No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

DANIEL ROSA
Petitioner

-vs-

BRUCE GELB, Superintendent,
Souza Baranowski Correctional Center
Respondent

On Petition for Writ of Certiorari to the
Court of Appeals for the First Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX 1

United States Court of Appeals
For the First Circuit

No. 20-1686

DANIEL ROSA,

Petitioner - Appellant,

v.

BRUCE GELB, Superintendent, Souza Baranowski Correctional Center,

Respondent - Appellee.

Before

Thompson, Kayatta and Barron,
Circuit Judges.

JUDGMENT

Entered: September 2, 2021

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

Petitioner-Appellant has also filed a motion for appointment of counsel to assist him in this appeal from the district court's denial of his motion to vacate his conviction under 28 U.S.C. §2254. "[P]etitioners have no constitutional right to counsel in [habeas corpus] proceedings." Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011), cert. denied, 133 S.Ct. 277 (2012). We are not persuaded that "the interests of justice" require appointment of counsel. 18 U.S.C. §3006A(a)(2)(B). Accordingly, Rosa's motion for appointment of appellate counsel is also denied.

The appeal is hereby terminated.

By the Court:

Maria R. Hamilton, Clerk

cc:
Stewart Thomas Graham Jr.
Daniel Rosa
Jennifer Kay Zalnasky
Tara Lyn Johnston

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL ROSA,	*	
	*	
Petitioner,	*	
	*	
v.	*	
	*	Civil Action No. 3:15-cv-30073-ADB
BRUCE GELB,	*	
	*	
Respondent.	*	
	*	
	*	

MEMORANDUM AND ORDER ON PETITION FOR A WRIT OF HABEAS CORPUS

BURROUGHS, D.J.

On July 2, 2012, a Hampden County Superior Court jury found Petitioner Daniel Rosa ("Petitioner") guilty of murder in the first degree on a theory of deliberate premeditation and of possession of a firearm without a license. Petitioner was sentenced to life in prison. Currently pending before the Court is Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. [ECF No. 1]. Petitioner challenges his convictions on three grounds, claiming: (1) that the retroactive application of a substantive change in the law violated his Due Process rights ("Ground One"); (2) that the Massachusetts Supreme Judicial Court's decision affirming the monitoring, recording, and use at trial of his telephone calls from jail violated his First, Fourth, and Fourteenth Amendments rights ("Ground Two"); and (3) that the refusal to require jury unanimity as to whether his guilt was based upon principal or accomplice liability violated his Due Process rights ("Ground Three"). [ECF No. 1 at 5, 7–8]. For the reasons set forth below, Petitioner's petition, [ECF No. 1], is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

In reviewing a habeas petition from an individual in custody pursuant to the judgment of a state court, a determination of a factual issue made by the state court shall be presumed to be correct and "can be rebutted only by clear and convincing evidence to the contrary." 28 U.S.C. § 2254(e)(1); RaShad v. Walsh, 300 F.3d 27, 35 (1st Cir. 2002) (quoting Ouber v. Guarino, 293 F.3d 19, 27 (1st Cir. 2002)).

The Massachusetts Supreme Judicial Court ("SJC") provided an account of the facts as the jury could have found them, which is reproduced in relevant part below.

> On January 26, 2011, at approximately noon, the victim, David Acevedo, was killed by a single gunshot wound to the back. The shooting occurred on Riverton Road in Springfield, near the home of Eric Caraballo, Sr., a mutual friend of the victim's and the [Petitioner's].
>
> Earlier that morning, at 9:30 or 10 A.M., the [Petitioner] had gone to his mother's home in Springfield to visit his daughter and to meet with a friend, Marcus Dixon. A dark-colored, two-door Honda automobile belonging to Dixon was parked there because the [Petitioner] was "holding" the car for Dixon. The [Petitioner] and Dixon left together in the Honda shortly after they both had arrived. Soon thereafter, the [Petitioner] went to Caraballo's house. At some point the victim also arrived at Caraballo's house and confronted the [Petitioner] about money that the [Petitioner] purportedly owed him. A heated verbal exchange ensued and the [Petitioner] and the victim began to fight, but Caraballo intervened. The [Petitioner] and the victim went outside to continue fighting while Caraballo remained inside. Several minutes later, the victim returned inside with a ripped, bloodied shirt, but he appeared otherwise unhurt. The [Petitioner] did not return inside.
>
> Between approximately 10:30 and 11:30 A.M. the [Petitioner] made and received a series of telephone calls to and from Dixon and another friend, Jerell Brunson. Just before noon, the [Petitioner] telephoned Caraballo on his cellular telephone asking for the victim to meet him outside of Caraballo's house again. The victim and Caraballo went outside and they exchanged additional telephone calls with the [Petitioner]. Snowbanks obscured their view of the [Petitioner], but when he appeared, the victim went to meet the [Petitioner] near a stop sign at the corner of Riverton Road and Denver Street; Caraballo remained in his driveway. Moments later, Brunson and Dixon began walking down from the top of the hill on Denver Street toward Riverton Road; Dixon's Honda was parked near the top of the hill. As they walked, Brunson and Dixon began shooting in Caraballo's direction.

Bullets struck an apartment building across the street from Caraballo's house as well as a car parked in front of that building. The victim turned away from the [Petitioner] and ran across the street toward the apartment building, yelling, "Duck!" Caraballo dropped to the ground and lay on his stomach behind the snow banks, pretending to be shot. The [Petitioner] took several steps toward the victim, who was running away. Caraballo saw the [Petitioner] holding a silver gun covered by a blue bandanna, one arm extended toward the victim. He heard "loud booms" peal from the [Petitioner's] hand. A single bullet struck the victim's back at a straight angle, injuring his spinal cord and causing cardiac arrest. The gunfire ceased and the [Petitioner] turned to Caraballo and said, "Remember that I love you."

The [Petitioner], Brunson, and Dixon retreated quickly up Denver Street toward the Honda. A man who lived on Denver Street, Gary O'Neal, observed a light-skinned man and a dark-skinned man, both holding revolvers, climb into the Honda. Of the three men (the [Petitioner], Brunson, and Dixon), only the [Petitioner] had light skin. The three drove in the Honda to Brunson's house at 39 Slater Avenue, approximately one mile away, where they parted ways.

After being shot, the victim lay on the ground bleeding, and died before the paramedics arrived some minutes later. O'Neal, the Denver Street resident, had observed the rear license plate of the Honda he saw two men climbing into, and he wrote the number in the snow on his front porch. His recollection was close to the rear license plate number on the dark, two-door Honda that police officers later discovered at Brunson's house. Later that day, O'Neal identified the [Petitioner] from a photographic array provided by the police, stating that he was sixty per cent certain it was the man he saw leaving the crime scene holding a revolver.

Police investigators found two of three projectiles that struck the apartment building across the street from Caraballo's house. The projectiles included one .44 caliber bullet and another scrap of lead that was likely the core of a second .44 caliber bullet. The police were unable to recover the bullets that struck the car parked in front of the apartment building, or the bullet that killed the victim. The investigators did not find any shell casings at the crime scene, a fact suggesting that the gunmen used revolvers.

Within hours of the shooting, police encountered Dixon as he approached a parked car outside the [Petitioner's] mother's residence. After ascertaining Dixon's identity, the officers detained him for questioning. Dixon spoke with the officers at the police station, and then drove with them to locations where he had been during and after the shooting, including 39 Slater Avenue, Brunson's house. At that point, two police officers secured the premises of 39 Slater Avenue, leading to the discovery of the Honda parked in back, while other officers obtained a search warrant for the interior of the house. In the basement area where Brunson stayed, police discovered four casings for .357 caliber bullets and one casing for a .38 caliber bullet in a plastic storage unit next to Brunson's bed. They also found two

> live .44 caliber bullets in a clay vase on a shelving unit, as well as the [Petitioner's] driver's license stashed in a narrow slit in the underside of the box spring in the bed. Analysis of the shell casings revealed that all the .357 caliber bullet casings were fired from the same weapon, which never has been recovered. At trial, two witnesses testified to seeing the [Petitioner] with a large, silver revolver during the months prior to the murder. Although the [Petitioner] denied possessing such a firearm, he admitted to having previously a .22 caliber gun that he and a friend referred to as a ".350."
>
> In his trial testimony, the [Petitioner] explained that he had met up with both Dixon and Brunson at the [Petitioner's] mother's house in the morning of January 26, 2011, before going to Caraballo's house. Just before noon, Dixon drove Brunson and the [Petitioner] in the Honda directly from the [Petitioner's] mother's house to Caraballo's neighborhood. The [Petitioner] had planned to purchase "crack" cocaine from the victim so that Dixon could resell it. The [Petitioner] had met the victim near the stop sign at the corner of Denver Street and Riverton Road to exchange money for the drugs, which the victim passed to him in a blue cloth, while Caraballo stood in his driveway. Suddenly, Brunson and Dixon began shooting from the top of Denver Street, surprising the [Petitioner] because he was unaware that his friends had guns. Dixon walked nearly all of the way down the hill and shot the victim. After the shooting, the [Petitioner] left the crime scene with Brunson and Dixon in the Honda. The [Petitioner] stated that he did not have a firearm with him at any time during the shooting incident.
>
> The Commonwealth proceeded against the [Petitioner] on the alternative theories of principal and joint venture liability.

Commonwealth v. Rosa, 9 N.E. 3d 832, 834–37 (Mass. 2014).

On March 29, 2011, a Hampden County grand jury indicted Petitioner on charges of murder in violation of Mass. Gen. Laws ch. 265, § 1, [ECF No. 22 ("Add.") at 130], and unlawful possession of a firearm, in violation of Mass. Gen. Laws ch. 269, § 10(a), [id. at 131]. Petitioner's trial began on June 18, 2012. [Id. at 2]. On July 2, 2012, a Hampden County Superior Court jury found Petitioner guilty of murder in the first degree on a theory of deliberate premeditation and possession of a firearm without a license. [Id. at 7]. Petitioner was sentenced to life in prison. [Id.]. He appealed his conviction to the SJC, which affirmed the conviction on May 20, 2014. Rosa, 9 N.E.3d at 834, 844.

On April 22, 2015, Petitioner filed his petition for writ of habeas corpus, raising his three grounds for relief. [ECF No. 1 at 5, 7–8]. In August 2015, Respondent moved to dismiss the petition, asserting that Petitioner had failed to exhaust state remedies regarding his Ground One claim—that the retroactive application of state law to his case violated his Due Process rights. [ECF No. 18 at 1]. After initially finding that Petitioner had to either voluntarily dismiss Ground One of his habeas petition or face dismissal of the entire petition, [ECF No. 26 at 6], the Court entered an order on February 1, 2016, finding that Petitioner met the requirement for a stay and abeyance and allowing him the opportunity to exhaust his claim. [ECF No. 32 at 3]. Petitioner filed a motion for a new trial in Hampden County Superior Court which was denied, [ECF No. 33-1], and then a petition for leave to appeal the denial of his motion for new trial pursuant to Mass. Gen. Laws ch. 278, § 33E, [ECF No. 33-2]. A single Justice of the SJC denied his § 33E petition on August 9, 2017. [Id.]. His subsequent motion for reconsideration was likewise denied. [ECF No. 33-3]. On September 4, 2017, Petitioner filed a notice in this case, informing the Court that he had exhausted his claim and the Court lifted the stay. [ECF Nos. 33, 34].

II. LEGAL STANDARD

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may grant habeas relief on claims previously adjudicated on the merits only after the petitioner has exhausted all available state remedies. 28 U.S.C. § 2254(b)–(c); see O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (noting that Section 2254(c) requires that state prisoners give state courts a fair opportunity to review their claims and correct alleged constitutional violations before review by a federal court). Assuming that the exhaustion requirement has been satisfied, the AEDPA permits habeas relief only if the previous adjudication:

> (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.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established Supreme Court precedent if the state court arrives at a conclusion contrary to that reached by the Supreme Court on a question of law, or if the court decides a case differently from a decision of the Supreme Court on a materially indistinguishable set of facts. Williams v. Taylor, 529 U.S. 362, 404–05 (2000). A state court unreasonably applies federal law when it "correctly identifies the governing legal principles, but (i) applies those principles to the facts of the case in an objectively unreasonable manner; (ii) unreasonably extends clearly established legal principles to a new context where they should not apply; or (iii) unreasonably refuses to extend established principles to a new context where they should apply." Gomes v. Brady, 564 F.3d 532, 537 (1st Cir. 2009) (citation omitted). An unreasonable application requires "some increment of incorrectness beyond error." Norton v. Spencer, 351 F.3d 1, 8 (1st Cir. 2003) (citation omitted). A petitioner must show that the state court decision applied clearly established law in a way that was "objectively unreasonable." Sanchez v. Roden, 753 F.3d 279, 299 (1st Cir. 2014) (quoting White v. Woodall, 572 U.S. 415, 419 (2014) (citation omitted)).

Thus, to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991) (citing 28 U.S.C.

§ 2241). "Errors based on violations of state law are not within the reach of federal habeas petitions unless there is a federal constitutional claim raised." Kater v. Maloney, 459 F.3d 56, 61 (1st Cir. 2006) (citing Estelle, 502 U.S. at 67–68). "'[T]he gap between erroneous state court decisions and unreasonable ones is narrow,' and 'it will be the rare case that will fall into this gap . . . .'" O'Laughlin v. O'Brien, 568 F.3d 287, 299 (1st Cir. 2009) (quoting Evans v. Thompson, 518 F.3d 1, 6 (1st Cir. 2008)).

The AEDPA presumes that the state court's factual findings are correct and requires rebuttal by the petitioner with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see Cullen v. Pinholster, 563 U.S. 170, 181 (2011) ("The petitioner carries the burden of proof."); see also Linton v. Saba, 812 F.3d 112, 116 (1st Cir. 2016) ("We must accept the state court findings of fact unless convinced by clear and convincing evidence that they are in error." (internal citation and punctuation omitted)). The factual findings include "'basic, primary, or historical facts,' such as witness credibility and recitals of external events." Sleeper v. Spencer, 510 F.3d 32, 38 (1st Cir. 2007) (quoting Sanna v. DiPaolo, 265 F.3d 1, 7 (1st Cir. 2001)).

