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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11386

COMMONWEALTH

v.

PATRICK GRIER

APPEAL OF DEFENDANT'S CONVICTIONS
SUFFOLK SUPERIOR COURT

BRIEF OF THE APPELLANT

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STATEMENT OF THE ISSUES

I. Whether the court abused its discretion in refusing to require the Commonwealth to provide a gender and race-neutral reason for challenging three female African American jurors, instead *sua sponte* providing its own race and gender-neutral reason for the Commonwealth's challenges – age – but where not all of the jurors were young.

II. Whether instructing the jury that they were to put aside any "relevant or experience or thoughts or opinions" tainted the jury selection process, constituting structural error which requires reversal.

III. Whether the practice of running juror records violates the Equal Protection Clause and a defendant's right to be judged by a jury of his peers, where the practice disparately impacts jurors of color, and whether the court abused its discretion in excluding an African American male juror due to criminal charges from 15 and 23 years prior to the trial, revealed after the Commonwealth ran his record.

IV. Whether excluding all young jurors violated Grier's right to a fair and impartial jury of his peers where he was only 19 years old at the time of the incident, and 21 years old at the time of trial.

V. Whether the Commonwealth's closing argument was improper where the prosecutor appealed to juror's motions, and improperly bolstered the credibility of the cooperating witness, suggesting the Commonwealth had specialized knowledge in her role in the offense, informed the jury that the grand jury declined to indict her for murder, and improperly used her cooperation agreement.

VI. Whether the court impermissibly permitted the lead detective to narrate the video evidence, and allowed the Commonwealth to include arrows and markings on surveillance stills which constituted argument, serving to improperly bolster the Commonwealth's case and was a backdoor means of identifying Grier as the shooter.

PROCEDURAL HISTORY

On December 1, 2008, Patrick Grier was arrested and charged with possession of a firearm and assault with intent to murder stemming from a shooting of D'Andre Barboza; the charges were later upgraded to murder. On February 25, 2009, Grier was indicted for murder and carrying a firearm without a license. R4.

On July 2, 2009, Grier filed two motions to suppress his statements: one as to alleged statements made to a jailhouse informant, and post-arrest statements and silence. R7. After hearing, the court allowed the motions. R8. In an amended order, the court allowed the motion to suppress as to the alleged statements to a jailhouse informant, and denied the motion as to post-arrest statements. R8.

A jury trial commenced on June 1, 2010. R11. After a 14-day trial, the jury returned verdicts of guilty on both counts. R13. Grier was sentenced to life in prison as to the murder charge, and four to five years in state prison as to the firearm charge, to be served concurrently with the life sentence. R13. Grier timely filed a notice of appeal. R13.

STATEMENT OF FACTS

The Commonwealth's theory of the case was that Patrick Grier and the victim, D'Andre Barboza, had an altercation at Ada's Market on the evening of November

30, 2008. The next morning, Grier and Tratasia Day met up and walked to the area of Washington Street and Aspinwall Road. Barboza was standing on the corner when the Commonwealth alleged Grier shot him multiple times, then fled on foot down Aspinwall Road. Grier and Day were stopped on Colonial Avenue, where Day was running approximately 50 yards ahead of Grier. Recovered from Day was the murder weapon.

There were several witnesses in the area of the shooting going about their morning routine who described the events leading up to the shooting, during the shooting, and after the shooting, but no one identified Grier as the shooter. 5:24, 31-33, 47-49; 5:223-226; 6:255-261; 7:12-16, 18-21, 31. While Grier conceded he was in the area at the time of the shooting, so was Day – who was ultimately arrested a few blocks away with the murder weapon – Jaquan Lewis, and one other unknown individual. 7:116; 9:74; 11:43.

Prior to the shooting, Betty Smith was traveling on Elmhurst Street when she noticed two young individuals walking on the opposite side of the street, one male and one female. 5:24. The female was wearing pink and white Nike sneakers, her hair was braided with a pom pom on top, and she was wearing a black coat with black fur on the hood. 5:26, 28-29. She was thin, and looked to be about 5’6. 5:29. The male looked taller than the female, but appeared

shorter than the prosecutor, who is about 5’11. 5:31-33. He was wearing a fitted baseball cap, which was black with a little bit of red on it, and he had cornrows coming out of the back of the hat. 5:33.

When Smith was walking on Washington St, the pair passed her again; they came off Norfolk near the McDonalds on the corner. 5:34-35. While Smith was approaching the bus stop, she heard gunshots coming from the direction of the post office; she did not see anyone shooting. 5:47-48. When she looked back, she saw the male and female “booking it” down Aspinwall. 5:48-49. At the police station later that day, she identified Day as the female she saw, but she was unable to identify Grier as the person she saw with Day. 5:56-57. She also did not believe the hat recovered from Aspinwall was the same hat worn by the male; she thought the hat had a “B” on it. 5:61.

