

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024-2025

TIMOTHY R. BROWN,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE APPEALS COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

APPENDIX

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APPENDIX CONTENTS

Appeals Court for the Commonwealth of Massachusetts, No. 2022-P-0558, Order affirming convictions and sentence on resentencing, <u>Commonwealth v. Brown</u> , 2024 Mass. Unpub. LEXIS 349, 104 Mass. App. Ct. 1108, 235 N.E. 3d 330 (May 30, 2024) Appendix A
<u>Commonwealth vs. Timothy R. Brown</u> , Supreme Judicial Court for the Commonwealth of Massachusetts, Case Docket on further appellate review of Appeals Court No. 2022-P-0558 Appendix B
Supreme Judicial Court of Massachusetts, Order denying further appellate review of order affirming convictions and sentence on resentencing, <u>Commonwealth v. Brown</u> , 2024 Mass. LEXIS 368, 494 Mass. 1106, 241 N.E.3d 1189 (September 5, 2024) . . . Appendix C
Supreme Judicial Court of Massachusetts, No. SJC-11669, Decision and order remanding for resentencing, <u>Commonwealth v.</u> <u>Brown</u> , 477 Mass. 805 (2017), 81 N.E.3d 1173, 2017 Mass. LEXIS 710 (2017) Appendix D
Supreme Court of the United States, No. 17-7732, Order denying petition for writ of certiorari from 477 Mass. 805 (2017),

Brown v. Massachusetts, 2018 U.S. LEXIS 4451, 586 U.S. 826,
139 S. Ct. 54 (October 1, 2018) Appendix E

Commonwealth vs. Timothy R. Brown, Appeals Court for the Commonwealth
of Massachusetts, No. 2022-P-0558,

Case Docket on appeal from resentencing in Middlesex Superior Court
No. MICR-2009-01511 (No. 0981CR01511), Commonwealth vs.
Timothy R. Brown Appendix F

Commonwealth vs. Timothy R. Brown, Middlesex Superior Court, No. MICR-
2009-01511 (No. 0981CR01511), Docket Entries Appendix G

Commonwealth vs. Timothy R. Brown, Appeals Court for the Commonwealth
of Massachusetts, No. 2022-P-0558, Defendant's Reply Brief Appendix H

APPENDIX A

Commonwealth v. Brown.

Appeals Court of Massachusetts

May 30, 2024, Entered

22-P-558

Reporter

2024 Mass. App. Unpub. LEXIS 349 *; 104 Mass. App. Ct. 1108; 235 N.E.3d 330; 2024 WL 2764401
23.0

COMMONWEALTH vs. TIMOTHY BROWN.

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by Commonwealth v. Brown, 494 Mass. 1106, 2024 Mass. LEXIS 368 (Mass., Sept. 5, 2024)

Prior History: Commonwealth v. Brown, 477 Mass. 805, 2017 Mass. LEXIS 710, 81 N.E.3d 1173, 2017 WL 4172566 (Sept. 20, 2017)

Disposition: Judgments affirmed.

Judges: [*1] Rubin, Englander & D'Angelo, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE

In this appeal we revisit various issues associated with the murder prosecution of defendant Timothy Brown, see Commonwealth v. Brown, 477 Mass. 805, 81 N.E.3d 1173 (2017), cert. denied, 139 S. Ct. 54 (2018). On June 25, 2013, a jury found Brown guilty of multiple charges, including felony-murder in the first degree and home invasion. On direct appeal, the Supreme Judicial Court rejected all claims of error with regard to Brown's convictions, and we refer the reader to that opinion for a detailed discussion of the facts. *Id.* at 807. Relevant for present purposes is that Brown was not present in the home where the murders occurred, but instead was tried and convicted on the theory that he had jointly participated in planning two felonies — attempted armed robbery and home invasion — and that Brown's coventurers had committed two murders in the course of that planned robbery. *Id.* at 808-811, 812, 814.

In upholding Brown's convictions, the Supreme Judicial Court explicitly held that the evidence was sufficient to convict Brown of felony-murder in the first degree under Massachusetts law, and that convicting Brown of felony-murder in the first degree did not violate Federal or Massachusetts constitutional principles. Brown, 477 Mass. at 814, 822-823. Importantly, [*2] a separate concurrence, joined by a majority of the justices, went on to hold that for future prosecutions, Massachusetts law would no longer recognize the felony-murder crimes of which Brown had been convicted; rather, going forward:

"criminal liability for murder in the first or second degree will be predicated on proof that the defendant acted with malice or shared the intent of a joint venturer who acted with malice. The sole remaining function of felony-murder will be to elevate what would otherwise be murder in the second degree to murder in the first degree where the killing occurs during the commission of a life felony."

Commonwealth v. Brown., 2024 Mass. App. Unpub. LEXIS 349

Id. at 832 (Gants, C.J., concurring).

Having concluded that it would change the Massachusetts common law of felony-murder, the majority was explicit that its change would not apply to Brown's case, but would apply only prospectively:

"The abolition of felony-murder liability from our common law of murder is prospective, applying only to cases where trial begins after our adoption of the change. It will have no effect on felony-murder cases already tried, including this case (which is why this is a concurrence rather than a dissent)."

Brown, 477 Mass. at 834.

Finally, the court performed its review [*3] of Brown's convictions of murder in the first degree under G. L. c. 278, § 33E, and concluded that on the facts before it, verdicts of murder in the second degree were more "consonant with justice." Brown, 477 Mass. at 824. Brown's first-degree murder convictions were accordingly vacated and the case remanded for resentencing. This appeal is taken from the judgments resentencing the defendant in accordance with verdicts of murder in the second degree, as well as of armed home invasion. For the reasons that follow, we affirm.

Discussion. 1. *The murder convictions.* The defendant raises a variety of arguments, which we address in turn. He first argues that his convictions of murder in the second degree must be overturned because the Commonwealth failed to prove every element of the crime, and thus violated the due process clause of the Fourteenth Amendment. Although not entirely clear, this argument appears to stem from the notion that the law applicable at the time of the murders required proof that the defendant acted with malice. The short answer to this argument is that the Supreme Judicial Court has already ruled that there was sufficient evidence to find the defendant guilty of murder in the first degree under the laws of the Commonwealth as of the time the defendant [*4] was tried and convicted. The defendant's insufficient evidence argument is thus barred by direct estoppel. See Commonwealth v. Sanchez, 485 Mass. 491, 498, 151 N.E.3d 404 (2020). Furthermore, the reduction of the verdicts to murder in the second degree was done pursuant to the court's powers under § 33E, and thus the decision to reduce the convictions provides no basis for an insufficiency of the evidence or other constitutional argument. Indeed, the defendant has not argued that the court violated any constitutional provision, Federal or State, by exercising

its § 33E powers in that fashion.¹

The defendant next argues that under the United States Supreme Court decision in Fiore v. White, 531 U.S. 225, 121 S. Ct. 712, 148 L. Ed. 2d 629 (2001), the verdicts of murder in the first degree must be reversed because the law of first-degree murder that the court announced in Brown must be applied to the charges against Brown himself. This argument is also incorrect. Fiore dealt with a criminal prosecution in Pennsylvania where, after the defendant had been convicted, the Pennsylvania Supreme Court (in a different case) clarified the necessary elements of the crime of which the defendant had been convicted. Fiore, 531 U.S. at 226, 229. The clarification showed that the defendant in Fiore could not have been convicted of the crime at the time he was tried, because the prosecution [*5] could not have established all the elements. Fiore is plainly distinguishable from this case, because here the Supreme Judicial Court's ruling makes clear that Brown was properly convicted at the time he was tried, and that the court changed the law for future prosecutions only.

Finally, the defendant argues, in essence, that Brown's convictions must be vacated because the Supreme Judicial Court was required by law to apply its new common-law rule to Brown's case. Brown, 477 Mass. at 807-808. To the extent the defendant's argument is based in Massachusetts retroactivity law, it of course is without merit, as the Supreme Judicial Court is the final arbiter of such an issue, and has already decided it. Id. at 808, 834. To the extent the defendant's argument is based on the Federal Constitution, the Supreme Judicial Court also has already concluded that its decision to announce a new common-law rule, but not to apply it to Brown, did not violate any Federal constitutional provision. The court addressed such arguments in Commonwealth v. Martin, 484 Mass. 634, 644, 144 N.E.3d 254 (2020), where the defendant argued that "as a matter of due process, equal protection, and basic fairness, we should extend our holding in Brown to his case, [because his case] was tried before the opinion in Brown and the appeal [*6] was pending when Brown was decided." The court concluded that Federal law was

¹ The defendant also argues that there was insufficient evidence to convict him because he was not "at, or near the scene" at the time his co-conspirators committed the murders. This argument, or a like argument, was addressed and rejected on the defendant's direct appeal. Brown, 477 Mass. at 811-814. It is also barred by direct estoppel. See Sanchez, 485 Mass. at 498.

Commonwealth v. Brown., 2024 Mass. App. Unpub. LEXIS 349

not violated by the court's refusal to apply its new common-law rule to cases tried before (and including) *Brown*, "[b]ecause *Brown* neither established a new Federal constitutional rule nor a new Federal rule of criminal procedure." *Martin*, 484 Mass. at 644. We of course are bound by the Supreme Judicial Court's ruling on that issue. See *Commonwealth v. Dube*, 59 Mass. App. Ct. 476, 485-486, 796 N.E.2d 859 (2003). To the extent that the defendant argues the due process holding of *Martin* should not apply because the due process clause of the Fourteenth Amendment requires that where the substantive law changes while an appeal is pending, the new, current law must be given effect in cases on appeal where the judgment is not final, we think that argument, raised by the defendant in *Martin*, was resolved by *Martin*, which we follow.

2. *The armed home invasion conviction.* The defendant also argues that his armed home invasion conviction must be vacated, for two reasons: (1) because there was insufficient evidence of his "actual participation" in the crime, and (2) because the home invasion conviction is duplicative of his convictions of felony-murder in the first degree. The defendant's insufficiency of the evidence argument was considered and explicitly rejected in the *Brown* decision itself. [*7] *Brown*, 477 Mass. at 814. The defendant's duplicative conviction argument also fails. Where as here a defendant is convicted of felony-murder based on two different underlying felonies, only the offense that is "better suited to serve as the predicate felony" is duplicative of the felony-murder conviction. *Commonwealth v. Simon*, 481 Mass. 861, 872, 120 N.E.3d 679 (2019), quoting *Commonwealth v. Rasmussen*, 444 Mass. 657, 666, 830 N.E.2d 1040 (2005). Here *Brown* was not separately convicted of the predicate felony of attempted armed robbery, and such a conviction would have been duplicative and thus invalid. But his conviction of home invasion may stand independently.

3. *Arguments based on Commonwealth v. Guardado.* Finally, the defendant argues, based on the Supreme Judicial Court's decisions in *Commonwealth v. Guardado*, 491 Mass. 666, 690, 692 (*Guardado I*), S.C. 493 Mass. 1 (2023) (*Guardado II*), that we are required to reverse his convictions of unlawful possession of a firearm, and unlawful possession of ammunition. In *Guardado I*, *supra* at 693, however, the Supreme Judicial Court expressly held that its decision only applied to cases on direct appeal as of the time *Guardado I* was decided on April 13, 2023; *Guardado I* did not apply to reopen convictions that were final as of April 13, 2023. The defendant's firearm convictions

became final as of the decision on direct appeal in *Brown*, in 2017. We disagree with the defendant's contrary argument that his firearm convictions [*8] were not final because, after the Supreme Judicial Court's decision in *Brown*, the Superior Court engaged in resentencing with respect to the reduced convictions of murder in the second degree. Indeed, as the Commonwealth points out, the defendant was sentenced to two years in the house of correction for the firearm convictions in 2013, and thus had already served his sentences for the firearm convictions by the time the case was remanded for resentencing in 2017.

Judgments affirmed.

By the Court (Rubin, Englander & D'Angelo, JJ.²),

Entered: May 30, 2024.

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²The panelists are listed in order of seniority.

APPENDIX B

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

Appendix B

COMMONWEALTH vs. TIMOTHY R. BROWN
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
FAR-29837

CASE HEADER	
Case Status	FAR denied
Status Date	09/05/2024
Nature	Murder2
Entry Date	06/05/2024
Appeals Ct Number	2022-P-0558
Response Date	08/08/2024
Appellant	Defendant
Applicant	Defendant
Citation	494 Mass. 1106
Case Type	Criminal
Full Ct Number	
TC Number	
Lower Court	Middlesex Superior Court
Lower Ct Judge	Laurence D. Pierce, J.

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellee	<u>Thomas D. Ralph, A.D.A.</u> <u>Melissa Weisgold Johnsen, A.D.A.</u> <u>Adrienne C. Lynch, A.D.A. - Inactive</u>
Timothy R. Brown Defendant/Appellant	<u>David H. Mirsky, Esquire</u> <u>Joanne T. Petito, Esquire</u> <u>Victoria Kelleher, Esquire - Inactive</u>

DOCKET ENTRIES		
Entry Date	Paper	Entry Text
06/05/2024		Docket opened.
06/05/2024	#1	MOTION to file FAR application late filed for Timothy R. Brown by Attorney David Mirsky. (ALLOWED to July 26, 2024.)
07/25/2024	#2	FAR APPLICATION filed for Timothy R. Brown by Attorney David Mirsky.
09/05/2024	#3	DENIAL of FAR application.

As of 09/18/2024 4:20pm

APPENDIX C

Appendix C

Commonwealth v. Brown.

Supreme Judicial Court of Massachusetts

September 5, 2024, Decided

No Number in Original

Reporter

2024 Mass. LEXIS 368 *; 494 Mass. 1106; 241 N.E.3d 1189

COMMONWEALTH vs. TIMOTHY BROWN.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Reported below: 104 Mass. App. Ct. 1108, 2024 (2024) [*1].

Commonwealth v. Brown., 104 Mass. App. Ct. 1108, 2024 Mass. App. Unpub. LEXIS 349, 235 N.E.3d 330, 2024 WL 2764401 (May 30, 2024)

Judges: Mme. Justice Dewar did not participate.

Opinion

Further appellate review denied.

MME. JUSTICE DEWAR did not participate.

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APPENDIX D

Commonwealth v. Brown

Supreme Judicial Court of Massachusetts

March 10, 2017, Argued; September 20, 2017, Decided

SJC-11669.

Reporter

477 Mass. 805 *; 81 N.E.3d 1173 **; 2017 Mass. LEXIS 710 ***; 2017 WL 4172566

COMMONWEALTH vs. TIMOTHY BROWN.

Notice: Corrected October 23, 2017.

Subsequent History: US Supreme Court certiorari denied by *Brown v. Massachusetts*, 139 S. Ct. 54, 202 L. Ed. 2d 41, 2018 U.S. LEXIS 4451, 2018 WL 838385 (U.S., Oct. 1, 2018)

Decision reached on appeal by *Commonwealth v. Brown*, 2024 Mass. App. Unpub. LEXIS 349 (Mass. App. Ct., May 30, 2024)

Prior History: [***1] Middlesex. INDICTMENTS found and returned in the Superior Court Department on December 22, 2009.

The cases were tried before Sandra L. Hamlin, J.

Case Summary

Overview

HOLDINGS: [1]-The trial court properly convicted defendant of first-degree felony-murder based on the predicate felonies of attempted armed robbery, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition because, after being in a vehicle with three friends who robbed two females, defendant and his friends returned to defendant's apartment where he supplied them with a gun and hooded sweatshirts to help them avoid detection in another robbery; however, defendant's conduct, as an individual who participated on the "remote outer fringes" of the joint venture, made verdicts of second-degree murder more consonant with justice.

Outcome

Verdicts vacated and set aside in part, matter remanded, and judgment otherwise affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

HN1 [+] Murder, Felony Murder

The Supreme Judicial Court of Massachusetts holds that, in trials that commence after September 20, 2017, a defendant may not be convicted of murder without proof of one of the three prongs of malice. As a result, in the future, felony-murder is no longer an independent theory of liability for murder. Rather, felony-murder is limited to its statutory role under *Mass. Gen. Laws ch. 265, § 1*, as an aggravating element of murder, permitting a jury to find a defendant guilty of murder in the first degree where the murder was committed in the course of a felony punishable by life imprisonment even if it was not committed with deliberate premeditation or with extreme atrocity or cruelty. This holding as to common-law felony-murder liability is prospective in effect.

Criminal Law & Procedure > Trials > Motions for Acquittal

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Motions to Acquit & Dismiss

HN2 [+] Trials, Motions for Acquittal

Commonwealth v. Brown, 477 Mass. 805

In reviewing the denial of a motion for a required finding of not guilty, the Supreme Judicial Court of Massachusetts applies the standard from Commonwealth v. Latimore, 378 Mass. 671, 677-678 (1979). The question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Under this standard of review, the Court resolves issues of witness credibility in favor of the Commonwealth. In determining whether a reasonable jury could find each element of the crime charged, the Court also do not weigh the supporting evidence against conflicting evidence.

Criminal Law & Procedure > ... > Crimes Against Persons > Home Invasion > Elements

HN5[down] Accessories, Aiding & Abetting

To prove armed home invasion, the Commonwealth must establish that the defendant (or his accomplice) entered a dwelling, while armed with a dangerous weapon, and used force or threatened the imminent use of force upon any person within such dwelling. Mass. Gen. Laws ch. 265, § 18C.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN6[down] Accessories, Aiding & Abetting

Knowing participation in a criminal offense may take any of several forms, and includes providing aid or assistance in committing the crime.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN7[down] Accessories, Aiding & Abetting

To establish guilt on a theory of accomplice liability, the Commonwealth is not required to prove that a defendant was physically present at the scene of the offense.

Criminal Law & Procedure > ... > Robbery > Armed Robbery > Elements

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

HN8[down] Accessories, Aiding & Abetting**HN4[down] Armed Robbery, Elements**

To support a finding of guilt of armed robbery requires proof that a defendant (or an accomplice) while armed with a dangerous weapon assaulted the victim and took money or property from the victim with the intent (or shared intent) to steal it. An attempt is defined as: (1) an intent to commit the underlying crime and (2) an overt act towards its commission.

A defendant may be convicted as a coventurer when he or she is not present at the scene of a crime so long as the jury finds that the defendant had actually associated himself or herself with the criminal venture and assisted in making it a success.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN9[down] Accessories, Aiding & Abetting

Commonwealth v. Brown, 477 Mass. 805

Complicity in the underlying felony is sufficient to establish guilt of felony-murder if the homicide followed naturally and probably from the carrying out of the joint enterprise.

Criminal Law & Procedure > Accessories > Aiding & Abetting

HN10 [down] Accessories, Aiding & Abetting

A person need not be physically present at the scene of the crime in order to participate as a joint venturer.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

HN11 [down] Procedural Due Process, Scope of Protection

The due process clause of the Fourteenth Amendment to the United States Constitution requires the Commonwealth to prove every essential element of the offense beyond a reasonable doubt. Instructions to the jury that would lead them to believe otherwise are constitutional error.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Evidence > Burdens of Proof > Burden Shifting

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

HN12 [down] Procedural Due Process, Scope of Protection

The due process clause prohibits use of evidentiary presumption that relieves government of its burden of

proof.

Criminal Law & Procedure > Trials > Jury Instructions > Particular Instructions

Evidence > Burdens of Proof > Burden Shifting

Evidence > Inferences & Presumptions > Presumptions > Particular Presumptions

Evidence > Inferences & Presumptions > Inferences

HN13 [down] Jury Instructions, Particular Instructions

An instruction that the jury reasonably could interpret as a mandatory presumption violates due process and cannot stand. By contrast, there is no constitutional infirmity where a jury instruction creates only a permissive inference. For example, a permissive inference that allows jury to infer an elemental fact from proof by prosecutor of another fact does not shift burden of proof. The analysis is relatively straightforward—a reviewing court must determine whether the challenged portion of an instruction created an unconstitutional mandatory presumption or merely a permissive inference.

Criminal Law & Procedure > Trials > Opening Statements

HN14 [down] Trials, Opening Statements

The purpose of an opening statement is to outline in a general way the nature of the case which the counsel expects to be able to prove or support by evidence.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN15 [down] Conduct Evidence, Prior Acts, Crimes & Wrongs

Evidence of a defendant's prior or subsequent bad acts is not admissible to show bad character or criminal propensity. It may be admissible, however, where it is relevant for another purpose, such as to establish a common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive.

Commonwealth v. Brown, 477 Mass. 805

Manslaughter & Murder > Murder > Felony Murder

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Evidence > Admissibility > Conduct
Evidence > Prior Acts, Crimes & Wrongs[HN16](#) Standards of Review, Clearly Erroneous Review

The Supreme Judicial Court of Massachusetts reviews questions of admissibility, probative value, and unfair prejudice for abuse of discretion and does not disturb a trial judge's decision absent a clear error of judgment in weighing the relevant factors. In deciding whether to allow the admission of such evidence, a judge must decide whether the probative value of the evidence is outweighed by the risk of unfair prejudice to the defendant.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

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

Criminal Law & Procedure > Trials > Judicial Discretion

[HN17](#) Standards of Review, Abuse of Discretion

During jury selection, a judge is required to examine jurors fully regarding possible bias or prejudice where it appears that there is a substantial risk that jurors may be influenced by factors extraneous to the evidence presented to them. The judge may ask questions designed to determine whether jurors can set aside their own opinions, weigh the evidence, and follow the instructions of the judge. The scope of jury voir dire is committed to the judge's sound discretion, and an appellate court will uphold the judge's questioning absent a clear showing of abuse of discretion. A question may not be introduced if it commits the jury to a verdict in advance or has the effect of identifying and selecting jurors who are predisposed to convicting the defendant based on evidence the Commonwealth will present.

Criminal Law & Procedure > ... > Homicide,

[HN18](#) Murder, Felony Murder

The felony-murder rule imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise.

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Murder > Felony Murder[HN19](#) Murder, Felony Murder

Felony-murder is a common-law crime. The felony-murder rule imposes criminal liability on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise.

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

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

[HN20](#) Felony Murder, Elements

The effect of the felony-murder rule, both for principals and accomplices, is to substitute the intent to commit the underlying felony for the malice aforethought required for murder.

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

Criminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Murder > Felony MurderCriminal Law & Procedure > ... > Homicide,
Manslaughter & Murder > Murder > Second-Degree Murder[HN21](#) First-Degree Murder, Elements

Felony-murder also falls within the province of Mass. Gen. Laws ch. 265, § 1, which establishes two degrees of murder. That statute provides that murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or

Commonwealth v. Brown, 477 Mass. 805

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. Section 1, was enacted to mitigate the harshness of the common law rule imposing a mandatory death penalty on all murderers.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN22 [down] Case or Controversy, Constitutionality of Legislation

The Supreme Judicial Court of Massachusetts has consistently rejected the argument that the felony-murder rule is unconstitutional or that it relieves the Commonwealth of its obligation to prove a defendant's own moral culpability.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

HN23 [down] Accessories, Aiding & Abetting

A broad conception of complicity is indeed at work in the special field of so called felony-murder.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Murder > Felony Murder > Elements

HN24 [down] Accessories, Aiding & Abetting

Felony-murder is an exception to the general rule that one is punished for his own blameworthy conduct, not that of others. Under the felony-murder rule, a person who knowingly participates in one crime as part of a joint venture is *ipso facto* also guilty of murder

committed by an accomplice in furtherance of the joint venture.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > First-Degree Murder

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Second-Degree Murder

Criminal Law & Procedure > Criminal Offenses > Homicide, Manslaughter & Murder > Voluntary Manslaughter

HN25 [down] Sentencing, Corrections, Modifications & Reductions

The Supreme Judicial Court of Massachusetts' authority under Mass. Gen. Laws ch. 278, § 33E, requires it to consider whether the convictions of murder in the first degree are consonant with justice. If upon examination of the facts, the Court should, in its discretion, be of the opinion that there was a miscarriage of justice in convicting a defendant of murder in the first degree, and that a verdict of guilty of murder in the second degree or of manslaughter would have been more consonant with justice, it is in its power and duty so to declare.

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > First-Degree Murder

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

HN26 [down] Sentencing, Corrections, Modifications & Reductions

The authority granted the Supreme Judicial Court of Massachusetts under Mass. Gen. Laws ch. 278, § 33E, includes the discretion to reduce a conviction of felony-murder in the first degree in circumstances where the

jury does not have that option.