III. DISCUSSION

A. Ground One: Retroactive Application of Commonwealth v. Britt

In Ground One of his petition, Petitioner claims that the SJC's retrospective application of Commonwealth v. Britt, 987 N.E.2d 558 (Mass. 2013), violated his Due Process rights. [ECF No. 43 at 7]. In that case, the SJC held that "in cases tried hereafter, juries should not be instructed that the Commonwealth must prove that a joint venturer knew that the principal was armed to return a conviction of murder based on deliberate premeditation." Britt, 987 N.E.2d at 569; see Rosa, 9 N.E.3d at 842–43 (citing and applying Britt). The SJC applied Britt to Petitioner's appeal and determined that the trial court's failure to instruct the jury regarding

Petitioner's knowledge as to whether his co-venturers were armed was not erroneous. Rosa, 9 N.E.3d at 843.

1. Procedural Default

Respondent now argues that Petitioner's Ground One claim is procedurally defaulted because "a single Justice of the SJC denied the [P]etitioner leave to appeal from the denial of his motion for new trial on grounds that the [P]etitioner's claim was not new within the meaning of Mass. Gen. Laws c. 278 § 33E." [ECF No. 44 at 15].

As an initial matter, because Petitioner's Ground One Due Process claim was not raised in his initial appeal to the SJC, that claim was not exhausted through his first round of appeals and he therefore had not exhausted the claim for purposes of habeas review at the time he filed his habeas petition with this court. See generally Rosa, 9 N.E.3d 832; [Add. at 22–81 (Petitioner's appellate brief); id. at 338–360 (Petitioner's appellate reply brief)]. Though he did challenge the application of Britt in that initial appeal to the SJC, he did not raise this challenge as a constitutional claim, nor did he cite relevant Supreme Court precedent or otherwise alert the SJC to the possibility that he was making a Due Process claim. See [Add. at 355–58 (arguing that the controlling law in his appeal should be the case law that was in place prior to his conviction)]. The exhaustion requirement for habeas review is satisfied only if "a petitioner can successfully claim that he has presented the same legal theory to the state court by presenting the substance of a federal constitutional claim in such a manner that it 'must have been likely to alert the court to the claim's federal nature.'" Dougan v. Ponte, 727 F.2d 199, 201 (1st Cir. 1984) (quoting Daye v. Attorney Gen. of N.Y., 696 F. 2d 186, 192 (2d Cir. 1982) (en banc)). Thus, this Court, after finding that Petitioner had failed to exhaust this claim, [ECF No. 26 at 5], granted a stay and abeyance to give him the opportunity to exhaust his claim. [ECF No. 32 at 4].

Thereafter the Superior Court denied Petitioner's motion for a new trial, [ECF No. 33-1], and he filed a petition with the SJC for leave to appeal to the full court the denial of his motion for a new trial. This petition was denied by a single Justice of the SJC. [ECF No. 33-2]; Commonwealth v. Rosa, SJ-2017-0119, (Mass. Aug. 8, 2017). In denying that petition, the single Justice quoted Commonwealth v. Gunter for the proposition that "[a]n issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Rosa, SJ-2017-0119 at 2 (quoting 945 N.E.2d 386, 393 (Mass. 2011). The single Justice found that, because Petitioner had challenged the application of Britt in his initial appellate reply brief, see [Add. at 355–58], his Due Process claim "could have been addressed" through his initial appeal and was therefore not new despite the fact that Petitioner had not raised it earlier. See Rosa, SJ-2017-0119, at 2–3. The claim is now exhausted based on the finding of the single Justice that the claim had been procedurally defaulted.

"The independent and adequate state ground doctrine applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds." Coleman v. Thompson, 501 U.S. 722, 729–30 (1991), holding modified by Martinez v. Ryan, 566 U.S. 1 (2012); see also Simpson v. Matesanz, 175 F.3d 200, 206 (1st Cir. 1999). "A determination by the single gatekeeper justice [of the SJC] that the issues presented in an appeal [under § 33E] are neither 'new' nor 'substantial' is an adequate and independent state-law ground precluding habeas relief when it rests on grounds of procedural waiver in the trial court." Jewett v. Brady, 634 F.3d 67, 76 (1st Cir. 2011) (citing Matesanz, 175 F.3d at 206–07); see Lee v. Corsini, 777 F.3d 46, 55 (1st Cir. 2015) (noting that

an issue is not "new" under § 33E if it has already been addressed, or if it could have been addressed had the defendant properly raised it at trial or on direct review (quoting Commonwealth v. Ambers, 493 N.E.2d 837, 839 (Mass. 1986)). The Court therefore finds that Petitioner's Ground One Due Process claim has been procedurally defaulted.

"Because the SJC resolved [Petitioner's] claim on state law grounds, [this Court] may only review this claim if [Petitioner] establishes 'cause and prejudice' with respect to the procedural default," Horton v. Allen, 370 F.3d 75, 81 (1st Cir. 2004), or "a fundamental miscarriage of justice," id. at 81 n.3; see Logan v. Gelb, 790 F.3d 65, 72–73 (1st Cir. 2015). In order to satisfy cause, a petitioner "must show 'that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Horton, 370 F.3d at 81 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Petitioner has made no such showing.[1] The alternative theory, the fundamental miscarriage of justice exception, is very narrow and "applies only in extraordinary circumstances—circumstances in which a petitioner makes some showing of actual innocence." Janosky v. St. Amand, 594 F.3d 39, 46 (1st Cir. 2010). Petitioner has also failed to demonstrate actual innocence and has therefore failed to establish a fundamental miscarriage of justice. As a result, the SJC's decision that this claim was procedurally defaulted "is an independent and adequate ground for decision," precluding habeas review on the merits of his claim. See Horton, 370 F.3d at 80–81.

[1] Petitioner argues in his reply brief that the Court implicitly found cause and excused Petitioner's default when it granted a stay and abeyance to allow him to pursue his Due Process claim in state court. [ECF No. 47 at 2]. Although the Court found cause for a stay and abeyance, Petitioner is incorrect in claiming that the Court, at that time, could have or would have excused a procedural default. In giving Petitioner an opportunity to exhaust his claim in state court, the Court must now be bound by the state court's decision as to that claim. See Jewett, 634 F.3d at 76.

2. Merits of Retroactivity Claim

Even assuming, arguendo, that Petitioner's Ground One claim was not procedurally defaulted, Petitioner would not succeed on the merits of this claim. Petitioner argues that "it was clear [before Britt] that a defendant charged with deliberately premeditated joint venture murder where a weapon was used, had the right to require the Commonwealth [to] prove he had knowledge that a co-venturer was armed[.]" [ECF No. 47 at 5]. Petitioner also claims that this change "was not foreseeable and thus was unexpected." [ECF No. 43 at 14]. Respondent contends that Petitioner is not entitled to habeas relief even on the merits "because the holding in Britt was not 'unexpected and indefensible by reference to existing law' and, therefore, its application to the petitioner's case did not violate his due process rights." [ECF. No. 44 at 19].

"Constraints on judicial retroactivity are rooted in 'core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.'" Marshall v. Bristol Superior Court, 753 F.3d 10, 17–18 (1st Cir. 2014) (citing Rogers v. Tennessee, 532 U.S. 451, 459 (2001)). "[T]he Supreme Court's concern with fair notice goes beyond actual reliance. . . . [S]ome court-made changes in criminal law may be so surprising and troubling ('unexpected and indefensible') as to offend a sense of fair warning even if the defendant probably paid no attention to the case law." United States v. Lata, 415 F.3d 107, 111 (1st Cir. 2005) (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). See generally Rogers, 532 U.S. 451; Marks v. United States, 430 U.S. 188 (1977).

Unlike changes to statutory law, however, Due Process concerns are less heightened when state courts retroactively apply changes to common law:

> In the context of common law doctrines . . . there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present

> themselves. Such judicial acts, whether they be characterized as 'making' or 'finding' the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements. Strict application of *ex post facto* principles in that context would unduly impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.

Rogers, 532 U.S. at 461. As a result, "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" Rogers, 532 U.S. at 462 (quoting Bouie, 378 U.S. at 354).

"In Massachusetts, first degree murder is 'committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life.'" Morgan v. Dickhaut, 677 F.3d 39, 48 (1st Cir. 2012) (quoting Mass. Gen. Laws ch. 265, § 1). "To succeed on a theory of deliberately premeditated murder as a joint venturer under our present articulation of the law, the Commonwealth was required to prove that the defendant was '(1) present at the scene of the crime, (2) with knowledge that another intends to commit the crime or with intent to commit a crime, and (3) by agreement, [was] willing and available to help the other if necessary.'" Commonwealth v. Zanetti, 910 N.E.2d 869, 875 (Mass. 2009) (alteration in original) (quoting Commonwealth v. Green, 652 N.E.2d 572, 578 (Mass. 1995)).

Petitioner is correct that, prior to Britt, there were several SJC opinions which stated that, in order to convict on a theory of deliberately premeditated joint venture murder, the prosecution also had to prove a defendant's knowledge that a co-venturer was armed. [ECF No. 47 at 5]. In Britt, the SJC "acknowledged a line of cases that stands for the proposition that a conviction for deliberately premeditated murder on a theory of joint venture requires proof that the joint

venturer had knowledge that at least one member of the joint venture possessed a weapon." 987 N.E.2d at 568 (referring to Zanetti, 910 N.E.2d at 875 n.8, Green, 652 N.E.2d at 578, Commonwealth v. Phillips, 897 N.E.2d 31, 44 (Mass. 2008), and Commonwealth v. Lydon, 597 N.E.2d 36, 39 n.2 (Mass. 1992)). The Britt decision also referenced a second line of SJC opinions which held that knowledge that a co-venturer was armed was not a required element for a theory of extreme atrocity joint venture murder. Id. at 569; see Commonwealth v. Pov Hour, 841 N.E.2d 709, 715 (Mass. 2006); Commonwealth. v. Semedo, 665 N.E.2d 638, 642 (Mass. 1996); Commonwealth. v. Colon-Cruz, 562 N.E.2d 797, 807 (Mass. 1990). There was yet a third line of SJC decisions that required knowledge that a co-venturer was armed in felony joint venture murder cases where possession of a weapon was an element of the felony. Britt, 987 N.E.2d at 568. See generally Commonwealth v. Melendez, 692 N.E.2d 61 (Mass. 1998); Commonwealth v. Claudio, 634 N.E.2d 902 (Mass. 1994).

After reviewing this case law, the SJC in Britt found that the line of cases on joint venture premeditated murder was "based on a misapplication of the principle that knowledge of a weapon is an element of the Commonwealth's proof when a defendant is prosecuted on a theory of joint venture where an element of the predicate offense is use or possession of a dangerous weapon." Britt, 987 N.E.2d at 568. In order to correct this error, the SJC held that "[t]he Commonwealth should only bear the burden of proving that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element." Id. at 569. As a result, the prosecution is not required to prove knowledge of a weapon in joint venture murder cases that raise theories of deliberate premeditation or extreme atrocity. See id.

It was foreseeable and reasonable for the SJC to correct the "misapplication" of cases which required an additional element on a joint venture theory of murder that was not, in fact, required by statute or common sense. As the Court observed in its 2015 Order on Respondent's motion to dismiss, "[t]he holding in Britt was not so 'unexpected and indefensible' that the SJC could not apply it retroactively" to Petitioner. [ECF No. 26 at 7]. Thus, "[f]ar from a marked and unpredictable departure from prior precedent," the SJC's "decision was a routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense." Rogers, 532 U.S. at 467. Therefore, the SJC's retroactive application of Britt was not contrary to clearly established Supreme Court precedent. Williams, 529 U.S. at 412–13.

Finally, even assuming that the SJC was incorrect in finding that the trial court's instructions as to knowledge that a co-venturer was armed was not in error, Petitioner has failed to demonstrate that he was prejudiced by any potential trial court error. "[H]abeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Constitutional error is harmless unless it "had [a] substantial and injurious effect or influence in determining the jury's verdict." Id. (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Foxworth v. St. Amand, 570 F.3d 414, 425 (1st Cir. 2009) ("Even if a state-court decision is determined to involve an unreasonable application of clearly established Federal law, habeas relief will not follow automatically. The error must be shown to have 'had a substantial and injurious effect or influence in determining the jury's verdict.'" (quoting Delaney v. Bartee, 522 F.3d 100, 105 (1st Cir. 2008))); see also Medina v. Roden, No. 11-cv-10615, 2012 U.S. Dist. LEXIS 108168, at *15–16 (D. Mass. July 2, 2012) ("This stringent test recognizes that the 'writ of habeas corpus has historically been

regarded as an extraordinary remedy,' which is only available to 'persons whom society has grievously wronged.'" (quoting Brecht, 507 U.S. at 633–34)).

The Court finds that no prejudice resulted from the trial court's failure to instruct the jury on joint venture premeditated murder. As the Superior Court and the SJC both observed, Petitioner was not prejudiced where the weight of the evidence demonstrated that Petitioner was armed, fired the shot that killed the victim, spoke with his co-venturers just prior to the shooting, was seen shooting at the victim with his co-venturers, and—after the shooting—police found Petitioner's license along with shell casings and ammunition at his co-venturer's house. See Rosa, 9 N.E.3d at 843 n.24 (reciting evidence in support of finding that there was sufficient evidence of joint venture); [ECF No. 43-4 at 12 (2017 Superior Court Order) (stating "there is no risk that the failure to so instruct may have resulted in a miscarriage of justice" and listing evidence against Petitioner)]. "Our review of the evidence indicates that, even if the jury had [not been influenced by the error], the substance of the case against [petitioner] would have remained the same. The other evidence, moreover, was considerable." Gilday v. Callahan, 59 F.3d 257, 269–70 (1st Cir. 1995). The Court finds that the trial court's instructions, even if erroneous, did not have a substantial influence on the jury, nor is the Court in "grave doubt" as to the influence, if any, of a potential error. See Kotteakos, 328 U.S. at 765, 776.

B. Ground Two: Monitoring of Petitioner's Phone Calls

Petitioner next claims that his First and Fourth Amendment rights were violated when his "telephone calls were recorded and later reviewed by a prison officer without any demonstrated justification for that review, and without evidence of valid regulations governing and allowing

that review." [ECF No. 47 at 10].[2] Respondent counters that Petitioner has failed to identify any Supreme Court precedent that is contrary to the SJC's holding. [ECF No. 44 at 25–26].

