

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.
BRCR2013-00983
SJC SJ#_____

COMMONWEALTH

vs.

AARON HERNANDEZ

PETITION FOR RELIEF PURSUANT TO G.L. c.211, SECTION 3

Introduction. The defendant, Aaron Hernandez, was arraigned in Attleboro District Court on June 26, 2013 on charges of first-degree murder and various firearms offenses, including unlawful possession of a firearm. He was subsequently indicted by a Bristol County grand jury for the same crimes and his trial is currently pending in the Superior Court before Garsh, J. The Court ordered the parties to file any motions in limine by December 3, 2014, and both parties ultimately submitted multiple motions. Two ruling thereon form the subject matter of the Commonwealth's present petition.

The Commonwealth respectfully requests that this Court, exercising its general superintendence power over the

Superior Court, as set out in G.L. c.211, section 3, provide the following relief: (1) vacate the trial judge's order, entered on February 28, 2015, denying the Commonwealth's motion in limine with respect to the testimony of Robert Paradis, as more fully described hereafter, and substitute in its place an order deeming Paradis' testimony admissible; (2) vacate the trial judge's order, entered on March 4, 2015, denying the Commonwealth's renewed motion in limine with respect to the evidence relating to the shooting of Alexander Bradley, as more fully described hereafter, and substitute in its place an order deeming such evidence admissible; and/or (3) impose such other relief as the interests of justice may require. The Commonwealth asserts that the trial judge's rulings on these matters are inconsistent with settled law, including the most recent rulings of this Court, and will seriously impair the government's ability to present its case to the jury and so deprive the Commonwealth of a fair trial. Further, at least as to the evidence of the Bradley shooting, the judge's order unintentionally creates the perception that a judicial imprimatur has been conferred on the defendant's efforts to convey a material misrepresentation of fact on the jury, and as a consequence undermines public confidence in the fair administration of justice.

Standard of Review. General Laws c. 211, § 3, confers on this Court the power of "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." Admittedly, this discretionary power of review is "extraordinary," and will be exercised only in "the most exceptional circumstances." *Costarelli v. Commonwealth*, 374 Mass. 677, 679 (1978). Parties seeking review under c. 211, § 3, must "demonstrate both a substantial claim of violation of [their] substantive rights and error that cannot be remedied under the ordinary review process." *Dunbrack v. Commonwealth*, 398 Mass. 502, 504 (1986). See *Parents of Two Minors v. Bristol Div. of the Juvenile Court Dep't*, 397 Mass. 846, 849 (1986). However, where these prerequisites for relief are met, relief may be granted from most intra-trial orders, including mid-trial rulings on evidentiary matters. *Commonwealth v. Ly*, 454 Mass. 223, 225 (2009). Here, in view of the lack of any opportunity for post-verdict review of the errors alleged herein by the Commonwealth, as well as the significant adverse impact on the Commonwealth's case resulting from the judge's rulings, both of these requirements are satisfied.

It is important to note that relief does not depend on this Court merely substituting its discretionary judgment

for that of the trial judge. "[M]ost evidentiary rulings by trial judges are governed by the abuse of discretion-error of law standard." *Canavan's Case*, 432 Mass. 304, 317 (2000) (Greaney, J., concurring) and, consistent with the familiar construction, a reviewing court will not disturb such a ruling "absent an abuse of discretion." See *Henderson v. D'Annolfo*, 15 Mass. App. Ct. 413, 429 (1983). However, the SJC has observed that the question of whether there has been an abuse of discretion is not a subjective or unstructured inquiry, but rather turns, *inter alia*, on the question of whether the judge's ruling is the product of an error of law. See *Canavan's Case*, *supra*, (words "abuse of discretion . . . encompass an error of law"). See also *Salvas v. Wal-Mart Stores, Inc.*, 452 Mass. 337, 369 (2008) (ruling that embodies error of law constitutes abuse of discretion). Here, the judge's rulings on the contested motions in limine, conflicting as they do with settled legal authority, should be set aside. Stated differently, and consistent with the abuse of discretion standard recently adopted by this Court, the judge made "a clear error of judgment in weighing" the factors relevant to the decision." *L.L. v. Commonwealth*, 470 Mass. 169, 185 (2014).

Likewise, to the extent that the judge's ruling rests on any misunderstanding of the operative facts, it would

also constitute an "error that cannot be remedied under the ordinary review process," and should be vacated under the authority of G.L. c.211, section 3. *Dunbrack v. Commonwealth*, 398 Mass. at 504. And while a trial judge's findings of fact are ordinarily entitled to significant weight, and set aside upon review only where clear error is present, this rule of deference does not apply to mistaken factual assertions that are not the product of some discernment or credibility-weighting process. See *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 302 (2009). Thus, where findings are derived directly from documentary or other "cold" record evidence, they receive no special deference on review. See *Bd. of Registration in Med. v. Doe*, 457 Mass. 738, 742 ("where factual findings are based solely on documentary evidence, they receive no special deference on appeal).

