012 | 0 | 11/03/2014 |
| Final Pre-Trial Conference | 01/19/2012 | 12/30/2012 | 346 | 11/03/2014 |
| Case Disposition | 01/19/2012 | 01/13/2013 | 360 | 11/03/2014 |

## Docket Information

| Docket Date | *Docket Text* | File Ref Nbr. | *Image Avail.* |
|---|---|---|---|
| 12/30/2011 | Indictment returned | 1 | |
| 01/19/2012 | Deft arraigned before Court | | |
| 01/19/2012 | Appearance of Commonwealth's Atty: Jean M Curran | 2 | |
| 01/19/2012 | Appearance of Deft's Atty: John P. Morris | | |
| 01/19/2012 | RE Offense 1:Plea of not guilty | | |
| 01/19/2012 | RE Offense 2:Plea of not guilty | | |
| 01/19/2012 | RE Offense 3:Plea of not guilty | | |
| 01/19/2012 | Bail: Defendant held without bail (John T Lu, Justice) | 3 | |
| 01/19/2012 | Assigned to track "C" see scheduling order | | |
| 01/19/2012 | Tracking deadlines Active since return date | | |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 01/19/2012 | Case Tracking scheduling order (John T Lu, Justice) mailed 1/19/2012 | 4 | |
| 01/19/2012 | Commonwealths notice of automatic discovery filed in court | 5 | |
| 02/01/2012 | MOTION by Deft: Ex-parte motion & affidavit for funds for forensic evaluation. Filed in court & Allowed , not to exceed $2,500. Original 1 of 2 (John T. Lu) 2/1/12 | 6 | |
| 02/01/2012 | MOTION by Deft: for funds for investigator and order.; Atty.'s affidavit in support of motion for funds for investigator. Filed in court & Allowed, not to exceed $ 1,000. (John T.Lu) | 7 | |
| 02/24/2012 | Defendants motion and order for criminal record of civilian witnesses allowed (Whitehead, J) copy sent to probation | 8 | |
| 02/24/2012 | Defendants first motion for discovery filed and agreed | 9 | |
| 02/24/2012 | Motion and order for discovery of fingerprint evidence filed and agreed | 10 | |
| 02/24/2012 | Defendants motion for production of 911 reocrdings as well as recordings of communications from dispatch filed and agreed | 11 | |
| 04/12/2012 | Commonwealth files Notice of Discovery 2. | 12 | |
| 04/12/2012 | Commonwealth files Notice of discovery 3. | 13 | |
| 06/25/2012 | Motion for additional funds for investigator and order allowed (Lu, J) copy given to Atty Morris in court | 14 | |
| 06/25/2012 | Ex-parte motion allowed (Lu, J) copy given to Atty Morris in court | 15 | |
| 01/11/2013 | Ex-Parte Motion filed and Allowed (Cornetta,J) | 16 | |
| 01/11/2013 | MOTION by Deft: for funds for DNA Expert filed and Allowed | 17 | |
| 01/11/2013 | MOTION by Deft: for Funds for Medical Expert filed and Allowed | 18 | |
| 04/26/2013 | Motion to suppress and memorandum filed in court | 19 | |
| 08/29/2013 | EX- PARTY MOTION by Deft: for additional funds for forensic evaluation | 20 | |
| 08/29/2013 | MOTION (P#20) allowed (Mary K. Ames, Justice). | | |
| 09/11/2013 | Interpreter present: Martinez, Mary on 9/11/2013 | | |
| 09/11/2013 | MOTION by Deft: for additional funds for investigator and order | 21 | |
| 09/11/2013 | MOTION (P#21) allowed (Mary K. Ames, Justice). | | |
| 09/23/2013 | Interpreter present: Genevieve K. Howe on 9/23/2013 | | |
| 09/23/2013 | Hearing on (P#19) held, matter taken under advisement (Mary K. Ames, Justice) | | |
| 11/21/2013 | After hearing Dr. Joss to provide report within 21 days (Lu, J) | | |
| 12/09/2013 | Deft files First production of reciprocal discovery. | 22 | |
| 02/24/2014 | MOTION (P#19) denied (Ames, J.) After hearing and review of all submissions. Motion is ALLOWED as to statements made while defendant was seated, handcuffed in the police cruiser. The motion is otherwise DENIED. Rulings and findings as stated on the record. Transcript ordered to be produced. 2/24/14. Copies mailed to J.C & J.M. | | |
| 02/24/2014 | Court Reporter Rael, Kathleen M. is hereby notified to prepare one copy of the transcript of the evidence of 9/11/2014 | 23 | |
| 06/30/2014 | Joint Pre-Trial Memorandum Filed | 24 | |
| 07/01/2014 | MOTION by Deft: for funds to hire a firearms expert.; Affidavit in support of motion;Filed in court & ALLOWED, not to exceed $2,500. (John T. Lu) 7/1/14. | 25 | |
| 07/03/2014 | Deft files Notice of Expert Witness. | 26 | |
| 08/11/2014 | Regarding jury trial: Case called to trial, Hearing held on pre-trial motions & impanelment begins. Cont'd to 8/12/14 for further impanelment. (Whitehead, J.) | | |
| 08/12/2014 | Impanelment of jurors on this date 8/12/14, Jury sworn & evidence begins;cont'd to 8/14/14 for further trial. (Whitehead, J.) | | |
| 08/20/2014 | MOTION by Commonwealth: Motion in limine to introduce autopsy photographs. Filed 8/12/14 | 27 | |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 08/20/2014 | MOTION (P#27) allowed. See transcript for discussion (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Deft: Motion for examination of jurors. Filed 8/11/14. | 28 | |
| 08/20/2014 | MOTION (P#28) See transcript for discussion (Howard Whitehead, Justice). | | |
| 08/20/2014 | Commonwealth files Notice of discovery 4. Filed 8/11/14 | 29 | |
| 08/20/2014 | Commonwealth files Notice of discovery 5. Filed 8/11/14 | 30 | |
| 08/20/2014 | Commonwealth files Notice of discovery 6. Filed 8/11/14. | 31 | |
| 08/20/2014 | MOTION by Deft: Motion for sequestration of witnesses filed 8/12/14. | 32 | |
| 08/20/2014 | MOTION (P#32) allowed except for Lt. Zuk, victims family, and def. family (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Deft: Motion in limine and memorandum to exclude references to the defendant's prior "bad acts". filed 8/12/14. | 33 | |
| 08/20/2014 | MOTION (P#33) allowed (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Commonwealth: Motion for a view. Filed 8/12/14. | 34 | |
| 08/20/2014 | MOTION (P#34) allowed (Howard Whitehead, Justice). | | |
| 08/22/2014 | Request by defendant for jury instructions.;Filed in court 8/22/14(Whithead, J.) | 35 | |
| 08/25/2014 | MOTION by Deft: for required finding of not guilty at close of all of the evidence.Filed in court & :Denied" 8/25/14(Whitehead, J.) | 36 | |
| 08/25/2014 | MOTION by Deft: for required finding of wot guilty at close of Commonwealth's case.;Filed in court & "Denied" 8/25/14;(whitehead, J.) | 37 | |
| 08/25/2014 | MOTION by Deft: for additional funds for firearms expert. Filed in court & "Allowed"(Whitehead, J.) 8/25/14. | 38 | |
| 08/25/2014 | RE Offense 1:Guilty verdict :Filed & recorded @ 4:30 P.M. 8/25/14(Whitehead, J.) | 39 | |
| 08/25/2014 | RE Offense 2:Guilty verdict;Filed & recorded @ 4:30 PM 8/25/14;(Whitehed, J.) | 40 | |
| 08/25/2014 | RE Offense 3:Guilty verdict;Filed & recorded @ 4:30 PM 8/25/14;(Whitehead, J.) | 41 | |
| 08/25/2014 | Re: #001:Defendant sentenced to LIfe, committed to MCI, Cedar Junction (Howard Whitehead, Justice) | 42 | |
| 08/25/2014 | Re: #002;Defendant sentenced to Life, F & A 2011-1390-001, committed to MCI, Cedar Junction (Howard Whitehead, Justice) | 43 | |
| 08/25/2014 | Re: #003:Defendant sentenced to Life, F & A #002 (Howard Whitehead, Justice) | 44 | |
| 08/25/2014 | Sentence credit given as per 279:33A: 1085 days credit | | |
| 08/25/2014 | Regarding jury trial: Trial Ends & deliberations begin @ (11:45) (Whitehead, J.) | | |
| 08/26/2014 | Victim-witness fee assessed: $90.00 (Howard Whitehead, Justice) | 45 | |
| 08/27/2014 | NOTICE of APPEAL FILED by Jose Tejada;cetian opinions, rulings and judgments of the Court during trial.;Filed in court 8/27/14. | 46 | |
| 08/27/2014 | MOTION by Deft: 's counsel, John P. Morris to withdraw & appointment of appellate counsel.Filed in court & "Allowed" (Whitehead, J.) | 47 | |
| 09/03/2014 | Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed by Jose Tejada | 48 | |
| 09/03/2014 | Letter transmitted to the Appellate Division. All parties notified 9/3/2014 | 49 | |
| 09/15/2014 | Victim-witness fee paid as assessed $90.00 | 50 | |
| 10/23/2014 | Legal counsel fee paid as assessed in the amount of $150.00 | 51 | |
| 11/03/2014 | Court Reporter Rael, Kathleen M. is hereby notified to prepare one copy of the transcript of the evidence of 08/29/2013 | | |