While being held in pretrial detention at the Hampden County House of Correction ("HCHC"), Petitioner placed a telephone call which was recorded by prison staff. Rosa, 9 N.E.3d at 838.[3] The recorded call, which was shared with law enforcement authorities, "covered a range of topics, including the events surrounding the shooting and killing of the victim on January 26, 2011, the people who were present during the shooting incident, and a general discussion about guns." Id. at 838–39. In his direct appeal before the SJC, Petitioner "argue[d] that jail officials violated his rights under the First and Fourth Amendments by monitoring and recording his telephone conversation and by forwarding a summary of it to law enforcement

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[2] In his petition, Petitioner also claims that his Fourteenth Amendment rights were violated. [ECF No. 1 at 7]. Petitioner did not raise a Fourteenth Amendment claim with the SJC, nor does he develop a Fourteenth Amendment claim in his memorandum in support of his petition or reply brief, therefore the Court focuses its analysis on Petitioner's First and Fourth Amendment arguments. See Rosa, 9 N.E.3d at 841 ("The defendant argues that jail officials violated his rights under the First and Fourth Amendments by monitoring and recording his telephone conversation and by forwarding a summary of it to law enforcement officials . . . ."); [Add. at 54–64 (Petitioner's appellate brief, raising only First and Fourth Amendment arguments); Add. at 352–355 (Petitioner's appellate reply brief, focusing on Fourth Amendment argument); ECF No. 43 at 25 ("Petitioner's argument was and is premised on clearly established Supreme Court law requiring penal institutions to have in place valid, neutral regulations based on legitimate penological needs justifying restrictions on prisoners' First and Fourth Amendment rights."); ECF No. 47 at 10 ("This case involves the restriction and violation of Petitioner's First and Fourth Amendment rights by officials at the Hampden County House of Corrections, where Petitioner was being detained pending trial.")].

[3] Petitioner was on notice that his calls were being monitored:

> Officer Jessica Athas, an intelligence officer at [HCHC] testified that the warning of monitoring and recording is included in the inmate handbook and is posted near the inmate telephones, and at the outset of each telephone call, a recorded voice tells the inmate and other participants on the call that the call is being recorded.

Rosa, 9 N.E.3d at 841 n.19.

without any showing of a legitimate penological purpose for doing so." Id. at 841. The SJC upheld the admission of the phone call at trial. Id. at 841–42.

As the SJC noted in describing Petitioner's claims on direct appeal, "the defendant cites both the First and Fourth Amendments to the United States Constitution, but the principal constitutional claim appears to be lodged in the Fourth Amendment and, specifically, the protection offered by the amendment to a person's reasonable expectation of privacy." Rosa, 9 N.E.3d at 841 n.18. There, as here, the parties do not contest that inmates retain First Amendment rights in their communications or that those rights may be restricted. See [ECF No. 43 at 26 (Petitioner's memorandum, acknowledging that "[a] penal institution has the right to restrict a detainee's communications per regulations that are reasonably related to legitimate penological needs"); ECF No. 44 at 28, 29 (Respondent's memorandum, stating that defendants retain constitutional rights in communications but that they may be restricted)]. As Petitioner states in his reply brief, he does not object to the recording of inmates' calls generally, but to the recording of his calls in particular, [ECF No. 47 at 15], as well as to the use of those recordings at trial. Petitioner argues that the Commonwealth was required to introduce into evidence the specific regulations that governed monitoring of pretrial detainees' calls in order to demonstrate that there was a legitimate penological purpose for monitoring his calls in particular. [ECF No. 43 at 29–30].

As Respondent notes, Petitioner fails to identify a Supreme Court holding that directly addresses inmates' privacy interests in telephone calls. [ECF No. 44 at 28]. The cases Petitioner does cite, as already noted by the SJC, "do not support [Petitioner's] implicit claim that the decisions of this court cited here in the text are contrary to the requirements of the First and Fourth Amendments." Rosa, 9 N.E.3d at 842 n.21. Those cases involve mail sent from inmates

to inmates, Turner v. Safley, 482 U.S. 78 (1987), mail sent from inmates to individuals outside of prison, Procunier v. Martinez, 416 U.S. 396 (1974), and materials received by inmates through the mail, including subscriptions, Thornburgh v. Abbott, 490 U.S. 401 (1989), and books, Bell v. Wolfish, 441 U.S. 520 (1979). See [ECF No. 43 at 25–26]. Petitioner also cites the Supreme Court's holding in Katz v. United States, 389 U.S. 347 (1967), but again, that case did not involve the monitoring of inmates' telephone calls.

When conducting habeas review, courts "must look for Supreme Court precedent that either 'squarely addresses the issue' in the case or that articulates legal principles that 'clearly extend' to the new factual context." Brown v. Ruane, 630 F.3d 62, 69 (1st Cir. 2011). While it might be possible to extend the cases cited by Petitioner from mail sent to or from inmates to telephone calls, that is not what Petitioner asks the Court to do.[4] Instead, Petitioner asks the Court to find that state courts have the burden of introducing regulations into evidence in order to use recordings from inmate calls at trial. [ECF No. 43 at 31 ("The burden was on the Commonwealth to establish the constitutional validity of the regulations pursuant to which the monitoring of Petitioner's calls was conducted.")]. None of the cases cited by Petitioner support

[4] As Respondent notes, the Second, Seventh, Ninth, and Tenth Circuits have held that inmates' calls may be recorded and/or monitored. See [ECF No. 44 at 30–31 (citing cases)]. The First Circuit has also held that inmates' calls may be recorded. "A telephone call can be monitored and recorded without violating the Fourth Amendment so long as one participant in the call consents to the monitoring." United States v. Novak, 531 F.3d 99, 101–02 (1st Cir. 2008) (citing United States v. White, 401 U.S. 745 (1971) (plurality opinion)). In United States v. Novak, the First Circuit held that "inmates and pretrial detainees who have been exposed to the sort of warnings that [defendant] saw here have been deemed to have consented to monitoring," id. at 102, and therefore those calls could "be introduced into evidence consistently with the requirements of the Fourth Amendment," id. at 103. The First Circuit further held that, even though prison officials failed to follow state regulations regarding monitoring and recording of the defendant's calls, the defendant's consent and the viability of the evidence under the Fourth Amendment was not affected by their error. Id. at 102–03 ("We thus find no reason to believe that [defendant's] consent was vitiated by the prison officials' failure to abide by the applicable regulations.").

imposing such a burden, and in fact, the Supreme Court has held the opposite: "[t]he burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." Overton v. Bazzetta, 539 U.S. 126, 132 (2003). If Petitioner felt that the regulations regarding recording and monitoring of inmate calls was invalid on its face and/or as applied to him, he had the opportunity to enter the regulations into evidence himself and challenge them at trial, but he did not do so. See Rosa, 9 N.E.3d at 842 n.20 ("The defendant did not raise any point about the nonproduction of regulations when arguing against the admission of the recorded jail call before or at trial, and we have not made the production of a correctional facility's telephone monitoring regulations a condition precedent to admission of evidence of any recorded calls.").

Petitioner has thus failed to demonstrate that the SJC's holding was contrary to or an unreasonable application of clearly established Supreme Court precedent. See Williams, 529 U.S. at 404–05. Accordingly, his Ground Two argument does not entitle him to relief.

C. Ground Three: Use of a General Verdict Form

Petitioner's final challenge is to the trial court's refusal to provide the jury with a unanimity instruction or to use a special verdict slip due to what he describes as alternate theories of principal and accomplice liability. [ECF No. 43 at 34–35]. Respondent maintains that the SJC's finding of no error was consistent with SJC precedent, specifically Commonwealth v. Zanetti, 910 N.E.2d at 869, and further, that the finding is unreviewable because it is a decision of a state court that was applying state law. [ECF No. 44 at 39].

At trial, Petitioner asked the judge to give the jury a specific unanimity instruction and to provide "them with a special verdict slip to clarify the specific grounds of conviction" as part of his charge on accomplice liability. Rosa, 9 N.E.3d at 843–44. The trial judge declined to do so, and, on appeal, the SJC ruled that the jury instructions on accomplice liability and the use of a

general verdict slip were proper. Id. at 844. Petitioner claims that, because the Commonwealth bears the burden of proving—and the jury must find—each element of a crime beyond a reasonable doubt, the SJC's application of Zanetti was a violation of his Due Process rights and contrary to clearly established federal law. [ECF No. 43 at 35 (citing Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000); In Re Winship, 397 U.S. 358, 364 (1970)). Citing the Massachusetts statute that defines accomplice liability, Petitioner argues that the statute requires the Commonwealth to prove and the jury to find that an accomplice is guilty of aiding and abetting. [Id. at 37–38]. The statute in question provides that, "[w]hoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Mass. Gen. Laws ch. 274, § 2. Although Petitioner argues that accomplice and principal liability are "different crimes," and reflect separate theories of liability, this is inconsistent with the SJC's interpretation of the statute. [ECF No. 47 at 19].

Zanetti, decided in 2009, clarified the SJC's earlier ruling in Commonwealth v. Santos, 797 N.E.2d 1191 (Mass. 2003), in which the SJC determined that under Massachusetts law, principal and joint venture liability are not different theories of guilt, and that there is therefore no need for a jury to make separate findings as to each theory of liability on a special verdict form. Zanetti, 910 N.E.2d at 881. Under the applicable statute, Chapter 274, § 2, the fact that an accomplice faces the same punishment as a principal led the SJC to "renounce the false distinction between a principal and an accomplice, and . . . recognize[] that the accomplice commits the crime no less than the principal . . . ." Id. The SJC held that general verdict forms were permitted "even when there is differing evidence that the defendant committed the crime as a principal or as an accomplice." Id. at 884. And further, that the standard of review on appeal

was to determine whether there was sufficient evidence for a juror to determine "beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime, rather than examine the sufficiency of the evidence separately as to principal and joint venture liability." Id. at 884. On appeal, the SJC applied this standard and declined to reverse Zanetti. Rosa, 9 N.E.3d at 842–43.

Petitioner fails to identify any clearly established Supreme Court precedent that is contrary to the SJC's holding in either Zanetti or Rosa. See 28 U.S.C. § 2254(d). The Supreme Court cases which Petitioner cites, see [ECF No. 43 at 36; ECF No. 47 at 16], do not address general versus special verdicts or specific unanimity instructions in cases where the defendant was tried as both a principal and accomplice, see, e.g., In re Winship, 397 U.S. at 368 (deciding that Due Process requires application of the proof beyond a reasonable doubt standard during the adjudicatory stage of a delinquency proceeding); Apprendi, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Where the statute at issue here indicates that accomplices face the same penalty as principals, the SJC's holding in Rosa (applying Zanetti) does not violate clearly established federal law.

The Supreme Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law.'" Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (quoting Estelle v. McGuire, 502 U.S. 62, 67 (1991)). "Instructions in a state trial are a matter of state law to which substantial deference is owed." Lucien v. Spencer, No. 07-cv-11338, 2015 U.S. Dist. LEXIS 134154, at *34 (D. Mass. Sep. 30, 2015) (quoting Niziolek v. Ashe, 694 F.2d 282 (1st Cir. 1982)). "In reviewing the habeas petition of a state prisoner," a federal court's "function ends when [it] determine[s] that the challenged jury instructions violated no federal constitutional

rights of the petitioner." Niziolek, 694 F.2d at 290. Petitioner has failed to demonstrate that the SJC's application of Zanetti—which held that principal and accomplice liability are not separate crimes and therefore do not require a special verdict slip or proof beyond a reasonable doubt as to each theory of liability—was not a violation of federal law. Petitioner is therefore not entitled to habeas relief on this ground.

IV. CONCLUSION

Accordingly, Petitioner's petition for a writ of habeas corpus, [ECF No.1], is DENIED. "The district court must issue or deny a certificate of appealability when it enters a final order adverse to" a habeas petitioner. Rules Governing Section 2254, Cases, R. 11(a). The Court declines to grant a certificate of appealability.

SO ORDERED.

June 29, 2020

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL ROSA,	*	
	*	
Petitioner,	*	
	*	
v.	*	Civil Action No. 15-cv-30073
	*	
BRUCE GELB, SUPERINTENDENT, SOUZ BARANOWSKI CORRECTIONAL CENTER,	*	
	*	
Defendants.	*	

MEMORANDUM AND ORDER

February 1, 2016

BURROUGHS, D.J.

Petitioner Daniel Rosa moves for reconsideration of the Court's Order of December 24, 2015 directing Rosa to voluntarily dismiss Ground One of his habeas petition by January 15, 2016 in order to avoid dismissal of his entire petition. Specifically, Rosa urges the Court to grant a stay and hold his petition in abeyance while he exhausts his state remedies. For the reasons stated herein, the motion for reconsideration is granted. Rosa's petition is hereby STAYED and held in abeyance while he exhausts the first ground of his petition in state court.

As discussed in greater detail in the Court's previous Order [ECF No. 26], in July 2012, petitioner Rosa was convicted of first degree murder on a theory of deliberate premeditation and possession of a firearm without a license. Rosa's petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254(d), asserts three grounds for habeas relief: (1) the Supreme Judicial Court ("SJC") decision affirming his convictions violated due process by retroactively applying a substantive change in the law (Ground One); (2) the monitoring, recording, and use at trial of his

phone calls from jail violated his rights under the 1st, 4th, and 14th Amendments to the U.S. Constitution (Ground Two); and (3) the jury instructions at trial violated due process by failing to require unanimity as to whether the murder verdict was based on principal or accomplice liability (Ground Three). [ECF No. 1].

On August 14, 2015, Respondent moved to dismiss the petition for failure to exhaust state remedies [ECF No. 17], arguing that Rosa's first habeas claim had not been raised in state court and that the petition should be dismissed under federal habeas' exhaustion requirement. In the December 24, 2015 Order, the Court agreed that Rosa had not exhausted the first ground of his petition, and held that the entire petition would be dismissed unless Rosa voluntarily dismissed Ground One by January 15, 2016. In the Motion for Reconsideration pending before the Court [ECF No. 28], Rosa does not challenge the Court's finding that Ground One is unexhausted. Rather, he argues that the Court should have granted a stay and held the petition in abeyance while he exhausts Ground One in state court. On January 6, 2016, in light of Rosa's motion for reconsideration, the Court stayed the deadline by which Petitioner was required to dismiss Ground One. [ECF No. 29].

Requests for reconsideration of an interlocutory decision dismissing portions of a complaint "do not necessarily fall within any specific Federal Rule." Greene v. Union Mut. Life Ins. Co. of Am., 764 F.2d 19, 22 (1st Cir. 1985). Fed. R. Civ. P. 59(e) and 60(b)(1) are inapplicable here since "neither of those rules address a *partial*—as opposed to a *final*—judgment, which is merely interlocutory in nature." Bulmer v. MidFirst Bank, FSA, No. CIV.A. 13-30089-KPN, 2014 WL 7409590, at *1 (D. Mass. Dec. 31, 2014) (emphasis in original). Instead, such requests rely on "the inherent power of the rendering district court to afford such relief from interlocutory judgments . . . as justice requires." Greene, 764 F.2d at 22 (quotation

marks and citations omitted); see also Shabazz v. Cole, 69 F. Supp. 2d 210, 226 (D. Mass. 1999) ("This court has the inherent power to reconsider its own interlocutory order. This inherent power is not governed by rule or statute and is rooted in the court's equitable power to 'process litigation to a just and equitable conclusion.'") (quoting In Re Villa Marina Yacht Harbor, Inc., 984 F.2d 546, 548 (1st Cir. 1993)).

