

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPREME JUDICIAL COURT
NO. FAR____

APPEALS COURT
NO. 2018-P-1232

COMMONWEALTH

v.

EDWARD GONZALEZ

ON APPEAL FROM JUDGMENTS OF THE
HAMPDEN COUNTY SUPERIOR COURT

**DEFENDANT'S APPLICATION FOR FURTHER
APPELLATE REVIEW**

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REQUEST FOR LEAVE

Edward Gonzalez hereby petitions this Court, pursuant to Mass. R. App. P. 27.1, for leave to obtain further appellate review.

STATEMENT OF PRIOR PROCEEDINGS

On July 22, 2016, the Hampden County Grand Jury indicted defendant Edward Gonzalez for the murder in the first degree of Juan Zayas (G. L. c. 265, §1) and the illegal possession of a firearm as an armed career criminal (G.L. c.269, §§10(a) & 10G(a)).

The defendant filed a motion to suppress statements, with a supporting affidavit, on September 15, 2017. On December 8, 2017, the Commonwealth filed a preliminary memorandum in opposition to the motion to suppress. Ferrara, J., held a hearing on the defendant's motion on December 14 and 15, 2017, and March 8, 2018. The motion judge issued a written decision allowing the motion on April 20, 2018.

The Commonwealth filed a notice of appeal of the suppression order on April 23, 2018. On May 23, 2018, the Commonwealth filed an application in the Massachusetts Supreme Judicial Court for Suffolk County seeking leave to appeal the suppression order. (Mass.

R. Crim. P. 15 (a)(2)(2017); G.L. c. 278, §28E; No. SJ-2018-0228).

The defendant filed an opposition to the Commonwealth's application on June 11, 2018. Gaziano, J., sitting as single justice, allowed the Commonwealth's application on June 25, 2018, directing that the appeal be heard by the Massachusetts Appeals Court.

The Appeals Court heard argument on October 1, 2019 and issued its decision reversing Judge Ferrera's allowance of the defendant's motion to suppress statements on November 1, 2019.

SHORT STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

The Appeals Court's statement of facts omits material facts which undergird inferences and conclusions reached by the motion judge. As the Appeals Court based its decision on a determination that the evidence and facts were insufficient to support certain inferences drawn and conclusions reached by the motion judge, the defendant reproduces here the motion judge's findings of fact. Additional undisputed facts from the record and explication of instances in which Judge Ferrara's findings represent implicit or explicit assessments of the credibility of certain witnesses are

included in footnotes.¹

On January 25, 2016, Juan Zayas was shot and killed in the backyard of his home on Brookline Avenue in Springfield. Captain Trent Duda of the Major Crimes Unit of the Springfield Police Department was on duty and he responded to the area for a report of shots fired. The victim, a man in his early seventies, was found deceased in his yard. He was the father of a Massachusetts State Trooper, so the case became a "high profile" case.

Shell casings and cigarette butts were found at the scene. One of the cigarette butts was tested for DNA, a profile was developed, and a match made to an individual named Jose Villegas Rodriguez. Rodriguez was arrested on May 25, 2016, and interrogated. He implicated Gonzalez in the homicide. An arrest warrant for Gonzalez was sought and obtained, and Gonzalez was arrested in Holyoke on May 26, 2016. Gonzalez underwent booking procedures at the Holyoke Police Department. As part of that process he was advised of his Miranda rights. The defendant was familiar with those rights, having previously been given those rights by Holyoke police on eight prior occasions. Gonzalez was then transported to the Springfield Police Department to be interrogated.

Captain Duda assigned a Spanish speaking detective, Jose Canini, to assist Sgt. Jeffrey Martucci in conducting the interview. The interview began at 1:52 a.m. and was video recorded. Gonzalez was advised that he was under arrest for murder and was again advised of his Miranda rights. Gonzalez voluntarily waived his

¹ Citations to the record included in the brief have been removed for the purposes of this application.

rights and agreed to speak to the detectives. Gonzalez said that he could understand, speak, and read English, but his speech is strongly accented, and his responses to certain questions reflect some difficulty comprehending English. Captain Duda was able to monitor the interrogation through a video feed to a room in the Detective Bureau. The District Attorney's Office was in communication with Duda that day regarding the investigation and arrests. Duda could not remember if he spoke with someone from the D.A.'s Office during the course of the interrogation.

Gonzalez was advised that someone had placed him at the scene of murder. He responded that he would like to see photos or video recordings of him at that scene. He denied involvement. He inquired of the detectives as to who had implicated him. There was further discussion. Captain Duda became frustrated, feeling that Gonzalez was being evasive. He entered the interrogation room.² He yelled and swore at Gonzalez, advising him that he would be going to jail or prison for murder where there were many "enemies" if he did not cooperate. Duda told him, "You are here, sitting here, to tell a story. Either you tell it, or you don't." Gonzalez gave a response that is transcribed as, "No, I ain't speaking." Having viewed and listened to the recording multiple times, I find the response was slurred and not clearly intelligible, but there was no effort to clarify what Gonzalez was saying.

² It is not clear in the record when Capt. Duda arrived in the room because the camera perspective of the video does not show the interrogators and he did not announce himself when he entered. Nor does the transcript indicate Duda's arrival because the stenographer did not note the addition of a new voice on the video.

Duda left the room and the interrogation continued with increasing pressure placed on Gonzalez to state his involvement.³ After some minutes passed, Gonzalez asked, in Spanish, "Can I call my lawyer?" His inquiry was initially ignored by Canini, who responded, "OK? Someone put you there. Someone put you there, OK?" Then the following exchange occurred:

Gonzalez again asked in Spanish, "Can I call my lawyer?"

Canini stated: "So - he's asking for a lawyer."

Martucci: "You want what?"

Gonzalez: "My lawyer."

Martucci: "You want your lawyer?"

Gonzalez: "Yeah."

Martucci: "OK. Alright. It's 2:11 a.m. We're gonna conclude this investigation, and –

Canini: "Fuck it. Call them and turn it off."
[Canini can be heard crumpling a paper.]

