

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, SS SUPREME JUDICIAL COURT
NO.
COMMONWEALTH APPEALS COURT NO. 2018-P-528
V.
NATHAN LUGO

APPLICATION FOR DIRECT APPELLATE REVIEW

I. Request For Direct Review

The defendant/appellant requests direct appellate review pursuant to Mass. R. Crim. P. 11(a) of the judgment of conviction and sentence entered on November 9, 2015, as well as denial of his Motion for A New Trial and Resentencing pursuant to Rule 30. The questions presented in this request for direct appellate review involve interpretation of both the U.S. and the Massachusetts Constitutions regarding whether a mandatory life sentence is cruel and unusual punishment as applied to juveniles convicted of second degree murder, as well as a question of first impression; whether an individualized sentencing hearing is required for juvenile homicide defendants.

Following the verdict in this case, the judge denied Mr. Lugo's request for a continuance of the sentencing hearing so that he could present evidence in

mitigation pursuant to *Miller v. Alabama*, 132 S. Ct. 2455 (2012). In denying his Rule 30 motion, the judge held that Mr. Lugo had no right to an individualized sentencing hearing because of the mandatory life sentence for juveniles convicted of second degree murder. That ruling has far reaching consequences for juvenile homicide defendants in the Commonwealth and needs to be addressed by this Court. This application is timely filed pursuant to Mass. R. Crim. P. 11(a); Mr. Lugo's appeal from the denial of his Rule 30 motion was docketed on April 10, 2018.

II. Statement Of Prior Proceedings

The defendant, Nathan Lugo, was convicted, following a jury trial in Dedham, Conners, J. presiding, of the lesser-included offense of second degree murder, armed robbery, conspiracy to violate the controlled substance laws, illegal possession of ammunition, and possession of a firearm without a license¹. He was found not guilty of conspiracy to

¹The indictments resulted from two separate grand jury proceedings. Mr. Lugo's original murder indictment in case No 2011-1153 was dismissed (the other charges remained), and he was reindicted on the murder charge as well as several other charges in case No. 2014-0673. All of the indictments were tried together and both cases are the subject of this appeal.

commit armed robbery. (TR19 5)². On November 9, 2015, the Court sentenced Mr. Lugo to a total effective sentence of life with the possibility of parole after fifteen years. (TR19 25). Mr. Lugo filed a timely Notice of Appeal. (App. 33). His appeal was stayed for the purpose of filing a motion for a new trial. On March 27, 2018, following a nonevidentiary hearing, the judge denied his Motion for a New Trial And For Resentencing pursuant to Rule 30. (App. 34). Mr. Lugo filed a timely Notice of Appeal of that decision, and his appeals were consolidated on April 19, 2018. (App. 34).

III. Statement Of Facts

On November 26, 2011, seventeen year old Mr. Lugo, his girlfriend, Alison Deshowitz, and two friends, Devante Thames and Brian Moulton³ arranged to meet Kyle

² Mr. Lugo relies on the following transcripts in support of his application for direct appellate review; TR1=1/17/14, TR2=2/7/14, TR3=2/12/14, TR4=4/30/14, TR5=5/30/14, TR6=12/18/14, TR7=10/9/15, TR8=10/21/15, TR9=10/22/15, TR10=10/26/15; TR11=10/27/15, TR12=10/28/15, TR13=10/29/15, TR14=11/2/15, TR15=11/3/15, TR16=11/4/15; TR17=11/5/15, TR18=11/6/15, TR19=11/9/15

³ Moulton and Thames testified pursuant to cooperation agreements whereby the Commonwealth agreed to dismiss

McManus, in order to obtain four ounces of marijuana. (TR14 99-100, 105-107, 117). Deshowitz, who had previously dated McManus, set up the meeting. (TR14 107, 114; TR15 20). The agreed upon price was eleven hundred dollars, but Mr. Lugo and his friends intended to take the marijuana without paying for it. (TR14 105, 107, 112; TR5 49-50; TR15 95-6; TR16 5). The plan was to obtain the marijuana by trickery, and the use a weapon or other force was not discussed or contemplated. (TR16 20, 22).

Mr. Lugo and the others met McManus at a bar in Randolph where he was drinking with his friends, Neil Doherty, Brittany Mofford, and Clayton Maddrey. (TR14 109, TR12 17, 21-22). Deshowitz went inside the bar by herself. (TR14 110). Mr. Lugo, Thames, and Moulton remained in Lugo's mother's car in the parking lot. (TR14 108). Mr. Lugo was in the driver's seat, Moulton was in the passenger seat, and Thames was in the back. (TR14 108). McManus came out to the car with Deshowitz and got in the backseat. (TR14 111). He was intoxicated. (TR15 106). They drove a short distance to McManus' house. (TR14 113). On the way, McManus made

the murder charges against them. (See TR14 141-2, TR15 123; TR16 36).

statements indicating he had a gun and could shoot people in the car in the legs and get away with it. (?TR15 106-7; TR16 28-30). Deshowitz told Mr. Lugo and the others that one of McManus' friends had displayed a gun at the bar and offered to give it to McManus. (TR15 17-18).

When they arrived at McManus' house, Thames and McManus got out and went inside to retrieve and weigh the marijuana. (TR14 113-14). The rest of the group stayed in the car in the driveway. (TR14 114). Approximately fifteen to twenty minutes later, McManus and Thames came back outside. (TR14 117). In the meantime, McManus' friends from the bar arrived to retrieve a set of keys from him and were standing on the porch. (TR12 29, 35-6; TR14 118-19). Mr. Lugo and the others saw them arrive. (TR15 108). Deshowitz told the group that McManus' friends were "strapped," meaning carrying weapons. (TR15 67, 108). Moulton testified that Mr. Lugo flashed the butt of a gun on his hip to him and told him not to worry about it. (TR16 109-110).

Thames got into the backseat. (TR14 119). The car was still running. (TR14 119). After speaking to his friends on the porch, McManus went to the passenger's

window, which was down. (TR14 119-20). Moulton, according to a previously agreed plan, counted out some money so McManus would not be suspicious. (TR15 98, 100). McManus tossed the marijuana into the car. (TR15 60). While Moulton was still counting out the money, Mr. Lugo put the car into reverse and began backing out of the driveway. (TR14 120).

McManus, whose upper body was in the car, began hitting Mouton and grabbed onto him. (TR14 120, 122; TR15 111-2). He ran alongside the car and screamed for his friends to help, and for the car to stop. (TR12 43; TR15 63; 112). He threw a beer bottle he was carrying into the car. (TR14 120, 122-3; TR15 112). Doherty joined McManus at the passenger's window. (TR12 43). Deshowitz was screaming. (TR16 45). Moulton ducked down and leaned forward to avoid being hit or shot by McManus or his friends. (TR16 46-7, 49-50). When the car reached the end of the driveway, Thames testified that Mr. Lugo, with his arm over Moulton's back, fired a single shot from a revolver. (TR14 120-1, 123). McManus fell away from the car. (TR14 121, 126).

Mr. Lugo sped off and drove back to his house in Brockton. (TR14 126). Moulton testified that on the ride home, Mr. Lugo stated that he thought McManus had

a gun. (TR16 52). No one in the car knew whether McManus had been hit. (TR16 51, 56). McManus died from a gunshot wound to the heart that first passed through his wrist. (TR12 99, 105, 113-14). The jury convicted Mr. Lugo of the lesser-included offense of second degree murder, armed robbery, conspiracy to violate the controlled substance laws, illegal possession of ammunition, and possession of a firearm without a license. He was found not guilty of conspiracy to commit armed robbery. (TR19 5).

Sentencing in Mr. Lugo's case took place immediately after the verdict. Defense counsel asked for a continuance of the sentencing so that he could present evidence in mitigation. (TR19 14-15, 17). Counsel also informed the court that he had retained an expert in juvenile psychology in connection with the case, and that he might want to present the expert's testimony at sentencing. (TR10 15). Specifically, counsel stated:

I would like a little bit of time. Mr. Lugo, at the time of this incident was seventeen years old. I think the courts, not just locally but nationally have recognized that people that have juvenile status at the time of the commission of the crime present unique differences that the Court should consider. Sentencing is certainly a constitutionally important part of any trial. I understand that there's no leeway in second degree

charge. I don't pretend to know what the Commonwealth wants to do with the armed robbery. I know the guideline is five to seven-and-a-half I believe. To the extent that they want to offer or ask the Court to impose something that goes beyond that and comes closer to the parole eligibility date of fifteen years for the second, I certainly think that for me to represent Mr. Lugo effectively I should probably present the Court with a sentencing memorandum to present to the Court, things about, not just about his background but you might remember during this trial I had retained in my pretrial preparation Frank D. Cataldo could certainly present a report or an affidavit to the Court that, as an expert, tell the Court about the unique things about juveniles, their perception, their need for instant gratification, their likelihood of success and rehabilitation, all things that are important. (TR19 15).

The judge denied the motion for a continuance in part because under the second degree murder statutes, he had no discretion with respect to the sentence. (TR19 16-17).

In his Rule 30 motion, Mr. Lugo argued that his sentence was unconstitutional pursuant to *Miller*, *supra*, and that the judge erred in denying his attorney's request for a continuation of the sentencing hearing. In denying Mr. Lugo's Motion For A New Trial and Resentencing, the motion judge relied on *Commonwealth v. Okoro*, 471 Mass. 51 (2015), finding:

Review of the *Okoro* ruling makes clear that a person in Lugo's position is not under the law as presently enunciated in a position to argue that he must receive an individualized sentencing

hearing after his conviction for second degree murder, an offense which requires the imposition of the mandatory sentence called for in c. 265 sec. 2. (Memo of Decision, p. 9; App. 43).

IV. Questions Of Law Presented⁴

1. Is A Mandatory Sentence Of Life With Parole For Second Degree Murder Unconstitutional Under The Eighth Amendment And/Or Article 26 As Applied To Juveniles?
2. Did The Judge Err In Denying The Defendant's Request For A Continuation Of The Sentencing Hearing So That He Could Present Mitigating Evidence Related To His Youth?

Trial counsel did not argue that the second degree murder sentencing statutes in effect in 2011, Mass. Gen. L. c. 265, sec. 2 and c. 127, sec. 133A, were unconstitutional. Mr. Lugo raised these issues in his Motion For A New Trial And For Resentencing pursuant to Rule 30, however. In addition, counsel objected to the court's denial of his motion for a continuance of the sentencing hearing. (TR19 17-18). These issues are therefore preserved.

V. Argument

1. The Defendant's Sentence Was Unconstitutional Under The Eighth Amendment And Article 26.

⁴Mr. Lugo is not waiving the other arguments presented in his Rule 30 motion. Those issues will be fully argued in the brief of appellant.

In *Okoro*, 471 Mass. at 62, this Court held that a mandatory life with parole sentence for juveniles convicted of second degree murder was not unconstitutional, despite finding that "the rights under art. 26 "may be broader than those guaranteed under the Eighth Amendment." In *Okoro*, this Court also suggested that it might reconsider its ruling about the constitutionality of the mandatory life with parole sentences for juveniles in the future based on the evolving standards of the Eighth Amendment, art. 26, and continuing "scientific and social science research on adolescent brain development." *Id.* at 59-61. Based on new developments in the law as well as in science, Mr. Lugo asks this Court to reexamine *Okoro* under art. 26 and the Eighth Amendment.

Mr. Lugo contends, contrary to *Okoro*, that because judges lack discretion to fashion offender specific sentences of less than life with parole for juveniles convicted of second degree murder based on the *Miller* factors, the statutes governing sentencing for juveniles convicted of that offense are unconstitutional under the Eighth Amendment and art. 26. Mr. Lugo does not contend that parole eligibility after fifteen years is cruel and unusual or

disproportional to the offense, but is instead challenging the legislature's one size fits all determination that a life sentence is necessary for every juvenile convicted of second degree murder. While a life sentence with parole review after fifteen years may be appropriate in some of these cases, lifetime parole may not be appropriate in others, especially where the homicide, which does not rise to the level of first degree murder, can largely be attributed to the poor decision making that often accompanies immaturity and youth. A judge must have the discretion to impose a sentence of something less than life with parole for persons under eighteen convicted of second degree murder where the circumstances warrant. A mandatory sentence of life with parole for juveniles, which necessarily encompasses lifetime supervision, "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Diatchenko v. District Attorney For Suffolk Dist*, 466 Mass. 655, 661 (2013) (*Diatcheko I*), quoting *Miller*, 132 S. Ct. at 2468.

Recent developments in the law in other states signal an increasing belief that mandatory sentences for juveniles are unconstitutional. In *Houston-*

Sconiers, 391 P.3d 409 (Wash. 2017), the Washington Supreme Court struck down a statutory scheme that did not allow the sentencing judge to exercise his discretion for juvenile offenders, stating:

In accordance with *Miller*, we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements. *Id.* at 420.

The *Houston-Sconiers* Court further held: “[T]he Eighth Amendment requires trial courts to exercise this discretion at the time of sentencing itself, regardless of what opportunities for discretionary release may occur down the line”. *Id.* at 419.

Several other state courts have also struck down mandatory sentences for juveniles, relying on language in *Miller*. See e.g., *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014) (finding mandatory minimums for juveniles to be unconstitutional under the Iowa Constitution); *Horsley v. State*, 160 So.3d 393, 408 (Florida 2015) (striking down sentencing scheme that precluded individualized sentencing for juvenile homicide

offenders). See also *State v. Jefferson*, 798 S.E.2d 121, 126 (N.C. App. 2017) ("there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity").

In addition, there have been further developments in social science and our understanding of the juvenile brain since this Court's decision in *Okoro*. Recent research shows that teenagers are less capable of controlling or restraining themselves under threatening conditions than adults. See e.g., www.newsweek.com/2016/04/29/young-brains-neuroscience-juvenile-inmates-criminal-justice-44900.html,⁵ citing a study by Cohen et al, "When Is an Adolescent An Adult? Assessing Cognitive Control In Emotional and Nonemotional Contexts." *Psychological Science*, Vol. 27, No 4, 2016, pp. 549-562.

In the study, 13 to 25 year olds were placed in a brain scanner while asked to do a task that required restraint with either positive arousal, negative

⁵ See also Requarth, Tim. "Neuroscience is Changing How and When the Criminal Justice System Punishes Young Adults." *Newsweek*, 6 June 2016.

arousal, or no arousal. *Id.* Requarth explains the results:

18 to 21 year-olds were less able than 22 to 25 year olds to restrain themselves from pushing the button when there was the threat of a loud sound. (This diminished control was not observed under positive or neutral conditions). In fact, under the threatening condition, says Casey, the 18 to 21 year olds 'weren't much better than teenagers.' The brain scanners revealed a telltale pattern: Areas in the prefrontal cortex that regulate emotion showed reduced activity, while areas linked to the emotional centers were in high gear. *Id.*

Requarth concludes:

Brain areas involved in reasoning and self control, such as the prefrontal cortex, are not fully developed until the mid-20s- a far later age than previously thought. Brain areas involved in emotions such as desire and fear, however, seem fully developed by 17. This pattern of brain development creates a perfect storm for crime. Around the ages of 18 to 21, people have the capacity for adult emotions yet a teenager's ability to control them. *Id.*

This study is particularly relevant in Mr. Lugo's case because the homicide occurred under chaotic, stressful conditions with the victim hitting the passenger, throwing a bottle into the car, and Deschowitz screaming as the defendant attempted to back out of the driveway and flee the scene.

In summary, there have been significant developments in both the law and science since *Okoro* was decided that warrant a reexamination of

constitutionality of the second degree murder statutes as applied to juveniles.