Here, the interests of justice require reconsideration of the Court's earlier ruling. Rosa has shown that this is the rare case where stay-and-abeyance is appropriate. See Rhines v. Weber, 544 U.S. 269, 277-78 (2005) (holding that the stay-and-abeyance procedure is only available in "limited circumstances" where "the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."). First, given the unusual circumstances of the case, in which the alleged constitutional violation first arose in the SJC's appellate decision, Rosa understandably initiated the habeas proceeding before pursuing additional state court review. See Miranda v. Mendonsa, No. 12-CV-11957-IT, 2014 WL 4385433, at *4 (D. Mass. Sept. 3, 2014) ("[B]ecause this particular claim challenges the constitutional validity of his judicial review, and does not challenge issues at the indictment, trial, conviction, or sentencing stage, Petitioner may have thought that a Rule 30(a) motion for post-conviction relief was an inappropriate vehicle to challenge the SJC's decision."). Second, though the Court is skeptical of Rosa's Due Process challenge for the reasons stated in its previous Order, Rosa has demonstrated that his unexhausted claim is "potentially meritorious" and not "plainly meritless." See Rhines, 544 U.S. at 270, 278. Before Commonwealth. v. Britt, 465 Mass. 87 (2013) was decided, there was arguably a different state common law rule for deliberately premeditated joint venture murder (requiring knowledge that the co-venturer was

armed) and joint venture by extreme atrocity and cruelty (not requiring knowledge that the co-venturer was armed), and thus Britt could be interpreted as an unexpected change in the law, rather than a mere clarification. See Rogers v. Tennessee, 532 U.S. 451, 462 (2001) (holding that "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue") (quotations omitted). Lastly, Respondent has never argued that Rosa pursued intentionally dilatory litigation tactics.

Rosa has satisfied the Court that he meets the stay-and-abeyance requirements, and that his interest in obtaining federal review of Ground One outweighs the competing interest of finality. Accordingly, it is in the interests of justice to reconsider the Court's previous Order and grant Rosa a stay and hold his petition in abeyance while he exhausts Ground One in state court.

SO ORDERED.

Dated: February 1, 2016

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT COURT JUDGE

152 F.Supp.3d 26

Daniel Rosa, Petitioner,
v.
Bruce Gelb, Respondent.

Civil Action No. 15-cv-30073-ADB

United States District Court, D. Massachusetts.

Signed December 24, 2015

[152 F.Supp.3d 27]

Stewart T. Graham, Jr., Graham & Graham, Hampden, MA, for Petitioner.

Jennifer K. Zalnasky, Office of the Attorney General, Springfield, MA, for Respondent.

MEMORANDUM AND ORDER

ALLISON D. BURROUGHS, UNITED STATES DISTRICT COURT JUDGE

On July 2, 2012, Daniel Rosa was convicted of first degree murder on a theory of deliberate premeditation, and possession of a firearm without a license. The convictions arose from a 2011 shooting in Springfield, Massachusetts involving Rosa and two alleged coventurers. In May 2014, the Massachusetts Supreme Judicial Court ("SJC") affirmed Rosa's convictions, and on April 22, 2015, Rosa filed a petition for a writ of habeas corpus with this Court, pursuant to 28 U.S.C. § 2254(d).

In his petition, Rosa contends that habeas relief should be granted because: (1) the SJC decision affirming his convictions violated due process by retroactively applying a substantive change in the law (Ground One); (2) the monitoring, recording, and use at trial of his phone calls from jail violated his rights under the 1st, 4th, and 14th Amendments to the U.S. Constitution (Ground Two); and (3) the jury instructions at trial violated due process by failing to require unanimity as to whether the

[152 F.Supp.3d 28]

murder verdict was based on principal or accomplice liability (Ground Three). [ECF No. 1].

Presently before the Court is Respondent's Motion to Dismiss for Failure to Exhaust State Remedies. [ECF No. 17]. The Respondent claims that Rosa did not raise the first ground for relief in state court, and therefore, his entire petition should be dismissed for failure to exhaust state remedies. For the reasons stated herein, the Court agrees that Rosa did not exhaust Ground One in state court. Rosa must voluntarily dismiss Ground One by January 15, 2016, or the Court will dismiss Rosa's entire petition without prejudice.

I. LEGAL STANDARD

A federal court cannot grant habeas relief to a state prisoner unless the prisoner has first exhausted his federal constitutional claims in state court. 28 U.S.C. § 2254(b)(1)(A). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel , 526 U.S. 838, 842, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). A claim for habeas relief is exhausted if it has been "fairly and recognizably" presented in state court. Sanchez v. Roden , 753 F.3d 279, 294 (1st Cir.2014) (quoting Casella v. Clemons , 207 F.3d 18, 20 (1st Cir.2000)). In other words, "a petitioner must have tendered his federal claim [in state court] in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question." Id. (quotations and citations omitted).

Where a habeas petition contains both unexhausted and exhausted claims, it must be dismissed. Rose v. Lundy , 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). When a petitioner submits such a "mixed" petition,

district courts have been instructed to first give the petitioner an opportunity to dismiss the unexhausted claims and then, if the petitioner declines to do so, to dismiss the entire petition without prejudice. DeLong v. Dickhaut , 715 F.3d 382, 386–387 (1st Cir.2013). Alternatively, under limited circumstances, the Court may stay the petition and allow the petitioner to exhaust his previously unexhausted claims in state court. Rhines v. Weber , 544 U.S. 269, 278, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). To be granted such a stay, a petitioner must show that there is good cause excusing his failure to exhaust his claims, that the unexhausted claims are not meritless, and that he is not engaging in intentionally dilatory litigation tactics. Clements v. Maloney , 485 F.3d 158, 169 (1st Cir.2007) (citing Rhines , 544 U.S. at 277, 125 S.Ct. 1528). A petitioner's inability to show any one of these three factors precludes the court from granting a stay. Id.

II. DISCUSSION

On January 26, 2011, David Acevedo was killed by a single gunshot wound to the back. Petitioner Rosa was subsequently convicted of murder with deliberate premeditation in connection with Acevedo's death. At trial, the Commonwealth proceeded against Rosa on the alternative theories of principal and joint venture liability, alleging that Rosa and two acquaintances were involved with the shooting.

At the close of the Commonwealth's case, Rosa moved for a required finding of not guilty. He argued that there was not sufficient evidence to show that Rosa knew either of the two coventurers were armed, which, according to Rosa, was a required finding under the Commonwealth's joint venture theory. [ECF No. 19 ("Addendum") at 94-95].[1] The Commonwealth countered that it did not need to prove that Rosa knew that either of the coventurers was armed. According to the Commonwealth, such proof is necessary only where the use or possession of a weapon is an element of the underlying crime, which was not the case here. Id. at 107-108.

[152 F.Supp.3d 29]

The trial court ruled in favor of the Commonwealth and denied Rosa's motion. Id. at 111. The subsequent jury instructions on joint venture did not require the jury to find that Rosa knew that either of the other coventurers was armed. The jury was instructed that to find Rosa guilty on a joint venture theory, there must be proof beyond a reasonable doubt that Rosa (1) intentionally participated in some fashion in committing the crime, and (2) had or shared the intent required to commit the crime. Id. at 117.

In his state court appeal, Rosa argued, among other things, that his motion for a required finding of not guilty should have been granted and that the jury should not, therefore, have been instructed on joint venture liability at all. Addendum at 23-81. Citing various SJC cases, Rosa argued that under a theory of joint venture premeditated murder, the Commonwealth must establish beyond a reasonable doubt that defendant knew the actual perpetrator was armed. Id. at 69.

The SJC rejected Rosa's argument. It found that "[b]ecause possession of a weapon is not an element of murder in the first degree committed with deliberate premeditation, there was no need for the Commonwealth to prove that the defendant knew [the two others] were armed with guns." Commonwealth v. Rosa , 468 Mass. 231, 245, 9 N.E.3d 832 (2014). As a result, the absence of such proof did not render the evidence insufficient, and the absence of an instruction requiring such proof did not render the jury instructions erroneous. Id. at 245–246, 9 N.E.3d 832.

In denying Rosa's appeal, the SJC relied on Commonwealth v. Britt , 465 Mass. 87, 88, 987 N.E.2d 558, (2013), a 2013 SJC opinion that was decided after Rosa's trial but before his appeal. In Britt , the defendant was convicted of murder with deliberate premeditation under a joint venture theory. The undisputed facts showed that the defendant did not shoot and kill the victim. On appeal, the defendant argued that the judge erred in failing to instruct the jury that, to sustain the murder conviction, the Commonwealth had to prove that defendant knew the coventurer was armed. The SJC did not agree, holding that the Commonwealth should only "bear the burden of proving that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element." Britt , 465 Mass. at 100, 987 N.E.2d 558.

Rosa now claims in Ground One of his habeas petition that by retroactively applying Britt to his case, the SJC violated his due process rights. Respondent counters that the entire habeas petition must be dismissed because this argument was never raised in state court. In response, Rosa argues that this argument could not have been raised in state court, since he could not challenge the retroactive application of Britt until after the SJC relied on Britt to deny his appeal.

The Court agrees with the Respondent. Ground One of Rosa's habeas petition has never been raised in state court, and it has therefore not been exhausted. Rosa did argue at trial and on appeal that the Commonwealth needed to prove he knew the coventurers were armed, but he never raised in state court the federal

[152 F.Supp.3d 30]

constitutional argument that underlies Ground One. While Rosa could not have made this argument on appeal, since the issue did not arise until after the appeals process had run its course, Rosa is not excused from the exhaustion requirement. As the First Circuit has instructed, "where [a] claim has not been fairly presented on direct appeal ... it should be fairly presented to the state court through a motion for collateral relief." Gunter v. Maloney , 291 F.3d 74, 82 (1st Cir.2002). Rosa could have filed a motion for a new trial, as he was entitled to do as of right under Massachusetts law. Id. (citing Mass. R. Crim. P. 30(a)); see also Miranda v. Mendonsa , No. 12–CV–11957–IT, 2014 WL 4385433, at *3 (D.Mass. Sept. 3, 2014) ("[W]here, as here, Petitioner's claim arose only after the SJC affirmed his conviction, Petitioner should give the state court the opportunity to pass upon and correct alleged violations of its prisoners' federal rights by presenting the claim first to the state court through either a [state] petition for habeas corpus or Rule 30(a) motion for post-conviction relief.") (internal citation omitted); Clemente v. O'Brien , No. 10–10279–GAO, 2010 WL 5207177, at *1 (D.Mass. Dec. 16, 2010) (finding that even where petitioner could not have raised constitutional issue until after SJC opinion, petitioner still needed to provide state courts the opportunity to address the issue before filing habeas petition, such as by filing a motion for a new trial).

"The exhaustion requirement of § 2254(b) ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." Duncan v. Walker , 533 U.S. 167, 179, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). It promotes comity and prevents federal district courts from upsetting a "state court conviction without an opportunity to the state courts to correct a constitutional violation." Id. Here, Rosa has not given the Massachusetts courts an opportunity to correct their alleged error. In his SJC reply brief, Rosa did argue that Britt should not be applied, since it had been decided after his

trial. Addendum at 357. He did not however assert the federal constitutional argument now raised in his habeas petition, namely that the retroactive application of Britt constituted a due process violation. See Casella , 207 F.3d at 20 (1st Cir.2000) (requiring petitioners to raise federal claims "recognizably" in state court, making it "probable that a reasonable jurist would have been alerted to the existence of the federal question") (internal quotations omitted). Accordingly, Rosa must voluntarily dismiss Ground One by January 15, 2016, or the Court will have to dismiss Rosa's entire petition.

The Court will not stay Rosa's habeas petition and allow him to exhaust Ground One in state court. This "stay and abeyance" procedure is only available in limited circumstances that are not present here. As an initial matter, Rosa has not demonstrated good cause for his failure to raise Ground One in state court before filing his petition, which is reason alone for denying a stay. In addition, the Court finds that Rosa's constitutional claim is unlikely to be meritorious. A judicial opinion that alters a common law doctrine of criminal law may be applied retroactively so long as the alteration is not "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Metrish v. Lancaster , ---U.S. ----, 133 S.Ct. 1781, 1792, 185 L.Ed.2d 988 (2013) (citing Rogers v. Tennessee , 532 U.S. 451, 461, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001)). The holding in Britt was not so "unexpected and indefensible" that the SJC could not apply it retroactively. Britt brought clarity to the issue of whether knowledge that a coventurer had a weapon is an element that the Commonwealth must prove on a joint venture theory of

[152 F.Supp.3d 31]

deliberately premeditated murder. As the Britt court acknowledged, SJC decisions preceding Britt had come out both ways on the issue. Compare, e.g. , Commonwealth v. Hour , 446 Mass. 35, 42, 841 N.E.2d 709 (2006) ("[T]he defendant did not need to know that the codefendant possessed the knife in order for the jury to find that he had acted with malice."), and Commonwealth v. Semedo , 422 Mass. 716, 720, 665 N.E.2d 638 (1996) ("If [defendant] possessed the malice aforethought required for a conviction of murder, he is guilty as a joint venture ... It is [ ] not necessary that the Commonwealth prove that [defendant] knew that his coventurer was armed with a dangerous weapon."), with Commonwealth v. Green , 420 Mass. 771, 779, 652 N.E.2d 572 (1995) ("[U]nder a theory of joint venture premeditated murder during which another person carried and used the gun, the Commonwealth must establish beyond a reasonable doubt that the defendant knew [the other person] had a gun with him.") (quoting Commonwealth v. Lydon , 413 Mass. 309, 312 n. 2, 597 N.E.2d 36 (1992)). Accordingly, the outcome in Britt was not unforeseeable and the SJC did not violate Rosa's constitutional rights by applying Britt retroactively. Even without Britt , there was ample precedent to support the SJC's decision to deny Rosa's appeal.

III. CONCLUSION

For the foregoing reasons, the Court finds that Rosa has not exhausted Ground One of his habeas petition. He must therefore voluntarily dismiss Ground One by January 15, 2016, or the Court will dismiss his entire habeas petition without prejudice.

So Ordered.

Notes:

[1] On August 14, 2015, the Respondent filed by hand an Addendum to its Motion to Dismiss, which contains relevant documents from the state court record.

