COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS SUPREME JUDICIAL COURT

PLYMOUTH COUNTY

FAR No. 27341
No. 2018-P-0347

COMMONWEALTH OF MASSACHUSETTS

v.

JERMAINE CELESTER

APPLICATION OF THE DEFENDANT FOR FURTHER APPELLATE REVIEW OF A DECISION RELEASED BY THE APPEALS COURT

CHAUNCEY B. WOOD
B.B.O. 600354
WOOD & NATHANSON, LLP
50 Congress Street, Suite 600
Boston, MA 02109
Tel. (617) 248-1806
cwood@woodnathanson.com

ATTORNEY FOR DEFENDANT
JERMAINE CELESTER

March 11, 2020

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APPLICATION FOR FURTHER APPELLATE REVIEW

The Defendant in the above-entitled matter applies pursuant to Mass. R.A.P. 27.1 for further appellate review of a decision of the Appeals Court, dated January 30, 2020, on his direct appeal in Plymouth County Indictment No. 9483 CR 95921.

Dated: March 11, 2020

By His Attorney:

/s/ Chauncey B. Wood
Chauncey B. Wood
BBO# 600354
Wood & Nathanson, LLP
50 Congress Street, Suite 600
Boston, MA 02109
Tel. (617) 248-1806
Cwood@woodnathanson.com

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MEMORANDUM IN SUPPORT OF APPLICATION FOR FURTHER APPELLATE REVIEW

Introduction

This Court's preference for "one appeal" is well-known. Statistics on the allowance of DAR applications and ALOFARs make that clear. But this preference is fraught when a criminal defendant's appeal receives short shrift from the Appeals Court in an unpublished opinion pursuant to Rule 1:28. This is such a case.

The Appeals Court affirmed Mr. Celester's second-degree murder conviction – and mandatory life sentence – in an unpublished opinion. And yet, that opinion completely omitted two major aspects of his appellate argument, rendering it an unreliable measure of justice.

First, while the opinion acknowledges Mr. Celester's Sixth Amendment claims that the prosecutor repeatedly moved to prevent the defense from presenting exculpatory evidence, the opinion ignores Mr. Celester's Fourteenth Amendment and art. 12 due process claim arising from the fact that the prosecutor then took

unfair advantage of the judge's exclusion of that exculpatory evidence in his closing argument. This Court has characterized a prosecutor's exploitation of "the absence of evidence that has been excluded at his request" as "fundamentally unfair" and "reprehensible". Commonwealth v. Harris, 443 Mass. 714, 732 (2005).

Second, the unpublished opinion ignores the fact that the core factual issues of guilt at trial, from which a mandatory life sentence and this appeal stemmed, were incredibly close even on the limited evidence the defense was permitted to present. After a two-week trial, the jury deliberated for more than a week, reported twice that they were deadlocked and then acquitted Mr. Celester of shooting one of the two victims, thereby rejecting the Commonwealth's theory that Mr. Celester was the only other person present. Finally, the jury convicted Mr. Celester of second-degree murder, rather than first, where the defense was identification, not lack of deliberate premeditation. Clearly, the jury struggled mightily with the evidence. In this context, no error could have been harmless.

In short, the stakes in this case are too high and the factual dispute too close to rely on an incomplete unpublished opinion to decide whether Mr. Celester received due process. This Court should grant further appellate review in the interest of justice.

Yet, there is more. This Court has long recognized "the possibility that in some unique circumstances . . . due process may require [that a judge grant] a limited form of immunity" to a defense witness. Commonwealth v. Curtis, 388 Mass. 637, 646 (1983). More recently, this Court has suggested that judicial immunity might be appropriate "where there exists prosecutorial misconduct arising from the government's deliberate intent to distort the fact-finding process." Commonwealth v. Brewer, 472 Mass. 312 (2015). But this Court has never identified a case where judicial immunity was required. This is such a case.

In order to prevent a defense witness from testifying, and instead introduce his prior recorded inculpatory testimony, the prosecutor convinced the witness's counsel and the judge that he had a "de minimis" Fifth Amendment privilege, and then refused to grant him immunity because he had said he would now provide favorable testimony for the defense. The prosecutor thereby revealed a "deliberate intent to distort the fact-finding process." Id. Despite a clear record and specific defense request, the trial judge refused to grant the witness judicial immunity.

The Court should grant further appellate review to consider whether these extreme and well-defined facts finally present a circumstance in which due process requires judicial immunity for a defense witness.

Statement of the Case

In 1994, Celester was indicted for the murder of Wakime Woods and armed assault with intent to murder Derek Gibbs. Record Appendix 1-2.[1]

In 1995, Celester was tried and convicted of all charges. In 2005, Celester filed a new trial motion which was denied. Celester appealed.

In 2016, the SJC reversed the denial of Celester's first new trial motion and remanded the case. Commonwealth v. Celester, 473 Mass. 553 (2016).

After an evidentiary hearing, the trial court granted Celester a new trial.

From May 22 to June 12, 2017, the case was retried (Davis, J., presiding). After deliberating for six days, and reporting twice that they were deadlocked, the jury found Celester guilty of second-degree murder of Woods and acquitted him of armed assault with intent to murder Gibbs. Tr.15:19. Celester appealed. R.A. 3.

On January 30, 2020, the Appeals Court affirmed Celester's conviction in an unpublished opinion pursuant to Rule 1:28. (Copy attached.)

[1] Although this case is over 25 years old, much of the delay accrued between the first trial in 1995 and the filing of Celester's first new trial motion in 2005. Apparently, this delay was caused primarily by prior post-conviction counsel's inability to obtain funds to conduct necessary factual and forensic investigation. Also, litigation of that motion took roughly four years.

Pretrial Proceedings

A. Derek Gibbs' Identification of his shooter.

Prior to trial, the defense moved that Derek Gibbs be prohibited from opining that Celester had shot him on the grounds that Gibbs had previously testified that he did not see who shot him. R.A. 201. The judge granted the motion. R.A. 59, 218.

B. Calvin Dyous

Calvin Dyous testified at the first trial in a manner generally favorable to the Commonwealth. See Tr.9:47-83. Both parties summoned Dyous to the second trial. Tr.1:62; 7:11 He appeared on the first day of trial and the judge recognized him. Tr.1:61-63.

On the fourth day of trial – the first three covered jury selection - the ADA reported that "Calvin Dyous has gone incommunicado." Tr.4:114. Because Dyous had not appeared in court during jury selection, the ADA sought a bench warrant, which the judge issued. Tr.4:223-224.

The next day, the prosecutor reported that Dyous had called prior to court and appeared in court as requested. Tr.5:5-6,97-98. The prosecutor then admitted that he had intended to "request a hearing to find Calvin Dyous unavailable based on his avoidance of the Commonwealth throughout the pretrial proceedings and now at trial." Tr.5:5. The fact that Dyous called back and came to court as requested contradicted that claim.