There were also a number of witnesses in the area of Washington Street and Aspinwall Road who observed parts of the events. All witnesses described the shooter as a black male wearing a wearing a black jacket, around 6 feet tall, with a thin build. 6:261; 7:16. Witnesses also described the jacket as having “patterns” or “writing” on it. 7:16; 5:212. Jaquan Lewis is approximately 5’11, 164 pounds. 8:210-211.

Lorraine Saunders, who was parked just across the street from where the shooting occurred, was able to

provide the most detailed description of the shooter: in addition to describing his black jacket, she took particular note of his pants, which she described as dungarees with a thin red ribbon or taping down the side of the pants. 6:261. She was able to see the entire leg of the pants as the individual crossed over in front of her van. 6:262. She testified the red piping on a portion of the jeans seized from Grier was "consistent with" the piping on the jeans she saw, but ultimately, she did <u>not</u> believe they were the same pants she saw. 6:298. The female and a male ran down Aspinwall, where witnesses lost sight of them. 7:34.

Deborah McKenna was stopped in traffic on Washington Street when she heard a popping noise coming from in front of the post office. 5:222. She saw someone on the ground, but did not see anyone with a gun. 5:223. There was a male standing there, but she was only able to see from the shoulders up because the person's lower body was blocked by a mailbox; the person was wearing a black hat, with a black jacket that had gray writing <u>all over it</u>. 5:225. Near the mailbox, there was a second male who was wearing a <u>red jacket</u> that looked like a Nascar jacket. 5:238-240. After shots were fired, the male in the black jacket, the male in the red jacket and a third person all ran in the same direction. 5:255-256; 5:179. One witness, Sterling Saunders, claimed the third person who ran

down Aspinwall, then returned to the scene near the post office; he went back to where the person was shot and appeared very upset. 7:35-37.

Officer Driscoll was driving towards Dorchester District Court when he and his partner, Officer Bissonnette, received a call for shots fired on Washington Street. 7:95. When they arrived at the corner of Aspinwall and Washington, there were already a number of people on scene, so they proceeded from Aspinwall, and onto Colonial Avenue to see if they could locate any suspects. 7:106-107. On Colonial, they observed a female running alone just past Millett St. 7:110. Just before Millett St, there was a male "walking at a fast pace, maybe a slow jog." 7:109-110.

Driscoll approached the male while Bissonnette approached the female. 7:111-112. Driscoll claimed he could smell a strong odor of gunpowder coming from the male. 7:115. He claimed it was a "very distinctive odor, just like being at the gun range." Id. The male was breathing heavy, and was sweating. 7:111-112. A firearm, later determined to be involved in the shooting, was on the female. 7:116. A hat was recovered from the driveway just beyond the Citizens Bank parking lot at the corner of Aspinwall and Washington (6:14-17); according to the Commonwealth, Grier was found to be a contributor to a DNA sample taken from the inside of the hat. 7:284-285.

The male and female were determined to be Day and Grier, and were arrested. 10:229. Both were charged with carrying a firearm and assault with intent to murder. 10:229. When both were brought back to the station, a gunshot residue sample was taken from their hands. 10:110, 115.

When officers explained to Day that they would be taking a gunshot residue sample from her and asked her to remove her gloves, she took off the gloves and "whack[ed] them together like she was trying to get dirt out of them." 10:280. Grier was fully compliant with the GSR sampling. 10:281. Officers also seized Day's gloves, and Grier's jacket for GSR testing. 10:163. Both Day and Grier's hands tested negative for GSR. 9:209-210. Day's gloves tested negative (9:212-213), but Grier's jacket tested positive (9:213-214). There were three particles on the right cuff, and one particle on the left cuff; three is the minimum number required to conclude there was GSR present. 9:214.

Just prior to the commencement of the grand jury investigation, the charges against Grier and Day were upgraded to murder. 10:230.

Lack of Investigation into Jaquan Lewis and the Unknown Third-Party

Sergeant Detective Devane claimed that investigators attempted to make contact with Jaquan Lewis on several occasions, but were unable to do so until March 12, 2009, one day prior to the end of the

grand jury investigation. 10:233. Lewis participated in two interviews: the first on March 12, 2009 and the second on June 5, 2010. 11:40. During the first interview, officers asked Lewis whether he saw Barboza in the area of Codman Square on the morning of December 1, 2008. 11:41. After that interview, detectives learned his answers were not truthful. 11:40. Also, they learned from Lewis that there was a third person with Barboza on the morning of the shooting, but Lewis would not give investigators that person's name. 11:43.

Lewis also provided his cell phone number to Sergeant Detective Devane, and the Commonwealth obtained his phone records for November 1, 2008 through December 31, 2008 the next day. 10:241.[1] The first time any incoming or outgoing action occurred on the phone was December 10, 2008. 10:241.