APPENDIX 5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2017-0119

HAMPDEN SUPERIOR COURT
NO. 1179CR00221

COMMONWEALTH

vs.

DANIEL ROSA

MEMORANDUM AND ORDER

The defendant, Daniel Rosa, applies under the gatekeeper provision of G. L. c. 278, § 33E, for leave to appeal to the full court the denial of his motion for a new trial, or for a reversal of his conviction and a remand for a new trial.

Background. In July, 2012, the defendant was tried before a jury in the Superior Court and convicted of murder in the first degree on a theory of deliberate premeditation. The defendant was also found guilty of possession of a firearm without a license. The convictions stemmed from a 2011 shooting in Springfield involving the defendant and two coventurers. The defendant filed a motion for a required finding of not guilty with respect to the Commonwealth's premeditated joint venture theory, arguing that his conviction could not be sustained where there was insufficient evidence that the defendant knew his coventurers possessed firearms.[1] The trial

[1] The Commonwealth indicted the defendant under a premeditation theory, arguing that the defendant was either subject to principal liability or joint liability.

judge denied the motion, and this court affirmed the defendant's conviction in May, 2014. Commonwealth v. Rosa, 468 Mass. 231 (2014).

In April, 2015, the defendant filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(d) in the United States District Court for the District of Massachusetts, arguing, *inter alia*, that the Supreme Judicial Court violated his due process rights by applying retroactively to his case Commonwealth v. Britt, 465 Mass. 87 (2013).[2] Rosa v. Gelb, 152 F. Supp. 3d 26, 27 (D. Mass. 2015). The Federal District Court ultimately found that the defendant had not exhausted this claim in the State courts and granted a stay of dismissal pending exhaustion. Id. at 28. In February, 2017, a Superior Court judge denied the defendant's motion for a new trial. The instant petition pursuant to G. L. c. 278, § 33E, is the defendant's response to the Superior Court's denial of his motion for a new trial.

Discussion. A defendant is not entitled to appeal a denial of a post-appeal motion for a new trial following plenary review on direct appeal under G. L. c. 278, § 33E, unless a single justice of this court allows it "on the ground that it presents a new and substantial question which ought to be determined by the full court." See Commonwealth v. DiBenedetto, 475 Mass. 429, 431 n.7 (2016). "An issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011), quoting Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). In this case, both the defendant and the Commonwealth raised arguments pertaining to Britt in their briefs before this court on direct appellate review. The defendant specifically argued the issue of the retroactivity of the

[2] In Commonwealth v. Britt, 465 Mass. 87, 100 (2013), this court clarified the law as to deliberately premeditated murder on a joint venture theory, holding that the Commonwealth must prove knowledge that a coventurer was armed only where the crime in question has "use or possession of a weapon as an element."

holding in Britt in his reply brief. Therefore, the defendant's argument is not new under G. L. c. 278, § 33E, and his gatekeeper petition must fail.

ORDER

For the foregoing reasons, an order shall enter denying the defendant's gatekeeper petition under G. L. c. 278, § 33E.

Kimberly S. Budd
Associate Justice

DATED: August 8, 2017

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2017-0119

Hampden Superior Court
No.1179CR00221

COMMONWEALTH

v.

DANIEL ROSA

ORDER DENYING LEAVE TO APPEAL

This matter came before the Court, Budd, J., on the defendant's Petition for leave to appeal to the full court pursuant to G.L. c. 278, § 33E filed on March 16, 2017. The Commonwealth having filed its opposition to the petition on May 1, 2017, and in accordance with the Memorandum and Order dated August 8, 2017,

It is ORDERED that the defendant's application pursuant to G. L. c. 278, § 33E, for leave to appeal from the denial of defendant's motion for new trial, is denied.

By the Court, (Budd, J.) rdB

Assistant Clerk

Entered: August 9, 2017

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1179CR00221

COMMONWEALTH

vs.

DANIEL ROSA

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

BACKGROUND

The defendant, Daniel Rosa, was convicted of murder in the first degree on July 2, 2012. Rosa appealed his conviction to the Supreme Judicial Court ("SJC"). *Commonwealth* v. *Rosa*, 468 Mass. 231 (2014). One of the arguments Rosa made for reversal of his conviction was that the trial judge erred in refusing to instruct the jury that the Commonwealth was required to prove beyond a reasonable doubt that he knew one of his coventurers was armed, in order to convict him of joint-venture deliberately premeditated murder involving use of a weapon. The SJC considered that claim, rejected it, and affirmed the conviction.

Rosa then filed a petition for federal habeas corpus relief in the Federal District Court for the District of Massachusetts. *Rosa* v. *Gelb*, Docket No. 15-CV-30073-ADB. In that suit, Rosa alleges that his right to due process was violated by a misapplication of law by the SJC. More specifically, he alleges that the SJC improperly gave retroactive application to a change of the elements of joint venture set forth in *Commonwealth* v. *Britt*, 465 Mass. 87 (2013), a case decided after he was tried. The District Court has stayed the federal case and directed Rosa to exhaust his state court remedies by filing a motion for new trial.

No Answer on Fax (Attempted 2-17-17 again) - Mailed to Defense counsel + left a voice mail message on 2-16-17 (mec)
2-16-17 - Faxed to Defense Counsel, placed in interoffice mail for ADA. (mec)

After review of the filings of the parties, consideration of their arguments, and review of the pertinent case law, I conclude that Rosa's motion must be DENIED.

FINDINGS OF FACT

All of the pertinent facts that the jury could have found are set forth in detail in the SJC's decision in *Commonwealth* v. *Rosa*, supra. I recount those facts that bear on analysis of Rosa's motion for new trial.

On the morning of January 26, 2011, at about 9:30 a.m., Rosa and a friend, Marcus Dixon, went to the home of Eric Caraballo, who resided on Riverton Road in Springfield. The victim, David Acevedo, arrived at Caraballo's home shortly thereafter. Rosa and Acevedo had an argument that escalated into a physical altercation outside of the residence. After the fight, Rosa left and Acevedo came back into the house.

Between 10:30 and 11:30 a.m., Rosa made and received telephone calls to and from Marcus Dixon and another of his friends, Jerell Brunson. Just before noon, the defendant telephoned Caraballo on his cellular telephone asking for Acevedo to meet him outside of Caraballo's house. Acevedo and Caraballo went outside and they exchanged additional telephone calls with Rosa. Rosa appeared at the end of Riverton Road, where it intersects with Denver Street. Acevedo went to meet him. Caraballo remained in his driveway. Moments later, Brunson and Dixon began walking down from the top of a hill on Denver Street toward Riverton Road, and began shooting in Caraballo's direction. Bullets struck an apartment building across the street from Caraballo's house as well as a car parked in front of that building.

Caraballo saw Acevedo turn away from Rosa and run, yelling, "Duck!" Caraballo dropped to the ground. He then saw Rosa take several steps after Acevedo, one arm extended toward Acevedo. Caraballo saw that Rosa was holding a silver gun covered by a blue bandana. He heard "loud booms" from the gun. Acevedo was struck by a single bullet in the back, killing him. The trajectory and straight angle of entry of the bullet showed it came from Rosa's gun. Rosa, Brunson, and Dixon quickly fled up Denver Street and got into Dixon's car. The three men then went to Brunson's residence, where they parted ways.

At the scene, the police recovered two of three projectiles that struck the apartment building across the street from Caraballo's house. The projectiles included one .44 caliber bullet and another scrap of lead that was likely the core of a second .44 caliber bullet.

Investigation led to the police obtaining a warrant to search Brunson's home. In the basement area where Brunson stayed, in a plastic storage unit next to Brunson's bed, police found four casings for .357 caliber bullets and one casing for a .38 caliber bullet. Analysis of the shell casings revealed that all the .357 caliber bullet casings were fired from the same weapon, which was never recovered. They found two live .44 caliber bullets in a clay vase. The police also found Rosa's driver's license hidden in the box spring of the bed.

DISCUSSION

A motion for a new trial will be allowed "if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b). The basis for a new trial can relate to the conduct of the trial, including improper jury instructions. *Commonwealth* v. *Francis*, 411 Mass. 579, 585-86 (1992). The defendant argues that the trial judge erred twice; once for not granting a motion for a required finding of not guilty because there was insufficient evidence that Rosa knew the

coventurers possessed firearms, and a second time for not instructing the jurors that such knowledge was an element of the charged offense. The defendant further argues that the SJC, in reviewing his case, improperly applied a material change in the Commonwealth's burden of proof announced in *Commonwealth* v. *Britt*, supra, retroactively, after having declared that it would only be applied prospectively.

In *Britt*, the SJC clarified the law on joint venture in cases where the defendant was charged with deliberately pre-meditated murder. Prior to *Britt*, there were conflicting lines of cases regarding the Commonwealth's burden of proof. One line of cases stood "for the proposition that a conviction for deliberately premeditated murder on a theory of joint venture requires proof that the [defendant] had knowledge that at least one member of the joint venture possessed a weapon." *Britt*, 465 Mass. at 99, citing *Commonwealth* v. *Zanetti*, 454 Mass. 449, 455 (2009), quoting *Commonwealth* v. *Green*, 420 Mass. 771, 779 (1995); *Commonwealth* v. *Phillips*, 452 Mass. 617, 631 (2008); *Commonwealth* v. *Lydon*, 413 Mass. 309, 312 n.2 (1992). The Court noted that the line of cases that so held began with *Lydon,* which it found had misapplied the requirement that knowledge of a weapon is an element of the Commonwealth's proof in cases tried on a theory of joint venture felony murder, where the predicate offense involves the use or possession of a weapon, to cases prosecuted under a theory of deliberate premeditation. See *Britt*, 465 Mass. at 100. "It was introduced as an element of deliberately premeditated murder on a joint venture theory in a footnote in *Commonwealth* v. *Lydon,* supra at 312 n.2 . . . without analysis, and based on a misunderstanding of the facts in *Commonwealth* v. *Fickett,* 403 Mass. 194, 197 . . . (1988)." *Id.* at 101 (citations omitted).

In *Fickett*, the defendant was charged with murder and armed robbery, and the

Commonwealth had proceeded on a theory of felony murder.[1] In *Lydon*, the Commonwealth did not proceed on a theory of felony-murder. Lydon and another were charged with deliberately premeditated murder as coventurers, and there was no direct evidence that Lydon possessed a weapon. The SJC noted that the footnote in *Lydon* conflicted with a line of cases that held that knowledge that a coventurer was armed with a dangerous weapon was not a required element of joint venture, deliberately premediated first degree murder. *Britt*, 465 Mass. at 100, citing *Commonwealth* v. *Pov Hour*, 446 Mass. 35, 42 (2006), and cases cited therein. The Court then held that, "the *Lydon* line of cases must be overruled to the extent that it requires proof of knowledge of a weapon for deliberately premeditated murder on a joint venture theory." *Britt*, 465 Mass. at 100.

> "The proper, indeed the traditional, application of the requirement of knowledge of a weapon in the context of murder in the first degree on a joint venture theory applies only where the conviction is for felony-murder and the underlying felony has as one of its elements the use or possession of a weapon. . . . Neither possession nor use of a firearm is an element of murder in the first degree based on deliberate premeditation. . . . Therefore, in cases tried hereafter, juries should not be instructed that the Commonwealth must prove that a joint venturer knew that the principal was armed to return a conviction of murder based on deliberate premeditation. . . . It is enough that the Commonwealth, proceeding against a defendant on a joint venture theory, prove beyond a reasonable doubt that 'the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent.'"

Id. at 100-101 (citations omitted; emphasis added).

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[1] "One theory on which the judge submitted the indictments of murder and of armed robbery to the jury was that the defendant participated in a joint venture during which [the coventurer] carried and used the gun. It was essential to the proof of this theory of guilt that the Commonwealth establish beyond a reasonable doubt that the defendant knew [the coventurer] had a gun with him. . . . Thus, the defendant could not properly be found guilty of the felony of joint venture armed robbery or of joint venture felony-murder with armed robbery as the underlying felony unless ... the evidence warranted a finding beyond a reasonable doubt that the defendant knew that [the coventurer] had a gun." *Fickett*, 403 Mass. at 196-197 (citation omitted).

A. Though The Britt Holding Did Not Constitute an Unforeseeable Change in the Substantive Criminal Law Relating to the Charge of Murder, The Holdings in Britt and Rosa Cannot Be Reconciled

In Rosa's appeal of his conviction, he argued that the Commonwealth's evidence was insufficient because of the absence of evidence that he knew that his two coventurers were armed, and that a motion for required finding should have been allowed. He further argued that the failure of the trial court to instruct the jury that such knowledge was an element of joint venture premeditated murder was error. The SJC rejected those claims, stating: "We decline to overrule *Britt*. Because possession of a weapon is not an element of murder in the first degree committed with deliberate premeditation, there was no need for the Commonwealth to prove that the defendant knew Brunson and Dixon were armed with guns. Accordingly, the absence of such proof does not itself render insufficient the evidence of the defendant's participation in a joint venture with one or both of the two men. Similarly, the judge's jury instructions, which did not include the element that the defendant knew that one or both of the joint venturers were armed, were not erroneous." *Rosa*, 468 Mass. at 245-246 (footnote omitted).

Rosa takes the position that the SJC's holding in *Britt* constituted an unexpected change in the substantive criminal law, and its retroactive application to his case violated his due process rights. An unforeseeable judicial decision that has the effect of increasing the penalty for a criminal offense, or that broadens the scope of the conduct punished, may not be applied retroactively. *Bouie* v. *Columbia*, 378 U.S. 347, 353-354 (1964) (state court's construction of trespass statute upholding convictions of black college students who entered drug store expecting to be served, and then were told that they were trespassers, violated due process); *Commonwealth* v. *Moreira*, 388 Mass. 596, 601 (1983) (change of law providing that one cannot resist an

unlawful arrest by a police officer). See also *Commonwealth* v. *Harrington*, 367 Mass. 13, 20-21 (1975), and the cases cited therein. Retroactive application of such a change violates due process in the same way as would an ex post facto law. See *Bouie*, 378 U.S. at 354; United States Constitution, art. 1, § 10; Declaration of Rights of the Massachusetts Constitution, art. 24. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

In Massachusetts, the common law definition of murder applies, with statutory clarification of the degrees of murder: "Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. . . . The degree of murder shall be found by the jury." G. L. c. 265, § 1. "Prior to the passage of that statute the common-law definition of murder was the one in force in this Commonwealth. Murder at common law was murder here. . . . There was only one degree, and it was punishable with death. . . . Shortly after the passage of the statute, it was held that it did not change the common law definition of murder as recognized by our courts, but simply manifested the intention of the Legislature to consider murder as a crime 'the punishment of which may be more or less severe according to certain aggravating circumstances, which may appear on the trial.'" *Commonwealth*

v. *Tucker*, 189 Mass. 457, 489-490 (1905), quoting *Commonwealth* v. *Gardner*, 11 Gray 438, 444 (1858).