Dyous came to court the next day (day six) as well, but the prosecutor did not call him as a witness. Rather, the prosecutor said that Dyous had requested an attorney after a conversation with Brockton police officers. Tr.6:29. Over the objection of defense counsel, the judge appointed counsel, Joshua Wood. Tr.6:29,70. Wood stated he did not see any Fifth Amendment privilege because the events to which Dyous would testify occurred in 1993 and 1994. Tr.7:147. The prosecutor then told Wood that "the only possible issue that I could see is a possible criminal contempt for failure to come to court." Tr.7:148.

Dyous's attorney then reversed course and asserted a Fifth Amendment privileged on Dyous's behalf. Tr.6:173. The judge then held a Martin hearing and found that Dyous "technically [had] a valid Fifth Amendment privilege." Id. He characterized it as "de minimis". Tr.6:179. The prosecutor agreed and asserted that "[t]he only potential Fifth would be around the circumstances of him not responding to the lawful summons and then a court order." Tr.7:17.

The judge suggested that the Commonwealth immunize Dyous. Tr.6:173. Instead, the prosecutor asked the judge to declare him unavailable. Tr.6:174. The prosecutor then explained that he did not want to call Dyous as a witness because Dyous was "friendly" with the defendant. Tr.6:181. Indeed, the prosecutor stated,

> [w]e have a witness who is friendly with the defendant, . . . who made statements that he's looking forward to his cousin[2] going home. . . . **I will not seek a grant of immunity for this individual because I believe he's going to help the defendant** and that he's going to change his testimony from '95 so that he can help the defendant go home like he said.

Id. (emphasis added).

The following day, the defense challenged the validity of Dyous's asserted Fifth Amendment privilege and in the alternative, requested that the judge grant him judicial immunity. R.A. 176. The defense explicitly characterized this as an intentional prosecution effort to "exclude defense evidence". Tr.7:10.

The judge denied the motion. He found that Dyous had a Fifth Amendment privilege. Tr.7:164-65. He then ruled that he did not have the power to grant Dyous judicial immunity. Tr.7:11-12,165. He also stated that "if there was some evidence. . . that the Commonwealth had somehow encouraged Mr. Dyous to assert the Fifth, . . . [t]hen you'd have this prosecutorial misconduct argument . . . ." Tr.7:166. The defendant objected to these rulings. Tr.7:166,169.

The Commonwealth ultimately read in Dyous's trial testimony from the first trial over a defense objection. Tr.9:47-83.

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[2] In fact, Dyous and Celester are not related. Their mothers were friends. Tr. 9:49.

Statement of Facts Adduced at Trial

On the evening of February 18, 1994, Wakime Woods and Derek Gibbs were shot as they walked down Green Street in Brockton with the Defendant, Jermaine Celester. Woods eventually died and Gibbs was paralyzed.

The Commonwealth argued that Celester shot Gibbs and Woods because Gibbs had witnessed the murder of Celester's friend Robert Moses five months earlier but had refused to identify the killer. Tr.10:50-53. The defense argued that someone in a Ford Tempo that fled the scene shot the victims. Tr.10:47-49.

The evidence against Celester was contradictory. Gibbs testified that as they were walking down the street, Celester suddenly "stopped short" and was behind him right before he was shot. But the ballistics evidence clearly established that Gibbs was shot in the face - from the front. In any event, Gibbs admitted he did not see who shot him. Moreover, one witness, Marlene Scott, testified that Woods told her moments after the shootings that he had been shot by "the kid [he] was with". But a second witness, Corrina DeFrancesco, who saw a car fleeing the scene, testified that Woods told her the shots came from "the backseat passenger side". Finally, two different police officers testified that Woods said he did not know who shot him.

A. September 6, 1993: The killing of Robert Moses

To establish Celester's motive for shooting one witness, Derek Gibbs, the Commonwealth introduced evidence of the killing of Celester's friend, Robert Moses, five months earlier, and the extent to which witnesses to the killing cooperated with the police investigation. In fact, the evidence indicated that Gibbs cooperated with police.

B. February 3, 1994: Meeting with Dyous and Brown

On February 3, 1994, Celester visited Gibbs with two of his friends, Bay and Rodney.[3] Tr.6:251-252. The group convinced Gibbs to go with them to visit Dyous to discuss the Moses killing. Tr.6:254-255.

Dyous claimed Celester was upset and angry when he arrived. Tr.6:51.[4] Celester and Dyous discussed the Moses killing. Tr.6:257. The entire group then went to Brown's home because Celester wanted to talk with all three witnesses to Moses' murder at the same time. Tr.9:60.

[3] One witness, Cheryl Scott, indicated that either Bay or Rodney was Moses' "brother". Tr.4:194.

[4] As noted above, the Commonwealth read Dyous' testimony from the first trial into evidence because Dyous asserted a Fifth Amendment privilege at the second trial and the judge deemed him unavailable.

Bay, Rodney and Celester asked Dyous and Brown to explain what happened.[5] Tr.9:64. The conversation was heated and loud. Tr.4:186; 7:47-48; 9:65.

Eventually, Celester allegedly insisted that Brown, Gibbs and Dyous go to Boston with them to continue investigating Moses's killing. Tr.4:199. Despite Celester's apparent insistence that Brown, Gibbs, and Dyous go to Boston, Dyous decided not to go. Tr.7:53,56. The rest of the group then left. Tr.7:53. Cheryl Scott, Brown's aunt, testified that as he was leaving, Celester said "if nobody didn't go into Boston to find out who killed his boy, that he was taking out all witnesses...cappin'." Tr.4:202-203. No one else heard this threat, including those to whom it was supposedly directed. See, e.g., Tr.7:215.[6]

[5] At trial Dyous claimed Celester questioned him, Brown and Gibbs. Tr. 9:64. But Dyous told the grand jury that Bay questioned them. Tr. 7:164.

[6] Cheryl admitted that prior to February 3, 1994, Celester had never been inside her house and she had never spoken to him. Furthermore, Cheryl admitted that when the defendant's investigator interviewed her on March 30, 2017, she did not recall knowing Celester or Moses. Tr.4:204-206. She also had no specific memory of the events of February 3, 1994, even after she listened to a report of those events. Tr.4:208-210. She ultimately acknowledged that her present testimony was "from the material that the prosecution [] provided [her]" rather than an independent recollection of events. Tr.4:51-52.

C. February 18, 1994: The shooting.

On February 18, 1994, Gibbs, Woods and a friend, Demetrius Lynch, met at the Brockton Boys and Girls Club and smoked marijuana. Tr.7:72; 8:203. Later, in the early evening, they walked to Gibbs' house at 55 Warren Avenue. Tr.7:73. Lynch then went home. Id.