Martucci: "Yep. Give me a sec. I'm gonna call down, turn off the video, and you're gonna be booked for murder, OK?"

Gonzalez: "Call my - call my lawyer."

Canini: "OK. He's gonna turn this off."

³ Again, it is not clear in the record when Duda left the room because the video does not show it and testimony is conflicting.

Martucci: "We're gonna stop interviewing you, and you'll be booked for murder."

Canini: "You're gonna be booked for murder."

Gonzalez: "Alright. Call my lawyer."

Canini: "You can call your murder - your lawyer - later on."

Martucci: "Can you have them turn off Room A, please? Yep. Have them turn it off."

Gonzalez: "Because, right now ... "

Canini: "Stop talking. You just said you want a lawyer, and we can't talk to you."
[Stated angrily]

The recording then ends.

Gonzalez stated that he wanted his attorney four times. It is clear from Canini's words and tone that he was frustrated and angry that Gonzalez had asked for counsel. Canini remained in the interview room with Gonzalez on the second floor of the police station. Martucci left the room. Gonzalez was not moved to the first floor where the booking area is located. Detective Canini testified that he was waiting for Captain Duda or Sgt. Martucci to tell him to bring Gonzalez to the booking area. Captain Duda testified that it would have been either him or Sgt. Martucci who would have arranged for Gonzalez to be brought down to the booking area via a call to the booking supervisor. Duda testified that he "assumed" that Martucci called the booking supervisor and did not know the reason for a delay in bringing Gonzalez down to be booked. Martucci testified that he did not remember if he called down to the booking

supervisor.

Canini and Gonzalez conversed, but it was not recorded. Canini could not recall what they discussed, but described it as "some general talk, but not about what was going on." He testified that Gonzalez, "did not say anything of evidentiary significance." Gonzalez asked to use the bathroom and was brought to the bathroom. He encountered Captain Duda in the hallway near the bathroom, but Duda testified that they did not speak. Canini testified that at some point, Gonzalez volunteered that he would "talk to him, but did not want to get yelled at." Canini understood this to be a reference to what had previously transpired. Canini did not prepare a report regarding their conversation.⁴

Captain Duda, who had been watching the interrogation via the camera feed, testified that he did not recall what he did after Gonzalez invoked his right to counsel.⁵ Duda did remain at the police

⁴ Canini was specifically questioned on cross-examination whether any supervising officer asked him to prepare a report or in any way indicated that the events of the forty minutes were important and he testified that he was not so instructed. He did acknowledge that if he had written a report that night that he would have been able to detail the specifics of the "general talk." Canini also testified that upon learning that Mr. Gonzalez allegedly wanted to talk, Capt. Duda did not make any effort to learn exactly how the reversal of the invocation came to pass and instead immediately went to get Podgurski to resume the interview.

⁵ Though he did not include it in his findings of fact, Judge Ferrara stated in his Rulings of Law that "[t]he conversation was likely being monitored by other officers, including Captain Duda, but no contemporaneous report was prepared." This was an explicit rejection of Captain Duda's testimony denying that he continued to watch after the first recording stopped even though the cameras in

station, though he had worked many hours and was not scheduled to be on duty. Detective Edward Podgurski had also watched "bits and pieces" of the video feed during the interview. He did not recall watching the feed after Gonzalez invoked his right to counsel. No other officer who might have witnessed the conversation between Canini and Gonzalez after the interview ended prepared a report.⁶

Officer Canini testified that when Captain Duda came to him and told him to bring Gonzalez down for booking, he told Duda that Gonzalez would now speak to officers without counsel being present.⁷ At about 2:56 a.m., the recording resumed with a "second" interview. Forty-five minutes had elapsed since the first recorded interrogation had concluded. The interrogators were now Canini and Detective Edward Podgurski. Gonzalez was shown the Miranda warnings sheet he previously signed.⁸ Podgurski confirmed that Gonzalez was aware he was being

the interview room could be viewed on a live feed in his personal office.

⁶ Martucci did write a one-paragraph report about Mr. Gonzalez's arrest on the warrant in Holyoke and transport to Springfield. It did not include any details of the interrogation in Springfield.

⁷ Judge Ferrara's inclusion of this fact marks an explicit rejection of Captain Duda's testimony that he was in his office when "someone brought it to [his] attention" that Mr. Gonzalez wanted to talk again. Capt. Duda testified that he could not remember who brought him the information.

⁸ The video shows Podgurski displaying a new Miranda form to the camera. Though the form contains blanks for both the witness and the administering officer to sign, Podgurski tells Mr. Gonzalez that he does not have to sign it. At the hearing, Podgurski testified that Capt. Duda told him he did not need to have Mr. Gonzalez sign the form again.

charged with murder, and made the following statement:

[Podgurski]: "And you signed off on this Miranda form earlier this evening, approximately- not even - about a half hour ago. And, I just want to... We gave you an opportunity to go to the bathroom and as we were bringing you to get booked you said you wanted to talk to us again."⁹

Gonzalez responded, "Um-huh."

Podgurski: "Is this correct?"

Gonzalez: "Um-huh."

Gonzalez was then read his Miranda rights again, indicated he understood them, and was asked, "Having these rights in mind, Edward, do you want to talk to Detective Canini and myself right now about what you're being charged with?" He again responded, "Um-huh."

⁹ Though Captain Duda testified that the video was intended to memorialize the terms of the alleged invocation reversal, Podgurski testified that no one told him how the reversal of the invocation occurred and that Duda "just told [him] to make sure [Mr. Gonzalez] understands the Miranda and reread it to him. As far as Podgurski understood, his job was simply to Mirandize Mr. Gonzalez as if it were the beginning of a new interview.