General Background Facts. In its ruling on the defendant's motion to dismiss, the Court summarized the Commonwealth's evidence as follows (augmented occasionally by other germane record evidence): "On Friday night, June 14, Hernandez and [Odin] Lloyd went to a club in Boston . . . Something happened at the club that caused Hernandez to arm himself . . . retriev[ing] a firearm from his vehicle, a rental Suburban. They left the club after

2:00 a.m and drove to Hernandez's apartment in Franklin, where they spent the night. The next morning, June 15, Hernandez and Lloyd returned to Hernandez's house, and Hernandez allowed Lloyd to keep the rented vehicle . . . On Saturday morning, June 16, Hernandez texted [his fiancée] Shayanna [Jenkins] that he 'somehow told [Lloyd] about my other spot, and I just woke up bugging'

"On Sunday night, June 16, [Ernest] Wallace and [Carlos] Ortiz arrived at Hernandez's house. Hernandez had earlier that evening contacted Lloyd about 'step[ping]' out for a while, as they had on Friday night . . . Hernandez, Wallace, and Ortiz left at about 1:00 a.m. to retrieve Lloyd. Shortly before their departure, Hernandez was [seen on his own home video surveillance system] holding an item that appears consistent with a firearm

"Around 2:30 a.m. on June 17, Hernandez, Wallace and Ortiz picked up Lloyd at his house in Dorchester, and the four of them drove in Hernandez's rented silver Altima to North Attleboro, ultimately stopping in an empty industrial area. At around 3:30 a.m., Lloyd was shot to death, and the other three men left the scene within minutes and went to Hernandez's house . . . The driving distance from the site of the killing to Hernandez's home is two to three minutes. Hernandez was driving the Altima when he returned to his

home at approximately 3:30 a.m. on June 17. Shortly after the killing, while in his home, at the entrance to his basement . . . [Hernandez was holding with what appears to be a semi-automatic handgun. Ballistic evidence recovered at the scene and from the silver Altima bear pin impressions, drag marks, aperture impressions and rifling marks that are all consistent with the fatal bullets having been fired from a Glock .45 caliber semiautomatic handgun.]

"Hernandez returned the silver Altima on June 17 at approximately 5:15 p.m. with Wallace and Ortiz; the driver's side mirror was broken and the driver's side of the vehicle was scratched. Hernandez purported to have no information about how the car was damaged, telling the rental company that 'he just came out to it and it was like that.' Soil similar in color and appearance to the location where Lloyd's body was found was on the tires and lower panels of the vehicle behind the tires and the tire treads appeared consistent with the tire tread marks left at the scene. Hernandez rented a Chrysler on June 17, which he allowed Wallace to drive; Wallace abandoned the vehicle in Connecticut

"Hernandez phoned [Jenkins] on June 18 and asked her to get rid of a box in the basement. As requested, she disposed of the item. The box was large and heavy; it

weighed about twenty-five pounds . . . [I]t would have been reasonable . . . to infer that Hernandez arranged for the disposal of firearms, including the murder weapon.

“In sum, there is evidence . . . that Hernandez organized the pickup of Lloyd, arranged for others to accompany him, rented the vehicle that picked up Lloyd in Boston and transported him to the scene of the shooting in North Attleboro, supplied the firearm used in the shooting, was present when Lloyd was shot, drove the car away from the scene with Wallace and Ortiz as his passengers to facilitate their escape, directed and aided in the concealment of evidence of the crime, assisted in Wallace's flight from the Commonwealth, and made false statements about when and where he last saw Lloyd and about his whereabouts at the time of the killing.”

Issue One: Order Relating to the Testimony of Robert Paradis. As noted already, the Commonwealth filed a motion in limine seeking to admit the testimony of one of the defendant's friends, Robert Paradis. After a hearing, the Court denied the Commonwealth's motion and excluded Paradis' testimony in its entirety. The Commonwealth now respectfully requests that this Court deem Paradis' testimony admissible. While evidentiary rulings on a motion in limine are typically "left to the sound discretion of the

trial judge," Commonwealth v. Arrington, 455 Mass. 437, 441 n.6, 917 N.E.2d 734 (2009), for the reasons indicated below, the judge's ruling on this issue constitutes an abuse of discretion under the standard previously described. On that basis, and under the authority of G.L. c. 211, section 3, this Court should vacate the judge's order or otherwise provide relief.

Facts Relevant to Paradis' Testimony. During his voir dire in the trial court conducted on February 18, 2015, Robert Paradis, one of the defendant's longtime friends, testified as follows: He had vacationed with the defendant and Wallace (as noted above, one of the defendant's coventurers), in Los Angeles, California, approximately six weeks before the murder. More specifically, the defendant sent Paradis a first class airline ticket for travel to Los Angeles on April 26, 2013 with a return date of May 1, 2015.

As Paradis has consistently told police and prosecutors over the past eighteen months, during that trip, the defendant told Paradis that he possessed a .45 caliber handgun. This is the same caliber and type of weapon used to kill the victim. Further, while driving in a car rented by the defendant, Paradis overheard the defendant tell Wallace that he (i.e. the defendant) had "heat" or "fire" under the seat to which Wallace responded "All right."

Paradis testified that he understood "heat" and "fire" to be synonyms for a firearm.

