

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

PLYMOUTH COUNTY

SJC No. DAR-_____

APPEALS COURT
No. 2019-P-1128

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

vs.

LEE ASHFORD,
Defendant-Appellant.

DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW OF
THE ORDERS DENYING HIS MOTIONS FOR POST-CONVICTION
RELIEF IN THE PLYMOUTH SUPERIOR COURT

Timothy St. Lawrence
BBO #676899
11 S Angell St #252
Providence RI 02906
401 484 7850
tstlawrence@gmail.com

November 15, 2019

APPLICATION FOR DIRECT APPELLATE REVIEW

Under Mass. R. App. P. 11, the defendant requests direct appellate review of the trial court's order denying his motion for required findings of not guilty and, in the alternative, to vacate an unlawful sentence, in Plymouth Superior Court no. 1083CR00205. As grounds, the defendant states that his appeal raises important issues of first impression that require a final determination by the full Supreme Judicial Court. In support of the application, the defendant submits the accompanying memorandum of law. In addition, the trial court docket entries and the motion judge's memorandum of decision are appended to this application.

Respectfully submitted,
Lee Ashford
By his attorney,

/s/ Tim St. Lawrence

Timothy St. Lawrence
BBO #676899
11 S Angell St #252
Providence RI 02906
401 484 7850
tstlawrence@gmail.com

November 15, 2019

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION

Statement of Prior Proceedings

On April , 2010, a Plymouth County grand jury returned five indictments against the defendant, Lee Ashford, alleging:

- (001) Unlawful Possession of a Firearm, G. L. c. 269, § 10(a);
- (002) Unlawful Possession of Ammunition, G. L. c. 269, §10(h);
- (003) Unlawful Possession of a Loaded Firearm, G. L. c. 269, § 10(n);
- (004) Unlawful Possession of a Firearm by a Person Previously Convicted of Two Violent Crimes or Serious Drug Offenses, G. L. c. 269, § 10G(b); and
- (005) Possession of Cocaine with the Intent to Distribute, G. L. c. 94C, §32A(c).

On March 5, 2012, Judge Richard J. Chin allowed the Commonwealth's motion to dismiss indictment 002 as duplicative of indictment 003. Later that day, a jury trial commenced before Judge Chin. The next day, the jury convicted Mr. Ashford on indictments 001, 003, and 005. Mr. Ashford was then arraigned, tried, and convicted in a jury waived trial before Judge Chin on indictment 004, which charged a sentencing enhancement under G. L. c. 269, § 10G(b). In a consolidated judgment on indictments 001 & 004, Judge Chin sentenced Mr. Ashford to prison for a term of not less than ten years or more than ten years and one day. On indictment 003, Judge Chin sentenced Mr. Ashford to two years probation, to be served from and after the consolidated sentence imposed on indictments 001 &

004. On indictment 005, Judge Chin sentenced Mr. Ashford to prison for not less than two years or more than three years, to be served concurrently with the consolidated sentence imposed on indictments 001 & 004.

Mr. Ashford filed a timely notice of appeal. While his appeal was stayed in the Appeals Court, Mr. Ashford filed a motion for new trial alleging that his trial counsel had been constitutionally ineffective at the plea stage. The Commonwealth filed a written opposition and, after an evidentiary hearing, Judge Chin denied the motion in a written decision. Mr. Ashford filed a timely notice of appeal from the denial of the motion, and his two appeals were consolidated in the Appeals Court. On April 1, 2015, the Appeals Court affirmed the judgments and the denial of the motion for new trial and, on June 10, 2015, the Superior Court received the rescript from the Appeals Court.

On January 28, 2019, Mr. Ashford filed a motion for required findings of not guilty and, in the alternative, to vacate an unlawful sentence. The Commonwealth opposed the motion and, on May 22, 2019, Judge Angel Kelley Brown denied the motion in a written memorandum of decision. On June 3, 2019, Mr. Ashford filed a timely notice of appeal and the case entered in the Appeals Court on July 30, 2019. On November 8, 2019, Mr. Ashford filed his brief and record appendix in the Appeals Court.

Statement of Facts Relevant to the Appeal

At about 9:15 p.m. on February 8, 2010, Massachusetts State Police Trooper Mark Concannon began following a car as it pulled out of a gas station parking lot and then turned around in the opposite direction. Trooper Concannon followed the car for several blocks in a 30-mph zone; when the car's speed increased to 35 mph, Trooper Concannon activated his overhead lights. At that point, the car accelerated to over 40 mph, eventually reaching a speed of close to 50 mph as Trooper Concannon gave chase in his cruiser. Two other troopers, who were in another cruiser, soon joined the chase, which ended when the car stopped in a parking lot at City Hall Plaza in Brockton.

Mr. Ashford got out of the car and ran off. The three troopers ran after him and eventually caught up to him in a parking lot near a loading dock. Mr. Ashford had his hands in his pockets; when the troopers ordered Mr. Ashford to take them out, he walked toward a fenced-in dumpster and "motioned" toward the dumpster. One trooper testified that he saw something come out of Mr. Ashford's hand and go into the dumpster. Trooper Concannon then arrested Mr. Ashford. Later, Brockton Police Detective George Almeida found a bagged substance inside the dumpster. The detective described his discovery as three clear plastic baggies: one had "two plastic twists with off-white rocks in them. In a second clear plastic baggie, there was a larger rock-like substance just by itself. In

the third baggie, there was...fourteen clear plastic twists with off-white rock-like substances in each one.”

In addition, Brockton Police Detective Erik Hilliard found a gun on the backseat of the car that Mr. Ashford was driving; the gun was inside a plastic bag, along with a scale and a bottle of “Very Sexy” cologne. The gun had a magazine inserted into the magazine port; in other words, the magazine was loaded into the gun. Trooper Concannon found four rounds in the magazine inside the gun. John Sylva of the Massachusetts State Police Firearms Identification Section test-fired the gun using one of the rounds that had been in it; he opined that the gun qualified as a firearm under Massachusetts law and that the rounds qualified as ammunition under Massachusetts law. A photograph of the gun was entered in evidence as trial Exhibit 12.

Trooper Concannon took Mr. Ashford to the State Police barracks. On the way there, Trooper Concannon gave Mr. Ashford his Miranda rights. At the State Police barracks, Trooper Erik Telford asked Mr. Ashford what cologne he was wearing, and Mr. Ashford replied, “Very Sexy.” Mr. Ashford admitted that the drugs, and the scale and cologne in the backseat of the car were his, but said that he did not know anything about a gun. Finally, when the trooper asked Mr. Ashford why he fled, Mr. Ashford said it was because of the drugs.

At the jury-waived trial on indictment 004, the Commonwealth sought to prove that Mr. Ashford had been previously convicted of two violent crimes within the meaning of the Massachusetts armed career criminal act (ACCA): armed robbery in Plymouth Superior Court and assault and battery with a dangerous weapon (ABDW) in Norfolk Superior Court. In support of its allegation that Mr. Ashford's conviction of ABDW constituted a "violent crime" for purposes of the ACCA, the Commonwealth entered in evidence, as exhibit 4, a certified copy of the docket sheets and indictments from the Norfolk case.