In *Gardner,* the 1858 statute was applied to a murder committed before its enactment. The Court held, "[t]he substitution of imprisonment for life, in place of death, is a mitigation in the eye of the law; it is everywhere so regarded. . . . Had this been previously the reverse, that is to say, had murder in the second degree been punishable by a penalty less severe than that declared by the new statute . . . it would clearly have been ex post facto, unconstitutional and void." *Gardner*, 77 Mass. at 443.

The SJC's holdings in *Lydon* and *Britt* did not alter the common law definition of murder, nor the statutory refinement of the degrees of murder. The effect of the *Lydon* line of cases, according to the SJC, was to increase the Commonwealth's burden by adding an unnecessary element for proof of deliberately premeditated murder, to the potential benefit of defendants in cases where knowledge of a coventurer's possession of a weapon might be in question.

Nonetheless, the SJC did hold in cases decided after *Lydon*, continuing up to *Britt*, that it was error not to instruct the jurors that, "under a theory of joint venture premeditated murder during which another person carried and used the gun, the Commonwealth must 'establish beyond a reasonable doubt that the defendant knew [the other person] had a gun with him.'" *Commonwealth* v. *Green*, 420 Mass. at 779, quoting *Lydon*, 413 Mass. at 312.

In *Commonwealth* v. *Green*, the Commonwealth had proceeded under theories that the defendant was either a principal or joint venturer. The SJC reversed the defendant's conviction because of error related to an improper restriction on his use of a peremptory challenge, but ruled

that there was insufficient evidence to retry him under a theory of joint venture because there was no evidence presented that he knew that a coventurer had a gun.

In *Commonwealth* v. *Phillips*, 452 Mass. 617 (2008), the Commonwealth proceeded under theories of joint venture felony murder and deliberately premeditated murder. The SJC wrote, "[t]o be convicted on a theory of joint venture for a crime that has possession of a weapon as one of its elements, the joint venturer must be shown to have had knowledge that the principal perpetrator had a weapon. . . . This knowledge must be established beyond a reasonable doubt, in cases involving a theory of joint venture premeditated murder 'during which another person carried and used the [weapon]' . . . which was a theory on which the Commonwealth proceeded at trial." *Phillips*, 452 Mass. at 632 (citations omitted; internal quotation marks omitted).

In *Commonwealth* v. *Zanetti*, 454 Mass. 449, 455 (2009), where a coventurer had fired the gun that killed the victim, the SJC reversed the defendant's conviction because there was no evidence from which the jurors could conclude that the defendant knew the coventurer had the weapon and was intending to kill the victim with it, and that the defendant shared that intent. *Id.* at 456. The SJC noted that it was error for the judge not to instruct the jurors as to the knowledge requirement.

In *Britt*, the SJC clarified that, where there were multiple coventurers, the Commonwealth did not have to prove that the defendant knew that the person who fired the fatal shot had a firearm, but only that one of the coventurers (including the defendant herself), had a firearm. "Thus, correctly stated, the principle of joint venture as it relates to deliberately premeditated murder does not require the Commonwealth to prove that the defendant knew the actual killer had a weapon. Rather, it requires the Commonwealth to prove that the defendant

knew that one or more of the participants in the joint venture had a weapon." *Id.* at 98 (emphasis added).

I cannot reconcile the holdings in the above-referenced cases and the SJC's statement in *Britt*, with the following language in the Court's decision in *Rosa*:

> We concluded in *Britt* that in the case of a crime that does *not* include possession or use of a dangerous weapon as an element, there is no need to prove the defendant's knowledge of the presence of the weapon in order to convict on a joint venture theory . . . .
>
> We decline to overrule *Britt*. Because possession of a weapon is not an element of murder in the first degree committed with deliberate premeditation, there was no need for the Commonwealth to prove that the defendant knew Brunson and Dixon were armed with guns. Accordingly, the absence of such proof does not itself render insufficient the evidence of the defendant's participation in a joint venture with one or both of the two men. Similarly, the judge's jury instructions, which did not include the element that the defendant knew that one or both of the joint venturers were armed, were not erroneous.

Rosa, 468 Mass. at 245-246. *Rosa* was tried before *Britt* was decided. The *Britt* decision makes clear that at the time of Rosa's trial, case law had held that proof of knowledge of a coventurer's possession of a weapon was an element that needed to be proven beyond a reasonable doubt, and that the clarification of the law made in *Britt* was to be applied prospectively. *Britt*, 465 Mass. at 100. Acknowledging the merit of Rosa's arguments as to the Commonwealth's burden, and the necessity of an instruction regarding same, could not have constituted an overruling of *Britt*.

B. The Trial Judge Properly Denied the Motion for Required Finding

In *Zanetti*, supra, the SJC abandoned the distinction between joint venture liability and liability as a principal, and adopted the language of 'aiding and abetting' as the appropriate instruction to be given a jury. "We ... now adopt the language of aiding and abetting rather than joint venture for use in trials that commence after the issuance of the rescript in this case. When

there is evidence that more than one person may have participated in the commission of the crime, judges are to instruct the jury that the defendant is guilty if the Commonwealth has proved beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, alone or with others, with the intent required for that offense." *Zanetti*, 454 Mass. at 467-468 (footnotes omitted). The Court provided a model 'aiding and abetting' instruction as an appendix to the case. The SJC further noted that a trial judge need not use a special verdict slip requiring the jury to specify whether it had unanimously agreed that a defendant was the principal or an accomplice, and stated, "Now, however, on appeal after a conviction, we will examine whether the evidence is sufficient to permit a rational juror to conclude beyond a reasonable doubt that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime, rather than examine the sufficiency of the evidence separately as to principal and joint venture liability." *Id.* at 468.

It follows then, that if there is evidence that might satisfy reasonable jurors beyond a reasonable doubt that a defendant is guilty either as a principal or an accomplice, a motion for required finding that challenges the sufficiency of evidence on either of the two theories must be denied. That was the situation presented in this case. The defendant moved for a required finding on so much of the charge of murder as alleged that Rosa acted as an accomplice, and the trial judge properly denied the motion. He instructed the jury in accordance with *Zanetti*, and a general verdict slip was used.

C. The Judge Should Have Instructed the Jurors That The Commonwealth Had to Prove That Rosa Knew Co-Venturer Was Armed on the Aiding and Abetting Theory, But the Failure To Do So Did Not Create a Risk That Justice Was Not Done

As noted above, at the time Rosa's case was tried, the SJC's rulings in the *Lydon* line of cases, including *Zanetti*, required that a judge instruct jurors that, where the Commonwealth is alleging accomplice liability, that it was the Commonwealth's burden to prove that the defendant knew that a coventurer was armed. The trial judge did not do so. However, there is no risk that the failure to so instruct may have resulted in a miscarriage of justice.

The weight of the evidence was that Rosa fired the shot that killed the victim. Additionally the defendant was found guilty of Unlawful Possession of a Firearm. The jury was instructed that in order to be convicted of that offense, he had to possess the weapon knowingly. Trial Transcript, Vol. X, p. 82-84. Thus, the jury necessarily found that either he possessed the weapon, or he knew that a coventurer possessed a firearm. It is likely the former, because when the jury was re-instructed on joint venture in response to a jury question, the judge instructed: "Now, each of the offenses ... you recall, that this particular theory of joint venture does not apply, nor did the Commonwealth go forward on the theory of joint venture the way they did along with the regular theory of premeditation for first-degree murder. But as to unlawful possession of a firearm, joint venture does not obtain . . . ." Trial Transcript, Vol. X, p. 123.

In *Britt*, the defendant had been convicted of murder of one victim, and armed assault with intent to murder another by means of dangerous weapon, a firearm. The Court found that the jury necessarily found knowing possession of weapon. "[T]he omission of an instruction on knowledge of a weapon as to deliberately premeditated murder on a joint venture theory did not create a substantial likelihood of a miscarriage of justice. The jury necessarily found that the

defendant knew that someone participating in the joint venture had a weapon, even if that weapon was in the defendant's own possession." *Id.* at 98.

Similarly, in *Phillips*, supra, the SJC found that omission of an instruction concerning defendant's knowledge of a coventurer's possession of weapon could not have created a substantial likelihood of miscarriage of justice where defendant was also convicted of armed robbery, which required proof of knowledge of weapon. *Phillips*, 452 Mass. at 631-632.

D. The Defendant's Argument That the SJC's Holding in Britt Effectively Relieved the Commonwealth of Proving Intent is Without Merit

The defendant argues that the SJC's ruling in *Britt* that the Commonwealth need not prove that a defendant knew a coventurer possessed a weapon effectively relieved the Commonwealth of having to prove that the defendant had the requisite intent to kill. This is incorrect. Knowledge and intent are separate issues as is clear from the *Zanetti* aiding and abetting instruction that the trial judge gave. See *Zanetti*, 454 Mass. at 470. The jurors were instructed that the Commonwealth was required to prove beyond a reasonable doubt that the defendant "intentionally participated in the commission of the alleged crime as something that he wished to bring about and sought by his actions to make it succeed." Trial Transcript, Vol. X, p. 72. They were instructed that the Commonwealth had to prove that at the time Rosa knowingly participated in the crime charged, "he had or shared the intent required for that crime." Trial Transcript, Vol. X, p. 72. They were instructed that mere knowledge that a crime was to be committed, and mere association with the perpetrator, was not sufficient, even when coupled with a failure to take steps to prevent the commission of a crime. They were instructed that proof of mere presence was not sufficient. Trial Transcript, Vol. X, p. 73-74.

ORDER

For the foregoing reasons, the defendant's motion for a new trial is **DENIED**.

John S. Ferrara
Justice of the Superior Court

Dated: February 16, 2017

468 Mass. 231
9 N.E.3d 832

COMMONWEALTH
v.
Daniel ROSA.

SJC–11377.

Supreme Judicial Court of Massachusetts, Hampden.

Argued Jan. 10, 2014.
Decided May 20, 2014.

Summaries:

Source: Justia

After a jury trial, Defendant was found guilty of murder in the first degree on a theory of deliberate premeditation and of possession of a firearm without a license. The Supreme Judicial Court affirmed the convictions and declined to grant relief under Mass. Gen. Laws ch. 278, 33E, holding (1) the trial judge did not abuse his discretion by admitting evidence of bullet shell casings and live ammunition found hours after the shooting; (2) the trial court did not abuse his discretion in admitting admitting a recording of a jailhouse telephone call made by Defendant in which he used street jargon and offensive language; (3) jail officials did not violate Defendant's constitutional rights by monitoring and recording Defendant's telephone calls from jail and by sending law enforcement information derived from the calls; (4) there was sufficient evidence to find Defendant guilty of murder under a joint venture theory; and (5) trial judge properly did not give the jury a special verdict slip and special jury instruction requiring the jury to determine separate whether Defendant was guilty of murder in the first degree as a principal or as an accomplice.

[9 N.E.3d 834]

Stewart T. Graham, Jr., for the defendant.

Marcia B. Julian, Assistant District Attorney, for the Commonwealth.

Present: IRELAND, C.J., CORDY, BOTSFORD, GANTS, & DUFFLY, JJ.

BOTSFORD, J.

A Superior Court jury found the defendant, Daniel Rosa, guilty of murder in the first degree on a theory of deliberate premeditation and of possession of a firearm without a license. The defendant appeals, arguing that (1) the trial judge erred in admitting evidence of bullet shell casings and live ammunition because the Commonwealth failed to prove that the defendant constructively possessed these items; (2) it was unduly prejudicial and violative of due process to admit the recording of a jailhouse telephone call made by the defendant in which he used street jargon and offensive language; (3) the defendant's constitutional rights were violated by the monitoring of his telephone calls from jail and a jail officer's sending to law enforcement authorities information derived from the calls; (4) the evidence was insufficient to prove the defendant guilty of murder in the first degree on a joint venture theory; and (5) the trial judge erred in failing to provide a special verdict slip and special jury instruction requiring the jury to determine separately whether the defendant was guilty of murder in the first degree as a principal or as an accomplice. We affirm the defendant's convictions and decline to grant relief under G.L. c. 278, § 33E.

1. *Background.* We recite the facts as the jury could have found them at trial, reserving certain details for later discussion. On January 26, 2011, at approximately noon, the

victim, David Acevedo, was killed by a single gunshot wound to the back. The shooting occurred on Riverton Road in Springfield, near the home of Eric Caraballo, Sr., a mutual friend of the victim's and the defendant's.

Earlier that morning, at 9:30 or 10 a.m., the defendant had gone to his mother's home in Springfield to visit his daughter and to meet with a friend, Marcus Dixon. A dark-colored, two-door Honda automobile belonging to Dixon was parked there because the defendant was "holding" the car for Dixon. The defendant and Dixon left together in the Honda shortly after they both had arrived. Soon thereafter, the defendant went to Caraballo's house. At some point the victim also arrived at Caraballo's house and confronted the defendant about money that the defendant purportedly owed him. A heated verbal exchange ensued and the defendant and the victim began to fight, but Caraballo intervened. The defendant and the victim went outside to continue fighting while Caraballo remained inside. Several minutes later, the victim returned inside with a ripped, bloodied shirt, but he appeared

[9 N.E.3d 835]

otherwise unhurt. The defendant did not return inside.

Between approximately 10:30 and 11:30 a.m. the defendant made and received a series of telephone calls to and from Dixon and another friend, Jerell Brunson. Just before noon, the defendant telephoned Caraballo on his cellular telephone asking for the victim to meet him outside of Caraballo's house again. The victim and Caraballo went outside and they exchanged additional telephone calls with the defendant. Snow banks obscured their view of the defendant, but when he appeared, the victim went to meet the defendant near a stop sign at the corner of Riverton Road and Denver Street; Caraballo remained in his driveway. Moments later, Brunson and Dixon began walking down from the top of the hill on Denver Street toward Riverton Road; Dixon's Honda was parked near the top of the hill. As they walked, Brunson and Dixon began shooting in Caraballo's direction.[1] Bullets struck an apartment building across the street from Caraballo's house as well as a car parked in front of that building. The victim turned away from the defendant and ran across the street toward the apartment building, yelling, "Duck!" Caraballo dropped to the ground and lay on his stomach behind the snow banks, pretending to be shot. The defendant took several steps toward the victim, who was running away. Caraballo saw the defendant holding a silver gun covered by a blue bandanna, one arm extended toward the victim. He heard "loud booms" peal from the defendant's hand. A single bullet struck the victim's back at a straight angle, injuring his spinal cord and causing cardiac arrest. The gunfire ceased and the defendant turned to Caraballo and said, "Remember that I love you."