On April 30, 2013, the defendant further corroborated his own statements about having a firearm during a telephone conversation with Paradis. On that date, the defendant and Wallace flew back to Boston. During the drive to the airport, the defendant telephoned Paradis (who was not leaving until the next day), and directed him to go into a bedroom in the Los Angeles condominium where the trio had stayed and to look inside a particular drawer in a nightstand to see if "it" was still there. In that location, Paradis found an object wrapped in a t-shirt. Although he did not take the item out of the t-shirt, Paradis picked it up. Relying on his knowledge and experience as a gun owner, and based on the object's size, shape and weight, Paradis determined that the object was a handgun. He told the defendant that "it" was still there.

After a hearing, the judge excluded all of Paradis' foregoing testimony, despite the fact that the defendant is being tried for possessing a .45 caliber handgun and despite the fact that a .45 caliber handgun was used to kill the victim. According to her oral findings and decision, the trial judge excluded the evidence on the basis of the traditional calculus governing the admissibility of evidence

- i.e. that its probative value is outweighed by its prejudicial effect. In essence, the judge concluded that Paradis' testimony had no probative value because there was no basis from which a juror might reasonably infer that a gun possessed by the defendant in California could possibly have been used by the defendant (or one of his coventurers) in the killing of Lloyd. Absent a basis for such an inference, the judge asserted, testimony that the defendant had a gun in California would be viewed by the jury merely as evidence of the defendant's propensity to carry and/or use guns. However, her ruling does not conform to the law, the evidence or the inferences a reasonable juror would be likely to draw with respect to Paradis' testimony.

Analysis. The significant probative value of Paradis' testimony is apparent on its face. First, and most obviously, the fact that the defendant admitted illegally possessing a firearm (there is no dispute that he does not possess a license to possess firearms) bears directly on the central element of one of the crimes with which he is charged, viz, illegal possession of a firearm (specifically a Glock .45 caliber handgun). Likewise, the fact that the type of weapon that he admitted possessing - a .45 - was the same type of gun used to kill Lloyd is strongly probative both of his access to and familiarity with such a weapon,

and so runs directly to the question of his guilt on the murder charge, as well. Paradis' testimony regarding his observations of what appeared to be a handgun in the defendant's nightstand is strongly corroborative of the defendant's admission that he possessed a ".45," and so is likewise strongly probative of the defendant's guilt as to both charges.

In addition to providing direct evidence of the defendant's guilt, Paradis' testimony is also relevant to rebutting various exculpatory allegations advanced by the defendant during his opening argument and through cross-examination. Specifically, the defendant has argued that the Commonwealth's video evidence depicting the defendant carrying what appears to be a .45 caliber Glock semi-automatic handgun is actually a television remote control or other electronic device. Paradis' testimony would be material - indeed central - to rebutting the defendant's exculpatory view of the videotape evidence. Similarly, Paradis' testimony is also material to rebutting the defendant's allegation that it was one or more of the defendant's coventurers, namely Wallace and/or Ortiz, who actually shot Lloyd. Paradis' testimony would establish that it was the defendant who owned and controlled a weapon of the same type used in the shooting.

Testimony of the type provided by Paradis has routinely been deemed admissible in prior cases on multiple bases. In the first instance, the defendant's statements to Paradis regarding the fact that he possessed a handgun constitute party admissions and are admissible under that rubric alone. As the SJC observed in *Commonwealth v. Spencer*, 465 Mass. 32, 46 (2013): "[a]n extrajudicial statement made by a party opponent is an exception to the rule against the introduction of hearsay, and is admissible unless subject to exclusion on other grounds. See *Commonwealth v. Allison*, 434 Mass. 670, 676 n.5 (2001); Mass. G. Evid. § 801(d)(2)(A) (2012). Although often referred to as the rule on 'admissions' by a party opponent, the rule encompasses any extrajudicial statement made by a party opponent regardless whether it is inculpatory or against the party's interest. See *Commonwealth v. Cutts*, 444 Mass. 821, 834, 831 N.E.2d 1279 (2005), citing P.J. Liacos, M.S. Brodin, & M. Avery, *Massachusetts Evidence* § 8.8.1, at 496 (7th ed. 1999). See also *Care & Protection of Sophie*, 449 Mass. 100, 110 n.14, 865 N.E.2d 789 (2007)." As admissions, the statements are presumptively admissible.

Further, the evidence regarding the defendant's handgun possession would also be routinely admissible even if not deemed an admission. As the SJC concluded in *Commonwealth*

v. Barbosa, 463 Mass. 116, 123 (2012): evidence of any kind of “[a] weapon that could have been used in the course of a crime is admissible, in the judge's discretion, even without direct proof that the particular weapon was in fact used in the commission of the crime. See Commonwealth v. Williams, 456 Mass. 857, 871, 926 N.E.2d 1162 & n.11 (2010); Commonwealth v. Ashman, 430 Mass. 736, 744, 723 N.E.2d 510 (2000); Commonwealth v. James, 424 Mass. 770, 779-780, 678 N.E.2d 1170 (1997); Commonwealth v. Toro, 395 Mass. 354, 356-357, 480 N.E.2d 19 (1985), and cases cited. Such evidence is relevant for demonstrating that the defendant had the ‘means of committing the crime.’ Commonwealth v. Ashman, supra.”