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 11/03/2014 | Court Reporter Rael, Kathleen M. is hereby notified to prepare one copy of the transcript of the evidence of 09/11/2013 | | |
| 11/03/2014 | Court Reporter Lynch, Jr., John M. is hereby notified to prepare one copy of the transcript of the evidence of 09/23/2013 | | |
| 11/03/2014 | Court Reporter Canty, Kathleen is hereby notified to prepare one copy of the transcript of the evidence of 08/11-26/2014 | | |
| 11/03/2014 | Court Reporter McDonald, Maryann is hereby notified to prepare one copy of the transcript of the evidence of 08/14/2014 | | |
| 11/03/2014 | General correspondence regarding NAC form sent to CPCS IN Boston | | |
| 11/24/2014 | Committee for Public Counsel Services appointed, pursuant to Rule 53 of Atty. David Mirsky;NAC #474101 | 52 | |
| 11/28/2014 | Appearance of Deft's Atty: David H Mirsky | 53 | |
| 12/11/2014 | Defendant's Motion to Obtain Additional Funds for Interpreter Allowed not to Exceed 1004.10 (Lu, J.) Copy sent to JM | 54 | |
| 04/08/2015 | Appeal: Transcript (4 Volumes) received from Kathy Canty, Court Reporter in Digital Format | | |
| 05/20/2015 | Appeal: JAVS DVD/CD Received from OTS dated 9/23/13 | | |
| 09/23/2015 | Appeal: notice of assembly of record | 55 | |
| 09/28/2015 | Notice of docket entry received from Supreme Judicial Court | 56 | |
| 04/06/2016 | Court Reporter John Lynch is hereby notified to prepare one copy of the transcript of the evidence of 02/26/2014 09:30 AM Trial Assignment Conference, 02/10/2014 02:00 PM Evidentiary Hearing on Suppression.<br>Finding and Rulings on Record on 2/24/14 before Ames,J | 57 | |
| 03/12/2018 | Commonwealth 's Motion to Reconstruct the Record Pursuant to Mass. R. App. P. 8 (c) (Assented by Both Parties) | 58 | |
| 04/18/2018 | ORDER: ORDER ON COMMONWEALTH'S ASSENTED TO MOTION TO RECONSTRUCT THE RECORD PURSUANT TO MASS. R. APP. P. 8(c)<br>CONCLUSION AND ORDER: For the reasons explained herein, Commonwealth's Assented to Motion to reconstruct its findings of fact and rulings of law on the Defendant's Motion to Suppress is ALLOWED. Rulings and findings shall issue within thirty days of this Order.<br><br>Judge: Ames, Hon. Mary K | 59 | Image |
| 10/09/2018 | MEMORANDUM & ORDER:<br><br>of Decision and Order on Defendant's Motion to Suppress Statements - For the Foregoing Reasons, The Defendant's Motion to Suppress Statements is Allowed as to statements made while defendant was seated, handcuffed in the police cruiser. The Motion is otherwise DENIED.<br><br>Judge: Ames, Hon. Mary K | 60 | Image |
| 03/23/2020 | Rescript received from Supreme Judicial Court; judgment AFFIRMED Judgments Affirmed. | 61 | Image |

## Case Disposition

| Disposition | Date | Case Judge |
|---|---|---|
| Disposed by Jury Verdict | 11/03/2014 | |

# APPENDIX E

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. JOSE TEJADA
SJC-11951

## CASE HEADER

| | | | |
|---|---|---|---|
| **Case Status** | Decided, Rescript issued | **Status Date** | 03/16/2020 |
| **Nature** | Murder1 appeal | **Entry Date** | 09/25/2015 |
| **Appellant** | Defendant | **Case Type** | Criminal |
| **Brief Status** | | **Brief Due** | |
| **Quorum** | Gants, C.J., Lenk, Lowy, Budd, Kafker, JJ. | | |
| **Argued Date** | 10/07/2019 | **Decision Date** | 01/23/2020 |
| **AC/SJ Number** | | **Citation** | 484 Mass. 1 |
| **DAR/FAR Number** | | **Lower Ct Number** | |
| **Lower Court** | Essex Superior Court | **Lower Ct Judge** | Mary K. Ames, J. |
| **Route to SJC** | Direct Entry: Murder 1 | | |

## ADDITIONAL INFORMATION

Transcripts received: 12 volumes (on CD). Transcripts dates: 8/29/13, 9/11/13, 9/23/13, 8/11/14, 8/12/14, 8/14/14, 8/15/14, 8/20/14, 8/21/14, 8/22/14, 8/25/14 and 8/26/14. (Scanned)

| INVOLVED PARTY | ATTORNEY APPEARANCE |
|---|---|
| **Commonwealth**<br>Plaintiff/Appellee<br>Red brief & appendix filed<br>5 Exts, 153 Days | David F. O'Sullivan, A.D.A.<br>Ronald DeRosa, A.D.A.<br>Elin H. Graydon, A.D.A. |
| **Jose Tejada**<br>Defendant/Appellant<br>Blue br, app & reply br filed<br>3 Exts, 1480 Days | David H. Mirsky, Esquire |

## DOCUMENTS

Appellant Tejada Amended Brief
Appellee Commonwealth Brief
Appellant Tejada Reply Brief

## DOCKET ENTRIES

| Entry Date | Paper | Entry Text |
|---|---|---|
| 09/25/2015 | #1 | Entered. Notice to counsel. |
| 01/19/2016 | #2 | MOTION FOR STAY OF APPEAL, filed for Jose Tejada by David H. Mirsky, Esquire. (The motion is ALLOWED. Appellate proceedings are stayed and the defendant shall file status reports every 30 days.) |
| 02/19/2016 | #3 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 03/22/2016 | #4 | STATUS LETTER from David H. Mirsky, Esquire. See status on file. |
| 04/21/2016 | #5 | STATUS LETTER from David H. Mirsky, Esquire: See Letter On File. |
| 05/23/2016 | #6 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 06/21/2016 | #7 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 07/21/2016 | #8 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 08/23/2016 | #9 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 09/23/2016 | #10 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 10/25/2016 | #11 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 11/25/2016 | #12 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 12/27/2016 | #13 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 01/25/2017 | #14 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. |
| 02/27/2017 | #15 | STATUS LETTER from David H. Mirsky, Esquire: See letter on file. (Further status reports are suspended due to the *expected filing of the defendant's brief on or before June 30, 2017.)* |
| 06/22/2017 | #16 | MOTION to extend to 08/14/2017 filing of brief of Jose Tejada by David H. Mirsky, Esquire. (ALLOWED to August 15, 2017) |