**STATEMENT OF THE POINTS WITH RESPECT TO WHICH
FURTHER APPELLATE REVIEW IS SOUGHT**

1. Did the Appeals Court overstep its bounds by substituting its view of testimonial evidence, engaging in independent fact-finding, and rejecting the motion judge's findings of subsidiary facts and inferences derived from those findings?
2. In holding that "absent a finding that Detective Canini's testimony was not credible, and absent any evidence that the defendant's reinitiation of communication with Detective Canini was involuntary, it was error to conclude that the Commonwealth had not met its burden of proof to establish beyond a reasonable doubt that the defendant initiated further communication with the police and thereby waived his right to counsel," did the Appeals Court improperly apply the Commonwealth's burden of proof as articulated by *Miranda v. Arizona*, 384 U.S. 436 (1966) and its federal and state progeny and improperly shift that burden to the defendant?

**REASONS WHY FURTHER APPELLATE REVIEW IS
APPROPRIATE**

- I. **In reversing the motion judge as it did, the Appeals Court overstepped its bounds and substituted its view of testimonial evidence for that of the motion judge. Stated plainly, the Appeals Court exceeded the standard of review.**

In reversing Judge Ferrara's decision allowing the motion to suppress because he "[could not] find beyond a reasonable doubt that Gonzalez initiated the 'further communication, exchanges, or conversations,'" the Appeals Court explicitly rejected various findings of fact based on testimonial evidence and inferences derived from those findings as unsupported by the evidence, ignored

subsidiary findings of fact made by the motion judge that were based on his view of the live testimony of police witnesses, and supplemented facts that were controverted and detracted from the judge's ultimate conclusions. In short, the Appeals Court failed to correctly apply the standard of review and overstepped its bounds by substituting its view of the testimonial evidence heard by Judge Ferrara. See *Commonwealth v. Jones-Pannell*, 472 Mass. 429 (2015).

While the appellate court may independently review documentary or recorded evidence de novo, "findings drawn partly or wholly from testimonial evidence are accorded deference and are not set aside unless clearly erroneous. The case is to be decided upon the entire evidence, however, giving due weight to the judge's findings that are entitled to deference." *Commonwealth v. Tremblay*, 480 Mass. 645, 655 (2018) (internal citations omitted). While reviewing courts may supplement the motion judge's findings with uncontested evidence that was implicitly or explicitly credited by the motion judge, such supplementation may not detract from the judge's ultimate findings. See *Commonwealth v. Jessup*, 471 Mass. 121, 127-28 (2015). "[I]n no event is it proper for an appellate court to engage in what amounts to independent fact finding in order to

reach a conclusion of law that is contrary to that of a motion judge who has seen and heard the witnesses, and made determinations regarding the weight and credibility of their testimony.”

Commonwealth v. Jones-Pannell, 472 Mass. 429, 438 (2015).

Failing to show deference, the Appeals Court rejected, as unsupported by the evidence, several findings made by the motion judge. Each of these findings were amply supported by the testimonial evidence from the record. First, the Appeals Court acknowledged that several subsidiary facts cited by the motion judge as a basis for his decision were “well supported,” but required something “more” to justify his inference that Canini’s motive in continuing to speak with Mr. Gonzalez was to persuade him to change his mind.

It is not clear from the Appeals Court decision why these subsidiary facts were insufficient to support the judge’s inference and what “more” should be required. Nonetheless, in addition to those subsidiary facts noted by the Appeals Court (it was a “high profile” case, Canini was frustrated by the defendant’s assertion of his right to counsel, conversation continued between Canini and Mr. Gonzalez),

other subsidiary findings noted by Judge Ferrara in support of his conclusion were disregarded entirely by the Appeals Court.

Specifically, the Appeals Court ignored Judge Ferrara's findings based on uncontroverted testimony from the hearing that the officers were experienced and understood the importance of the defendant's invocation and the interaction that followed; police had the ability to record the interaction but did not; Canini and other officers, who Judge Ferrara found likely monitored the interaction, failed to write reports; and, the defendant was not promptly brought down to be booked as he was told when he invoked his right to counsel.

The Appeals Court's rejection of Judge Ferrara's credibility determination that other officers, including Captain Duda, probably monitored the interaction from outside the room is a particularly egregious failure to afford substantial deference. Judge Ferrara's finding was an explicit rejection of Captain Duda's testimony that he had not monitored the interaction during the gap in the video. Contrary to the Appeals Court's interpretation of this finding that he had not discredited the testimony, Judge Ferrara clearly did not believe Captain Duda on this point.

Nor is it the case that Judge Ferrara's assessment of Duda's credibility was unsupported or inconsistent with uncontradicted testimony. In addition to basing his finding on his own assessment of Duda's live testimony, Judge Ferrara also heard extensive testimony describing the technology installed in interview rooms in the Springfield Police Department which allowed law enforcement to not only record interrogations conducted in those rooms, but also allowed officers to monitor interactions within the interrogation rooms even while not recording via a live feed to a monitor in a room adjacent to Captain Duda's office. Judge Ferrara also heard testimony from various officers that they had, in fact, monitored the recorded part of the interview and Duda had even left his office, where he had been monitoring, to intervene when he thought the interrogation was "getting derailed." Thus, Judge Ferrara's findings that officers viewed the case as high priority, understood the post-invocation interaction was important, and had the means and opportunity to monitor the unrecorded interaction more than amply supported his finding that officers probably watched the unrecorded interaction. This finding was not clearly erroneous.

Finally, the Appeals Court supplemented other facts that detracted from Judge Ferrara's ultimate findings, exceeding the clear bounds of appellate review. Most glaring is the Appeals Court's assertion, without analysis, that "the evidence before the judge was that the interview *ceased* after the defendant's invocation to his right to counsel." The question of whether the interrogation ceased when police stopped recording was very much a contested issue that was argued by the defendant in the trial court and in his brief and was supported by many facts in the record.

Similarly, the Appeals Court supplanted Judge Ferrara's finding, drawn partly or entirely from the testimonial evidence, that the officers' rendition of the defendant's alleged reversal of his invocation on the second video "shed[] no light on what transpired between the time the first recording ended and when Gonzalez went to the bathroom," with its own assessment that the defendant's monosyllabic adoption of officers' "self-serving" descriptions "corroborated Detective Canini's testimony regarding the defendant's *reinitiation* of communication with him" (emphasis added). Though the Appeals Court was entitled to its own de novo review of the video, in ruling as it did the Appeals Court failed to

base its decision upon the entire evidence and failed to give due weight to Judge Ferrara's findings that were entitled to deference.