Applying these same principles in relation to the admission of a pistol potentially used by the defendant to murder the victim in Commonwealth v. O'Toole, 326 Mass. 35, 39 (1950), the SJC stated that: “[t]he second assignment [of error] of each defendant is to the admission in evidence of a pistol of foreign make found in O'Toole's room behind a radio, the butt of which was capable of being the blunt instrument with which Irwin's skull was fractured. There was no direct evidence that the pistol was in fact the instrument used. *But it is commonly competent to show the possession by a defendant of an instrument capable of being*

used in the commission of the crime, without direct proof that that particular instrument was in fact the one used. Commonwealth v. Williams, 2 Cush. 582, 586. Commonwealth v. Choate, 105 Mass. 451, 458, 459. Commonwealth v. Brown, 121 Mass. 69, 81. Commonwealth v. Howard, 205 Mass. 128, 152. Commonwealth v. Bartolini, 299 Mass. 503, 511, 512. Commonwealth v. Giacomazza, 311 Mass. 456, 470. Commonwealth v. Noxon, 319 Mass. 495, 539, 540. Starchman v. State, 62 Ark. 538. People v. Hale, 81 Cal.App. 734. People v. McCall, 10 Cal.App.(2d) 503, 505, 506. People v. Rodriguez, 31 Cal.App.(2d) 524. People v. Hightower, 40 Cal.App.(2d) 102. People v. Dale, 355 Ill. 330, 334. Amith v. State, 182 Md. 176. Commonwealth v. Pasco, 332 Pa. 439. State v. Taylor, 159 Wash. 614. State v. Montgomery, 16 Wash.(2d) 130. We think there was no error in the admission of the pistol” (emphasis added).

A similar result - again, in relation to the admission of a handgun potentially used by the defendant to murder the victim - was obtained in Commonwealth v. Otsuki, 411 Mass. 218, 235-236 (1991). There, the SJC observed: “[the trial judge held that] the testimony properly was admitted for *the purpose of demonstrating that the defendant possessed the means to accomplish the crime, regardless of whether the defendant actually employed that means to commit the*

crime . . . 'Evidence of prior bad acts is not admissible to show that the defendant has a criminal propensity or is of bad character.' Commonwealth v. Robertson, 408 Mass. 747, 750 (1990). Such evidence, if relevant, may be admitted, however, if it is offered for a purpose other than impugning the defendant's character, and if its probative value is not substantially outweighed by any prejudice. Id. [Here] . . . the testimony speaks to the defendant's ability to possess the means to commit the crimes alleged." Id. See also Commonwealth v. Ridge, 455 Mass. 307, 309, 322-323 (2009) (no error in admitting evidence showing defendant's access to and familiarity with firearms allegedly dissimilar to murder weapon, when appropriate limiting instruction given).

Finally, as the SJC observed in Commonwealth v. LeBlanc, 373 Mass. 478 (1977): "[t]here was no error in permitting the testimony of a witness who said she had seen the defendant in possession of two guns -- a smaller gun like the murder weapon and a larger gun -- prior to the day of the murder. While the defendant argues that the only purpose of this evidence was 'to portray the defendant as a dangerous and violent man,' the testimony had the value of establishing the defendant's familiarity with guns, his prior possession of a gun like the murder weapon . . . and his [general] practice of carrying guns See

Commonwealth v. Caine, 366 Mass. 366, 370-371 (1974), and cases cited; Commonwealth v. McLaughlin, 352 Mass. 218, 229-230, cert. denied, 389 U.S. 916 (1967)."

Apart from demonstrating that the defendant possessed a weapon of the same type as the one actually used in the murder, Paradis' testimony is also admissible for the more general purpose of establishing the defendant's ready access to and familiarity with firearms. In Commonwealth v. Tassinari, 466 Mass. 340, 353 (2013), where the main issue at trial is premeditation, evidence of defendant's access to firearms was deemed highly relevant to the question of whether or not the defendant planned to kill the victim. See also Commonwealth v. Hodge (No. 2), 380 Mass. 858, 863 (1980) (defendant's proficiency with firearms relevant to deliberate shooting of victim). Indeed, this evidence, combined with other evidence of the defendant's possession of firearms already addressed in the government's first motion in limine, provides a strong basis for inferring such familiarity and access. These principles provide a further, independent basis for the admission of Paradis' testimony.

The trial judge took the view that Paradis' testimony would be more prejudicial than probative because there is either "no direct evidence" or no reasonable basis for inferring that the gun referenced by the defendant while

Paradis was in California or the gun in the nightstand handled by Paradis was or "could have been" the gun used to kill Lloyd. However, as Otsuki, Barbosa and O'Toole make plain, the absence of proof that a gun possessed by the defendant was, in fact, the same gun used to commit a subsequent crime is not a lawful basis for excluding evidence of such prior possession. Moreover, even absent proof of such a direct link, the evidence still speaks to the question of access and familiarity. The latter is especially relevant here in view of the nature of the attack on Lloyd - a close quarters assault that unfolded quickly and in darkness. These facts bespeak a high level of firearms knowledge and skill on the part of the shooter. The issue of familiarity in this case is, therefore, central to the Commonwealth's proof. However, more generally, as in Otsuki, supra at 236, Paradis testimony was admissible "for the purpose of demonstrating that the defendant possessed the means to accomplish the crime, regardless of whether the defendant actually employed that means to commit the crime."