| | | |
|---|---|---|
| 08/09/2017 | #17 | MOTION to extend to 09/08/2017 filing of brief of Jose Tejada by David H. Mirsky, Esquire. (ALLOWED to September 8, 2017, to provide additional time to to file the defendant's brief and record appendix.) |
| 09/11/2017 | #18 | SERVICE of brief & appendix for Defendant/Appellant Jose Tejada by David H. Mirsky. |
| 12/18/2017 | #19 | MOTION FOR STAY OF APPEAL, filed for Commonwealth by Ronald DeRosa, A.D.A. (ALLOWED to January 22, 2018, for the reasons set forth in the motion). |
| 01/24/2018 | #20 | STATUS LETTER from Ronald DeRosa, A.D.A.. (Further stay ALLOWED to February 26, 2018, for the reasons stated in the motion). |
| 03/09/2018 | #21 | STATUS LETTER from Ronald DeRosa, A.D.A. (Further stay is ALLOWED to April 30, 2018, to provide time for the motion judge to re-create findings and rulings). |
| 04/09/2018 | #22 | APPEARANCE of David F. O'Sullivan, A.D.A. for Commonwealth. |
| 05/02/2018 | #23 | STATUS LETTER from David F. O'Sullivan, A.D.A. (Further stay is ALLOWED to July 31, to provide time for the motion judge to re-create findings and rulings). |
| 08/03/2018 | #24 | STATUS LETTER from David F. O'Sullivan, A.D.A.. |
| 09/26/2018 | #25 | NOTICE OF STATUS CONFERENCE: A status conference has been scheduled in this matter for THURSDAY, OCTOBER 11, 2018, at 11:00 A.M., in Courtroom 1, John Adams Courthouse, One Pemberton Square, Boston, Massachusetts. A status report shall be filed by October 3, 2018. (Botsford, J., presiding as Special Master). |
| 10/03/2018 | #26 | STATUS LETTER from David H. Mirsky, Esquire. |
| 10/04/2018 | #27 | STATUS LETTER from David F. O'Sullivan, A.D.A.. |
| 10/29/2018 | #28 | NOTICE: The parties having appeared for a status conference before Special Master Margot Botsford on October 11, 2018, it is reported and recommended that the defendant's amended brief shall be filed on or before December 21, 2018 and shall consolidate the brief filed previously with any additional reference to the findings and rulings of the motion Judge (Ames, J.). The Commonwealth's brief shall be filed on or before March 21, 2019. |
| 11/09/2018 | #29 | ORDER: Upon consideration of the report of the Special Master, it is ORDERED that the defendant's amended brief shall be filed on or before December 21, 2018 and shall consolidate the brief filed previously with any additional reference to the findings and rulings of the motion Judge (Ames, J.). The Commonwealth's brief shall be filed on or before March 21, 2019. |
| 12/24/2018 | #30 | SERVICE of amended brief & appendix for Defendant/Appellant Jose Tejada by David H. Mirsky, Esquire. |
| 01/04/2019 | #31 | NOTICE OF AVAILABILITY OF ELECTRONIC FILING: The clerk's office will accept briefs, appendices, motions, status reports, and correspondence through eFileMA effective immediately. Please note that after review and docketing of e-filed briefs and appendices, the clerk will require a limited number of paper copies to be filed. Parties are free to file their briefs and record appendices under the revised rules of appellate procedure prior to their effective date, March 1, 2019. |
| 03/20/2019 | #32 | Motion to extend to date for filing of appellee's brief filed for Commonwealth by David F. O'Sullivan, A.D.A. (ALLOWED to June 19, 2019.) |
| 06/17/2019 | #33 | Motion to extend to date for filing of appellee's brief filed for Commonwealth by David O'Sullivan, A.D.A. (ALLOWED to July 3, 2019.) |
| 07/03/2019 | #34 | Appellee brief filed for Commonwealth by David F. O'Sullivan, A.D.A.. |
| 07/03/2019 | #35 | Appendix filed for Commonwealth by David F. O'Sullivan, A.D.A.. |
| 07/03/2019 | #36 | MOTION to exceed page limit filed for Commonwealth by David F. O'Sullivan, A.D.A.. (ALLOWED to 52 pages.) |
| 07/03/2019 | | The clerk's office has received the Commonwealth's brief and appendix through e-fileMA. The brief has been accepted for filing and entered on the docket. The Commonwealth shall file with the clerk 4 copies of the brief and 3 copies of the appendix within 5 days. The clerk's office may require additional copies if necessary. |
| 07/09/2019 | #37 | Motion to extend to date for filing of appellant's reply brief filed for Jose Tejada by Attorney David Mirsky. (ALLOWED to August 30, 2019.) |
| 07/15/2019 | #38 | Additional 4 copies of appellee's brief filed by Commonwealth. |
| 08/01/2019 | #39 | ORDERED for argument on October 7. Notice sent. |
| 08/23/2019 | #40 | Motion to extend to date for filing of appellant's reply brief filed for Jose Tejada by Attorney David Mirsky. (ALLOWED, in part, brief due on or before September 16, 2019). |
| 09/16/2019 | #41 | Reply brief filed for Jose Tejada by Attorney David Mirsky. |
| 09/16/2019 | | The clerk's office has received the appellant's reply brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The appellant shall file with the clerk 4 copies of the brief within 5 days. The clerk's office may require additional copies if necessary. |
| 09/19/2019 | #42 | Additional 4 copies of appellant's reply brief filed by Jose Tejada. |
| 10/07/2019 | | Oral argument held. (Gants, C.J., Lenk, J., Lowy, J., Budd, J., Kafker, J.). View Webcast |
| 10/31/2019 | #43 | It is ORDERED that the Clerk of the Superior Court shall transmit to the Clerk of the Supreme Judicial Court for the Commonwealth any and all trial and motion exhibits in the above-captioned matter except for currency, firearms, narcotics, or contraband articles. By the Court |
| 01/23/2020 | #44 | RESCRIPT (Full Opinion): Judgments affirmed. (By the Court) |
| 02/04/2020 | #45 | Motion to Enlarge Time to File Motion for Reconsideration filed for Jose Tejada by Attorney David Mirsky. (ALLOWED to February 28, 2020) |
| 02/19/2020 | #46 | Motion for Reconsideration or Modification filed for Jose Tejada by Attorney David Mirsky. |

| | | |
|---|---|---|
| 03/16/2020 | #47 | DENIAL of Motion for Reconsideration. (By the Court) |
| 03/16/2020 | | RESCRIPT ISSUED to trial court. |

As of 03/16/2020 10:20am

# APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT

INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

FILED IN COURT
ASST. CLERK
4/24/13
20

MOTION AND MEMORANDUM TO SUPPRESS STATEMENTS

Now comes the defendant, Jose Tejada ("Tejada") in the above captioned matter and respectfully moves, pursuant to Mass.R.Crim.P. Rule 13(a), that this Honorable Court suppress statements alleged to have been made by the defendant, to officers of the Lawrence Police Department, on September 5, 2011, as not being the product of knowing, intelligent or voluntary waiver of all rights afforded him under the United States Constitution and the Massachusetts Declaration of Rights.

The defendant states that at the time of his arrest he was subjected to an illegal detention and seizure of his person in violation of his Four, and Fourteenth Amendment rights under the United States Constitution, and in violation of his rights under Article 14 of the

Findings as stated on the record. Transcript ordered to be produced. MLGines 2/24/14

R.A. 7

Massachusetts Declaration of Rights of the Massachusetts Constitution.

In addition Tejada states that any statements alleged to have been made by him were made in violation of his right against self incrimination as provided in the Fifth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights and without the benefit of his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) ("Miranda").

BACKGROUND

On September 5, 2011 at approximately 2:04PM Officer Laird ("Laird") and Officer Augusta ("Augusta") of the Lawrence Police Department (collectively "the officers") were dispatched to 6 Diamond Street, Lawrence, Massachusetts on the report of a man claiming to have killed someone. When the Officers arrived Sergeant Duschame ("Duschame") was already on scene speaking with a witness. They saw one male sitting on the curb, now known as Jose Tejada ("Tejada")and another male standing over him, now known as Luciano Diogenes ("Diogenes"). Diogenes was a bystander who claimed to have been stopped by Tejada. Tejada only spoke Spanish and Diogenes spoke both English

and Spanish. Laird and Duschame utilized an untrained, ad-hoc interpreter, Diogenes, at the time of initial questioning of Tejada as well as the subsequent continued illegal questioning of Tejada. At this point and at no other time did officers ask Diogenes to advise Tejada of his Miranda rights.

Based on what Diogenes claims that he was told by Tejada, Duschame left the scene and proceeded to 15 Maginnis Avenue, Lawrence, Massachusetts. Once at 15 Maginnis Avenue ("the address"), Duschame radioed to confirm the address. About the same time Officer Inoa of the Lawrence Police Department ("Inoa") arrived on scene.[1] Inoa speaks both Spanish and English and was used as another un-trained, ad-hoc interpreter. Inoa confirmed the address with Tejada. Tejada was then placed into handcuffs. Inoa never Mirandized Tejada prior to asking him any questions.

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[1] Officer Laird's report identifies Officer Inoa as the person interpreting for the officers at the scene. The officer that helped "interpret" is not consistent from one officers report to another. Officer Augusta and Sergeant Duschame identifies Officer Ruffin as the person interpreting. For the purposes of this motion to suppress Officer Inoa is the person that will be the police officer interpreting on scene even though others may have been involved. It is the defendant's position that whomever questioned him did so in violation of all rights afforded him under the United States Constitution as well as the Massachusetts Declaration of Rights.

Officer Ruffin ("Ruffin")authored a report regarding her involvement in this investigation. In that report she claims to have gone to 6 Diamond Street to "assist with translation" Ruffin, like Inoa, is an un-trained, ad-hoc interpreter. According to Ruffin's report she arrived at 2:11PM and began to question Tejada. She never advised Tejada of his rights pursuant to Miranda, yet she continued to question him.[2]

At some point Tejada was placed into Inoa's cruiser "because she could translate" and brought to the address to confirm the address.[3]

Duschame ultimately made entry into the address and found two females and one male all deceased. Duschame then asked Tejada about the gun. At that point Tejada refused to answer. No officer ever advised Tejada of his rights prior to being taken to the Lawrence Police Station. Tejada was then taken to the Lawrence Police Station, advised of his rights, at which point he told officers "I've said all I'm gonna say let the law do what it has to".

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[2] Taken from Officer Ruffin's report

[3] Taken from Officer Laird's report

ARGUMENT

**I. Tejada did not knowingly, intelligently, and voluntarily waive his *Miranda* rights before being questioned by officers on September 5, 2011.**

Tejada argues that although he was not under arrest at the time of his interrogations, he was still in custody under the objective reasonable person standard. See Commonwealth v. Hilton, 443 Mass. 597, 609 (2005). Multiple officers arrived at 6 Diamond Street, based on a dispatch. Tejada was questioned about the basis of the dispatch while multiple officers detained him. He was not free to leave as the officers were investigating serious allegations. Tejada was out numbered by police who were questioning him. Tejada then had handcuffs placed on him by Laird and placed in the back of Inoa's cruiser.[4] Without conceding at what point Tejada was in custody and not free to leave, it is clear from the point when handcuffs were placed on him forward, Tejada was in custody, being questioned and was entitled to the rights afforded him pursuant to Miranda, which was not done. A reasonable

[4] Taken from Officer Laird's report. Other reports are in conflict with Officer Laird's report as to who was questioning Tejada and how he got from the scene were he was found.

person in Tejada's position would believe that they were in custody and not free to leave.