Investigators never searched Lewis' house to determine whether he had jeans with a red stripe down the side, and never asked to see his multi-color jacket he admitted to having. 11:39-40.

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[1] Defense counsel cross-examined Detective Walsh regarding whether they ever obtained call records for Jaquan Lewis in order to substantiate a Bowden defense, and Walsh testified that they never obtained records for Lewis. In the middle of trial, ADA Pappas claimed he just found the records, and that they were, in fact, obtained, and provided them for the first time during trial. 10:238-239. He then asked Sergeant Detective Devane about this piece of the investigation. 10:241.

Tratasia Day

At the time of the incident, Day had known Grier for approximately 6 or 7 years; they lived on the same street, and she would see him every day. 6:58-59. Day was 16 at the time, and Grier was 19. 6:61.[2] There was nothing romantic involved; they were good friends, and would hang out and make music and talk. 6:62.

On the morning of December 1, 2008, Day woke up around 7am, and was planning to go to school. 6:67. She was wearing blue jeans; black, white and pink Nikes; and a black half coat with a white shirt under the coat. 6:68. Her hair was in braids, and bunched up into a ball. 6:69.

On her way to school, she went to her friend Anays Mercedes house on Elm Street so they could walk to school together. 6:67-68. While Day was there, she learned Mercedes was not going to school so she made the decision to skip school as well since she was already late. 6:71-72. Once she made that decision, she called Grier and they made plans to meet up at the end of Elmhurst Street, then go back to Grier's house. 6:71, 73. Since she was no longer going to school, she left her bookbag at Mercedes' house. 6:73.

Day identified the jacket entered as Exhibit 18 as Grier's jacket, but did not know if he was wearing

[2] Day testified Grier was 19 at the time of the incident, but he was actually 20.

it on the morning of December 1. 6:74. The jacket had a Champion logo on the left-hand sleeve, and the same logo turned upside down on the left chest. 6:75.

Day confirmed the route Smith observed her walking: Norfolk to Talbot towards Codman Square, and onto Washington St past the McDonalds. 6:76-77. Day claimed it was both her and Grier the entire time until they neared the post office. 6:79.

Once they neared the storefronts on Washington Street, Day saw Jaquan Lewis and another person she did not know the name of inside the Caribbean market. 6:89-90. She has known Lewis for a long time, and he goes by the nickname Boston.6:146. She only recognized the person with Lewis by sight; he was the person she saw with him the night prior at Ada's Market on Norfolk Street. 6:91. She later learned his name was D'Andre Barboza. 6:93.

The night prior at Ada's Market, Lewis and Barboza were also with an individual named Damal Jackson. 6:92. When she was inside the store, she saw Grier and Barboza were having a conversation outside, but she could not hear what they were saying. 6:93. Afterwards, Grier seemed quiet and upset, and he was not himself. 6:94-95.

On the morning of the shooting, when Day saw Lewis inside the Caribbean market, they made eye contact but she did not know if Grier saw him. 6:136.

Once her and Grier passed the market, Barboza and Lewis exited. 6:96. Barboza walked towards Lyndhurst St, and as Lewis walked behind, he shouted at Day. Day stopped and looked back at Lewis, and they stopped next to one another in front of the post office. 6:133-134. She lost sight of Grier at that point, then heard gunshots and saw Barboza fall. 6:104-105. She claimed she never saw Lewis, or anyone else, with a gun. 6:103, 149.

Lewis and Day then ran down Aspinwall St together, with Lewis on her right. 6:104-105. She lost sight of Lewis at some point, and Grier caught up to her in the area of the bank. 6:105. Day claimed Grier threw a gun at her and said “Take this.” 6:105. She also claimed to see Grier throw his hat into a yard near the bank. 6:106. The hat was very distinctive: it had a pinwheel on the top. 6:128. She knows through her long relationship with Grier that he has a severe case of asthma and would have trouble playing a full game of basketball, and with running. 6:151.

Day was held in DYS custody on a $1 million bail for approximately 6 months when, through her attorney, she asked to meet with someone from the District Attorney’s Office. 6:123. She entered into a proffer agreement with the DA’s office on June 1, 2009, and sometime after that, she was released on personal recognizance. 6:164-165. She also had an open case of

two counts of assault and battery on a police officer that she picked up in October of 2008 that were dismissed once she signed the proffer agreement. 6:167. She entered into a cooperation agreement on May 28, 2010, and her understanding was that if she cooperated with the Commonwealth, she would not receive any more jail time; she would complete her probationary period approximately 4 months after Grier's trial. 6:174, 180.

Jury Selection

When the court provided preliminary instructions to the jury venire before conducting individual voir dire at sidebar, without objection the court instructed all jurors that they were to decide the case solely based on the facts presented, "so if that means you've had some relevant experience or thoughts or opinions, or read something or hear something, that you will put that aside…" 3:24.