At some point, Celester arrived and asked Gibbs to go with him to speak to Brown. Tr.7:83. Gibbs agreed. Tr. 7:91. Gibbs introduced Celester and Woods. Tr.7:94. Woods agreed to go with them to Brown's house. Tr.7:95.

Because there was snow on the sidewalks, the three men walked in the middle of the road. Tr.7:104. Gibbs was in the middle, Woods to his left, and Celester to his right. Tr.7:109.

Gibbs wore two hooded sweatshirts. Tr.7:90. Both hoods were up and obscured his peripheral vision. Tr.7:110; 8:40-41. But he could see both Woods and Celester. Tr.7:110.

At some point after crossing Newbury Street, Gibbs perceived that Celester suddenly "stopped short" and was no longer in his peripheral vision. Tr.7:112-13. At the very same moment Gibbs perceived Celester to be behind him, Gibbs was shot in the face. Tr.8:50 ("no time at all" passed between the moment Gibbs noticed Celester stopped short and the moment he was shot in the face;

"[i]t was just like right away.").[7] More specifically, a bullet entered the front right side of his jaw and exited the back left side of his neck. Tr.8:140-141. The wound track "went from his right to left, from his front toward his back in a slightly downward fashion". Tr.8:140-141, Ex. 50. Gibbs immediately collapsed. Tr.7:114; 8:141.

Gibbs never saw who shot him. Tr.8:50. He never heard a gun rack or saw a muzzle flash. Tr.7:121; 8:49. Finally, he did not see anyone, including Celester, holding a gun at any point. Id.

Woods was shot at least three times in the back. Tr.8:129; Ex. 42. Another bullet entered the front of his left thigh. The medical examiner hypothesized that one of the bullets that struck him in the back exited his mid abdomen and then lodged in his left leg. Tr.8:137, Ex. 44,49. There was no gunpowder residue around any of the four entrance wounds. Tr.8:139,187.

D. The aftermath of the shooting

1. Corrina DeFrancesco and the Ford Tempo

a. Facts introduced at trial

Corrina DeFrancesco was in her apartment on the third floor of 45 Newbury Street on the evening of February 18, 1994. Tr.9:95-97. She heard gunshots and

[7] Despite conceding this instantaneous sequence, Gibbs claimed for the first time during the second trial that he "started to turn to the right" before he was shot. Tr.7:114. He did not mention this at the first trial. Tr.8:50.

immediately looked out the window. Tr.9:98. She saw a car stopped on Green Street. Id. The car was small and maroon or dark red. Tr.9:99-100.

DeFrancesco ran downstairs to the intersection of Green and Newbury streets. Tr.9:102. Her father followed. Tr. 7:109. She saw the same car backing up. Tr.9:104. The car then "went flying" past her through the stop sign and took the first left onto Glenwood Street. Tr.9:104,106-107. The car's headlights were "square and kind of like dull." Tr.9:110.

After the car fled, she walked over to Gibbs, and thought he was dead. Tr.9:107. She then heard Woods saying "help me". Tr.9:109. Woods told her "the shots came from the backseat passenger side." Id.

The police arrived shortly afterwards. Tr.9:211. DeFrancesco spoke briefly to Officer LeGrice who handed her off to Officer Mather. Tr.5:86; 9:211. After Mather spoke to DeFrancesco, he radioed out a description of the car she saw: a dark-colored, four-door, possibly Dodge Ares, with tinted windows and square headlights. Tr.9:188,213,218. Officer Mark Reardon was nearby and heard Mather's dispatch. Tr.9:164. He started driving towards the scene and saw a similar car: a red Ford Tempo, boxy like a Dodge Ares. Tr.9:166-167. It had two doors, tinted windows and square headlights. Tr.9:190. He followed it. Tr.9:168. The occupants appeared "spooked or very nervous" and accelerated. Tr.9:169-70.

He activated his blue lights and siren, and the Tempo made a series of quick turns. Tr.9:171. He "radioed in that he was following a car that fit that description with four black males in it." Id. (emphasis added).

The car stopped and two men exited - one from each side. Tr.9:173. Reardon ordered them back into the car, but they ignored him. Id. Instead, they "took off running in two different directions" including a wooded area toward a housing project. Tr.9:174. Reardon detained a third man, who also exited the car. Tr.9:176,195.

In response to Reardon's dispatches, Officer Mather took DeFrancesco to view the car. Tr.9:111,185-186,211. Initially, DeFrancesco said that it was not the same car she had seen fleeing from Green Street. Tr.9:214. Mather counseled her to take her time. Tr.9:214. She walked around the car, and then concluded that it was the car she had seen fleeing from Green Street. Tr.9:111,214,221. Mather then took DeFrancesco to the police station. Tr.9:214.

The car was towed to the police station and searched pursuant to a warrant. Tr.8:86. No ballistics evidence was found. Tr.9:192.

At the police station DeFrancesco apparently talked to Officer Manny Gomes about the incident. At trial, however, she did not recall this. Tr.9:138. Gomes testified that DeFrancesco told him she heard four gunshots from her kitchen and looked out the window.

Tr.9:250-251. DeFrancseco reported seeing a car backing up on Green Street with its headlights off. Tr.9:252. She described it as box-shaped with tinted windows. Tr.9:253. The color was unclear because it was dark out. Id. She described approaching the victims with her father. Tr.9:253-254. She told Gomes she knew Gibbs and Woods from the neighborhood. Tr.9:254. She reported that she later identified the car with police. Tr.9:255.

b. Facts excluded at trial

The defense attempted to introduce the identity of the occupants of the Ford Tempo as crucial exculpatory evidence in support of its third-party culprit defense. The Commonwealth moved to exclude it. The judge granted the motion, excluding the following evidence:

Officer Reardon arrested one occupant of the Ford Tempo - Donald Outlar. Outlar then "told [police] that he was in the aforementioned vehicle at the time of the shooting and was in the Glenwood Street area which is one block east of the shooting scene." R.A. 28. "Mr. Outlar also told [police] that the driver of the vehicle was one Shelton Terry and the other passenger was one Tommy Woods." Id. Likewise, "Officer Reardon told Lt. Morrill that Shelton Terry was the driver". Id.

Indeed, Shelton Terry arrived at the Brockton Police Station later that night with the registered owner of the Ford Tempo, Ruby Phillips, who tried to

reclaim it. When police questioned Terry, however, he denied being in the car that night. Id.

Phillips told police that night that she loaned the car to a man she met at a bar in Boston named Ty Washington. Id. In an interview immediately before the second trial, however, Phillips admitted to the defense investigator that she in fact lent her car to Terry. R.A. 33. She further admitted she does not know anyone named Ty Washington and would not have lent her car to a strange man she met in a bar. Id.