Judge Ferrara did not explicate whether his finding that he "[could] not find beyond a reasonable doubt that Gonzalez initiated the further, communications, or exchanges" was because he found that the interview never really stopped or because he harbored a reasonable doubt that even if the interrogation had ceased, Canini had, in fact, resumed communication with the objective of getting Mr. Gonzalez to change his mind about speaking. But he did specifically find that "Canini, clearly displeased with Gonzalez's invocation of his right to counsel, *continued* to speak with him." The Appeals Court's findings that the interrogation ceased simply because the police stopped recording and that the defendant reinitiated communication with Canini are both supplemental findings regarding issues that were very much in controversy that detracted from Judge Ferrara's ultimate conclusion and therefore exceeded the standard of review.

II. The Appeals Court improperly applied the burden of proof which requires the Commonwealth to prove beyond a

reasonable doubt that, after the defendant invoked his right to counsel, police scrupulously honored his invocation and that the defendant reinitiated further communication.

Having dispensed with facts and inferences it found troubling and rendering its own assessment of the testimonial evidence, the Appeals Court reversed Judge Ferrara's decision, holding that "absent a finding that Detective Canini's testimony was not credible, and absent any evidence that the defendant's reinitiation of communication with Detective Canini was involuntary, it was error [for Judge Ferrara] to conclude that the Commonwealth had not met its burden to establish beyond a reasonable doubt that the defendant initiated further communication with the police and thereby waived his right to counsel." In ruling as it did, the Appeals Court misapplied the burden of proof, relieving the Commonwealth of its heavy burden.

It is well established that for any statement made during custodial interrogation to be admissible against the defendant at trial, both the federal and state constitutions require that the prosecution prove that the defendant waived these rights before making the statement. The Commonwealth bears the heavy burden of proving such waiver beyond a reasonable doubt. *Miranda v. Arizona*, 384 U.S.

436 (1966). “If a suspect invokes any of the rights enumerated in *Miranda*, the invocation must be scrupulously honored.” *Commonwealth v. Hoyt*, 461 Mass. 143, 151 (2011), citing *Edwards v. Arizona*, 451 U.S. 477, 484–485 (1981). Specifically, an accused person, “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him.” *Edwards*, 451 U.S. at 484-485. “When a defendant invokes his right to counsel, all subsequent statements are inadmissible unless counsel is provided or the Commonwealth can prove beyond a reasonable doubt that the ‘defendant initiated further communication, exchanges, or conversations with the police... and thereby waived his right to counsel.’” *Commonwealth v. Thomas*, 469 Mass. 531, 543 (2014), quoting *Hoyt*, 461 Mass. at 151, quoting *Edwards*, 451 U.S. at 485.

The motion judge correctly applied this burden. However, the Commonwealth argued and the Appeals Court accepted that because the motion judge failed to outright reject Officer Canini’s testimony as not credible, any inferences made by Judge Ferrara regarding the nature of the vaguely described “general talk” that took place between Officer Canini and Mr. Gonzalez and the effect it had on

Mr. Gonzalez's decision to resume answering questions after he had unequivocally invoked his right to silence and counsel was "impermissible speculation." To the contrary, Judge Ferrara correctly *declined* to speculate as to the substance of the conversation and, based on other subsidiary findings of facts he made (discussed above), ruled that the Commonwealth failed to meet its burden to prove to "the highest degree of certainty possible in matters of human affairs" that Mr. Gonzalez, having invoked his right to counsel, reinitiated the communication or that Canini had not engaged in the functional equivalent of interrogation in order to persuade him to change his mind. *Commonwealth v. Russell*, 470 Mass. 464, 605 (2005).

Stated another way, the Commonwealth argued, and the Appeals Court held, that in the absence of contrary evidence, Canini's "general talk," "not about the case," was presumptively not the functional equivalent of interrogation and shifted the burden to the defendant to produce some quantum of "evidence that the defendant's reinitiation of communication with Detective Canini was


involuntary.”¹⁰ By reversing Judge Ferrara in this manner, the Appeals Court substituted its view of the evidence for the motion judge’s and declared an inference that would have been *permissible* for Judge Ferrara to make to be *mandatory* absent evidence to the contrary. This vitiated Judge Ferrara’s role as a factfinder and relieved the Commonwealth from having to shoulder its full burden of proof and persuasion. See *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that a jury instruction which could be interpreted as “a direction to find intent upon proof of a defendant’s voluntary actions [], unless *the defendant* proved the contrary by some quantum of proof” unconstitutionally shifted the burden of persuasion on the element of intent.)

CONCLUSION

The Court should grant further appellate review and Judge Ferrara’s original order allowing the defendant’s motion to suppress statements should be affirmed.

¹⁰ As discussed above, the finding that the defendant “reinitiated” the discussion is a supplemental finding by the Appeals Court that detracts from Judge Ferrara’s decision.

Respectfully submitted,
DEFENDANT,
Edward Gonzalez
By his Attorney

A handwritten signature in black ink, appearing to read 'M. Elkins', is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

I, Marissa Elkins, Esquire, attorney for the Defendant, hereby certify that this brief complies with all rules of Massachusetts Appellate Procedure pertaining to the filing of applications for further appellate review. This brief was produced with Microsoft Word for Mac version 16.3 using Calisto MT 14-point font. The word count for this brief, ascertained using the software word count function, is ~~1,821~~. 1901.



Marissa Elkins, Esq.

CERTIFICATE OF SERVICE

I, Marissa Elkins, hereby certify that on this 26th day of November, 2019, I have forwarded the APPLICATION FOR FURTHER APPELLATE REVIEW in the matter of Commonwealth v. Edward Gonzalez, via e-file to:

Asst. District Attorney Katherine McMahon
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50 State Street
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Marissa Elkins

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1232

COMMONWEALTH

vs.