HINES, and BUDD, JJ., joined. GAZIANO, J., concurring, with whom LOWY and CYPHER, JJ., joined.

Criminal Law & Procedure > Accessories > Aiding & Abetting

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > Felony Murder

HN27 Accessories, Aiding & Abetting

The Supreme Judicial Court of Massachusetts' authority under Mass. Gen. Laws ch. 278, § 33E, should be used sparingly and with restraint. The Court does not serve as a second jury. Moreover, the doctrines of felony-murder and joint venture liability are well established and should not be undermined on an ad hoc basis. Nonetheless, the doctrines of felony-murder and joint venture may, on some hypothetical fact patterns, produce a conviction of murder in the first degree that would appear out of proportion to a defendant's culpability.

At the trial of indictments charging the defendant with felony-murder as an accomplice based on the predicate felonies of an attempted commission of armed robbery, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition, the evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt that the defendant knowingly participated in the predicate felonies, where the defendant was present in his apartment when his accomplices developed a plan to rob the victims, where the defendant gave his gun to one of the accomplices knowing that it was going to be used in a robbery, and where the defendant gave hooded sweatshirts to his accomplices to help them avoid detection. [811-814]

At the trial of indictments charging the defendant with felony-murder as an accomplice based on the predicate felonies of an attempted commission of armed robbery, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition, the judge's instruction to the jury on intent and shared intent did not impermissibly shift the burden of proof, where the instructions created permissive inferences [814-817]; further, the judge did not err in instructing the jury on attempted armed robbery and home invasion, where the judge properly and consistently instructed the jury that the Commonwealth bore the burden to prove that the defendant knowingly [806] participated in the predicate offense, with the requisite shared intent [817]; finally, the judge's misstatement on one point was isolated and did not result in a substantial likelihood of a miscarriage of justice [817-818].

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS
HEADNOTES

Homicide > Felony-Murder Rule > Home Invasion > Robbery > Firearms > Joint Enterprise > Accessory and Principal > Practice, Criminal > Capital case > Instructions to jury > Argument by prosecutor > Opening statement > Jury and jurors > Voir dire > Presumptions and burden of proof > Evidence > Joint venturer > Prior misconduct

This court concluded that following the issuance of this opinion, a conviction of felony-murder will require a finding of actual malice, not merely constructive malice, and that as a result, felony-murder will no longer be an independent theory of liability for murder but will be limited to its statutory role under G. L. c. 265, § 1, as an aggravating element of murder that permits a jury to find a defendant guilty of murder in the first degree where the murder was neither premeditated nor committed with extreme atrocity or cruelty but was committed in the course of a felony punishable by life imprisonment. [807-808] GANTS, C.J., concurring, with whom LENK,

At a criminal trial, no prejudicial error or substantial likelihood of a miscarriage of justice arose from the prosecutor's use, in her opening statement and in her closing argument, of a sports analogy to explain the Commonwealth's theory of the case [818-819]; further, an isolated misstatement of the evidence in the prosecutor's closing argument was unlikely to have prejudiced the defendant [819].

At the trial of indictments charging the defendant with felony-murder as an accomplice based on the predicate felonies of an attempted commission of armed robbery, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition, the judge did not abuse her discretion in allowing the introduction of evidence of a prior armed robbery, where such evidence was probative of an accomplice's intent to rob the

Commonwealth v. Brown, 477 Mass. 805

victims of the attempted armed robbery and the defendant's shared intent to participate in that crime by supplying the guns and the means for potential disguise; likewise, the judge did not abuse her discretion in admitting in evidence photographs showing the defendant and an accomplice brandishing handguns, where the photographs established the defendant's access to a weapon that was used in the commission of the underlying felonies. [819-821]

During voir dire of the venire at a criminal trial, the judge had discretion to ask the venire a question regarding their ability to follow her legal instructions, and the defendant failed to demonstrate a substantial likelihood of a miscarriage of justice arising from that question. [821-822]

This court concluded that the felony-murder rule does not violate art. 12 of the Massachusetts Declaration of Rights. [822-823]

Although this court concluded that the verdicts against the defendant of felony-murder in the first degree were neither contrary to this court's jurisprudence regarding joint venture felony-murder nor against the weight of the evidence, this court exercised its authority under G. L. c. 278, § 33E, to reduce the verdicts to murder in the second degree, where the defendant's conduct, as an individual who participated on the remote outer fringes of a joint venture, made such verdicts more consonant with justice. [823-824]

Counsel: David H. Mirsky for the defendant.

Melissa Weisgold Johnsen, Assistant District Attorney, for the Commonwealth.

Judges: Present: GANTS, C.J., LENK, HINES, GAZIANO, LOWY, BUDD, & CYPHER, JJ.¹

Opinion by: GAZIANO

Opinion

[**1178] GAZIANO, J. We address, in this opinion, the scope of criminal liability under the common-law felony-murder rule. The charges stem from an attempted

armed robbery and home invasion of a townhouse shared by Hector and Tony Delgado. Two armed gunmen fatally shot the brothers during the botched robbery. The defendant was not present at the scene. The Commonwealth[*807] wealth alleged that the defendant was liable as an accomplice to felony-murder because he supplied one of the gunmen with a pistol and provided hooded sweatshirts to the intruders to help them conceal their identities. A Superior Court jury convicted the [***2] defendant of two counts of felony-murder in the first degree based on the predicate felonies of an attempted commission of armed robbery, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition.

The defendant raises the following claims on appeal: (1) the Commonwealth failed to produce sufficient evidence to prove that he was a knowing participant in the felony-murders; (2) the judge provided erroneous instructions on shared intent and accomplice liability; (3) portions of the prosecutor's opening statement and closing argument were improper; (4) the judge should have excluded prejudicial evidence of prior misconduct; (5) the judge asked improper voir dire questions of potential jurors; and (6) we should abolish the felony-murder rule. The defendant also asks us to order a new trial under our extraordinary authority pursuant to G. L. c. 278, § 33E.

We conclude that the Commonwealth introduced sufficient evidence to prove that the defendant knowingly participated in the underlying felonies and, therefore, was an accomplice to felony-murder. We conclude also that the defendant's other challenges do not raise error warranting reversal or a new trial as to any of the convictions. [***3] Nonetheless, in the circumstances of this case, we are convinced that, pursuant to our authority under G. L. c. 278, § 33E, the interests of justice require that the degree of guilt be reduced to that of murder in the second degree.

[↑] As to whether we should abolish the common-law felony-murder rule, a unanimous court concludes that the felony-murder rule is constitutional. However, a majority of Justices, through the concurrence of Chief Justice Gants, conclude that the scope of felony-murder liability should be prospectively narrowed, and HN1[↑] hold that, in trials that commence after the date of the opinion in this case, a defendant may not be convicted of murder without proof of one of the three prongs of malice. As a result, in the future, felony-murder is no longer an independent theory of liability for murder. Rather, felony-murder is limited to its statutory role

¹ Justice Hines participated in the deliberation on this case prior to her retirement.

Commonwealth v. Brown, 477 Mass. 805

under G. L. c. 265, § 1, as an aggravating element of murder, permitting a jury to find a defendant guilty of murder in the first degree where the murder was committed in the course of a felony punishable by life imprisonment even if it was not [**808] committed with deliberate premeditation or with extreme atrocity or cruelty. Because the majority holding as [**1179] to common-law [**4] felony-murder liability is prospective in effect, it does not affect the judgment reached in this case. Because I disagree with that holding, I write separately in a concurrence to explain my reasoning.

1. *Background.* Because the defendant challenges the sufficiency of the evidence of the extent of his involvement in the armed home invasion, and his shared intent to commit that crime, we recite the facts the jury could have found in some detail.

a. *Facts.* On the evening of October 22, 2009, the defendant was a passenger in a green Honda Civic automobile that was being driven around the Pawtucketville section of Lowell. The other occupants of the vehicle were his friends Ariel Hernandez, Giovanni Hill, and Darien Doby. Hernandez was the driver. Hill was in the front passenger seat, and the defendant and Doby shared the rear passenger seat. Hernandez drove past two men walking on the street and raised the possibility of robbing them. The passengers convinced Hernandez not to do so.

A short time later, Hill and Hernandez noticed two women walking down the street. Hernandez pulled into a side street and parked. Hill and Hernandez got out of the vehicle and Hernandez removed a firearm from [**5] the trunk. The two rounded the corner and confronted the women while the defendant and Doby waited in the vehicle. Hill stood and watched from a few feet away as Hernandez, gun in hand, grabbed their purses. The two men returned to the vehicle, and Hernandez drove away, with the purses and the handgun in his lap. He stopped at a friend's house to exchange the green hooded sweatshirt he had been wearing for a black sweatshirt without a hood.

The defendant, Doby, and Hill left the friend's house, while Hernandez stayed behind. The four men later met at the defendant's one-bedroom apartment. Hernandez stashed the handgun he had used in the robbery (a nine millimeter pistol) in a kitchen cabinet above the refrigerator. He rifled through the purses, pulling out cash, driver's licenses, and automated teller machine (ATM) cards. Hernandez found what appeared to be a passcode for one of the ATM cards written on a scrap of paper, and sent Hill to a bank to attempt to withdraw

money with the card. Before he left, Hill borrowed the defendant's black sweatshirt so he could change out of the jacket he had worn during the robbery. When he returned, Hill reported that he had been unsuccessful in withdrawing [**6] any money.

[*809] Later, at approximately 12:15 A.M., two cousins, Jamal and Karon McDougal, visited the defendant's apartment.² They were joined by one of their friends, Joshua Silva. While gathered in the kitchen with the defendant, Jamal asked Hernandez if he wanted to participate in robbing someone who owed money to one of Jamal's friends. Karon predicted that the robbery would be "pretty easy." He warned the others, however, that they were going to rob two "pretty big guys" who worked in bars.³ Hernandez agreed to participate in the robbery. Silva joined them as the getaway driver.

Once Silva agreed to participate, Hernandez urged, "If we're going to do it, let's [**1180] go do it now." Hernandez retrieved his gun from the kitchen cabinet, looked it over, and tucked it inside his waistband. Still wearing the hoodless black sweatshirt he had changed into after the earlier robbery, Hernandez asked the defendant for a hooded sweatshirt so that he could "hide his face." The defendant provided Hernandez with a hooded sweatshirt with a front zipper. Hernandez complained that the zipper was broken and that some part of his shirt would be visible. The defendant then gave Hernandez a black and red pullover-style [**7] hooded sweatshirt with a white Red Sox "B" logo on the front. Jamal and Karon also borrowed hooded sweatshirts from the defendant.

Before leaving, Jamal asked to borrow the defendant's "burner" (gun). At first, the defendant hesitated, stating his concern that something might happen to his gun. Hernandez and Karon then urged the defendant to allow Jamal to borrow the gun, promising that "nothing's going to happen to it." The defendant eventually gave Jamal a .380 pistol that had been stored underneath his bed.

Jamal, Karon, Hernandez, and Silva left the defendant's apartment and drove in Silva's Toyota Camry

² Because they share a last name, we refer to Jamal and Karon McDougal by their first names.

³ In addition to his full-time job, Hector, one of the victims, worked part time as a doorman at a local bar. Tony, the other victim, managed that bar and supplemented his income by selling small "dime bag" quantities of marijuana from the townhouse in Lowell where the brothers and their housemates lived.

Commonwealth v. Brown, 477 Mass. 805

automobile to the victims' townhouse. Silva drove, and Jamal gave directions. After Silva parked on a nearby side street, Jamal, Karon, and Hernandez got out and approached the townhouse, while Silva waited in the vehicle. Shortly after 1 A.M., the occupants of the townhouse heard loud banging on the front door. From a fourth-floor window⁴ dow, Tony called out, "Who's there?" A voice that sounded female responded "Nicole," or "Nicki." Tony went downstairs and opened the front door. His housemates heard a scuffle at the bottom of the stairs near the door, and then Jamal and Hernandez chased Tony up the stairs into the second-floor living room.

A visitor had been sleeping on the living room couch. He saw Jamal threaten Tony with a gun, demanding, "Where's everything?" Tony responded that "[a]ll [he] see[s] is dimes." The visitor was unable to identify Jamal, whose face was obscured by a hooded sweatshirt. Hector and one of his roommates, Brian Staples, headed downstairs from their third-floor bedrooms and entered the living room. At that point, Jamal had Tony in a headlock and was pointing the gun at his head.⁴ Hernandez rushed toward Staples, brandishing a gun, and ordered him upstairs. Staples and Hector ran upstairs to hide. Tony managed to break free from Jamal and also ran up the stairs. Jamal and Hernandez followed him.

From his hiding place, Staples heard Hector's door being kicked in, followed by an argument, and then gunshots. Once the shooting stopped, Hector was found lying face up on his bed, gasping for air. He had been shot three times and shortly thereafter died of multiple gunshot wounds. Tony, fatally shot in the abdomen, managed to stagger to the fourth floor, where he was treated at the scene before he died. Police recovered five nine millimeter cartridge casings⁵ from Hector's bedroom.

After the gunshots, Jamal and Hernandez ran outside, cheering and exchanging "high fives." They met up with Karon and Silva and drove back to the defendant's apartment. En route to the apartment, Jamal and Hernandez informed Karon that they had been unable to

⁴ Jamal and Hernandez told Silva, the getaway driver, that Staples had been unable to see the face of the person who grabbed Tony because the assailant "had the hood on." Staples, however, had been able to see a portion of the other intruder's face. He described the individual as dark skinned with a scruffy goatee, and he later identified Hernandez from a photographic array.

steal anything. ⁶ Jamal remarked that Hernandez was a good shot, and Hernandez responded, "Yeah, once I seen them jump on you, I just started shooting." Jamal returned the defendant's gun to him. Hernandez asked the defendant if he could leave his own gun at the defendant's apartment. When the defendant said no, Hernandez gave the gun to Hill and told him to put it in the trunk of the Honda Civic. Jamal, Karon, and Hernandez removed the borrowed sweatshirts and left them in the defendant's living room.

⁷ Within an hour of the shootings, Lowell police spotted Hernandez driving the green Honda Civic that had been used in the earlier robbery. They stopped the vehicle, arrested Hernandez and Hill, and found the gun Hernandez had used in the shooting hidden in the trunk.

Detectives interviewed the defendant on October 24 and 25, 2009. He initially told police that he had purchased a .380 handgun "for protection," ⁸ which he kept under his mattress. Eventually, the defendant admitted to having given this gun to Hernandez and the other men on the evening of the shootings. The defendant first said that he did not know what Hernandez and the other men were going to do with the gun. Eventually he stated that he believed they were going to rob someone, based on conversations that he overheard inside his apartment and the fact that Hernandez had robbed two women earlier that evening.

b. *Prior proceedings.* The defendant was indicted on two counts charging murder in the first degree in the deaths of Hector and Tony Delgado, home invasion, unlawful possession of a firearm, and unlawful possession of ammunition. The defendant was tried before a Superior Court jury on the theory of felony-murder with the underlying offenses of attempted armed robbery and home invasion as the predicate felonies. The jury convicted the defendant on all charges.

2. *Discussion.* The defendant's primary argument on appeal is that the Commonwealth failed to produce sufficient evidence to prove that he participated in the underlying felonies, i.e., that he shared the intent of the other participants to commit an armed robbery. He ⁹ also argues that the judge erroneously instructed the jury on the issues of shared intent and accomplice liability; portions of the prosecutor's opening statement and closing argument were improper; the judge abused her discretion by allowing the introduction of evidence of uncharged misconduct; and, during voir dire, the judge asked potential jurors an impermissible question. The defendant contends also that this court should abolish the felony-murder rule. In addition, he

Commonwealth v. Brown, 477 Mass. 805

asks us to exercise our extraordinary authority under G. L. c. 278, § 33E, to reverse the murder convictions as against the weight of evidence. We address each argument in turn.

[↑] a. *Sufficiency of the evidence.* HN2[↑] In reviewing the denial of a motion for a required finding of not guilty, we apply the familiar *Latimore* standard. See Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979). “[The] question is whether, after viewing [¶812] the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 677, quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Under this standard of review, we resolve issues of witness credibility in favor of the Commonwealth. Commonwealth v. Dilone, 385 Mass. 281, 286, 431 N.E.2d 576 (1982). In determining whether a reasonable jury could find each element of the crime charged, [***12] we also do not weigh the supporting evidence against conflicting evidence. [**1182] Commonwealth v. Lao, 443 Mass. 770, 779, 824 N.E.2d 821 (2005).

HN3[↑] To convict the defendant of felony-murder on a theory of accomplice liability, the Commonwealth was required to prove beyond a reasonable doubt that the defendant knowingly participated in the commission of one of the underlying felonies, alone or with others, with the intent required for that offense.⁵ Commonwealth v. Zanetti, 454 Mass. 449, 466, 910 N.E.2d 869 (2009). See Commonwealth v. Silva, 471 Mass. 610, 621, 31 N.E.3d 1092 (2015) (Commonwealth required to prove defendant’s “knowing participation in some manner in the commission of the offense” together with shared

intent); Commonwealth v. Akara, 465 Mass. 245, 253, 988 N.E.2d 430 (2013) (court considers whether defendant actively participated in events leading to victims’ deaths); Marshall v. Commonwealth, 463 Mass. 529, 536-537, 977 N.E.2d 40 (2012) (conduct that historically had been described as accessory before fact “plainly falls under the rubric of accomplice liability”). In this case, where the predicate felonies were attempted armed robbery and armed home invasion, the Commonwealth also was required to prove that the defendant knew that one of his accomplices possessed a firearm. Commonwealth v. Garcia, 470 Mass. 24, 31, 18 N.E.3d 654 (2014).

HN6[↑] Knowing participation in a criminal offense “may take any of several forms” and includes providing “aid or assistance in com- [¶813] mitting the crime.” Zanetti, 454 Mass. at 470 (Appendix). HN7[↑] To establish guilt on a theory of accomplice liability, the Commonwealth is not [***13] required to prove that a defendant was physically present at the scene of the offense. Commonwealth v. Ortiz, 424 Mass. 853, 858-859, 679 N.E.2d 1007 (1997). HN8[↑] A defendant may be convicted as a coventurer when he or she is not present at the scene of a crime “so long as the jury [find] [that the defendant] had actually associated [himself or herself] with the criminal venture and assisted in making it a success.” Commonwealth v. Silanskas, 433 Mass. 678, 690 n.13, 746 N.E.2d 445 (2001), quoting Ortiz, *supra*. See Commonwealth v. Hanright, 466 Mass. 303, 310, 994 N.E.2d 363 (2013) (HN9[↑]) “[C]omplicity in the underlying felony is sufficient to establish guilt of [felony-murder] if the homicide followed naturally and probably from the carrying out of the joint enterprise” [citation omitted]); Commonwealth v. Benitez, 464 Mass. 686, 690 n.6, 985 N.E.2d 102 (2013) (HN10[↑]) “a person need not be physically present at the scene of the crime in order to participate as a joint venturer”).

⁵ As for the substantive offenses, HN4[↑] to support a finding of guilt of armed robbery requires proof that the defendant (or an accomplice) while armed with a dangerous weapon assaulted the victim and took money or property from the victim with the intent (or shared intent) to steal it. Commonwealth v. Williams, 475 Mass. 705, 710, 60 N.E.3d 335 (2016). An attempt is defined as (1) an intent to commit the underlying crime and (2) an overt act toward its commission. Commonwealth v. LaBrie, 473 Mass. 754, 760-761, 46 N.E.3d 519 (2016). HN5[↑] To prove armed home invasion, the Commonwealth must establish that the defendant (or his accomplice) entered a dwelling, while armed with a dangerous weapon, and “use[d] force or threaten[ed] the imminent use of force upon any person within such dwelling.” Commonwealth v. Bois, 476 Mass. 15, 29, 62 N.E.3d 513 (2016), quoting G. L. c. 265, § 18C.

We do not agree with the defendant’s contention that the evidence, at best, established that he was present inside an apartment where others planned a robbery, and that his mere “acquiescence in a request to produce clothing or a firearm does not confer joint venture liability.” There was sufficient evidence from which a reasonable jury could have found beyond a reasonable doubt that the defendant knowingly [**1183] participated in the predicate felonies. He was present in his apartment when Jamal and Karon openly solicited [***14] others to help rob “the pretty big” “Puerto Rican guy.” Hernandez agreed to join the robbery, announced that he would use his own gun, and retrieved it from its hiding place inside the defendant’s

Commonwealth v. Brown, 477 Mass. 805

kitchen cabinet. Jamal then asked to borrow the defendant's gun. The defendant expressed concern over the possibility that something would happen to it. Karon and Hernandez urged the defendant to lend the gun to Jamal, assuring him, "Nothing is going to happen to it." The defendant agreed and gave Jamal the gun.

In his statement to police, the defendant admitted that he gave the gun to Hernandez and the other men knowing that it was going to be used in a robbery. See Benitez, 464 Mass. at 690 (act of providing accomplice with gun supports finding that defendant knowingly and actively participated in armed robbery); Commonwealth v. Melton, 436 Mass. 291, 301, 763 N.E.2d 1092 (2002) (defendant's participation in joint venture supported by evidence that he supplied firearm to shooter). See also Commonwealth v. Gunter, 427 Mass. [*814] 259, 261, 265, 692 N.E.2d 515 (1998) (defendant who remained in vehicle while his accomplices entered apartment and robbed rival drug dealers actively participated in felony-murder). The jury also reasonably could have found that the defendant gave hooded sweatshirts to his accomplices to help them avoid detection. Prior to the [***15] robbery, Hernandez asked the defendant for a hooded sweatshirt so that he could "hide his face." The defendant provided Hernandez with a hooded sweatshirt with a front zipper. When Hernandez complained that the zipper was broken, and that some part of his shirt would be visible, the defendant gave him a pullover-style hooded sweatshirt. Jamal and Karon also borrowed hooded sweatshirts from the defendant. After the robbery, Hernandez, Karon, and Jamal drove directly to the defendant's apartment and returned the sweatshirts to him rather than wearing them in public.

It also is reasonable to infer that the instruments supplied by the defendant played an important role in the underlying crimes of attempted armed robbery and home invasion. Jamal, armed with the defendant's pistol, forced his way into the Delgados' townhouse. See Commonwealth v. Netto, 438 Mass. 686, 702-703, 783 N.E.2d 439 (2003) (circumstances may dictate that weapon is necessary to overcome anticipated resistance from victims). Once inside, Jamal used the gun to threaten Tony and demand money and drugs. Further, the hooded sweatshirts provided by the defendant hindered the ability of the other occupants of the townhouse to identify the intruders.

We conclude, therefore, that the jury reasonably [***16] could have found that the defendant was an active participant in the commission of the underlying felonies.

[↑] b. *Jury instructions.* The defendant contends that three of the judge's instructions concerning shared intent and accomplice liability were erroneous. First, he argues that the judge's instruction on intent and shared intent shifted the burden of proof by imposing a "mandatory rebuttable presumption," which instructed the jury that the defendant's conduct "necessarily indicated [his] knowledge and support of every aspect of criminal conduct that occurred." Second, he argues that it was error for the judge to refer to the theory of accomplice liability while instructing on the substantive felony charges. Third, he argues that the judge misstated the burden of proof. Because there was no objection to these instructions, we review these claims to determine whether there was error and, if so, whether it created a [**815] substantial likelihood of a [**1184] miscarriage of justice. Commonwealth v. Wright, 411 Mass. 678, 681, 584 N.E.2d 621 (1992).

We turn first to the defendant's argument that the instruction on intent impermissibly shifted the Commonwealth's burden of proof to him. The defendant characterizes the following jury instructions as having created an impermissible [***17] "mandatory rebuttable presumption":

[Y]ou may determine the defendant's intent from any statement or act committed or omitted and from all the other circumstances that indicate a state of mind provided first you find that any or all such circumstances occurred.

"Now, the jury may but not need necessarily infer from the conduct of a person that he intended the natural and probabl[e] consequences of his own acts.

"...