On day 2 of jury selection, Grier lodged a Soares challenge after the prosecutor challenged three African American jurors. 3:144-145. Counsel for Grier pointed out that during that day of empanelment, only three African-American women were cleared, and the Commonwealth challenged all three. 3:144. Moreover, the only jurors the Commonwealth did not challenge were middle-aged white men and women. 3:144. The Commonwealth did not contest these representations.

3:145. Grier requested that the Court require the Commonwealth to articulate a basis for challenging jurors 2, 38 and 54. 3:145.

The court indicated that it was denying the defense request to require the Commonwealth to articulate a basis for the challenges because the court did not find a pattern existed with respect to race. 3:145. Instead, the court found "I do find a pattern, the pattern is age" and that pattern had been consistent and obvious. 3:145.

Counsel then stated that juror number 2 was 31 years old, so apparently the juror was not struck due to age. 3:146. The court responded, "As I said, I don't see a pattern with respect to race. The pattern I see is with respect to age, and age is not a protected category." 3:146.

With respect to age, the court noted that "the pattern with respect to age is clear and obvious and has been consistent throughout, and indeed, is consistent in every criminal case that I try in which prosecutors virtually always challenge young people." 3:145. While the age of every one of the Commonwealth's challenges is unclear, it appears that they struck all but one college age student, who had two uncles who were police officers. 2:168-169. The Commonwealth challenged the four remaining students on the jury. 2:89; 3:61, 89-94, 140.

The court also excluded, over objection, a juror where the CORI check revealed outdated criminal charges that were not disclosed on his juror questionnaire. 3:35-53. Counsel also lodged a race-based challenge to the exclusion of this juror, because he was the only African American male that had been seated. 3:53.

The juror, number 89, was seated in seat 13 on day 2 of jury selection. 2:195. During individual voir dire, he indicated that he was the head chef at Mass. Eye and Ear before he retired, and his ex-wife was an LPN. 2:193. He answered in the affirmative as to whether he would be fair and impartial to both sides in the case, and did not have any issue with the specifics of the case, such as whether he would have difficulty with the issue of rap music. 2:194.

After the Commonwealth ran his CORI record, he was recalled on day 3 of jury selection to discuss some of the entries that were revealed. 3:45. The court indicated that the questionnaire asked about any involvement with the law, and read the specific question to the juror, then asked whether he left anything out. 3:45. Juror #89 was forthcoming, and indicated that he did not remember the year, but he was arrested and brought to court, got an attorney and the case was cleared up after they sent him to AA meetings. 3:46. After the court refreshed his memory,

he recalled that the incident involved driving a car, that he got an OUI, and that it occurred in 1995. 3:46. When asked if there was a reason why he did not include the arrest on his questionnaire, he stated "Not really, I wasn't even thinking about it." 3:46. He did not recall there being any cocaine charges involved, because he has never done drugs. 3:48.

Juror #89 was then candid about an incident that occurred around that same time where he relieved himself near Dudley Station and was arrested for indecent exposure because his zipper was down. 3:47. The court then reminded him of an insurance incident, and he recalled that he got into an accident giving his friend a ride to Cambridge, but he "didn't know he had to put issues like insurance" on the questionnaire. 3:49-50.

Ultimately, the juror affirmed that the incidents would not affect his ability to be a fair and impartial juror for Grier's trial. 3:51.

The prosecutor challenged the juror for cause due to his supposed lack of candor and the "cognitive aspect" of his answers not lining up with the questions. 3:52. Defense counsel objected, noting that the cases were 15 and 23 years old, that they were dismissed, and that the juror was candid when reminded of the charges. 3:53. Counsel further objected that Juror #89 was the only black male seated at that

point, and he would provide Grier with a cross-section of the community on his jury. 3:53.

The court excluded the juror for cause, noting at the outset that "Well, I need to say, first of all, I don't make these judgments based on race." 3:54. The court then went on to state that it had "some concerns about comprehension and about candor…either one I think is significantly problematic for serving the functions of a juror" and excused him. 3:54.

Later, Juror #48, whose race is not noted, failed to include a number of charges on his questionnaire, only informing the court of one OUI charge. 3:120-125. The prosecutor argued his disclosures were close enough, so further inquiry was not necessary. The court agreed until defense counsel pointed out that the juror failed to disclose the most serious of charges on his record. 3:123-124. The juror was reluctant to disclose any additional information, and did not reveal he had past charges in Florida until pressed by the court. 3:126-127. He indicated he was arrested but not charged. 3:129. Also, after the court pressed him, he admitted to a charge from Brockton for disturbing the peace, and that he had actually been charged with OUIs twice, not once. 3:128.

When asked why he did not disclose the charges, he stated, "I didn't remember them. I honestly had no

idea" to which the court replied, "Okay. So those slipped your mind?" 3:129.