Further, the Court's conclusion that there was no basis for inferring that the weapon observed in California could have been used six weeks later in Massachusetts is squarely contradicted by the evidence. The court, in its ruling, dismissed the suggestion that a firearm like the one handled

by Paradis in the nightstand drawer could easily be shipped back to his home in Massachusetts. Apart from defying common sense – guns are shipped around the country by common carriers every day – this conclusion is contradicted by other evidence already deemed admissible in this very case. The Court has previously ruled that the Commonwealth could offer evidence of the defendant's involvement in the shipment of a firearm from Florida to his home. In April of 2013, the defendant deposited \$15,000 into the account of Oscar Hernandez (no familial relation to the defendant) who was then living in Florida. After receiving this money, Oscar Hernandez purchased an older model Toyota automobile. Oscar Hernandez then accompanied a friend, Gion Jackson, to a gun store in Belle Glade, Florida where they purchased a .22 caliber Jiminez semi-automatic handgun. This .22 caliber firearm was found at the base of an embankment adjacent to the road that led from the scene of the murder to the defendant's home, just a few hundred yards from where the victim's body was found. A maid working at the defendant's home testified that she observed a firearm, similar in color and size to the Jiminez .22, in the pocket of the defendant's pants. During the execution of a search warrant shortly after the murder, police recovered a box of .22 caliber ammunition from the defendant's home.

Thus, despite the Court's conclusion to the contrary, there is actual evidence in this case of the defendant's ability to transport a firearm from out-of-state to his home in Massachusetts. In fact, in addition to the foregoing evidence regarding the .22 caliber Jiminez, there is evidence that the defendant also received a fully loaded FEG 7.62 Hungarian rifle from out of state. As with the .22 Jiminez, the purchase of the rifle involved Oscar Hernandez. Although the evidence regarding the FEG rifle and .22 caliber ammunition has been excluded, it nonetheless refutes the judge's suggestion that the defendant could not readily have shipped the .45 caliber handgun from California to Massachusetts. Indeed, the defendant had already accomplished the same act (transporting a firearm) during the very same time (six weeks prior to the murder). Thus, the facts of the case provide a ready basis for the jury reasonably to infer that the defendant's .45 caliber handgun could have made its way from California to Massachusetts sometime before the murder.

Finally, the judge also appeared to suggest that Paradis' testimony would have been merely cumulative of other evidence already deemed admissible at this trial, and so less generally probative of the facts in dispute. In support of her argument, the judge identified at least two

other instances of handgun-related evidence that has been admitted, including evidence of a Glock handgun that the defendant possessed in Florida. The judge, however, misstated key facts.

In the first instance, the witness who testified regarding the Glock in Florida never indicated that he knew the caliber of the firearm (the judge appears mistakenly to assume that all Glock firearms are .45 caliber). The other evidence referred to by the Court - evidence that guns were seen the defendant's cleaning staff in his home, by his fiancée, by a parking attendant outside of a hotel and by one of the defendant's friends, Alexander Bradley - likewise makes no mention of the crucial question of caliber - crucial because it has been established that the victim was killed by a .45 caliber weapon. Indeed, no other witness besides Paradis has testified that the defendant possessed a gun similar to the one used to murder the victim. Accordingly, the proposed testimony of Paradis would not be cumulative but, in fact, necessary and uniquely relevant to establishing a key element of the offenses with which the defendant has been charged. Again, Paradis' testimony alone establishes the defendant's possession and access to the very type of weapon, **by caliber**, used in the crimes for the which he has been indicted, unlawful possession of a .45

caliber firearm, and murder by means of a .45 caliber Glock handgun.

Apart from the fact that Paradis' testimony is uniquely relevant and material, the acknowledged presence of other evidence suggesting that the defendant possessed firearms generally sharply reduces the possibility that Paradis' testimony might inject any improper prejudice into the case, by demonstrating a criminal propensity or otherwise. The jury is already going to be hearing evidence of people observing firearms in the possession of the defendant or in areas that he controlled. Consequently, there is little potential for Paradis' testimony to introduce any incremental prejudice.

Neither were Paradis' observations here too temporally or geographically remote from the crime to provide a basis for exclusion. Indeed, the governing law indicates exactly the reverse. In *Otsuki*, *supra*, the contested evidence related to a gun seen in the defendant's possession in California - exactly the same situation present here. In *Otsuki*, the geographical removal of the evidence of prior possession posed absolutely no barrier to the admission of the evidence. The same principles apply here.

As for temporal proximity, the six-week gap in this case is far shorter than the intervals in other cases in

which evidence of prior gun possession was deemed admissible. Indeed, in *Commonwealth v. Corliss* (slip op., January 20, 2015), the SJC concluded that there was: “no error in the admission of Dauteuil's observations of the defendant's possession of a gun, even though they occurred more than one year before the shooting at the store. The testimony was relevant to show that the defendant had the means to perpetrate the crime. See *McGee*, 467 Mass. At 156-157. See also *Ridge*, 455 Mass. at 322-323 (no error in admitting ‘evidence of the defendant's access to, and knowledge of, firearms and bullets’ where trial judge ‘instructed the jury that the evidence was only to show that the defendant had some familiarity with firearms and not that he was a bad person”).’ Similar or greater gaps than the one present here have been approved in a large number of prior decisions. See *Commonwealth v. Butler*, 445 Mass. 568, 574 (2005); *Commonwealth v. Barrett*, 418 Mass. 788, 794 (1994). *Commonwealth v. Watkins*, 375 Mass. 472, 491 (1978); *Commonwealth v. Russell*, 2 Mass. App. Ct. 293, 295 (1974).”