The defendant, Brunson, and Dixon retreated quickly up Denver Street toward the Honda. A man who lived on Denver Street, Gary O'Neal, observed a light-skinned man and a dark-skinned man, both holding revolvers, climb into the Honda.[2] Of the three men (the defendant, Brunson, and Dixon), only the defendant had light skin. The three drove in the Honda to Brunson's house at 39 Slater Avenue, approximately one mile away, where they parted ways. [3]

After being shot, the victim lay on the ground bleeding, and died before the paramedics arrived some minutes later. O'Neal, the Denver Street resident, had observed the rear license plate of the Honda he saw two men climbing into, and he wrote the number in the snow on his front porch. His recollection was close to the rear license plate number on the dark, two-door Honda that police officers later discovered at Brunson's house. Later that day, O'Neal identified the defendant from a photographic

array provided by the police, stating that he was sixty per cent

[9 N.E.3d 836]

certain it was the man he saw leaving the crime scene holding a revolver.

Police investigators found two of three projectiles that struck the apartment building across the street from Caraballo's house. The projectiles included one .44 caliber bullet and another scrap of lead that was likely the core of a second .44 caliber bullet. The police were unable to recover the bullets that struck the car parked in front of the apartment building, or the bullet that killed the victim. The investigators did not find any shell casings at the crime scene, a fact suggesting that the gunmen used revolvers.

Within hours of the shooting, police encountered Dixon as he approached a parked car outside the defendant's mother's residence. After ascertaining Dixon's identity, the officers detained him for questioning. Dixon spoke with the officers at the police station, and then drove with them to locations where he had been during and after the shooting, including 39 Slater Avenue, Brunson's house. At that point, two police officers secured the premises of 39 Slater Avenue, leading to the discovery of the Honda parked in back, while other officers obtained a search warrant for the interior of the house. In the basement area where Brunson stayed, police discovered four casings for .357 caliber bullets and one casing for a .38 caliber bullet in a plastic storage unit next to Brunson's bed. They also found two live .44 caliber bullets in a clay vase on a shelving unit, as well as the defendant's driver's license stashed in a narrow slit in the underside of the box spring in the bed. Analysis of the shell casings revealed that all the .357 caliber bullet casings were fired from the same weapon, which never has been recovered.[4] At trial, two witnesses testified to seeing the defendant with a large, silver revolver during the months prior to the murder. Although the defendant denied possessing such a firearm, he admitted to having previously a .22 caliber gun that he and a friend referred to as a ".350." [5]

In his trial testimony, the defendant explained that he had met up with both Dixon and Brunson at the defendant's mother's house in the morning of January 26, 2011, before going to Caraballo's house. Just before noon, Dixon drove Brunson and the defendant in the Honda directly from the defendant's mother's house to Caraballo's neighborhood. The defendant had planned to purchase "crack" cocaine from the victim so that Dixon could resell it. The defendant had met the victim near the stop sign at the corner of Denver Street and Riverton Road to exchange money for the drugs, which the victim passed to him in a blue cloth, while Caraballo stood in his driveway. Suddenly, Brunson and Dixon began shooting from the top of Denver Street, surprising the defendant because he was unaware that his friends had guns. Dixon walked nearly all of the way down the hill and shot the victim. After the shooting, the defendant left the crime scene with Brunson and Dixon in the Honda. The defendant stated that he did not have a firearm with him at any time during the shooting incident.

The Commonwealth proceeded against the defendant on the alternative theories

[9 N.E.3d 837]

of principal and joint venture liability.[6]

2. *Discussion.* a. *Shell casings, bullets, and the defendant's driver's license.* The defendant asserts that the trial judge erred in denying his motion in limine to exclude from evidence the bullet casings, live ammunition, and the defendant's driver's license found by the police hours after the shooting. The defendant argues there was no evidence at trial that he lived in, used, or ever was present in Brunson's bedroom, and he maintains that

the record fails to show he had knowledge that any of the items were there, much less the ability and intent to exercise dominion and control over them. In the defendant's view, the presence of his license in the box spring on the bed, with no indication of who placed it there or when, was an inadequate basis on which to base a claim of constructive possession of the ammunition or even of the license itself.[7]

We review a judge's evidentiary rulings on a motion in limine for abuse of discretion. *Commonwealth v. Spencer,* 465 Mass. 32, 48, 987 N.E.2d 205 (2013), quoting *Commonwealth v. Arrington,* 455 Mass. 437, 441 n. 6, 917 N.E.2d 734 (2009). "Whether proffered 'evidence is relevant and whether its probative value is substantially outweighed by its prejudicial effect are matters entrusted to the trial judge's broad discretion and are not disturbed absent palpable error.' " *Spencer, supra,* quoting *Commonwealth v. Sylvia,* 456 Mass. 182, 192, 921 N.E.2d 968 (2010).

The trial judge did not abuse his discretion by admitting this evidence. The defendant emphasizes the absence of evidence connecting him individually to the casings and live ammunition. He is correct that there was no evidence of his constructive possession of these items, but as the Commonwealth points out, the sufficiency of evidence to support an inference of constructive possession is not the issue, because the ballistics and identification evidence was not being offered to prove a crime for which possession is an element. Rather, the question was whether the evidence had a rational tendency to prove the defendant's participation in the victim's murder. See *Commonwealth v. Fayerweather,* 406 Mass. 78, 83, 546 N.E.2d 345 (1989), quoting *Commonwealth v. Chretien,* 383 Mass. 123, 136, 417 N.E.2d 1203 (1981). The Commonwealth was proceeding at least in part on a joint venture theory in this case. The shell casings, ammunition, and identification card were relevant because these items had a tendency to make more probable the existence of a joint venture among the defendant, Dixon, and Brunson to commit the crime. See *Commonwealth v. Arroyo,* 442 Mass. 135, 144, 810 N.E.2d 1201 (2004) (defining relevant evidence). See also *Commonwealth v. Pytou Heang,* 458 Mass. 827, 851, 942 N.E.2d 927 (2011). Police officers discovered

[9 N.E.3d 838]

the items in Brunson's house reasonably close in time to the shooting incident; they also located at the same address the Honda in which the three perpetrators were seen leaving the scene of the shooting. In addition, the jury could infer that the casings and live rounds found in Brunson's bedroom were connected to the guns used by the perpetrators of the crime, [8] or at a minimum that this evidence tended to show that at least one of the perpetrators—Brunson—had access to the "means of committing the crime." See *Commonwealth v. McGee,* 467 Mass. 141, 156, 4 N.E.3d 256 (2014), quoting *Commonwealth v. Barbosa,* 463 Mass. 116, 122, 972 N.E.2d 987 (2012). [9]

Together, the ballistics evidence and driver's license challenged by the defendant permitted the inference that these items were hidden at Brunson's house in furtherance of the alleged joint venture between the defendant and his two companions to kill the victim. The judge's decision to admit these items constituted an evidentiary ruling well within the permissible scope of his discretion. The defendant's claim fails.

b. *Recording of detainee telephone call.* The defendant challenges on two separate grounds the admission in evidence of portions of a recorded telephone call that he placed on February 15, 2011, while being held at the Hampden County house of correction (jail). He argues first that the recording was far more prejudicial than probative because (a) much of the conversation was conducted

in subculture slang that could not be understood by a lay jury without explanatory expert testimony; and (b) the conversation was replete with racial epithets and curse words that painted him as a person of bad character in the minds of the jurors. His second argument is that the jail's monitoring and recording of the call, and its transmittal of the recording to law enforcement authorities, violated his rights under the First and Fourth Amendments to the United States Constitution.

i. *Prejudice.* The jail recorded the defendant's telephone call while he was being held in pretrial custody. During the call, the defendant spoke with a man identified only as "Blue." The conversation covered a range of topics, including the events surrounding the shooting and killing of the victim on January 26, 2011, the people who were present during the shooting incident,

[9 N.E.3d 839]

and a general discussion about guns. Before trial, the Commonwealth filed a motion in limine to admit the recording of the telephone call, and the defendant filed a motion in limine to exclude it.[10] The judge heard arguments on the motions before listening to the recording, and then he heard additional arguments. The judge admitted the recording but redacted a number of portions that he deemed prejudicial or irrelevant, including references to attorney-client discussions and statements implicating gang-related activity. The judge admitted the redacted recording as a trial exhibit, but he did not admit a transcript of the telephone call in evidence. The court provided a set of headphones to each juror to listen to the recording during trial. The admitted portions of the recording totaled approximately one-half of the thirty-minute telephone call.

The defendant's objection to admission of the telephone call recording was preserved, and we review generally for prejudicial error. See *Commonwealth v. Gambora,* 457 Mass. 715, 723–724, 933 N.E.2d 50 (2010), quoting *Commonwealth v. Flebotte,* 417 Mass. 348, 353, 630 N.E.2d 265 (1994) (review for prejudicial error requires court to determine whether claimed error "was nonprejudicial in the sense that we are sure 'that the error did not influence the jury, or had but very slight effect' ").

As indicated, the defendant contends that expert testimony was required to assist the jury to understand the "street jargon" spoken by the defendant during the telephone call; without an expert, he claims, the evidence of the call was inadmissible.[11] Expert testimony is useful where speakers engage in coded conversation or speak about a subject using specialized vocabulary.[12] This is not the case here. Portions of the recording were (and are) difficult to understand by themselves,[13] but the difficulty arises from the

[9 N.E.3d 840]

speakers' enunciation, the quality of the recording, and, most importantly, a lack of context provided during the conversation. An expert would not have been able to offer contextual information to aid the jury in understanding the conversation. However, in its case-in-chief the Commonwealth *did* furnish context and helped to give meaning to the portions of the call the jury heard.[14] Jurors could be expected to apply their knowledge and understanding of the trial evidence to interpret the meaning of the recorded telephone conversation. Cf. *Commonwealth v. Bundy,* 465 Mass. 538, 546–547, 989 N.E.2d 496 (2013) (expert testimony unnecessary on use and operation of video game console where witnesses testified about its operation and Commonwealth also introduced explanatory photographic evidence). Turning to the claim about the overly prejudicial effect of permitting the jury to hear the language used during the telephone call, there is no question that the defendant's (as well as Blue's) use of

the word "nigger" (or "nigga") and curse words was constant. The defendant argues the jury would find all this language, and the epithet "nigger" in particular, highly offensive, and would conclude from it that the defendant was a bad person who was more likely to have committed this crime.

It would be difficult to argue that the defendant's persistent use of profanity during the telephone call was not prejudicial, and the defendant correctly notes the risk that jurors could draw inappropriate conclusions about his propensity toward criminality based on the language. But the question is not whether admission of the telephone call containing this language was prejudicial; it is rather whether it was unduly prejudicial, or more prejudicial than probative. See generally *Commonwealth v. Rousseau,* 465 Mass. 372, 388, 990 N.E.2d 543 (2013), quoting *Arroyo,* 442 Mass. at 144, 810 N.E.2d 1201 ("evidence is admissible unless unduly prejudicial, and, '[i]n weighing the probative value of evidence against any prejudicial effect it might have on a jury, we afford trial judges great latitude and discretion, and we uphold a judge's decision in this area unless it is palpably wrong' "). We conclude that it was not. The defendant is most concerned about the use of the word "nigger." As offensive as the word is, when one listens to the recorded conversation, it becomes very clear almost immediately that the defendant, and Blue, were not using the word as a racial epithet or in a pejorative sense but, rather, as the defendant testified, as a term of familiarity, such as "guy," or "dude." [15] And the defendant's persistent use of curse words, although offensive, was so constant that we think it likely the jury heard the language as a pattern of speech without intended meaning.[16] On the probative side of the ledger, the substantive contents of the recorded call were directly relevant to the

[9 N.E.3d 841]

crimes charged. In particular, the recorded conversation included statements by the defendant about his participation in the shooting incident; supporting the existence of a joint venture among the defendant, Brunson and Dixon; reflecting consciousness of guilt; [17] and supporting his possession of a firearm. The judge proceeded carefully in redacting portions of the recording that would have had the most prejudicial effect, such as statements that could be interpreted as gang references; redacting all, or even most, of the problematic language would have been impossible because it was so intermingled with everything said.

The weighing of probative value versus prejudicial effect of evidence in the context of a trial is an issue left particularly to the discretion of the trial judge. See, e.g., *Rousseau,* 465 Mass. at 388, 990 N.E.2d 543, quoting *Arroyo,* 442 Mass. at 144, 810 N.E.2d 1201; *Commonwealth v. Anderson,* 445 Mass. 195, 208–209, 834 N.E.2d 1159 (2005), quoting *Commonwealth v. DeSouza,* 428 Mass. 667, 670, 704 N.E.2d 190 (1999). The judge did not abuse his discretion in admitting the redacted recording of the defendant's jailhouse call, and there was no error. See *Commonwealth v. Robidoux,* 450 Mass. 144, 158–159, 877 N.E.2d 232 (2007).

ii. *Violation of constitutional rights.* The defendant argues that jail officials violated his rights under the First and Fourth Amendments by monitoring and recording his telephone conversation and by forwarding a summary of it to law enforcement officials without any showing of a legitimate penological purpose for doing so.