Issues of Law Raised by the Appeal

1. Whether the Court's holding in *Commonwealth v. Brown*—that G. L. c. 269, § 10(n) requires proof that a defendant knew the firearm at issue was loaded—applies retroactively to cases on collateral review.
2. Whether the defendant's sentence for the crime of unlicensed possession of a firearm, which was enhanced under two separate sentence enhancement statutes, violated the prohibition against imposition of multiple sentencing enhancements for a single underlying offense.
3. Whether the Court's holding in *Commonwealth v. Beal*—that the residual clause of the Massachusetts Armed Career Criminal Act (ACCA) is unconstitutionally vague—applies retroactively to cases on collateral review. If the Court finds that it does, this case presents another important question of law: Whether the crime of reckless assault and battery with a dangerous weapon constitutes a violent crime under the force clause of the ACCA, which requires that the crime has as an element the *use*, attempted use or threatened use of physical force *against* the person of another.

The defendant preserved these issues for the Court's review by raising them in the trial court in his motions for post conviction relief.

Argument

1.

The motion judge erred in concluding that the Court’s holding in *Commonwealth v. Brown*—that G. L. c. 269, § 10(n) required proof that a defendant knew the firearm was loaded—did not apply retroactively to cases on collateral review.

In *Commonwealth v. Brown*, this Court held that G. L. c. 269, § 10(n) required the Commonwealth to “prove that a defendant knew the firearm he or she possessed was loaded.” 479 Mass. 600, 601 (2018). In *Commonwealth v. Paul*, the Appeals Court concluded that, at the very least, the holding in *Brown* applied retroactively to cases pending on direct review: “Although *Brown* was decided after the trial in this case, it has application to this case because the court was interpreting a statute enacted before the conduct of the defendant that is the basis for the charge.” 132 N.E. 544, 548 (2019).

The rationale behind *Paul* also establishes that the holding in *Brown* applies retroactively to cases on collateral review, because *Brown* “did not announce any new legal principles but merely clarified the meaning” of § 10(n). *Commonwealth v. Marley*, 396 Mass. 433, 437 (1985). “Where a decision does not announce new common-law rules or rights but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment.” *In re McIntire*, 458 Mass. 257, 261 (2010). So just as this Court’s holding in *Commonwealth v. Henson*, 394 Mass. 584 (1985)—that G. L. c. 265, § 18(b) required proof of a specific intent to kill—

was “fully retroactive,” *Commonwealth v. Ennis*, 398 Mass. 170, 175 (1986), so too is *Brown*’s holding that G. L. c. 269, § 10(n) required proof of knowledge. In short, *Brown* did not announce a new rule and “an old rule applies both on direct and collateral review...” *Commonwealth v. Melendez-Diaz*, 460 Mass. 238, 243 (2011), quoting *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

Even if *Brown* announced a new rule under retroactivity doctrine, which it did not, it would still apply retroactively on direct and collateral review. This is because, while “a new rule is generally applicable only to cases that are still on direct review,” *Melendez-Diaz*, 460 Mass. at 243, quoting *Whorton*, 549 U.S. at 416, a new rule that is substantive also applies to cases on collateral review. If *Brown* announced a new rule, it no doubt announced a new substantive rule. “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” *Schriro v. Summerlin*, 542 U. S. 348, 353 (2004). “This includes decisions that narrow the scope of a criminal statute by interpreting its terms...” *Id.* at 351–352 (citation omitted). As a result, because *Brown* narrowed the scope of § 10(n) by interpreting its terms, it was a substantive rule under retroactivity doctrine. See *Bousley v. United States*, 523 U.S. 614, 620 (1998) (Court’s decision in *Bailey v. United States*, 516 U. S. 137 (1995), was substantive and therefore fully retroactive, where it interpreted a federal criminal statute and held that the statute did not reach certain conduct).

For all of these reasons, the motion judge erred in concluding that the holding in *Brown* did not apply to cases on collateral review. Moreover, in *Brown*, the Court concluded that “the Commonwealth did not present any evidence from which an inference could be drawn that the defendant was aware that the firearm was loaded” because “it was not possible to discern merely by observation whether the pistol found in the defendant’s vehicle was loaded; the magazine was inserted inside the handle and was not visible.” 479 Mass. at 608. Accord *Commonwealth v. Galarza*, 93 Mass. App. Ct. 740, 748 (2018). Because the facts of *Brown* and *Galarza* cannot be meaningfully distinguished from the facts of this case, the evidence here was insufficient to establish, beyond a reasonable doubt, that Mr. Ashford knew that the firearm at issue was loaded.

2.

The motion judge erred in concluding that the prohibition against imposition of multiple sentencing enhancements for a single underlying offense did not apply in this case.

Mr. Ashford’s sentence for the crime of unlicensed possession of a firearm, G. L. c. 269, §10(a), was enhanced under two separate sentence enhancement statutes: G. L. c. 269, § 10(n) and G. L. c. 269, § 10G(b). “General Laws c. 269, § 10(n) provides a sentencing enhancement to the crime of unlicensed possession of a firearm where an unlicensed firearm was loaded. It does not create a stand-alone offense; in order to be convicted under G. L. c. 269, § 10(n), an individual must first have been convicted under G. L. c. 269, § 10 (a) or (c).” *Brown*, 479

Mass. at 604. General Laws c. 269, § 10G(b) likewise is not a stand-alone crime, but “a sentencing enhancement[] for offenders who, having been previously convicted of two violent crimes...commit certain firearms offenses, including those prohibited by § 10(a)...” *Commonwealth v. Sylvia*, 89 Mass. App. Ct. 279, 288 (2016). As a result, § 10(n) and § 10G(b) “are separate sentencing enhancements for the same underlying crime of unlawful possession of a firearm, in violation of § 10(a).” *Commonwealth v. Richardson*, 469 Mass. 248, 252 (2014).

Whether a defendant may be sentenced under separate sentencing enhancements for the same underlying crime is a question of statutory interpretation, see *Richardson*, 469 Mass. at 252-54, which is reviewed de novo. *Commonwealth v. Wassilie*, 482 Mass. 562, 565 (2019). In *Richardson*, the Court “conclude[d] that, unless the Legislature has explicitly declared its intent to permit multiple sentencing enhancements, a defendant may be sentenced under only one sentencing enhancement statute.” *Id.* at 249. Because “neither of the enhancement provisions at issue in this case contains a clear statement of legislative intent regarding the imposition of multiple sentencing

enhancements,”¹ the defendant may only be sentenced pursuant to one of the enhancement statutes.” *Id.* at 254. “Where a defendant has been sentenced on duplicative convictions, one of them must be vacated.” *Commonwealth v. Rivas*, 466 Mass. 184, 188 (2013). The determination as to which conviction to vacate lies within the sound discretion of the sentencing judge. *Id.* at 190. As a result, the Court should remand to the trial court to vacate and dismiss the conviction on either indictment 003 or indictment 004.