Shortly before the second trial, the police interviewed J.D. Woods, the brother of Wakime Woods. He disclosed that he saw his cousin Tommy Woods in the Ford Tempo the night of the shooting. R.A. 36. He stated that

> he . . . spoke to Thomas Woods about why police thought they were involved in the shooting of his brother. [J.D.] stated that Thomas had a beef with dudes who lived on Newbury Street, Brockton, MA over a female. [J.D.] stated that Thomas wanted to see if it was one of his friends that had been shot or if one of his friends had done the shooting. [J.D.] stated that Thomas left the area and . . . the police began to chase him.

Id. In short, Tommy admitted he was in the Tempo, was at the scene of the shooting, fled, and was chased by police, confirming that Officer Reardon stopped the same car DeFrancesco had seen fleeing the scene.

Furthermore, prior to the second trial, the defense interviewed Tommy Woods. See R.A. 38. He claimed that he

was alone in the Ford Tempo with Outlar on the night of the shooting; he denied that Terry was in the car with them. Id. Contrary to the claim of J.D. Woods, Tommy told the defense that he was nowhere near the scene of the shooting. Id. However, he admitted that he knew Gibbs. Id. Moreover, he revealed animosity towards Gibbs. He said that he was aware that his cousin Wakime had been friends with Gibbs, but had not approved of the friendship. Id.

Finally, both Outlar and Terry admitted that they saw Gibbs at the E.A. Styles Barbershop with Lynch on the day of the shooting. Tr.7:220.

2. Marlene Scott

On February 18, 1994, Marlene Scott was at her mother's house at 69 Newbury Street. Tr.6:138. She heard gunshots in rapid succession. Tr.6:147. Eventually, she went out onto Green Street to investigate. Tr.6:203-204.

Marlene saw Gibbs in the street and heard Woods calling for help. Tr.9:156. She recognized Woods. Id. She asked, "what happened to you? Who shot you?" Id. Woods allegedly responded, "the kid I was with." Id. Scott asked Woods if he knew the person and he said no. Id. She tried to stop the bleeding. Tr.6:160.[8]

[8] Marlene also searched Woods' pockets and took his beeper, supposedly to notify his family. Tr.6:165,210. She called several numbers but never reached them. Id. She never told the police that she took his beeper and never turned it over to the police. Tr.6:211-212.

Marlene spoke to the police later that night. Tr.6:162. At that time, she gave a false name: Rochelle Green – her sister. Tr.6:162,213. Under oath at the first trial, she denied that she had done this. Tr.6:213.

3. Police response

At approximately 8:15 p.m., two Brockton police officers, Kenneth LeGrice and Arthur Sullivan responded to the scene. Tr.5:56-59,67.

Woods was crying for help. Tr.5:62. LeGrice asked if Woods knew who shot him. Tr.5:76. Woods responded, "No, I don't." Id. LeGrice recorded this exchange in his contemporaneous police report and no other communication. Tr.5:92. Another officer, James Smith, also heard Woods screaming for help, approached, and asked him who shot him. Tr.9:227. Like LeGrice, Smith reported that Woods said he did not know. Id.

At trial, however, LeGrice testified that he asked Woods, an eighteen-year-old shooting victim expressing fear and pain, a second question in a sarcastic tone: "you mean you don't know who shot you?" Tr.5:76. LeGrice reported that Woods responded, "I don't know his name." Id. LeGrice did not note this exchange in his contemporaneous police report. Tr.5:92.

LeGrice testified that Marlene Scott was with Woods. Tr.5:63. She appeared to be putting pressure on Woods' abdomen. Tr.5:74-75.

LeGrice also encountered DeFrancesco. Tr.5:86,93. He directed her to Officer Mather. Tr.5:86; 9:211.

Points with Respect to Which Further Appellate Review is Sought

1. Whether the trial judge violated Celester's constitutional right to present a third-party culprit defense by barring him from presenting the identity of the occupants of the car that fled the scene of the shooting, the fact that they knew and disliked one of the victims and their consciousness of guilt.

2. Whether the prosecutor violated Celester's constitutional right to due process when he took advantage of the exclusion of this third-party culprit evidence by arguing that the jury should reject Corinne DeFrancesco's testimony that she saw a car flee the scene and her claim that Wakime told her "the shots came from the backseat passenger side" because it was uncorroborated.

3. Whether the trial judge violated Celester's constitutional right to compulsory process, confrontation, and due process by making a witness, Calvin Dyous, unavailable to the defense, where (1) he erroneously found, over a defense objection, that Dyous had a "de minimis" Fifth Amendment privilege for contempt based on the fact that he had not promptly returned the prosecution's phone calls during jury selection; and (2) he denied a defense motion for

judicial immunity in spite of the prosecutor's admission that he intentionally caused Dyous to invoke the privilege for the purpose of distorting the fact-finding process. Specifically, because Dyous had admitted he would now provide exculpatory testimony if called, the prosecutor orchestrated his invocation of the privilege, refused to grant him immunity and instead presented Dyous's inculpatory testimony from the first trial.

4. Whether the prosecutor violated due process and a court order when he asserted, contrary to the evidence, that one shooting victim identified the defendant as the shooter.

ARGUMENT

I. The judge violated Celester's constitutional right to present a third-party culprit defense by barring him from presenting the identity of the occupants of the car that fled the scene of the shooting, the fact that they knew the victims and their consciousness of guilt.

On the Commonwealth's motion, the judge excluded the heart of Celester's defense, in violation of his Sixth Amendment and Article 12 right to present a defense. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006). Specifically, he prevented Celester from introducing the identity of the people who ran from the Ford Tempo that fled the scene of the shooting, after the car was chased and stopped by the police. As a result, the jury never learned that (1) all three knew Derek Gibbs, (2) one disliked Gibbs (motive) (3) two

admitted being present at the scene (opportunity), and (4) two falsely denied being present at the scene (consciousness of guilt). Most importantly, the jury never learned that all of this evidence corroborated Corrina DeFrancesco's claim that she saw the Ford Tempo flee the scene and the victim Wakime told her that "the shots came from the backseat passenger side." Tr. 9:109.

"A defendant has a constitutional right to present evidence that another may have committed the crime." Commonwealth v. Conkey, 443 Mass. 60, 66 (2004); Holmes, 547 U.S. at 324. The admission of this "time-honored method of defending against a criminal charge" has been given "wide-latitude" by the courts. Commonwealth v. Silva-Santiago, 453 Mass. 782, 800 (2009). And "all doubt should be resolved in favor of admissibility" of third-party culprit evidence. Commonwealth v. Ruell, 459 Mass. 126, 132–133 (2011). "If the defendant's right to have his day in court is to be guaranteed, he must be given the opportunity to establish even a *tenuous defense*." Commonwealth v. Hood, 389 Mass. 581, 595 (1983) (emphasis added).