EDWARD GONZALEZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant has been charged with murder and illegal possession of a firearm. Following evidentiary hearings, a Superior Court judge allowed a motion to suppress the defendant's statements, reasoning that the Commonwealth had failed to establish beyond a reasonable doubt that the defendant reinitiated communication with the police after he invoked his right to counsel. The Commonwealth's application to pursue an interlocutory appeal was allowed by a single justice of the Supreme Judicial Court, who reported the matter to this court. We reverse.

Background. We summarize the relevant facts from the judge's findings and from undisputed facts in the record that were implicitly credited by him. See Commonwealth v. Jones-Pannell, 472 Mass. 429, 436 (2015). On May 26, 2016, the

defendant was arrested after being implicated in a Springfield murder. The victim of the murder was the father of a Massachusetts State trooper. The defendant was arrested in Holyoke, advised of his Miranda rights, and transported to the Springfield Police Department to be interviewed. Captain Trent Duda of the Springfield Police Department assigned Sergeant Jeffrey Martucci and Detective Jose Canini to interview the defendant. Sergeant Martucci advised the defendant that he was under arrest for murder and again administered Miranda warnings to the defendant. The defendant knowingly and voluntarily waived his Miranda rights and agreed to be interviewed.

The officers informed the defendant that a witness had placed him at the scene of the murder. The defendant denied his involvement in the murder and asked the officers for photographs or video recordings of him at the scene. Captain Duda, who was watching the interview from another room, grew frustrated with the defendant's responses. He entered the interrogation room and confronted the defendant aggressively, directing him to answer the officers' questions. Specifically, Captain Duda told the defendant that he would go to prison unless he cooperated. Captain Duda also told the defendant, "You are here, sitting here, to tell a story. Either you tell it, or you don't." The defendant responded, "No, I ain't speaking." Captain Duda left the room and the officers continued to press the defendant for

answers.¹ The defendant repeated that he wanted to see evidence of his presence at the scene. The conversation continued and approximately two minutes later, the defendant asked, in Spanish, "Can I call my lawyer."² After the defendant repeated his request to call a lawyer the officers ended the interview. Sergeant Martucci directed that the recording equipment be turned off and told the defendant that he would be booked for murder.

Detective Canini remained alone with the defendant for approximately forty minutes while he waited for instructions to transfer the defendant to the booking area. During that time, Detective Canini escorted the defendant to the bathroom. The defendant asked what would happen next and Detective Canini explained the booking process. Detective Canini and the defendant engaged in conversation while they waited in the interrogation room, but that conversation was not recorded. Detective Canini could not recall the subject of their conversation, but testified that it involved "some general talk,

¹ The first interview was not a model of technique or clarity. The defendant appeared willing to respond to questions, but the officers frequently interrupted and talked over the defendant (and each other) as the defendant attempted to respond. At one point, despite the defendant's statement that he "would like to talk to [them]," the officers told him to stop talking and then lectured him. Both officers shouted and swore at the defendant and he responded, "[W]hy are you yelling at me?"

² Detective Canini spoke Spanish and conducted some of the interview in Spanish.

but not about what was going on," and that the defendant "did not say anything of any evidentiary significance." The defendant told Detective Canini that he would "talk to him but, did not want to get yelled at." No report was prepared memorializing the conversation. Canini then informed Captain Duda that the defendant wanted to speak with the officers again.

Approximately forty minutes after the conclusion of the first interview, Detective Edward Podgurski and Detective Canini commenced a second recorded interview. Detective Podgurski showed the defendant the Miranda advisement and waiver form the defendant had executed earlier and stated, "And you signed off on this Miranda form earlier this evening, approximately -- not even -- about a half hour ago. . . . We gave you an opportunity to go to the bathroom and as we were bringing you to get booked you said you wanted to talk to us again." The defendant responded, "Um-huh."³ Detective Podgurski then repeated the Miranda warnings and asked, "Having these rights in mind, Edward, do you wanna talk to Detective Canini and myself right now about what you're being charged with?" The defendant again responded, "Um-huh."

³ We quote the phrase's "[u]m-huh" and "[a]h-hah" as they appear in the transcripts of the recorded interviews. It is clear from our independent review of the recorded interviews that these phrases were affirmative responses.

Shortly after the second interview began, the following exchange occurred between Detective Canini and the defendant:

Q.: "Earlier today we tried to talk to you and you asked for a lawyer correct?"

A.: "Ah-hah."

Q.: "You had a couple of minutes to think about it and you decided you didn't need a lawyer and you wanted to talk to us, is this correct?"

A.: "Ah-hah."

Q.: "And you made these decisions on your own?"

A.: "Ah-hah."

In the ensuing interview, which lasted just over an hour, the defendant first explained that on the night of the murder he agreed to drive Jose Rodriguez Villegas and a man called "Pinto" to Springfield to "hold-up somebody." The defendant waited in the car while Rodriguez and the other man, who was armed, entered a house. After the defendant heard gun shots, Rodriguez and the other man came running back to the car and the defendant drove them to Holyoke. Later in the interview, the defendant admitted there was no third person and that he was present when Jose Rodriguez Villegas shot the victim.

Discussion. We accept the judge's findings as to the background facts unless they are clearly erroneous. See Commonwealth v. Welch, 420 Mass. 646, 651 (1995). We defer to the judge's assessment of the credibility of the testimony taken

at the evidentiary hearing on the motion to suppress, see Commonwealth v. Scott, 440 Mass. 642, 646 (2004), but we are in the same position as the judge in reviewing the recorded interviews, and therefore make our own determination as to the weight of that evidence. See Commonwealth v. Novo, 442 Mass. 262, 266 (2004). We "make an independent determination of the correctness of the judge's application of the constitutional principles to the facts." Commonwealth v. Mercado, 422 Mass. 367, 369 (1996).