2. The Motion Judge Erred In Concluding That Mr. Lugo Was Not Entitled To An Individualized Sentencing Hearing.

In *Okoro*, this Court left for a later day the question of "whether juvenile homicide offenders require individualized sentencing." *Id.* at 58. In Mr. Lugo's case, the reviewing court must tackle that unanswered question. The motion judge's conclusion that Mr. Lugo was not entitled to an individualized sentencing hearing as a result of *Okoro* was erroneous and should be corrected by this Court.

Mr. Lugo argues that in addition to a violation of the Eighth Amendment and art. 26, the judge violated his due process rights in denying his request for a continuance of sentencing. The judge's denial of his motion to continue the sentencing hearing prohibited Mr. Lugo from presented mitigating evidence concerning his "distinctive mental attributes and environmental vulnerabilities" as required by *Miller*, 132 S.Ct. at 2465-7.

In a death penalty case, due process requires that the sentencer "not be precluded from considering as a mitigating factor, any aspect of the defendant's

character or record." *Lockett v. Ohio*, 438 U.S. 586, 604 (1976) (plurality opinion) (striking down Ohio's death penalty statute which did not permit the sentencing judge to consider as mitigating factors such as age and lack of specific intent to cause death). See also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (mandatory death sentence for first degree murder held to be unconstitutional under the Eighth Amendment). Citing the *Lockett* and *Woodson* cases, the *Miller* Court effectively extended these due process protections to juvenile defendants who are sentenced to life. 132 S.Ct. at 2464, 2467 ("Graham's '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,' makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.") (citation omitted).

In *Landrum v. State*, 192 So.3d 459, 467 (Florida 2016), the court stated:

[T]he Supreme Court's recent decision in *Montgomery* clarified that the *Miller* Court had no intention of limiting its rule of requiring individualized sentencing for juvenile offenders only to mandatorily-imposed sentences of life without parole, when a sentencing court's exercise of discretion was not informed by *Miller*'s considerations. 192 So.3d 467.

In *Diatchenko v. District Attorney For Suffolk Dist II*, 471 Mass. 12, 24, 27, 32 (2015) (*Diatchenko II*), this Court extended certain due process protections to juveniles sentenced to life appearing before the parole board. See also *Okoro*, 471 Mass. at 62-3 (extending the due process protections of *Diatchenko II* to juveniles convicted of second degree murder). Those due process protections, including the right to court appointed counsel, are not required under the 5th or 14th Amendments to the U.S. Constitution. See 471 Mass. at 24. Thus, in *Diatchenko II*, this Court impliedly held that art. 12 of the Massachusetts Declaration of Rights affords greater due process for juvenile homicide offenders than the U.S. constitution. Mr. Lugo contends that even if there was no federal due process violation, the sentencing judge violated his due process rights under the Massachusetts Constitution.

The judge here imposed the mandatory life sentence without allowing counsel time to prepare and present testimony or other evidence concerning the *Miller* factors. Although the judge stated that he understood and appreciated "the issues that have been raised by our State Supreme Court as well as by the US Supreme

Court concerning juveniles," (TR19 16), he did not have sufficient information at the hearing to impose a constitutional sentence that took into account specific factors related to Mr. Lugo's immaturity at the time of the offense as well as his potential for rehabilitation. See *State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013) ("We think the direction from the Supreme Court that trial courts consider everything said about youth in *Roper*, *Graham*, and *Miller* means more than a generalized notion of taking age into consideration as a factor in sentencing.").

Mr. Lugo should not have to wait until a parole hearing to present this evidence. Evidence available to him at the time of sentencing, such as the testimony of counsel's juvenile expert, may no longer be available at the time of a parole hearing. At a minimum, evidence showing his mental state and immaturity at the time of the homicide will be extremely stale then. The judge should have considered the types of evidence related to youthfulness described in *Miller*⁶, for their effect on

⁶ The Miller Court identified "failure to appreciate risks and consequences," "family and home environment," "peer pressure", and "the possibility of rehabilitation" as among the factors the judge should consider. 132 S.Ct. at 2467-8.

Mr. Lugo at the time of his offenses, even if the sentence remained the same. The denial of his motion to continue the sentencing wrongly deprived him of an opportunity to make a record of his mental, emotional, and physical state at the time, evidence that will be necessary to assess his potential for rehabilitation as he ages and matures.

VI. Reasons Why Direct Appellate Review Is Appropriate.

The Appeals Court is bound to follow *Okoro* and cannot reexamine the constitutionality of a life with parole sentence for juveniles convicted of second degree murder under either the Eighth Amendment or art. 26. Mr. Lugo's case also requires a reviewing court to answer the unanswered question in *Okoro*; whether the Eighth Amendment and/or art. 26 require an individualized sentencing hearing for juvenile homicide defendants. Finally, the court here must determine whether Mr. Lugo's due process rights were violated by the denial of his request for a continuation of the sentencing hearing so he could present evidence in mitigation pursuant to *Miller*. The answers to these questions are extremely important and could potentially affect every juvenile homicide defendant in the

Commonwealth. As a result, direct review of Mr. Lugo's appeal by this Court is warranted.

Respectfully submitted,

THE DEFENDANT
NATHAN LUGO

BY HIS ATTORNEY,

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COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report

1482CR00673 Commonwealth vs. Lugo, Nathan Enesto

CASE TYPE:	Indictment	FILE DATE:	08/19/2014
ACTION CODE:	265/1-0	CASE TRACK:	C - Most Complex
DESCRIPTION:	MURDER c265 §1	CASE STATUS:	Open
CASE DISPOSITION DATE	09/04/2014	STATUS DATE:	08/19/2014
CASE DISPOSITION:	Disposed by Jury Verdict	CASE SESSION:	Criminal 1
CASE JUDGE:			

LINKED CASE

1182CR01153

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	09/04/2014	09/04/2014
Final Pre-Trial Conference	08/16/2015	09/04/2014
Case Disposition	08/30/2015	09/04/2014
Under Advisement	11/08/2015	02/22/2018
Under Advisement	02/25/2018	02/22/2018

PARTIES

I ATTEST THAT THIS DOCUMENT
IS A CERTIFIED PHOTOCOPY OF
AN ORIGINAL ON FILE.

[Signature]
Assistant Clerk

A1



COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report

Prosecutor Commonwealth	Attorney for the Commonwealth 631379 Varsha Kukafka Norfolk County District Attorney Norfolk County District Attorney 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4800 Added Date: 04/14/2016
	Attorney for the Commonwealth 654803 Margaret Rose Sweeney Krippendorf Norfolk District Attorney's Office Norfolk District Attorney's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4830 Added Date: 08/19/2014
	Attorney for the Commonwealth 035840 Lynn M Beland Norfolk County DA's Office Norfolk County DA's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4826 Added Date: 08/19/2014
	647136 Pamela Lynne Alford Norfolk District Attorney Office Norfolk District Attorney Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4800 Added Date: 04/09/2018
	Attorney for the Commonwealth 546977 Stephanie Martin Glennon Norfolk District Attorney's Office Norfolk District Attorney's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4800 Added Date: 08/07/2017

A2



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

Defendant Lugo, Nathan Enesto 26 Breer Cr. Brockton, MA 02301	Appointed - Indigent Defendant 640902 Joseph F Krowski Attorney at Law Attorney at Law 30 Cottage St Brockton, MA 02301 Work Phone (508) 584-2555 Added Date: 09/05/2014 675207 Katherine C Essington Massachusetts Bar 190 Broad St Suite 3W Providence, RI 02903 Work Phone (401) 351-2889 Added Date: 04/19/2016
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PARTY CHARGES

#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	11/26/2011 MURDER c265 §1 Sentence Date: 11/09/2015 <i>Not greater than</i>	265/1-0	Randolph	Life with Parole <i>Not less than</i> Yrs 15 Mos Days Guilty Verdict - Lesser Included	11/09/2015
2	11/26/2011 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h)(1) Sentence Date: 11/09/2015 <i>Term:</i> Yrs 2 Mos 0 Days 0 <i>To Serve:</i> Yrs 2 Mos 0 Days 0	269/10/TT	Randolph	Committed to HOC Guilty Verdict	11/09/2015
3	11/26/2011 AMMUNITION WITHOUT FID CARD, POSSESS, SUBSQ. OFF. c269 §10(h)(1)	269/10/UU	Randolph	Nolle Prosequi	11/09/2015



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

EVENTS				
Date	Session	Event	Result	Resulting Judge
09/04/2014	Criminal 1	Arraignment	Held as Scheduled	
10/07/2014	Criminal 1	Pre-Trial Hearing	Held as Scheduled	
11/21/2014	Criminal 1	Pre-Trial Hearing	Rescheduled	
03/13/2015	Criminal 1	Evidentiary Hearing on Suppression	Rescheduled	
05/08/2015	Criminal 1	Non-Evidentiary Hearing on Suppression	Not Held	
07/20/2015	Criminal 1	Final Pre-Trial Conference	Rescheduled	
07/27/2015	Criminal 1	Jury Trial	Rescheduled	
08/28/2015	Criminal 1	Non-Evidentiary Hearing on Suppression	Rescheduled	Cosgrove
08/28/2015	Criminal 2	Non-Evidentiary Hearing on Suppression	Rescheduled	Cosgrove
10/09/2015	Criminal 1	Final Pre-Trial Conference	Held as Scheduled	Connors
10/09/2015	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled	Fishman
			Held - Under advisement	Connors
10/13/2015	Criminal 1	Jury Trial	Rescheduled	Connors
10/21/2015	Criminal 1	Hearing on Motion(s) in Limine	Held as Scheduled	Connors
10/22/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/26/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/27/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/28/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/29/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/02/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/03/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/04/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/05/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/06/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/09/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
01/11/2018	Criminal 1	Motion Hearing	Held - Under advisement	Connors

FINANCIAL SUMMARY					
	Fees/Fines/Costs	Assessed	Paid	Dismissed	Balance
Total		A4 90.00	90.00	0.00	0.00



COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
Docket Report**

INFORMATIONAL DOCKET ENTRIES			
Date	Ref	Description	Judge
08/19/2014	1	Indictment returned	
09/04/2014		Disposed for statistical purposes	
09/04/2014		RE: Offense #001 - Deft arraigned before Court - Track C - Plea Not Guilty - Bail - No Bail without prejudice - Attorney Fee private (Krowski) - Pre-Trial Hearing 10/7/14 - HABE Plymouth House of Correction - J. McDermott, asst. clerk - JAVS	
09/04/2014		RE: Offense #002 thru #003 - Deft arraigned before Court - Plea Not Guilty - Bail Personal (Fishman, J.) J. McDermott, asst. clerk - JAVS	
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09/04/2014		RE Offense 1:Plea of not guilty	
09/04/2014		RE Offense 2:Plea of not guilty	
09/04/2014		RE Offense 3:Plea of not guilty	
09/04/2014		Assigned to track "C" see scheduling order	
09/08/2014		Tracking deadlines Active since return date	
10/07/2014		Continued 11/21/14 PTH; Defendant's Attorney unavailable. Habe Plymouth. (Fishman, J) BG Roche a.c., JAVS	
10/08/2014	3	Habeas corpus for Deft at Plymouth County Correctional Facility on 11/21/2014	
12/18/2014	4	Case Tracking scheduling order (Kenneth J. Fishman, Regional Administrative Justice) Copies mailed to ADA & Attorney on 12/23/2014	
12/18/2014		Continued 3/13/15 Motion to Suppress 9am; 7/20/15 Final Pre-Trial Conference; 7/27/15 Trial, agreed. - HABE Plymouth for all dates (Fishman, J.) J. McDermott, asst. clerk - JAVS	
05/07/2015	5	Habeas corpus for Deft at Plymouth County Correctional Facility for 5/8/15	
08/17/2015		Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 08/28/2015 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Transferred to another session Appeared:	Cosgrove
08/27/2015		Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 08/28/2015 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Request of Defendant Appeared:	Cosgrove
08/27/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/09/2015 09:00 AM Evidentiary Hearing on Suppression. Cancel 8/28 habe	



**COMMONWEALTH OF MASSACHUSETTS
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08/31/2015	6	Defendant 's Notice of Potential Expert Testimony w/attachments	
10/07/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/09/2015 09:00 AM Evidentiary Hearing on Suppression.	
10/09/2015		Event Result: The following event: Final Pre-Trial Conference scheduled for 10/09/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled	Connors
10/09/2015		Matter taken under advisement The following event: Evidentiary Hearing on Suppression scheduled for 10/09/2015 09:00 AM has been resulted as follows: Result: Held - Under advisement	Connors
10/09/2015		Event Result: The following event: Jury Trial scheduled for 10/13/2015 09:00 AM has been resulted as follows: Continued to 10/21/15 for Motion in Limine - 9AM - 10/22/15 trial - (Endorsement Dated 10/13/15) Habes have been to DJ and Plymouth HOC - Result: Rescheduled Reason: Request of Defendant	Connors
10/15/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/21/2015 09:00 AM Hearing on Motion(s) in Limine. Habes issued to DJ and Ply. HOC for 10/21/15 and 10/22/15 (See Case # 11-1153)	
10/15/2015	7	ORDER: Memorandum Of Decision On Deft's Motion To Suppress Evidence - The Deft's Motion to Suppress Evidence is DENIED. (Thomas A. Connors, RAJ) Dated 10/13/15 - Copies mailed to ADA and Defense Counsel	Connors
10/16/2015	8	Defendant 's Motion to Continue The Trial and Stay Proceedings Until The deft's Interlocutory Appeal Rights Have Been Exhausted. and Certificate of Service - ALLOWED, Trial continued to 10/22/15 at 9AM (Connors,J) B G Roche ac (dated 10/22/15) Copies sent to ADA and Defense Counsel	
10/19/2015	9	Defendant 's Request for Jurors (Dated 10/13/14)	
10/21/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/22/2015 09:00 AM Jury Trial.	
10/21/2015		Event Result: The following event: Hearing on Motion(s) in Limine scheduled for 10/21/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/21/2015	10	Defendant 's Motion for Board of Probation Records - Allowed (Connors, RAJ) c/s ADA & Atty.	Connors
10/21/2015	11	Defendant 's Motion for Promises Rewards Inducements and Related Discovery - Allowed as agreed (Connors, RAP) c/s ADA & Atty.	Connors
10/21/2015	13	Defendant 's Motion for Funds for a Ballistics Expert Filed under Seal - Allowed; ORDERED IMPOUNDED (Connors, J) c/s ADA & Atty.	Connors
10/21/2015	14	Opposition to paper #8.0 to Commonwealth's Motion in Limine to Admit Statements of the Defendant at the Police Station filed by	Connors



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10/22/2015		Event Result: The following event: Jury Trial scheduled for 10/22/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/23/2015	12	Opposition to paper #7.0 to Commonwealth's Motion to Introduce Evidence of a Rifle filed by Nathan E Lugo	Connors
10/26/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/27/2015 09:00 AM Jury Trial.	
10/26/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/28/2015 09:00 AM Jury Trial.	
10/26/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/29/2015 09:00 AM Jury Trial.	
10/26/2015		Event Result: The following event: Jury Trial scheduled for 10/26/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/27/2015		Event Result: The following event: Jury Trial scheduled for 10/27/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/28/2015		Event Result: The following event: Jury Trial scheduled for 10/28/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/29/2015		Event Result: The following event: Jury Trial scheduled for 10/29/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/30/2015	15	Defendant's Motion for funds For a Fingerprint Expert Filed Under Seal	
10/30/2015		Endorsement on Motion for funds For A Fingerprint Expert Filed Under Seal, (#15.0): ALLOWED	Connors
		at the approved cps rates - B. Roche, Asst. Clerk - copies sent	
10/30/2015	16	Affidavit of of Attorney Joseph F. Krowski for the Defendant	
11/02/2015		Event Result: The following event: Jury Trial scheduled for 11/02/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/03/2015		Event Result: The following event: Jury Trial scheduled for 11/03/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/04/2015		Event Result: The following event: Jury Trial scheduled for 11/04/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors



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11/05/2015		Event Result: The following event: Jury Trial scheduled for 11/05/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/06/2015		Event Result: The following event: Jury Trial scheduled for 11/06/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/09/2015		Offense Disposition: Charge #1 MURDER c265 §1 Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict - Lesser Included Second degree Judge: Connors, Hon. Thomas A	
11/09/2015		Defendant sentenced: Sentence Date: 11/09/2015 Judge: Connors, Hon. Thomas A Charge #: 1 MURDER c265 §1 Life with Parole State Prison Sentence-Not Less Than: 15 Years, 0 Months, 0 Days Served Primary Charge Committed to MCI - Cedar Junction (at Walpole) Credits 1445 Days Financials Docket Type Victim/Witness Assessment on felony G.L. c. 258B, § 8. Amount \$90.00 Miscellaneous Options Further Orders of the Court: defndant convicted of secondegrade murder SENTENCED TO LIFE WITH ELIGIBILITY FOR PAROLE AFTER 15 YEARS	
11/09/2015	17	Issued on this date: Mitt For Sentence (First 6 charges) Sent On: 11/09/2015 15:52:03	



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11/09/2015		<p>Defendant sentenced: Sentence Date: 11/09/2015 Judge: Connors, Hon. Thomas A</p> <p>Charge #: 2 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h) (1) Committed to HOC Term: 2 Years, 0 Months, 0 Days</p> <p>To Serve: 2 Years, 0 Months, 0 Days</p> <p>Served Concurrently Charge # 1 Case 1482cr00673</p> <p>Committed to MCI - Cedar Junction (at Walpole)</p> <p>Credits 1445 Days</p>	
11/09/2015		<p>Event Result: The following event: Jury Trial scheduled for 11/09/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled</p>	Connors
11/10/2015		<p>Offense Disposition: Charge #1 MURDER c265 §1 Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict - Lesser Included Judge: Connors, Hon. Thomas A</p> <p>Charge #2 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h) (1) Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict Judge: Connors, Hon. Thomas A</p>	
11/17/2015	18	<p>Notice of appeal from sentence to MCI - Cedar Junction (at Walpole) filed by defendant Rec'd 11/16/15</p>	
11/23/2015	20	<p>Notice of appeal filed</p> <p>Attorney: Krowski, Jr., Esq., Joseph F.</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>	
11/23/2015	21	<p>'s Certificate of Service</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>	



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11/24/2015	19	<p>Attorney Joseph F. Krowski, Jr., Esq.'s motion to withdraw as counsel of record for party and for Appointment of Appellate Counsel - Allowed (Connors, J) B. Roche, a.c.</p> <p>Attorney: Krowski, Jr., Esq., Joseph F.</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015	22	<p>Court Reporter JAV'S 1 - Latora Everett is hereby notified to prepare one copy of the transcript of the evidence of 10/09/2015 09:00 AM Evidentiary Hearing on Suppression, 10/22/2015 09:00 AM Jury Trial, 10/21/2015 09:00 AM Hearing on Motion(s) in Limine, 10/26/2015 09:00 AM Jury Trial, 10/27/2015 09:00 AM Jury Trial, 10/28/2015 09:00 AM Jury Trial, 10/29/2015 09:00 AM Jury Trial, 11/02/2015 09:00 AM Jury Trial, 11/03/2015 09:00 AM Jury Trial, 11/04/2015 09:00 AM Jury Trial, 11/05/2015 09:00 AM Jury Trial, 11/09/2015 09:00 AM Jury Trial</p>
11/24/2015	23	<p>Witness list</p> <p>Defendant's List of Potential Witnesses (10/21/15)</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015	24	<p>Defendant's Motion to in Limine to Exclude Evidence of the Recovery of an Alleged .22 Caliber Firearm, Certificate of Service w/attachments</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015	25	<p>Defendant's Motion of Limine to Preclude the Commonwealth from Introducing Recorded Calls from the House of Corrections, Certificate of Service (10/22/15)</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015	26	<p>Commonwealth's Motion to Admit Specific Jail Call Conversations (10/22/15)</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015	27	<p>Commonwealth's Motion to Introduce Text Messages w/attachments (10/22/15)</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>
11/24/2015		<p>Statement of Undisputed Facts for the Jury (10/22/15)</p> <p>Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)</p>



**COMMONWEALTH OF MASSACHUSETTS
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11/24/2015	28	's Motion to to Allow Prior Bad Act Evidence at Trial & Certificate of Service (10/22/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	29	Commonwealth's Motion to Opposition in Limine to Admit Conversations of Co-Defendant; and Victim (10/22/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	30	Defendant's Motion for Proposed Jury Instructions (10/22/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	31	's Certificate of Service (10/22/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	32	Commonwealth's Request for Jury Instructions (11/4/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	33	Defendant's Supplemental Motion for Jury Instructions Regarding Deliberate Premeditation and Armed Robbery (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	34	Defendant's Certificate of Service (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	35	General correspondence regarding Deliberate Premeditation (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	36	Defendant's Motion for Jury Instructions on the Use of Self-Defense & Defense of Another on all Theories of Murder (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	37	Defendant's Certificate of Service (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	38	Defendant's Motion for a Required Finding of Not Guilty at the Close of the Commonwealth's Case-in-Chief & Certificate of Service (11/5/15)
		Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)



**COMMONWEALTH OF MASSACHUSETTS
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11/24/2015	39	Defendant's Supplemental Motion for Jury Instructions (11/6/15) Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	40	Commonwealth's Motion to Introduce Rifle (11/6/15) Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
11/24/2015	41	Commonwealth's Motion to Admit Prior Bad Act Evidence (11/6/15) Applies To: Krowski, Jr., Esq., Joseph F. (Attorney) on behalf of Lugo, Nathan E (Defendant)
12/01/2015	42	Court Reporter JAV'S 1 is hereby notified to prepare one copy of the transcript of the evidence of 10/09/2015 09:00 AM Evidentiary Hearing on Suppression, 10/22/2015 09:00 AM Jury Trial, 10/26/2015 09:00 AM Jury Trial, 10/27/2015 09:00 AM Jury Trial, 10/28/2015 09:00 AM Jury Trial, 10/29/2015 09:00 AM Jury Trial, 11/02/2015 09:00 AM Jury Trial, 11/03/2015 09:00 AM Jury Trial, 11/04/2015 09:00 AM Jury Trial, 11/05/2015 09:00 AM Jury Trial, 11/06/2015 09:00 AM Jury Trial, 11/09/2015 09:00 AM Jury Trial
12/04/2015	43	Court Reporter transcriber D. Chapin for dates 10/21/15, 11/2/15, 11/5/15 & 11/9/15 is hereby notified to prepare one copy of the transcript of the evidence of 10/21/2015 09:00 AM Hearing on Motion(s) in Limine, 11/02/2015 09:00 AM Jury Trial, 11/05/2015 09:00 AM Jury Trial, 11/09/2015 09:00 AM Jury Trial
12/04/2015		Transcript received dated 10/9, 10/22, 10/26, 10/27, 10/28, 10/29, 10/18 & 11/3/15 mailed to Transcription services
01/14/2016		Transcript received dated 1/17/14 and 4/30/14 from Cylia Isreal - eScribers
01/14/2016		Transcript received from transcription services 12/18/14, 10/9, 22, 26, 27, 28, 29 & 11/3/15 from eScribers Services
03/11/2016	44	Court Reporter Caryn Johnson is hereby notified to prepare one copy of the transcript of the evidence of 10/21/2015 09:00 AM Hearing on Motion(s) in Limine
03/11/2016	45	Court Reporter Ann Marie MacDonald is hereby notified to prepare one copy of the transcript of the evidence of 11/02/2015 09:00 AM Jury Trial
04/19/2016		Attorney appearance On this date Katherine C. Essington, Esq. added for Defendant Nathan Ernesto Lugo
07/18/2016		Transcript received from Caryn Johnson dated 10/21/15
07/25/2016		Transcript received from AnnMarie McDonald dated 11/2/15
07/27/2016	46	ORDER: That the judgement imposing said sentence stand and that said appeal be and is hereby dismissed - dated 5/5/16 - Danielle Sheehan - Appellate Division
		Connors



COMMONWEALTH OF MASSACHUSETTS
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08/09/2016		<p>Offense Disposition: Charge #1 MURDER c265 §1 Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict - Lesser Included Judge: Connors, Hon. Thomas A</p> <p>Charge #2 AMMUNITION WITHOUT FID CARD, POSSESS c269 §10(h) (1) Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict Judge: Connors, Hon. Thomas A</p> <p>Charge #3 AMMUNITION WITHOUT FID CARD, POSSESS, SUBSQ. OFF. c269 §10(h)(1) Date: 11/09/2015 Method: Other Court Event Code: Nolle Prosequi Judge: Connors, Hon. Thomas A</p>
08/16/2016	47	Court Reporter Dawna Chapin is hereby notified to prepare one copy of the transcript of the evidence of 11/05/2015 09:00 AM Jury Trial, 11/06/2015 09:00 AM Jury Trial, 11/09/2015 09:00 AM Jury Trial
08/18/2016		Notice sent to clerk of Supreme Judicial Court that record is assembled
08/24/2016	48	Notice of Entry of appeal received from the Appeals Court Re: No. 2016-P-1157
09/19/2016		Transcript received from D. Keefer and mailed to SJC, ADA & Atty. dated 2/7/14, 4/30/14 and 2/12/14
10/28/2016		Transcript received dated 11/2/15 from Ann McDonald, OCR and original and copy mailed to Appeals Ct., 1 copy to ADA & 1 copy to Def. Atty. to be included as part of the record on case #2016-P-1157
11/22/2016		Transcript received from Ann Marie McDonald dated 11/2/15 and mailed to Appeals Court, ADA and Atty.
12/09/2016	49	<p>Notice of docket entry received from Appeals Court</p> <p>ORDER (RE#7): The appeal is stayed and the Clerk of the Trial Court (Norfolk Superior Court) is to provide to the parties a transcript of the proceeding, pre-trial hearing motion which took place on 5/30/2014. If, within three months of this order. i.e., on or before 2/28/2017, a transcript has not been filed in the trial court and transmitted to the Appeals Court, the requesting party is to file a status report with the Appeals Court that explains the delay and offer an estimated completion date of the transcript. Furthermore, the requesting party shall file a status report with the Appeals Court within seven days of the filing of the transcript.</p>
12/29/2016	50	<p>Notice of docket entry received from Appeals Court</p> <p>RE: P#9: A response from the Commonwealth is due on or before 1/18/2017, Notice/Attest - Joseph Stanton, Clerk</p>



**COMMONWEALTH OF MASSACHUSETTS
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01/11/2017	51	Notice of docket entry received from Appeals Court RE#9: REVISED ACTION: Allowed. The notice of appeal filed in 1482CR673 is deemed timely filed as to his convictions in NOCR2011-1153, and defendant's convictions related to both docket numbers are hereby consolidated in this appeal. The trial court is to transmit to this court forthwith the docket sheets in NOCR2011-1153 under docket #16-P-1157. (Sullivan,J)(docket sheet sent to Appeals Court 1/11/17)
02/07/2017		Transcript of case #2011cr1153 dated 5/30/14 sent to SJC, ADA, and Atty.
02/24/2017	52	Notice of docket entry received from Appeals Court RE:#12: This court received the transcript on 2/8/17. Therefore, the stay of appellate proceedings is vacated. Extension to 4/3/2017 granting for filing of breif of Nathan Lugo. Defendnt/Appellant.
04/03/2017	53	Notice of docket entry received from Appeals Court RE#13: Appellate proceedings STAYED to 5/3/2017. The defendant is granted leave to file, and the trial court leave to consider, a motion for new trial. A status report is due 5/3/2017 concerning the filing of the new trial motion. (rec'd 3/31/17)
06/06/2017	54	Defendant 's Motion for new trial and resentencing pursuant to Rule 30(b) - received 5/9/2017 w/box of transcripts - given to B.Roche
06/06/2017	55	Nathan Enesto Lugo's Memorandum in support of motion for a new trial and resentencing. Filed 5/9/2017
06/06/2017	56	Affidavit of Joseph Krowski, Jr in support of motion for new trial and resentencing. Filed 5/9/2017
06/06/2017	57	Other Katherine C. Essington, Esq.'s Certificate of service - filed 5/9/2017
08/03/2017	58	Commonwealth 's Motion to compel Commonwealth to respond to Defendant's motion for a new trial and resentencing pursuant to Rule30(b)
08/03/2017	59	Affidavit filed by Defendant Nathan Enesto Lugo in support of Defendant's motion to compel the Commonwealth to respond to Defendant's motion for a new trial and resentencing
08/03/2017	60	Defendant 's Certificate of service
09/25/2017	61	Opposition to to Defendant's Motion for New Trial and Sentencing filed. filed by Commonwealth
11/13/2017	62	Notice of docket entry received from Appeals Court Re#21: Appellate proceedings STAYED to 12/6/17. status report due 12/6/17 concerning the motion for new trial pending before the trial court. This appeal, entered on 8/19/16, has been stayed for several months awaiting disposition of the defendant's motion for new trial, with monthly status reports filed by counsel for the defendant in this court since that time. As the appeal has been and continues to be unable to proceed pending the lower court's disposition of the motion, counsel and the lower court to anticipate the possible vacating of this appeal without prejudice to reentry, following disposition of the pending motion should the motion not have been disposed by the status date. Notice/attest/Connors, J - Joseph Stanton, Clerk



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12/05/2017	63	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 01/11/2018 02:00 PM Motion Hearing. To be heard before Connors, RAJ.	
12/13/2017	64	Notice of docket entry received from Appeals Court RE#22: Appellate proceedings stayed to 1/18/18. Status report due then concerning outcome of trial court hearing on 1/11/18. Notices/attest/Connors, J)	
01/11/2018		Matter taken under advisement Judge: Connors, Hon. Thomas A The following event: Motion Hearing scheduled for 01/11/2018 02:00 PM has been resulted as follows: Result: Held - Under advisement Appeared: Defendant Lugo, Nathan Enesto Attorney Glennon, Esq., Stephanie Martin for the Commonwealth Attorney Essington, Esq., Katherine C for the Defendant Ct Rep: FTR Rm 1 Start time approx start 3:20 pm approx end 3:59 pm Clerk: S Irwin	Connors
		Judge: Connors, Hon. Thomas A	
01/29/2018	65	Notice of docket entry received from Appeals Court Re#12: Appellate proceedings STAYED to 2/20/18. Status report due 2/20/18 concerning the disposition of the defendant's new trial motion, which is under advisement in the lower court. *Notice/Attest/Connors, J)	
02/21/2018	66	Notice of docket entry received from Appeals Court RE#24: APPELLATE PROCEEDINGS STAYED TO 3/16/18. STATUS REPORT DUE THEN CONCERNING TRIAL COURT'S DISPOSITION OF PENDING MOTION FOR NEW TRIAL FOLLOWING HEARING ON 1/11/18 *NOTICE/ATTESTCONNORS, J	
03/28/2018	67	MEMORANDUM & ORDER: of Decision on Defendant's Motion for New Trial and Resentencing Pursuant to Rule 30(b) - ORDER - The defendant's motion for new trial and for re-sentencing is DENIED (Thomas A. Connors, RAJ) c/s ADA & Atty. Judge: Connors, Hon. Thomas A	Connors
04/02/2018	68	Notice of appeal filed. -Denial of Motion for a New Trial and Resentencing Pursuant to Rule 30. Applies To: Lugo, Nathan Enesto (Defendant)	
04/09/2018	69	Appeal: notice of assembly of record sent to Counsel Applies To: Alford, Esq., Pamela Lynne (Attorney) on behalf of Commonwealth (Prosecutor); Essington, Esq., Katherine C (Attorney) on behalf of Lugo, Nathan Enesto (Defendant)	