The Defendant's proffered evidence presents far more than a "tenuous defense"; it provides a compelling case that the occupants of the Ford Tempo shot Derek Gibbs and Wakime Woods and then fled the scene. Specifically, it corroborated DeFrancesco's claim that she saw the Ford Tempo flee the scene, and connected its

occupants to the victims, which in turn bolstered the credibility of her claim that Wakime told her "the shots came from the backseat passenger side." Tr. 9:109.

Ignoring the constitutionally mandated low threshold for admissibility of third-party culprit evidence, the judge kept this evidence from the jury. He conceded that the fact that DeFrancesco saw a car fleeing the scene, that the police gave chase to a car fitting the description, that the occupants fled when stopped by the police, and that DeFrancesco identified the Tempo as the car she had seen was all admissible as third-party culprit evidence. But the judge inexplicably excluded evidence of the identity of the occupants of the Tempo, their knowledge of the victims, their admission to being at the scene, and their consciousness of guilt.

The judge erroneously asserted that the occupants of the Ford Tempo were unknown. Tr. 4:9. In fact, Officer Reardon arrested one of them, Donald Outlar, at the scene. He also identified one who fled from the car as Shelton Terry. R.A. 28. That identification was corroborated by Outlar and the fact that Terry returned to the Brockton Police Department to retrieve the car. Id. Finally, Outlar told police that Tommy Woods was also in the car. Id. This claim was corroborated by J.D. Woods, who told police that he saw his Tommy in the Tempo the night of the shooting, R.A. 67, and Tommy himself,

who admitted to the defense investigator that he had been in the car with Outlar. R.A. 38.

The occupants also admitted that they were near the crime scene. Specifically, Outlar told police that they were in the Glenwood Street area, one block east of the shooting just as DeFrancesco had described. R.A. 28. Moreover, Tommy Woods admitted to J.D. Woods that he had driven to the scene of the shooting, purportedly to determine who had been involved, before fleeing and being chased by the police. R.A. 37. This evidence directly contradicted the judge's assertion that DeFrancesco might have erroneously identified the Tempo as the car she saw fleeing the scene. Tr.4:10 ("it is unclear" whether the car that DeFrancesco saw "was the red Ford Tempo that was stopped").[9]

Also, all three occupants of the Tempo knew Gibbs. Tr.1:53; 7:220. Tommy Woods expressed animosity towards Gibbs. R.A. 38. These admissions established obvious bias against Gibbs, motive to harm him, and further evidence of a link between the occupants of the Tempo and the shooting.

Finally, the three occupants gave inconsistent statements about their involvement, which is relevant

[9] The judge erroneously believed that Ford Tempos at the time were "curvy" unlike the car DeFrancesco described. Tr.4:10. In fact, this Tempo was boxy and had square headlights as she described. Ex. 31.

consciousness of guilt evidence. Specifically, despite the fact that Officer Reardon, and Outlar stated that Terry was in the car, Terry denied this. Also, Tommy admitted to J.D. Woods he was at the scene, and Outlar corroborated this; yet, Tommy told the defense that he and Outlar were nowhere near the scene.

The judge also erroneously asserted that the defense had to establish which occupant of the Ford Tempo had actually shot Gibbs and Woods. Tr. 4:19.[10] Likewise, he erroneously asserted that admission of the identity of the occupants of the Tempo would improperly invite speculation about motive for the shooting. Id. In fact, motive is not an element or murder,[11] and so it cannot be a basis to exclude a third-party culprit defense.

The Appeals Court deferred to the trial judge's conclusion that the excluded third-party culprit evidence was too speculative and confusing, without explaining why. Slip Op. at 6-7.[12] This flips precedent

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[10] Just as the Commonwealth would have had no burden to prove which occupant shot the victims if it had prosecuted them for these crimes under a joint venture theory, the defense did not have to prove which one pulled the trigger to establish relevance to a third-party culprit defense. See Commonwealth v. Zannetti, 454 Mass. 449 (2009).

[11] Commonwealth v. Carlson, 448 Mass. 501, 508-509 (2007) (cleaned up) (Motive is not an essential element of the crime of murder, and the Commonwealth need not prove that the defendant had a motive).

[12] The Appeals Court ignored the trial judge's clearly erroneous factual assertion that it was "hotly disputed" who was in the Tempo and his erroneous legal

on its head. Deference must be given to admissibility of the defense itself, not the judge's exclusion of the defense. See Ruell, 459 Mass. at 132–133 ("all doubt should be resolved in favor of admissibility" of third-party culprit evidence); Silva-Santiago, 453 Mass. at 800 (third-party culprit defense must be given "wide-latitude"); Hood, 389 Mass. at 595 (the defendant "must be given the opportunity to establish even a *tenuous defense*.") (emphasis added). Compare Commonwealth v. Santos, 463 Mass. 273, 296-97 (2012) (murder conviction reversed; trial judge abused discretion in prohibiting third-party culprit argument as "too attenuated").

This evidence could have tipped the scales. The jury should have heard it.

II. The prosecutor violated Celester's constitutional right to due process when he took advantage of the absence of this third-party culprit evidence he had successfully moved to exclude by arguing that the jury should reject Corinne DeFrancesco's testimony that she saw a car flee the scene because it was uncorroborated.

In his opening statement, the prosecutor asserted that "there were no other cars on the street". Tr.4:63. Yet, he knew the excluded evidence contradicted this.

Long before closing arguments, defense counsel presciently warned the judge that the Commonwealth was

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assertion that the defense had to establish who pulled the trigger to establish relevance.

"seeking to . . . exploit the absence of evidence that they sought to exclude." Tr.6:14.

Despite this warning, the prosecutor returned to this claim in his closing argument. As in his opening, he first asserted that at the time of the shooting, "there were no cars on Green Street." Tr.10:56. He then urged the jury to reject DeFrancesco's testimony "in its entirety" because there was "no corroboration, zero. And all evidence to the contrary. [S]he's . . . on an island by herself." Tr. 10:75. Furthermore, he asserted, "if Corrina saw a car on Green Street, . . . [the Ford Tempo] was not it." Tr. 10:76.

Defense counsel immediately objected that the prosecutor was exploiting his exclusion the third-party culprit evidence by making claims contradicted by that evidence. Tr.10:83. The judge took no action.

The SJC has characterized a prosecutor's exploitation of "the absence of evidence that had been excluded at his request" as "fundamentally unfair" and "reprehensible". See Commonwealth v. Harris, 443 Mass. 714, 732 (2005) (cleaned up).

Quite simply, this was prosecutorial misconduct, to which counsel objected both before and immediately after it occurred. It violated Celester's constitutional rights to present a defense and due process under the Sixth Amendment and art. 12.