3.

The evidence, viewed in the light most favorable to the Commonwealth, failed to establish, beyond a reasonable doubt, that Mr. Ashford previously had been convicted of two violent crimes.

Under the Massachusetts armed career criminal act (ACCA), which imposes an enhanced sentence on a person convicted of possession of a firearm if that person previously has been convicted of a violent crime or a serious drug offense, *Commonwealth v. Beal*, 474 Mass. 341, 349 (2016), the Commonwealth

¹ General Laws c. 269, § 10(n) reads: “Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2 1/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).”

General Laws c. 269, § 10G(b) reads: “Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.”

alleged that Mr. Ashford had been previously convicted of two violent crimes: armed robbery and assault and battery with a dangerous weapon. G. L. c. 269, § 10G(b).

“To constitute a violent crime under the ACCA, the crime must fall within the scope of either (1) the force clause; (2) the enumerated crimes provision; or (3) the residual clause.” *Beal*, 474 Mass. at 349. In *Beal*, this Court held that “the residual clause of the Massachusetts ACCA is unconstitutionally vague.” *Id.* at 351. The Court’s holding in *Beal* should apply retroactively to cases on collateral review. See *Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016) (Court’s decision invalidating the residual clause of the Federal ACCA as unconstitutionally vague applies retroactively to cases on collateral review). In addition, assault and battery with a dangerous weapon does not fall within the scope of the enumerated crimes provision because it is not “burglary, extortion, arson or kidnapping.” G. L. c. 140, § 121. As a result, the Commonwealth was required to prove that Mr. Ashford’s conviction of assault and battery with a dangerous weapon constituted a violent crime “under the force clause, which requires that the crime has as an element the use, attempted use or threatened use of physical force.” *Beal* at 351.

General Laws c. 265, § 15A(b), which prohibits assault and battery with a dangerous weapon (ABDW), is “a broad statute that encompasses multiple

crimes,” *Beal* at 351, i.e., Intentional ABDW and Reckless ABDW. See *Commonwealth v. Burno*, 396 Mass. 622, 625 (1986) (“An assault and battery is the intentional and unjustified use of force upon the person of another, however slight, or the intentional commission of a wanton or reckless act (something more than gross negligence) causing physical or bodily injury to another.”) (citations and quotations omitted).

Where, as here, a defendant is “convicted under a broad statute that encompasses multiple crimes,” courts apply the “modified categorical approach” to determine whether the conviction constitutes a “violent crime” under the ACCA. *Beal* at 351, citing *Commonwealth v. Eberhart*, 461 Mass. 809, 816 (2012). “Under the modified categorical approach, a certified record of conviction referencing a particular statute may prove that the defendant committed a violent crime only when all crimes encompassed within that statute are violent crimes.” *Eberhart* at 817.

Because not all crimes encompassed within the ABDW statute are violent crimes, Mr. Ashford’s certified record of conviction of ABDW did not suffice to prove that he committed a violent crime. Indeed, Reckless ABDW is not a “violent crime” for purposes of the Massachusetts ACCA because the force clause’s “use of physical force...against the person of another” language establishes that it only reaches offenses requiring the intentional use of force;

recent decisions from the First Circuit Court of Appeals and the Ninth Circuit Court of Appeals support this conclusion. See *United States v. Kennedy*, 881 F.3d 14, 19 (1st Cir. 2018), citing *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (per curiam) (adopting the analysis in *Bennett v. United States*, 868 F.3d 1 (1st Cir. 2018) (Massachusetts Reckless ABDW is not a “violent crime” under the force clause of the Federal ACCA because the force clause only reaches offenses requiring the intentional use of force); *United States v. Parnell*, 818 F.3d 974, n.5 (9th Cir. 2016) (same). To the extent that this Court stated that reckless battery is indeed a “violent crime” under the force clause of the ACCA, see *Eberhart* at 818-19 & n.14, that statement was incorrect and, in any event, it was dictum: it “was unnecessary in [that] decision and [] passed upon an issue not really presented.” *Commonwealth v. Rahim*, 441 Mass. 273, 284-85 (2004) (defining dictum). Indeed, “[w]hen a court decides an issue that has not been argued by any party, it makes its decision without the benefit of the vigorous advocacy on which the adversary process relies.” *Id.* at 284.

In sum, because ABDW is not categorically a “violent crime” for purposes of the Massachusetts ACCA, a certified copy of Mr. Ashford’s conviction of that crime was insufficient to prove, beyond a reasonable doubt, that he committed a “violent crime” within the meaning of the ACCA. *Beal* at 352.

Reasons Why Direct Appellate Review is Appropriate

This case presents several important issues of first impression, including the retroactivity of this Court’s holdings in *Commonwealth v. Brown*, 479 Mass. 600 (2018), and *Commonwealth v. Beal*, 474 Mass. 341 (2016); the scope of this Court’s holding in *Commonwealth v. Richardson*, 469 Mass. 248 (2014); and the scope of the ACCA’s force clause, that is, whether the force clause’s “*use of physical force...against the person of another*” language establishes that it only reaches offenses requiring the intentional use of force. G. L. c. 140, § 121 (emphasis added).

For these reasons and for those reasons stated in the Argument section above, Mr. Ashford respectfully requests that the Court allow his application for direct appellate review.

Respectfully submitted,
Lee Ashford
By his attorney,

/s/ Tim St. Lawrence

Timothy St. Lawrence
BBO #676899
11 S Angell St #252
Providence RI 02906
401 484 7850
tstlawrence@gmail.com

November 15, 2019

1083CR00205 Commonwealth vs. Ashford, Lee

- Case Type
- Indictment
- Case Status
- Open
- File Date
- 04/09/2010
- DCM Track:
- A - Standard
- Initiating Action:
- FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)
- Status Date:
- 04/09/2010
- Case Judge:
-
- Next Event:
-