The prosecutor argued that "I think the juror answered the questions candidly, frankly, so I'm going to ask that he stay." 3:131. Defense counsel argued that the juror be dismissed for cause because he did *not* answer candidly, and it took prompting by the court, and even when he finally disclosed a Florida arrest, he admitted to only one incident when he had three separate arrests, on three separate dates on his record. 3:132. The court disagreed with the Commonwealth, and also had issues with his candor so it excused the juror for cause. 3:132.

Closing Argument

During closing arguments, the Commonwealth improperly suggested they had specialized knowledge as to Day's involvement, and improperly used her cooperation agreement:

> [L]et's talk about Tratasia Day for a moment. Now, Tratasia Day, her big mistake that particular morning, on December 1st of 2008, was not going to school. She didn't go to school, and it wound up being the biggest mistake of her life. Why? Because she came within a whisper of being indicted for murder. She was charged, she was arrested, arraigned in Dorchester District Court, her charges were upgraded to murder, and when it came out of the grand jury she was charged with accessory after the fact and unlawful possession of a firearm. And who put her in that situation? She says the defendant, a lifelong friend, someone she grew up with, someone she spent time with every day, someone she talked to every day. And from December 24 1st of 2008, day after day, after day, after day, she was in custody for the next six to seven months because someone had implicated her in not a

> murder, let's call it what it is, an execution of a 16-year- old boy at Washington and Lyndhurst Street on the morning of December 1st of 2008.
>
> 12:77-78.

> But there is only one person on trial in this particular case, even though you may not think so based on the number of questions that were asked about Jaquan Lewis during the course of this trial. and the one person who is on trial is this defendant, Patrick Grier, not Jaquan Lewis. Tratasia Day is not on trial before you.
> 12:82.

Moreover, the prosecutor also improperly appealed to juror’s emotions by repeatedly referring to the victim’s age, and the fact that the shooting occurred on a busy morning:

> After De’Andre Barboza was shot, after the craniotomy, after his organs were harvested, and finally after he was pronounced dead on December 3rd of 2008, Sergeant Devane is left with his duty and his responsibility to investigate, to investigate who brutally executed a 16-year-old boy in broad daylight, in your city, in a place bustling with activity. Can there be a place any busier on a Monday morning, a post office with a bank across the street where people are running their errands?
>
> 12:85.

> You went out on the view after you were selected to sit on the jury. You stood, you stood in the very spot at Washington and Lyndhurst Street where De'Andre Barboza's life, for all intents and purposes, ended. You stood in that very spot.
>
> 12:91.

SUMMARY OF THE ARGUMENT

Grier was denied his right to a fair and impartial jury of his peers for three reasons: (1) the court abused its discretion in failing to require the Commonwealth to provide race and gender-neutral reasons for its

challenges, (2) the running of juror records caused the exclusion of the only African American male jury seated on the jury at the time of the exclusion, and (3) the Commonwealth impermissibly excluded all young jurors from Grier's trial. 25, 33, 37.

Moreover, the court impermissibly instructed the entire venire that they if they had "some relevant experience or thoughts or opinions" that they should "put that aside." Jurors are presumed to follow the court's instructions, and any instruction directing jurors to "put aside" or "disregard" what they think, feel or believe, amounts to a structural error requiring reversal. 31.

On day 3 of jury empanelment, Grier objected to the Commonwealth striking an African American female juror, the third that day. The Commonwealth declined to find a pattern of excluding African American women, stating that the only pattern of exclusion was young jurors. When defense counsel pointed out that at least one of the women was 31 years old, the court still declined to require the Commonwealth to justify the challenges. This was an abuse of discretion amounting to a structural error, requiring reversal. 25.

Next, the Commonwealth ran records for all jurors. It was revealed that an African American male had charges on his record – which were dismissed – from 15 and 23 years prior to Grier's trial. Although the juror was

candid when approached with his record, the Commonwealth moved to challenge him for cause, and over objection, the court removed the juror. Defense counsel objected because of the outdated nature of the record, the fact that the juror was candid, and because he was the only black male seated at that time. The court refused to consider the race of the juror, and found he was not candid, and removed him from the jury. This was an abuse of discretion, and deprived Grier of a jury of the cross-section of the community of his peers. 33.

The court also impermissibly permitted the Commonwealth to exclude all young jurors, and erroneously found that this was an adequate race-neutral reason to exclude jurors of Grier's protected class, namely young, African American citizens. 37.

Moreover, the Commonwealth's closing argument was improper where the prosecutor appealed to juror's emotions by emphasizing the victim's young age of 16, and by implying the jury should be outraged since the shooting occurred in broad daylight on the juror's city streets while people were going about their daily lives. Additionally, the prosecutor improperly implied to have independent knowledge of Day's involvement, that the grand jury declined to indict her for murder, and suggested she was victimized by Grier for pulling her into the incident. 45.