**COMMONWEALTH OF MASSACHUSETTS
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1182CR01153 Commonwealth vs. Lugo, Nathan Enesto

CASE TYPE:	Indictment	FILE DATE:	12/21/2011
ACTION CODE:	265/1-0	CASE TRACK:	C - Most Complex
DESCRIPTION:	MURDER c265 §1		
CASE DISPOSITION DATE	11/09/2015	CASE STATUS:	Open
CASE DISPOSITION:	Disposed by Jury Verdict	STATUS DATE :	12/21/2011
CASE JUDGE:	Connors, Thomas A	CASE SESSION:	Criminal 1

LINKED CASE

1482CR00673

DCM TRACK

Tickler Description	Due Date	Completion Date
Pre-Trial Hearing	01/20/2012	11/09/2015
Final Pre-Trial Conference	12/31/2012	11/09/2015
Case Disposition	01/14/2013	11/09/2015
Under Advisement	11/08/2015	02/22/2018

PARTIES

Prosecutor Commonwealth	Attorney for the Commonwealth 654803 Margaret Rose Sweeney Krippendorf Norfolk District Attorney's Office Norfolk District Attorney's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4830 Added Date: 11/22/2013
	Attorney for the Commonwealth 035840 Lynn M Beland Norfolk County DA's Office Norfolk County DA's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4826 Added Date: 12/21/2011
	Attorney for the Commonwealth 546977 Stephanie Martin Glennon Norfolk District Attorney's Office Norfolk District Attorney's Office 45 Shawmut Rd Canton, MA 02021 Work Phone (781) 830-4800 Added Date: 08/07/2017
A17	<p>I ATTEST THAT THIS DOCUMENT IS A CERTIFIED PHOTOCOPY OF AN ORIGINAL ON FILE.</p> <p><i>Walter F. Smyth</i> Assistant Clerk</p>



**COMMONWEALTH OF MASSACHUSETTS
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Defendant Lugo, Nathan Enesto 190 Broad Street Suite 3W Providence, RI 02903	Private Counsel 640902 Joseph F Krowski Attorney at Law Attorney at Law 30 Cottage St Brockton, MA 02301 Work Phone (508) 584-2555 Added Date: 01/13/2012 675207 Katherine C Essington Massachusetts Bar 190 Broad St Suite 3W Providence, RI 02903 Work Phone (401) 351-2889 Added Date: 04/20/2016
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PARTY CHARGES					
#	Offense Date/ Charge	Code	Town	Disposition	Disposition Date
1	11/26/2011 MURDER c265 §1	265/1-0	Randolph	Dismissed	07/14/2014
2	11/26/2011 ROBBERY, ARMED c265 §17 Sentence Date: 11/09/2015 <i>Not greater than</i>	265/17/A-0	Randolph	State Prison Sentence <i>Not less than</i>	11/09/2015
		Yrs 15 Mos 0 Days 0		Yrs 12 Mos 0 Days 0	
3	11/26/2011 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) Sentence Date: 11/09/2015 <i>Not greater than</i>	269/10/J-1	Randolph	State Prison Sentence <i>Not less than</i>	11/09/2015
		Yrs 5 Mos 0 Days 0		Yrs 4 Mos 0 Days 0	
4	11/26/2011 CONSPIRACY c274 §7	274/7-1	Randolph	Not Guilty Verdict	11/09/2015
5	11/26/2011 CONSPIRACY TO VIOLATE DRUG LAW c94C §40 Sentence Date: 11/09/2015 <i>Term:</i>	94C/40-0	Randolph	Committed to HOC <i>To Serve:</i>	11/09/2015
		Yrs 2 Mos 0 Days 0		Yrs 2 Mos 0 Days 0	
				Guilty Verdict	



**COMMONWEALTH OF MASSACHUSETTS
NORFOLK COUNTY
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EVENTS				
Date	Session	Event	Result	Resulting Judge
01/20/2012	Criminal 1	Arraignment	Held as Scheduled	
04/04/2012	Criminal 1	Pre-Trial Conference	Held as Scheduled	
07/10/2012	Criminal 1	Pre-Trial Hearing	Held as Scheduled	
09/06/2012	Criminal 1	Pre-Trial Hearing		
10/26/2012	Criminal 1	Pre-Trial Hearing	Held as Scheduled	
03/08/2013	Criminal 1	Pre-Trial Hearing		
05/22/2013	Criminal 1	Pre-Trial Hearing	Held as Scheduled	
06/25/2013	Criminal 1	Pre-Trial Hearing	Rescheduled	
07/25/2013	Criminal 1	Non-Evidentiary Hearing to Dismiss	Rescheduled	
08/20/2013	Criminal 1	Non-Evidentiary Hearing to Dismiss	Not Held	
09/20/2013	Criminal 1	Non-Evidentiary Hearing to Dismiss	Not Held	
11/22/2013	Criminal 1	Hearing	Held as Scheduled	
12/27/2013	Criminal 1	Non-Evidentiary Hearing to Dismiss	Held as Scheduled	
01/17/2014	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled	
02/07/2014	Criminal 1	Evidentiary Hearing on Suppression		
02/12/2014	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled	
04/01/2014	Criminal 1	Evidentiary Hearing on Suppression	Rescheduled	
04/30/2014	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled	
05/12/2014	Criminal 1	Final Pre-Trial Conference	Rescheduled	
05/30/2014	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled	
06/02/2014	Criminal 1	Jury Trial	Rescheduled	
07/14/2014	Criminal 1	Bail Hearing	Held as Scheduled	
07/31/2014	Criminal 2	Trial Assignment Conference	Canceled	
09/04/2014	Criminal 1	Status Review	Held as Scheduled	
10/07/2014	Criminal 1	Pre-Trial Hearing	Rescheduled	
11/21/2014	Criminal 1	Pre-Trial Hearing	Rescheduled	
12/18/2014	Criminal 1	Pre-Trial Hearing	Held as Scheduled	

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03/13/2015	Criminal 1	Evidentiary Hearing on Suppression	Rescheduled	
05/08/2015	Criminal 1	Non-Evidentiary Hearing on Suppression	Not Held	
07/20/2015	Criminal 1	Final Pre-Trial Conference	Rescheduled	
07/27/2015	Criminal 1	Jury Trial	Rescheduled	
08/28/2015	Criminal 1	Non-Evidentiary Hearing on Suppression	Rescheduled	Cosgrove
08/28/2015	Criminal 2	Non-Evidentiary Hearing on Suppression	Not Held	Cosgrove
10/09/2015	Criminal 1	Evidentiary Hearing on Suppression	Held - Under advisement Held as Scheduled	Connors Connors
10/13/2015	Criminal 1	Jury Trial	Rescheduled	Connors
10/21/2015	Criminal 1	Hearing on Motion(s) in Limine	Held as Scheduled	Connors
10/22/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/26/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/27/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/28/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
10/29/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/02/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/03/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/04/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/05/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/06/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
11/09/2015	Criminal 1	Jury Trial	Held as Scheduled	Connors
01/11/2018	Criminal 2	Motion Hearing	Held as Scheduled	Connors

FINANCIAL SUMMARY

No Financial Data for this report

Deposit Account(s) Summary	Received	Applied	Checks Paid	Balance
Total				



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INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
12/21/2011	1	Indictment returned	
01/13/2012	2	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 1/20/12	
01/13/2012	3	Appearance of Deft's Atty: Joseph F Krowski Jr	
01/20/2012		Deft arraigned before Court - Track C - Plea Not Guilty - No Bail w/o prej. - Atty. Fee: \$150.00 (Joseph Krowski, Jr.) - Continued to 4/4/12 for PTC (Habe DJJ) - PTH 7/10/12 PTH (Habe DJJ) (Fishman, J) J McDermott a.c., D Chapin ct. rpt.	
01/20/2012		Assigned to track "C" see scheduling order	
01/20/2012		Tracking deadlines Active since return date	
01/20/2012		Tracking deadlines Active since return date	
01/20/2012		RE Offense 1:Plea of not guilty	
01/20/2012		RE Offense 2:Plea of not guilty	
01/20/2012		RE Offense 3:Plea of not guilty	
01/20/2012		RE Offense 4:Plea of not guilty	
01/20/2012		RE Offense 5:Plea of not guilty	
01/20/2012	4	1/30/12: Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 4/4/12.	
01/20/2012	5	1/30/12: Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 7/10/12.	
01/20/2012	6	MOTION by Deft: To Preserve Handwritten Notes	
01/20/2012		MOTION (P#6.0) Allowed. No Opposition. (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed 1/30/2012	
01/20/2012	7	MOTION by Deft: For Funds For A Private Investigator Filed Under Seal with Affidavit	
01/20/2012		MOTION (P#7.0) Allowed at CPCS approved rates. (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed 1/30/2012	
04/04/2012	8	Pre-trial conference report filed	
06/07/2012	9	Commonwealth files Notice of Discovery III with certificate of service	
07/19/2012		7/10/2012 - Continued 9/6/12 Pretrial Hearing, agreed Habe DJJ (Veary, J), J. McDermott, a.c., Dawna Chapin, ct. rpt	
07/19/2012	10	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 9/6/2012	
07/19/2012	11	Commonwealth files Notice of Discovery IV	
07/19/2012	12	Commonwealth files Notice of Discovery V	
07/19/2012	13	Commonwealth files Notice of Discovery VI and certificate of service	
10/26/2012	14	MOTION by Deft: for Board of Probation Records - allowed, agreed (Fishman, J) J. McDermott, a.c. c/s Def. counsel	

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10/26/2012	15	MOTION by Deft: for Funds for a Cell Phone Record Expert - Allowed (Fishman, J) J. McDermott, a.c. c/s Def. Atty.
10/26/2012	16	MOTION by Deft: for Funds for a Forensic Pathologist - Allowed (Fishman, J) J. McDermott, a.c.
10/26/2012		MOTION (P#14) allowed, agreed (Fishman, Regional Associate Justice). Copies mailed 10/31/2012
10/26/2012		MOTION (P#15) allowed (Fishman, Regional Associate Justice). Copies mailed 10/31/2012 Def. Atty.
10/26/2012		MOTION (P#16) Allowed (Fishman, Regional Associate Justice). Copies mailed 10/31/2012 Def. Atty.
10/26/2012	17	Commonwealth files Notice of Discovery VIII
10/26/2012	18	Commonwealth files Notice of Discovery IX
10/26/2012	19	MOTION by Deft: For All Identification Procedures
10/26/2012	20	MOTION by Deft: To Inspect All Physical Evidence
10/26/2012	21	MOTION by Deft: For A Bill Of Particulars
10/26/2012	22	MOTION by Deft: For All Promises Rewards And Inducements
10/26/2012	23	MOTION by Deft: For Any Statements Of The Defendant
10/26/2012	24	MOTION by Deft: For All Statements Of Potential Witnesses
10/26/2012	25	MOTION by Deft: For All Potential Expert Testimony
10/26/2012	26	MOTION by Deft: For Cell Phone And Cell Phone Tower Records
02/15/2013	27	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 3/8/13
03/08/2013		re: paper #19 Commonwealth Allege there are none (Fishman,J) c/s to ADA and Attorney
03/08/2013		MOTION (P#20) Allowed by Agreement (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed to ADA and Attorney 3/14/2013
03/08/2013		MOTION (P#23) Allowed No Objection (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed to ADA and Attorney 3/14/2013
03/08/2013		MOTION (P#24) Allowed Without Objection (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed to ADA and Attorney 3/14/2013
03/08/2013		MOTION (P#25) Allowed Without Objection (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed to ADA and Attorney 3/14/2013
03/08/2013		MOTION (P#26) Allowed No Objection (Kenneth J. Fishman, Regional Administrative Justice). Copies mailed to ADA and Attorney 3/14/2013
03/08/2013		Continued 5/22/13 PTH; Habe DJ (Fishman,J) J. McDermott a.c., D. Keefer ct rpt.
03/08/2013	28	Habeas corpus for Deft at Norfolk House of Correction (Dedham) 5/22/13
03/08/2013	29	Re: paper #21 - Commonwealth shall aderse in
03/08/2013		Re: paper #21 - Commonwealth shall advise in writing on which theory or theories of murder it is proceeding other requests are withdrawn (Kenneth J. Fishman, J) c/s ADA & Atty.



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05/22/2013		Continued to 6/25/13 PTH - Habe DJJ. agreed. (Fishman,J) J.MC Dermott ac D.Keefer ct rpt
05/22/2013	31	Habeas corpus for Deft at Norfolk House of Correction (Dedham) for 6/25/13
05/23/2013	30	Commonwealth files Notice of Discovery X & Certificate of Service
06/25/2013		Continued 7/25/13 Non-Evidentiary Motion To Dismiss - HABE DJJ (Fishman, J)
06/28/2013	32	Habeas corpus for Deft at Norfolk House of Correction (Dedham) 7/25/13
07/15/2013	33	MOTION by Deft: To Suppress Cellular Site Location Information And Evidence Derived Therefrom Obtained By Law Enforcement Without A Warrant with certificate of service and Memorandum
07/15/2013	34	MOTION by Deft: To Dismiss Count One of the Indictment Alleging Murder Due to the Commonwealth's Failure to Instruct the Grand Jury on Mitigation and Defenses with certificate of service
07/15/2013	35	MOTION by Deft: To Dismiss So Much Of Count One of the Indictment that Alleges First Degree Murder with certificate of service
07/15/2013	36	MOTION by Deft: To Sever with Memorandum , Affidavit and Certificate of Service
07/25/2013		Continued 8/20/13 Motions - HABE DJJJ (Veary, J.) J. McDermott asst. clerk, D. Chapin ct. reporter
08/01/2013	37	Habeas corpus for Deft at Norfolk House of Correction on 8/20/13
08/20/2013		Continued 9/20/13 Motions - Habe DJJ, agreed. (Veary, J) J McDermott a.c., P Morris ct. rpt.
08/22/2013	38	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 9/20/13 CANCELLED PER a.c. J.McDermott
09/20/2013		Def. Atty on trial. - Counsel to notify clerk of date for non-evid motions before Veary,J) Habe DJ. (Veary,J) J.Uguccioni a.c
10/17/2013	39	Commonwealth files Opposition to Deft's Motions to Dismiss so Much of Count One of the Indictment that Alleges First Degree Murder.
11/21/2013	40	Habeas corpus for Deft at Plymouth County Correctional Facility for 11/22/13
11/22/2013		Continued to 1/17/2014 Motion to Supress 9am Habe Plymouth agreed (Kenneth J. Fishman, Regional Administrative Justice) J. McDermott a.c., Dawna Chapin c.r
11/22/2013	41	Habeas corpus for Deft at Plymouth County Correctional Facility 1/17/14
12/23/2013	42	Habeas corpus for Deft at Norfolk House of Correction (Dedham) on 12/27/13 at 9:00 to be heard in Brockton with Judge Veary.
12/27/2013	42.1	Commonwealth files Amended Opposition to Defendant's Motion to Dismiss so much o Count One of the Indictment that Alleges First Degree Murder
01/17/2014	43	Commonwealth files Notice of Discovery XI & Certificate of Service
01/17/2014	44	Habeas corpus for Deft at Norfolk House of Correction (Dedham) and Plymouth for 2/7/14

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01/21/2014		Deft not transported. - Continued to 2/7/14 @ 9AM Motion to Suppress (2 Hrs) Habe DJ/Ply. (Connors, J) J. Uguccioni a.c JAVS
01/21/2014	45	Deft files Supplemental Memorandum of Law in support of the defendant's motion to dismiss count one of the indictment alleging murder due to the Commonwealth's failure properly to instruct the Grand Jury on Mitigation and Defenses with certificate of service and attachment
02/12/2014		Continued 4/1/14 @ 9am evid. motion to suppress (2-3 hrs) agreed. HABE DJ, Plymouth . 5/12/14 Final pre-trial conference, 6/2/14 trial. HABES all dates. (Connors, J). J. Uguccioni, a.c., JAVS
02/14/2014	46	Habeas corpus for Deft at Norfolk House of Correction (Dedham) and Plymouth Jail on 4/1/14
02/14/2014	47	Habeas corpus for Deft at Norfolk House of Correction (Dedham) and Plymouth Jail on 5/12/14
02/14/2014	48	Habeas corpus for Deft at Norfolk House of Correction (Dedham) and Plymouth Jail 6/2/14 CANCELLED PER CLERK
04/04/2014		Hearing on Defendant's Motion to Supress (p.33.0) rescheduled to April 30,2014 at 9am. HABE DJ and Plymouth HOC. (Connors, J). J.Hurley, a.c.
04/04/2014	49	Habeas corpus for Deft at Plymouth County Correctional Facility and Dedham Jail for 4/30/14.
04/30/2014		Brought into court - Hearing Continues before Connors, J. Continued to 5/30/14 for further hearing on Motion to Suppress - HABE DJ/Plymouth (Connors, J.) L. Beland, ada - J. Kowski, attny - JAVS - MHS, asst. clerk
04/30/2014	50	MOTION by Deft for Expedited Transcripts - ALLOWED (Connors, J.)- Copies sent to ADA & Attorney
05/05/2014	51	Habeas corpus for Deft at Plymouth County Correctional Facility & Norfolk House of Correction on 5/30/14
05/30/2014	51.1	Nathan E Lugo's Memorandum Supplemental Memorandum Of Law Filed In Support Of A Motion To Suppress Cell Phone Site Location Information Obtained By Law Enforcement Without A Warrant w/Certificate of Service
07/02/2014	52	MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS COUNT ONE OF THE INDICTMENT ALLEGING MURDER DUE TO THE COMMONWEALTH'S FAILURE PROPERLY TO INSTRUCT THE GRAND JURY ON MITIGATION AND DEFENSES: ORDER - For the reasons discussed above, it is hereby ORDERED that the Defendant's Motion to Dismiss Count One of the Indictment Alleging Murder Due to the Commonwealth's Failure Properly to Instruct the Grand Jury on Mitigation and Defenses by ALLOWED and that said indictment be DISMISSED, and it is further ORDERED that this ORDER be stayed until fourteen days from the below-listed entry date 7/2/2014, (Raymond P. Veary, Jr, Administrative Justice) c/s ADA & Atty.