We disagree. As the Commonwealth points out, this court's decisions have made clear that the monitoring and recording of his telephone calls by jail or prison officials does not violate a criminal defendant's constitutional rights [18] where, as here, the defendant and other participants in the telephone conversation are warned before the

call that it will be monitored and recorded.[19] See *Commonwealth v. Fitzpatrick,* 463 Mass. 581, 602, 977 N.E.2d 505 (2012); *Commonwealth v. Gomes,* 459 Mass. 194, 206–207, 944 N.E.2d 1007 (2011), and cases cited. There was evidence here that the monitoring and recording were carried out in accordance with regulations, and our decisions have approved of these types of regulations generally as serving the legitimate penological purpose of advancing the security of prisons.[20] See

[9 N.E.3d 842]

Matter of a Grand Jury Subpoena, 454 Mass. 685, 690–692 & nn.7, 8, 912 N.E.2d 970 (2009) (*Grand Jury Subpoena*); *Cacicio v. Secretary of Pub. Safety,* 422 Mass. 764, 769–770, 665 N.E.2d 85 (1996).[21]

The defendant's principal point appears to be that although regulations that provide for the monitoring of inmate telephone calls may serve legitimate penological purposes as a general matter, before evidence of a call may be used against a defendant at trial, the government must establish that the monitoring of that particular call was justified as advancing such a legitimate purpose. The claim fails. The premise of our decisions upholding and discussing such regulations is that a regulation or rule calling for regular monitoring and recording of all telephone calls made by or to all inmates is an appropriate prophylactic means to implement the penological purpose of security, both within and outside the institution. See *Grand Jury Subpoena,* 454 Mass. at 690–691, 912 N.E.2d 970; *Cacicio,* 422 Mass. at 769–770, 665 N.E.2d 85. There is no suggestion in any of our cases that it is necessary to make an individualized determination whether the monitoring and recording of a particular inmate call serves a penological purpose; indeed, this concept would be antithetical to the prophylactic purpose of the regulation, because it is at best difficult (and more likely impossible) to identify in advance specific telephone calls that may raise safety and security issues.[22]

c. *Joint venture.* The defendant argues that the evidence was insufficient to find him guilty of murder under a joint venture theory because there was no showing that he knew Brunson and Dixon, his two alleged coventurers, were armed; [23] his related contention is that the trial judge's instructions to the jury on joint venture erroneously failed to explain that

[9 N.E.3d 843]

the Commonwealth must prove the defendant knew the coventurers were armed.

We reject the defendant's claims. In *Commonwealth v. Britt,* 465 Mass. 87, 99–100, 987 N.E.2d 558 (2013), this court overruled a line of earlier decisions, beginning with *Commonwealth v. Lydon,* 413 Mass. 309, 597 N.E.2d 36 (1992), standing for the proposition that where a defendant is tried "[u]nder a theory of joint venture premeditated murder" and the coventurer possessed and used a gun, proof of the defendant's knowledge that the coventurer was armed is required. See *id.* at 312 n. 2, 597 N.E.2d 36. We concluded in *Britt* that in the case of a crime that does *not* include possession or use of a dangerous weapon as an element, there is no need to prove the defendant's knowledge of the presence of the weapon in order to convict on a joint venture theory. See *Britt, supra* at 100, 987 N.E.2d 558 ("The Commonwealth should bear the burden of proving only that a joint venturer had knowledge that a member of the joint venture had a weapon where the conviction on a joint venture theory is for a crime that has use or possession of a weapon as an element"). Rather, what is necessary in such a case is proof that "the defendant knowingly participated in the commission of the crime charged, and that the defendant had or shared the required criminal intent." *Id.* at 100–101, 987 N.E.2d 558, quoting

Commonwealth v. Zanetti, 454 Mass. 449, 467, 910 N.E.2d 869 (2009).

We decline to overrule *Britt.* Because possession of a weapon is not an element of murder in the first degree committed with deliberate premeditation, there was no need for the Commonwealth to prove that the defendant knew Brunson and Dixon were armed with guns. Accordingly, the absence of such proof does not itself render insufficient the evidence of the defendant's participation in a joint venture with one or both of the two men. [24] Similarly, the judge's jury instructions, which did not include the element that the defendant knew that one or both of the joint venturers were armed, were not erroneous.

d. *Specific unanimity instruction and special verdict slip.* The defendant argues that due process requires the jury to reach a unanimous determination beyond a reasonable doubt regarding the specific criminal act for which a defendant is convicted, including the elements of accomplice liability. He contends that a conviction based on a theory of joint venture—i.e., accomplice liability—requires proof of factual elements that are distinct from the requirements of proof based on a theory of principal liability—i.e., the defendant was the shooter. His rights were abridged, the defendant claims, because there was conflicting evidence about his

[9 N.E.3d 844]

role as either an accomplice or a principal in the victim's murder, and the trial judge erred in not giving the jury a specific unanimity instruction and in not providing them with a special verdict slip to clarify the specific grounds of conviction.

The defendant's argument in substance asks us to reverse our decision in *Zanetti,* 454 Mass. at 467–468, 910 N.E.2d 869, where we clarified that it was not necessary, in a case tried on a theory of joint venture or accomplice liability, for the jury to determine specifically whether the defendant participated as an accomplice or as a principal, so long as there was sufficient evidence of the defendant's active participation in the crime and that he had or shared the necessary intent. In such a case, use of a general verdict slip is also appropriate. See *id.* at 468, 910 N.E.2d 869. We decline to overrule *Zanetti.* The trial judge properly instructed the jury in accordance with that case, and properly used a general verdict slip.

e. *G.L. c. 278, § 33E.* We have thoroughly reviewed the record as required under G.L. c. 278, § 33E, and find no grounds to warrant relief.

Judgment affirmed.

Notes:

[1] According to the defendant, who testified at trial, Brunson had a .44 gauge revolver and Dixon carried a smaller gauge revolver.

[2] Another Denver Street resident also heard gunshots and saw a man—possibly with light skin—running or walking quickly up the hill away from the crime scene.

[3] The evidence that the defendant, Brunson, and Dixon drove together in the Honda from Denver Street to Brunson's house was provided by the defendant's trial testimony. According to the defendant, once he separated from Brunson and Dixon after arriving at Brunson's house, he walked to a nearby restaurant to meet a friend. Dixon went back to the defendant's mother's house where earlier that morning he had parked a

yellow car that also belonged to him. There was no direct evidence presented about where Brunson went after driving in the Honda to his house, but the jury could have inferred that he went inside the house and hid the shell casings, driver's license, and ammunition.

4. A State police officer experienced in ballistics testified that the .38 caliber casing may have been fired from the same weapon.

5. The Commonwealth introduced in evidence a redacted recording of a telephone conversation between the defendant and an unidentified male; the recorded conversation included statements by the defendant reflecting a knowledge of firearms. We discuss the recording and its contents in greater detail *infra*.

6. The record indicates that the police arrested and questioned Brunson and questioned Dixon in connection with this shooting incident, but it contains no information about any legal proceedings against either individual.

7. The defendant argues that his claim of error relating to the admission of this evidence was preserved, because he challenged its admissibility in a motion in limine that the judge considered before and again during trial and finally denied. The Commonwealth disagrees, contending that the defendant failed to preserve the objection by failing to renew it when the evidence actually was introduced at trial. Whether an objection is preserved in connection with the denial of a motion in limine depends on the particular circumstances of the case, see *Commonwealth v. Jones*, 464 Mass. 16, 19 & n. 4, 979 N.E.2d 1088 (2012); here, the record appears to provide more support for the defendant's position than the Commonwealth's. We do not need to resolve the issue, however, because we conclude there was no error committed.

8. Trooper John Shrijn, the Commonwealth's ballistics witness, testified that four of the shell casings found in Brunson's living space were fired from the same gun, possibly a .357 caliber revolver. A witness had observed the three men at the crime scene holding revolvers, Caraballo's son testified about seeing the defendant with a .357 caliber revolver prior to the crime, and in a recording of the defendant's telephone conversation from the jail, he spoke about possessing a .350 caliber weapon. In light of the undisputed evidence that revolvers do not eject casings automatically, the jury could infer that the casings found in Brunson's bedroom had been removed from the revolver or revolvers used by the perpetrators and hidden in the bedroom. Additionally, police officers found live .44 caliber bullets in Brunson's space and pieces of .44 caliber bullets at the crime scene; the defendant testified that Brunson shot a .44 caliber gun at the shooting incident.

9. It is unnecessary to offer "direct proof" that a "particular weapon was in fact used in the commission of the crime." *Commonwealth v. McGee*, 467 Mass. 141, 156, 4 N.E.3d 256 (2014), quoting *Commonwealth v. Barbosa*, 463 Mass. 116, 122, 972 N.E.2d 987 (2012). See *Commonwealth v. O'Toole*, 326 Mass. 35, 39, 92 N.E.2d 618 (1950). Weapons-related items, including ammunition and shell casings, are admissible to show that means of committing the crime were available. See *Commonwealth v. Gagnon*, 408 Mass. 185, 199–200, 557 N.E.2d 728 (1990) (spent cartridge admissible because same caliber as bullet retrieved from victim's body).

[10] In his motion in limine, the defendant argued that (1) there was no notice that the jail could turn over to law enforcement information gleaned from a call, and that doing so was a "fishing expedition" to seek out statements of prosecutorial interest; (2) the call must be authenticated; (3) the content of the call was highly prejudicial due to the defendant's use of profanity and racial epithets—evidence that, he argued, the Commonwealth was "back-dooring" as evidence of his bad character; and (4) his consciousness of guilt was not clear from the content of the conversation. The defendant also asserted that the frequent use of profanity and the word "nigger" during the telephone call was prejudicial because the jury could take offense at the language or improperly infer that he was a member of a criminal organization or gang.

[11] The defendant did not assert the need for expert testimony to interpret the recording either in his motion in limine or during trial. Accordingly, we review this particular aspect of the defendant's claim of error to determine whether there was a substantial likelihood of a miscarriage of justice.

[12] Expert testimony may be admitted to explain the meaning of conversations conducted in "street-level jargon," or other coded language, see *United States v. Baptiste,* 596 F.3d 214, 222 & n. 6 (4th Cir.2010), but "interpretations of clear conversations are not admissible." *United States v. Gonzalez–Maldonado,* 115 F.3d 9, 17 (1st Cir.1997). See *United States v. Gibbs,* 190 F.3d 188, 213 (3d Cir.1999), cert. denied, 528 U.S. 1131, 120 S.Ct. 969, 145 L.Ed.2d 840 (2000), quoting *United States v. Dicker,* 853 F.2d 1103, 1108–1109 (3d Cir.1988) (expert testimony permitted to interpret "coded or 'code-like' conversations," but "interpretation of clear conversations is not helpful to the jury, and thus is not admissible"). See also *United States v. Griffith,* 118 F.3d 318, 321–322 (5th Cir.1997) (expert testimony allowed to explain slang pertaining to drug trade); *United States v. Delpit,* 94 F.3d 1134, 1144–1145 (8th Cir.1996) (same).

[13] Both the judge and the prosecutor expressed difficulty comprehending portions of the recording.

[14] Examples include Caraballo's testimony about the shooting incident, which helped furnish context for comments made by the defendant during the telephone call about the shooting incident as well as about the victim; and information about firearms provided by Trooper John Shrijn, including his descriptions of .357 caliber revolvers and Glocks, and of how guns deposit a residue when fired.

[15] Jurors reasonably could infer that the defendant did not use the word "nigger" pejoratively at all unless paired with another term such as "bitch."

[16] An expert witness perhaps could have been called to explain the use of curse words and, particularly, use of the word "nigger" among groups that the defendant might be part of, but as indicated in the text, it seems reasonably clear to us that the jury would have been able sufficiently to understand the defendant's use of these words and terms simply by listening to the recorded telephone call itself.

[17] For example, the defendant's consciousness of guilt is present in his discussion of turning over a blue rag without gunshot residue and the statement about how it would have been "gravy" had Caraballo

been shot.

[18] The defendant cites both the First and Fourth Amendments to the United States Constitution, but the principal constitutional claim appears to be lodged in the Fourth Amendment and, specifically, the protection offered by the amendment to a person's reasonable expectation of privacy. See *Matter of a Grand Jury Subpoena,* 454 Mass. 685, 688–689, 912 N.E.2d 970 (2009) (*Grand Jury Subpoena*) (Fourth Amendment). See also *id.* at 689–692, 912 N.E.2d 970 (art. 14 of Massachusetts Declaration of Rights).

[19] Officer Jessica Athas, an intelligence officer at the Hampden County house of correction (jail), testified that the warning of monitoring and recording is included in the inmate handbook and is posted near the inmate telephones, and at the outset of each telephone call, a recorded voice tells the inmate and other participants on the call that the call is being recorded.

[20] The defendant argues that the Commonwealth never introduced the jail "regulations" referred to by Officer Athas. The defendant did not raise any point about the nonproduction of regulations when arguing against the admission of the recorded jail call before or at trial, and we have not made the production of a correctional facility's telephone monitoring regulations a condition precedent to admission of evidence of any recorded calls. Nothing in the record suggests that the jail's regulations were likely to be materially different from the Department of Correction regulations discussed in *Cacicio v. Secretary of Pub. Safety,* 422 Mass. 764, 665 N.E.2d 85 (1996), or the regulations of the Suffolk County house of correction discussed in *Grand Jury Subpoena,* 454 Mass. 685, 912 N.E.2d 970. Even if error, the nonproduction of the jail's regulations in this case did not create a substantial likelihood of a miscarriage of justice.

[21] The defendant cites decisions of the United States Supreme Court in support of his over-all argument, including *Thornburgh v. Abbott,* 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989); *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). See *United States v. Savage,* 482 F.2d 1371 (9th Cir.1973), cert. denied, 415 U.S. 932, 94 S.Ct. 1446, 39 L.Ed.2d 491 (1974). These cases do not support the defendant's implicit claim that the decisions of this court cited here in the text are contrary to the requirements of the First and Fourth Amendments.

[22] To the extent the defendant separately challenges on appeal Officer Athas's transmittal of a summary of his telephone call to law enforcement officials, that challenge also fails. Athas testified that she referred this particular call to "law enforcement" because it contained potential threats to individuals outside the prison. During the call, Blue, the person with whom the defendant was speaking, stated something about "knocking out" members of the victim's family, and the defendant responded, "Do that." Apparent threats relating to the family of a homicide victim provide justification for sending information about the contents of the call to police, even without a subpoena or other form of process seeking it. See *Grand Jury Subpoena,* 454 Mass. at 690 n. 8, 912 N.E.2d 970. See also *id.* at 697 n. 14, 912 N.E.2d 970 (Marshall, C.J., dissenting).

[23] The defendant moved for a required finding of not guilty with respect to the joint venture theory at the close of the Commonwealth's case.

[24] The defendant's challenge to the sufficiency of the joint venture evidence on appeal is limited to the issue whether he knew that the other joint venturers were armed. Nevertheless, the review we have conducted under G.L. c. 278, § 33E, of all of the evidence relating to the defendant's participation in a joint venture persuades us that even a more generalized sufficiency challenge would fail. There was strong evidence that the defendant knowingly participated in the victim's murder with Dixon and Brunson and that he did so with deliberate premeditation, regardless of whether he or one of the other two men shot the victim. The evidence included a series of telephone calls among the three men that took place directly before the shooting of the victim occurred, observations by bystander witnesses that all three men fired guns at or in the direction of the victim and Caraballo during the incident, and other observations by bystanders that the three men left together in the Honda immediately after the victim was shot. The shell casings, ammunition, and driver's license uncovered at Brunson's residence lent further credence to the joint venture theory.