[T]he Commonwealth must also prove beyond a reasonable doubt that at the time the defendant knowingly participated in the commission of the crime and, as I've indicated, the felonies involved are attempted armed robbery and home invasion, that he possessed or shared the intent required for that crime. And when I define the essential elements, I'm going to be telling you what the intent is. You're permitted but not required to infer the defendant's mental state or intent, from his knowledge of the circumstances and any subsequent participation in the crime. The inferences you draw must be reasonable and you may rely upon your experience and common sense in determining the defendant's knowledge or intent."

Commonwealth v. Brown, 477 Mass. 805

HN11[¹⁸] The due process clause of the Fourteenth Amendment to the United States Constitution requires the Commonwealth to prove every essential element of the offense beyond a [**18] reasonable doubt. Matter of Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). “Instructions to the jury that would lead them to believe otherwise are constitutional error.” Commonwealth v. Cruz, 456 Mass. 741, 752, 926 N.E.2d 142 (2010), citing Sandstrom v. Montana, 442 U.S. 510, 521, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). See Francis v. Franklin, 471 U.S. 307, 313, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (HN12[¹⁹] due process clause prohibits use of evidentiary presumption that relieves government of its burden). HN13[²⁰] An instruction that the jury reasonably could have interpreted as a mandatory presumption violates due process and [⁸¹⁶] cannot stand. See DeJoinville v. Commonwealth, 381 Mass. 246, 252, 408 N.E.2d 1353 (1980). By contrast, there is no constitutional infirmity where a jury instruction creates only a permissive inference. *Id.* at 253. See Commonwealth v. Ely, 388 Mass. 69, 76, 444 N.E.2d 1276 (1983) (permissive inference that allows jury to infer elemental fact from proof by prosecutor of another fact does not shift burden of proof).

As the United States Supreme Court noted in Francis, 471 U.S. at 313, the analysis is relatively straightforward — a reviewing court must determine whether the challenged portion of an instruction created an unconstitutional mandatory presumption or merely a permissive inference. In this case, we conclude that the instructions on intent created permissive inferences. The judge did not instruct the jury that they were to presume that certain facts were proved, or that they were required to reach a particular conclusion. Compare *id.* at 316 (instruction that person of sound mind and discretion is presumed to [**185] intend natural [**19] and probable consequences of his or her actions is mandatory presumption “cast in the language of command”); Commonwealth v. Nolin, 448 Mass. 207, 217-218, 859 N.E.2d 843 (2007) (instruction that person is presumed to intend natural and probable consequences of his or her acts improperly shifts burden of proof to defendant).

To the contrary, here, rather than being “cast in the language of command,” the challenged instructions were permissive. The judge instructed that intent and knowledge ordinarily cannot be proved by direct evidence, and then added, “[Y]ou *may* determine the defendant’s intent from any statement or act committed or omitted and from all the other circumstances that

indicate a state of mind provided first you find that any or all such circumstances occurred” (emphasis supplied). She then continued, “[T]he jury *may but not need necessarily infer* from the conduct of a person that he intended the natural and probabl[e] consequences of his own acts” (emphasis supplied). The judge instructed as follows on shared intent: “You’re permitted *but not required* to infer the defendant’s mental state or intent, from his knowledge of the circumstances and any subsequent participation in the crime” (emphasis supplied). See Hill v. Maloney, 927 F.2d 646, 651 (1st Cir. 1990) (words “you may infer” clearly indicated that [**20] inferences of malice and intent were permissive).

Such permissive intent instructions do not run up against a defendant’s right to due process. See Commonwealth v. Van Winkle, 443 Mass. 230, 239, 820 N.E.2d 220 (2005) (no error in instruction that “jury may infer, though it is not required to do so, that a person [⁸¹⁷] intends the natural and probable consequences of an act that is knowingly done”); Ely, 388 Mass. at 76 (instruction that permits, but does not require, jury to infer intent does not violate due process). Indeed, the inferences on permissive intent also are included in the model jury instructions on homicide, explaining shared intent: “You are permitted, but not required, to infer the defendant’s mental state or intent from his [or her] knowledge of the circumstances or any subsequent participation in the crime.” Model Jury Instructions on Homicide 15 (2013). A similar instruction is included in the instruction concerning the intentional use of a dangerous weapon: “As a general rule, you are permitted (but not required) to infer that a person who intentionally uses a dangerous weapon on another person intends to kill that person” *Id.* at 92.

[¹⁸] The defendant argues that the judge’s instructions on attempted armed robbery and home invasion were erroneous because she [²¹] improperly linked the phrase “aider and abettor” with the definition of the elements of the underlying offenses. The defendant contends that “[t]hese instructions were confusing and implied that the jury should presume that the defendant was an aider and abettor, with the requisite knowledge and intent pertaining to home invasion and attempted armed robbery.” There was no error.

Before defining the elements of each underlying offense, the judge explained, “[W]henever I say the defendant, I always mean as an aider or abettor or a

Commonwealth v. Brown, 477 Mass. 805

joint venturer.⁶ In Zanetti, 454 Mass. at 468 n.22, we recommended that judges incorporate the concept of accessory liability within their instructions on substantive offenses. Here, the judge properly and consistently instructed the [**1186] jury that the Commonwealth bore the burden to prove that the defendant knowingly participated in the predicate offense, with the requisite shared intent.

[↑] In his third claim of error in the instructions, the defendant argues that the judge made a misstatement at the end of her instructions on the predicate offenses, when she said, "If after [**818] your consideration of all the evidence you find the Commonwealth has not proven any one of these elements beyond a reasonable doubt you must find the defendant guilty of murder in the first degree." This misstatement was a clear slip of the tongue that went unnoticed by the judge and by the attorneys. Throughout her comprehensive charge, the judge properly instructed the jury on the presumption of innocence and the Commonwealth's burden of proving each essential element of the offense beyond a reasonable doubt. Thus, the misstatement was isolated and did not result in a substantial likelihood of a miscarriage of justice. See Commonwealth v. Oliveira, 445 Mass. 837, 844-845, 840 N.E.2d 954 (2006).

[↑] c. *Prosecutor's opening statement and closing argument.* The defendant maintains that the prosecutor misstated the evidence, both in her opening statement and in her closing argument. For instance, the defendant points to the prosecutor's asserted improper argument that the defendant "planned and executed" the attempted armed robbery and the home invasion. The defendant [**23] contends that the prosecutor misstated the evidence by arguing that "but for" the defendant's participation, the crimes would not have occurred.

We begin with the prosecutor's opening statement. Because defense counsel timely objected, we review for prejudicial error. See Commonwealth v. Santiago, 425

⁶ For example, at the beginning of her instructions on home invasion, the judge explained:

"To prove the defendant guilty of the crime of home invasion, the Commonwealth must convince you the jury of four elements beyond a reasonable doubt. That the defendant as an aider and abettor unlawfully entered the dwelling house of another. In other words, he doesn't have to physically go there himself if he aided/abetted [**22] the entry."

Mass. 491, 500, 681 N.E.2d 1205 (1997).

HN14 [↑] The purpose of an opening statement is to "outline in a general way the nature of the case which the counsel expects to be able to prove or support by evidence" (citation omitted). Commonwealth v. Fazio, 375 Mass. 451, 454, 378 N.E.2d 648 (1978). Here, the prosecutor's opening statement did not exceed the bounds of propriety. She used a sports analogy to explain the Commonwealth's theory of the case, stating that the defendant had been part of a team that planned and executed a botched home invasion. She emphasized that each team member played a particular role, and that the defendant contributed to the team effort by supplying a firearm and some clothing needed for disguise. The prosecutor also argued that the team effort ultimately resulted in the deaths of the Delgado brothers. The prosecutor's characterization of the defendant's role in the shootings as the person who allegedly provided "that .380 gun and hoodies to the team" did not misstate the evidence.

The defendant raises [**24] a similar argument with respect to the prosecutor's closing, which carried on the sports analogy. Because trial counsel did not object, we consider whether any of the [**819] challenged statements was improper and, if so, whether it created a substantial likelihood of a miscarriage of justice. See Commonwealth v. Penn, 472 Mass. 610, 626-627, 36 N.E.3d 552 (2015), cert. denied, 136 S. Ct. 1656, 194 L. Ed. 2d 773 (2016).

In closing, the prosecutor urged the jury to draw an inference, based on the evidence, that the defendant knew about the intended robbery and was an active participant in it. She pointed out that the defendant was aware that Hernandez had robbed two women earlier in the evening, the defendant was present when the men discussed robbing the two victims, and he knew that Hernandez would be bringing his gun to the robbery. The prosecutor described the defendant's role as providing [**1187] "the tools to the rest of the team to effectuate this armed robbery and home invasion." This was not beyond the bounds of permissible advocacy.

[↑] The defendant contends also that a portion of the prosecutor's closing argument misstated the evidence. While discussing Hernandez's attempt to hide his gun in the defendant's apartment after the attempted robbery, the prosecutor said the defendant "knew that that gun [**25] was just used in a crime. The crime that he helped plan." The defendant maintains that this statement "reiterated the false theme that [he] was a

Commonwealth v. Brown, 477 Mass. 805

planner whose role was critical." In the context of the closing argument as a whole, however, see Commonwealth v. Foxworth, 473 Mass. 149, 161, 40 N.E.3d 1003 (2015), this isolated statement was unlikely to have prejudiced the defendant. Throughout the trial, the prosecutor clearly proceeded on the theory that the defendant was liable because he had supplied necessary instruments that facilitated the commission of the underlying felonies, just as she presented his role on the "team" in her opening statement.⁷

[↑] d. *Evidence of uncharged prior misconduct.* The defendant maintains that the judge abused her discretion in allowing the introduction of evidence of the prior armed robbery, as well as photographs showing the defendant and an accomplice brandishing handguns. The defendant argues that this evidence "over- [¶820] whelmed" the case with unfair prejudice. This argument is unavailing.

HN15[↑] Evidence of a defendant's prior or subsequent bad acts is not admissible to show "bad character or criminal propensity." Commonwealth v. Lally, 473 Mass. 693, 712, 46 N.E.3d 41 (2016). It may be admissible, however, where it is relevant for another purpose, such as to establish a "common scheme, pattern [***26] of operation, absence of accident or mistake, identity, intent, or motive." Commonwealth v. Helfant, 398 Mass. 214, 224-225, 496 N.E.2d 433 (1986). HN16[↑] We review questions of admissibility, probative value, and unfair prejudice for abuse of discretion, *id. at 229*, and do not disturb a trial judge's decision absent a clear error of judgment in weighing the relevant factors, see L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). In deciding whether to allow the admission of such evidence, a judge must decide whether the probative value of the evidence is outweighed by the risk of unfair prejudice to the defendant. See Commonwealth v. Crayton, 470 Mass. 228, 249, 21 N.E.3d 157 (2014).

⁷ The defendant also argues that the prosecutor misstated the evidence by arguing that Jamal entered the townhouse because he was armed with the defendant's pistol; Hernandez participated in the robbery because he wore a hoodie supplied by the defendant; and nobody would have entered the townhouse unless the defendant had supplied a firearm and disguises. There was no error. The Commonwealth was entitled to analyze the evidence and suggest reasonable inferences that the jury could draw from that evidence. Commonwealth v. Cole, 473 Mass. 317, 333, 41 N.E.3d 1073 (2015).

In the circumstances here, the judge did not abuse her discretion in allowing the introduction of evidence concerning the armed robbery earlier in the afternoon on the day of the killing, while the defendant waited in the vehicle; such evidence was probative of Hernandez's intent to rob the Delgado brothers, and the defendant's shared intent to participate in that crime by supplying the guns and the means for potential disguise. Indeed, in his statement to police, the defendant admitted that, as a result of the earlier robbery, he believed Hernandez and the others intended to commit another armed robbery at the time he handed them his gun.

[**1188] We also discern no error in the introduction of the photographs [***27] showing the defendant brandishing his gun. The photographs were introduced to establish his access to a weapon that was used in the commission of the underlying felonies — the armed home invasion and the attempted armed robbery. See Commonwealth v. Corliss, 470 Mass. 443, 450, 23 N.E.3d 92 (2015) (judge has discretion to admit evidence that defendant previously possessed weapon that could have been used to commit crime); Commonwealth v. Tassinari, 466 Mass. 340, 353, 995 N.E.2d 42 (2013) (information about defendant's possession of firearms admissible where connected to commission of crime). The photographs, which were taken a few weeks before the shootings, showed the defendant and Hernandez displaying their respective weapons. Because both guns were introduced in [¶821] evidence, the prejudicial impact of the photographs was minimal.

[↑] e. *Jury voir dire.* During a pretrial hearing, the judge informed counsel that she intended to ask the venire a question concerning joint venture liability. Defense counsel responded, "Yes, I think that would be fine, Judge." At trial, the judge asked potential jurors, "Is there anything about the concept of aiding and abetting that would prohibit your ability to listen and apply the law as I will explain it to you at the conclusion of the trial and be a fair and impartial juror?" The defendant [***28] did not object.

On appeal, the defendant contends that this question reduced the Commonwealth's burden of proof and "ensur[ed] a jury predisposed to find [him] guilty." Because the issue is unpreserved, we review to determine whether asking the question was erroneous and, if so, whether it created a substantial likelihood of a miscarriage of justice. Wright, 411 Mass. at 681.

Commonwealth v. Brown, 477 Mass. 805

HN17 During jury selection, a judge is required to "examine jurors fully regarding possible bias or prejudice where 'it appears that there is a substantial risk that jurors may be influenced by factors extraneous to the evidence presented to them.'" Commonwealth v. Perez, 460 Mass. 683, 688, 954 N.E.2d 1 (2011), quoting Commonwealth v. Garuti, 454 Mass. 48, 52, 907 N.E.2d 221 (2009). The judge may ask questions designed to "determine whether jurors [can] set aside their own opinions, weigh the evidence ... , and follow the instructions of the judge." Commonwealth v. Bryant, 447 Mass. 494, 501, 852 N.E.2d 1072 (2006), quoting Commonwealth v. Leahy, 445 Mass. 481, 495, 838 N.E.2d 1220 (2005). The scope of jury voir dire is committed to the judge's sound discretion, and we will uphold the judge's questioning "absent a clear showing of abuse of discretion." Commonwealth v. Gray, 465 Mass. 330, 338, 990 N.E.2d 528 (2013), quoting Perez, *supra* at 689, and cases cited.

We do not share the defendant's view that the disputed question predisposed the jury to convict the defendant. A question may not be introduced if it "commit[ted] the jury to a verdict in advance" or "[had] the effect of [**29] identifying and selecting jurors who were predisposed to convicting the defendant based on evidence the Commonwealth would present." Gray, 465 Mass. at 339, quoting Perez, 460 Mass. at 691. Here, the judge sought to identify jurors who were unwilling or unable to follow her instructions regarding accomplice liability. Indeed, one potential juror reported, "I have more qualms about aiding and abetting being charged as a murder case." That juror was excused without objection.

At the beginning of jury selection, the judge provided the members of the venire [**1189] with a preliminary instruction that the [*822] Commonwealth was required to prove each essential element of the offense beyond a reasonable doubt. In addition, the judge instructed that it was the Commonwealth's burden to prove joint venture liability by establishing that the defendant knowingly participated in the commission of the crime with the requisite intent to commit that crime. After jury selection, the judge properly instructed the seated jury a number of times that, in order for them to find the defendant guilty of felony-murder, the Commonwealth was required to prove that the defendant aided and abetted at least one of the underlying felonies. See Commonwealth v. Gray, 465 Mass. at 341 (court considers issues raised [**30] by question to venire in context with judge's conduct of entire empanelment and judge's legal instructions on topic). We conclude that the

judge had discretion to ask the venire a question regarding their ability to follow her legal instructions, and that the defendant has failed to demonstrate a substantial likelihood of a miscarriage of justice.

[¹⁸] f. *Abolition of the felony-murder rule.* HN18 The felony-murder rule "imposes criminal liability for homicide on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise." Hanright, 466 Mass. at 307, quoting Commonwealth v. Matchett, 386 Mass. 492, 502, 436 N.E.2d 400 (1982). The defendant invites the court to abolish the felony-murder rule, arguing that it is arbitrary and unjust, and in violation of art. 12 of the Massachusetts Declaration of Rights. According to the defendant, the imposition of felony-murder liability is contrary to the fundamental notion that an individual is culpable for his or her own misconduct.

HN19 Felony-murder is a common-law crime.⁸ See Matchett, 386 Mass. at 502. The felony-murder rule imposes criminal liability "on all participants in a certain common criminal enterprise if a death occurred in the course of that enterprise." Commonwealth v. Watkins, 375 Mass. 472, 486, 379 N.E.2d 1040 (1978). HN20 "The effect of the fel- [*823] ony-murder rule,' both for principals and accomplices, 'is to substitute the intent to commit [**31] the underlying felony for the malice aforethought required for murder.'" Hanright, 466 Mass. at 307, quoting Matchett, *supra*.

HN22 We consistently have rejected the argument that the felony-murder rule is unconstitutional, see Commonwealth v. Moran, 387 Mass. 644, 649-650, 442 N.E.2d 399 (1982), and Watkins, 375 Mass. at 486-487, or that it relieves the Commonwealth of its obligation to prove a defendant's own moral culpability, see Hanright, 466 Mass. at 307-310; Commonwealth v. Richards, 363

⁸ HN21 Felony-murder also falls within the province of G. L. c. 265, § 1, which establishes two degrees of murder. That statute provides: "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." General Laws c. 265, § 1, was enacted to "mitigate the harshness of the common law rule imposing a mandatory death penalty on all murderers." Commonwealth v. Paulding, 438 Mass. 1, 8, 777 N.E.2d 135 (2002), discussing Commonwealth v. Dickerson, 372 Mass. 783, 803-805, 364 N.E.2d 1052 (1977) (Quirico, J., concurring).

Commonwealth v. Brown, 477 Mass. 805

Mass. 299, 307, 293 N.E.2d 854 (1973) (HN23[↑]) "A broad conception of complicity is indeed at work in the special field of so called felony-murder ...").

More recently, in Commonwealth v. Tejeda, 473 Mass. 269, 277, 41 N.E.3d 721 (2015), we considered the continued viability of the common-law felony-murder rule [**1190] but did not reach the issue. Discussing the scope of vicarious liability, we noted that HN24[↑] felony-murder is an exception to the general rule that "[o]ne is punished for his own blameworthy conduct, not that of others" (citation omitted). *Id.* at 276. Under the felony-murder rule, "a person who knowingly participates in one crime as part of a joint venture is 'ipso facto also guilty' of [murder] committed by an accomplice in furtherance of the joint venture." *Id.* We discern no reason to deviate from our decisions in *Moran* and *Watkins*, and to accept the defendant's invitation that we abolish the felony-murder rule.

[↑] g. *Review under G. L. c. 278, § 33E*. The defendant asks also that we exercise our authority under G. L. c. 278, § 33E, [**32] to grant him a new trial because the felony-murder verdicts, "as indicated by the prosecutor's reliance on innuendo and misrepresentation," were against the weight of the evidence. We have carefully reviewed the entire record pursuant to our duty under G. L. c. 278, § 33E, and conclude that the verdicts of felony-murder were neither contrary to our joint venture felony-murder jurisprudence nor against the weight of the evidence.

HN25[↑] Our authority under G. L. c. 278, § 33E, however, also requires us to consider whether the convictions of murder in the first degree are consonant with justice. Commonwealth v. Gould, 380 Mass. 672, 680, 405 N.E.2d 927 (1980). "If upon our examination of the facts, we should, in our discretion, be of [the] opinion that there was a miscarriage of justice in convicting the defendant of murder in the first degree, and that a verdict of guilty of murder in the second degree or of manslaughter would have been more consonant with justice, it is now our power and duty so to declare."

Commonwealth v. Baker, 346 Mass. 107, 109, 190 N.E.2d 555 (1963). HN26[↑] The authority granted us under G. L. c. 278, § 33E, includes the discretion to reduce a conviction of felony-murder in the first degree in circumstances where the jury do not have that option. Commonwealth v. Paulding, 438 Mass. 1, 10, 777 N.E.2d 135 (2002) (it is left to court's authority under G. L. c. 278, § 33E, and is not within jury's role in reaching verdict, to reduce felony-murder [**33] in first degree to felony-murder in second degree).

We are cognizant that HN27[↑] the court's authority under G. L. c. 278, § 33E, should be used sparingly and with restraint. See Commonwealth v. Lannon, 364 Mass. 480, 486, 306 N.E.2d 248 (1974). The court does not serve as a second jury. Commonwealth v. Prendergast, 385 Mass. 625, 638, 433 N.E.2d 438 (1982). Moreover, the doctrines of felony-murder and joint venture liability "are well established and should not be undermined on an ad hoc basis." Commonwealth v. Hooks, 375 Mass. 284, 298, 376 N.E.2d 857 (1978).

Nonetheless, we have recognized that "the doctrines of felony-murder and joint venture may, on some hypothetical fact patterns, produce a conviction of murder in the first degree that would appear out of proportion to a defendant's culpability." Commonwealth v. Rolon, 438 Mass. 808, 824, 784 N.E.2d 1092 (2003). Here, the defendant was involved in the "remote outer fringes" of the attempted armed robbery and armed home invasion. See *id.* As discussed, the defendant should be held liable for felony-murder as a supplier of a firearm and clothing utilized by his cohorts in the commission of the underlying felonies. Having carefully reviewed the facts and circumstances of this case, we conclude that the defendant's conduct, as an individual who participated on the "remote outer fringes" of the joint venture, makes verdicts of murder in the second degree more consonant with justice.

[**1191] 4. *Conclusion*. The verdicts [**34] of murder in the first degree and the sentences imposed are vacated and set aside. The matter is remanded to the Superior Court where verdicts of guilty of murder in the second degree are to be entered, and the defendant is to be sentenced accordingly. The defendant's remaining convictions are affirmed.

So ordered.

Concur by: GANTS; GAZIANO

Concur

GANTS, C.J. (concurring, with whom Lenk, Hines, and Budd, JJ., join). I agree with the court that, where the defendant's only [**825] participation in the crimes was to provide a firearm and hooded sweatshirts to his friends, knowing they intended to use them in the commission of an armed robbery, convictions of murder in the first degree on the theory of felony-murder are not consonant with justice. I write separately to explore how

Commonwealth v. Brown, 477 Mass. 805

our common law of felony-murder led to convictions of murder in the first degree that are not consonant with justice, and to explain why it is time for us to narrow the scope of liability for that common-law crime. I believe that, in the future, a defendant should not be convicted of murder without proof of one of the three prongs of malice: that he or she intended to kill or to cause grievous bodily harm, or intended to do an act which, [***35] in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. I also believe that we should abandon the fiction of constructive malice — that where a killing occurs in the commission of a felony, the intent to commit the felony is sufficient alone to establish malice.¹

As noted in the opinion of the court, following the issuance of this concurring opinion, which is joined by three other Justices, a conviction of felony-murder will require a finding of actual malice, not merely constructive malice. As a result, felony-murder will no longer be an independent theory of liability for murder. Rather, felony-murder will be limited to its statutory role under G. L. c. 265, § 1, as an aggravating element of murder, permitting a jury to find a defendant guilty of murder in the first degree where the murder was neither premeditated nor committed with extreme atrocity or cruelty but was committed in the course of a felony punishable by life imprisonment.