Officers would have been required to read him Miranda, and Tejada would have had to knowingly, intelligently, and voluntarily waive his rights before speaking to officers. In determining whether a waiver is constitutionally sufficient the burden of proof beyond a reasonable doubt rests on the Commonwealth, and the Court must examine the totality of circumstances surrounding the making of the waiver. See Commonwealth v. Edwards, 420 Mass. 666, 670 (1995); Commonwealth v. Magee, 423 Mass. 381, 386 (1996).

Statements made by Tejada to officers on September 5, 2011, were not made voluntarily. Tejada argues that the statements he allegedly made to police on these dates were not the product of a free and rational intellect. See Commonwealth v. Tavares, 385 Mass. 140, 145 (1982). "The test for voluntariness of a confession is 'whether in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act.'" Commonwealth v. Souza, 428 Mass. 478, 483-84 (1998), quoting Commonwealth v. Raymond, 424

Mass. 382, 395 (1997). The burden is on the Commonwealth to prove voluntariness beyond a reasonable doubt. Tavares, 385 Mass. at 145.

Officers began questioning Tejada about a serious crime that they were investigating. Tejada was not free to leave, while detained he was subjected to interrogation without the benefit of Miranda. He did not voluntarily make any statement and they were not the product of a free and rational intellect.

It is clear from the police reports that after Tejada was read his Miranda rights it had a sobering effect on him and he decided that he should wait for counsel and not speak any further.

**II. The community caretaking exception does not apply in this matter as there no need for immediate assistance.**

By law, "[l]ocal police officers are charged with community 'caretaking functions, totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute.'" Commonwealth v. Evans, 436 Mass. 369, 372 (2002), quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1972). However, the

community caretaking exception only applies in cases where the police are acting on an objectively reasonable belief that the safety of an individual or the public is jeopardized. Commonwealth v. Brinson, 440 Mass. 609, 615 (2003). Indeed, the Supreme Judicial Court has expressly held that the community caretaking exception does not apply absent the need for "immediate assistance." Commonwealth v. Smigliano, 427 Mass. 490, 492-493 (1998).

In Smigliano, the Court characterized the rationale behind the community caretaking exception in terms of a choice between leaving a citizen in harm's way and exposing the officer to liability or rendering immediate assistance. Smigliano, at 493. The burden is on the Commonwealth to demonstrate that "a well-being check [was] reasonable in light of an objective basis for believing that the defendant's safety and well being or that of the public may be in jeopardy." Commonwealth v. Knowles, 451 Mass. 91, 95 (2008). In Commonwealth v. Quezada, 67 Mass. App. 693, 694 (2006) officers noticed the defendant, who appeared "out of it," cross the street in front of their cruiser with a bandage on his forehead. Id. One of the officers ordered the defendant to stop and then chased the defendant when he

refused. Id. Despite the defendant's apparent injury, the Court still refused to apply the community caretaking exception because there was no need for immediate assistance. Id. at 695.

Officers made an initial inquiry of Tejada. Based on that initial inquiry they had an address that was alleged to be the scene of a serious crime. Officers went to the scene and attempted to gain access to the home. Separate and distinct, from that information, officers continued to question Tejada, who was not free to leave, about facts of the crime they were then investigating. None of the questions they asked related to the safety of an individual or the public they were simply asking inculpatory questions without the benefit of Miranda.

CONCLUSION

Wherefore for the above stated reasons as well as the attached affidavit of Jose Tejada, the defendant respectfully requests that his motion to suppress all statements illegally obtained by him be suppressed.

Respectfully submitted
Jose Tejada
By his attorney

John P. Morris, Esq. BBO#653918
60 Washington Street, Suite 201
Salem, Ma 01970
978-740-4480

Dated: 4/24/13

CERTIFICATE OF SERVICE

I hereby certify that true copies of the above documents were served upon the Essex County District Attorney's Office by hand delivery on April 26, 2013.

John P. Morris, Esq.

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT
INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

---

AFFIDAVIT IN SUPPORT OF DEFENDANTS
MOTION TO SUPPRESS STATEMENTS

---

I Jose Tejada, do hereby depose and state the following to be true to the best of my ability and belief:

1. I am the defendant in the above matter.

2. My attorney is John Morris.

3. On September 5, 2011 I was stopped by officers of the Lawrence Police Department.

4. I was questioned by these officers even though I did not understand English as I only speak and understand Spanish.

5. The officers initially used a person on the street to question with me. They then used Spanish speaking officers to question me.

6. I did not totally understand what they were saying to me. As I would consider myself poorly educated and illiterate, I did not attend formal schooling during my childhood. I worked on my grandfathers farm in the Dominican Republic when I was four or five years old instead of attending school.

7. Even though they questioned me I was not provided my rights until after I was taken to the Lawrence Police Station.

8. Once I was provided my rights I refused to answer any more of their questions.

9. Had I know what my rights were before the questioning began I would not have spoken to the officers.

10. At no time during my interaction with the police did I feel I was free to leave. In fact at one point they put handcuffs on me an put me in the back of a police car.

Signed under the pains and penalties of perjury this 26 day of April 2013.

Jose Tejada

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT
INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

---

AFFIDAVIT OF ATTORNEY JOHN P. MORRIS IN SUPPORT OF DEFENDANTS MOTION AND MEMORANDUM TO SUPPRESS STATEMENTS

---

I, John P. Morris, being a duly licensed attorney in the Commonwealth of Massachusetts do hereby depose and state the following to the best of my ability and belief:

1. I represent the defendant in the above captioned matter.

2. I have been provided discovery in this matter by the prosecutor, which I have reviewed. This discovery included police reports authored by different police officers from the Lawrence Police Department, including Officer Laird, Sergeant Duschame, Officer Ruffin and others.

3. Based on my review of these police reports and the other discovery no where was the defendant provided his Miranda warnings until he was placed under arrest, and taken to the police station.

4. Police questioned him at length about the crime that they were investigating that they believed he had committed yet they did not advise him of his right to remain silent or his right to speak to an attorney before any questioning.

5. I believe that the continued interrogation of the defendant, by officers, violated his rights under the Fifth Amendment to the United States Constitution and

Article 12 of the Massachusetts Declaration of Rights. I also believe that any statements by the defendant were not given knowingly, intelligently and voluntarily and therefore violated the defendants rights under the Four, and Fourteenth Amendment of the United States Constitution, and in violation of his rights under Article 14 of the Massachusetts Declaration of Rights of the Massachusetts Constitution.

6. Accordingly all statements made to the police must be suppressed.

7. Based on my review of the docket entries, court proceedings, discovery and conversations with the defendant, I believe the above accurately reflects the proceedings in this matter.

Signed under the pains and penalties of perjury this 24 day of April 2013.

John P. Morris

# APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT

INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

FILED IN COURT
ASST. CLERK
4/24/13

MOTION AND MEMORANDUM TO SUPPRESS STATEMENTS

Now comes the defendant, Jose Tejada ("Tejada") in the above captioned matter and respectfully moves, pursuant to Mass.R.Crim.P. Rule 13(a), that this Honorable Court suppress statements alleged to have been made by the defendant, to officers of the Lawrence Police Department, on September 5, 2011, as not being the product of knowing, intelligent or voluntary waiver of all rights afforded him under the United States Constitution and the Massachusetts Declaration of Rights.