Because the excluded evidence clearly contradicted the prosecutor's closing argument, its exclusion was prejudicial. Where the jury deliberated for six days, reported twice that it was deadlocked and acquitted Celester of shooting Gibbs, neither the exclusion of this evidence nor the prosecutor's exploitation of it was harmless beyond a reasonable doubt. Conkey, 443 Mass. at 70; Harris, 443 Mass. at 732.

The Appeals Court ignored all of this. The interests of justice warrant further appellate review.

III. The judge violated Celester's constitutional right to compulsory process, confrontation, and due process by refusing to grant defense witness Calvin Dyous judicial immunity after he asserted a 5th Amendment privilege in spite of the prosecutor's admission that he intentionally caused Dyous to invoke the privilege for the purpose of distorting the fact-finding process.

A. The judge erred in finding that Calvin Dyous had a valid Fifth Amendment privilege.

The judge's finding that Dyous had exposure for criminal contempt was flawed on both substantive and procedural grounds. First, substantively, Dyous did not intend to "prevent the course of justice" and his actions did not affect "the administration of justice". Furtado v. Furtado, 380 Mass. 137, 141 (1980). Dyous merely failed to respond to Commonwealth's calls for twenty-four hours during jury selection. But he ultimately returned the calls, came to court on the second day of testimony and spoke to Commonwealth agents. Tr.5:5-6.

Second, both the prosecutor and the judge conceded that there was no reasonable likelihood that Dyous's alleged contempt would be prosecuted. The judge conceded that Dyous's Fifth Amendment privilege claim was at most "technical", Tr. 6:173, and "de minimis". Tr.6:179. He even admitted that he had never seen such a violation prosecuted. Tr.7:165 ("do I think he is exposed in some way that I've seen other . . . persons in the past? No."). The prosecutor explicitly agreed with the judge's characterization of the alleged contempt violation as "de minimis", Tr.7:17, and later conceded that his office only pursues contempt charges in extreme situations." Tr.7:148. Therefore, at most, Dyous' testimony would have exposed him to "a mere imaginary, remote and speculative possibility of prosecution." Commonwealth v. Martin, 423 Mass. 496, 502-03 (1996).

B. The judge's refusal to grant the defense request for judicial immunity was reversible error because the prosecutor orchestrated Dyous's unavailability to distort the fact-finding process.

The SJC has long recognized "the possibility that in some unique circumstances ... due process may require the granting by a judge of a limited form of immunity" to a witness so that a defendant may secure his testimony. Commonwealth v. Curtis, 388 Mass. 637, 646 (1983). In Commonwealth v. Vacher, 469 Mass. 425 (2014), the SJC stated that "judicial immunity might be

warranted in circumstances where [the] prosecution attempted to intimidate [the] potential witness or deliberately withheld immunity to hide exculpatory evidence from [the] jury." Id. at 439. See also Commonwealth v. Brewer, 472 Mass. 307, 312 (2015) (judicial immunity might be appropriate "where there exists prosecutorial misconduct arising from the government's deliberate intent to distort the fact-finding process.").

The prosecutor intentionally (1) prevented Dyous from testifying and (2) developed a legal basis to introduce his prior recorded testimony because, as the prosecutor explicitly admitted, he feared Dyous would "change his testimony . . . so that he can help the defendant". Tr. 6:181. This amounted to an intentional "distort[ion] of the fact-finding process" that violated the defendant's constitutional rights to compulsory process, confrontation and due process under the Sixth and Fourteenth Amendments and art. 12.

This Court should grant further appellate review to address the public interest in identifying, for the first time, an instance where defense counsel fully developed a record in support of a claim of judicial immunity based on prosecutorial misconduct.

IV. The prosecutor violated due process when he asserted, contrary to a court order and the evidence, that Gibbs identified Celester as the shooter.

In closing, the prosecutor stated that Gibbs identified Celester as the shooter, despite the fact that the judge had specifically precluded Gibbs from testifying to that fact. Tr.10:54 (Derek Gibbs "told you that it was [Celester], . . . the identity of that shooter is unequivocal"); R.A. 218.

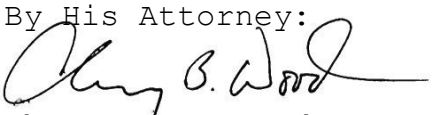
The prosecutor's assertion violated Celester's constitutional right to due process under the Fourteenth Amendment and art. 12. This was the central issue. The interests of justice warrant further appellate review.

CONCLUSION

For the reasons set forth above, the defendant's application for Further Appellate Review should be granted.

Dated: March 11, 2020

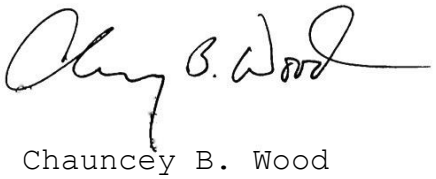
Jermaine Celester,
By His Attorney:



Chauncey B. Wood,
BBO# 600354
Wood & Nathanson, LLP
50 Congress Street,
Suite 600
Boston, MA 02109
Tel. (617) 248-1806
cwood@woodnathanson.com

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service the Commonwealth by sending a pdf of this motion via Tyler e-filing to ADA Mary Nguyen.



Chauncey B. Wood
BBO # 600354
Wood & Nathanson, LLP
50 Congress Street, #600
Boston, MA 02109
(617) 248 - 1806
cwood@woodnathanson.com

Date: March 11, 2020

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-347

COMMONWEALTH

vs.

JERMAINE CELESTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Jermaine Celester, was convicted, following a jury trial in 1995, of murder in the first degree, pursuant to G. L. c. 265, § 1, and armed assault with intent to murder, pursuant to G. L. c. 265, § 18 (b). On appeal, the Supreme Judicial Court remanded to the Superior Court to determine whether a new trial was warranted in view of the defendant's assertion that he was provided ineffective assistance of counsel. Commonwealth v. Celester, 473 Mass. 553 (2016). On remand, a Superior Court judge allowed the motion for a new trial, and following a second jury trial, the defendant was convicted of murder in the second degree.[1] On appeal, the defendant contends that (1) the judge violated his

[1] The jury acquitted him of armed assault with intent to murder pursuant to G. L. c. 265, § 18 (b).

constitutional right to present a third-party culprit defense; (2) the judge erroneously held that a witness, who had testified in the first trial, had a valid privilege under the Fifth Amendment to the United States Constitution; (3) the judge erred in refusing to grant judicial immunity to that same witness; (4) the prosecutor improperly stated in his closing argument that one of the victims identified the defendant as the shooter; and (5) the defendant's mandatory life sentence was disproportionate in view of his age at the time he committed the crime. We affirm.

Background. In February 1994, Wakime Woods[2] was shot, as was his friend, Derek Gibbs. Wakime died of his wounds; Gibbs was paralyzed. Just prior to the shooting, Wakime and Gibbs walked shoulder-to-shoulder with the defendant down the middle of a street in Brockton. Gibbs testified that there were no other persons or cars on the street.[3] Gibbs was in the middle of the group with the defendant to his right and Wakime to his left. Suddenly, the defendant stopped short, leaving Gibbs's peripheral view. As Gibbs turned in the defendant's direction, he was shot in the right side of his face and fell to the ground. He heard more gunshots and Wakime screaming for help.