Lastly, the court erroneously permitted the lead detective to narrate the video evidence, provide opinions as to what was depicted, including an opinion that the person depicted was raising his arm and shooting, and match clothing. The detective's testimony was a backdoor way of identifying Grier as the shooter, where the detective did not have any specialized knowledge to render such an opinion. 51.

ARGUMENT

I. The Court abused its discretion in failing to require the Commonwealth to offer a race-neutral reason for excluding three African-American female jurors.

An erroneous denial of a peremptory challenge is structural error requiring reversal. CW v. Ortega, 480 Mass. 603, 605-06 (2018). Moreover, when a judge abuses her discretion in failing to find a prima facie case of bias requiring a race-neutral explanation for a challenge, the error is unlikely to be harmless. CW v. Issa, 466 Mass. 1, 11-12 n. 14 (2013).

The use of peremptory challenges to exclude prospective jurors solely because of their membership in a discrete protected class is prohibited by both art. 12, see CW v. Soares, 377 Mass. 461 (1979), and the Equal Protection Clause, see Batson v. Kentucky, 476 U.S. 79 (1986). "[O]nce a party contesting a peremptory challenge rebuts the ordinary presumption that the challenge was properly used by making a

showing of an improper basis for the challenge, the challenging party must provide, if possible, a neutral explanation establishing that the challenge is unrelated to the prospective juror's group affiliation." CW v. Harris, 406 Mass. 461, 464 (1991).

The burden of making a prima facie showing "ought not be a terribly weighty one." CW v. Jones, 477 Mass. 307, 321 (2017). It is merely a "burden of production, not persuasion." Id., *quoting*, Sanchez v. Roden, 753 F.3d 279, 302 (1st Cir. 2014). This Court has urged "judges to think long and hard before they decide to require no explanation…for [a] challenge." Id., *quoting*, Issa, 466 Mass. at 11 n. 14.

Factors for the court to consider when determining whether to require a group-neutral reason for a challenge "begins with the number and percentage of group members who have been excluded," which, under certain circumstances, is sufficient to make the requisite prima facie showing. Jones, 477 Mass. at 322. Other factors include: the possibility of an objective group-neutral reason for the strike or strikes; any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck; differences among various members of the allegedly targeted group who were struck; whether those excluded are members of the same

protected group as the defendant or the victim; and the composition of the jurors already seated. Id.

Here, Grier lodged a Soares challenge after the prosecutor challenged three African American jurors. 3:144-145. Counsel for Grier pointed out that during that day of empanelment, only three African-American women were cleared, and the Commonwealth challenged all three. 3:144. Moreover, the only jurors the Commonwealth did not challenge were middle-aged white men and women. 3:144. The Commonwealth did not contest these representations. 3:145. Grier requested that the Court require the Commonwealth to articulate a basis for challenging jurors 2, 38 and 54. 3:145.

The court indicated that it was denying the defense request to require the Commonwealth to articulate a basis for the challenges because the court did not find a pattern existed with respect to race. 3:145. Instead, the court found "I do find a pattern, the pattern is age" and that pattern had been consistent and obvious. 3:145.

Counsel then stated that juror number 2 was 31 years old, so apparently the juror was not struck due to age. 3:146. The court responded, "As I said, I don't see a pattern with respect to race. The pattern

I see is with respect to age, and age is not a protected category." 3:146.[3]

Given that 100% of African-American female jurors were challenged by the Commonwealth during that day of empanelment, the court should have required the Commonwealth to offer a race-neutral reason where "the number and percentage of group members" fell into one protected class. Under the circumstances, Grier met his low burden of establishing a prima facie showing of improper challenges. This was a structural error, requiring reversal. See Ortega, 480 Mass. at 605.

Even if, however, this Court determines the other factors are relevant, the Commonwealth did not overcome a prima facie showing. While the record is not entirely clear on whether the Commonwealth struck any white 31 year olds, juror 2 did not have any other characteristics that would suggest a race-neutral reason for the challenge. Moreover, all three jurors were a part of Grier's same protected class, where Grier is also African-American.

While the court found "we have a very diversified jury. Our jury has included many, many people of color," 3:146, the court did not elaborate on the

[3] Later that same day, the court indicated that it also did not find a pattern with respect to sex. 3:176. This was because women were supposedly disproportionately cleared, so naturally the Commonwealth would challenge more women. 3:176.

makeup of the jury. In fact, earlier in the day, defense counsel objected to removing a juror for cause for forgetting to include decades-old offenses because he was the only black male on the jury. 3:54-55. It is unclear whether any other black male jurors were sat in the meantime, but it does not appear the court's representation that there were "many, many people of color" on the jury was born out by the record.