The Commonwealth concedes that during custodial interrogation of the defendant, he clearly and unequivocally invoked his right to counsel. A defendant's invocation of his right to counsel must be scrupulously honored. Commonwealth v. Thomas, 469 Mass. 531, 541 (2014). Once a defendant invokes his right to counsel, questioning cannot resume until an attorney is obtained for the suspect or the suspect initiates further communication. Edwards v. Arizona, 451 U.S. 477, 484-485 (1981). Commonwealth v. Rankins, 429 Mass. 470, 473 (1999). The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant "initiate[d] further communication, exchanges, or conversations with the police," Edwards, supra at 485, and thereby waived his right to counsel. Rankins, supra.

Here, the judge found that the murder investigation was a "high profile" case, that Detective Canini was frustrated by the

defendant's assertion of his right to counsel, and that there was conversation between Detective Canini and the defendant after the defendant's invocation of his right to counsel. Those findings were well supported. However, without more, those facts did not support the judge's inference that Detective Canini's "objective in his continued conversation with [the defendant] was to persuade him to change his mind." Nor was there sufficient evidence to support the judge's inference that "[t]he conversation was likely being monitored by other officers, including Captain Duda." All of the testimony was to the contrary and the judge did not discredit that testimony.

The evidence before the judge was that the interview ceased after the defendant's invocation of his right to counsel, and before any inculpatory statements by the defendant. After the defendant was escorted to the bathroom, he asked what would happen next and Detective Canini explained the booking process. Detective Canini testified that, thereafter, there might have been "some general talk, but not about what was going on." As they waited to be directed to the booking area, the defendant told Detective Canini that he would "talk to [Detective Canini], but he did not want to get yelled at." The judge did not discredit Detective Canini's testimony and no contrary evidence was presented.

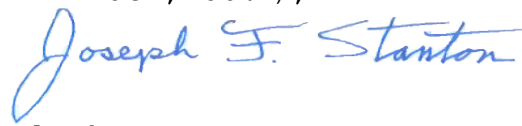
We disagree with the judge's conclusion that the exchange between Detective Podgurski and the defendant at the beginning of the second interview "sheds no light on what transpired" between the first and second interviews. While it is true that Detective Podgurski's description of the events was self-serving, the defendant was not bound to adopt that description. Based on our de novo review of the recording of the second interview, we conclude that the defendant adopted Detective Podgurski's description without question or hesitation. During that interview, the defendant agreed that he told Detective Canini that he wanted to talk to him again and repeated as much moments later when, in response to Detective Canini's question, he acknowledged that he had decided, on his own, to speak with Detective Canini without a lawyer present. We agree with the Commonwealth that these acknowledgements from the defendant corroborated Detective Canini's testimony regarding the defendant's reinitiation of communication with him.⁴

⁴ Detective Canini's testimony is further corroborated by the defendant's statements in the second interview indicating that his reluctance to participate was limited to certain interviewers. Near the end of the second interview, one of the detectives told the defendant, "Someone else want[s] to ask you a question." The defendant responded that he didn't want to talk to anybody else, and then said, "No, no. Like people that will yell at me and that." Detective Canini responded, "Yeah he doesn't need that." The defendant then said, in English, "Nah, I don't like people screaming at me. . . . You respect me and I'll respect you."

In summary, absent a finding that Detective Canini's testimony was not credible, and absent any evidence that the defendant's reinitiation of communication with Detective Canini was involuntary, it was error to conclude that the Commonwealth had not met its burden of proof to establish beyond a reasonable doubt that the defendant initiated further communication with the police and thereby waived his right to counsel. See Commonwealth v. Knowles, 451 Mass. 91, 93 n.2 (2008) (motion judge may decline to credit testimony, but cannot make findings inconsistent with uncontradicted testimony without evidence to support those findings). The order allowing the motion to suppress the defendant's statements is reversed.⁵

So ordered.

By the Court (Meade, Hanlon &
Kinder, JJ.⁶),



Clerk

Entered: November 1, 2019.

⁵ The defendant also argues that his statements should be suppressed because the Commonwealth (1) failed to honor his right to remain silent during the first interview, and (2) failed to afford him an opportunity to make a telephone call as required by G. L. C. 276, § 33A. We need not address these arguments as they were not raised in the defendant's motion to suppress, the affidavit in support of the motion, or the defendant's memorandum of law filed in the Superior Court. Were we to reach the arguments, we see no merit in them based on the record before us.

⁶ The panelists are listed in order of seniority.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 18-P-1232

COMMONWEALTH

vs.

EDWARD GONZALEZ.

Pending in the Superior

Court for the County of Hampden

Ordered, that the following entry be made on the docket:

Order allowing motion to
suppress reversed.

By the Court,

Joseph F. Stanton, Clerk
Date November 1, 2019.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

**SUPERIOR COURT
CRIMINAL ACTION
NO. 1679CR00473**

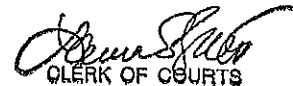
COMMONWEALTH

**HAMPDEN COUNTY
SUPERIOR COURT
FILED**

vs.

APR 20 2018

EDWARD GONZALEZ


CLERK OF COURTS

**FINDINGS OF FACT, RULINGS OF LAW, AND ORDER ON
THE DEFENDANT'S MOTION TO SUPPRESS STATEMENTS**

The defendant, Edward Gonzalez, is charged in two indictments with the murder of Juan Zayas, in violation of G. L. c. 265, § 1, and illegal possession of a firearm, in violation of G. L. c. 269, § 10(a). Now before the court is the defendant's motion to suppress all statements made after he allegedly invoked his right to counsel during a police interview on May 26, 2016. After an evidentiary hearing and review of (1) the parties' written submissions, (2) a stipulation of the parties admitted as Exhibit 1 at the hearing, (3) and the other exhibits, including video recordings and transcripts of two interviews, for the reasons stated below, the defendant's motion will be ALLOWED.

FINDINGS OF FACT

Based on the evidence presented and the stipulation of the parties, the court finds the following facts.