It is worth noting, as well, that *Corliss* also strongly reaffirmed the settled rule that proof of any connection between a handgun possessed by a defendant before a crime and the weapon actually used in the offense is by no means a prerequisite for admissibility: “[t]he defendant argues

that in addition to the question of remoteness, Dauteuil's testimony, in conjunction with later testimony by a police ballistics expert that the murder weapon took bullets larger than .22 caliber bullets, created significant prejudice because it improperly linked the gun observed by Dauteuil with the murder weapon. However, 'evidence of "[a] weapon that could have been used in the course of a crime is admissible" to show that the defendant had the means to commit the crimes alleged, "even without direct proof that the particular weapon was in fact used in the commission of the crime"' (internal quotations omitted). Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012)."

As the SJC ultimately observed in Corliss, "it was for jury to determine 'any link between the gun [the defendant] was said to possess and the one used to shoot the victim.'" So too here; the trial judge should have left it to the factfinder to assess the weight of Paradis' testimony. By foreclosing that option, the ruling deprives the jury of highly relevant evidence essential for assuring a fair outcome in the defendant's trial. The judge's order regarding Paradis' testimony should, therefore, be set aside or modified.

Issue Two: The Order Relating to the Bradley Shooting Incident. The Commonwealth also filed a motion in limine

seeking to admit evidence regarding a shooting in Florida. The victim was the defendant's friend and confidante, Alexander Bradley. The Court denied the Commonwealth's motion and excluded all evidence of the Bradley shooting, at least for use in the Commonwealth's case-in-chief.

Thereafter, both in his opening statement and through cross-examination, the defendant has sought unfairly to capitalize on the Court's ruling by presenting alleged exculpatory evidence - viz, that the defendant would not have shot the victim because he was his friend - that could readily be rebutted by evidence of the incident involving Bradley. Indeed, the defendant stated that the victim and the defendant were friends more than thirty times during his opening argument, and he repeatedly argued that there was, as a consequence, no motive for him to be involved in the homicide. The defendant has also pressed this issue during cross-examination, particularly with the victim's girlfriend and her uncle. It has, as even the defendant seemed to suggest during the hearing on the Commonwealth's renewed motion, become a principal theme of the defense.

As a result of the theory presented by the defendant, he has "opened the door" to the topic of his conception of friendship - how he treats his friends - and whether friendship is, for him, an impediment to violence as he has

repeatedly asserted to the jury. On that basis, the Commonwealth submitted a renewed motion in limine to admit evidence of the Bradley shooting. That motion was, after hearing, denied by the trial judge. The Commonwealth now requests this Court to enter an order permitting the government to present evidence of the Bradley shooting to the jury. The defendant's tactics have rendered such an order necessary in order to prevent him from presenting a distorted view of the facts to the jury.

Facts Relating to the Bradley Shooting. On February 13, 2013, employees of a John Deere tractor store in West Palm Beach, Florida found Bradley on the ground, bleeding profusely from his head. Minutes before, Bradley had been shot in the face. Bradley was hospitalized but, as a result of the shooting, suffered permanent injuries, including the loss of his right eye.

Bradley later described the circumstances leading up to the shooting: He stated that he and the defendant had been close friends and had frequently traveled together. In February of 2013, they visited West Palm Beach, Florida where they met, over the course of several days, with various friends and associates of the defendant. On the night of the shooting, Bradley, the defendant and two men

not personally known to Bradley visited "Tootsie's Caberet," in Miami, Florida.

While inside Tootsie's, Bradley and Hernandez got into an argument over how the bill would be divided. The argument escalated when the defendant asked Bradley to split the bill with him while the defendant's other friends paid nothing. Bradley did not think this was fair and objected.

In the vehicle, on the way back to West Palm Beach, Bradley realized that he had left his cellphone in the club and asked the defendant to go back and get it. The defendant refused and he told his friend who was driving to continue on. By the time the group had reached West Palm Beach, Bradley had fallen asleep in the right rear passenger seat. Bradley awoke as the SUV in which the group was traveling stopped in an isolated industrial area. Bradley saw the muzzle of a gun from the seat in front of him pointing at his face. As he attempted to move out of the way, he was shot between the eyes. The defendant, who had been seated in front of Bradley, got out of the car and opened Bradley's door. Bradley was pushed from the vehicle from the vehicle, and the defendant and the other men then drove off.

Analysis. In her ruling on the Commonwealth's renewed motion in limine, the trial judge concluded that the

defendant had not, in fact, opened the door on the question of his violent nature toward his friends. The trial judge began by considering the potential relevance of the government's principal legal authority, *Commonwealth v. Oliveira*, *infra*, in which the Appeals Court stated, *inter alia*, a "judge's initial decision to exclude the evidence of [prior misconduct] did not provide the defendant, given his criminal history of violence, license to unfairly depict himself as a peaceful man who eschewed conflict. Once he depicted himself as such, the prosecutor's hands no longer were tied, and he was free to rebut the defendant's testimony with the evidence of the prior [bad acts]" (citations omitted)." *Id* at 53-54. The trial judge attempted to marginalize *Oliveira's* relevance to the present case by stating that the decision was a "close call." Beyond that, she did not, in fact, clearly address the legal merits of the government's argument premised on *Oliveira* except to distinguish the decision on the dubious basis (as discussed *infra*) of the fact that the prior bad acts admitted there related to the same victim as in the case in chief. Rather, the judge appeared to focus on the fact that, even if the defendant had opened the door to the sort of rebuttal evidence that the Commonwealth contends the Bradley incident represents, the facts underlying the

Bradley shooting are sufficiently different to make it inadmissible on probity grounds in any event. She laid particular emphasis on the fact that, as to the Bradley shooting, there was some evidence of provocation; namely, the argument over the bar tab. However, the judge's approach is unsupported by the law and the facts.