The makeup of the jury cannot serve as the only basis for the failure to sustain a challenge to a party's peremptory challenges. See Jones, 477 Mass. at 321; Ortega, 480 Mass. at 603; CW v. Robertson, 480 Mass. 383 (2018). By primarily relying on the presence of other "people of color" to refuse to require the prosecutor to offer a race-neutral reason for a challenge, the court "sent the unmistakable message that a prosecutor can get away with discriminating against some African Americans…so long as a prosecutor does not discriminate against all such individuals, not only will his strikes be permitted, but he will not even be required to explain them." Sanchez, 753 F.3d at 299-300. Even more troubling, the court lumped all "people of color" into one category – stating there were "many, many" on the jury – where counsel was making it clear that he was objecting specifically to the challenges to African American jurors, where Grier is also African American. See CW v. Lopes, 478

Mass. 593, 600 n. 5 (2018) (stating members of all minority ethnic or racial groups cannot be lumped together for Soares and Batson analysis).

This case is unlike Henderson, where this Court recently found the court did not abuse its discretion in finding the defendant did not make a prima facie showing of discriminatory intent. The court in that case noted that "the seated jurors included four black people out of eight…So, obviously the Commonwealth passed on them. CW v. Henderson, SJC-11702 (11/30/20). This Court then concluded the judge did not abuse his discretion where "[h]e considered the number of potential jurors determined to be indifferent and assessed whether the prosecutor had challenged a disproportionate number of black jurors." Id.

Here, by contrast, the defense attorney's representations that all three of the African American women that day were contested was not disputed. Moreover, based on the court's representation that the Commonwealth did not challenge one black male, suggests this was the only person of Grier's class that was seated on the jury. Therefore, this case is unlike Henderson, and the court abused its discretion in not requiring a race-neutral reason. Id.

Under the circumstances, the court abused its discretion in failing to require the Commonwealth to offer a race-neutral reason for the challenges of

three African-American jurors. See CW v. Jones, 477 Mass. 307, 321 (2017). This amounted to a structural error requiring reversal. CW v. Soares, 377 Mass. 461 (1979); Batson v. Kentucky, 476 U.S. 79 (1986).

II. The court impermissibly instructed the jury venire to "put aside" any relevant experiences, thoughts or opinions, which tainted the entire jury empanelment process, and amounted to structural error requiring reversal.

When the court was instructing the entire venire prior to the individual voir dire process, the court directed jurors that if they had any "relevant experience or thoughts or opinions" they were to put that aside, and decide the case solely on the evidence presented at trial. Although this instruction was not objected to, it tainted the entire empanelment process, as well as Grier's right to a fair and impartial jury, amounting to a structural error. See Owens v. U.S., 483 F.3d 48, 64 (1st Cir. 2007); CW v. Hampton, 457 Mass. 152, 163 (2010).

As has been noted by this Court, "[e]very prospective juror comes with his or her own thoughts, feelings, opinions, beliefs and experiences that may, or may not, affect how he or she 'looks' at a case." CW v. Williams, 481 Mass. 443, 451 (2019). A judge should never require a prospective juror to put aside or "disregard his or her life experiences and resulting beliefs in order to serve." Id.

Any instruction requiring jurors to put aside or disregard their beliefs "comes perilously close to improperly requiring them to 'leave behind all that their human experience has taught them.'" Id. at 452, *quoting*, Beck v. Alabama, 447 U.S. 625, 642 (1980) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.").

Here, this was not one isolated incident where a juror was excluded for his inability to aver that he could put aside any beliefs or feelings. Cf. Williams, 481 Mass. 454. Instead, this was an affirmative instruction to *all* jurors that they were *required* to put aside any thoughts, feelings or beliefs in order to serve as a juror.

This erroneous instruction constituted structural error. Structural error is "error that 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Williams, 481 Mass. at 454; CW v. Recuenco, 548 U.S. 212, 218-219 (2006).

Jurors are presumed to follow the courts instructions. See CW v. Maynard, 436 Mass. 558, 571 (2002). Therefore, all jurors are presumed to have followed the courts instruction that in order to serve as a juror, he or she was required to put aside any thoughts, feelings or beliefs. This erroneously

instructed tainted the entire empanelment process where it is impossible to know whether any juror was unable to confirm an ability to be fair and impartial due to an inability to put aside life experiences. Moreover, any seated jurors, would have believed the case was to be considered in a vacuum, without bringing life experiences to the table, which jurors cannot be asked to do. See Beck, 447 U.S. at 642.

This structural error infected the entire trial process, and violated Grier's rights to a fair and impartial jury and to his right to due process under the Fifth, Sixth and Fourteenth Amendments and Article XII of the Massachusetts Declaration of Rights. See Williams, 481 Mass. at 451; Beck, 447 U.S. at 642.

III. The practice of running juror records disparately impacts jurors of color, and the court abused its discretion in striking a seated juror due to an old record revealed after the CORI check.