The court correctly concludes that, under our existing common law, the defendant committed felony-murder in the first degree: he knowingly aided and abetted the commission of a life [***36] felony (attempted armed robbery and home invasion), in which his accomplices killed two victims. Under our existing common law of felony-murder, it is legally irrelevant that the defendant was not present at the scene of the attempted armed robbery; he is criminally responsible for every act resulting in death committed by his accomplices during the attempted commission of the armed robbery. See Commonwealth v. Tejeda, 473 Mass. 269, 272, 41 N.E.3d 721 (2015). It is also legally irrelevant that he did not share his accomplices' intent to kill or to cause grievous bodily harm during the attempt; his intent to commit the armed robbery substitutes for the malice aforesought generally required for [**826] murder. *Id.* Because the underlying crimes were both felonies punishable by life in prison, the jury properly were not instructed on felony-murder in the second degree, because the evidence did not permit such a verdict. See Commonwealth v. Paulding, 438 Mass. 1, 10, 777 N.E.2d 135 (2002). In short, under our existing common

law of felony-murder, the jury reached the correct verdicts. Indeed, guilty verdicts of murder in the first degree on the theory of felony-murder are the only verdicts they reasonably could have reached on this evidence. It is not the fault of the jury that the [**1192] verdicts they reached are not consonant [***37] with justice; it is the fault of our common law of felony-murder.¹

We have long recognized that “[t]he common law felony-murder rule is of questionable origin.” Commonwealth v. Matchett, 386 Mass. 492, 503 n.12, 436 N.E.2d 400 (1982). A look at the early English law reveals that there was no precedent in English cases for what we now refer to as “felony-murder.” Professor Guyora Binder, in an exhaustive analysis of the origins of American

¹ It should not escape notice that this is the first time we have exercised our authority under G. L. c. 278, § 33E, to reduce a conviction of murder in the first degree on the theory of felony-murder to murder in the second degree where the evidence more than sufficed to support the verdict. See Commonwealth v. Rolon, 438 Mass. 808, 824 n.19, 784 N.E.2d 1092 (2003) (“This court has reduced convictions of murder in the first degree predicated on felony-murder only where the evidence suggested that the felony intended by the defendant would not suffice for felony-murder in the first degree”). Until now, “[t]his court’s power under G. L. c. 278, § 33E, has never been exercised to relieve a defendant of the consequences of participation in a felony that does qualify as the predicate for felony-murder in the first degree.” *Id.* In *Rolon*, we declared:

“We recognize that the doctrines of felony-murder and joint venture may, on some hypothetical fact patterns, produce a conviction of murder in the first degree that would appear out of proportion to a defendant’s culpability. It may in some circumstances seem harsh to convict a defendant of murder in the first degree if the defendant was on the remote outer fringes of a joint venture to commit some felony that satisfied the felony-murder rule in only some hypertechnical way.”

Id. at 824. But in *Rolon* we simply assumed, “without deciding, that reduction of a verdict in such circumstances could be appropriate under [Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995)].” *Id.* We did not need to decide that issue because we determined that the case did “not present such circumstances.” *Id.* Here, it is not accurate to say that the defendant’s conduct constituted felony-murder “in only some hypertechnical way.” However, the court correctly recognizes that a conviction of murder in the first degree, with its mandatory sentence of life in prison without the possibility of parole, is not consonant with justice where the defendant’s role was limited to providing a firearm and hooded sweatshirts to his accomplices for the commission of an armed robbery.

Commonwealth v. Brown, 477 Mass. 805

[*827] felony-murder rules, concluded:

"By the time of the American Revolution, the rule that an accidental death in the course of any felony was murder had become a standard theme in scholarly writing about the common law of homicide . . . Yet no English court had ever actually applied such a rule. . . . By the end of the eighteenth century, [***38] some judges thought cofelons were automatically implicated in any murder committed in attempt of a felony, but most judges required participation in or encouragement of the act causing death."

Binder, The Origins of American Felony Murder Rules, 57 *Stan. L. Rev.* 59, 98 (2004). An analysis of early American cases leads to a similar conclusion — in most instances murder liability was imposed only where there was independent proof of malice. See *id.* at 193-194.

The absence of any clear preexisting concept of "felony-murder" also becomes evident when examining the provenance of the Massachusetts murder statute. In 1784, Massachusetts enacted a statute providing "[t]hat whosoever shall commit wilful murder, of malice aforethought, . . . shall suffer the pains of death." St. 1784, c. 44. It was only in 1858 that the Massachusetts Legislature established two degrees of murder, and provided that the degree of murder is to be found by the jury. St. 1858, c. 154, §§ 1, 2. "The legislative documents that precede the enactment of St. 1858, c. 154, suggest that murder was divided into degrees largely to mitigate the [**1193] harshness of the common law rule imposing a mandatory death penalty on all murderers." *Commonwealth v. Dickerson*, 372 Mass. 783, 803, 364 N.E.2d 1052 (1977) (Quirico, J., concurring). Murder in the first [***39] degree, punishable by death, was defined as "[m]urder, committed with deliberately premeditated malice aforethought, or in the commission of an attempt to commit any crime punishable with imprisonment for life, or committed with extreme atrocity or cruelty." St. 1858, c. 154, § 1. This statute is described by Professor Binder as a "felony aggravator statute," in that it provided that where a defendant committed "murder" and where that murder was committed in the attempt to commit a life felony, the murder was murder in the first degree regardless of whether it was premeditated or committed with extreme atrocity or cruelty. See Binder, *supra* at 120. The statute did not define "murder" and did not declare that a person is guilty of murder [*828] whenever a death occurs during the commission of a felony; the elements of murder liability continued to rest

in the domain of the common law. See *People v. Aaron*, 409 Mich. 672, 721, 299 N.W.2d 304 (1980) ("[t]he use of the term 'murder' in the first-degree statute requires that a murder must first be established before the statute is applied to elevate the degree").

It is not surprising that the first Massachusetts statute that refers to murder in the commission of a felony treated it simply as an aggravating element that made the murder worthy [***40] of the death penalty. In the vast majority of the cases where a victim was killed during the commission of a felony, the defendant had killed the victim in furtherance of the crime or to facilitate his or her escape, and intended to kill or to commit grievous bodily harm, so there was no need for a distinct theory of felony-murder that substituted the intent to commit the underlying felony for the malice necessary for a murder conviction. In these cases, the killing already met the definition of murder. See Binder, *supra* at 65-66. Nor is it surprising that this statute included only "an attempt to commit any crime punishable with imprisonment for life," rather than the commission of a completed crime.² The law of attempt during this time period was still evolving, and felony-murder was a means to ensure that the attempt was appropriately punished where it resulted in death. *Id.* at 92.

The first Supreme Judicial Court case that specifically addressed the issue of liability for a death occurring during the commission of a felony (felony-murder liability)³ was issued in 1863, five years after the enactment of the statute. See *Commonwealth v. Campbell*, 89 Mass. 541, 7 Allen 541 (1863). In *Campbell*, a man was killed by a gun shot during a draft riot but it was not clear whether [***41] the shot was fired by a rioter or by a soldier who was defending the armory from the rioters. *Id.* at 541, 543. The court considered the prosecutor's request for a jury instruction declaring that, if the defendant was a participant in the

² The statute was revised in 1860 to include "[m]urder committed . . . in the commission of, or attempt to commit, any crime." St. 1860, c. 160, § 1.

³ In this opinion "felony-murder liability" refers to liability for murder absent independent proof of malice. This is distinguishable from felony-murder as a statutory aggravator that merely elevates what would otherwise be murder in the second degree, based on proof of actual malice, to murder in the first degree where the killing occurred during the commission of a life felony — the concept codified in *G. L. c. 265, § 1*.

Commonwealth v. Brown, 477 Mass. 805

riot, and if the homicide occurred during the attack on the armory, the defendant "is in law [^{**829}] guilty of manslaughter" even if the evidence fails to show whether the shot was fired by a rioter or a soldier. [**1194] *Id. at 543*. The court held that the jury should be instructed that the defendant is entitled to an acquittal unless the jury finds "beyond a reasonable doubt that the deceased was killed by means of a gun or other deadly weapon in the hands of the prisoner, or of one of the rioters with whom he was associated and acting." *Id. at 547-548*. The court reasoned that its conclusion flowed from the general rule of law "that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable [criminally] for the acts of each and all who participate with him in the execution of the unlawful design." *Id. at 543-544*. But [**42] he is not criminally liable for acts that are not "committed by his own hand or by some one acting in concert with him or in furtherance of a common object or purpose." *Id. at 544*.

The *Campbell* opinion identifies two principles of law on which our common law of felony-murder liability rests that we reject elsewhere in our criminal jurisprudence: vicarious substantive criminal liability for every act committed by a joint venturer, and the conclusive presumption of malice from the intent to commit an inherently dangerous felony. See Tejeda, 473 Mass. at 276 ("the common law of felony-murder is an exception to two basic principles of our criminal jurisprudence"). I discuss each in turn.

The first of these principles is the rule of law that a person engaged in a criminal joint venture is criminally liable for all the acts of his or her accomplices committed in furtherance of the joint venture. This rule was adopted by the United States Supreme Court in Pinkerton v. United States, 328 U.S. 640, 645-648, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), which held that a defendant may be found guilty of substantive offenses committed by his coconspirator in furtherance of the conspiracy, even if he did not participate directly in the commission of those substantive offenses.

We no longer adhere to this *Pinkerton* theory [**43] of accomplice liability. See Commonwealth v. Stasiun, 349 Mass. 38, 47-49, 206 N.E.2d 672 (1965) ("To be liable for the substantive offence, a coconspirator must participate or aid in the commission of it"). We declared in Stasiun, *supra* at 48:

"While it has been said that a conspiracy is a 'partnership in crime' (United States v. Socony-Vacuum Oil Co., Inc., 310 [^{**830}] U.S. 150, 253, 60 S. Ct. 811, 84 L. Ed. 1129 [(1940)])], that metaphor should not be pressed too far. It does not follow that such a partnership is governed by the same principles of vicarious liability as would apply in civil cases. Our criminal law is founded on the principle that guilt, for the more serious offences, is personal, not vicarious. One is punished for his own blameworthy conduct, not that of others. Perkins on Criminal Law, 550 [(1957)]. Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 [(1930)] . . . To ignore the distinction between the crime of conspiracy and the substantive offence would enable 'the government through the use of the conspiracy dragnet to convict a conspirator of every substantive offense committed by any other member of the group even though he had no part in it or even knowledge of it.' United States v. Sall, 116 F.2d 745, 748 (3d Cir. [1940])."

Under our common law of joint venture liability, a defendant is criminally responsible for a crime committed by an accomplice only where the defendant knowingly participates [**44] in the crime with the intent required to commit it. See Commonwealth v. Zanetti, 454 Mass. 449, 466, 910 N.E.2d 869 (2009). But until now, we have retained one exception: under our common law of felony-murder, a defendant was still vicariously responsible for all the acts of his or her accomplices that resulted in death committed during the course of the felony. Tejeda, 473 Mass. at 275-276. The consequence of this exception was that, if an accomplice shot and killed a victim during the commission of an armed robbery, the defendant was guilty of felony-murder even if he or she sat outside in the getaway vehicle and had implored the accomplices to hurt no one in committing the crime. However, if the accomplice committed the same shooting but the victim survived, the defendant sitting in that getaway vehicle would have been guilty only of the underlying armed robbery, not of the shooting. "Only where a dangerous felony result[ed] in death [did] we adopt a principle that we otherwise [had] 'firmly rejected' — that a person who knowingly participates in one crime as part of a joint venture is 'ipso facto also guilty' of all other crimes committed by an accomplice in furtherance of the joint venture." *Id. at 276*, quoting Commonwealth v. Richards, 363 Mass. 299, 306, 293 N.E.2d 854 (1973). See Commonwealth v. Hanright, 466 Mass. 303, 307-310, 994 N.E.2d 363 (2013), quoting 2 W.R. LaFave,

Commonwealth v. Brown, 477 Mass. 805

Substantive Criminal Law § 13.3 (b), at 362-363 (2d ed. [**45] 2003) (“we remain committed to the view [**831] that ... A’s guilt as an accomplice to one crime should not per se be a basis for holding A accountable for a related crime merely because the latter offense was carried out by A’s principal”).

The second principle set forth in Campbell, 7 Allen at 543 — “that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it” — has evolved in our common law of felony-murder into a rule that, where a defendant commits an inherently dangerous felony, such as armed robbery, he or she is criminally responsible for the consequences of every act by a joint venturer during the commission of the felony where the consequence is death. See Hanright, 466 Mass. at 307-310, citing Matchett, 386 Mass. at 502. As a result of this rule, a defendant who participates in an armed robbery is guilty of felony-murder in the first degree if the defendant or an accomplice commits any act that results in death, even if the act is accidental and unintended. As a result, although in every other circumstance a killing constitutes murder only where it is committed with actual malice, where the killing occurs in the commission of an inherently dangerous felony, proof of [**46] actual malice is not required; a felony-murder conviction may rest on proof of constructive malice, which is defined simply as the intent to commit the underlying felony.

We have noted that, in this regard, our common law of felony-murder is an exception to our general rule that “we require proof of a defendant’s intent to commit the crime charged, and do not conclusively presume such intent from the intent to commit another crime.” Tejeda, 473 Mass. at 276. In fact, we have said, “A felony-murder rule that punishes all homicides committed in the perpetration of a felony whether the death is intentional, unintentional or accidental, without the necessity of proving the relation of the perpetrator’s state of mind to the homicide, violates the most fundamental principle of the criminal law — ‘criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result.’” Matchett, 386 Mass. at 506-507, quoting Aaron, 409 Mich. at 708.

[**1196] The consequence of this exception to “the most fundamental principle of the criminal law” is that, if a defendant drops his or her firearm and accidentally shoots someone during the commission of a felony, the

defendant is guilty of both the underlying felony and felony-murder [**47] if the shooting proves fatal. But if the [**832] victim survives, the defendant is guilty only of the underlying felony, and is not criminally responsible for the shooting. The defendant’s liability for the shooting rests not on the defendant’s conduct, but on whether the victim lives or dies. See, e.g., Hanright, 466 Mass. at 308-309 (“The intent to commit armed robbery, although sufficient to support liability for felony-murder on a theory of joint venture, is insufficient to support liability for” additional offenses against other, surviving police officers who attempted to apprehend accomplice); Richards, 363 Mass. at 302, 307-308 (defendant who was waiting near getaway vehicle in armed robbery may be found guilty of assault with intent to murder police officer committed by accomplice only if defendant had specific intent to kill police officer).

We have recognized that the application of the felony-murder rule erodes “the relation between criminal liability and moral culpability.” Matchett, 386 Mass. at 507, quoting People v. Washington, 62 Cal. 2d 777, 783, 44 Cal. Rptr. 442, 402 P.2d 130 (1965). It is time for us to eliminate the last vestige of these two abandoned principles and end their application in our common law of felony-murder. Doing so means that criminal liability for murder in the first or second degree will be predicated on proof that the [**48] defendant acted with malice or shared the intent of a joint venturer who acted with malice. The sole remaining function of felony-murder will be to elevate what would otherwise be murder in the second degree to murder in the first degree where the killing occurs during the commission of a life felony.⁴

Thus, a defendant who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if he or she knowingly participated in the killing with the intent required to commit it — that is, with the intent either to kill, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. Model Jury Instructions on Homicide 57 & n.131 (2013), citing Commonwealth v. Earle, 458 Mass. 341, 346-347, 937 N.E.2d 42 & n.9, 350 (2010), and Commonwealth v. Grey, 399 Mass. 469, 470 n.1, 472 n.4, 505 N.E.2d 171 (1987). Where a defendant participates in an armed

⁴This will entirely eliminate the concept of “felony-murder in the second degree.” See Model Jury Instructions on Homicide 58-63 (2013).

Commonwealth v. Brown, 477 Mass. 805

robbery but does not have the requisite intent for murder, the defendant will be found guilty [~~833~~]⁴⁹ of involuntary manslaughter if he or she acted wantonly or recklessly. Where a defendant does not participate in the killing or otherwise lacked the intent required to prove murder or [~~49~~]⁵⁰ manslaughter, the defendant will not go free because he or she can still be convicted of the underlying armed robbery he or she committed, and a judge in setting the sentence on that underlying felony can take into account the aggravating factor that the felony resulted in a victim's death. Where the defendant is found guilty of murder and the murder is committed "in the commission or attempted commission of a crime punishable with ... imprisonment for life," the defendant will be guilty of murder in the first degree, regardless of whether the murder was premeditated [~~1197~~]⁵¹ or committed with extreme atrocity or cruelty. G. L. c. 265, § 1.

We are not the first to do this. Great Britain has abolished felony-murder liability by statute, providing that "[w]here a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought ... as is required for a killing to amount to murder when not done in the course or furtherance of another offence." Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11, § 1. See Tejeda, 473 Mass. at 277 n.9. Michigan has abolished felony-murder liability under its common law, *id.*, citing Aaron, 409 Mich. at 727-729, and Hawaii and Kentucky have abolished felony-murder [~~50~~]⁵² liability by statute. Tejeda, supra, citing 7A Hawaii Rev. Stat. § 707-701 commentary, and Ky. Rev. Stat. Ann. § 507.020, 1974 commentary. Other States have not abolished the doctrine but have significantly departed from the traditional formulation. See Tejeda, supra, citing State v. Doucette, 143 Vt. 573, 582, 470 A.2d 676 (1983) (holding that felony-murder requires proof of malice, but that malice can be inferred "from evidence presented that the defendant intentionally set in motion a chain of events likely to cause death or great bodily injury, or acted with extreme indifference to the value of human life"), Del. Code Ann. tit. 11, §§ 635, 636 (2007) (requiring defendant to act with recklessness, for murder in the first degree, or criminal negligence, for murder in the second degree), and N.Y. Penal Law §§ 125.25(3), 125.27 (McKinney 2009) (setting forth affirmative defense where joint venturer rather than defendant commits act causing death). The Model Penal Code also has abandoned the traditional doctrine of felony-murder, requiring the homicide to be purposeful, knowing, or reckless in order to constitute murder, but providing for a rebuttable presumption of recklessness

where the homicide occurs [~~834~~]⁵³ during the commission of certain felonies. Model Penal Code §§ 1.12(5); 210.2(1)(b) (Official Draft and Revised Comments 1985). See Matchett, 386 Mass. at 503 n.12.

Without felony-murder liability, our common law [~~51~~]⁵⁴ of murder will be spared much of the confusion that has arisen from applying legal principles we have otherwise abandoned. General Laws c. 265, § 1, provides that "[t]he degree of murder shall be found by the jury," but we have held that this statutory directive cannot be met when a defendant is charged with felony-murder and the only underlying felony is a life felony, because in such a case "no reasonable view of the evidence supports a conviction of murder in the second degree." See Paulding, 438 Mass. at 3. As a result, when a defendant fatally shoots a victim but does not do so during the commission of a felony, the jury must be given the option of finding the defendant guilty of murder in the second degree. But when a defendant, as in this case, provides a weapon and hooded sweatshirts to friends to help them commit what turns out to be a botched armed robbery, the jury is denied that option.

The abolition of felony-murder liability from our common law of murder is prospective, applying only to cases where trial begins after our adoption of the change. It will have no effect on felony-murder cases already tried, including this case (which is why this is a concurrence rather than a dissent). I recognize that a felony-murder case [~~52~~]⁵⁵ might have been tried very differently if the prosecutor had known that liability for murder would need to rest on proof of actual malice. For instance, a prosecutor might have asked for an involuntary manslaughter instruction if he or she had known that the jury could not rest a finding of murder on felony-murder liability.

Justice Gaziano's concurrence identifies various factual scenarios, some of which [~~1198~~]⁵⁶ come from Massachusetts criminal cases, where a victim was killed during the commission of a felony. See *post* at 836, 838-840. Through these examples, that concurrence seeks to show, first, that a verdict of murder in the first degree would not be possible on these facts without felony-murder liability and, second, that any lesser conviction would not be consonant with justice. See *id.* In fact, the examples show that, without felony-murder liability, each of these cases could yield convictions that are entirely consonant with justice.

Without felony-murder liability, the rapist who smothers the child rape victim could be found guilty of murder with

Commonwealth v. Brown, 477 Mass. 805

actual malice if a jury found, either from the violence of the rape or the [*835] smothering of the child, that the defendant had an intent to commit grievous [***53] bodily harm or intended to do an act that, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result. See *post* at 836. Had the jury been so instructed, Robert Wade, too, could have been found guilty of murder without felony-murder liability based on his rape of an eighty-three year old woman, his dragging her along a dirt road, and his violent assault on her body, which would more than suffice to support a finding of those two prongs of malice. See *id.* at 838; *Commonwealth v. Wade*, 428 Mass. 147, 148-149, 153, 697 N.E.2d 541 (1998) (jury instructed only on felony-murder in first and second degree and manslaughter). Had the jury found actual malice, each would have been convicted of murder in the first degree under G. L. c. 265, § 1, because the murder was committed in the commission of a life felony.

The armed robbers who accidentally discharged a fatal shot while vaulting over the counter or when struck by the victim's baseball bat likely could not be found guilty of murder in the first degree because their intent with respect to the killing probably did not satisfy any of the three prongs of malice. See *post* at 836, 839-840; *Commonwealth v. Vizcarrondo*, 427 Mass. 392, 397, 693 N.E.2d 677 (1998). But they might be found guilty of involuntary manslaughter if the jury [***54] found that the death arose from their wanton or reckless conduct that created a high degree of likelihood that substantial harm will result to another person. See Model Jury Instructions on Homicide 73 & n.158 (2013), citing *Commonwealth v. Earle*, 458 Mass. 341, 347, 937 N.E.2d 42 (2010); *Commonwealth v. Sneed*, 413 Mass. 387, 393-394, 597 N.E.2d 1346 (1992). And, even if the jury found that the death did not arise from their wanton or reckless conduct, they could still be sentenced to life in prison on the armed robbery conviction. See G. L. c. 265, § 17. Convictions of both armed robbery and involuntary manslaughter, or of armed robbery alone, with a possible sentence of life in prison, should not be perceived as "getting off easy" for an accidental killing during an armed robbery.⁵

[**1199] [*836] Felony-murder liability is a creation of our common law, and this court is responsible for the content of that common law. When our experience with the common law of felony-murder liability demonstrates that it can yield a verdict of murder in the first degree that is not consonant with justice, and where we recognize that it was derived from legal principles we no longer accept and contravenes two fundamental principles of our criminal jurisprudence, we must revise that common law so that it accords with those fundamental principles and yields [***55] verdicts that are just and fair in light of the defendant's criminal conduct. "And if not now, when?" C. Taylor, *Sayings of the Jewish Fathers* 23 (2d ed. 1897) (quoting Hillel the Elder).

GAZIANO, J. (concurring, with whom Lowy and Cypher, JJ., join). A rapist smothers a distraught child victim to silence her sobbing. To his surprise, the child dies. An armed robber enters a convenience store and threatens the store clerk with a handgun. The store clerk, frozen in fear, fails to comply with his demands. The frustrated armed robber vaults over the counter to empty the cash register, and in the process accidentally discharges a fatal

accomplice's attempted escape following an armed robbery and shooting and so much of an indictment charging murder in the first degree as included theories other than felony-murder. Where that opinion discussed the distinction between joint venture liability for the escape-related crimes and the joint venture principles in the common law of felony-murder, I agree that the reasoning differs, but that reasoning was premised on principles that this concurring opinion changes. The reference to that case is apt, however, because its facts illustrate the need for this change in our jurisprudence if our law of homicide is to be more consonant with justice. Under our current law of felony-murder, Scott Hanright, who was nineteen years old at the time, could have been convicted of murder in the first degree, with a mandatory life sentence without the possibility of parole, if he were found to have served as an unarmed lookout or getaway driver during a department store robbery committed by his accomplice, who was his grandmother's boyfriend. *Id.* at 305-306. The accomplice killed a police officer who responded to the robbery; Hanright never entered the department store and, when he saw police officers pursuing his accomplice before the shooting, walked away from the scene of the crime. *Id.* at 306. The prosecutor ultimately did not seek a conviction of murder in the first degree; Hanright pleaded guilty to murder in the second degree. *Man, 23, Guilty in Slaying of Officer*, *Boston Globe*, May 28, 2015, at B1. A conviction of murder in the second degree would not have been legally possible except through our review under G. L. c. 278, § 33E, if Hanright had been found guilty of felony-murder in the first degree with armed robbery as the predicate felony.