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

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/09/2010	Indictment returned	1	Image
04/30/2010	Deft arraigned before Court		
04/30/2010	Appearance of Commonwealth's Atty: Matthew W Green	2	
04/30/2010	Appearance of Deft's Atty: Kenneth J Elias	3.1	
04/30/2010	Notice of assignment of counsel	3	
04/30/2010	RE Offense 1:Plea of not guilty		
04/30/2010	RE Offense 2:Plea of not guilty		
04/30/2010	RE Offense 3:Plea of not guilty		
04/30/2010	RE Offense 5:Plea of not guilty		
04/30/2010	Defendant ordered to recognize in the sum of \$100,000.00 cash without prejudice (Locke,J.)		
04/30/2010	Bail warning read		
04/30/2010	Special mittimus on indictment issued	4	
04/30/2010	Assigned to Track "A", see scheduling order		
04/30/2010	Tracking deadlines Active since return date		
04/30/2010	Case scheduling order pursuant to Standing Order 2-86 Amended	5	
04/30/2010	Notice of unpaid counsel fees sent to Dept of Revenue and Registry of MV	6	
04/30/2010	Case continued to May 19,2010 for pre-trial conference (Locke,J.) R.Griffin court reporter		
04/30/2010	Tracking deadlines Active since return date		
05/13/2010	Mittimus returned with service	7	
05/19/2010	Pre-trial conference report filed	8	
05/19/2010	Case continued to June 30,2010 for motion(J.Walsh ac/m) R.Griffin court reporter		
06/30/2010	Case continued by agreement to July 27, 2010 for motion to suppress (Locke, J.) C. Johnson, court reporter		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
07/12/2010	Habeas corpus for Deft at Cedar Junction MCI (Walpole) to appear July 27,2010 @ Brockton	9	
07/21/2010	Defendant's MOTION to suppress	10	
07/27/2010	Case continued by agreement to August 25, 2010 for motion to suppress (Walker, J.) R. Griffin, court reporter		
08/04/2010	Defendant's MOTION to dismiss(McCarthy)	11	
08/19/2010	Habeas corpus for Deft at Cedar Junction MCI (Walpole) to appear August 25,2010 @ Brockton	12	
08/25/2010	Case continued at request of Commonwealth to October 7, 2010 for motion to suppress (Wqalker, J.) R. Griffin, court reporter		
10/01/2010	Habeas corpus for Deft at Cedar Junction MCI (Walpole) to appear October 7,2010 @ Brockton	13	
10/07/2010	Case continued to November 4,2010 for hearing re: bail (Roach,J.) C.Johnson court reporter		
10/07/2010	Commonwealth's MOTION to amend indictment	13.1	
10/25/2010	Habeas corpus for Deft at Cedar Junction MCI (Walpole) to appear November 4,2010 @ Brockton	14	
11/04/2010	MOTION#13.1 Comm's motion to amend indictment; Motion Allowed following hearing the court seeing no prejudice to the defendant([Roach,J.]). Copies mailed December 7,2010		
11/04/2010	MOTION#11 Deft's motion to dismiss (McCarthy); Following hearing motion Denied the mistaken date is not a substantive error impacting the level of evidence heard by the grand jury which was suffiecent ([Roach,J.]). Copies mailed December 7,2010		
11/04/2010	Commonwealth files opposition to the defendant's motion to suppress evidence	14.1	
11/04/2010	Hearing on Motion#10 def't's motion to suppress held, matter taken under advisement ([Roach,J.])		
11/04/2010	Case continued to December 2,2010 for status (Roach,J.) R.Griffin court reporter		
11/08/2010	Commonwealth's MOTION to re-open evidence on the defendant's motion to suppress	15	
11/09/2010	Commonwealth files supplemental memo of law in opposition to defendant's motion to suppress evidence	16	
11/17/2010	Case continued by agreement to December 2, 2010 for status (Roach, J.) R. Griffin, court reporter		
12/06/2010	MOTION#10 Deft's motion to suppress; Following evidentiary hearing motion Denied please see attached endoresement([Roach,J.]). Copies mailed December 7,2010		
12/06/2010	MOTION#15 Comm's motion to re-open evidence on the defendant's motion to suppress; Motion Denied as moot ([Roach,J.]). Copies mailed December 7,2010		
01/20/2011	Case continued to February 9, 2011 by agreement for status (Locke,J.) R. Griffin, court reporter		
02/09/2011	Case continued to March 14, 2011 by agreement for hearing (Locke,J.) R. Griffin, court reporter		
03/02/2011	Habeas corpus for Deft at Souza-Baranowski Correctional Center to appear March 14,2011 @ Brockton	17	
03/14/2011	Case continued to April 8,2011 by agreement for trial assignment (Locke,J) R. Griffin, court reporter		
03/15/2011	Notice sent to appear for Trial Assignment on 4/8/2011	18	
04/08/2011	Notice of Trial assignment to 3rd session (Hopkins,J)	19	
04/13/2011	Notice sent to appear for Final Pre Trial Conference on 6/14/2011	20	
04/13/2011	Notice sent to counsel of June 20,2011 Trial date	21	
05/05/2011	MOTION by Deft: from transcripts	22	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/06/2011	MOTION#22 Deft's motion for transcripts; The motion is hereby Allowed (Giles,J.]). Copies mailed May 6,2011		
06/09/2011	Appearance of Commonwealth's Atty: Michael Sheehan	23	
06/09/2011	MOTION by Commonwealth: to continue	24	
06/09/2011	Case continued to August 30, 3011 for final pre trial and September 12, 2011 for trial		
06/13/2011	Habeas corpus for Deft at Souza-Baranowski Correctional Center to appear June 14, 2011 at 9:00 AM in Brockton	25	
08/22/2011	Appearance of Deft's Atty: Richard C Chambers Jr	26	
08/29/2011	Habeas corpus for Deft at Souza-Baranowski Correctional Center to appear August 30,2011 @ Brockton	26.1	
08/30/2011	Filed: Joint Pre-Trial Memorandum	27	
09/12/2011	Commonwealth's motion in limine to admit testimony of chemist Kenneth Gagnon as a substitute chemist as to weight and composition of controlled substance	28	
09/12/2011	MOTION by Deft: in limine to exclude certificate of analysis	29	
09/12/2011	MOTION by Deft: for voir dire on miranda compliance prior to any statements being admitted	30	
09/12/2011	MOTION by Deft: in limine to exclude all prior convictions and evidence of prior bad acts	31	
09/12/2011	Defendant's motion in limine : statements of the defendant	32	
09/12/2011	Case contineud to September 21, 2011 for hearing on motions and to reschedule the trial date (due to the 3rd session being engaged in the matter of Comm vs L. Bynum-Harris, #07-00593) (Dortch-Okara,J)		
09/21/2011	Defendant brought into Court		
09/21/2011	MOTION (P#28) to admit testimony of chemist Kenneth Gagnon as a substitute chemist as to weight and composition of controlled substance, allowed (Barbara A. Dortch-Okara,Justice).		
09/21/2011	MOTION (P#29) in limine to exclude certificate of analysis, after hearing denied (Barbara A. Dortch-Okara,Justice).		
09/21/2011	Filed: Amended Joint Pre-Trial Memorandum	33	
09/21/2011	Case continued to October 27, 2011 for trial (Dortch-Okara,J.) N. Gagnon, court reporter		
10/27/2011	Commonwealth's MOTION to continue; Filed and Allowed by agreement of counsel trial continued to December 14,2011 in third criminal session (Hely,J.) copies mailed October 27,2011	34	
10/27/2011	Notice sent to counsel of trial scheduled for December 14,2011 third criminal session	35	
10/27/2011	Case continued to December 14,2011 by agreement for trial third criminal session (Hely,J.) J. Russo court reporter		
10/27/2011	Defendant brought into court		
10/27/2011	After hearing case sent to fourth criminal for possible trial on October 31,2011 counsel to report back to third session if case cannot go in fourth session		
10/27/2011	Case unable to go foward in fourth session case continued to December 14,2011 for trial by agreement of counsel parties to agree on final pre-trial hearing date (Troy,J.) N. Gagnon court reporter		
12/14/2011	After review by the clerk session unavailble trial continued to March 6,2012 by agreement for trial (Leo P. Foley Asst. Clerk)		
12/15/2011	Notice sent to counsel about trial scheduled for March 6,2012 third criminal session	36	
01/30/2012	ORDER to counsel of conference advance to 2/9/12 in the 3rd crimina session sent 1/30/12	37	
02/09/2012	Conference continued to February 10,2012 (Ball,J) N. Gagnon, court reporter		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
02/10/2012	Defendant brought into court		
02/10/2012	Defendant declines dispositional conference, continued per order of Court to March 1, 2012 for final pre trial conference and motions and March 5, 2012 for trial (Ball, J.) N. Gagnon, court reporter		
02/10/2012	Notice sent to appear on March 1, 2012 for final pre trial conference and motions at 9:00 AM in Brockton	38	
02/10/2012	Notice sent to appear on March 5, 2012 for trial at 9:00 Am in Brockton	39	
02/22/2012	Commonwealths motion to amend complaint	40	
03/05/2012	Appearance of Commonwealth's Atty: Eric Drury	41	
03/05/2012	Defendant brought into court for trial before Judge Chin		
03/05/2012	Request of commonwealth to dismiss offense 002; Allowed (Chin,J.)		
03/05/2012	RE Offense 2:Dismissed		
03/05/2012	Defendant's oral motion for witness sequestration; Allowed (Chin,J.)		
03/05/2012	MOTION#40 Comm's motion to amend the indictment; Motion Allowed ([Chin,J.).		