On January 25, 2016, Juan Zayas was shot and killed in the backyard of his home on Brookline Avenue in Springfield. Captain Trent Duda of the Major Crimes Unit of the Springfield Police Department was on duty and he responded to the area for a report of shots fired. The victim, a man in his early seventies, was found deceased in his yard. He was the

father of a Massachusetts State Trooper, so the case became a “high profile” case.

Shell casings and cigarette butts were found at the scene. One of the cigarette butts was tested for DNA, a profile was developed, and a match made to an individual named Jose Villegas Rodriguez. Rodriguez was arrested on May 25, 2016, and interrogated. He implicated the Gonzalez in the homicide. An arrest warrant for Gonzalez was sought and obtained, and Gonzalez was arrested in Holyoke on May 26, 2016. Gonzalez underwent booking procedures at the Holyoke Police Department. As part of that process he was advised of his *Miranda* rights.¹ The defendant was familiar with those rights, having previously been given those rights by Holyoke police on eight prior occasions.² Gonzalez was then transported to the Springfield Police Department to be interrogated.

Captain Duda assigned a Spanish speaking detective, Jose Canini, to assist Sgt. Jeffrey Martucci in conducting the interview. The interview began at 1:52 a.m. and was video recorded. Gonzalez was advised that he was under arrest for murder and was again advised of his *Miranda* rights. Gonzalez voluntarily waived his rights and agreed to speak to the detectives. Gonzalez said that he could understand, speak, and read English, but his speech is strongly accented, and his responses to certain questions reflect some difficulty comprehending English. Captain Duda was able to monitor the interrogation through a video feed to a room in the Detective Bureau. The District Attorney’s Office was in communication with Duda that day regarding the investigation and arrests. Duda could not remember if he spoke with someone from the D.A.’s

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966)

² On January 9, 2009; August 8, 2013; June 10, 2014; October 7, 2014; July 25, 2015; November 22, 2015; and February 5, 2016, he was read his rights and acknowledged he understood them. On August 8, 2013, Det. Jared Hamel of the Holyoke Police Department attempted to read Gonzalez his rights several times, but the defendant stopped him by repeatedly stating, “I know my rights.”

Office during the course of the interrogation.

Gonzalez was advised that someone had placed him at the scene of murder. He responded that he would like to see photos or video recordings of him at that scene. He denied involvement. He inquired of the detectives as to who had implicated him. There was further discussion. Captain Duda became frustrated, feeling that Gonzalez was being evasive. He entered the interrogation room. He yelled and swore at Gonzalez, advising him that he would be going to jail or prison for murder where there were many "enemies" if he did not cooperate. Duda told him, "You are here, sitting here, to tell a story. Either you tell it, or you don't." Gonzalez gave a response that is transcribed as, "No, I ain't speaking." Having viewed and listened to the recording multiple times, I find the response was slurred and not clearly intelligible, but there was no effort to clarify what Gonzalez was saying.

Duda left the room and the interrogation continued with increasing pressure placed on Gonzalez to state his involvement. After some minutes passed, Gonzalez asked, in Spanish, "Can I call my lawyer?" His inquiry was initially ignored by Canini, who responded, "OK? Someone put you there. Someone put you there, OK?" Then the following exchange occurred:

Gonzalez again asked in Spanish, "Can I call my lawyer?"

Canini stated: "So – he's asking for a lawyer."

Martucci: "You want what?"

Gonzalez: "My lawyer."

Martucci: "You want your lawyer?"

Gonzalez: "Yeah."

Martucci: "OK. Alright. It's 2:11 a.m. We're gonna conclude this investigation,

and –

Canini: “Fuck it.³ Call them and turn it off.”

[Canini can be heard crumpling a paper.]

Martucci: “Yep. Give me a sec. I’m gonna call down, turn off the video, and you’re gonna be booked for murder, OK?”

Gonzalez: “Call my – call my lawyer.”

Canini: “OK. He’s gonna turn this off.”

Martucci: “We’re gonna stop interviewing you, and you’ll be booked for murder.”

Canini: “You’re gonna be booked for murder.”

Gonzalez: “Alright. Call my lawyer.”

Canini: “You can call your murder – your lawyer – later on.”

Martucci: “Can you have them turn off Room A, please? Yep. Have them turn it off.”

Gonzalez: “Because, right now ...”

Canini: “Stop talking. You just said you want a lawyer, and we can’t talk to you.”

[Stated angrily]

The recording then ends.

Gonzalez stated that he wanted his attorney four times. It is clear from Canini’s words and tone that he was frustrated and angry that Gonzalez had asked for counsel. Canini remained in the interview room with Gonzalez on the second floor of the police station. Martucci left the room. Gonzalez was not moved to the first floor where the booking area is located. Detective

³Not reflected in transcript.

Canini testified that he was waiting for Captain Duda or Sgt. Martucci to tell him to bring Gonzalez to the booking area. Captain Duda testified that it would have been either him or Sgt. Martucci who would have arranged for Gonzalez to be brought down to the booking area via a call to the booking supervisor. Duda testified that he “assumed” that Martucci called the booking supervisor and did not know the reason for a delay in bringing Gonzalez down to be booked. Martucci testified that he did not remember if he called down to the booking supervisor.

Canini and Gonzalez conversed, but it was not recorded. Canini could not recall what they discussed, but described it as “some general talk, but not about what was going on.” He testified that Gonzalez, “did not say anything of evidentiary significance.” Gonzalez asked to use the bathroom and was brought to the bathroom. He encountered Captain Duda in the hallway near the bathroom, but Duda testified that they did not speak. Canini testified that at some point, Gonzalez volunteered that he would “talk to him, but did not want to get yelled at.” Canini understood this to be a reference to what had previously transpired. Canini did not prepare a report regarding their conversation.

Captain Duda, who had been watching the interrogation via the camera feed, testified that he did not recall what he did after Gonzalez invoked his right to counsel. Duda did remain at the police station, though he had worked many hours and was not scheduled to be on duty. Detective Edward Podgurski had also watched “bits and pieces” of the video feed during the interview. He did not recall watching the feed after Gonzalez invoked his right to counsel. No other officer who might have witnessed the conversation between Canini and Gonzalez after the interview ended prepared a report.