⁵ Justice Gaziano's concurrence correctly notes that this concurring opinion is in conflict with the reasoning in the court's unanimous opinion in *Commonwealth v. Hanright*, 466 Mass. 303, 994 N.E.2d 363 (2013), where we reversed the judge's dismissal of indictments charging crimes related to an

Commonwealth v. Brown, 477 Mass. 805

shot. See Binder, *The Culpability of Felony Murder*, 83 *Notre Dame L. Rev.* 965, 966 (2008) (Binder I). Neither of these offenders would be convicted of murder under Chief Justice Gants's abrogated [*837] version of felony-murder. In this view, charging the rapist and the armed robber with murder would be unfair and unjust because each's criminal liability is disconnected from moral culpability for the respective crimes. This approach, which is predicated on an extremely narrow view of moral culpability (or blameworthiness), diminishes the seriousness of violent felonies that result in the deaths of innocent [***56] victims.¹

Although an offender's mental state is an important component of assessing blameworthiness, it is not "the only legitimate determinant of the grade of a homicide resulting from a felony." Crump & Crump, *In Defense of the Felony Murder Doctrine*, 8 *Harv. J.L. & Pub. Pol'y* 359, 366 (1985) (Crump). See *Binder I, supra* at 1059 (accurate assessment of culpability [*1200] requires consideration of fatal result). It is a fundamental tenet of criminal law that blameworthiness is premised on two factors, not just the offender's state of mind. *Commonwealth v. Lopez*, 433 Mass. 722, 725, 745 N.E.2d 961 (2001), citing *Morissette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952). A criminal defendant's blameworthiness depends on "a showing that the prohibited conduct (actus reus) was committed with the concomitant mental state (mens rea) prescribed for the offense." *Lopez, supra*, citing *Morissette, supra*. See Crump, *supra* at 362 ("Differences in result must be taken into account as part of actus reus if classification and grading are to be rational"). The actus reus component of a criminal offense refers to all the physical elements of the crime, including the individual's offense conduct and the consequences of the act. See *Commonwealth v.*

Williams, 399 Mass. 60, 64-65, 503 N.E.2d 1 (1987). See also Black's Law Dictionary 44 (10th ed. 2014) (actus reus includes attendant circumstances and societal harm caused by criminal act, all of which make [***57] up physical components of offense).

The criminal law, in general, considers the harm caused by an individual in evaluating the severity of an offense. Binder, Mak- [*838] ing the Best of Felony Murder, 91 *B.U. L. Rev.* 403, 427 (2011) (Binder II) ("the evaluation of ends pervades American criminal law"). Chief Justice Gants's exclusive focus on the mens rea component of the crime ignores the human costs of an offender's actions, and overlooks numerous examples in the criminal law to the contrary. For example, it is a misdemeanor to drive a motor vehicle while under the influence of alcohol. See *G. L. c. 90, § 24*. If one intoxicated driver strikes and kills a pedestrian, whereas another manages to avoid any accident, the former offense is elevated to the serious felony of motor vehicle homicide. See *G. L. c. 90, § 24G (a)*. A defendant who shoots and kills his or her intended target, and an individual who attempts to shoot someone but misses, may share the same intent to kill, yet it is clear that they are not equally blameworthy. See *Commonwealth v. LaBrie*, 473 Mass. 754, 760, 46 N.E.3d 519 (2016) (discussing mens rea of attempted murder).

To provide needed context, I address several instances where blameworthy defendants, who did not kill intentionally or recklessly, were convicted of felony-murder in the first degree. [***58] Each of these defendants would not be convicted of murder under Chief Justice Gants's reformulation of the felony-murder rule.

In October, 1993, a farmhand named Robert Wade abducted the farm owner's eighty-three year old mother from her house. Wade dragged the victim, who suffered from Alzheimer's disease, along a dirt road to the shack where he lived. *Commonwealth v. Wade*, 428 Mass. 147, 147-149, 697 N.E.2d 541 (1998). In the process, the victim's shoulders, knees, and buttocks were badly scraped, and gravel was embedded in the torn tissue of her back. *Id. at 149*. Wade brutally raped her. *Id. at 148*. "The victim's clothing [was] torn and was covered with human blood. She ... suffered bruises to her eyes and to her neck ... , her left wrist was fractured and there was evidence that she ... suffered a blow to the head." *Id. at 148-149*. The farmer found his mother lying naked on the defendant's bed. *Id. at 148*. Her hip had been fractured during the sexual assault. *Id. at 149*. She had hip replacement surgery but contracted pneumonia and

¹The concurring opinion by Chief Justice Gants relies on *Commonwealth v. Matchett*, 386 Mass. 492, 507, 436 N.E.2d 400 (1982), in support of the proposition that application of the felony-murder rule erodes "the relation between criminal liability and moral culpability." *Ante* at 832. Prior to the decision in that case, "a defendant could be found guilty of murder on a theory of felony-murder if he or she committed a homicide while engaged in the commission or attempted commission of a felony punishable by life in prison." *Commonwealth v. Prater*, 431 Mass. 86, 95, 725 N.E.2d 233 (2000). In *Matchett, supra*, we addressed those concerns by narrowing the scope of the felony-murder rule to require that the Commonwealth prove that the underlying felony is either inherently dangerous to human life or was committed with a conscious disregard of the risk to human life.

Commonwealth v. Brown, 477 Mass. 805

died three weeks after the rape. *Id.* The court affirmed the defendant's conviction of felony-murder in the first degree with aggravated rape as the predicate felony. *Id.* at 147-148. The court also determined that there was no **[**1201]** basis on which to grant relief under **[***59]** *G.L. c. 278, § 33E*, for this "brutal" **[*839]** attack on a vulnerable, older woman." *Id.* at 155.^{2,3}

On March 28, 1980, William Griffith spent the evening smoking marijuana, ingesting cocaine, and drinking alcohol. *Commonwealth v. Griffith*, 404 Mass. 256, 258, 534 N.E.2d 1153 (1989). Thereafter, he announced that he was going to rob a convenience store located about a block away. *Id.* Griffith waited for the store to empty of customers and entered armed with a revolver. *Id.* He demanded money from the victim at gunpoint. *Id.* The victim managed to slip away during a chaotic moment when his **[***60]** wife confronted Griffith. *Id.* The victim then emerged from a back room armed with a baseball

bat and struck Griffith on the shoulder, head, and arm. *Id.* During this confrontation, Griffith accidentally shot the victim in the head. *Id.* The defendant was convicted of felony-murder, and the court concluded that his claim that the shooting was an accident did not absolve him of liability. *Id.* 257, 260-261. "A defendant who kills a victim in the commission or attempted commission of a robbery, while the defendant is armed with a gun, is guilty of murder by application of the felony-murder rule.... The fact that, according to the defendant, the gun was discharged accidentally is of no consequence." *Id.* at 261, quoting **[*840]** *Commonwealth v. Evans*, 390 Mass. 144, 151-152, 454 N.E.2d 458 (1983). See *Commonwealth v. Neves*, 474 Mass. 355, 371, 50 N.E.3d 428 (2016) (defendant convicted of felony-murder in death of taxicab driver notwithstanding defendant's claim that gun discharged accidentally when victim accelerated and grabbed his hand).

²The court's decision in *Commonwealth v. Wade*, 428 Mass. 147, 147-149, 697 N.E.2d 541 (1998), supports the position that a rapist whose actions result in death, regardless of whether the death is intended, is sufficiently blameworthy for the imposition of felony-murder liability due to the depraved nature of this crime.

"To compel another by force to acquiesce in the violation of an important right is to express contempt for a victim's autonomy and status by asserting mastery over him or her. The death of a victim under the offender's dominion and as a result of the offender's coercion, typifies the wrongfulness of assuming power over another's fate in order to wrong her. Felony murder rules appropriately impose liability for negligently causing death for a very depraved motive, as long as the predicate felony involves coercion or destruction, and a felonious purpose independent of the fatal injury. In evaluating the offender's motives, felony murder rules are compatible with other rules of American criminal law...."

Binder, The Culpability of Felony Murder, *83 Notre Dame L. Rev.* 965, 1059-1060 (2008) (Binder I).

³According to Chief Justice Gants's concurrence, the factual scenarios discussed above, in which the victim was killed in the course of a sexual assault, would result in a conviction of murder. This is a misreading of the fact patterns. The rapist described in the hypothetical is intent on one "selfish aim[]," and does not recognize the obvious risks that his conduct imposes on the victim. *Binder I, supra* at 966. Similarly, Robert Wade's intent was to abduct and rape the elderly victim; he dragged her out of the farmhouse and beat her to accomplish this purpose. She died weeks later due to medical complications. *Wade*, 428 Mass. at 147-149.

The second issue raised in Chief Justice Gants's concurrence involves the imposition of vicarious criminal liability for every act committed by an accomplice, in furtherance of the felony, that results in death. See *Commonwealth v. Tejeda*, 473 Mass. 269, 276, 41 N.E.3d 721 (2015). Under this reformulation of felony-murder, an accomplice would be liable for a death resulting from **[***61]** the commission of a felony only if the Commonwealth were able to prove that he or she shared the intent of a joint venturer who acted with malice.

[1202]** Chief Justice Gants's concurrence repudiates the court's recent decision in *Commonwealth v. Hanright*, 466 Mass. 303, 310, 994 N.E.2d 363 (2013). In that case, the nineteen year old defendant participated in a masked armed robbery of a department store by an acquaintance, Domenic Cinelli. *Id.* at 304-305. The defendant, who was unarmed, walked to the store with Cinelli and waited outside while Cinelli entered. *Id.* at 306. He told the police that he did not act as a lookout. *Id.* He claimed that he merely went along because he was afraid of Cinelli, and because he hoped to share in some of the proceeds from the robbery. *Id.* Responding to a report of a robbery in progress, police observed the defendant standing outside, but focused on Cinelli, who left the store carrying a duffle bag. *Id.* Cinelli pointed a gun at the first responding officer, a chase ensued, and Cinelli fatally shot one of the officers. *Id.* The defendant had walked away from the store during the pursuit and was not involved in the subsequent confrontation. *Id.*

Addressing joint venture liability for escape-related

Commonwealth v. Brown, 477 Mass. 805

crimes, the court stated, "To establish liability [***62] for felony-murder on a theory of joint venture the Commonwealth must prove 'that a homicide occurred in the commission or attempted commission of that felony[.] [C]omplicity in the underlying felony is sufficient to establish guilt of murder in the first or second degree if the homicide ... *followed naturally and probably* from the carrying out of the joint enterprise'" (emphasis in original; citation omitted). *Id. at 307*. Recognizing that "the felony-murder rule operates according to a unique set of principles," the court concluded that the felony-murder doctrine allowed a jury to find the defendant [**841] *ant* liable for the police officer's death by virtue of his complicity in the underlying armed robbery. *Id. at 308-309*. Thus, the jury were not required to find that the defendant specifically intended to harm the officer. *Id.* See *Commonwealth v. Devereaux*, 256 Mass. 387, 392, 152 N.E. 380 (1926) ("it is no defence for the associates engaged with others in the commission of a robbery, that they did not intend to take life in its perpetration, or that they forbade their companions to kill").

The conclusion reached by Chief Justice Gants is that revision of the common-law felony-murder rule is necessary to vanquish the "fiction of constructive malice" and yield "verdicts that are just [***63] and fair in light of the defendant's criminal conduct." See *ante* at 825, 836. Yet, under this narrowed version of felony-murder, the defendant in this case likely would be convicted of murder in the first degree on the basis of his joint participation in an act of third prong malice.

Chief Justice Gants describes joint venture felony-murder liability as follows: "a defendant who commits an armed robbery as a joint venturer will be found guilty of murder where a killing was committed in the course of that robbery if he or she knowingly participated in the killing with the intent required to commit it — that is, with the intent either to kill, to cause grievous bodily harm, or to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result." *Ante* at 832.

Here, the Commonwealth established that the defendant knowingly participated in the killing by supplying an accomplice with a loaded .380 handgun and other accomplices with hooded sweatshirts to be used to conceal their identities. See *Commonwealth v. Zanetti*, 454 Mass. 449, 470, 910 N.E.2d 869 (2009) (Appendix) (knowing participation includes aid or assistance in committing the crime). The evidence also would [***64] support a reasonable inference [**1203]

that the defendant had or shared the intent to carry out the crime of armed home invasion or armed robbery. The defendant supplied the handgun and disguises knowing that his accomplices were planning to enter an occupied residence at night to rob two large men, both drug dealers, at gunpoint. In *Commonwealth v. Selby*, 426 Mass. 168, 172, 686 N.E.2d 1316 (1997), the court concluded that a jury could infer third-prong malice from evidence that an individual entered an occupied house, carrying a loaded firearm, with the intent to commit a robbery. See *Commonwealth v. Childs*, 445 Mass. 529, 533, 839 N.E.2d 294 (2005) (act of cocking and pointing loaded gun at three [**842] people creates plain and strong likelihood of death to one of them).

In *Commonwealth v. Rolon*, 438 Mass. 808, 824, 784 N.E.2d 1092 (2003), the court noted that "the doctrines of felony-murder and joint venture may, on some hypothetical fact patterns, produce a conviction of murder in the first degree that would appear out of proportion to a defendant's culpability." The reasonable and far simpler remedy to the problem of a disproportionate conviction of murder in the first degree is to exercise the court's statutory authority under *G. L. c. 278, § 33E*, to reduce the verdict in those extraordinary cases not consonant with justice. See *Zanetti*, 454 Mass. at 466 ("All of this ... might be tolerable if there were no reasonable alternative, [***65] but there is a reasonable, and far simpler, alternative ..."). As Chief Justice Gants's concurrence points out, this is the first time that the court has exercised its authority under *G. L. c. 278, § 33E*, to reduce a conviction of felony-murder in the first degree in similar circumstances. See *ante* at 826, n.1.

Thus, rather than abolish common-law felony-murder, Chief Justice Gants's concurrence offers a muddled version of the same crime. In the future, felony-murder liability will hinge on fine gradations between third-prong malice, wanton and reckless involuntary manslaughter, negligence, and accident — with predictably unpredictable results. See *Crump, supra* at 372 (discussing disparity in verdicts created by ambiguous felony-murder rule). To be sure, there will be instances where morally culpable individuals will not be held responsible for the death of a rape victim, gasoline station attendant, or convenience store clerk. Rather than create such confusion, I would, instead, rely on the existing mechanism under *G. L. c. 278, § 33E*, to remedy those rare cases, such as the one presented here, where a verdict is not consonant with the interests of justice. In my view, the abrogation of common-law felony-murder to address the perceived

Commonwealth v. Brown, 477 Mass. 805

unfairness [***66] of this conviction, at the expense of innocent victims of violent crime, is not necessary.

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APPENDIX E

Brown v. Massachusetts

Supreme Court of the United States

October 1, 2018, Decided

No. 17-7732.

Reporter

2018 U.S. LEXIS 4451 *; 586 U.S. 826; 139 S. Ct. 54; 202 L. Ed. 2d 41; 87 U.S.L.W. 3106; 2018 WL 838385

Timothy Brown, Petitioner v. Massachusetts.

Prior History: Commonwealth v. Brown, 477 Mass. 805, 2017 Mass. LEXIS 710, 81 N.E.3d 1173 (Sept. 20, 2017)

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

Opinion

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

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APPENDIX F

APPEALS COURT
Full Court Panel Case
Case Docket

Appendix F

COMMONWEALTH vs. TIMOTHY R. BROWN
THIS CASE CONTAINS IMPOUNDED MATERIAL OR PID
2022-P-0558

CASE HEADER	
Case Status	Closed: Rescript issued
Status Date	09/06/2024
Nature	Murder, second degree
Entry Date	06/13/2022
Appellant	Defendant
Case Type	Criminal
Brief Status	
Brief Due	
Arg/Submitted	03/11/2024
Decision Date	05/30/2024
Panel	Rubin, Englander, D'Angelo, JJ.
Citation	104 Mass. App. Ct. 1108
Lower Court	Middlesex Superior Court
TC Number	
Lower Ct Judge	Laurence D. Pierce, J.
TC Entry Date	12/22/2009
SJ Number	
FAR Number	<u>FAR-29837</u>
SJC Number	

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth	<u>Thomas D. Ralph, A.D.A.</u>
Plaintiff/Appellee	<u>Adrienne C. Lynch, A.D.A. - Inactive</u>
Red brief & appendix filed	<u>Melissa Weisgold Johnsen, A.D.A.</u>
1 Enl, 59 Days	
Timothy R. Brown	<u>David H. Mirsky, Esquire</u>
Defendant/Appellant	<u>Victoria Kelleher, Esquire - Inactive</u>
Stay vacated	<u>Joanne T. Petito, Esquire</u>
Blue br, app & reply br filed	
3 Enls, 217 Days	

ORAL ARGUMENTS
0:00 / 0:00

DOCKET ENTRIES		
Entry Date	Paper	Entry Text
06/27/2022		IMPOUNDED INFORMATION: Hearing of 1/28/19 containing impounded sidebar conference per order of re-sentencing judge.
06/13/2022		Transcript Volume: 02/21/2019 - Hearing .
06/13/2022		Transcript Volume: 05/10/2019 - Sentencing Hearing .
06/13/2022		Transcript Volume: 07/24/2019 - Sentencing Hearing .
06/13/2022 #1		Lower Court Assembly of the Record Package
06/13/2022 #2		Notice of entry sent.
06/24/2022 #3		Docketing Statement filed for Timothy R. Brown by Attorney David Mirsky.
07/15/2022 #4		Motion of Appellant to extend date for filing brief and appendix filed for Timothy R. Brown by Attorney David Mirsky.
07/18/2022		RE#4: Allowed to 10/28/2022. Notice sent.
10/18/2022 #5		Motion of Appellant to extend date for filing brief and appendix filed for Timothy R. Brown by Attorney David Mirsky.
10/24/2022		RE#5: Allowed to 1/27/23. No further enlargements. (Massing, J.). Notice

01/17/2023 #6	Motion of Appellant to extend date for filing brief and appendix filed for Timothy R. Brown by Attorney David Mirsky.
01/23/2023	RE#6: Denied without prejudice to renewal with defendant's brief and appendix on or before 2/27/23. (Henry, J.) . *Notice.
02/10/2023 #7	Appellant brief filed for Timothy R. Brown by Attorney David Mirsky.
02/10/2023 #8	Appendix filed for Timothy R. Brown by Attorney David Mirsky.
02/10/2023 #9	Motion of Appellant to extend date for filing brief and appendix filed for Timothy R. Brown by Attorney David Mirsky.
02/13/2023	RE#9: Allowed and accepted for filing. *Notice.
02/13/2023 #10	MOTION of Appellee to extend brief due date filed for Commonwealth by Attorney Thomas D. Ralph.
02/14/2023	RE#10: Allowed to 05/11/2023. Notice sent.
03/17/2023 #11	Appellee brief filed for Commonwealth by Attorney Melissa Weisgold Johnsen.
03/17/2023 #12	Appendix (Supplemental) filed for Commonwealth by Attorney Melissa Weisgold Johnsen.
03/17/2023 #13	Notice of appearance filed for Commonwealth by Attorney Melissa Weisgold Johnsen.
03/24/2023 #14	Motion of Appellant to extend date for filing Reply Brief filed for Timothy R. Brown by Attorney David Mirsky.
03/27/2023	RE#14: Allowed to 4/28/2023. *Notice.
04/25/2023 #15	Motion of Appellant to extend date for filing Reply Brief filed for Timothy R. Brown by Attorney David Mirsky.
04/25/2023	RE#15: Allowed to 6/2/23. *Notice.
05/26/2023 #16	MOTION of Appellant to stay appellate proceedings filed for Timothy R. Brown by Attorney David Mirsky.
05/26/2023	ORDER: It has come to the court's attention that the parties filed Rule 27 motions for reconsideration or modification of decision in <u>Commonwealth v. Guardado</u> (SJC-13315). As issues related to <u>Guardado</u> appear to be implicated in this appeal, appellate proceedings are stayed pending the SJC's issuance of the rescript to the trial court in that matter or further order of this court. A status report is due within 7 days of the issuance of the rescript in <u>Guardado</u> . *Notice/Attest.
10/27/2023	ORDER: The SJC has issued two decisions in <u>Commonwealth v. Guardado</u> , SJC-13315, the first on 4/13/23 (Guardado I), the second on 10/26/23 after allowing the Commonwealth's motion for reconsideration (Guardado II). The parties are to file a joint status report, on or before 11/10/13, regarding how they request to proceed following the SJC's Guardado decisions. Should the parties disagree as to how to proceed, they are to provide an explanation as to their disagreement. Notice/attest
11/09/2023 #17	Status Report filed for Timothy R. Brown by Attorney David Mirsky.
11/13/2023	<u>ORDER RE#17:</u> The defendant's request to include his arguments regarding the application of the Guardado cases to this appeal in his reply brief is denied. Consistent with the orders of this Court in other cases implicating <u>Commonwealth v. Guardado</u> , 491 Mass. 666 (2023), and <u>Commonwealth v. Guardado</u> , 493 Mass. 1 (2023), the defendant may file a supplemental memorandum addressing those cases, not to exceed 10 double spaced pages or 2,200 words, on or before 11/23/23. The Commonwealth's responsive memorandum, if any, is due 14 days after service of the defendant's supplemental memorandum, and is subject to the same limitations as to length. The defendant's reply brief, if any, complying with Mass. R. A. P. 16(c), will be due 14 days after service of the Commonwealth's memorandum or a notice to the Court that the Commonwealth will not be filing a supplemental memorandum. (Grant, J.) Notice
11/15/2023	Notice sent seeking information on unavailability for oral argument in January 2024
11/15/2023 #18	Response from Melissa Weisgold Johnsen, A.D.A. re: unavailable for oral argument January 3, 4, 5, 8, 9, 12.
11/17/2023 #19	Motion for extension of time to file supplemental memorandum filed for Timothy R. Brown by Attorney David Mirsky.
11/20/2023	RE#19: Allowed to 12/8/23. No further enlargements should be anticipated. *Notice
11/21/2023 #20	Response from David H. Mirsky, Esquire re: unavailable for oral argument January 3, 4, 5, 8, 9, 10, 11, 12.
12/08/2023 #21	Supplemental Memorandum filed for Timothy R. Brown by Attorney David Mirsky.
12/14/2023	Notice sent seeking information on unavailability for oral argument in February 2024
12/14/2023 #22	Response from Melissa Weisgold Johnsen, A.D.A. re: unavailable for oral argument February 2, 5, and 15, 2024.
12/15/2023 #23	Supplemental Memorandum filed for Commonwealth by Attorney Melissa Weisgold Johnsen.
12/20/2023 #24	Motion of Appellant to extend date for filing Reply Brief filed for Timothy R. Brown by Attorney David Mirsky.
12/20/2023	Response from David H. Mirsky, Esquire re: available all dates for oral argument.
12/21/2023	RE#24: Allowed to 01/25/24. No further enlargement should be anticipated. *Notice.
01/17/2024	Notice sent seeking information on unavailability for oral argument in March 2024
01/17/2024	Response from Melissa Weisgold Johnsen, A.D.A. re: available all dates for oral argument..
01/19/2024 #25	Response from David H. Mirsky, Esquire re: unavailable for oral argument March 18.
01/24/2024 #26	Reply brief filed for Timothy R. Brown by Attorney David Mirsky.
02/02/2024 #27	Notice of 03/11/2024, 9:30 AM argument at Christopher J. Armstrong (Rm Three) sent.
02/05/2024	REVISED Response from David H. Mirsky, Esquire re: will appear and argue on 03/11/2024.
02/05/2024	REVISED Response from Melissa Weisgold Johnsen, A.D.A. re: will appear and argue on 03/11/2024.
03/06/2024 #28	Motion to Expand the Record filed for Timothy R. Brown by Attorney David Mirsky.

03/06/2024 #29	Transcript (Friday 17 April 2013 Motion to Dismiss) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #30	Transcript (June 4 2013 Jury Trial Day 1) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #31	Transcript (June 5 2013 Jury Trial Day 2) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #32	Transcript (June 6 2013 Jury Trial Day 3) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #33	Transcript (June 7 2013 PreTrial matters) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #34	Transcript (June 10 2013 Jury Trial Day 5) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #35	Transcript (June 11 2013 Jury Trial Day 6) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #36	Transcript (June 12 2013 Jury Trial Day 7) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #37	Transcript (June 13 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #38	Transcript (June 14 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #39	Transcript (June 17 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #40	Transcript (June 18 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #41	Transcript (June 19 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #42	Transcript (June 20 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #43	Transcript (June 21 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #44	Transcript (June 24 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #45	Transcript (June 25 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/06/2024 #46	Transcript (June 26 2013 Jury Trial) filed for Timothy R. Brown by Attorney David Mirsky.
03/08/2024 #47	Letter pursuant to MRAP 16(l) filed for Timothy R. Brown by Attorney David Mirsky.
03/11/2024	Oral argument held. (Rubin, J., Englander, J, D'Angelo, J.).
05/30/2024	RE#28: Allowed. (Rubin, Englander, D'Angelo, JJ.). *Notice.
05/30/2024 #48	Decision: Rule 23.0 Judgments affirmed. (Rubin, Englander, D'Angelo, JJ.). *Notice.
06/05/2024	FAR-29837 opened on MOTION to file FAR application late filed for Timothy R. Brown by Attorney David Mirsky.
09/06/2024	FAR DENIED (on 09/05/2024).
09/06/2024	RESCRIPT to Trial Court.