The defendant states that at the time of his arrest he was subjected to an illegal detention and seizure of his person in violation of his Four, and Fourteenth Amendment rights under the United States Constitution, and in violation of his rights under Article 14 of the

After hearing and review of all submissions Motion is Allowed as to Statements made while the defendant was Handcuffed in the Police Cruiser. The Motion is otherwise Denied. Leila Quad

findings as stated on the record. Transcript ordered to be produced. MJC 4/24/14

| Docket Date | Docket Text | File Ref Nbr. | Image Avail. |
|---|---|---|---|
| 09/11/2013 | MOTION by Deft: for additional funds for investigator and order | 21 | |
| 09/11/2013 | MOTION (P#21) allowed (Mary K. Ames, Justice). | | |
| 09/23/2013 | Interpreter present: Genevieve K. Howe on 9/23/2013 | | |
| 09/23/2013 | Hearing on (P#19) held, matter taken under advisement (Mary K. Ames, Justice) | | |
| 11/21/2013 | After hearing Dr. Joss to provide report within 21 days (Lu, J) | | |
| 12/09/2013 | Deft files First production of reciprocal discovery. | 22 | |
| 02/24/2014 | MOTION (P#19) denied (Ames, J.) After hearing and review of all submissions. Motion is ALLOWED as to statements made while defendant was seated, handcuffed in the police cruiser. The motion is otherwise DENIED. Rulings and findings as stated on the record. Transcript ordered to be produced. 2/24/14. Copies mailed to J.C & J.M. | | |
| 02/24/2014 | Court Reporter Rael, Kathleen M. is hereby notified to prepare one copy of the transcript of the evidence of 9/11/2014 | 23 | |
| 06/30/2014 | Joint Pre-Trial Memorandum Filed | 24 | |
| 07/01/2014 | MOTION by Deft: for funds to hire a firearms expert.; Affidavit in support of motion;Filed in court & ALLOWED, not to exceed $2,500. (John T. Lu) 7/1/14. | 25 | |
| 07/03/2014 | Deft files Notice of Expert Witness. | 26 | |
| 08/11/2014 | Regarding jury trial: Case called to trial, Hearing held on pre-trial motions & impanelment begins. Cont'd to 8/12/14 for further impanelment. (Whitehead, J.) | | |
| 08/12/2014 | Impanelment of jurors on this date 8/12/14, Jury sworn & evidence begins;cont'd to 8/14/14 for further trial. (Whitehead, J.) | | |
| 08/20/2014 | MOTION by Commonwealth: Motion in limine to introduce autopsy photographs. Filed 8/12/14 | 27 | |
| 08/20/2014 | MOTION (P#27) allowed. See transcript for discussion (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Deft: Motion for examination of jurors. Filed 8/11/14. | 28 | |
| 08/20/2014 | MOTION (P#28) See transcript for discussion (Howard Whitehead, Justice). | | |
| 08/20/2014 | Commonwealth files Notice of discovery 4. Filed 8/11/14 | 29 | |
| 08/20/2014 | Commonwealth files Notice of discovery 5. Filed 8/11/14 | 30 | |
| 08/20/2014 | Commonwealth files Notice of discovery 6. Filed 8/11/14. | 31 | |
| 08/20/2014 | MOTION by Deft: Motion for sequestration of witnesses filed 8/12/14. | 32 | |
| 08/20/2014 | MOTION (P#32) allowed except for Lt. Zuk, victims family, and def. family (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Deft: Motion in limine and memorandum to exclude references to the defendant's prior "bad acts". filed 8/12/14. | 33 | |
| 08/20/2014 | MOTION (P#33) allowed (Howard Whitehead, Justice). | | |
| 08/20/2014 | MOTION by Commonwealth: Motion for a view. Filed 8/12/14. | 34 | |
| 08/20/2014 | MOTION (P#34) allowed (Howard Whitehead, Justice). | | |
| 08/22/2014 | Request by defendant for jury instructions.;Filed in court 8/22/14(Whithead, J.) | 35 | |
| 08/25/2014 | MOTION by Deft: for required finding of not guilty at close of all of the evidence.Filed in court & :Denied" 8/25/14(Whitehead, J.) | 36 | |
| 08/25/2014 | MOTION by Deft: for required finding of wot guilty at close of Commonwealth's case.;Filed in court & "Denied" 8/25/14;(whitehead, J.) | 37 | |

A.2

# APPENDIX H

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION NO.: ESCR 2011-1390

COMMONWEALTH

vs.

JOSE TEJADA

(Paper No.:9)

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

The defendant, Jose Tejada ("Tejada "or "Defendant") is charged with three counts of first degree murder in violation of G. L, c. 265, §1. Tejada now moves this court to the suppress statements he made to Lawrence Police Officers on September 5, 2011. As grounds for his motion, Tejada argues that his statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and his Massachusetts Declaration of Rights Article XII rights. Tejada maintains that he did not knowingly and voluntarily waive his right to silence at the time the statements were made and that his statements were not voluntary. Tejada further seeks to suppress the fruits of the stop, search and arrest on September 5, 2011, on grounds that this evidence was obtained in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Articles 12 and 14 of the Massachusetts Declaration of Rights. Specifically, the Defendant argues that his warrantless stop, detention and arrest were unlawful.

Evidentiary hearings were held on August 29, 2013 and September 11, 2013. On September 23, 2013 supplemental memoranda were filed by counsel and oral arguments were heard by the court.

At hearing, testimony was received from Lawrence Police Officers Ariskelda Inoa and Alan Laird, Detective Dave Augusta and Sergeant John Ducharme. Seven photographs were entered into evidence. The Court finds the testimony of each witness to be credible in all respects, and accordingly adopts such testimony as part of its findings.

This court issued its decision with a margin note on the motion reflecting its ruling and the court dictated findings of fact and rulings of law onto the record. This court requested production of the transcript of the rulings and findings with copies to be mailed to counsel of record and a copy to be placed on the docket. The case proceeded to trial and the defendant was convicted. Defendant filed his notice of appeal on August 27, 2014. Unbeknown to the court, the transcript of the court's rulings and findings on the motion to suppress was never produced. During the appeal the Commonwealth requested a stay to obtain the transcript. The stay was allowed by the Supreme Judicial Court. A diligent search was made to attempt to locate the recording, to no avail. It became apparent that the original findings and rulings by the court are hopelessly lost.

On March 12, 2018, the Commonwealth filed an assented to Motion to Reconstruct the Record Pursuant to Mass. R. App. P.8 (c). On April 18, 2018 the court allowed the motion ruling that the court will be able to faithfully reconstruct its factual findings and rulings

of law on the defendant's motion to suppress. Thereafter, this court obtained the papers, hearing transcripts and located its own extensive notes of the proceedings.

For the reasons that follow, the Defendant's Motion to Suppress is **ALLOWED** as to statements made while defendant was seated, handcuffed in the police cruiser. The motion is otherwise **DENIED**.

## FINDINGS OF FACT

Based on the credible evidence introduced at the evidentiary hearing and reasonable inferences therefrom, the court finds the following facts.

On September 5, 2011 at approximately 2:00A.M. a radio dispatch went out over the air informing patrol officers that a civilian, later identified as one Luciano Diogenes, called to report he was with a man, later identified as the defendant, who said he killed his family and was crying. Officer Laird was on patrol in his sector when the dispatch was made directing him to 6 Diamond Street, a part of the Diamond Springs Apartments, a part of his sector. Arriving quickly, he observed the defendant in conversation with Mr. Diogenes. The defendant was making eye contact with Mr. Diogenes and appeared to interact appropriately with him. Mr. Diogenes told Officer Laird he was getting out of his car with his own family when approached by the defendant who wanted to speak with him. Concerned for his family, he got them into the house and spoke to the defendant, calling the police, and remaining with Tejada until police arrived. Mr. Diogenes told police, "This guy told me to call the police because he killed someone". Officers tried to speak with Tejada but quickly realized he did not speak English. Diogenes translated for police until the arrival of Officer Ariskelda Ruffin- Inoa, a native Spanish speaker from birth.

Tejada was comfortably seated on a curb when Officer Liard arrived. Officer Laird noticed a small amount of blood on the defendant's pants. Officer Laird tried to speak to Tejada in Spanish to no avail so Diogenes, fluent in both English and Spanish, translated for him until Officer Inoa and Sergeant Ducharme arrived moments later. Throughout the encounter Tejada appeared to understand all that was transpiring and remained calm and spoke slowly. They were located in a well-lit parking lot. The defendant was not in custody. Laird began by asking Tejada what is going on. Where do you live? Who did you kill? Tejada answered, through Diogenes, responded he killed his family, more than one person, at 15 McGuinness. Officer Laird was next joined on scene by Sergeant Ducharme who called for a Spanish speaking officer. Officer Inoa responded with Detective Augusta. When Sergeant Ducharme arrived Tejada and Diogenes were seated on the curb and Laird was standing alone in front of them. There was no one else in the parking lot. Ducharme asked what happened. Tejada told him he does not speak English. Diogenes told Sergeant Ducharme that Tejada told him he killed people and threw the gun away. Tejada then said (with Diogenes translating) I had enough I killed them. When asked where Tejada said, 15 McGuinness, two to three blocks away.

Upon her arrival, Officer Iona translated for police and the defendant. Diogenes remained with Tejada. When asked how did this happen Tejada gestured with his hand making a gun motion to his head. He said they kept yelling at me, and they wouldn't shut up so I shot them, took out a 357 and shot all three put the gun to the head pulled the trigger until there were no bullets left. Concerned for the safety of the residents of the projects and knowing there were lots of children living in the area the officer next asked the location of the weapon. Tejada said he threw it when he left the apartment, tossed it when he went for a walk. Tejada remained calm and conversational throughout each encounter. He spoke calmly, slowly and clearly. He

remained seated on the curb, he was not handcuffed and while he was not then free to leave no one informed him of that or physical restrained or detained him. Tejada was not cuffed at any point as officers spoke to him while he was seated on the curb. His movements were not directed by officers, he was not asked to sit or to stand and no one put their hands on him. The officers were standing in front of him but to the side, he was not surrounded or blocked by the officers. To this point police had no information concerning anyone shot or injured. They had no knowledge if any of the defendant's statements were true. However, there was concern that there may be injured parties needing medical help.