03/05/2012	Jury of 14 members impanlled and sworn in	42	
03/05/2012	Defendant's MOTION for a required finding of not guilty (after the commonwealth's opening statement); Filed and motion is Denied(Chin,J.)	43	
03/05/2012	Commonwealth rests		
03/05/2012	Defendant's MOTION for a required findings of not guilty at the close of the commonwealth's case; Filed and motion is Denied (Chin,J.)	44	
03/05/2012	Case continued to March 6,2012 for continuance of trial (Chin,J.) B.St.Charles court reporter		
03/06/2012	Defendant brought into court for continuance of trial before Judge Chin		
03/06/2012	Defense rests		
03/06/2012	Defendant's MOTION for required finding of not guilty (at the close of all evidence); File and Denied (Chin,J.)	45	
03/06/2012	Jury reduced to 12 members		
03/06/2012	RE Offense 1:Guilty verdict	46	
03/06/2012	RE Offense 3:Guilty verdict	47	
03/06/2012	RE Offense 5:Guilty verdict	48	
03/06/2012	RE Offense 4:Plea of not guilty		
03/06/2012	Defendant waived trial by jury after colloquy with Chin, J	49	
03/06/2012	RE Offense 4:Guilty finding		
03/06/2012	RE:Offenses 001/004 Consolidated JudgementDefendant sentenced 10 years to 10 years and 1 day MCI Cedar Junction (438 days credit) (Chin,J.) B.St.Charles court reporter		
03/06/2012	RE:Offense 005 Defendant sentenced to 2 yrs to 3 years MCI Cedar Junction(1yr man)(438 days credit) to be served concurrent with sentence imposed on 10-00205-001/004 (Chin,J.) B.St.Charles court reporter		
03/06/2012	RE:Offense 003 2 years probation from and after sentence presently imposed Conditions of probation: 1.Notified to provide DNA testing 2. \$90.00 victim witness fee imposed 3.\$65.00 per month probation supervision fee imposed(Chin,J.)B.St.Charles court reporter		
03/06/2012	Notified of right of appeal under Rule 64		
03/06/2012	Clerk's written statement under Superior Court Rule 65	50	
03/06/2012	Abstract sent to RMV	51	
03/06/2012	RE:Offenses 001/004 Consolidated Judgement warrant for commitment issued	52	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/06/2012	RE:Offense 005 Warrant for commitment issued	53	
03/06/2012	Commonwealth files notice of intent to seek forfeiture; Filed and Allowed (Chin,J.) copies mailed March 9,2012	54	
03/06/2012	Defendant's MOTION to set aside the jury verdict and for a new trial; Filed and Denied (Chin,J.) copies mailed March 9,2012	55	
03/06/2012	Attorney Richard Chambpers Jr's MOTION to withdraw as counsel of record for deft Lee Ashford; Filed and Allowed (Chin,J.) copies mailed March 9,2012	56	
03/06/2012	Defendant's MOTION for to appoint appellate counsel; Filed and no action pending probation interview(Chin,J.) copies mailed March 9,2012	57	
03/06/2012	NOTICE of APPEAL FILED by deft	58	
03/07/2012	Exhibits returned to State Police except for exhibits #1,2,3,9,11 and 12 and ID B	59	
03/09/2012	RE: Offenses 001/004 Consolidated Judgement Corrected warrant for commitment issued	60	
03/09/2012	Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed by Lee Ashford	60.5	
03/12/2012	Notice to Justice, DA and defense counsel of defendant's notice of appeal	61	
03/12/2012	Court Reporter Griffin, Regina M. is hereby notified to prepare one copy of the transcript of the evidence of 11/04/2010	62	
03/12/2012	Court Reporter St. Charles, Barbara is hereby notified to prepare one copy of the transcript of the evidence of 03/05/2012 & 3/6/12	63	
03/13/2012	Letter transmitted to the Appellate Division. All parties notified 3/13/2012	64	
03/26/2012	Transcript of testimony received 2 volumes from Transcript of proceedings from Court Reporter St. Charles, Barbara		
04/02/2012	Transcript of testimony received 1 volumes from Transcript of proceedings from Court Reporter Griffin, Regina M.		
04/12/2012	Two (2) certified copies of docket entries, original and copy of transcript, two (2) copies of exhibit list and list of documents, and copy of the notice of appeal, each transmitted to clerk of appellate court.	65	
04/12/2012	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.	66	
04/24/2012	Notice of Entry of appeal received from the Appeals Court	67	
05/08/2012	Habeas corpus for Deft at Cedar Junction MCI (Walpole) to appear May 16,2012 @ Brockton	68	
05/16/2012	After intake the court deems the defendant indigent		
05/16/2012	Notice of assignment of counsel	69	
06/22/2012	Appearance of Deft's Atty: Scott A Katz	70	
06/26/2012	Clerk's certificate that defense counsel has received copy of transcript; mailed to counsel at his request	71	
07/02/2012	Defendant's MOTION for production of additional transcript for appeal	72	
07/06/2012	Notice to Justice Chin, DA and Defense Counsel about deft's motion for production of additional transcript for appeal	73	
07/11/2012	Defendant's MOTION for production of additional transcript for appeal : allowed (Chin,J)		
07/16/2012	Court Reporter Gagnon, Nicole is hereby notified to prepare one copy of the transcript of the evidence of 09/21/2011	74	
08/20/2012	Transcript of testimony received 1 volumes from Transcript of proceedings from Court Reporter Gagnon, Nicole		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/29/2012	ORDER Appeals Court RE: #7 Appellate proceedings stayed to 12/21/12. Appellant is granted leave to file and the trial court to rule on a motion for new trial. Status report to be filed on or before that date as represented whether thw Commonwealth has filed an opposition and any othe raction in the trial court ent: 10/25/12	75	
04/08/2013	Deft's MOTION for New Trial (to Judge Chin)	76	
04/10/2013	Defendant's motion for a new trial; Commonwealth has 60 days to respond (Chin,J)		
06/06/2013	Commonwealth files memorandum in opposition to defendant's motions for post conviction relief (given to Judge Chin)	77	
06/10/2013	Re 001/002 & 005: ORDERED: that the judgements imposing said sentence sentences stand and that said appeal be and is hereby dismissed ent: 5/9/13	78	
06/19/2013	Notice to counsel of status hearing scheduled for Thursday June 27, 2013 in the 2nd criminal session before the Honorable Richard Chin	79	
06/26/2013	Habeas corpus for Deft at Souza-Baranowski Correctional Center to appear June 27,2013 @ Brockton	80	
06/27/2013	After hearing counsel to contact clerk to scheduled further hearing in Plymouth (Chin,J) B. St. Charles court reporter		
08/09/2013	Notice to counsel of hearing scheduled for September 4, 2013 at 10; 00 AM before Justice Chin in the Civil "B" Session at Plymouth	81	
08/27/2013	Habeas corpus for Deft at Souza-Baranowski Correctional Center to appear September 4,2013 @ Plymouth	82	
09/04/2013	Hearing on Defendant's motion for new trial (Paper 76), taken under advisement (Chin,J)	83	
09/09/2013	Defendant's MOTION for production of transcript(faxed to Judge Chin in Plymouth)	84	
09/25/2013	ORDER (APPEALS COURT) RE#13: Appellate proceedings STAYED to October 18,2013. Status report due then concerning trial court's disposition of pending motion for new trial ent: September 18,2013	85	
10/17/2013	Defendant's MOTION for funds for transcripts (faxed J Chin in Plymouth)	86	
10/18/2013	Defendant's MOTION for funds for transcripts ; Allowed (Chin,J)		
10/21/2013	ORDER(Appeals Court)RE #14: Appellate proceedings stayed to 11/18/13. status report due 11/18/2013 as to the disposition of the motion for a new trial, which is under advisement in teh trial court ent: 10/17/13	87	
11/12/2013	MOTION#76 Deft's motion for new trial; Denied(see finding of fact and rulings of law) ([Chin,J]). Copies mailed November 12,2013		
11/12/2013	FINDINGS of FACT RULINGS of LAW: on deft's motion for new trial([Chin,J])copies mailed November 12,201	88	
11/19/2013	NOTICE of APPEAL FILED by Lee Ashford from the denial of motion for new trial	89	
11/22/2013	NOtice of Docke Entry Appeals Court: As the trial court's denial of his mo. for new trial has entered on the trial court docket, his notice of appeal is to be filed forthwith. Stats report due 12/13/13 stating that the notice of appeal has been filed ent. 11/20/13	90	
11/22/2013	Transcript (1 CD) rec'd. from N. Gagon		
12/09/2013	Court Reporter McDonald, Ann Marie is hereby notified to prepare one copy of the transcript of the evidence of 09/04/2013	91	
12/19/2013	ORDER (APPEALS COURT)RE:#16 Appellate proceedings further stayed to January 14,2014. The defendant's appeal from the denial of his new trial motion is hereby consolidated with the pending appeal. Status report to be filed on or before January 14,2014 regarding production of the transcripts of the new trial hearing. Upon completion and filing of transcripts, the trial court is to transmit forthwith the transcripts and update docket sheets, under docket no.12-P-666 at which time the stay will be vacated and briefing schedule set forthe consolidated appeal ent: December 16,2013	92	
01/13/2014	Statement of the case on Appeal (Cover Sheet)	93	