As of 09/06/2024 4:15pm

APPENDIX G

0981CR01511 Commonwealth vs. Brown, Timothy R

Appendix G

- Case Type: Indictment
- Case Status: Open
- File Date: 12/22/2009
- DCM Track: C - Most Complex
- Initiating Action: MURDER c265 §1
- Status Date: 12/22/2009
- Case Judge:
- Next Event:

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)
Party Information
Commonwealth
- Prosecutor

Alias

Party Attorney

- Attorney
- Lynch, Esq., Adrienne C
- Bar Code
- 308580
- Address
- Middlesex County District Attorney
15 Commonwealth Ave
Woburn, MA 01801
- Phone Number
- (617)201-3086

[More Party Information](#)
Brown, Timothy R
- Defendant

Alias

Party Attorney

- Attorney
- Mirsky, Esq., David H
- Bar Code
- 559367
- Address
- Mirsky and Petito, Attorneys at Law
PO Box 1063
Exeter, NH 03833
- Phone Number
- (603)580-2132

[More Party Information](#)**Party Charge Information**

- Brown, Timothy R**
- Defendant
- Charge # 1:
265/1-0 - Felony MURDER c265 §1

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

Charge Disposition
Disposition Date

Disposition
06/25/2013
Guilty Verdict

- **Brown, Timothy R**
- - Defendant
- Charge # 2:
265/1-0 - Felony MURDER c265 §1

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

Charge Disposition

Disposition Date
Disposition
06/25/2013
Guilty Verdict

- **Brown, Timothy R**
- - Defendant
- Charge # 3:
265/18C/A-0 - Felony HOME INVASION c265 §18C

- Original Charge
- 265/18C/A-0 HOME INVASION c265 §18C (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
06/25/2014
Guilty Verdict

- **Brown, Timothy R**
- - Defendant
- Charge # 4:
269/10/G-2 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)

- Original Charge
- 269/10/G-2 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)
(Misdemeanor - more than 100 days incarceration)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
06/25/2013
Guilty Verdict

- **Brown, Timothy R**
- - Defendant
- Charge # 5:
269/10/G-2 - Misdemeanor - more than 100 days incarceration FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)

- Original Charge
- 269/10/G-2 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h)
(Misdemeanor - more than 100 days incarceration)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
06/25/2013
Guilty Verdict

Events

Date	Session	Location	Type	Event Judge	Result
01/07/2010 02:00 PM	Woburn Magistrate Session		Arraignment		Held as Scheduled
02/02/2010 09:00 AM	Woburn Magistrate Session		Pre-Trial Conference		Not Held

Date	Session	Location	Type	Event Judge	Result
02/08/2010 02:00	Criminal 5 Rm 640 PM		Hearing RE: Discovery Motion(s)		Held as Scheduled
02/08/2010 02:00	Criminal 5 Rm 640 PM		Pre-Trial Conference		Held as Scheduled
03/26/2010 02:00	Criminal 5 Rm 640 PM		Non-Evidentiary Hearing to Dismiss		Rescheduled
04/28/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Rescheduled
06/17/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
06/24/2010 08:30	Criminal 5 Rm 640 AM		Pre-Trial Hearing		Rescheduled
07/19/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
08/12/2010 02:00	Criminal 5 Rm 640 PM		Non-Evidentiary Hearing on Suppression		Rescheduled
08/24/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
09/13/2010 08:30	Criminal 5 Rm 640 AM		Evidentiary Hearing on Suppression		Rescheduled
10/14/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Unknown result at conversion
10/21/2010 02:00	Criminal 5 Rm 640 PM		Motion Hearing		Not Held
10/21/2010 02:00	Criminal 1 Rm 430 PM		Motion Hearing		Held as Scheduled
11/03/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Rescheduled
11/18/2010 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
12/15/2010 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Rescheduled
12/16/2010 02:00	Criminal 5 Rm 640 PM		Hearing		Held as Scheduled
01/03/2011 08:30	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
03/03/2011 02:00	Criminal 5 Rm 640 PM		Hearing RE: Discovery Motion(s)		Not Held
04/04/2011 02:00	Criminal 5 Rm 640 PM		Non-Evidentiary Hearing on Suppression		Rescheduled
04/25/2011 09:00	Criminal 5 Rm 640 AM		Evidentiary Hearing on Suppression		Rescheduled
04/27/2011 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
05/24/2011 02:00	Criminal 5 Rm 640 PM		Evidentiary Hearing on Suppression		Not Held
06/21/2011 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
08/03/2011 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
09/08/2011 02:00	Criminal 5 Rm 640 PM		Status Review		Not Held
09/19/2011 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Held as Scheduled
10/17/2011 09:00	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
11/21/2011 04:00	Criminal 5 Rm 640 PM		Status Review		Rescheduled

Date	Session	Location	Type	Event Judge	Result
11/28/2011 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Not Held
11/28/2011 02:00	Criminal 1 Rm 430 PM		Status Review		Held as Scheduled
12/12/2011 02:00	Criminal 5 Rm 640 PM		Trial Assignment Conference		Held as Scheduled
02/02/2012 02:00	Criminal 5 Rm 640 PM		Bail Hearing		Held as Scheduled
02/27/2012 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Held as Scheduled
03/14/2012 02:00	Criminal 5 Rm 640 PM		Hearing		Held as Scheduled
03/26/2012 09:00	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
04/26/2012 02:00	Criminal 5 Rm 640 PM		Trial Assignment Conference		Rescheduled
05/17/2012 02:00	Criminal 5 Rm 640 PM		Trial Assignment Conference		Not Held
06/04/2012 02:00	Criminal 5 Rm 640 PM		Trial Assignment Conference		Held as Scheduled
06/15/2012 02:00	Criminal 5 Rm 640 PM		Hearing for Appearance / Appointment of Counsel		Held as Scheduled
07/16/2012 08:30	Criminal 5 Rm 640 AM		Status Review		Not Held
07/16/2012 02:01	Criminal 2 Rm 530 PM		Status Review		Held as Scheduled
08/27/2012 02:01	Criminal 2 Rm 530 PM		Status Review		Held as Scheduled
09/26/2012 02:00	Criminal 2 Rm 530 PM		Hearing on Motion to Continue		Rescheduled
10/10/2012 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
12/03/2012 08:30	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
12/03/2012 04:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
01/08/2013 02:00	Criminal 5 Rm 640 PM		Hearing		Rescheduled
02/11/2013 02:00	Criminal 5 Rm 640 PM		Motion Hearing		Rescheduled
02/11/2013 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
02/27/2013 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
03/05/2013 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Rescheduled
03/13/2013 02:00	Criminal 5 Rm 640 PM		Trial Assignment Conference		Held as Scheduled
03/19/2013 08:30	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
04/17/2013 02:00	Criminal 5 Rm 640 PM		Evidentiary Hearing on Suppression		Held as Scheduled
05/01/2013 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Rescheduled
05/06/2013 02:00	Criminal 5 Rm 640 PM		Status Review		Held as Scheduled
05/14/2013 04:00	Criminal 5 Rm 640 PM		Status Review		Not Held

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/15/2013 08:30	Criminal 5 Rm 640 AM		Jury Trial		Rescheduled
05/15/2013 09:00	Criminal 3 Rm 540 AM		Final Pre-Trial Conference		Held as Scheduled
05/15/2013 02:00	Criminal 5 Rm 640 PM		Final Pre-Trial Conference		Not Held
05/31/2013 08:30	Criminal 3 Rm 540 AM		Status Review		Held as Scheduled
06/03/2013 08:30	Criminal 5 Rm 640 AM		Jury Trial		Not Held
06/03/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		
06/04/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/05/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/06/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/07/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/10/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/11/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/12/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/13/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/14/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/17/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/18/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/19/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/20/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/21/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/24/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/25/2013 09:00	Criminal 3 Rm 540 AM		Jury Trial		Held as Scheduled
06/26/2013 10:00	Criminal 3 Rm 540 AM		Hearing for Sentence Imposition		Held as Scheduled
07/15/2015 09:00	Criminal 4 Rm 630 AM	Courtroom 630	Motion Hearing		Held as Scheduled
08/10/2015 09:00	Criminal 4 Rm 630 AM	Courtroom 630	Motion Hearing		Held as Scheduled
01/23/2018 09:00	Criminal 1 Rm 430 AM		Hearing for Sentence Imposition		Rescheduled
03/23/2018 09:00	Criminal 3 Rm 540 AM		Hearing for Sentence Imposition		Rescheduled
03/23/2018 09:00	Criminal 1 Rm 430 AM	Courtroom 430	Hearing for Sentence Imposition	Pierce, Hon. Laurence D	Not Held
03/26/2018 09:00	Criminal 2 Rm 530 AM	Courtroom 530	Scheduling Conference	Wall, Hon. Joshua	Held as Scheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
05/03/2018 02:00 PM	Criminal 2 Rm 530	Courtroom 530	Hearing for Sentence Imposition	Pierce, Hon. Laurence D	Rescheduled
01/18/2019 09:00 AM	Criminal 1 Rm 430		Hearing on Withdrawal of Attorney	Pierce, Hon. Laurence D	Held as Scheduled
01/28/2019 09:00 AM	Criminal 1 Rm 430		Hearing for Sentence Imposition		Rescheduled
01/28/2019 09:00 AM	Criminal 1 Rm 430		Hearing on Withdrawal of Attorney	Pierce, Hon. Laurence D	Held as Scheduled
02/11/2019 09:00 AM	Criminal 1 Rm 430		Scheduling Conference	Pierce, Hon. Laurence D	Rescheduled
02/21/2019 09:00 AM	Criminal 1 Rm 430		Scheduling Conference	Pierce, Hon. Laurence D	Held as Scheduled
05/10/2019 09:00 AM	Criminal 2 Rm 530		Hearing for Sentence Imposition		Held as Scheduled
07/08/2019 02:00 PM	Criminal 2 Rm 530		Hearing for Sentence Imposition	Pierce, Hon. Laurence D	
07/23/2019 09:00 AM	Criminal 1 Rm 430		Hearing for Sentence Imposition	Pierce, Hon. Laurence D	Rescheduled
07/24/2019 09:00 AM	Criminal 1 Rm 430		Hearing for Sentence Imposition	Pierce, Hon. Laurence D	Held as scheduled

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	01/07/2010	01/07/2010	0	05/06/2014
Final Pre-Trial Conference	01/07/2010	12/19/2010	346	05/06/2014
Case Disposition	01/07/2010	01/02/2011	360	05/06/2014