[2] Because they share a surname, we use the first names of Wakime Woods, Tommy Woods, and J.D. Woods.

[3] Prior to the shooting, Gibbs's father had driven past them.

Marlene Scott, who was sitting in the kitchen of her mother's house near the scene of the shooting, heard the gunshots and looked out the window. She saw a body lying in the street and ran outside to render aid. She did not see any people (other than the two victims) or cars.

The Commonwealth's theory at trial was that the defendant shot Gibbs because, approximately five months earlier, Gibbs (along with Calvin Dyous and Larry Brown) witnessed the shooting of the defendant's close friend, Robert Moses, but the three had been unable (or unwilling) to identify the perpetrator. After Moses's shooting, the defendant repeatedly questioned Gibbs, Dyous, and Brown. The defendant was not satisfied with Gibbs's answers.

Two weeks before Wakime and Gibbs were shot, the defendant (along with two others whom Gibbs could not identify) gathered Gibbs, Brown, and Dyous together to question them again about Moses's murder. The defendant was upset and angry; he insisted that the three witnesses to Moses's murder accompany him to the police station to identify photographs of the murderer. He threatened that if they did not do so, he would shoot them. Brown and Gibbs went with the defendant, but Dyous did not. Gibbs was unable to identify anyone at the police station.

The defendant presented a third-party culprit defense; specifically, he maintained that the gunshots, which killed

Wakime and maimed Gibbs, were delivered by occupants of a vehicle that drove past them. Corrina DeFrancesco, who lived near the site of the shooting, testified that upon hearing gunshots, she looked out the window. Contrary to Scott's and Gibbs's testimony that there were no cars on the street, DeFrancesco testified that she saw a small dark-colored, possibly maroon, car with square headlights and tinted windows on the road. DeFrancesco ran outside to investigate and saw the car fleeing the scene. She further testified that Wakime told her that the shots came from the back passenger's side.

Brockton Police Officer Mark Reardon testified that after receiving a radio message to be on the lookout for the described car, he spotted a Ford Tempo fitting DeFrancesco's description a few blocks away from the shooting. After following the car, Reardon pulled it over. Two males exited the vehicle and fled. A third occupant got out from the backseat, did not flee, and was arrested. DeFrancesco eventually identified the Ford Tempo as the car she had seen fleeing after the shooting. The red Ford Tempo was searched and no ballistics evidence was found.

Discussion. 1. Third-party culprit evidence. As set forth supra, the defendant presented a third-party culprit defense. He contends, however, that the judge erred by not permitting him to present additional evidence regarding the

identities of the occupants of the Ford Tempo,[4] their relationship with the victims,[5] and some discrepancies in statements regarding their whereabouts on the evening of the shooting, which he refers to as "consciousness of guilt" evidence.[6]

"[T]he exclusion of third-party culprit evidence is of constitutional dimension and therefore examined independently." Commonwealth v. Silva-Santiago, 453 Mass. 782, 804 n.26 (2009). However, "[i]n conducting an independent examination whether the evidence of the alleged third-party culprit's prior conduct was

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[4] According to the defendant, the identities of the occupants of the vehicle were (i) Donald Outlar, who was arrested by Reardon, (ii) Tommy, whom Outlar and Reardon identified as the passenger who fled and whom J.D. identified as being in the Ford Tempo on the evening of the shooting, (iii) Shelton Terry, whom Outlar identified as the driver, and (iv) possibly J.D., who was arrested after reportedly running through backyards near the area of the fleeing suspects.

[5] Their relationship with the victims were that (i) Outlar and Terry had seen Gibbs at a barbershop earlier in the day, and Outlar stated that the Ford Tempo, which DeFrancesco placed at the scene of the crime and which was detained by Reardon a few blocks from the shooting, had been one block away from the scene earlier, (ii) Tommy was Wakime's cousin and reported in 2017 (just prior to the second trial) that he disliked Gibbs, and (iii) J.D. was Wakime's brother and stated that Tommy told him that he had gone to the scene of the crime after the shooting to check whether his friend was one of the victims.

[6] These discrepancies include (i) shortly before the second trial, Tommy identified Outlar as the driver and denied Terry was in the vehicle, (ii) Outlar identified Terry as the driver, (iii) Terry denied being in the car when he and Ruby Phillips, the registered owner of the vehicle, came to the police station to claim the car, and (iv) Phillips said she had lent the car to Ty Washington, but later denied the same and instead said she had lent the car to Terry.

too remote in time and too dissimilar, we [do] not . . . displace the judge's customary discretion with regard to the admission of evidence." Commonwealth v. Rosario, 444 Mass. 550, 556-557 (2005). Thus, the Supreme Judicial Court has held that where (as is the case here) the judge does not preclude introduction of evidence that someone else committed the crime or otherwise make any ruling that excluded an entire category of third-party culprit evidence,[7] we review the judge's assessment that the probative value of proffered evidence is outweighed by some countervailing prejudicial effect for an abuse of discretion. Id. at 557.

Especially in view of the third-party culprit evidence that was admitted, see supra, the judge did not abuse his discretion in excluding the additional proffered evidence. See Rosario, 444 Mass. at 557. As is evident from the summary of the proffered evidence set forth in notes 4 to 6, supra, the judge acted well within his discretion in finding that the additional evidence was too speculative and confusing and thus of limited probative value. See Silva-Santiago, 453 Mass. at 801, quoting

[7] This is not a case where the judge prevented the defendant from introducing a third-party culprit defense altogether or excluded an entire category of evidence. Contrast Commonwealth v. Conkey, 443 Mass. 60, 67-70 (2004) (conducting independent review of judge's decision to exclude evidence of victim's landlord's sexual assault of former girlfriend and more recent pattern of predatory, aggressive behavior towards women who spurned his advances).

Commonwealth v. Rice, 441 Mass. 291, 305 (2004) (third-party culprit evidence admissible where not too remote or speculative and will "not tend to prejudice or confuse the jury, and there are other 'substantial connecting links' to the crime"). It was not an abuse of discretion for the judge to conclude, for example, that the identities of the three (or possibly four) occupants were, on balance, more confusing and prejudicial than any marginal value those identities might add to DeFrancesco's and Reardon's testimony regarding the Ford Tempo and Wakime's dying declaration, that their relationships (a brother and a cousin to Wakime) or earlier sightings of Gibbs in a barbershop provided little additional value to the already admitted third-party culprit defense, or that the alleged consciousness of guilt evidence added marginal benefit in light of the evidence that the occupants fled the scene, which was admitted already.