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/13/2014	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.	94	
01/13/2014	Trans. 2 CD's mailed to defense counsel and DA		
02/06/2014	Transcript 2 CD's and 2 sets of attested docket entries mailed to Appeals for Case No. . 12-P-666		
06/10/2015	Rescript received from Appeals Court; judgment AFFIRMED Order denying motion for for a new trial affirmed ent: 4/1/15	95	
01/28/2019	Attorney appearance On this date Timothy St. Lawrence, Esq. added for Defendant Lee Ashford	96	
01/28/2019	Defendant 's Motion for required findings of not guilty and, in the alternative, to vacate an unlawful sentence; memorandum in support (given to Chin, J.)	97	
01/29/2019	Endorsement on Motion for requiring finding of not guilty and, in the Alternative, to Vacate an Unlawful Sentence, (#97.0): Other action taken Commonwealth shall have 60 days to respond, up to and including April 1, 2019, (Chin, J.). Judge: Chin, Hon. Richard J		
03/29/2019	Commonwealth's Memorandum in opposition to the defendant's motion for required findings of not guilty	98	
05/22/2019	MEMORANDUM & ORDER: on motion for required findings of not guilty and in the alternative to vacate an unlawful sentence; For the foregoing reasons, it is hereby ORDERED that defendant's motion for required findings of not guilty and in the alternative to vacate and unlawful sentence be DENIED (Kelley,J) Judge: Kelley, Hon. Angel	99	Image
06/03/2019	Notice of appeal filed. Applies To: Ashford, Lee (Defendant)	100	Image
06/11/2019	Notice sent to DA and defense counsel regarding notice of appeal that was filed by the defendant	101	
07/26/2019	General correspondence regarding letter from Atty Timothy St Lawrence that he will not be ordering transcripts for the appeal in this case so please assemble and send to Appeals Court	102	Image
07/26/2019	Docket Note: Case Sent To Plymouth RE: Appeal		
07/30/2019	Appeal: Statement of the Case on Appeal (Cover Sheet).	103	
07/30/2019	Notice to Clerk of the Appeals Court of Assembly of Record	104	
07/30/2019	Notice of assembly of record sent to Counsel	105	
08/02/2019	Appeal entered in Appeals Court on 07/30/2019 docket number 2019-P-1128	106	Image

COMMONWEALTH OF MASSACHUSETTS**PLYMOUTH, ss.****SUPERIOR COURT
PLCR2010-00205****COMMONWEALTH****vs.****LEE ASHFORD****MEMORANDUM OF DECISION AND ORDER ON MOTION FOR
REQUIRED FINDINGS OF NOT GUILTY AND, IN THE ALTERNATIVE,
TO VACATE AN UNLAWFUL SENTENCE**

On March 6, 2012, Lee Ashford was convicted of unlawful possession of a firearm, unlawful possession of a loaded firearm, and possession of cocaine with intent to distribute. This Court (Chin, J.) then found him guilty of unlawful possession of a firearm as an armed career criminal. For the reasons discussed below, Ashford's Motion For Required Findings of Not Guilty and, in the Alternative, to Vacate an Unlawful Sentence is **DENIED**.