Docket Information

<u>Docket</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
<u>Date</u>			
12/22/2009	Indictment returned	1	 Image
12/22/2009	Order of notice of finding of murder indictment		
12/22/2009	Notice & copy of indictment sent to Chief Justice & Atty General		
12/22/2009	Notice & copy of indictment sent to Sheriff of Middlesex County		
12/23/2009	Order of notice of finding of murder indictment returned with service	2	
01/07/2010	Deft arraigned before Court		
01/07/2010	RE Offense 1:Plea of not guilty		
01/07/2010	RE Offense 2:Plea of not guilty		
01/07/2010	RE Offense 3:Plea of not guilty		
01/07/2010	RE Offense 4:Plea of not guilty		
01/07/2010	RE Offense 5:Plea of not guilty		
01/07/2010	Bail: Defendant held without bail w/o prejudice		
01/07/2010	Bail warning read		
01/07/2010	Affidavit of indigency filed; approved	3	
01/07/2010	Appearance of Deft's Atty: Stanley W Norkunas		
01/07/2010	Appearance of Commonwealth's Atty: Cara L Krysil		
01/07/2010	Assigned to track "C" see scheduling order		
01/12/2010	Tracking deadlines Active since return date		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/12/2010	Mittimus issued		
02/02/2010	Commonwealth's First Notice of Discovery	4	
02/08/2010	MOTION by Commonwealth: for a protective order	5	
02/08/2010	Motion (P#5) After a hearing, the court orders that counsel not provide the defendant with any documents or other information containing the addresses of Commonwealth witnesses, all without obtaining prior court approval		
02/08/2010	Criminal Tracking order "C" see calendar for scheduled events	6	
02/08/2010	Pre-trial conference report filed	7	
02/08/2010	MOTION by Deft: For funds for an investigator with an affidavit attached	8	
02/08/2010	MOTION (P#8) allowed (Howard J. Whitehead, Justice). Copies mailed 2/11/2010		
03/26/2010	MOTION by Deft: For Discovery (Filed In Court)	9	
04/28/2010	Habe: returned w/service	10	
06/17/2010	MOTION by Deft: Dave Dowells appearance for status hearing 6-17-2010 full appearance will not be allowed until Atty S. Norkunas files motion to withdraw		
06/17/2010	Commonwealth files second notice of discovery	11	
08/24/2010	Appearance of Deft's Atty: Dane C. Dowell		
10/01/2010	Commonwealth files Fourth Notice Of Discovery	12	
10/21/2010	Habe: returned wo/service	13	
11/18/2010	Commonwealth files Fifth notice of discovery	14	
11/22/2010	MOTION by Commonwealth: For theProduction Of Blood And/Or Saliva Samples Of Defendant	15	
11/22/2010	Motion P#15 Moot as this defendant has submitted such a sample. (Henry, J.)	16	
03/03/2011	Commonwealth files sixth notice of discovery	17	
05/24/2011	Commonwealth files Seventh notice of discovery	18	
06/05/2011	Affidavit of indigency filed; APPROVED, Committee for Public Counsel Services appointed.CPCS notified 6-5-12 as prior Counsel has been suspended by BBO (Billings,J)	28	
06/05/2011	Notice of assignment of counsel filed. CPCS (C50040863)	29	
06/21/2011	Commonwealth files Eight Notice of Discovery	19	
09/08/2011	Commonwealth files ninth notice of discovery	20	
09/09/2011	ORDER: Defendant's counsel, failed to appear at the court hearing on September 8,2011. Attorney Dowell also failed to call the Court prior to this hearing to explain his absence. Attorney Dowell also failed to call the ADA or any of the three other defense counsel in this case. Yesterday's date, Spetember 8,2011, was a date agreed-upon by all counsel at a prior hearing. The Court has learned, and the docket reflects, that this not the first time Attorney Dowell has not attended a court date. Failure of Attorney Dowell to appear without first notifying the clerk is inexcusable. The next court date is September 19,2011 at 2:00 p.m. Failure of Attorney Dowell to attend the court hearing on Spetember 19,2011 may well cause sanctions to be imposed, including the striking of his appearance. It is difficult enough to manage a four co-defendant case, and not having all counsel present only increases that difficulty. Counsel are to attend this September 19,2011 hearing with knowledge of their and their witnesses' (including experts) schedules in the event that a new trial date in 2011 needs to be selected. SO ORDERED, (Elizabeth M.Fahey,J.) Dated: September 9,2011	21	
12/12/2011	Clerks Minutes On Rule 36: The above entitled matter has come before the Court (Inge,J.) Presiding. The Court has ordered the following entry be made on the docket: A. The Defendant has waived his Rule 36 rights for the period 12/12/11 to 3/26/12...Dated: 12/12/11	22	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/02/2012	ORDERED: MEMORANDUM AND ORDER ON DEFENDANT'S REQUEST TO BE ADMITTED TO BAIL; FOR THE REASONS THAT FOLLOW, THE DEFENDANT'S REQUEST TO BE ADMITTED TO BAIL IS DENIED. THOMAS P. BILLINGS, JUSTICE OF THE SUPERIOR COURT	23	
02/02/2012	ORDERED: Memorandum and Order on Defendant's Request To Be Admitted To Bail. DENIED (Thomas P. Billings, Justice)	24	
02/03/2012	ADA Cara Krysil notified of ruling via e-mail, Attempts to reach D/C D. Donef via telephone unsuccessful as telephone # has been disconnected and no notification of new telephone # was provided to court. Copies mailed to both sides. Attest: L. Pasquale /ACM		
03/14/2012	ORDERED: For Sanctions Against Counsel: The defendant in this four-codefendant case is represented by Dane Dowell,Esq. Today was the assigned date for a pretrial conference to address motions in limine, joinder/severance issues, impanelment issues, and other matters that need to be resolved before the trial date of March 26,2012. The date was set the final pretrial conference on February 27,2012, at which all counsel were present. Mr.Dowell was not present for the 2:00 call. After several unsuccessful attempts by counsel, the clerk reached him by telephone, and he reported that he has calendared the event for tomorrow. He finally arrived about 3:45 p.m. A review of the docket indicates that this has been a chronic problem, enough so to prompt Judge Fahey on September 9,2012 to issue an order that Mr.Dowell appear at the next court date on pain of sanctions. His tardiness at today's session is unexcused, and he is hereby fined in the amount of one thousand dollars (\$1,000.00). Payment is to be remitted to the clerk's office on or before March 21,2012, and is not to be billed to the client. (Thomas P. Billings, Justice) (Copies Mailed 3/16/12)	25	
03/16/2012	Habe: returned w/service	26	
03/26/2012	Commonwealth files Tenth Notice of Discovery	26.1	
03/26/2012	Commonwealth files Eleventh Notice Of Discovery	26.2	
03/26/2012	Commonwealth files Twelfth Notice Of Discovery	26.3	
03/26/2012	Commonwealth files Thirteenth Notice Of Discovery	26.4	
04/26/2012	Habe: returned w/service	27	
06/04/2012	ADA Solet appeared along with defendant Brown's mother before Billings, J. It was reported in open court that prior counsel D. Dowell was suspended by the BBO. Defendant interviewed for indigency and was reported indigent by Middlesex APO S. Heywood. CPCs notified and case was continued to 6/15/2012 @ 2pm for status. Linda Rattigan reporter present.		
07/12/2012	Appearance of Deft's Atty: John H LaChance	30	
07/17/2012	ORDER: Within 10 Days, Prior Defense Counsel Dane C.Dowell III is ordered to turn over his entire defense file to attorney John La Chance. Attorney Dane is also ordered with 14 days to provide written notice to the clerk's office of his compliance with this order. (Elizabeth M.Fahey,Justice Of The Superior Court) Dated: July 17,2012	31	
08/27/2012	Clerks Minutes On Rule 36: The above entitled matter has come before the Court (Fahey,J.) Presiding. The Court has ordered the following entry be made on the docket; B. The Court has ordered that rule 36 be tolled for the period 6/5/12 to 12/3/12. Mari Toomey Assistant Clerk; Dated: 8/27/12	32	
08/28/2012	ORDER: By Agreement and nunc pro tunc, Rule 36 is tolled from June 5,2012 to December 3,2012. On Spetember 26,2012, the parties should be prepared to address: 1. Rule 36 issued including all of the time between March 26, 2012 which is already tolled from Rule 36) 2. A hearing date for any Motion to Dismiss filed by defendant; 3. Whether and when defendant file a Motion to Suppress and any hearing date; 4. Whether the December 3,2012 trial date is realistic. (Elizabeth M.Fahey, Justice of the Superior Court) Dated: August 28,2012	33	
09/05/2012	MOTION by Deft: to authorize funds for the production of and/or copies of the transcript of the witnesses who testified at the prior trial of the co-defendants filed in court	34	
09/05/2012	MOTION (P#34) allowed (Fahey,J). Copies mailed 9/14/2012		
09/23/2012	MOTION by Deft: Assented to motion to continue	36	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/26/2012	MOTION by Deft: Assented to motion to continue filed in court	35	
09/26/2012	MOTION (P#35) allowed hearing will be in room 640 (Fahey, J.). Copies mailed 9/28/2012		
10/10/2012	Clerks Minutes on rule 36: Hopkins, J Presiding The court ordered the following entry be made on the docket on Defendant oral motion to continue trial date The defendant has waived his rule 36 rights for the period 10-10-12 to 3-19-13 for trial case continued to 12-3-12 file motions, Jan 8, 2013 for all motions non evid and evidentiary and 3-5-13 for FPTC	37	
12/14/2012	MOTION by Deft: to enlarge time for filing motions	39	
12/20/2012	Letter from Clerk to Atty LaChance Re: Late motion filing	38	
12/28/2012	MOTION by Deft: to enlarge time for filing motions	40	
02/27/2013	Deft files Motion to Amend Tracking Order, filed in Court	41	
02/27/2013	MOTION (P#41) allowed, Dates scheduled in court. Defendant waives Rule 36. (Maureen B. Hogan, Justice). Copies mailed 3/5/2013		
02/27/2013	Clerks Minutes on Rule 36: Hogan, J. presiding, the Court has ordered the following entry be made on the docket. The defendant has waived his Rule 36 rights for the period of 2/27/13 to 5/15/2013 for Trial.	42	
03/13/2013	Deft files Motion To Dismiss	43	
03/13/2013	Clerk's minutes on Rule36. The above entitled matter has come before the Court, Hogan, J. Presiding. The Court has ordered the following entry be made on the docket. (A) The defendant has waived his Rule 36 rights for the period original trial of 05-15-2013 to June 03,2013. Per order of the Court 05-15-2013 2p.m. final pre-trial conference. Lucie Pascuale. Assistant Clerk.	44	
03/13/2013	Clerk's minutes. Entry: Attorney: John LaChance notified court at this time the defendant does not have enough information to provide the basis to file a motion to suppress and does not expect to do so. However, the defendant reserves his right to file. Assistant Clerk. Lucie Pascuale	45	
04/17/2013	Hearing on (P#43) Defendant's Motion To Dismiss Hearing Held and Taken under advisement, By the COurt, Haggerty J. Linda Rattigan/ reporter present		
04/19/2013	Habe: returned w/service	46	
04/19/2013	MOTION (P#43) After hearing and review, the Motion is denied for essentially the reasons stated in the Commonwealth's Opposition and at oral argument. (S.Jane Haggerty, Justice). Copies mailed 4/23/13		
05/15/2013	MOTION by Deft: To View Exhibits From Commonwealth v.Ariel Hernandez	47	
05/15/2013	MOTION (P#47) ALLOWED. (Sandra Hamlin, Justice). Copies mailed		
05/22/2013	Deft files Motion to Change Scheduling	48	
05/22/2013	MOTION (P#48) allowed by Agreement (Sandra Hamlin, Justice). Copies mailed 5/23/2013		
05/31/2013	Commonwealth files Proposed Statement of Facts to be Read to the Jury, filed in Court	49	
05/31/2013	Commonwealth files Witness List, filed in Court	50	
05/31/2013	Commonwealth files Proposed Voir Dire Questions, filed in Court	51	
05/31/2013	Commonwealth files Motion for a View	52	
05/31/2013	Commonwealth files Motion in Limine: Prior Bad Acts Evidence	53	
05/31/2013	Commonwealth files Motion for Judicial Inquiry into Criminal History Records of Potential Trial Jurors or, in the alternative, Notice of intent to independently seek such information for Limited purposes of jury empanelment, Allowed (Hamlin, J.)	54	
05/31/2013	Commonwealth files Commonwealth's Motion in Limine to introduce Photograph of the Victims when they were Alive Allowed by agreement (Hamlin, J.)	55	
05/31/2013	Commonwealth files Motion to Admit Evidence of Armed Robbery on October 22, 2009, filed in Court Allowed (Hamlin, J.)	56	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/31/2013	Def files Motion in Limine to Redact those portions of the Plea Agreement which set forth the Accomplice's Truthfulness: Allowed and Denied as indicated by the record. (Hamlin, J.)	57	
05/31/2013	Def files Motion in Limine - Photographs of Defendant posing for a Camera with Gun; Denied (Hamlin, J.)	58	
05/31/2013	Def files Motion in Limine to Exclude Introduction of Autopsy Photographs	59	
05/31/2013	Commonwealth files Motion in Limine to Admit Autopsy Photograph of the Victims; Allowed in part and denied in part. See Record. (Hamlin, J.)	60	
05/31/2013	Def files Motion in Limine, filed in Court Allowed (Hamlin, J.)	61	
05/31/2013	Commonwealth files Motion in Limine Regarding the Defendant's Recorded Interview (s) with Police, filed in Court Allowed by Agreement (Hamlin, J.)	62	
05/31/2013	Commonwealth files Motion in Limine Regarding Statement of Joint Venturers, filed in Court Allowed (Hamlin, J.)	63	
06/04/2013	Joint Motion to Release Trial Exhibits from Trial of Co-Defendant to the Commonwealth, Allowed by Agreement.	64	
06/04/2013	Def files Request for Voir dire Questions of Prospective Jurors, filed in Court	65	
06/05/2013	Commonwealth files Motion in Limine to Admit 911 Calls, filed in Court and Allowed by Agreement (Hamlin, J.)	68	
06/13/2013	Commonwealth files Motion to Exempt a police Witnesses from Sequestration during the Testimony of Darien Body, After Hearing, ALLOWED.	66	
06/24/2013	Def files Request for Jury Instructions, filed in Court	67	
06/24/2013	Def files Motion in Limine - Joint Venture Statements, filed in Court ALLOWED in part and DENIED in part. See record (Hamlin, J.)	69	
06/25/2013	001: Verdict of guilty as charged First Degree Felony Murder	70	
06/25/2013	002: Verdict of guilty as charged First Degree Felony Murder	71	
06/25/2013	003: Verdict of guilty as charged Home Invasion	72	
06/25/2013	004: Verdict of guilty as charged Possession of Firearm	73	
06/25/2013	005: Verdict of guilty as charged Possession of Ammunition	74	
06/25/2013	Continued to 6/26/2013 for Sentence Imposition (Sandra Hamlin, Justice)		
06/25/2013	RE Offense 1:Guilty verdict		
06/25/2013	RE Offense 2:Guilty plea		
06/25/2013	RE Offense 2:Guilty verdict		
06/25/2013	RE Offense 4:Guilty verdict		
06/25/2013	RE Offense 5:Guilty verdict		
06/26/2013	IMPOUNDMENT ORDER: Identifying Record/Document: Juror Questionnaires; Date Received: 6/4/13; Record/Document Reviewed: Yes; Date Reviewed: 6/26/13; Justice: Sandra L.Hamlin; Court Reporter Present: N/A; Counsel Of Record Granted Access to Record/Document: NO (IMPOUNDED)	76	
06/26/2013	Defendant sentenced to 001: M.C.I. Cedar Junction for a term of LIFE (Sandra Hamlin, Justice)		
06/26/2013	Defendant sentenced to 002: M.c.I. Cedar Junction for a term of LIFE.; this sentence to take effect from and after the expiration of the sentence imposed this day in 2009-1511-001 (Sandra Hamlin, Justice)		
06/26/2013	Defendant sentenced to 003: M.C.I. Cedar Junction for a term not exceeding twenty (20) years and one (1) day or less than twenty (20) years; this sentence to be served concurrently with the sentence imposed this day in 2009-1511-001. (Sandra Hamlin, Justice)		
06/26/2013	Defendant sentenced to 004: House of Correction for Two (2) Years; this sentence to run concurrently with the sentence imposed this day		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	2009-1511-001. (Sandra Hamlin, Justice)		
06/26/2013	Defendant sentenced to 005: House of Correction for Two (2) years; this sentence to be served concurrently with the sentence imposed this day in 2009-1511-001. (Sandra Hamlin, Justice)		
06/26/2013	Sentence credit given as per 279:33A: 1340 days.		
06/26/2013	Notified of right of appeal under Rule 64		
06/26/2013	Notified of right of appeal under Rule 65	75	
06/26/2013	Reporter present: Abreu, Darlene T (Digital Recording device)		
06/26/2013	ORDER: Victim/Witness Fee imposed \$90.00 (Sandra Hamlin, Justice)	77	
07/03/2013	NOTICE of APPEAL FILED by Timothy Brown	78	
07/03/2013	Attorney, John H LaChance's MOTION to withdraw as counsel of record for Timothy Brown (sent to Hamlin,J)	79	
07/03/2013	MOTION by Deft: for appointment of appellate counsel	80	
07/03/2013	Court Reporter Rattigan, Linda is hereby notified to prepare one copy of the transcript of the evidence of 04/17/2013 motion to suppress		
07/03/2013	Court Reporter Considine, Karen is hereby notified to prepare one copy of the transcript of the evidence of 06/04,5,6,10,11,12,2013 Trial		
07/03/2013	Court Reporter Mecurio, Elena is hereby notified to prepare one copy of the transcript of the evidence of 06/07/2013 Trial		
07/03/2013	Court Reporter Belanger, Robin (Digital Recording device) is hereby notified to prepare one copy of the transcript of the evidence of 06/13,14,17,18,19,20,2013 Trial		
07/03/2013	Court Reporter Abreu, Darlene T (Digital Recording device) is hereby notified to prepare one copy of the transcript of the evidence of 06/21,24,25,26,2013 Trial		
07/12/2013	MOTION (P#79) allowed (Sandra Hamlin, Justice).		
07/12/2013	MOTION (P#80) allowed (Sandra Hamlin, Justice).		
07/19/2013	Victim-witness fee paid as assessed \$90.00 paid as assessed.		
08/15/2013	Notice of assignment of counsel filed. David Mirsky,Esq (C48362171)	81	
08/19/2013	Transcript of testimony received One Volume of April 17, 2013 from Transcript of proceedings from Court Reporter Rattigan, Linda		
08/22/2013	Appearance of Deft's Atty: David H Mirsky		
09/03/2013	Transcript of testimony received Ten Volumes of June 13, 14, 17, 18, 19, 20, 21, 24, 25, & 26, 2013 from Transcript of proceedings from Court Reporter Belanger, Robin (Digital Recording device) produced by SHari Riemer		
12/05/2013	Transcript of testimony received Six Volumes of June 4, 5, 6, 10, 11 & 12, 2013 from Transcript of proceedings from Court Reporter Considine, Karen		
03/04/2014	Transcript of testimony received One Volume pf June 7, 2013 from Transcript of proceedings from Court Reporter Mecurio, Elena		
04/28/2014	Notice of assembly of record;One set one volume in each set of court reporter Linda Rattigan 4-17-13 mailed to the appeals court this day		
04/28/2014	Notice of assembly of record;One Set,Six volumes in each set of court reporter Karen Consdidine 6-4,5,6,10,11,12,2013 mailed to the appeals court this day		
04/28/2014	Notice of assembly of record; One set , one volume in each set of court reporter Elena Mecurio 6-7-13 mailed to the appeals court this day		
04/28/2014	Notice of assembly of record; one set, Ten volumes in each set of the JAVS system 6-13,14,17,18,19,20,21,24,25,26,2013 mailed to the appeals court this day		
04/28/2014	Notice of assembly of record; two certified copies of docket entries and P#78 Notice of appeal and list of exhibits sent to the clerk of the appeals court this day	82	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/28/2014	Notice of assembly of record; sent to Jim Sahakian,ADA and David Mirsky,Esq		
05/01/2014	Appeals court sent over appeal to the SJC		
05/06/2014	Transcripts mailed to Attorney David Mirsky this day	83	
05/06/2014	Notice of Entry of appeal received from the Supreme Judicial Court SJC-11669	84	
06/24/2015	Defendant's EX PARTE Motion in limine for funds For Psychiatric Evaluation (SENT UP TO JUDGE TUTTMAN) (IMPOUNDED)	85	
07/06/2015	Order:	86	
	ORDER OF ASSIGNMENT: The defendant has filed a post-conviction, ex parte motion for funds. Justice Brian Davis is assigned to this matter. The Clerk's office shall notify all counsel of record. (Kate M. Tuttman, Regional Administrative Justice)		
07/06/2015	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: David H Mirsky, Esq. Attorney: Cara L. Krysil, Esq. Attorney: Kate M. Kleimola, Esq.		
07/15/2015	Event Result: The following event: Motion Hearing scheduled for 07/15/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:		
07/29/2015	Defendant's Motion in limine for funds exparte (IMPOUNDED)	87	
08/10/2015	Event Result: The following event: Motion Hearing scheduled for 08/10/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled Appeared:		
12/09/2015	Defendant's EX PARTE Motion in limine for issuance of a summons Supplemental Memorandum and Affidavit in support of amended Ex Parte Motion for Funds (IMPOUNDED)	88	
12/09/2015	Defendant's EX PARTE Motion for funds Amended Ex Parte Motion for Funds, with affidavit	89	
02/10/2016	General correspondence regarding Sent copies of motions to J. Davis sitting in Plymouth County		
02/23/2016	ORDER: Order Regarding Defendant's Ex Parte Motion For Funds For Psychiatric Evaluation (Docket No.85) and Defendant's Amended Ex Parte Motion for Funds For Psychiatric Evaluation (Docket No.89.0) (IMPOUNDED)	90	
02/23/2016	Endorsement on Motion for funds (Amended Ex Parte), (#89.0): DENIED Motion is DENIED. See Court Order Filed this day.		
05/18/2016	Defendant's EX PARTE Motion to Impound Documents #85, #87, #88, #90 and Instant Motion (COPY MAILED TO JUDGE DAVIS @ WORCESTER SUPERIOR COURT) (IMPOUNDED)	91	
06/14/2016	Endorsement on Motion to Impound Documents #85, #87, #88, #90 and Instant Motion, (#91.0): ALLOWED The requested materials shall be impounded until further order of the Court. (COPY MAILED TO D/C DAVID MIRSKY,ESQ.)		
02/02/2017	General correspondence regarding Courtesy Copy Of Motion To Transmit To The Supreme Judicial Court Trial Exhibit No.164 From DA's Office to SJC	92	
03/24/2017	General correspondence regarding Letter to Clerk Francis Keneally @ SJC: Enclosed is Exhibit #164 in the Case of Commonwealth vs. Timothy Brown as requested. (ORIGINAL EXHIBIT #164 DVD DISC PICKED UP ON 3/24/17)	93	 Image
11/14/2017	Rescript received from Supreme Judicial Court; judgment VACATED ORDERED, that the following entry be made in the docket; viz., - The verdicts of murder in the first degree and the sentences imposed are vacated and set aside. The natter is remanded to the Superior Court where verdicts of guilty of murder in the second degree are to be entered, and the defendant is to be sentenced accordingly. The defendant's remaining convictions are affirmed. So ordered..	94	 Image
01/22/2018	Habeas Corpus for defendant issued to MCI - Shirley returnable for 01/23/2018 09:00 AM Hearing for Sentence Imposition.	95	 Image
01/22/2018	Event Result: Judge: Pierce, Hon. Laurence D The following event: Hearing for Sentence Imposition scheduled for 01/23/2018 09:00 AM has been resulted as follows:		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Result: Rescheduled Reason: Request of Defendant		
03/23/2018	Event Result: Judge: Pierce, Hon. Laurence D The following event: Hearing for Sentence Imposition scheduled for 03/23/2018 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
03/23/2018	Event Result: Judge: Pierce, Hon. Laurence D The following event: Hearing for Sentence Imposition scheduled for 03/23/2018 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Request of Commonwealth Appeared: Attorney Kleimola, Esq., Kate M FTR: Newman Judge: Pierce, Hon. Laurence D		
03/26/2018	Event Result: Judge: Wall, Hon. Joshua The following event: Scheduling Conference scheduled for 03/26/2018 09:00 AM has been resulted as follows: Result: Held as Scheduled No record DA only appearing Judge: Wall, Hon. Joshua	96	
05/02/2018	Commonwealth 's Assented to Motion to Continue	96	
05/03/2018	Event Result: Judge: Pierce, Hon. Laurence D The following event: Hearing for Sentence Imposition scheduled for 05/03/2018 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date		
12/11/2018	Attorney appearance On this date Kate M Kleimola, Esq. dismissed/withdrawn as Private Counsel for Prosecutor Commonwealth		
12/11/2018	Attorney appearance On this date Cara L Krysil, Esq. dismissed/withdrawn as Private Counsel for Prosecutor Commonwealth		
12/11/2018	Attorney appearance On this date Adrienne C Lynch, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth		
12/11/2018	Attorney appearance On this date David H Mirsky, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Timothy R Brown		
12/11/2018	Attorney appearance On this date John P Morris, Esq. added as Private Counsel for Defendant Timothy R Brown		
01/07/2019	Defendant 's Submission of Sentencing Memorandum	97	
01/17/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 01/18/2019 09:00 AM Hearing on Withdrawal of Attorney.	98	
01/18/2019	Event Result:: Hearing on Withdrawal of Attorney scheduled on: 01/18/2019 09:00 AM Has been: Held as Scheduled Hon. Laurence D Pierce, Presiding Appeared: Prosecutor Adrienne C Lynch, Esq., Attorney for the Commonwealth Defendant Timothy R Brown John P Morris, Esq., Private Counsel Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
	FTR S. Matto		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/23/2019	Commonwealth's Memorandum on Sentencing	99	 Image
01/25/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 01/28/2019 09:00 AM Hearing for Sentence Imposition.	100	 Image
01/28/2019	Defendant's Motion to Withdraw From Representation	101	 Image
01/28/2019	Endorsement on Motion To Withdraw From Representation, (#101.0): ALLOWED ALLOWED J. Pierce 1/28/19		 Image
	Judge: Pierce, Hon. Laurence D		
01/28/2019	Event Result: Hearing for Sentence Imposition scheduled on: 01/28/2019 09:00 AM		
	Has been: Rescheduled For the following reason: Request of Defendant Hon. Laurence D Pierce, Presiding		
	Appeared: Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
01/28/2019	Event Result: Hearing on Withdrawal of Attorney scheduled on: 01/28/2019 09:00 AM		
	Has been: Held as Scheduled Hon. Laurence D Pierce, Presiding		
	Appeared: Prosecutor Adrienne C Lynch, Esq., Attorney for the Commonwealth Defendant Timothy R Brown John P Morris, Esq., Private Counsel		
	Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
	FTR: Stephen Mattos		
02/08/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 02/11/2019 09:00 AM Scheduling Conference.	102	 Image
02/08/2019	Event Result: Scheduling Conference scheduled on: 02/11/2019 09:00 AM		
	Has been: Rescheduled For the following reason: Request of Defendant Hon. Laurence D Pierce, Presiding		
	Appeared: Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
02/20/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 02/21/2019 09:00 AM Scheduling Conference.	103	 Image
02/21/2019	Attorney appearance On this date John P Morris, Esq. dismissed/withdrawn as Private Counsel for Defendant Timothy R Brown		
02/21/2019	Attorney appearance On this date Victoria Kelleher, Esq. added as Appointed - Indigent Defendant for Defendant Timothy R Brown		
02/21/2019	Appointment made for the purpose of Case in Chief by Judge Hon. Laurence D Pierce.		
02/21/2019	Event Result: Scheduling Conference scheduled on: 02/21/2019 09:00 AM		
	Has been: Held as Scheduled Hon. Laurence D Pierce, Presiding		
	Appeared: Prosecutor Adrienne C Lynch, Esq., Attorney for the Commonwealth Defendant Timothy R Brown Victoria Kelleher, Esq., Appointed - Indigent Defendant		
	Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
	FTR K. Jordan		
02/21/2019	Commonwealth's Motion For Restitution For Out Of Pocket Costs Incurred By Family Members Of The Victims	111	 Image

Docket Date	Docket Text	File Ref. Nbr.	Image Avail.
02/21/2019	Affidavit of Commonwealth's Motion For Restitution For Out Of Pocket Costs Incurred By Family Members Of The Victims	111.1	
05/03/2019	Defendant's Motion For Resentencing And Memorandum In Support	109	 Image
05/03/2019	Affidavit of Defendant's Motion For Resentencing And Memorandum In Support	109.1	 Image
05/09/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 05/10/2019 09:00 AM Hearing for Sentence Imposition. 9:00 arrival for sentencing	104	 Image
05/09/2019	Commonwealth's Supplemental Sentencing Memorandum	110	
05/10/2019	Event Result: Hearing for Sentence Imposition scheduled on: 05/10/2019 09:00 AM Has been: Held as Scheduled Comments: Continued to 7-9-19 for imposition of sentence. FTR Darlene Abreu Hon. Laurence D Pierce, Presiding Appeared: Prosecutor Adrienne C Lynch, Esq., Attorney for the Commonwealth Defendant Timothy R Brown Victoria Kelleher, Esq., Appointed - Indigent Defendant		
	Staff: Mark J Toomey, Assistant Clerk Magistrate		
07/22/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 07/23/2019 09:00 AM Hearing for Sentence Imposition.	105	 Image
07/23/2019	Habeas Corpus for defendant issued to MCI - Concord returnable for 07/24/2019 09:00 AM Hearing for Sentence Imposition.	106	
07/23/2019	Event Result: Hearing for Sentence Imposition scheduled on: 07/23/2019 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Laurence D Pierce, Presiding Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
07/24/2019	MEMORANDUM & ORDER:	107	 Image
	ORDER: Accordingly, as to Count 1, the court imposes a sentence of life in state prison, with eligibility for parole in fifteen years. As to Count 2, the court imposes a sentence of life in state prison, with eligibility for parole in fifteen years, to be served concurrently with the sentence imposed on Count 1. J Pierce Judge: Pierce, Hon. Laurence D		
07/24/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Victoria Kelleher, Esq. Attorney: Adrienne C Lynch, Esq.		
07/24/2019	Event Result: Hearing for Sentence Imposition scheduled on: 07/24/2019 09:00 AM Has been: Held as scheduled Comments: FTR: S. Mattos Hon. Laurence D Pierce, Presiding Appeared: Prosecutor Adrienne C Lynch, Esq., Attorney for the Commonwealth Defendant Timothy R Brown Victoria Kelleher, Esq., Appointed - Indigent Defendant		
	Staff: Michelle Goldman, Assistant Clerk Magistrate Mary Santiago, Assistant Clerk Magistrate		
07/24/2019	Defendant notified of right of appeal to the Appellate Division of the Superior Court within ten (10) days. Judge: Pierce, Hon. Laurence D		
07/24/2019	Defendant sentenced: Sentence Date: 07/24/2019 Judge: Hon. Laurence D Pierce Charge #: 1 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days Charge #: 2 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Charge #: 3 HOME INVASION c265 §18C		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	State Prison Sentence Not Less Than: 20 Years, 0 Months, 0 Days Not More Than: 20 Years, 0 Months, 1 Days Served Concurrently Charge # 1		
	Charge #: 4 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Charge #: 5 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Committed to MCI - Cedar Junction (at Walpole) Credits 1340 Days		
	Further Orders of the Court:		
	Nunc Pro Tunc to June 26, 2013		
07/24/2019	Defendant sentenced:: Revision Date: 07/24/2019 Judge: Hon. Laurence D Pierce Charge #: 1 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days		
	Charge #: 2 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Charge #: 3 HOME INVASION c265 §18C State Prison Sentence Not Less Than: 20 Years, 0 Months, 0 Days Not More Than: 20 Years, 0 Months, 1 Days Served Concurrently Charge # 1		
	Charge #: 4 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Charge #: 5 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Committed to MCI - Cedar Junction (at Walpole) Credits 1340 Days		
	Further Orders of the Court:		
	Nunc Pro Tunc to June 26, 2013. This defendant was previously sentenced on June 26, 2013 and was remanded from an appellate court to the superior court for re-sentencing. Original date of sentence was June 26, 2013, new mittimus issued this day, July 24, 2019, in accordance with appellate court ruling.		
07/24/2019	Defendant sentenced:: Revision Date: 07/24/2019 Judge: Hon. Laurence D Pierce Charge #: 1 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days		
	Charge #: 2 MURDER c265 §1 Life with Parole Not Less Than: 15 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Charge #: 3 HOME INVASION c265 §18C State Prison Sentence Not Less Than: 20 Years, 0 Months, 0 Days Not More Than: 20 Years, 0 Months, 1 Days Served Concurrently Charge # 1		
	Charge #: 4 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Charge #: 5 FIREARM WITHOUT FID CARD, POSSESS c269 s.10(h) Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1		
	Committed to MCI - Cedar Junction (at Walpole) Credits 1340 Days		
	Further Orders of the Court:		
	Nunc Pro Tunc to June 26, 2013. This defendant was previously sentenced on June 26, 2013. Counts 001 and 002 were remanded from an appellate court to the superior court for re-sentencing. Original date of sentence was June 26, 2013, new mittimus issued this day, July 24, 2019, in accordance with appellate court ruling.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
07/24/2019	Issued on this date: Mittimus for Sentence (All Charges) Sent On: 07/24/2019 11:13:59	108	 Image
07/24/2019	Endorsement on Defendant's Motion For Resentencing And Memorandum In Support, (#109.0): DENIED As to the defendant's argument that the home invasion conviction be dismissed as duplicative and his argument that the SJC opinion in his case (477 Mass. 805 (2017)) be applied retroactively, defendant's motion is DENIED. In affirming the sentence imposed on the invasion, the SJC has passed on the validity of that conviction. With the respect to the retroactively argument, the SJC stated that its new rule would apply only to "trials that commence after the date of the opinion in this case." 477 Mass. at 807. The opinion was dated March 10, 2017. The trial of this case was in June 2013. So ordered. J Pierce Judge: Pierce, Hon. Laurence D		 Image
07/24/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Victoria Kelleher, Esq. Attorney: Adrienne C Lynch, Esq.		
07/24/2019	Opposition to Commonwealth's Motion For Restitution filed by Timothy R Brown	112	 Image
07/24/2019	Affidavit of Opposition To Commonwealth's Motion for Restitution	112.1	 Image
07/24/2019	Endorsement on Commonwealth's Motion For Restitution For Out Of Pocket Costs Incurred By Family Members Of The Victims, (#111.0): DENIED The Comm's motion for out-of-pocket costs is DENIED. While the matter was continued at the defendant's request for appointment of new defense counsel, the court granted the request after finding sufficient grounds for appointing new defense counsel. J Pierce Judge: Pierce, Hon. Laurence D		 Image
07/24/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Victoria Kelleher, Esq. Attorney: Adrienne C Lynch, Esq.		
07/31/2019	Notice of appeal filed. Applies To: Kelleher, Esq., Victoria (Attorney) on behalf of Brown, Timothy R (Defendant)	113	 Image
08/13/2019	Attorney appearance On this date Victoria Kelleher, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Timothy R Brown		
08/20/2019	Attorney appearance On this date David H Mirsky, Esq. added for Defendant Timothy R Brown		
08/23/2019	Defendant's Motion for resentencing and memorandum in support	114	 Image
08/23/2019	Commonwealth's Supplemental sentencing memorandum	115	 Image
10/01/2019	Docket Note: Email received from Atty. Mirsky regarding order of Transcripts hearing dates of 5/10/19 and 7/24/19		
03/03/2021	CD of Transcript of 02/21/2019 09:00 AM Scheduling Conference received from Hunt Reporting.		
06/13/2022	Notice to Clerk of the Appeals Court of Assembly of Record- Copy of Notice of Appeal (P#113), List of Docket Entries, and Transcript dates of 2/21/19, 5/10/19, and 7/24/19 (Appeal was sent via electronically to the Appeals Court)	116	 Image
06/13/2022	Notice of assembly of record sent to Counsel Applies To: Commonwealth (Prosecutor); Mirsky, Esq., David H (Attorney) on behalf of Brown, Timothy R (Defendant)	117	 Image
06/13/2022	Appeal: Statement of the Case on Appeal (Cover Sheet).	118	 Image
06/14/2022	Notice of Entry of appeal received from the Appeals Court -COMMONWEALTH OF MASSACHUSETTS	119	 Image
	APPEALS COURT CLERK'S OFFICE		