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07/10/2014	53	Habeas corpus for Deft at Plymouth County Correctional Facility for 7/31/14
07/14/2014	54	Habeas corpus for Deft at Plymouth County Correctional Facility on 7/14/14.
07/14/2014		RE Offense 1:Dismissed
07/14/2014		Indictment dismissed; See memorandum of decision (Veary, J.) J. McDermott, asst. clerk - JAVS
07/14/2014		Re; offense #2 - After hearing, Bail set at \$250,000.00 cash - Bail Warning given - Continued 9/4/14 status - HABE Plymouth House of Correction, agreed. (Fishman, J.) J. McDermott, asst. clerk - JAVS
07/18/2014	55	Cancel Habeas corpus for Deft at Plymouth County Correctional Facility on 7/31/14
07/18/2014	56	Habeas corpus for Deft at Plymouth County Correctional Facility on 9/4/14
08/20/2014	57	8/11/14 - MEMORANDUM OF DECISION ON DEFENDANTS' MOTION TO SUPPRESS EVIDENCE: ORDER - For the foregoing reasons, the defendants' motions to suppress are DENIED (Thomas A. Connors, J) c/s ADA & Atty.
09/04/2014		Continued 10/7/14 Pre-Trial Hearing; - HABE Plymouth (Fishman, J.) J. McDermott, asst. clerk - JAVS
09/04/2014	58	Habeas corpus for Defendant at Plymouth County Correctional Facility on 10/7/14
10/07/2014		Interpreter present: Lopez, Merce on 10/7/2014
10/07/2014		Continued 11/21/14 PTH; defendant's attorney unavailable. Habe Plymouth. (Fishman, J) BG Roche a.c., JAVS
10/08/2014	59	Habeas corpus for Deft at Plymouth County Correctional Facility on 11/21/14.
11/21/2014		At request of Defendant, continue 12/18/14 PTH; Habe Plymouth _ Rule 36 waived (Fishman, J) J McDermott a.c., D Chapin ct. rpt.
11/25/2014	60	Habeas corpus for Deft at Plymouth County Correctional Facility on 12/18/2014.
12/18/2014	61	Defendant's MOTION to Suppress Physical Evidence, Observations, and Statements Obtained from a Warrantless Search of a Home w/Certificate of Service attached.
12/18/2014	62	Defendant's Memorandum Supporting The Defendant's Motion to Suppress Physical Evidence, Observations, and Statements Obtained from a Warrantless Search of A Home w/Certificate of Service attached.
12/18/2014	63	Defendant's MOTION to Suppress Evidence Obtained From 27 Breer Circle, Brockton, MA Pursuant to an Invalid Search Warrant, Certificate of Service & attachments.
12/18/2014	64	Defendant's Memorandum Supporting the Defendant's Motion to Suppress Evidence Obtained From 27 Breer Circle, Brockton, MA Pursuant to an Invalid Search Warrant w/Certificate of Service attached.
12/18/2014	65	Defendant's Affidavit



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12/18/2014	65.1	Continued 3/13/15 M/S 9AM; 7/20/15 FPTC; 7/27/15 Trial, agreed. Habe Plymouth for all dates. (Fishman, J) J McDermott a.c., Javs	
12/23/2014	66	Habeas corpus for Deft at Plymouth County Correctional Facility on 3/13/15	
12/23/2014	67	Habeas corpus for Deft at Plymouth County Correctional Facility on 7/27/15	
04/02/2015	68	Defendants Ex-Parte Motion For Funds For Transcripts Of Witness Interviews	
04/03/2015	69	Habeas corpus for Deft at Plymouth County Correctional Facility on 7/20/15	
04/03/2015	70	Habeas corpus for Deft at Plymouth County Correctional Facility on 7/27/15	
07/27/2015		Continued 8/28/15 Motion to Suppress 9am; 10/9/15 Final Pre-Trial Conference; 10/13/15 Trial, agreed. - HABE Plymouth House of Correction for all dates (Fishman, J.) J. McDermott, Asst. Clerk - JAVS	
07/27/2015	71	Defendant's Ex Parte Motion For The Hiring Of A Psychologist Filed Under Seal, w/Counsel For the Defendants Affidavit - ALLOWED in the amount of \$2,500.00 (Fishman, J.) (dated 7/20/15) copies sent to attorney (FILED UNDER SEAL)	
07/27/2015	72	Habeas corpus for Deft at Plymouth County Correctional Facility on 8/28/15	
07/27/2015	73	Habeas corpus for Deft at Plymouth County Correctional Facility on 10/9/15	
07/27/2015	74	Habeas corpus for Deft at Plymouth County Correctional Facility on 10/13/15	
08/17/2015		Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 08/28/2015 09:00 AM has been resulted as follows: Result: Rescheduled Reason: Transferred to another session Appeared:	Cosgrove
08/28/2015		Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 08/28/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session Appeared:	Cosgrove
10/05/2015	75	Commonwealth's Motion to Opposition to Defendant's Motion to Suppress Search of Home (10/2/15)	
10/08/2015		Event Result: The following event: Non-Evidentiary Hearing on Suppression scheduled for 10/09/2015 02:00 PM has been resulted as follows: Result: Rescheduled Reason: By Court prior to date	Connors



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10/08/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/09/2015 09:00 AM Evidentiary Hearing on Suppression.	
10/09/2015		Matter taken under advisement The following event: Evidentiary Hearing on Suppression scheduled for 10/09/2015 09:00 AM has been resulted as follows: Result: Held - Under advisement	Connors
10/09/2015		Event Result: The following event: Jury Trial scheduled for 10/13/2015 09:00 AM has been resulted as follows: Continued to 10/21/15 Motion In Limine - 9AM to 10/22/15 Trial 9 AM - Habe Plymouth & DJ both Dates. (Cannone J.) B G Roche ac JAVS (endorsement dated 10/13/15) Result: Rescheduled Reason: Request of Defendant	Connors
10/15/2015	76	Commonwealth 's Request for Voir Dire Questions rec'd 10/8/15	
10/15/2015	77	Commonwealth 's Motion for view. (rec'd 10/8/15)	
10/15/2015	78	Commonwealth 's Statement for Rhe Jury. (rec'd 10/8/15)	
10/15/2015	79	Commonwealth 's Motion in limine to Introduce Statements of The Deft. At The Police Station (rec'd 10/8/15)	
10/15/2015	80	Commonwealth 's Motion in limine to Admit Conversation of Co-Deft. And The Victim (rec'd 10/8/15)	
10/15/2015	81	Commonwealth 's Motion to Introduce Text Messages (rec'd 10/8/15)	
10/15/2015	82	Commonwealth 's Motion to Introduce Rifle (Rec'd 10/8/15)	
10/15/2015	83	Commonwealth 's Motion to Allow Prior Bad Act Evidence At Trial. (rec'd 10/8/15)	
10/15/2015	84	Commonwealth 's Motion to Allow Family To Remain In Courtroom After Testifying (rec'd 10/8/15)	
10/15/2015	85	Commonwealth 's Motion to Admit Prior Bad Act Evidence (rec'd 10/8/15)	
10/15/2015	86	Commonwealth 's Motion to Admit Specific Jail Call Conversations (rec'd 10/8/15)	
10/15/2015	87	Commonwealth 's Motion for Joinder of Offenses. (rec'd 10/8/15)	
10/15/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/21/2015 09:00 AM Hearing on Motion(s) in Limine.	
10/15/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/22/2015 09:00 AM Jury Trial.	
10/15/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/22/2015 09:00 AM Jury Trial.	
10/15/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/21/2015 09:00 AM Hearing on Motion(s) in Limine.	
10/15/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/21/2015 09:00 AM Hearing on Motion(s) in Limine.	



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10/15/2015	88	ORDER: Memorandum of Decision on Deft's Motion to Suppress Evidence - The Deft's Motion to Suppress Evidence is DENIED - (Thomas A. Connors, J. RAJ) Copies mailed to ADA and Defense Counsel (Dated 10/13/15)	Connors
10/19/2015	89	Defendant's Request for Jurors (dated 10/13/15)	
10/20/2015		Habeas Corpus for defendant issued to Plymouth County House of Correction returnable for 10/21/2015 09:00 AM Hearing on Motion(s) in Limine.	
10/21/2015		Event Result: The following event: Hearing on Motion(s) in Limine scheduled for 10/21/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/21/2015	91	Commonwealth's Motion to Limine to Admit conversation of Co-Defendant and the Victim - Allowed and agreed (Connors, RAJ) c/s ADA & Atty.	Connors
10/21/2015	92	Commonwealth's Motion for View Allowed-agreed (Connors, RAJ) c/s ADA & Atty.	Connors
10/22/2015		Event Result: The following event: Jury Trial scheduled for 10/22/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/23/2015	90	Commonwealth's Motion to in Limine to Introduce Statements of the Defendant at the Police Station - Allowed (Thomas Connors, RAJ) c/s ADA & Def. Atty.	Connors
10/23/2015	93	Commonwealth's Motion for Joinder of Offenses - Allowed (Connors, RAJ) c/s ADA & Atty.	Connors
10/23/2015	94	Commonwealth's Motion to Allow Family to Remain in Courtroom After Testifying - Referred (Connors, RAJ) c/s ADA & Atty.	Connors
10/23/2015	95	Commonwealth's Motion to Allow Prior bad Act Evidence at Trial c/s ADA & Atty.	Connors
10/26/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/26/2015 09:00 AM Jury Trial.	
10/26/2015		Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 10/26/2015 09:00 AM Jury Trial.	
10/26/2015		Event Result: The following event: Jury Trial scheduled for 10/26/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/27/2015		Event Result: The following event: Jury Trial scheduled for 10/27/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/28/2015		Event Result: The following event: Jury Trial scheduled for 10/28/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors



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10/29/2015	Event Result: The following event: Jury Trial scheduled for 10/29/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/02/2015 09:00 AM Jury Trial.	
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/03/2015 09:00 AM Jury Trial.	
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/04/2015 09:00 AM Jury Trial.	
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/05/2015 09:00 AM Jury Trial.	
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/06/2015 09:00 AM Jury Trial.	
10/30/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/03/2015 09:00 AM Jury Trial.	
11/02/2015	Event Result: The following event: Jury Trial scheduled for 11/02/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/02/2015	Habeas corpus for witness, Devante Thames, issued to Norfolk County Correctional Center. Returnable on 11/03/2015 09:00 AM Jury Trial.	Connors
11/02/2015	Habeas corpus for witness, Devante Thames, issued to Plymouth County House of Correction. Returnable on 11/03/2015 09:00 AM Jury Trial.	Connors
	PLEASE TRANSPORT TO DEDHAM DISTRICT COURT FOR SAFE KEEP. 9AM ARRIVAL FOR TRIAL . PLEASE	
11/02/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/03/2015 09:00 AM Jury Trial.	
11/03/2015	Event Result: The following event: Jury Trial scheduled for 11/03/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/04/2015	Event Result: The following event: Jury Trial scheduled for 11/04/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/05/2015	Event Result: The following event: Jury Trial scheduled for 11/05/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/06/2015	Event Result: The following event: Jury Trial scheduled for 11/06/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/06/2015	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 11/09/2015 09:00 AM Jury Trial.	