Evidence of prior bad acts may not be admitted to prove a defendant's criminal propensity, but such evidence is admissible for other purposes, so long as its prejudicial effect does not outweigh its probative value. See *Commonwealth v. Bianchi*, 435 Mass. 316, 322 (2001). For example, evidence of prior bad acts may be admitted to rebut "specific portions" of a defense theory. See *Commonwealth v. Roderick*, 429 Mass. 271, 274 (1999). This principle applies directly to the situation here.

As outlined above, the defendant has repeatedly emphasized to the jury that the defendant could not have been the person who murdered Lloyd because the defendant and Lloyd were "friends." In his opening alone, the defendant referred to the victim as his "friend" dozens of times. Indeed, the defendant has made this argument one of the cornerstones of his defense, stressing that the two were friends during cross-examination.

Needless to say, the defendant adopted this approach mindful of the fact that the government has been enjoined from mentioning that the defendant, just four months before Lloyd was murdered, shot another one of his friends in response to the most trivial provocation. Since the Commonwealth had been muzzled on the topic of the Bradley shooting, the defendant apparently believed that he could purvey what he knew to be a falsehood to the jury - i.e. that the defendant would never harm his friends - with complete impunity. The Court cannot countenance this conduct consistent with ensuring a fair trial for both of the parties.

Indeed, if the Court fails to act, it will enable the defendant - completely unfairly in view of the actual facts of the case - to argue to the jury, not only that there is a complete absence of apparent motive in this case, but that, in fact, the defendant had a strong motive **not** to murder Lloyd. Apart from generally frustrating the ends of justice, permitting the defendant to proceed in this course unchecked would make the Court's ruling the predicate for what now appears to be an inaccurate portrayal of himself to the jury. The Court's ruling on the evidence relating to the Bradley shooting would essentially allow the defendant to establish a fictionalized view of reality - one in which

the defendant, like most people, does not shoot his friends. In this construct, the shooting of Lloyd appears to be a "random act of violence." *Commonwealth v. O'Brien*, 432 Mass. 578, 590 (2000). The defendant has expressly relied on that fiction to mislead the jury about what has become, in light of the defendant's trial strategy, one of the key facts in dispute. However, the law of the Commonwealth is designed to prevent just such abuses.

The present situation is the same in most material respects to the facts of *Commonwealth v. Oliveira*, 74 Mass. App. Ct. 49, 53-54 (2009). There, "[a]t the outset of the trial, the judge considered the issue of the defendant's prior convictions involving the same victim . . . {After weighing} "the possible unfairness to the defendant against the probative value of the evidence . . . the judge decided that the prior convictions were too prejudicial to be admitted . . . [However,] the judge allowed the topic to be revisited if the defendant changed the terrain of the case by opening the door for their admission . . . The defendant testified that despite the beating he took . . . at the insistence of the victim, he neither summoned the police nor fought back because he merely wished to retreat to his house where he could avoid any conflict. He wanted to be at peace because he was retired and disabled, and he was astonished

at what had occurred . . . Given this testimony, the judge was justified in concluding that the defendant had unfairly depicted himself to the jury as a peaceful, non-combative person who had been victimized by [the victim]." Ibid.

In these circumstances, the Appeals Court concluded that "the Commonwealth was entitled to offer the prior convictions to rebut this specific portion of the defendant's testimony, i.e., that he was a peaceful, nonviolent man who wished to avoid conflict . . . The judge's initial decision to exclude the evidence of the prior convictions did not provide the defendant, given his criminal history of violence, license to unfairly depict himself as a peaceful man who eschewed conflict. See *Commonwealth v. Rivera*, 425 Mass. 633, 638 (1997). Once he depicted himself as such, the prosecutor's hands no longer were tied, and he was free to rebut the defendant's testimony with the evidence of [prior bad acts]. See *Commonwealth v. Bembury*, 406 Mass. 552, 561-562 (1990)." Ibid. Particularly noteworthy for purposes of the present case is the Oliveira Court's use of the word "unfair" to describe the defendant's conduct. It would, indeed, be grossly unfair to permit the defendant here to continue to abuse the Court's pretrial rulings.