Dated: June 13, 2022

RE: No. 2022-P-0558
Lower Court No: 0981CR01511

COMMONWEALTH vs. TIMOTHY R. BROWN

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
NOTICE OF ENTRY OF APPEAL			
In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case was entered in this Court on June 13, 2022.			
IMPORTANT INFORMATION FROM THE APPEALS COURT			
ELECTRONIC NOTICE TO TRIAL COURTS. The Appeals Court is conducting a pilot program to provide electronic notification to the trial courts. Please contact Assistant Clerk Paul Tuttle for more details about participating in this program. His phone number is 617-723-1522, and his email address is paul.tuttle@jud.state.ma.us.			
Very truly yours, Joseph F. Stanton, Clerk			
05/26/2023	Notice of docket entry received from Appeals Court COMMONWEALTH OF MASSACHUSETTS APPEALS COURT CLERK'S OFFICE RE: No. 2022-P-0558 Lower Court No. 0981CR01511 COMMONWEALTH vs. TIMOTHY R. BROWN NOTICE OF DOCKET ENTRY Please take note that, with respect to the , on May 26, 2023, the following entry was made on the docket of the above-referenced case: ORDER: It has come to the court's attention that the parties filed Rule 27 motions for reconsideration or modification of decision in Commonwealth v. Guardado (SJC-13315). As issues related to Guardado appear to be implicated in this appeal, appellate proceedings are stayed pending the SJC's issuance of the rescript to the trial court in that matter or further order of this court. A status report is due within 7 days of the issuance of the rescript in Guardado. *Notice/Attest.	120	 Image
10/27/2023	Notice of docket entry received from Appeals Court COMMONWEALTH OF MASSACHUSETTS APPEALS COURT CLERK'S OFFICE RE: No. 2022-P-0558 Lower Court No. 0981CR01511 COMMONWEALTH vs. TIMOTHY R. BROWN NOTICE OF DOCKET ENTRY Please take note that, with respect to the , on October 27, 2023, the following entry was made on the docket of the above-referenced case: ORDER: The SJC has issued two decisions in Commonwealth v. Guardado, SJC-13315, the first on 4/13/23 (Guardado I), the second on 10/26/23 after allowing the Commonwealth's motion for reconsideration (Guardado II). The parties are to file a joint status report, on or before 11/10/13, regarding how they request to proceed following the SJC's Guardado decisions. Should the parties disagree as to how to proceed, they are to provide an explanation as to their disagreement. Notice/attest	121	 Image
11/13/2023	Notice of docket entry received from Appeals Court COMMONWEALTH OF MASSACHUSETTS APPEALS COURT CLERK'S OFFICE RE: No. 2022-P-0558 Lower Court No. 0981CR01511 COMMONWEALTH vs. TIMOTHY R. BROWN NOTICE OF DOCKET ENTRY Please take note that on November 13, 2023, the following entry was made on the docket of the above-referenced case: ORDER RE#17: The defendant's request to include his arguments regarding the application of the Guardado cases to this appeal in his reply brief is denied. Consistent with the orders of this Court in other cases implicating Commonwealth v. Guardado, 491 Mass. 666 (2023), and Commonwealth v. Guardado, 493 Mass. 1 (2023), the defendant may file a supplemental memorandum addressing those cases, not to exceed 10 double spaced pages or 2,200 words, on or before 11/23/23. The Commonwealth's responsive memorandum, if any, is due 14 days after service of the defendant's supplemental memorandum, and is subject to the same limitations as to length. The defendant's reply brief, if any, complying with Mass. R. A. P. 16(c), will be due 14 days after service of the Commonwealth's memorandum or a notice to the Court that the Commonwealth will not be filing a supplemental memorandum. (Grant, J.) Notice	122	 Image
11/20/2023	Notice of docket entry received from Appeals Court COMMONWEALTH OF MASSACHUSETTS APPEALS COURT CLERK'S OFFICE RE: No. 2022-P-0558 Lower Court No. 0981CR01511 COMMONWEALTH vs. TIMOTHY R. BROWN NOTICE OF DOCKET ENTRY Please take note that, with respect to the Motion for extension of time to file supplemental memorandum filed for Timothy R. Brown by Attorney David Mirsky. (Paper #19), on November 20, 2023, the following entry was made on the docket of the above-referenced case: RE#19: Allowed to 12/8/23. No further enlargements should be anticipated. *Notice	123	 Image
12/14/2023	Notice of docket entry received from Appeals Court COMMONWEALTH OF MASSACHUSETTS APPEALS COURT CLERK'S OFFICE	124	 Image

<u>Docket</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>						
<u>Date</u>									
<p>RE: No. 2022-P-0558 Lower Court No. 0981CR01511 COMMONWEALTH vs. TIMOTHY R. BROWN</p> <p>NOTICE OF PRE-SCHEDULING AND UNAVAILABILITY TO ARGUE</p> <p>Dear Counsel or Litigant:</p> <p>The Appeals Court anticipates scheduling this case for oral argument before a panel of justices in February 2024, on one of the following days: February 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16. It is the obligation of the attorney or party who will be presenting the argument to notify the Appeals Court in writing of any preplanned unavailability to appear and argue on any of those days. Unavailability typically includes a vacation, maternity leave, or medical procedure, but not a trial date. You are required to file such notice within seven (7) days of this notice, and thereafter to update the notice when necessary.</p> <p>As always, the Appeals Court will endeavor to accommodate counsel's schedule for which we have received prior notice. Once the court issues a notice of oral argument, however, counsel or the party must file a motion to reschedule that establishes grave cause for any postponement.</p> <p>To limit rescheduling issues, please submit a written notice of any dates when you will be unavailable to argue this case, and update it when necessary.</p> <p>If you received this notice by email, you should send any notice of unavailability by replying to this email. If you are not currently registered to receive electronic notifications, please review the Appeals Court's standing order governing electronic notices and register.</p> <p>Very truly yours,</p> <p>Assistant Clerk</p> <p>Dated: December 14, 2023</p> <p>To: Thomas D. Ralph, A.D.A. Melissa Weisgold Johnsen, A.D.A. David H. Mirsky, Esquire Middlesex Superior Court Dept.</p> <p>Appeals Court Clerk's Office Address: John Adams Courthouse One Pemberton Square, Suite 1200 Boston, Massachusetts 02108-1705 Website: www.mass.gov/orgs/appeals-court</p> <p>Phone: (617) 921-4443</p>									
09/09/2024 Rescript received from Supreme Judicial Court; judgment AFFIRMED 22-P-558 on May 30, 2024. 125									
 Image									
<h3>Case Disposition</h3> <table border="1"> <thead> <tr> <th><u>Disposition</u></th> <th><u>Date</u></th> <th><u>Case Judge</u></th> </tr> </thead> <tbody> <tr> <td>Disposed by Jury Verdict</td> <td>05/06/2014</td> <td></td> </tr> </tbody> </table>				<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	Disposed by Jury Verdict	05/06/2014	
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>							
Disposed by Jury Verdict	05/06/2014								

APPENDIX H

Appendix H

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX, SS.

No. 2022-P-0558

COMMONWEALTH,
Appellee,

v.

TIMOTHY R. BROWN,
Appellant

On Appeal from Superior Court

DEFENDANT'S REPLY BRIEF

David H. Mirsky, Esquire
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TABLE OF CONTENTS

	<u>Page</u>
Issues	5
Statement of the Case	6
Statement of Facts	6
Argument	8
<u>I. This appeal from the defendant's July 24, 2019, resentencing in Middlesex Superior Court is not precluded by law.</u>	<u>8</u>
<u>A. This appeal from resentencing is not precluded by the U.S. Supreme Court's prior denial of the defendant's petition for writ of certiorari.</u>	<u>8</u>
<u>B. The restrictions and prescriptions of Massachusetts law governing first degree murder litigation as set forth in G. L. c. 278, § 33E, are not applicable to this appeal from resentencing in which the defendant's prior first degree murder convictions no longer exist.</u>	<u>9</u>
II. The defendant's convictions of illegal possession of a firearm and illegal possession of ammunition must be vacated and either remanded for new trial or dismissed.	10
Conclusion	14
REPLY BRIEF ADDENDUM	15
Certificate of Compliance	
Certificate of Service	

TABLE OF AUTHORITIES

	<u>Page</u>
	<u>CASES</u>
<u>Berman v. United States, 302 U.S. 211 (1937)</u>	<u>8</u>

<u>Brown v. Allen</u> , 344 U.S. 443 (1953)	9
<u>Burks v. United States</u> , 437 U.S. 1 (1978)	12
<u>Burton v. Stewart</u> , 549 U.S. 147 (2007)	8
<u>Commonwealth v. Brown</u> , 470 Mass. 595 (2015)	12
<u>Commonwealth v. Gilbert</u> , 447 Mass. 161 (2006)	9
<u>Commonwealth v. Guardado</u> , 491 Mass. 666 (April 13, 2023)	5 n. 1, 5 n. 2, 6
<u>Commonwealth v Guardado</u> , 493 Mass. 1 (October 26, 2023)	5 n. 1, 5 n. 2, 6, 12, 13
<u>Commonwealth v. Hebb</u> , 477 Mass. 409 (2017)	12
<u>Commonwealth v. James</u> , 477 Mass. 549 (2017)	9
<u>Commonwealth v. Latimore</u> , 378 Mass. 671 (1979)	10, 11, 12, 13
<u>Commonwealth v. Lattimore</u> , 400 Mass. 1001 (1987)	9
<u>Commonwealth v. Perry</u> , 424 Mass. 1019 (1997)	9
<u>District of Columbia v. Heller</u> , 554 U.S. 570 (2008)	10, 11
<u>Commonwealth v. Houston</u> , 792 F.3d 663 (6 th Cir. 2015)	13
<u>Hughes Tool Co. v. Trans World Airlines, Inc.</u> , 409 U.S. 363 (1973)	8

<u>In re Winship</u> , 397 U.S. 358 (1970)	10, 11, 12, 13
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979)	10, 11, 12, 13
<u>McDonald v. Chicago</u> , 561 U.S. 742 (2010)	11
<u>New York State Rifle & Pistol Ass'n v. Bruen</u> , 142 S. Ct. 2111 (2022)	10, 11
<u>Teague v. Lane</u> , 489 U.S. 288 (1989)	8
<u>United States v. Carver</u> , 260 U.S. 482 (1923)	8
<u>United States v. Houston</u> , 792 F.3d 663 (6 th Cir. 2015)	13
<u>Yeager v. United States</u> , 557 U.S. 110 (2009)	13

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. 5	12
U.S. Const., Amend. 14	13

STATUTES

Mass. Gen. L. c. 269, § 10(h)	5
Mass. Gen. L. c. 278, § 33E	9
Mass. Gen. L. c. 279, § 25(b)	9

MISCELLANEOUS

Defendant Timothy R. Brown's <u>Supplemental Memorandum</u> <u>Re Guardado Cases</u> , <u>Commonwealth v. Timothy R.</u> <u>Brown</u> , Massachusetts Appeals Court No. 2022-P-0558 (filed December 8, 2023)	5 n. 1, 10, 12
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ISSUES¹

I. Whether this appeal from the defendant's July 24, 2019, resentencing in Middlesex Superior Court is not precluded by law.

II. Whether the defendant's convictions of illegal possession of a firearm and illegal possession of ammunition, under G. L. c. 269, § 10(h), must be vacated and either remanded for new trial or dismissed.²

¹ The defendant hereby incorporates by reference his SUPPLEMENTAL MEMORANDUM RE GUARDADO CASES filed in this Court on December 8, 2023. See generally Commonwealth v. Guardado, 491 Mass. 666 (2023) ("Guardado I"); Commonwealth v. Guardado, 493 Mass. 1 (2023) ("Guardado II").

² In keeping with the Appeals Court's order requiring the issues pertaining to Guardado I, and Guardado II, to be addressed in supplemental memoranda and not as a matter arising in and confined to the defendant's reply brief, the defendant is restating arguments stated previously in his supplemental memorandum for the purpose of ensuring that his arguments pertaining to Guardado I and Guardado II will be preserved for Massachusetts further appellate review or subsequent federal review, as necessary.

..

STATEMENT OF THE CASE^{3, 4}

The defendant relies on the Statement of the Case set forth in his principal brief, and further states the following:

The SJC in Commonwealth v. Guardado, 491 Mass. 666 (April 13, 2023) ("Guardado I"), reversing SJC precedent, held, inter alia, that failure of sufficient proof that a defendant did not possess an FID card requires reversal of the convictions of illegal possession of a firearm and illegal possession of ammunition. Guardado I, 491 Mass., at 686-693. In Commonwealth v Guardado, 493 Mass. 1 (October 26, 2023) ("Guardado II"), the SJC held that the remedy for failure of sufficient proof that a defendant did not possess an FID card is remand for a new trial. Id.

STATEMENT OF FACTS

The defendant relies upon the Statement of Facts set forth in his principal brief; and the defendant further states the following:

³ Defendant's Record Appendix is hereinafter referred to as "R.A. (page)". Defendant's Addendum is hereinafter referred to as "A. (page)".

⁴ The trial transcripts are referred to as "Tr. (date) / (page number)". The resentencing hearing transcripts are referred to as "Tr. (date) / (page number)".

There was no evidence at the defendant's trial that he did not possess an FID card for a firearm or for ammunition, and the jury was not instructed on the essential element of absence of licensure for either offense. See, e.g., Tr. 6/25/2013/82-86 (trial judge in final jury instructions defines illegal possession of a firearm and illegal possession of ammunition); Tr. 6/25/2013/85 (in defining illegal possession of a firearm, trial judge instructed, "Now, in this indictment there's some reference made to a firearm's identification card. There is no evidence in this case that the defendant had a firearms ID and no evidence they qualified for one of the legal exemptions that are a substitute for having a firearms ID card. And for that reason, the issue of a firearms ID card or exemption isn't relevant to your deliberations in this case and you should put it out of your mind."); Tr. 6/25/2013/86 (in defining illegal possession of ammunition, trial judge instructed, "Again, as I've said, there's reference made in the indictment to a firearms identification card. There's no evidence in the case that he had a firearms ID and no evidence that the defendant qualified for one of the legal

exceptions that are a substitute for having a firearms ID card. For that reason the issue of a firearms ID card or exemption isn't relevant to your deliberations and you should put it out of your minds.")

ARGUMENT

I. This appeal from the defendant's July 24, 2019, resentencing in Middlesex Superior Court is not precluded by law.

This is an appeal from resentencing, and, as such, Mr. Brown's case remains pending on direct review from his original convictions and sentence.

See Burton v. Stewart, 549 U.S. 147, 156 (2007) ("Final judgment in a criminal case means sentence. The sentence is the judgment.") (quoting Berman v. United States, 302 U.S. 211, 212 (1937)).

A. This appeal from resentencing is not precluded by the U.S. Supreme Court's prior denial of the defendant's petition for writ of certiorari.

The denial of a petition for writ of certiorari by the U.S. Supreme Court has no precedential or preclusive value. Teague v. Lane, 489 U.S. 288, 296 (1989) ("As we have often stated, the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923) (Holmes, J.). Accord, Hughes

Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 366, n. 1 (1973); Brown v. Allen, 344 U.S. 443, 489-497 (1953).") .

B. The restrictions and prescriptions of Massachusetts law governing first degree murder litigation as set forth in G. L. c. 278, § 33E, are not applicable to this appeal from resentencing in which the defendant's prior first degree murder convictions no longer exist.

When the SJC vacated the defendant's first degree murder convictions, G. L. c. 278, § 33E was no longer applicable to the defendant's case, as 33E pertains only to convictions of first degree murder.

Commonwealth v. James, 477 Mass. 549, 551 n. 1 (2017) (once a first degree murder conviction is vacated by the SJC, the defendant at issue is no longer subject to the provisions of § 33E. (citing Commonwealth v. Gilbert, 447 Mass. 161, 165 n. 7 (2006); Commonwealth v. Perry, 424 Mass. 1019, 1020 (1997); Commonwealth v. Lattimore, 400 Mass. 1001, 1001 (1987)); G. L. c. 278, § 33E ("For the purposes of [appeal under section 33E] a capital case shall mean: (i) a case in which the defendant was . . . convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279."). See and compare G. L. c. 279, § 25(b) .

II. The defendant's convictions of illegal possession of a firearm and illegal possession of ammunition must be vacated and either remanded for new trial or dismissed.

The [Fourteenth Amendment's] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 358-364 (1970).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [The] question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (emphasis in original).

Commonwealth v. Latimore, 378 Mass. 671, 676-678

(1979) (citing and quoting Jackson v. Virginia, 443 U.S. 307, 318-319 (1979)).

As stated in the defendant's SUPPLEMENTAL MEMORANDUM RE GUARDADO CASES (filed in this case on December 8, 2023), the evidence in the defendant's trial may be deemed insufficient not only by the post-trial legal development in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), but by the law set forth in District of Columbia v. Heller,

554 U.S. 570 (2008); and McDonald v. Chicago, 561 U.S. 742 (2010).

As the Commonwealth has not proved all the required elements of illegal possession of a firearm, or illegal possession of ammunition, beyond a reasonable doubt, under Jackson and Winship, the Due Process Clause of the Fourteenth Amendment forbids Massachusetts from convicting the defendant in this case of those crimes, and those convictions must be vacated and dismissed. See In re Winship, supra, 397 U.S. at 358-364; Commonwealth v. Latimore, supra, 378 Mass., at 676-678 (citing and quoting Jackson v. Virginia, supra, 443 U.S., at 318-319). See In re Winship, supra, 397 U.S. at 358-364; Commonwealth v. Latimore, supra, 378 Mass., at 676-678 (citing and quoting Jackson v. Virginia, supra, 443 U.S., at 318-319).

Where the right to possess a handgun in one's own home was established prior to the defendant's trial by Heller, supra, and McDonald, supra, the evidence in the defendant's trial may be deemed insufficient not only by the post-trial legal development in Bruen, but by the law set forth in Heller and McDonald. Under

those circumstances, the defendant's motions for required finding of not guilty, see Tr.

6/24/2013/66,79, should have been granted on the firearm and ammunition charges, and the defendant's convictions and sentences on those charges must be vacated and dismissed. See In re Winship, supra, 397 U.S. at 358-364; Commonwealth v. Latimore, supra, 378 Mass., at 676-678 (citing and quoting Jackson v. Virginia, supra, 443 U.S., at 318-319).

Contrary to the defendant's position stated in his SUPPLEMENTAL MEMORANDUM RE GUARDADO CASES, supra, that Fifth Amendment principles of Double Jeopardy bar retrial on the charges of illegal possession of a firearm and illegal possession of ammunition, in Guardado II, the SJC stated:

Because the evidence against the defendant was insufficient only when viewed through the lens of a legal development that occurred after trial, the Commonwealth has not "been given [a] fair opportunity to offer whatever proof it could assemble" at trial (emphasis added). *Burks[v. United States]*, 437 U.S. [1,] at 16 [(1978)] (emphasis added). Further, because absence of licensure was not recognized as an essential element at the time of trial, the resulting verdict did not resolve this element of the offenses charged. See *Commonwealth v. Hebb*, 477 Mass. 409, 413, 77 N.E.3d 308 (2017), quoting [*Commonwealth v.]Brown*, 470 Mass. 595 (2015),] at 603-604 ("where a verdict does not specifically resolve all the elements of the

offense charged, it is defective ... and thus does not trigger double jeopardy protections"). A new trial is warranted so that the Commonwealth may have "one complete opportunity to convict" the defendant under the new law. *Hebb, supra*, quoting *Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009). See *United States v. Houston*, 792 F.3d 663, 670 (6th Cir. 2015) ("the government would not be seeking a second bite at the apple but a first bite under the right legal test").

Guardado II, supra, 493 Mass. at 6-7. Because the evidence against the defendant on the firearm and ammunition charges was actually insufficient "through the lens" of U.S. Supreme Court case law that was existing and in effect prior to the defendant's trial, there is no possibility that the Commonwealth may not have been given a fair opportunity to offer its proof on the firearm and ammunition charges at the defendant's trial, and the Due Process Clause of the Fourteenth Amendment, and Massachusetts law require entry of judgments of "not guilty" on those charges.

See In re Winship, supra, 397 U.S. at 358-364; Commonwealth v. Latimore, supra, 378 Mass., at 676-678 (citing and quoting Jackson v. Virginia, supra, 443 U.S., at 318-319).

CONCLUSION

In light of the foregoing, the defendant urges the Court to vacate the defendant's convictions and sentences and to dismiss the charges against him, and to enter judgments of not guilty on all charges on the basis that the evidence presented against him at trial was insufficient to convict him; or, in the alternative, to grant him a new trial.

Respectfully submitted,

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By his Attorney,

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January 24, 2024

REPLY BRIEF ADDENDUM
TABLE OF CONTENTS

	<u>Page</u>
<u>Constitutional Provisions</u>	
Fifth Amendment to the United States Constitution	16
Fourteenth Amendment to the United States Constitution	17
<u>Statutes</u>	
G. L. c. 269, § 10	17
G. L. c. 278, § 33E	24
G. L. c. 279, § 25(b)	25

Fifth Amendment to the United States Constitution

No person shall . . . be subject for the same offense
to be twice put in jeopardy of life or limb[.]

Fourteenth Amendment to the United States Constitution

AMENDMENT 14

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

G. L. c. 269, § 10

§ 10. Weapons - Dangerous Weapons - Unlawfully Carrying.

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

- (1) being present in or on his residence or place of business; or
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
- (3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
- (4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
- (5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:

- (1) being present in or on his residence or place of business; or
- (2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
- (3) having in effect a license to carry firearms

issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being

dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blowgun, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a

felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the colonel of the state police, who, upon receipt of the same, shall notify said court or justice thereof. Said colonel may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars.

(h)

(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than \$500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than \$1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 2½ years or in state prison for not more than 5 years.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or machine gun, as provided in section one hundred and twenty-nine D of chapter one hundred and forty, unless an

appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

(j) For the purposes of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.

Whoever, not being a law enforcement officer and notwithstanding any license obtained by the person pursuant to chapter 140, carries on the person a firearm, loaded or unloaded, or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of the elementary or secondary school, college or university shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may arrest without a warrant and detain a person found carrying a firearm in violation of this paragraph.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university that fails to report a violation of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than \$500.

(k) [None.]

(l) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section

131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or

institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

(o) For purposes of this section, "loaded" shall mean that ammunition is contained in the weapon or within a feeding device attached thereto.

For purposes of this section, "ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun.

G. L. c. 278, § 33E

§ 33E. Capital Cases – Appeals.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the

supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

G. L. c. 279, § 25(b)

(b) Whoever: (i) has been convicted 2 times previously of 1 or more of the following offenses: section 1, section 13, section 13½, clause (i) of subsection (b) of section 13A, section 13B, subsection (a) of section 13B½, section 13B¾, section 13F, committing an assault and battery upon a child and by such assault and battery causing bodily injury or substantial bodily injury under subsection (b) of section 13J, section 14, section 15, clause (i) of subsection (c) of section 15A, section 16, sections 17 and 18 if armed with a firearm, shotgun, rifle, machine gun, or assault weapon, section 18A, section 18B, section 18C, section 21, section 22, section 22A, section 22B, section 22C, section 23A, section 23B, section 24, section 24B, section 26, section 26B, section 26C, section 28, and subsection (b) of section 39 of chapter 265, section 14 or section 102C of chapter 266, section 4A, section 17, subsection (b) of section 29A, subsection (b) of section 29B, section 29C, section 35A and subsection (b) of section 53A of chapter 272, or has been convicted 2 times previously of a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, arising out of charges separately brought and tried, and arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction; (ii) has been sentenced to

incarceration at a state prison or state correctional facility or federal correction facility for at least 3 years to be served for each of the prior 2 convictions; and (iii) does not show that he has been pardoned for either prior offense on the ground that he was innocent shall, upon conviction of 1 of the enumerated offenses in clause (i), where the offense occurred subsequent to the second conviction, shall be considered a habitual offender and shall be imprisoned in the state prison or state correctional facility for the maximum term provided by law for the offense enumerated in clause (i). No sentence imposed under this section shall be reduced or suspended nor shall such person so sentenced be eligible for probation, parole, work release or furlough or receive any deduction from such person's sentence for good conduct. A sentence imposed on a habitual offender under this section, if such habitual offender is incarcerated at a state prison or state correctional facility, shall commence upon the conclusion of the sentence such habitual offender is serving at the time of sentencing.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX, SS.

No. 2022-P-0558

COMMONWEALTH,
Appellee,

v.

TIMOTHY R. BROWN,
Appellant

CERTIFICATE OF COMPLIANCE

I, David H. Mirsky, hereby certify, pursuant to Mass. R. A. P. 16(k), that DEFENDANT'S REPLY BRIEF in the above-captioned case are in compliance with Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. (16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18; and Mass. R. A. P. 20.

January 24, 2024

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CERTIFICATE OF SERVICE

I, David H. Mirsky, hereby certify, under the penalties of perjury, that on January 25, 2024, I served an electronic copy of this reply brief on Melissa Weisgold Johnsen, Assistant District Attorney, and Thomas D. Ralph, Assistant District Attorney, Middlesex County District Attorney's Office, 15 Commonwealth Avenue, Woburn, MA 01801.

January 24, 2024

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