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11/09/2015	Event Result: The following event: Jury Trial scheduled for 11/09/2015 09:00 AM has been resulted as follows: Result: Held as Scheduled	Connors
11/09/2015	Defendant sentenced: Sentence Date: 11/09/2015 Judge: Connors, Hon. Thomas A Charge #: 2 ROBBERY, ARMED c265 §17 State Prison Sentence State Prison Sentence-Not Less Than: 12 Years, 0 Months, 0 Days State Prison Sentence-Not More Than: 15 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Case 1482cr00673 Charge #: 3 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) State Prison Sentence State Prison Sentence-Not Less Than: 4 Years, 0 Months, 0 Days State Prison Sentence-Not More Than: 5 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Case 1482cr00673 Charge #: 5 CONSPIRACY TO VIOLATE DRUG LAW c 94C §40 Committed to HOC Term: 2 Years, 0 Months, 0 Days To Serve: 2 Years, 0 Months, 0 Days Served Concurrently Charge # 1 Case 1482cr00673 Committed to MCI - Cedar Junction (at Walpole) Credits 1445 Days	
11/09/2015	Disposed for statistical purposes	



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11/10/2015		<p>Offense Disposition: Charge #1 MURDER c265 §1 Date: 07/14/2014 Code: Dismissed</p> <p>Charge #2 ROBBERY, ARMED c265 §17 Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict Judge: Connors, Hon. Thomas A</p> <p>Charge #3 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a) Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict Judge: Connors, Hon. Thomas A</p> <p>Charge #5 CONSPIRACY TO VIOLATE DRUG LAW c94C §40 Date: 11/09/2015 Method: Jury Trial Code: Guilty Verdict Judge: Connors, Hon. Thomas A</p>
11/10/2015	96	<p>Issued on this date:</p> <p>Mitt For Sentence (First 6 charges) Sent On: 11/10/2015 15:29:20</p>
11/24/2015	97	Commonwealth's Motion for Prospective Witness List (10/22/15)
11/24/2015	98	Commonwealth's Statement of Facts for the Jury (10/22/15)
11/24/2015	99	's Request for Voir Dire Questions (10/22/15)
11/24/2015	100	's Motion for Proposed Jury Voir Dire & Certificate of Service
12/01/2015	101	<p>Court Reporter JAV'S 1 - Latora is hereby notified to prepare one copy of the transcript of the evidence of 12/27/2013 09:00 AM Non-Evidentiary Hearing to Dismiss, 01/17/2014 09:00 AM Evidentiary Hearing on Suppression, 02/12/2014 09:00 AM Evidentiary Hearing on Suppression, 04/30/2014 09:00 AM Evidentiary Hearing on Suppression, 05/30/2014 09:00 AM Evidentiary Hearing on Suppression, 10/09/2015 09:00 AM Evidentiary Hearing on Suppression, 10/21/2015 09:00 AM Hearing on Motion(s) in Limine, 10/22/2015 09:00 AM Jury Trial, 10/26/2015 09:00 AM Jury Trial, 10/27/2015 09:00 AM Jury Trial, 10/28/2015 09:00 AM Jury Trial</p>
12/01/2015	102	<p>Issued on this date:</p> <p>Mitt For Sentence - Additional Charges (1 - 15) Sent On: 12/01/2015 15:17:55</p>
12/16/2015		Transcript received dated 1/17/14 and 4/30/14 mailed to transcription services



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02/09/2016	103	<p>Witness list</p> <p>Commonwealth's Prospective Witness List</p> <p>Applies To: Krippendorf, Esq., Margaret Rose Sweeney (Attorney) on behalf of Commonwealth (Prosecutor)</p> <p>(10/22/15)</p>
04/13/2016		Transcript received from Caryn Johnson, ct. rpt. dated 11/3 & 4, 2015
04/20/2016		<p>Attorney appearance</p> <p>On this date Katherine C. Essington, Esq. added for Defendant Nathan Enesto Lugo</p>
05/05/2016		Transcript received from Jav's 1 (Latora) dated 10/9, 22, 26, 27, 28, 29/15 & 11/3/16
08/09/2016		<p>Offense Disposition:</p> <p>Charge #1 MURDER c265 §1</p> <p>Date: 07/14/2014</p> <p>Code: Dismissed</p> <p>Charge #2 ROBBERY, ARMED c265 §17</p> <p>Date: 11/09/2015</p> <p>Method: Jury Trial</p> <p>Code: Guilty Verdict</p> <p>Judge: Connors, Hon. Thomas A</p> <p>Charge #3 FIREARM, CARRY WITHOUT LICENSE c269 s.10(a)</p> <p>Date: 11/09/2015</p> <p>Method: Jury Trial</p> <p>Code: Guilty Verdict</p> <p>Judge: Connors, Hon. Thomas A</p> <p>Charge #4 CONSPIRACY c274 §7</p> <p>Date: 11/09/2015</p> <p>Method: Jury Trial</p> <p>Code: Not Guilty Verdict</p> <p>Judge: Connors, Hon. Thomas A</p> <p>Charge #5 CONSPIRACY TO VIOLATE DRUG LAW c94C §40</p> <p>Date: 11/09/2015</p> <p>Method: Jury Trial</p> <p>Code: Guilty Verdict</p> <p>Judge: Connors, Hon. Thomas A</p>
09/01/2016	104	Court Reporter JAV'S 1 - Latora is hereby notified to prepare one copy of the transcript of the evidence of 02/12/2014 09:00 AM Evidentiary Hearing on Suppression
09/08/2016		Transcript received from Cindy J. Crowley, Transcriber dated 2/7/14 & 4/30/14
09/15/2016	105	Court Reporter Debra Keefer is hereby notified to prepare one copy of the transcript of the evidence of 02/12/2014 09:00 AM Evidentiary Hearing on Suppression



**COMMONWEALTH OF MASSACHUSETTS
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09/19/2016		Transcript received from Debra Keefer dated 2/12/14 and mailed to SJC, ADA & Atty. along with transcript dated 2/7/14 and 4/30/14 to be part of the record on SJC #216 - P -1157	
10/03/2016	106	Court Reporter Debra Keefer is hereby notified to prepare one copy of the transcript of the evidence of 02/12/2014 09:00 AM Evidentiary Hearing on Suppression	
10/03/2016	107	Court Reporter Latora Everett is hereby notified to prepare one copy of the transcript of the evidence of 05/30/2014 09:00 AM Evidentiary Hearing on Suppression	
11/22/2016		Transcript received from Ann Marie McDonald dated 11/2/15 and mailed to Appeals Ct., ADA and Atty. Essington	
01/11/2017		Notice of docket entry received from Appeals Court RE#9: REVISED ACTION: Allowed. The notice of appeal filed in 1482CR673 is deemed timely filed as to his convictions in NOCR2011-1153, and defendant's convictions related to both docket numbers are hereby consolidated in this appeal. The trial court is to transmit to this court forthwith the docket sheets in NOCR2011-1153 under docket #16-P-1157. (Sullivan,J)(original order filed in case 14CR673(docket sheet sent to Appeals Court 1/11/17)	
02/03/2017		Transcript received for 5/30/14 by court transcriber Sara Milstein-escribers.	
02/07/2017		Transcript dated 5/30/14 sent to Appeals Court, ADA, and Atty.	
05/09/2017	108	Defendant 's Motion for new trial and resentencing pursuant to Rule 30(b) - received 5/9/2017 w/ box of transcripts - given to B. Roche	
05/09/2017	109	Nathan Enesto Lugo's Memorandum in support of motion for a new trial and resentencing - filed 5/9/2017	
05/09/2017	110	Affidavit of Joseph Krowski, Jr. in support of motion for new trial and resentencing. Filed 5/9/2017	
05/09/2017	111	Other Katherine C. Essington, Esq.'s Certificate of service - filed 5/9/217	
08/03/2017	112	Defendant 's Motion to compel Commonwealth to respond to Defendant's motion for a new trial and resentencing pursuant to Rule 30(b)	
08/03/2017	113	Affidavit of Katherine C. Essington in support of Defendant's motion to compel the Commonwealth to respond to Defendant's motion for a new trial and resentencing	
08/03/2017	114	Defendant 's Certificate of service	
09/07/2017		ORDER: Commonwealth is given 30 days from this date either to file its opposition or to file other response as to its position on Defendant's Motion. Connors, RAJ. (ADA Glennon & Atty Essington notified).	Connors
09/07/2017		The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Joseph F Krowski, Jr., Esq. Attorney: Katherine C Essington, Esq. Attorney: Margaret Rose Sweeney Krippendorf, Esq. Attorney: Lynn M Beland, Esq. Attorney: Stephanie Martin Glennon, Esq. Holding Institution: Norfolk County Correctional Center Witness: Devante Thames	A33



COMMONWEALTH OF MASSACHUSETTS
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09/25/2017	115	Opposition to to Defendant's Motion for New Trial and Resentencing filed. filed by Commonwealth	
01/11/2018		Event Result: Judge: Connors, Hon. Thomas A The following event: Motion Hearing scheduled for 01/11/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled	Connors
03/27/2018	116	MEMORANDUM & ORDER: of Decision on Defendant's Motion for New Trial and Resentencing Pursuant to Rule 30(b) - ORDER - The defendant's motion for new trial and for re-sentencing is DENIED (Thomas A. Connors, RAJ) c/s ADA & Atty. Judge: Connors, Hon. Thomas A	Connors
04/02/2018		Notice of appeal filed. - Denial of his Motion for a New Trial and Resentencing Pursuant to Rule 30 - see docket #14cr-673 paper #68 for Notice of Appeal Applies To: Lugo, Nathan Enesto (Defendant)	

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT

INDICTMENT NO. NOCR2011-1153

NOCR2014-0673 ✓

COMMONWEALTH

v.

NATHAN LUGO

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR
NEW TRIAL AND RESENTENCING PURSUANT TO RULE 30(b)

The defendant, Nathan Lugo, was convicted by a jury of second degree murder, armed robbery, unlicensed possession of a firearm and of ammunition, and conspiracy to violate the controlled substance law. The incident from which these convictions stemmed was a planned theft of narcotics from the decedent, Kyle McManus by the defendant and three co-venturers. McManus was shot and killed by a bullet from a handgun brought to the scene and wielded by the defendant while McManus was attempting to retrieve payment for a quantity of marijuana from the four who were in a vehicle driven by the defendant. On those charges, the defendant received the mandatory sentence of life imprisonment with the possibility of parole on the murder count. He received sentences on the other charges which were to run concurrently with that sentence; twelve to fifteen years for armed robbery, four to five years for unlawful firearm possession, and a two year House of Correction sentence for the drug conspiracy charge.

Following sentencing, the defendant filed a notice of appeal. Subsequent to that filing, he moved in the Appeals Court for a stay of proceedings and for leave to file a motion for new trial with this court. That motion was allowed, and after the filing of the instant motion in this court, the Commonwealth was afforded an opportunity to respond. Non-evidentiary hearing on the

motion was conducted on January 11, 2018.

The Motion

The defendant's motion is essentially of three parts. The first portion attacks the applicability of the statutorily-ordained mandatory sentence imposed on the defendant on the lead charge of second degree murder. He argues that because he was seventeen years old at the time of the commission of the McManus homicide, the imposition of that sentence, as applied to him, violates provisions of the state and federal constitutions.

The second portion of his motion makes specific arguments as to different aspects of the instructions which the court gave the jurors. Each of these challenges relates to the instruction given on the homicide charge. These allege failure to have instructed the jury on the defense of accident, on involuntary manslaughter, and on voluntary manslaughter by virtue of sudden combat. The latter of these two also incorporate a claim that his trial counsel had been ineffective in failing to have objected to the alleged improper failures.

The fourth and final basis for the motion is one which seeks to address the sufficiency of the evidence on one of the charges of which the defendant was convicted, conspiracy to possess marijuana with intent to distribute.

The Factual Background

The facts are set forth as they bear upon the issues which are raised by the defendant in the various aspects of his motion and are based upon evidence heard by the jury at trial.

The defendant, Lugo, was in the company of three of his friends at his residence in Brockton on the evening of November 26, 2011. The three were Devonte Thames, Brian Moulton, and Allison Deshowitz. Lugo's date of birth is February 26, 1994 and on that date, he

was seventeen years of age. The four began to discuss a plan to set up and rob someone in order to obtain money. They settled upon an intended victim, Kyle McManus, an acquaintance of Deshowitz whom she had once dated. She was aware that McManus sold marijuana, and the group hatched a scheme to feign interest in purchasing from him a quarter pound of the substance. Moulton had with him \$800.00 in cash, proceeds from his own drug-selling, and the plan was to have him display the money during discussion with McManus to allay the latter's fear that this would be a theft or robbery rather than a transaction.

After Deshowitz had phoned McManus to set up the purported deal, the four entered Lugo's mother's vehicle, a Jeep Grand Cherokee, and Lugo began driving in the direction of Randolph which was where McManus resided. On the way, Moulton inquired of Lugo if he had with him a firearm, which he referred to by the term "Clint Eastwood." Lugo responded in the affirmative. A bulge was visible under Lugo's jacket.

Deshowitz had learned that McManus was at a restaurant, Not Your Average Joe's, in Randolph. Lugo drove into its parking lot and Deshowitz went inside to speak with McManus. Within ten minutes or so, McManus and Deshowitz came out and approached the Jeep. McManus looked inside the vehicle, and he appeared relieved to see that among the persons who had come with Deshowitz was Thames, someone whom he had met before. He began to discuss price with the four for the quarter pound of marijuana, and they came to an agreement that they would purchase it from him for \$1,000.00.¹

McManus told the group that the drugs were at his house, and he got into the Jeep's

¹ McManus told the group he was willing to sell it them for a low price, and there was some trial evidence that the street value of that quantity was about \$1,100.00

backseat. Lugo then drove the short distance to McManus' house. When they arrived, McManus and Thames got out and went inside to retrieve the marijuana. McManus measured out the drugs he intended to sell to the group and placed them in a paper bag.

As Lugo, Deshowitz, and Moulton sat waiting in the car, they observed three people near the residence's front porch, two men and a woman. McManus had spoken briefly to them, but the three did not speak to nor interact in any way with the Jeep's occupants. When Deshowitz expressed concern that these persons, presumably friends of McManus, might be "strapped," Lugo responded not to worry about it. As he did so, Lugo flashed visibly to Moulton's observation the butt end of the handgun from under his jacket.

Thames and McManus returned to the Jeep, and Thames who was now carrying the bag of marijuana got into its backseat. McManus walked over to its front passenger-side by where Moulton sat and he stood at its partially-opened window. The Jeep's engine was running. Moulton had taken out and was displaying his cash, and McManus commented that it looked short of the agreed purchase amount. Lugo then abruptly threw the Jeep into reverse gear and began pulling out of the residence's driveway. McManus leaned into the window adjacent to Moulton and hung on as the Jeep moved onto the street, yelling for the driver to stop. He had no weapon, but he was holding a beer bottle which he had brought with him from the restaurant.

Moulton leaned forward and McManus reached toward him and tried to grab the cash which Moulton was still holding in his hand. As the two engaged in a brief struggle, beer may have splashed on Moulton.² As this was occurring, Lugo retrieved his firearm, a silver handgun,

² In his trial testimony, Moulton was unclear whether McManus held a can or a bottle of beer. He asserted that he believed McManus intentionally directed the bottle or can or its contents toward him as McManus "tussled" with him through the car's window grabbing onto

and reached across the front passenger seat behind where Moulton was leaning forward. Lugo fired a shot from the handgun and McManus fell off of the vehicle and into the street. Lugo then drove the Jeep away.

At this time, Neil Doherty, a companion of McManus who had been with him earlier at the restaurant was approaching the McManus residence. He saw McManus holding onto the vehicle and he heard a gunshot after which McManus fell to the street. As the Jeep drove away, Doherty observed that McManus was bleeding and was not moving. Police and an ambulance were summoned and McManus was discovered to have gunshot wounds to his chest and to his left arm. He later was pronounced dead at Good Samaritan Medical Center.

Lugo drove the Jeep back to his Brockton residence and with Thames, Deshowitz, and Moulton went to the basement where he had his bedroom. Lugo directed the other three to remove and wash their outer clothing in the residence's washing machine as a precaution to eliminate the presence of any gunpowder. The four then split the marijuana taken from the decedent between themselves. Moulton left the premises and later gave some of his share of the marijuana to his girlfriend. He returned afterward to the basement of Lugo's residence.

At some point, Lugo produced a silver handgun which was in a Ziploc bag. He and Moulton went to the residence's backyard where they hid the gun under a brick in a patio area. He and Moulton rejoined Thames and Deshowitz in the basement where the four smoked marijuana, after which they all went to sleep there.

In the early morning hours, police arrived at the Lugo residence. After a peaceful entry, they discovered Lugo, Thames, Moulton, and Deshowitz in the basement and placed them under

him.

arrest. Police searched the premises pursuant to a search warrant. They discovered the silver handgun in the backyard where Lugo and Moulton had hidden it under the brick.

Ruling

The defendant's motion, as referenced, challenges three separate aspects of the proceeding which resulted in his convictions and sentences. These will be considered in turn.

1. The Request for Resentencing

This portion of the defendant's motion involves the interplay between two matters—the defendant's age at the time of the commission of the crimes and the second degree murder statute which calls for a mandatory life sentence with a possibility of parole after fifteen years.

The defendant notes that his sentencing took place immediately after the reception of the jury's verdict. He further notes that his trial counsel, Joseph Krowski, Jr., specifically had requested that he have an opportunity to decide if he wished to consider whether he might present an expert he had retained in the field of juvenile psychology to testify on the issue of sentencing. The court denied the defendant's motion. In doing so, it noted that it had no discretion on the conviction of the lead charge, second degree murder, which calls for a mandatory life sentence and sets a period of fifteen years incarceration before parole eligibility. G. L. c. 265 § 2.