Sergeant Ducharme left immediately for 15 McGuinness Street. Within moments Sergeant Ducharme called over the radio that he could not gain entry to the apartment. Still not sure that the statements were true but worried there might be injured people needing medical help, Tejada was asked to stand up, for his and officer safety was frisked, hand cuffed, placed in the cruiser and taken to 15 McGuinness. He was not yet placed under arrest or informed he was in custody. A beautiful night, the rear windows of the cruiser were down. Officers still had no verification from any source of the information provided by Tejada.

Additional officers and an ambulance joined Sergeant Ducharme who was standing outside at 15 McGuinness. When the defendant first arrived, seeing the officer trying to gain entrance, not in response to any question he stated, no one is going to answer, break the door down. When asked if he had the key he said no. They confirmed the names on the door, address and location with the defendant. The ambulance personnel on scene approached and asked Tejada if he was all right. He responded he was fine.

There were lights on upstairs in the house but no response to knocking on the door which was locked. The door had to be forced open. Sergeant Ducharme saw bloody footsteps on the

stairs and blood on the floor. Laird, Ducharme and Michaud went upstairs and discovered a young woman, an older woman and a young man all dead in one room, almost on top of one another. There was lots of blood. Bloody footprints went down the stairs and out the back door. Officers confirmed there were no other people in the home and then left the home. The scene was secured, notifications were made and the officers awaited the arrival of the homicide detectives. A K-9 was brought to the scene and a firearm was recovered 20-25 feet from the door. Sergeant Ducharme placed the defendant under arrest. The defendant was not asked any further questions.

Tejada was taken to the station and booked. During the booking process he was advised of the Miranda rights for the first time. In response Tejada said, I have said all I am going to say, let the law do what it is going to do to me.

## RULINGS OF LAW

### The initial encounter

The defendant first argues he was unlawfully detained and as such all fruits of the unlawful detention must be suppressed. There is no merit in this argument. This defendant was neither stopped nor seized by police until probable cause to arrest existed. To the contrary, he sought out the police at a time when they had no information relating to any crime, no victim was discovered and no one was suspected of any wrong doing. To be sure as the events unfolded, reasonable suspicion developed which ripened into probable cause, but the encounter began when police were called to the parking lot at the defendant's request. He sought to convince first the civilian witness and then the police, who were skeptical of his account, that he

had killed his family. He never sought to leave and was not detained until the evidence had developed. Suppression is not warranted in these circumstances.

**Statements made by the defendant at the time of the encounter in the parking lot were not the product of an illegal detention, were not obtained in violation of Miranda and were voluntary.**

The court next addresses the series of statements attributed to the defendant.

The Commonwealth attributes and the defense challenges four statements to the defendant. First the statements to Mr. Diogenes before the arrival of police. These statements, to a civilian, without state action, are not subject to suppression but will be addressed in the context of voluntariness. Second, the statements to Officer Laird then joined by Sergeant Ducharme and Officer Inoa in the parking lot. Third the statements in the police car and finally the statements at booking, post *Miranda*.

Tejada first argues his rights against self-incrimination were violated because he was not given the *Miranda* warnings during the initial Terry stop and that the warnings were required because the questioning was "custodial". This Court disagrees.

Under *Miranda v. Arizona,* 384 U.S. 436 (1966), when an individual is taken into custody, police are required to inform that individual of his rights against self-incrimination and to an attorney. In addition, the police must obtain a knowing, intelligent, and voluntary waiver of those rights before any interrogation otherwise any subsequent statement is inadmissible. Id. at 444–45; *Commonwealth v. Bryant,* 390 Mass. 729, 736 (1984); *Commonwealth v. Hass,* 373 Mass. 545, 552 (1977).

Miranda warnings are only required when an individual, is subject to custodial interrogation. See *Commonwealth v. Morse,* 427 Mass. 117, 122–23 (1998); *Commonwealth v. A*

*Juvenile*, 402 Mass. 275 (1988). The defendant bears the burden of proving custody. *Commonwealth v. Larkin*, 429 Mass. 426, 432 (1999).

"[C]ustodial interrogation [is] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of [her] freedom in any significant way." *Miranda v. Arizona*, 384 U.S. at 444 (1966); see *Commonwealth v. Haas*, 373 Mass. 545, 551–54 (1977). In determining if a person is deprived of freedom in a significant way, the Supreme Judicial Court has recognized four factors to be considered: "(1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned any belief or opinion that the person is a suspect; (3) the nature of the interrogation, i.e. whether the interview was aggressive or, instead, informal; and (4) whether, at the time the incriminating statement or statements were made, the suspect was free to end the interview by leaving the place of the interrogation or by asking the interrogator to leave, or, alternatively, whether the interview terminated with the defendant's arrest." *Commonwealth v. Sneed*, 440 Mass. 216, 220 (2003); see also *Commonwealth v. Ira I*, 439 Mass. 805, 814 (2003).

"The test is an objective one: whether a reasonable person in the suspect's shoes would experience the environment in which the interrogation took place as coercive." *Commonwealth v. Larkin*, 429 Mass. at 432. The critical question is "whether, considering all the circumstances, a reasonable person in the defendant's position would have believed that [she] was in custody." *Commonwealth v. Sneed*, 440 Mass. at 220, quoting *Commonwealth v. Brum*, 438 Mass. 103, 111 (2002).

Here, while in the parking lot talking with Mr. Diogenes joined by Officer Laird, Inoa and Ducharme, considering all the circumstances, a reasonable person in Tejada's position would not have understood that he was in custody. Police do not effectuate a seizure merely by asking

questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away. *Commonwealth v Lopez* 451 Mass. 608, N.E. 2d 1065 (2008). A question is not an order. Of course, that does not end the inquiry. The court must also consider whether the officers objectively made a show of authority sufficient to create a seizure.

A person has been seized by a police officer "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Commonwealth v. Borges*, 395 Mass. 788, 791, 482 N.E.2d 314 (1985), quoting *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). "[N]ot every encounter between a law enforcement official and a member of the public constitutes an intrusion of constitutional dimensions requiring justification." *Commonwealth v. Stoute*, 422 Mass. 782, 789, 665 N.E.2d 93 (1996). "[T]he police do not effect a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his back on his interrogator and walk away." *Commonwealth v. Fraser*, supra. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Commonwealth v. Thinh Van Cao*, 419 Mass. 383, 388 n. 7, 644 N.E.2d 1294, cert. denied, 515 U.S. 1146, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

The facts herein do not support the proposition that the police effected the seizure of Tejada. To the contrary, there was no evidence of a raised voice or pursuit. Tejada was not told he could not refuse to answer. He was not under arrest or handcuffed. No officer placed hands on Tejada. There is no evidence of cruiser lights being illuminated or the siren on. The entire

exchange was of brief duration. There are no facts sufficient to support the proposition that this defendant was in custody or subjected to custodial interrogation. Although officers held their own belief that Tejada was not free to go they never conveyed that to him by words or actions. Officers never conveyed any thought or belief that Tejada was a suspect. The encounter was not aggressive. The officers used a conversational tone and spoke conversationally to Tejada who calmly answered and volunteered additional information not in response to any question. There was nothing in their action, manner or tone to suggest Tejada was not free to leave. Indeed it was Tejada who reached out to the officers. The second set of statements of the defendant, to officers in the lot was not as a result of custodial interrogation. *Commonwealth v Groome*, 435 Mass. 201, 211-212 (2001). Miranda warnings were not required. Moreover the questions concerning the location of the gun were further warranted by the concerns for public safety of the families and many children in the project.

The statements made while the defendant was seated and handcuffed in the cruiser present a different circumstance under which suppression is required.

Finally, this court views the statement of the defendant made at booking as an invocation of his Miranda rights. They too must be suppressed.

**Each of the statements made by the defendant at were voluntary.**

Apart from a consideration of the validity of a Miranda waiver, due process requires a separate inquiry into the voluntariness of a statement. *Commonwealth v. Magee*, 432 Mass. 381, 385 (1996). The court must look at the totality of the circumstances surrounding the making of the statement, "to ensure that the defendant's confession was a free and voluntary act and was not the product of inquisitorial activity which had overborne [her] will." *Commonwealth v. Mahnke*, 368 Mass. 662, 680 (1975), cert. denied, 425 U.S. 959 (1976). "Relevant factors include, but are

not limited to, promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings." *Commonwealth v. Selby,* 420 Mass. 656, 663 (1995), quoting *Commonwealth v. Mandile,* 397 Mass. 410, 413 (1986). Again, the Commonwealth bears the burden of proving that the defendant's statement was voluntary beyond a reasonable doubt. *Commonwealth v. Tavares,* 385 Mass. 140, 151–52 (1982).

In viewing the totality of the circumstances in this case, the Commonwealth has sustained its burden of showing beyond a reasonable doubt that Tejada's statement of September 5, 2011 was voluntary. As stated above, the encounter was initiated by Tejada, the conversation and questions and the conduct of the police officers was neither coercive nor aggressive. Tejada was calm, confident, articulate, demonstrated intelligence and conversed easily with Mr. Diogenes and the officers. Finally there is no evidence that any officer acted in such a way as to intimidate or coerce Tejada into making the statement. His will was not overborne. The statements were voluntary.