Officer Canini testified that when Captain Duda came to him and told him to bring Gonzalez down for booking, he told Duda that Gonzalez would now speak to officers without counsel being present. At about 2:56 a.m., the recording resumed with a “second” interview. Forty-five minutes had elapsed since the first recorded interrogation had concluded. The interrogators were now Canini and Detective Edward Podgurski. Gonzalez was shown the Miranda warnings sheet he previously signed. Podgurski confirmed that Gonzalez was aware he was being charged with murder, and made the following statement:

“And you signed off on this Miranda form earlier this evening, approximately – not even – about a half hour ago. And, I just want to We gave you an opportunity to go to the bathroom and as we were bringing you to get booked you said you wanted to talk to us again.”

Gonzalez responded, “Um-huh.”

Podgurski: “Is this correct?”

Gonzalez: “Um-huh.”

Gonzalez was then read his Miranda rights again, indicated he understood them, and was asked, “Having these rights in mind, Edward, do you want to talk to Detective Canini and myself right now about what you’re being charged with?” He again responded, “Um-huh.”

RULINGS OF LAW

The defendant contends that he unequivocally invoked his right to counsel and the police failed to scrupulously honor his assertion of that right. When an individual in custody invokes his right to counsel, the police must cease all questioning until counsel is made available to the individual. *Edwards v. Arizona*, 451 U.S. 477 (1981); *Commonwealth v. Hoyt*, 461 Mass. 143,

149 (2011); *Commonwealth v. Obershaw*, 435 Mass. 794, 800 (2002). “A suspect who has ‘expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges or conversations with police.” *Edwards*, 451 U.S. at 484-485; *Judge*, 420 Mass. at 448-449; *Commonwealth v. Rankins*, 429 Mass. 470, 471 (1999).

To invoke one’s right to counsel, a suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. United States*, 512 U.S. 452, 459 (1994). See, e.g., *Hoyt*, 461 Mass. at 150 (“I’d like an attorney present”); *Commonwealth v. Contos*, 435 Mass. 19, 29 (2001) (“I think we’re going to stop, and I think I’m going to get a lawyer”); *Commonwealth v. Barros*, 56 Mass. App. Ct. 675, 681 (2002) (“I don’t think I want to talk to you anymore without a lawyer”). The Commonwealth concedes that during the first interview Gonzalez clearly and unequivocally invoked his right to counsel. It asserts that the officers scrupulously honored his assertion of that right by stopping the interrogation and contends that Gonzalez initiated further discussion thereafter, and thus the “second” interview did not violate his rights.

“When a defendant invokes his right to counsel, all subsequent statements are inadmissible unless counsel is provided or the Commonwealth can prove beyond a reasonable doubt that the defendant “initiate[d] further communication, exchanges, or conversations with the police ... and thereby waived his right to counsel.” *Commonwealth v. Hoyt*, 461 Mass. 143, 151 (2011), quoting *Edwards*, 451 U.S. at 485, 101 S.Ct. 1880; *Commonwealth v. Thomas*, 469

Mass. 531, 543 (2014). The burden is on the Commonwealth to prove beyond a reasonable doubt that the events subsequent to Gonzalez's invocation of his right to counsel indicate a voluntary, knowing, and intelligent waiver of that right. *Rankins*, 429 Mass. at 472-473. It is not enough for the Commonwealth to prove that the defendant agreed to speak to officers after a repetition of his Miranda rights, where the police initiated the further discussion. After an accused invokes his right to have counsel present during custodial interrogation, a subsequent valid waiver of that right cannot be established merely by showing that the defendant was re-advised of his Miranda rights and then agreed to be further interviewed. The police must show that they did not initiate the discussion that led to the defendant rescinding his invocation of the right to counsel. *Edwards*, 451 U.S. at 484-85; *Hoyt*, 461 Mass. at 151.

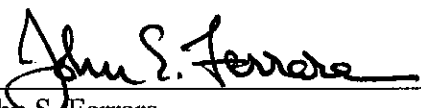
At the start of the second interview, Detective Podgurski states to Gonzalez, "We gave you an opportunity to go to the bathroom and as we were bringing you to get booked you said you wanted to talk to us again." Gonzalez responds, "Um-huh." That self-serving statement of Podgurski sheds no light on what transpired between the time the first recording ended and when Gonzalez was brought to the bathroom. The Commonwealth argues that all that is required is a credibility assessment; if the court credits Canini's assertion that he and Gonzalez did not discuss any aspect of the case during the interim period between the first recorded interrogation and the second, then the Commonwealth has met its burden. If the Commonwealth's burden was a mere preponderance of the evidence, Canini's testimony might suffice. But that is not the Commonwealth's burden of proof, and the Commonwealth has not meet its burden in this instance.

Gonzalez was not brought down to be booked, as he was told was going to occur. Canini, clearly displeased with Gonzalez's invocation of his right to counsel, continued to speak with him. Canini described the conversation as "some general talk, but not about what was going on." It is reasonably inferred that Canini's objective in his continued conversation with Gonzalez was to persuade him to change his mind. The experienced officers involved in Gonzalez's interrogation necessarily understood that evidence of his conversations with Canini after his invocation of his right to counsel would be important. Though the conversation could have been recorded, it was not. Canini wrote no report of what was discussed. The conversation was likely being monitored by other officers, including Captain Duda, but no contemporaneous report was prepared. The only evidence of what transpired during the forty-five minutes between the end of the first recorded interview and the beginning of the second, is Detective Canini's testimony. It appears that the "general talk" effected Gonzalez's decision to speak without having counsel present. Under the circumstances presented, I cannot find beyond a reasonable doubt that Gonzalez initiated the "further communication, exchanges, or conversations."

ORDER

For the foregoing reasons, defendant's Motion to Suppress Statements is **ALLOWED**, and it is hereby **ORDERED** that any statements that he made to police on May 26, 2016, after he invoked his right to counsel, is excluded from evidence.

Dated: April 19, 2018



John S. Ferrara
Justice of the Superior Court