Similar to Oliveira is Commonwealth v. Roderick, 429 Mass. 271, 274-275 (1999). There the Commonwealth was permitted to introduce evidence of the defendant's prior illegal possession of guns. The court had initially barred the evidence, but later reversed its position in view of the defense theory presented. As the SJC stated in Roderick, "[t]he defendant moved in limine to exclude evidence of his prior convictions as unfairly prejudicial, and the judge granted this request. That decision, however, should not prevent the prosecution from introducing that evidence to rebut subsequent false testimony by the defendant. The judge's ruling in limine was not a license to lie in answer to proper questions, and when the defendant did lie, the door was open to the prosecution to show as much." The Court noted further that "[r]ebuttal evidence has been permitted in circumstances very similar to those in this case. In Commonwealth v. Bembury, 406 Mass. 552, 561-562 (1990), the prosecution introduced evidence that the defendant had been convicted . . . of unlawfully carrying a firearm. This court held that introduction of that evidence was proper because it 'directly contradicted [the defendant's] testimony and suggested its falsity.'" Id at 275. See also Commonwealth v. Haley, 363 Mass. 513, 524 (1973) (at husband's trial for the murder of his wife,

otherwise inadmissible evidence that the wife feared husband was properly admitted to rebut husband's claim that the couple was "happy").

While Oliveira and Roderick arose in the context of impeachment of trial testimony, that difference is immaterial; a prosecutor is equally entitled to rebut defense claims advanced in both argument and cross-examination. See *Commonwealth v. Tavares*, 27 Mass. App. Ct. 637, 643 (1989). For example, in *Commonwealth v. Dargon*, 74 Mass. App. Ct. 330, 335-336 (2009), the Appeals Court sanctioned the use of otherwise inadmissible prior consistent statements to rebut the central defense theory of recent contrivance where that theory was advanced solely through opening argument and cross-examination. In approving this approach, the Appeals Court relied on *Commonwealth v. Arana*, 453 Mass. 214, 228-229 (2009), the relevant portions of which speak equally to the present situation: Evidentiary exclusions are "not intended to be used as a shield to bar the jury from obtaining a fair and accurate picture of the Commonwealth's case-in-chief. . . . If . . . after careful balancing of the testimony's probative and prejudicial value, testimony is found by the judge to be relevant and admissible for reasons that are independent of the [basis for the exclusion], in the context

of a particular case, it is within the judge's discretion to admit the testimony. In this way, the jury will be able to make a fairer and more accurate assessment of the Commonwealth's case." This is precisely the Commonwealth's argument here.

Likewise, it is wholly immaterial that both Oliveira and Roderick involved situations in which the victims at trial and in the contested episodes of prior misconduct were identical. There is no suggestion whatsoever in Oliveira that the decision hinged - from a legal, as opposed to factual, perspective - on the fact that the victims in the case-in-chief and the prior incident were the same person. In fact, if anything, them being the same person introduced an otherwise absent potential for prejudice. The Oliveira decision reflects the simple point that a defendant cannot obtain court-ordered exclusion of bad acts evidence and then assert to the jury that he has not previously engaged in the very type of conduct that constitute those bad acts. The identity of victims is simply not a factor unless, as noted, a factor that would militate against admission on prejudice grounds. Indeed, in other contexts, the SJC has expressly approved admission of a defendant's past acts of violence to rebut exculpatory claims made by the defendant regarding his own potential for violence, irrespective of whether the

prior incidents involved the same victim as the case-in-chief or not. For example, in *Commonwealth v. Morales*, 464 Mass. 302, 310-312 (2013), the SJC specifically approved the admission of a defendant's prior acts of violence - including acts of violence committed against persons other than the victim in that case - when, in the context of a self-defense claim, he opened the door by introducing evidence of the victim's prior bad acts on the question of "first aggressor." While the analogy is not exact, the general principle is the same; viz, excluded evidence of a defendant's prior acts of violence against third-parties may be admissible to rebut elements of a defense theory where the defendant opens the door to a particular subject-matter as to which such evidence is directly relevant and where, if the evidence were excluded, it would allow the defendant to take unfair advantage of such exclusion through offensive use of same.

Finally, there is no merit to any suggestion that, wholly apart from the question of whether the defendant opened the door to some form of rebuttal evidence, factual differences between the Bradley shooting and Lloyd's murder provide a sufficient independent basis for denying the Commonwealth's renewed motion. The defendant had no real motive to murder Bradley. A disagreement over a bar tab to

a man in the defendant's financial circumstances can hardly be described as a motive for murder - nor would it likely be viewed by a reasonable juror as such. Rather, as the Commonwealth contends, the defendant's attack on Bradley reflects an extreme callousness toward avowed friends that flies directly in the face of the image of himself that the defendant is seeking to present to the jury. In any event, the jury should be afforded the opportunity to consider that evidence for themselves and, if they choose to do so, factor it into their deliberations on the crucial question of motive. This Court, therefore, should deem the evidence relating to the Bradley shooting admissible.

In sum, just as in Roderick and Oliveira, the defendant here has unfairly sought to portray himself in a manner decidedly inconsistent with the picture painted by excluded but nonetheless reliable evidence. The defendant is by no means someone who would necessarily refrain from resorting to extreme violence - including homicidal violence - merely because the victim is a friend. Having opened the door to this topic, like his counterparts in the cases cited above, the defendant has now left himself open to rebuttal through the use of the previously excluded evidence.

WHEREFORE, the Commonwealth respectfully requests that both the evidence relating to the Bradley shooting and the

testimony of Robert Paradis be deemed admissible. To the extent that any further hearing is required in connection with this matter, the Commonwealth respectfully requests that such hearing be scheduled at the earliest possible date.

Respectfully submitted,

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