**ORDER**

For the foregoing reasons, the Defendant's Motion to Suppress is **ALLOWED** as to statements made while defendant was seated, handcuffed in the police cruiser. The motion is otherwise **DENIED**.

SO ORDERED.

Mary K. Ames
Justice of the Superior Court

Date: October 9, 2018



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# APPENDIX I

28

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS

SALEM SUPERIOR COURT
INDICTMENT NO. ESCR11-1390

COMMONWEALTH

V.

JOSE TEJADA

**MOTION FOR EXAMINATION OF JURORS**

Now comes Jose Tejada ("Tejada"), by his Attorney John P. Morris ("Morris"), in the above-numbered indictment and requests pursuant to G.L. c. 234, § 28, that this Court put the following questions to each person called as a juror in order that the defendant, a white male charged with murder, may intelligently exercise her right to peremptory challenges, and to ensure that each juror stands indifferent in this case and is not affected by any bias, prejudice, or interest. *See Commonwealth v. Flebotte*, 417 Mass. 348 (1994); *Commonwealth v. Fuller*, 423 Mass. 216, 222 n.5 (1996); *Commonwealth v. Allen*, 379 Mass. 564, 576 (1980); *Commonwealth v. Soares*, 377 Mass. 461 (1979); *Rosales-Lopez v. United States*, 101 S. Ct. 1629, 1636 (1981); *Commonwealth v. Sanders*, 383 Mass. 637 (1981); *Commonwealth v. Dela Cruz*, 405 Mass. 269 (1989).

**I. JUROR'S RELUCTANCE TO VOLUNTEER PERSONAL INFORMATION IN A GROUP**

Tejada further moves that all questions be put to each juror individually and outside the presence of other persons about to be called as jurors, or already called, as provided by G.L. c. 234, § 28. *Commonwealth v. Shelley*, 381 Mass. 340, 353 n.12 (1980); *see Commonwealth v. Flebotte*, 417 Mass. 348 (1994). It has been counsel's experience that, for various reasons, members of the venire often do not fully complete the written juror questionnaire and/or do not volunteer personnel, and potentially disqualifying information, to the court unless individually asked.

In addition, the Supreme Judicial Court has recognized the potential difficulty individual jurors have in volunteering personal information while situated in a group. For example, see *Commonwealth v. Lafaille*, 430 Mass. 44, 57 (1999) (Ireland, J. concurring); *Commonwealth v. Flebotte*, 417 Mass. 348 (1994) ("adult victims of childhood sexual offenses may be reluctant to come forward from a venire and discuss such a private and highly emotional event with a judge").

**II. JUROR'S POTENTIAL EXPOSURE TO "EXTRANEOUS INFLUENCES" FROM THE MEDIA**

Potential jurors in Essex County have been exposed to massive amounts of highly prejudicial publicity concerning crime and homicides involving family members, domestic partners, hus-

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band and wives as well as boyfriends and girlfriends.[1] In addition, there have been numerous references in the printed media to this specific case. Media coverage has repeatedly dealt with the issues of violent crime, particularly within the community from which the defendant, deceased, and many of the potential jurors have lived or work in. The publicity presents "a substantial risk of extraneous influences upon the jury." *Commonwealth v. Kendrick*, 404 Mass. 298, 303 (1989) (quoting *Commonwealth v. Boyer*, 40 Mass. 52, 55 (1987)).

## III. CONCLUSION

Therefore, "it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent." G.L. c. 234, § 28. Because of this the court should individually examine the prospective jurors as to these considerations or "any other matters" that may cause a decision to be based, even partly, on extraneous issues. G.L. c. 234, § 28. [See Appendices in Support attached and incorporated herein.]

## RE: STATEMENT OF FACTS

1. Jose Tejada is a Hispanic male, charged with the homicide of his girlfriend and her two teenaged children. Mr. Tejada is alleged to have committed the crime with firearm, where he shot a three with that firearm. Mr. Wright denies the allegations.

   a) Have you read or heard anything about this case from the newspapers, radio, or television?

   b) Based on these facts does and the fact that Mr. Tejada is charged with murder affect in any way your ability to be fair and impartial?

## RE: NATURE OF THE CHARGES

2. This case involves three charges of murder. In addition to what is alleged to have occurred on the night in question there may be evidence of illegal drug use by Mr. Tejada as well as alleged domestic violence in the past.

3. Drugs and violence are issues that have received a great deal of media attention. Newspapers, magazines, television, and radio talk shows are constantly reporting events surrounding these issues. Is there anything that you have read or heard that would affect your ability to decide this case solely on the evidence that you will hear in this courtroom?

## RE: CREDIBILITY

4. Have you or any of your relatives or close friends been the victim of a violent crime?

5. If the evidence were in conflict, would you tend to believe or disbelieve the testimony of a police officer, as opposed to any other witness, just because he/she is a police officer?

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[1] Commonwealth v. Jared Remy.

**RE: PRESUMPTION OF INNOCENCE**

6. Under our system of law, a defendant in a criminal trial has a guaranteed right to be considered innocent until proven guilty. Do you think a defendant in a criminal trial should be made to prove her innocence?

7. A Defendant in a criminal case has an absolute right not to testify. Would you hold it against Mr. Tejada in any way if he did not testify in this case?

8. Do you believe that because Mr. Tejada has been charged in this case, he is guilty?

**If Gruesome Injuries, Photographs, or Testimony expected:**

9. If you are selected as a juror in this case, you will be asked to view particularly graphic and grotesque photographs depicting, the lifeless, dead bodies of all three victims, in addition to bloody photographs of all three victims.

   a) Have you had any life experiences that would make it difficult for you to look at such photographs?

   b) Would you be able to view graphic and grotesque photographs?

   c) Does the possibility of viewing such photographs affect your ability to serve fairly as a juror?

   d) Would you be able to keep an open mind after viewing such photographs?

10. If you are selected to sit as a juror in this case, you will hear testimony from certain witnesses describing the injuries sustained by the victims, as well as descriptions of the condition of the body of the victims. These physical descriptions may be particularly gruesome and grotesque.

    a) Have you had any life experiences that would make it difficult for you to hear such testimony?

    b) Would you be able to listen to such testimony?

    c) Does the possibility of hearing such testimony affect your ability to serve fairly as a juror?

    d) Would you be able to keep an open mind after hearing such testimony, even if the testimony was particularly gruesome?

11. Some of the evidence presented in this case may be repulsive to you and may even turn your stomach. Are you still able to sit as a fair and impartial juror knowing this? Can you assure the court that any such feelings of repulsion will not interfere with your ability to consider the evidence in this case fairly and impartially?

12. Do you have any feelings about guns in general that may cause you to be biased against Mr. Tejada?

13. Do you believe that Hispanics, from cities such as Lawrence, are more likely to commit crimes of violence that any other ethnicity of people?

14. As you can see the defendant requires the services of an interpreter. Does this fact alone affect your ability to be a fair and impartial juror?

Respectfully Submitted,
Jose Tejada,
By his Attorney,

John P. Morris, Esq.
BBO No. 653918
60 Washington Street, Suite 201
Salem, MA 01970
(978) 740-4480

Date: August 11, 2014

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the Essex County District Attorney's Office by hand delivery on August 11, 2014.

John P. Morris, Esq.

# APPENDIX J

32

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT
INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

8/25/14
"Denied"
ATT: James E Clum
ASST.

MOTION FOR REQUIRED FINDING OF NOT GUILTY
AT CLOSE OF COMMONWEALTH'S CASE

Now comes the Defendant in the above-entitled action and hereby respectfully moves this Honorable Court to enter a finding of not guilty on the above-numbered Complaints, on the ground that the evidence is insufficient to sustain a conviction. Commonwealth v. Latimore, 378 Mass. 671, 677-78 (1979).

Specifically, the defendant moves the court find that he did not commit the crime alleged with deliberate premeditation or with extreme atrocity or cruelty.

The Supreme Judicial Court has set out a number of factors a jury must consider in deciding whether a murder was committed with extreme atrocity or cruelty, commonly referred to as the *Cunneen* factors. Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983); Commonwealth v. Akara, 465 Mass. 245, 259-61 (2013); Commonwealth v. Linton, 456 Mass. 534, 536 n.10 (2010). These include the following:

- whether there is evidence of indifference to, or taking pleasure in the victim's suffering;
- the consciousness and degree of suffering by the victim;
- the extent of physical injuries to the victim;
- the number of blows to the victim;
- the manner and force with which the blows were delivered;
- the instrument employed by the defendant; and
- the disproportion between the means needed to cause death and those employed.

It is error to instruct that extreme atrocity or cruelty is not limited to the *Cunneen* factors. Commonwealth v. Smith, 460 Mass. 318, 323 (2011). The jury only needs to find one factor present to convict on this theory, but the jury must find at least one *Cunneen* factor. Commonwealth v. Boateng, 438 Mass. 498, 511 (2003); Commonwealth v. Semedo, 422 Mass. 716, 727 (1996); Commonwealth v. Blackwell, 422 Mass. 294, 299 (1996) (error to fail to instruct that jury must find at least one factor to convict under this theory).