The defendant's challenge to the denial of the delay for sentencing proceeds from a straightforward premise: that the sentence currently extant for the crime of second degree murder violates the constitutional rights of a person who was under eighteen at the time of the crime's commission, amounting to cruel and unusual punishment. Eighth Amendment to the Constitution of the United States and Article Twenty-Six of the Declaration of Rights of the Constitution of the Commonwealth. He makes a related claim that failure to have granted a

postponement to permit expanded advocacy for a sentence below the statutorily-prescribed minimum violated his right to due process of law. In support he cites the cases of *Miller v. Alabama*, 132 S. Ct. 2455 (2012) and *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013).

As the defendant acknowledges in his memorandum, the issue which he raises has been the subject of a ruling by the Supreme Judicial Court in *Commonwealth v. Okoro*, 471 Mass. 51 (2015). That case involved a defendant in a position essentially identical to his own. Emmanuel Okoro was fifteen years old at the time of commission of a homicide which resulted in a jury's return of a verdict of guilty of murder in the second degree. In his appeal, Okoro argued that the trial judge had erred in not permitting him to have had an individualized sentencing hearing at which a judge could take his age into account before passing sentence.

In rejecting the defendant's claim, the Court expressly ruled that the United States Supreme Court's ruling in *Miller* did not go so far as defense counsel was arguing in mandating an individualized sentencing hearing whenever a juvenile offender faces a sentence with a maximum, as opposed to a minimum, of life in prison. *Miller's* holding, the Court stated, is of more limited scope, ruling only that the imposition of a mandatory sentence of life imprisonment without possibility of parole amounts to an Eighth Amendment violation when applied to a juvenile defendant. *Commonwealth v. Okoro*, 471 Mass. at 57, citing *Miller v. Alabama*, 132 S. Ct. at 2469. The Court noted that two of its own decisions, *Diatchenko*, *supra* and *Commonwealth v. Brown*, 466 Mass. 676 (2013) had amplified the manner in which the *Miller* ruling was to affect mandatory life with no parole sentences which had been imposed on juvenile offenders in the Commonwealth. *Id.*, at 57. While the Court did note that an Eighth Amendment

challenge as made by Okoro implicated consideration as to whether the sentencing was “unacceptable under contemporary moral standards,” it left his sentencing to the mandatory punishment imposed for second degree murder undisturbed. *Id.*, at 62-63. While the Court expressed that it was not ruling out that it was a question that it might some day revisit, it stated without ambiguity:

“In sum, we conclude that at present, a mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender convicted of murder in the second degree does not offend the Eighth Amendment or art. 26.” *Id.*, at 62.

The Court then went on in its ruling to deal with Okoro’s claim that lack of individualized sentencing violated his right to Due Process under article 30 of the Massachusetts Declaration of Rights. In this portion of his argument, Okoro had focused upon the fact that the issue of his ability to be released on parole from his mandatory sentence would now be left to determination by the Parole Board. His contention that this process was constitutionally deficient had two facets. First, he argued that he would be subject to procedures before that Board relating to possible release which would be lacking in his ability to assert and have recognized the sort of considerations relating to the attributes of a youthful offender that *Miller* had mandated. Second, he proffered an argument grounded in the separation of powers; that this process effectively was vesting in an executive branch agency a decisional option concerning life in prison for juveniles which as a matter of constitutional governance must reside within the judiciary.

The Court rejected both of these arguments. First, it noted that it was issuing that day a second decision, *Diatchenko v. District Attorney for the Suffolk District*, 471 Mass. 12 (2015) (*Diatchenko II*), relating to juveniles convicted of first degree murder who now had the right,

right, post-*Diatchenko (I)*, to seek from the Parole Board release on parole from the life imprisonment sentence. That decision specifically mandated that juvenile offenders be afforded significant due process protections, not available to adult offenders, to ensure that they would receive “meaningful opportunity to obtain release” which would include recognition of the particular attributes of juveniles, the concept at the heart of the *Miller* decision. *Id.*, at 62, quoting *Diatchenko (I)*, 466 Mass. at 674. With respect to the second prong of Okoro’s challenge on this point, the Court observed simply that as in the case with juveniles convicted of first degree murder, there is no constitutional requirement that the decision concerning release on parole be determined by a court instead of an executive branch paroling entity, and, therefore, presented no violation of due process.

Review of the *Okoro* ruling makes clear that a person in Lugo’s position is not under the law as presently enunciated in a position to argue that he must receive an individualized sentencing hearing after his conviction of second degree murder, an offense which requires the imposition of the mandatory sentence called for in c. 265 § 2. It should be noted that under the ruling in *Diatchenko (II)*, the Supreme Judicial Court has extended to a defendant in Lugo’s position the same due process protections as afforded to a juvenile such as the one in that case who was convicted of first degree murder, to the end that he have a meaningful opportunity to argue for release on parole. *Diatchenko (II)*, 471 Mass. at 32. This includes the right to appointment of counsel, the right to access to funds to retain expert witnesses, specifically to opine, *inter alia*, on issues concerning the relationship between neurobiological immaturity and culpability, and an opportunity for limited judicial review of adverse Parole Board determination through an action in the nature of *certiorari*. *Id.*, at 24-31.

Given the Court's ruling in *Okoro* and in the other cases cited, *ante*, not having afforded Lugo an individualized sentencing hearing after the jury had determined his guilt of second degree murder was not error and he is not entitled to the relief he seeks.

2. The Issues Relating to Jury Instructions

The defendant argues that the jury was given erroneous instructions concerning the count of the indictment for which the jury returned the verdict of murder in the second degree. He argues that he was entitled to three specific instructions which were not given. Two of these would have afforded him the benefit of having the jurors consider guilt of the lesser charge of manslaughter, involuntary manslaughter, and voluntary manslaughter by reason of sudden combat. The third instruction to which he claims the trial evidence entitled him, an instruction of accident, he argues, could properly have given an avenue to the jury to have reached a judgement of acquittal which the instructions they were given did not provide.

A. The Requested Instruction on Accident

There was no dispute at trial that Kyle McManus was fatally shot by a handgun wielded by the defendant. There is no inference that may be drawn from the trial evidence other than that the fatal shot was fired from that handgun while McManus stood at the window of the Jeep that the defendant was operating in reverse in attempting to complete the theft of drugs from him. There is no construct that can be put on the evidence other than that the handgun had been on the defendant's person underneath his jacket, and that he had retrieved it from there and had pointed it at McManus as he stood on the opposite side of the Jeep beyond where Moulton was seated crouching forward.

The defendant in arguing that an instruction on accident was required focuses upon the

testimony of Trooper Brian Canavan of the Massachusetts State Police, called by the Commonwealth as an expert witness on ballistics. The defendant points to testimony elicited on cross-examination which involved the amount of trigger pressure that was necessary to discharge the handgun. In that testimony, Canavan acknowledged that that amount of pressure varies between handguns, and that on that scale of gradation, the particular weapon that fired the bullet that killed McManus required a lesser trigger pull than did other firearms.³

Accident, in the context of request for instruction in a criminal case is “an unintended happening that results in injury or loss ... some sudden and unexpected event that takes place.” *Commonwealth v. Parker*, 25 Mass. App. Ct. 727, 731 n. 6 (1989). Where the evidence at trial fairly raises the possibility of accident, the defendant is entitled to have the jury instructed that the Commonwealth bears the burden of proving beyond a reasonable doubt that the death was not accidental. *Commonwealth v. Jewett*, 442 Mass. 356, 370 (2004). In cases in which the cause of death of the victim was by shooting, a defendant may be entitled to the instruction in circumstances in which the defense of accident is “fairly raised” in the evidence. *Commonwealth v. Palmariello*, 392 Mass. 126, 145 (1984). At the same time, a trial judge is not required to give a requested instruction based on a hypothesis which is not supported by the evidence. *Id.*, quoting *Commonwealth v. Costa*, 360 Mass. 177, 184 (1971).

The factual circumstances as represented in the trial evidence conspire mightily against Lugo’s claim that the jurors should have been provided an instruction on accident. The evidence

³ The specific testimony elicited from Trooper Canavan was that while “standard handguns” might require eight to twelve pounds of trigger pressure, the Ruger handgun that the defendant had wielded required only three pounds of trigger pressure to discharge a shot.

was uncontested that the homicide occurred in the course of the robbery of the quantity of marijuana from the decedent. It was also without dispute that Lugo had prepared for the episode by arming himself with a handgun and that this was the instrument that caused the victim's death. The inference from the evidence is inescapable that Lugo removed the concealed weapon from under his jacket, then pointed and fired it at the victim who was struggling to keep hold onto the vehicle to attempt to prevent Lugo and his confederates from departing with the stolen drugs. In these factual circumstances, a defense that the homicide of McManus was accidental simply is not one that was fairly raised in the evidence.

In *Commonwealth v. Evans*, 390 Mass. 144 (1983), the Supreme Judicial Court determined that instruction of accident was not warranted in a case which bears significant similarity to the present. There, a robbery victim was fatally shot as he struggled with one of his assailants who wielded a firearm as part of a preconceived plan to rob a victim. The Court rejected the assertion of the defendant, who testified that the gun had discharged in some fashion when the victim had physically struggled with him, that this testimony warranted instruction on accident. It determined that any resistance which the victim had put forward did not "permit a conclusion that the resulting struggle and allegedly accidental firing of the gun was not a natural and probable consequence of the armed robbery." *Id.*, at 151-152, citing *Commonwealth v. Devlin*, 335 Mass. 555, 567 (1957).

The factual circumstances in this case are even less favorable to the defendant's position than those presented in *Evans*. Here, there was no testimony from anyone proffering evidence for the jury to consider of an accidental discharge of the handgun that fired the fatal shot. Unlike in *Evans*, there was not evidence even of any physical contact between the defendant and the

victim. That certain of the trial evidence, cited by the defense in its memorandum, allowed that some lesser amount of trigger pull pressure might have been sufficient to have fired the defendant's handgun than certain other types of firearms does not present a basis for the jury to have been charged on accident. Here, where the defendant was convicted by the jury of armed robbery of the decedent, and in the factual circumstances from the evidence as hereinbefore referenced, there was no basis for instruction on accident. See also *Commonwealth v. Griffith*, 404 Mass. 256, 261 (1989).

The primary case which the defendant cites, *Commonwealth v. Power-Koch*, 69 Mass. App. Ct. 735 (2007) is factually inapposite and does not assist his contention. There the jury's return of a verdict of involuntary manslaughter was reversed by the Appeals Court which ruled that instruction on accident should have been given. In that case, the defendant and the victim were close friends. The evidence reflected that the victim who was depressed had implored the defendant to shoot him and had himself cocked the gun and handed it to the defendant. *Id.*, at 736. The defendant in his statement played to the jury stated that he had intended not to do it, but that the firearm had gone off by accident and the victim had been struck. The court determined that this account warranted the accident instruction, citing as additional factors in support the defendant's assertions of his unfamiliarity with the weapon the decedent had provided him and his uncertainty as to whether it was loaded. *Id.*, at 738. The factual circumstances in the defendant's case bear no congruence on the question of whether the issue of accident is fairly raised.

B. The Failure to Request Instruction on Involuntary Manslaughter

The defendant faults his counsel for claimed failure relating to the propriety of instruction

on involuntary manslaughter. His motion notes that defense counsel had made written request for such instruction but had then failed to request that instruction during the charge conference. The defendant's motion is accompanied by an affidavit of his trial counsel, Joseph Krowski, Jr., in which he asserts that his failure to have requested the instruction at the charge conference was unintentional and not part of his defense strategy. The defendant argues that this failure amounted to ineffective assistance on Krowski's part, entitling him to a new trial.

Claims of ineffective assistance fall under the familiar formulation enunciated in *Commonwealth v. Saferian*, 366 Mass. 89, 96-97 (1974). First, a defendant asserting such claim must show that the complained of conduct fell measurably below what might be expected of the ordinary fallible lawyer; second he or she must then demonstrate that such conduct resulted in deprivation of an otherwise available, substantial ground of defense. *Id.* (citations omitted).

The crux of the defendant's contention, of course, involves whether or not the evidence presented at his trial necessitated giving the instruction on involuntary manslaughter. As he argues in his memorandum, such an instruction should be given where any view of the evidence would permit a finding of manslaughter and not murder. *Commonwealth v. Pierce*, 419 Mass. 28, 33 (1994) citing *Commonwealth v. Sires*, 423 Mass. 292, 301 (1992). The defendant asserts a basis to support his argument of entitlement to the instruction which parallels that discussed in the preceding section of this ruling. He concedes as he must that the pointing of a loaded handgun at the victim and intentionally pulling the trigger could not be conduct that would give rise to the suggestion that an involuntary manslaughter instruction was required, in light of the plain and strong likelihood that death would be the result of such conduct. See *Commonwealth v. Abelord*, 68 Mass. App. Ct. 1, 7 (2016). However, he contends that the instruction should

have been given since, he asserts, the trial evidence supported an inference that the firearm had been discharged due to “accident or reckless conduct,” citing *Commonwealth v. Clark*, 363 Mass. 467, 471-472 (1973).

The *Clark* case involved the fatal shooting of a victim which took place in the midst of a sale of drugs. The Court there actually rejected an argument that it had been improper to have refused giving an involuntary manslaughter instruction in the factual circumstances at issue. In noting that the handgun in that case had been trained on the victim at the time it discharged, the Court rejected a defense suggestion that the weapon had been fired “as a result of accident or wanton or reckless conduct.” *Id.*, at 472. The Court then observed that “there was no evidence to require the judge to charge on an hypothesis suggested by the definition of involuntary manslaughter set forth above.” *Id.*

In his memorandum, the defendant’s initial contention is that the instruction he argues should have been given is one which is required where the trial evidence has sufficed to warrant an instruction on accident. This argument presents no basis for having given the proffered instruction for the reasons set forth in the preceding section of this ruling. The defendant posits a further argument for the instruction arising from what his memorandum characterizes as the “general chaos of the scene.” He also cites to the lack of evidence of discussion amongst the four coventurers preceding the taking of the marijuana that a gun would be used to accomplish that end, claiming that this supports his claim that infliction of the fatal gunshot may be viewed as merely wanton or reckless conduct. He adds that the instruction was warranted in light of the lack of evidence of specific intent to kill citing what he argues is the lack of evidence before the jury that the killing was purposeful. He sees a necessity of the giving of the instruction arising

from the possibility that he had pulled out his weapon only to effectuate his and his companions' flight from the stealing of the drugs from the victim, citing his trial counsel's argument that its discharge could be seen simply as a "warning shot" not intended to cause the death.

The evidence here sufficed to have warranted the jury's return of a verdict of guilty of armed robbery. Additionally, the jurors reached a determination in this case that the defendant was guilty of second degree murder committed with malice aforethought. It is plain that the return of these verdicts, warranted by the trial evidence, represented the jury's determination that Lugo had fired his handgun and killed the decedent while he possessed the mental state requisite for the commission of the crime of second degree murder: that is that he either intended to kill the victim, or intended to cause him grievous bodily harm, or intended an act which in the circumstances known to him subjectively, a reasonable person would have known presented a plain and strong likelihood that death would result. *Model Jury Instructions on Homicide* (2013). See also *Commonwealth v. Earle*, 458 Mass. 341, 346 (2010) (citing identical language contained in the earlier Model Jury Instructions).

In the factual circumstances presented at trial, an instruction on involuntary manslaughter on the basis of simply wanton and reckless conduct does not find support. Where the defendant had armed himself prior to the planned theft of the drugs from the decedent and had employed the inherently lethal weapon as the decedent was attempting to retrieve product or cash, it cannot be said that some view of the evidence supported a finding of simply wanton and reckless conduct. See *Commonwealth v. Gibson*, 424 Mass. 242, 244-246 and n. 3 (determining that manslaughter instruction was not warranted on theory of wanton and reckless conduct where evidence reflected that defendant had produced a firearm and fired a fatal shot, even where he

testified he had not been aiming the weapon). See also *Commonwealth v. Mack*, 423 Mass. 288, 290 (1996) citing *Commonwealth v. Sires*, 413 Mass. 292, 303 and nn. 12 and 14 (1992) (“[a]bsent some evidence that the defendant’s knowledge was impaired, intentionally discharging a firearm in the direction of another person creates a plain and strong likelihood of death”).