2. Fifth Amendment privilege. The defendant next maintains that the judge erred in finding that Dyous, who had testified at the defendant's first trial, had a valid Fifth Amendment privilege on the basis that his testimony, in particular cross-examination, could expose him to criminal contempt. We review the judge's determination for an abuse of discretion. See Commonwealth v. Pixley, 77 Mass. App. Ct. 624, 628-629 (2010). When determining whether a claim of privilege is justified, "[t]he standards are highly protective of the

constitutionally guaranteed right against self-incrimination." Commonwealth v. Martin, 423 Mass. 496, 502 (1996). A witness may invoke the privilege against self-incrimination and refuse to testify unless it is "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Id., quoting Commonwealth v. Funches, 379 Mass. 283, 289 (1979). In assessing the validity of the assertion of the privilege, a judge takes into account "the real possibility of having to strike [a witness's] direct testimony if [the witness] exercise[s] the privilege on cross-examination, and having to declare a mistrial." Pixley, supra at 628.

The Commonwealth issued a trial subpoena to Dyous (who had been eluding the Commonwealth's attempts to reach him prior to the second trial). On the first day of the second trial, the judge told Dyous "to appear at the appropriate time to testify in this case. It will not be today." The judge stated that he expected that Dyous would be contacted by one of the parties and that it was important to respond and actually come back to court. The judge told Dyous that if he did not, he would be subject to a warrant. Dyous acknowledged the judge's order. Nevertheless, Dyous did not respond when the Commonwealth attempted to reach him. Despite one-half dozen attempts, he was

unreachable either through his mother or at the cellular telephone number he had provided to the Commonwealth specifically for the purpose of complying with the judge's order. The prosecutor reported Dyous's failure to respond to calls, and the judge issued a bench warrant. The prosecutor assembled a fugitive apprehension team to obtain Dyous's presence in court. The next day, Dyous appeared. He was ordered to wear a global positioning system bracelet until he testified. Thereafter, Dyous asked for counsel, was appointed an attorney, and raised a Fifth Amendment privilege. After conducting a hearing pursuant to Martin, 423 Mass. at 502,[8] the judge agreed that the defendant had a valid basis for asserting the privilege.

On this record, the judge did not abuse his discretion in finding that, in particular on cross-examination, Dyous's testimony could lead to self-incrimination. See G. L. c. 233, § 5; Commonwealth v. Delaney, 425 Mass. 587, 596 (1997), cert. denied, 522 U.S. 1058 (1998), quoting Commonwealth v. Brogan, 415 Mass. 169, 171 (1993) (where Commonwealth established "there was a clear, outstanding order of the court, that the defendant knew of that order, and that the defendant clearly and

[8] Because only the Justices of the Appeals Court may examine the contents of the Martin hearing, we discuss the merits to the extent they were revealed in open court. See Pixley, 77 Mass. App. Ct. at 628 n.3, 629.

intentionally disobeyed that order in circumstances in which he was able to obey it," witness can be convicted of criminal contempt). If, for example, Dyous testified as he did in the first trial, the defendant might try to impeach his credibility by eliciting testimony regarding Dyous's failure to abide by the judge's order, thereby exposing Dyous to a potential charge of criminal contempt. If, on the other hand, he testified (as the Commonwealth suggested he might) more helpfully to the defendant than he had in the first trial, the Commonwealth might try to impeach him by eliciting testimony that he had been nonresponsive to the Commonwealth pretrial, that he had been ordered to appear, and that he had failed to respond (at least initially). Such testimony, the judge properly concluded, might lead to a link in the chain towards criminal contempt.

The defendant, nonetheless, maintains that Dyous lacked the required intent for criminal contempt because he did not intend to thwart the administration of justice and received insufficient warnings that his failure to comply with the order would expose him to criminal consequences. However, Dyous's failure to respond (despite numerous attempts to garner his cooperation) in violation of the judge's order to do so could be a basis to infer the requisite intent (even if Dyous changed his mind and ultimately conformed his conduct to the judge's order once the bench warrant issued). See Furtado v. Furtado, 380

Mass. 137, 141 (1980), quoting Blankenburg v. Commonwealth, 260 Mass. 369, 373 (1927) (charge of criminal contempt "is designed wholly to punish an attempt to prevent the course of justice"). Moreover, the judge expressly told Dyous that his failure to respond when called could subject him to a warrant. Contrast Commonwealth v. Carr, 38 Mass. App. Ct. 179, 181 (1995) (contempt improper where "defendants were neither told of the significance of being recognized as a witness nor warned of the consequences of failure to appear"). Because a valid Fifth Amendment privilege exists where there is a possibility of prosecution for criminal contempt even if conviction is unlikely, the judge did not abuse his discretion. See Commonwealth v. Borans, 388 Mass. 453, 459 (1983), quoting Turner v. Fair, 476 F. Supp. 874, 880 (D. Mass. 1979) ("neither a practical unlikelihood of prosecution nor the prosecutor's denial of an intention to prosecute negates an otherwise proper invocation of the Fifth Amendment").

3. Judicial immunity. The defendant contends that the judge should have granted judicial immunity to Dyous on the ground of prosecutorial misconduct. See Commonwealth v. Brewer, 472 Mass. 307, 312 (2015), quoting Commonwealth v. Vacher, 469 Mass. 425, 439 (2014) (leaving open possibility that judge may grant immunity to defense witness where government has engaged in "deliberate intent to distort the fact-finding process").

The judge, however, found no prosecutorial misconduct -- a finding that is not clearly erroneous on the record before us. See Commonwealth v. Valentin, 91 Mass. App. Ct. 515, 522 (2017) (proper denial of immunity where records failed to show prosecutorial misconduct and proffered testimony "relates only to the credibility of the government's witnesses").

4. Prosecutor's closing argument. The defendant argues that the prosecutor's phrase in his closing argument, "but [Gibbs] told you that it was this man," was improper in light of the allowance of the defendant's motion to exclude Gibbs from identifying the defendant as his shooter. We view the prosecutor's remarks in light of the "entire closing argument, the judge's instructions to the jury, and the evidence produced at trial." Commonwealth v. Lyons, 426 Mass. 466, 471 (1998). In the closing, which spanned twenty-seven pages of transcript, the prosecutor reminded the jury multiple times that Gibbs did not complete the turn to see the defendant shoot him. When viewed in context, there was no error. See Commonwealth v. Whitman, 453 Mass. 331, 345 (2009).

5. Life sentence. Finally, the defendant contends his life sentence is unconstitutionally disproportionate because he

was twenty-one years old at the time of the shooting. The argument lacks merit. See Miller v. Alabama, 567 U.S. 460 (2012).

Judgment affirmed.

By the Court (Lemire, Singh & Wendlandt, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: January 30, 2020.

[9] The panelists are listed in order of seniority.