In the case at bar, the defendant argues that none of the *Cunneen* factors are present and for a conviction of murder with extreme atrocity or cruelty at least one of these factors must be present.

The facts, taken in the light most favorable to the Commonwealth, are that the defendant killed Milka Rivera and Sanchary Montanez with a single gun shot and that the third victim, Maxariel Montanez, had two gunshot wounds, one of which was preceded by a graze to the neck in the area of one of the two wounds. The Commonwealth has not put forth any evidence that the defendant had any indifference to or took pleasure in the victim's suffering. The evidence presented simply lacks any specificity as to how the crime occurred or whether or not the defendant had any indifference at the time of the killings.

The evidence that has been put forth includes the defendant approaching an unknown individual immediately after the killings and telling him that he needed to go to the police because he had killed his family. He didn't run from the scene, make any representations as to how he felt about killing them and made no statements that could have been interpreted to suggest he took any pleasure in the killings.

WHEREFORE, defendant requests that this Court enter a finding of not guilty to murder with extreme atrocity or cruelty and not guilty to murder with deliberate premeditation.

Respectfully Submitted
Defendant,
By his Attorney,

John P. Morris, Esquire
60 Washington Street, Suite 201
Salem, MA 01970
978-740-4480
BBO #653918

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the Essex County District Attorney's Office [ ] by prepaid 1st class U.S. Mail [ ] by prepaid UPS Tracking No. _____ [X] by hand delivery on 8/25, 2014.

John P. Morris, Esq.

# APPENDIX K

36

COMMONWEALTH OF MASSACHUSETTS

ESSEX.SS SALEM SUPERIOR COURT
INDICTMENT NO. ESCR2011-1390

COMMONWEALTH OF MASSACHUSETTS

V.

JOSE TEJADA

8/25/14
"Denied"
Att: James E. Clancy
Asst. Clerk

MOTION FOR REQUIRED FINDING OF NOT GUILTY
AT CLOSE OF ALL OF THE EVIDENCE

Now comes the Defendant in the above-entitled action and hereby respectfully moves this Honorable Court to enter a finding of not guilty on the above-numbered Complaints, on the ground that the evidence is insufficient to sustain a conviction. Commonwealth v. Latimore, 378 Mass. 671, 677-78 (1979).

Specifically, the defendant moves the court find that he did not commit the crime alleged with deliberate premeditation or with extreme atrocity or cruelty.

The Supreme Judicial Court has set out a number of factors a jury must consider in deciding whether a murder was committed with extreme atrocity or cruelty, commonly referred to as the *Cunneen* factors. Commonwealth v. Cunneen, 389 Mass. 216, 227 (1983); Commonwealth v. Akara, 465 Mass. 245, 259-61 (2013); Commonwealth v. Linton, 456 Mass. 534, 536 n.10 (2010). These include the following:

- whether there is evidence of indifference to, or taking pleasure in the victim's suffering;
- the consciousness and degree of suffering by the victim;
- the extent of physical injuries to the victim;
- the number of blows to the victim;
- the manner and force with which the blows were delivered;
- the instrument employed by the defendant; and
- the disproportion between the means needed to cause death and those employed.

It is error to instruct that extreme atrocity or cruelty is not limited to the *Cunneen* factors. Commonwealth v. Smith, 460 Mass. 318, 323 (2011). The jury only needs to find one factor present to convict on this theory, but the jury must find at least one *Cunneen* factor. Commonwealth v. Boateng, 438 Mass. 498, 511 (2003); Commonwealth v. Semedo, 422 Mass. 716, 727 (1996); Commonwealth v. Blackwell, 422 Mass. 294, 299 (1996) (error to fail to instruct that jury must find at least one factor to convict under this theory).

In the case at bar, the defendant argues that none of the *Cunneen* factors are present and for a conviction of murder with extreme atrocity or cruelty at least one of these factors must be present.

The facts, taken in the light most favorable to the Commonwealth, are that the defendant killed Milka Rivera and Sanchary Montanez with a single gun shot and that the third victim, Maxariel Montanez, had two gunshot wounds, one of which was preceded by a graze to the neck in the area of one of the two wounds. The Commonwealth has not put forth any evidence that the defendant had any indifference to or took pleasure in the victim's suffering. The evidence presented simply lacks any specificity as to how the crime occurred or whether or not the defendant had any indifference at the time of the killings.

The evidence that has been put forth includes the defendant approaching an unknown individual immediately after the killings and telling him that he needed to go to the police because he had killed his family. He didn't run from the scene, make any representations as to how he felt about killing them and made no statements that could have been interpreted to suggest he took any pleasure in the killings.

WHEREFORE, defendant requests that this Court enter a finding of not guilty to murder with extreme atrocity or cruelty and not guilty to murder with deliberate premeditation.

Respectfully Submitted
Defendant,
By his Attorney,

John P. Morris, Esquire
60 Washington Street, Suite 201
Salem, MA 01970
978-740-4480
BBO #653918

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the Essex County District Attorney's Office [ ] by prepaid 1st class U.S. Mail [ ] by prepaid UPS Tracking No. _____ [X] by hand delivery on 8/25, 2014.

John P. Morris, Esq.

# APPENDIX L

31

# COMMONWEALTH OF MASSACHUSETTS

**ESSEX, SS** **DOCKET NO. ESCR2013-1390-001**

8/25/14
Filed & Recorded
at 4:30 PM
ATT: Jessica E Clerk

## VERDICT SLIP

## COMMONWEALTH
## VS.
## JOSE TEJADA

# MURDER 1ST DEGREE

## (Milka Rivera)

1. ( ) **NOT GUILTY**

2. ( X ) **GUILTY- Offense as Charged**

   ( X ) **DELIBERATE PREMEDITATION**

   ( X ) **EXTREME ATROCITY/CRUELTY**

3. ( ) **GUILTY - Lesser Included Offense**

   ( ) **MURDER 2ND DEGREE**

DATE: 8/25/14

**FOREPERSON OF THE JURY**

R.A. 31

# APPENDIX M

# COMMONWEALTH OF MASSACHUSETTS

**ESSEX, SS** **DOCKET NO. ESCR2013-1390-002**

# VERDICT SLIP

8/25/14
Filed & Received
at 4:30 pm
Attn: Jan E Clerk
Asst. Clerk

## COMMONWEALTH
## VS.
## JOSE TEJADA

# MURDER 1ST DEGREE

## (Sachary Montanez)

1. ( ) **NOT GUILTY**

2. ( X ) **GUILTY- Offense as Charged**

   ( X ) **DELIBERATE PREMEDITATION**

   ( X ) **EXTREME ATROCITY/CRUELTY**

3. ( ) **GUILTY - Lesser Included Offense**

   ( ) **MURDER 2ND DEGREE**

DATE: 8/25/14

**FOREPERSON OF THE JURY**

R.A. 32

# APPENDIX N

41

# COMMONWEALTH OF MASSACHUSETTS

**ESSEX, SS** **DOCKET NO. ESCR2013-1390-003**

## VERDICT SLIP

8/25/14
Filed & Recorded
at 4:30 pm
ATT: James McClain
Asst Clerk

## COMMONWEALTH
## VS.
## JOSE TEJADA

# MURDER 1ST DEGREE

## (Max Ariel Montanez)

1. ( ) **NOT GUILTY**

2. ( X ) **GUILTY- Offense as Charged**

   ( X ) **DELIBERATE PREMEDITATION**

   ( X ) **EXTREME ATROCITY/CRUELTY**

3. ( ) **GUILTY - Lesser Included Offense**

   ( ) **MURDER 2ND DEGREE**

DATE: 8/25/14

**FOREPERSON OF THE JURY**

# APPENDIX O

46

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

ESSEX SUPERIOR COURT
SALEM SESSION
INDICTMENT NO. ESCR2011-1390

COMMONWEALTH

v.

JOSE TEJADA

8/27/14
Filed:
Att: Jam E Clancy
Asst. Clerk

NOTICE OF APPEAL

Now comes counsel for the defendant and files notice of appeal in this matter in accord with Mass.R.App.P. 3. As reasons the defendant states that he was aggrieved by certain opinions, rulings, and judgments of the Court during trial.

Respectfully Submitted
Jose Tejada,
By his Attorney,

John P. Morris, Esquire
60 Washington Street, Suite 201
Salem, MA 01970
978-740-4480
BBO #653918

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the Essex County District Attorney's Office[ ] by prepaid 1st class U.S. Mail [ ] by prepaid UPS Tracking No. _____ [X] by hand delivery on 8/25, 2014.

John P. Morris, Esq.

R.A.34

# APPENDIX P

**(ORDER LIST: 589 U.S.)**

**THURSDAY, MARCH 19, 2020**

**ORDER**

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

**IT IS ORDERED** that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

**IT IS FURTHER ORDERED** that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

**IT IS FURTHER ORDERED** that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

**IT IS FURTHER ORDERED** that these modifications to the Court's Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.

# APPENDIX Q

Current through Public Law 116-152, approved August 4, 2020.



# § 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**