BACKGROUND

In April of 2010, Ashford was indicted on Count 1, unlawful possession of a firearm in violation of G.L. c. 269, § 10(a); Count 2, unlawful possession of ammunition in violation of G.L. c. 269, § 10(h); Count 3, unlawful possession of a loaded firearm in violation of G.L. c. 269, § 10(n); Count 4, unlawful possession of a firearm by a person previously convicted of two violent crimes or serious drug offenses in violation of G.L. c. 269, § 10G(b); and Count 5, possession of cocaine with intent to distribute in violation of G.L. c. 94C, § 32A(c). Prior to trial, the Commonwealth dismissed Count 2 as duplicative of Count 3.

The jury heard the following evidence. On February 8, 2010, State Police Trooper Mark Concannon began following a car for several blocks as it pulled out of a gas station parking lot in Brockton and turned around in the opposite direction. The speed limit was 30 m.p.h. Concannon activated his blue lights when the car's speed increased to 35 m.p.h. The car accelerated to 40 m.p.h., reaching a speed of 50 m.p.h. as Concannon gave chase. Two troopers in a second cruiser joined the pursuit, which ended when the car stopped in a parking lot in City Hall Plaza.

Ashford exited the car and fled. The troopers caught up to him in a parking lot near a loading dock. When ordered to remove his hands from his pockets, Ashford walked toward a fenced-in dumpster and motioned toward it. A trooper saw an object come out of Ashford's hand and land in the dumpster. Trooper Concannon arrested Ashford. Brockton Police Detective George Almeida found three clear plastic bags in the dumpster. One bag contained two twists with off-white rocks. The second bag contained a larger rock-like substance. The third bag contained fourteen clear plastic twists of an off-white rock-like substance.

Brockton Police Detective Erik Hilliard found a plastic bag on the backseat of the car that Ashford was driving. The bag contained a gun, a scale, and a bottle of Very Sexy cologne. The gun had a magazine loaded into the magazine port. Trooper Concannon found four rounds inside the magazine. The State Police test-fired the gun using one of the rounds in it and opined that it qualified as a firearm and the bullets qualified as ammunition under Massachusetts law. A photograph of the gun was entered into evidence as trial Exhibit 12.

Trooper Concannon brought Ashford to the State Police barracks and read him the *Miranda* rights. Trooper Erik Telford asked Ashford what cologne he was wearing and Ashford replied, "Very Sexy." Ashford admitted that the drugs, scale and cologne were his but insisted

he did not know anything about a gun. When asked why he fled from police, Ashford stated it was because of the drugs.

On March 6, 2012, the jury convicted Ashford of Counts 1, 3 and 5. This Court (Chin, J.) then conducted a jury-waived trial on the Count 4 Armed Career Criminal Act (“ACCA”) sentencing enhancement. The Commonwealth introduced certified copies of the docket sheets and indictments from Ashford’s conviction of ABDW in Norfolk Superior Court and his conviction of armed robbery in Plymouth Superior Court. This Court found Ashford guilty under the ACCA with two predicate offenses. The Court sentenced Ashford in a consolidated judgment on Counts 1 and 4 to a prison term of ten years to ten years and one day, with two to three years on Count 5 to be served concurrently, and two years of probation on Count 3 to be served from and after.

Ashford filed a new trial motion claiming ineffective assistance of counsel which this Court (Chin, J.) denied on November 12, 2013. The Appeals Court affirmed his conviction and the denial of his new trial motion on April 1, 2015. See Commonwealth v. Ashford, 2015 WL 1443150 (Mass. App. Ct. Rule 1:28), rev. den., 471 Mass. 1107 (2015) (rejecting claims of insufficient evidence of identity to support ACCA enhancement, error in admission of chemist’s testimony, inadequacy of jury waiver, and ineffective assistance with respect to plea offer).

DISCUSSION

Ashford seeks a required finding of not guilty on Count 3, which charged him with unlawful possession of a loaded firearm in violation of G.L. c. 269, § 10(n). He contends that the Commonwealth failed to prove beyond a reasonable doubt that he knew the firearm in his car

was loaded. See Commonwealth v. Brown, 479 Mass. 600, 608 (2018) (to convict under G.L. c. 269, § 10(n), Commonwealth must prove defendant's knowledge that firearm was loaded).

The Commonwealth argues that Ashford waived this claim by failing to raise it at trial or in his new trial motion and appeal. See Rodwell v. Commonwealth, 432 Mass. 1016, 1018 (2000) (claim that is known and available at time of direct appeal or prior motion for post-conviction relief is waived if not brought at earliest opportunity). A waived claim is reviewed only to determine whether there was a substantial risk of a miscarriage of justice. Commonwealth v. LaChance, 469 Mass. 854, 858 (2014), cert. den., 136 S.Ct. 817 (2015); Commonwealth v. Fay, 467 Mass. 574, 583 n.9, cert. den., 135 S.Ct. 150 (2014). A conviction based on legally insufficient evidence is inherently serious enough to create a substantial risk of a miscarriage of justice, and the court reviews it even if the defendant failed to move for a required finding of not guilty or otherwise waives it. Commonwealth v. Garrett, 473 Mass. 257, 259 (2015); Commonwealth v. Cullity, 470 Mass. 1022, 1022 n.2 (2015); Commonwealth v. Galarza, 93 Mass. App. Ct. 740, 747, rev. den., 480 Mass. 1110 (2018). Accordingly, this Court is not persuaded that Ashford waived a claim of insufficient evidence.

The Commonwealth further argues that the *Brown* decision does not apply retroactively to Ashford's 2012 conviction. Ashford cites case law stating that where an SJC case does not announce any new common law rules, rights, or legal principles but merely construes a statute, the court need not engage in an analysis of retroactivity, because at issue is the meaning of the statute since its enactment. See In re McIntire, 458 Mass. 257, 260-261 (2010), cert. den., 563 U.S. 1012 (2011); Commonwealth v. Marley, 396 Mass. 433, 437 (1985); Commonwealth v. Taranovsky, 93 Mass. App. Ct. 399, 402, rev. den., 480 Mass. 1108 (2018). However, none of those cases involved a conviction that had become final through the appellate process. See

Marley, 396 Mass. at 437 (applying clarification of statute on direct appeal of conviction); Taranovsky, 93 Mass. App. Ct. at 402 (applying on direct appeal construction of statute announced three months after conviction).