The defendant’s argument on this point suffers from an infirmity identical to that which characterized his claim of entitlement to an instruction on accident, and which makes his assertion weaker than that made in the above cases which had determined instruction on involuntary manslaughter by wanton and reckless conduct unnecessary. Here there was no evidence from the defendant himself or from anyone else which would substantiate a hypothesis that during the time he and his companions had commenced flight from the victim the discharge of the firearm had simply been a wanton and a reckless act. In the absence of the grounding of some factual scenario inferential from the actual trial evidence itself, the giving of instruction on involuntary manslaughter was not required. See *Commonwealth v. Dyous*, 436 Mass. 719, 732 (2002) (“[t]estimony from which the jury might have found an intent to shoot in the air could not have supported an involuntary manslaughter verdict, because, as the judge correctly ruled, there was no evidence that anyone fired into the air or that the victim died as a result of firing into the air.”).

The instruction which the defendant asserted his counsel erred in not pressing with the court was not required, and he presents no basis to warrant the award of a new trial.

C. The Failure to Have Requested Instruction on Voluntary Manslaughter

In his written request for jury instructions, Lugo’s trial counsel had requested the jury be charged on voluntary manslaughter by reason of sudden combat or provocation, but he did not

argue for that instruction at the charge conference nor object when it was not given. Lugo contends that this deprived him of effective assistance of counsel. Again, under the *Saferian* standard which governs such post-trial claims, the defendant bears the burden of establishing both that his counsel's performance was inadequate and that he was thereby deprived of an otherwise available substantial ground of defense. As with Lugo's contention on the question of involuntary manslaughter by unintentional but wanton and reckless conduct, analysis turns upon the central issue of whether under law he was entitled to have had an instruction on voluntary manslaughter given at trial had he requested it. See *Commonwealth v. Acevedo*, 446 Mass. 435, 442 and n. 12 (2006).

Reasonable provocation is defined in our case law as "provocation that 'would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint.'"⁴⁴ *Id.*, at 443 quoting *Commonwealth v. Walden*, 380 Mass. 724, 728 (1980). A jury instruction on reasonable provocation is warranted where "there is evidence of provocation deemed adequate in law to cause the accused to lose self-control in the heat of passion, and if the killing followed the provocation before sufficient time had elapsed for the accused's temper to cool." *Commonwealth v. Andrade*, 422 Mass. 236, 237 (1996), quoting *Commonwealth v. Schnopps*, 383 Mass. 178, 180 (1981). The assessment of this question implicates both objective and subjective components: first, a jury must have heard evidence from which it could infer that a reasonable person would have become sufficiently provoked and would not have "cooled off" by the time the killing took place, and second, that the defendant himself was so provoked and did not "cool off." *Commonwealth v. Groome*, 435 Mass. 201, 220 (2001).

The facts as presented at trial are inapposite to those which would have entitled the defendant to the instruction he requests. In terms of the objective component, Lugo in his memorandum in support of motion cites the testimony given by Brian Moulton as to the circumstances which attended the immediate aftermath of the victim's discovery that he had been targeted by the vehicle's four occupants for the theft of narcotics. He cites evidence that Kyle McManus had displayed resistance to that theft, and he contends that the physical actions on his part referenced in Moulton's testimony was legally sufficient to have constituted "provocation" in the eyes of a reasonable person for the homicide by infliction of the fatal gunshot coming before a "cooling off" period, again objectively viewed.

The evidence upon which Lugo seeks to rely falls well short of what would amount to sudden combat or provocation on an objective basis. There was no trial evidence at all as to physical engagement between the decedent and Lugo himself. Moulton's description of his interaction with McManus was not pellucidly clear. In the light most favorable to the defendant, it could be said that McManus struggled to keep hold of the fleeing vehicle and reached through its passenger side window, "tussled" with Moulton by grabbing onto him as he did so, and that he may have attempted to assault him with the bottle or can he held or with its contents.⁴ As all this was occurring, Moulton testified he ducked downward in his seat in the vehicle, and he heard the

⁴ As referenced earlier, Moulton's testimony on the point fairly must be characterized as ambiguous. He did describe that McManus was "tussling" with him and was "grabbing onto" him as he reached with his two hands through the partially open car window. (Trial Trans., Vol. I, p. 111, l. 23 to p. 112, l. 1 and Vol. II, p. 46, l. 4 to l. 7.). Moulton also stated "I believe that [McManus] tried to assault me with the beer can or bottle, or whatever it was." (*Id.*, Vol. I, p. 112, l. 9 to l. 11) . When asked on re-direct examination about the bottle or can which McManus had been holding when he had come to the side of the car, Moulton simply reiterated: "I thought he was trying to hit me with it." (*Id.*, Vol. II, p. 65 l. 7 to l. 9).

shot discharged from Lugo's handgun, and that McManus was no longer at the window.

The conduct which Moulton described, is equivocal as to what exactly the decedent was holding, and also as to what McManus was doing with that item as Moulton was leaning downward other than his venturing an opinion that he thought the decedent was trying to assault him with the object. There unquestionably was evidence in his testimony that the two came into physical contact as McManus reached his hands through the window of the moving vehicle. However, even where there is physical contact between a defendant himself and a victim, this is not always sufficient to warrant instruction on manslaughter. *Commonwealth v. Walden*, 380 Mass. 724, 727-728 (1980). When compared with cases which have discussed the quantum of evidence which must have been presented, objectively viewed, to trigger the requirement of instruction on involuntary manslaughter, what the defendant relies upon in this case appears deficient. See *Commonwealth v. Acevedo*, 446 Mass. 435, 443-444 (2006) (where defendant presented evidence that he had been surrounded by the decedent and several of his friends who repeatedly punched him and knocked him to the ground, sufficient evidence of provocation to warrant instruction.). Cf *Commonwealth v. Ruiz*, 442 Mass. 826, 839 (2004) (where the evidence at most showed that victim had slapped him before defendant responded with fatal stabbing, sudden combat instruction was not warranted, in light of the absence of threat of serious harm presented by victim's conduct).

The case of *Commonwealth v. Curtis*, 417 Mass. 619 (2009) is instructive on this issue. There, the defendant argued the jury should have been charged on provocation and sudden combat, citing evidence that the victim had tried to hit the defendant with a full quart bottle of liquor prior to the fatal attack which involved baseball bats and a bottle. The Court rejected that

argument, finding that the victim's unsuccessful attempt to strike the defendant with a weapon was insufficient in those factual circumstances. *Id.*, at 629. It observed that this was especially inapposite, where the defendant himself had landed the first blow, but then noted a series of cases in which the Court had determined that evidence that a victim had struck the initial physical blow would not automatically entitle a defendant to an instruction on voluntary manslaughter. *Id.*, at 629 and n. 6, citing *Commonwealth v. Parker*, 402 Mass. 333, 344-345 (1988), *Commonwealth v. Garabedian*, 399 Mass. 304, 313-314 (1987), *Commonwealth v. Brown*, 317 Mass. 220, 227 (1982), *Commonwealth v. Walden*, *supra*, *Commonwealth v. Zukoski*, 370 Mass. 23, 29 (1976). In the present case, that the victim had attempted to grapple with one of the defendant's coventurers through the window of the moving vehicle is not, on an objective basis, sufficient provocation to warrant the defendant's shooting him with the handgun he had brought to the scene as the defendant was attempting to drive away with the stolen drugs.

Even if McManus' conduct in struggling with Moulton as he held the bottle or can could be viewed objectively as provocation, the second component necessary for the voluntary manslaughter instruction is lacking. There was no evidence presented to the jury that Lugo fired his handgun as a result of his having been provoked by the decedent's conduct. Lugo did not testify as to what effect Moulton's interaction with McManus had upon him as he himself was operating the Jeep in reverse from the driveway. This factor contrasts with the two cases cited by the defendant in his memorandum in support, in each of which evidence which addressed the subjective component had been placed before the jury, warranting the instruction. Cf. *Commonwealth v. Berry*, 431 Mass. 326, 329 (2000) (instruction was warranted where defendant testified that during general melee between two groups, he was attacked by victim and his

companions and his shirt was torn off of him); *Commonwealth v. Fortini*, 68 Mass. App. Ct. 701, 702-704 (2007) (evidence was before the jury that defendant who had been threatened, was sitting on the porch of his residence with a shotgun when a man ran up the stairs and lunged at the weapon; the defendant “was scared at that moment,” and pulled the trigger, “[b]elieving that the man was going to kill him, the defendant feared for his life.”).

The defendant attempts to compensate for the absence of any congruent evidence in his own case by citing snippets from the trial testimony of two of the Commonwealth’s witnesses Moulton and Thames as to statements he made after the shooting had taken place. Moulton testified that in the aftermath of the shooting as Lugo drove from the scene, that “[e]veryone was fairly upset,” Trial Trans., Vol. 8, l. 24 to l. 25, and that Lugo had expressed that he had thought that McManus had a firearm.⁵ During re-direct examination of Thames, when he had been asked about any conversations that had taken place in the car after the shooting during the drive back to Brockton, he testified: “He was scared at the time. He didn’t know what was gonna happen after hearing what Ally had said.” (*Id.*, Vol. 7, l. 4 to l. 6).⁶

This evidence about Lugo’s subjective view of matters, while indirect, is, nonetheless,

⁵ Defense counsel on cross-examination asked Moulton: “All right. And when they were, when you were driving down the street, Nathan had exclaimed I thought he had a gun, right?” to which the witness had responded “Yeah.” *Id.*, p. 52 l. 1 to l. 3.

⁶ This apparently adverts to a statement attributed to Deshowitz during Thames’ testimony in which he had heard her comment “that she thought they were strapped.” *Id.*, p. 66 l. 22 to p. 67, l. 2). There was also testimony from Thames that Lugo had told him that Deshowitz had told him that before the shooting when she had met McManus at the restaurant, a friend of his had displayed a gun and had asked McManus if he wanted it. (*Id.*, p. 17, l. 20 to l. 25), and from Moulton that during the drive to his residence, McManus had made reference to having access to a firearm. (Vol. 8, p. 29, l. 9 to l. 14. There was no trial testimony that McManus had been given a gun, or that Lugo had been told by anyone that McManus had, in fact, been given a gun.

probative evidence that was before the jury. It does not, however, lend adequate support to a theory that he did, in fact, fatally shoot McManus because he was in fear that McManus was about to pull out a firearm and shoot him or one of his confederates. First, as review of the testimony upon which the defendant relies reveals, there was no probative evidence before the jury that the decedent had a firearm on his person at that time, or that Lugo had so been told. Second, there is no evidence that Lugo subjectively had fired the shot motivated by a contemporaneous belief that he was being provoked by such imminent peril offered by McManus as the latter struggled at the window of the moving Jeep. Here evidence was lacking that “the defendant had the requisite subjective state of mind to require a charge on manslaughter.” *Commonwealth v. Pitts*, 403 Mass. 665, 668 and n. 4 (1989) (citing the lack of any testimony from the defendant and the absence of any other evidence that he had been “experiencing anything resembling transport of passion during the killing”). As the Court in *Pitts* observed: “[t]he jury may not be permitted to speculate as to whether the defendant, at the time of the shooting, was ‘roused to the heat of passion.’” *Id.*, quoting *Commonwealth v. Walden*, *supra*, at 728.

The decision of trial counsel not to press for instruction on voluntary manslaughter does not provide him a basis for award of a new trial.

3. The Verdict of Guilty on the Charge of Conspiracy to Distribute Marijuana

The defendant argues that his conviction for conspiracy to possess the quantity of marijuana taken from McManus with intent to distribute was based upon insufficient evidence. He focuses specifically upon the element of intent to distribute, contending that the evidence is consistent instead only with personal use of the quantity of the drug amongst the four joint

venturers who had plotted to steal the marijuana. He requests that the court vacate the conviction as it stands and enter guilty verdict of the lesser crime of conspiracy to the end of simple possession of the quantity of marijuana.

Under governing law, the jury's verdict is sustainable where some rational view of the evidence viewed in the light most favorable to the Commonwealth permits a rational trier of fact to have concluded guilt beyond a reasonable doubt. *Commonwealth v. Lodge*, 431 Mass. 461, 465 (2000), citing *Commonwealth v. Latimore*, 378 Mass. 671, 677 (1979). Matters of the weight and the credibility of the evidence are not considered in this analysis, and all permissible factual inferences are resolved in the Commonwealth's favor. *Commonwealth v. Platt*, 440 Mass. 396, 401 (2003). Further, sufficient evidence to support an element of the crime, including that which relates to the defendant's intent, may be provided by evidence which is not direct but is wholly circumstantial. *Commonwealth v. Dostie*, 425 Mass. 372, 375 (1997).

The quantity of marijuana which Lugo and his coventurers conspired to possess in this case was substantial, four ounces, with a street value of about \$1,100.00. Possession of a substantial quantity of drugs would be sufficient to support an inference that it was possessed with intent to distribute. *Commonwealth v. Sepheus*, 468 Mass. 160, 164-165 (2014). In attempting to minimize the relevancy of the quantity of drugs at issue here, the defendant points to the fact that four coventurers unquestionably were involved in the conspiracy to obtain the drugs and evidence that they intended to divide the amount equally between them. He then argues that the one ounce divisible share when apportioned to each renders it a quantity that should not support the jury's verdict on the element of intent.

A number of factors are present in the trial evidence here which lend significant support

to the jurors properly having drawn the inference that the object of the conspiracy was to possess the stolen drugs with intent to distribute. First, there was evidence that one of the four co-conspirators, Moulton, did actually distribute a portion of the marijuana to a second person after it had come into the group's possession and before they were arrested early the next morning. In addition, the jury heard evidence that Moulton was an actively engaged drug seller, having vended \$800.00 from sales on the date of the crimes, and that the co-conspirators including Lugo were well aware of this, having decided to use his drug sale proceeds as bait money in the scheme to acquire the quantity of drugs from the decedent.


Highly compelling as testimony on this point was evidence which the jury also heard concerning other aspects as to how the feigned drug purchase with McManus was set up and was carried out. The four who were meeting at Lugo's residence were actively seeking to locate and target a drug-seller in order to take from him narcotics. Deshowitz suggested McManus, and she engaged in extended contact with him to set up a purchase. When he indicated to her that he had two ounces on hand, she pressed him for a greater quantity, and he finally agreed to double that initial on hand amount. When price was discussed, the jury heard evidence that the negotiated price would be shy of the actual street value, representing a discount for the greater bulk purchase. Finally, that the defendant chose to bring with him to the encounter with the drug-seller a loaded handgun appears inferentially more consistent with a state of mind evincing an intent to profit from the drug-theft rather than to have sought to obtain a quantity of marijuana for simply personal use of the marijuana exclusively among the four co-conspirators. The evidence introduced at trial here warranted the jury to have concluded rationally that the object of the planned conspiracy to steal the four ounces of marijuana from the victim and then to possess

that quantity was sufficient to satisfy the element that this had been done with the intent to distribute beyond the circle of the four conspirators. See *Commonwealth v. Wilson*, 441 Mass. 390, 401 (2004).

Order

The defendant's motion for new trial and for re-sentencing is **Denied**.

Date: March 27, 2018



Thomas A. Connors
Justice of the Superior Court

CERTIFICATE OF SERVICE

I, Katherine C. Essington, counsel for the defendant herein, hereby certify that on this 30th day of April, 2018, I mailed a copy, postage prepaid, of the foregoing Application to Pamela Alford, District Attorney's Office, 435 Shamut Rd., Canton, MA 02021, and to the defendant.

/s/ Katherine C. Essington
Katherine C. Essington