There is no constitutional requirement that a new interpretation of a statute be applied retroactively and the SJC is free to determine whether it should be applied only prospectively. American Int'l Ins. Co. v. Robert Seuffer GmbH & Co. KG, 468 Mass. 109, 120, cert. den., 135 S.Ct. 871 (2014); Commonwealth v. Dagley, 442 Mass. 713, 721 n. 10 (2004), cert. den., 544 U.S. 930 (2005). The SJC in *Brown* did not indicate that its interpretation of G.L. c. 269, § 10(n) should apply retroactively to convictions that have become final through the appellate process. In the view of this Court, where Ashford's appeal was concluded prior to the issuance of *Brown*, he is precluded from arguing the insufficiency of the evidence of his knowledge that the firearm was loaded. Cf. Dagley, 442 Mass. at 721 n.20 (where new criminal rule stems from a constitutional requirement, it applies to defendants whose direct appeals are pending when rule is announced).

Duplicative Convictions

Alternatively, Ashford argues that his Count 3 conviction of unlawful possession of a loaded firearm in violation of G.L. c. 269, § 10(n) is duplicative of his Count 4 conviction of unlawful possession of a firearm by a person previously convicted of two violent crimes or serious drug offenses in violation of G.L. c. 269, § 10G(b). Unless the Legislature has explicitly declared its intent to permit multiple sentencing enhancements, a defendant may be sentenced under only one sentencing enhancement statute for the same underlying crime. Commonwealth v. Richardson, 469 Mass. 248, 254 (2014) (concluding that defendant could not be sentenced

under both ACCA and G.L. c. 269, § 10(d), which enhances sentence for second offense of unlawful possession of firearm).

A violation of § 10(n) is not a stand-alone crime but rather, a sentencing enhancement to unlawful possession of a firearm where the firearm is loaded. Brown, 479 Mass. at 604. Unlike a § 10(d) enhancement, § 10(n) is not an enhancement based on a prior conviction. See Commonwealth v. Dancy, 90 Mass. App. Ct. 703, 705 (2016). Ashford's sentence was not enhanced twice based on the same underlying conviction. Rather, he was punished under § 10(n) for the fact that the firearm was loaded and under the ACCA for his prior conviction of two violent crimes. Accordingly, sentencing Ashford on both Counts 3 and 4 does not violate legislative intent.¹

ACCA Count

Finally, Ashford asks the court to vacate his conviction on Count 4 of two predicate offenses under the ACCA and resentence him under G.L. c. 269, § 10G(a) for only one predicate offense. He contends that the Commonwealth failed to prove beyond a reasonable doubt that his ABDW conviction constituted a violent crime under the ACCA. Where the defendant is convicted under a broad statute that encompasses multiple crimes, such as assault and battery, the court takes a modified categorical approach to determining whether he was convicted of a

¹ Indeed, there are numerous decisions in which a defendant was sentenced under both § 10(n) and the ACCA. See, e.g., Commonwealth v. Eberhart, 461 Mass. 809, 810 (2012); Commonwealth v. Johnson, 461 Mass. 44, 45 (2011); Commonwealth v. Widener, 91 Mass. App. Ct. 696, 701, rev. den., 478 Mass. 1102 (2017).

violent crime for ACCA purposes. Commonwealth v. Beal, 474 Mass. 341, 351 (2016); Commonwealth v. Eberhart, 461 Mass. 809, 816 (2012). Under that approach, introduction of a certified copy of the conviction is insufficient and the court must examine extrinsic evidence concerning the basis for the conviction. Beal, 474 Mass. at 353; Eberhart, 461 Mass. at 816. A certified record of conviction referencing a particular statute proves that the defendant committed a violent crime only when all crimes encompassed within that statute are violent crimes. Eberhart, 461 Mass. at 817.

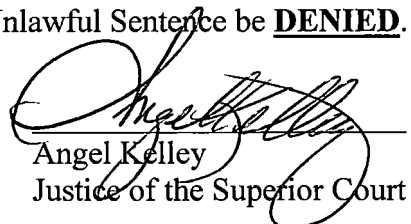
The SJC has concluded that both harmful and reckless battery qualify as violent crimes under the ACCA. Beal, 474 Mass. at 351; Eberhart, 461 Mass. at 818.² Accordingly, the Appeals Court has concluded that the more serious crime of ABDW is by statutory definition a violent crime under the ACCA, such that the modified categorical approach is not required. See Commonwealth v. Widener, 91 Mass. App. Ct. 696, 703, rev. den., 478 Mass. 1102 (2017); Commonwealth v. Rezendes, 88 Mass. App. Ct. 369, 372, rev. den., 473 Mass. 1105 (2015). See also Commonwealth v. Spencer, 2018 WL 6684335 at *5 (Mass. App. Ct. Rule 1:28), rev. den., 481 Mass. 1108 (2019) (rejecting argument that to indict under ACCA based on ABDW, grand jury had to hear evidence of more than slight but nonconsensual touching with weapon); Commonwealth v. Clark, 2014 WL 2776858 at *1 (Mass. App. Ct. Rule 1:28), rev. den., 469 Mass. 1104 (2014) (concluding that all assaults with a dangerous weapon are violent crimes).

² In contrast, offensive battery, which may involve a de minimis touching, does not qualify as a violent crime under the ACCA. Eberhart, 461 Mass. at 819.

Ashford was properly convicted of the ACCA sentencing enhancement based on his certified conviction of ABDW.³

ORDER

For the foregoing reasons, it is hereby **ORDERED** that defendant's Motion For Required Findings of Not Guilty And, In The Alternative, To Vacate An Unlawful Sentence be **DENIED**.



Angel Kelley
Justice of the Superior Court

DATED: May 22, 2019

³ This Court acknowledges but declines to follow a First Circuit case to the contrary. See United States v. Windley, 864 F.3d 36, 38-39 (1st Cir. 2017) (concluding that reckless ABDW under Massachusetts statute is not a violent felony under Federal ACCA).

CERTIFICATE OF COMPLIANCE

I hereby certify, under Mass. R. App. P. 16(k), that this application for direct appellate review complies with the rules of appellate procedure, including rules 11, 13 & 20. In compliance with Mass. R. App. P. 20(a)(2)(A), I hereby certify, under Mass. R. App. P. 16(k), the following information:

- Font Name and Size: Sabon, 14 point
- Word-Processing Program: Apple Pages
- Number of Non-Excluded Words in Argument Section: 1997

/s/ Tim St. Lawrence

Timothy St. Lawrence

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I filed the attached documents through the Electronic Filing Service Provider for electronic service to the following registered User: Assistant District Attorney Carolyn A. Burbine, Plymouth County District Attorney's Office, at carolyn.burbine@state.ma.us.

/s/ Tim St. Lawrence

Timothy St. Lawrence
BBO #676899
Attorney for Lee Ashford
11 S Angell St #252
Providence RI 02906
401 484 7850
tstlawrence@gmail.com

November 15, 2019