The trial judge erred in excluding a juror because of "new information" (3:44-48) where the outdated criminal record was not an adequate race-neutral reason, and the juror's failure to report the information was not intentional. See Issa, 466 Mass. at 11 n. 13; Flowers, 139 S.Ct. at 2233-2234 ("blanket discretion to strike prospective jurors for any reason can clash with the dictates of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution"). This Court suggested in Issa that

under certain circumstances, particularly where the charges are old, an arrest or criminal charges will not serve as an adequate race-neutral reason for a challenge:

> We do not consider in our analysis the prospective juror's arrest thirteen years earlier in Kansas for criminal trespass, which resulting in his spending forty-eight hours in jail. Where there is nothing in the record to suggest that this experience would have affected the prospective juror in his evaluation of the case, we would not find it reasonable for a prosecutor to rely on this arrest as a basis for challenging a prospective juror, especially where, as here, the prosecutor did not challenge other jurors with similar criminal experiences.
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> Id.; Robertson, 480 Mass. at 395 n. 9 (noting same relating to 11-year-old arrest for domestic violence).

The court abused its discretion in excluding the juror for cause. Defense counsel objected to excluding the juror because he was the only black male seated, the class of people of which Grier is a member. The criminal charges were not an adequate race-neutral reason, and using these charges to exercise a peremptory was a pretext to exclude members of a protected class. See Issa, 466 Mass. 1 at 11 n. 13; Robertson, 480 Mass. at 395 n. 9. While the court noted its exclusion of the juror had nothing to do with race, it does not negate the fact that excluding a juror with an old record had the impact of excluding an already seated African-American juror. That the court did not even consider this disparate impact

because she was not considering race constituted an abuse of discretion. See Robertson, 480 Mass. at 397; Sanchez, 753 F.3d at 303.

Additionally, the remoteness of the juror's records, as well as the relatively minor nature of the record, also highlights that the decision to remove the juror was an abuse of discretion. See Issa, 466 Mass. at 11 n. 13; Robertson, 480 Mass. at 395 n. 9.

Another factor to consider is the Commonwealth argued the juror should be excluded because of the omission, but later found a similarly situation juror – who's race is unclear but which the defense did not object – should not be excluded. Robertson, 480 Mass. at 391 (noting "whether the challenged jurors are members of the same constitutionally protected group as the defendant" as relevant factor).

The unfairness of running records for potential jurors is highlighted by the fact that it is the only portion of the juror questionnaire that is "checked" to determine whether it is fully complete. There is no mechanism or practice of confirming whether a potential juror worked for the DA's office but failed to mention it, or whether he/she was a victim of a crime. See CW v. Gonsalves, 96 Mass. App. Ct. 29, 30 (2019) (juror failed to mention she was starting internship with DA's office one week after trial, and she previously worked for Marshfield PD). For some

reason, however, the Commonwealth is permitted to check the one piece of information that will certainly disparately effect people of color.

The practice of running jurors' criminal records provides a prosecutor with a reason to challenge a juror that would not otherwise exist, simply because the juror mistakenly left charges off of his or her questionnaire. Using an arrest record as a basis for challenging a juror "compounds the racially disparate impact of our criminal justice system." Arresting *Batson*: How Striking Jurors Based on Arrest Records Violates *Batson*, Yale Law & Policy Review (June 2016). (R22). As is now well-established, people of color are stopped, arrested, and prosecuted at a disproportionately higher rate. See Commonwealth v. Warren, 475 Mass. 530, 539 (2016); Commonwealth v. Long, 485 Mass. 711, 717 (2020). Therefore, they are statistically more likely to be excluded from the jury due to the CORI check, leading to a systemic exclusion of people of color from the jury.

Under the totality of the circumstances, where the juror's charges were old, the juror did not appear to be attempting to conceal the charges, he was the same race and sex as Grier, and there is no indication his past record would impair his ability to remain fair and impartial, the court abused its discretion in excluding the juror. "Because such an error is

structural, carrying the presumption of prejudice," reversal of the convictions is required. Robertson, 380 Mass. at 397; Batson, 476 U.S. at 84. See also Flowers, 139 S.Ct. at 2233.

IV. Excluding all young jurors violated Grier's right to a fair and impartial jury of his peers where Grier was only 21 years old at the time of trial, and this should not have been an adequate basis to overcome a Soares challenge.

Grier was 20-years old at the time of the incident, and 21-years old at the time of trial. Despite his young age, the court sanctioned the practice of excluding all young jurors, and even used it as a reason to provide to decline to require the Commonwealth to provide a race-neutral reason for challenges. In doing so, the court stated:

> Ok. I do not find a pattern. Well, let me rephrase that. I do find a pattern, the pattern is age. It has nothing to do with race. And the pattern with respect to age is clear and obvious and has been consistent throughout, and indeed, is consistent in every criminal case that I try in which prosecutors virtually always challenge young people. I've noticed in this case one exception to that, and the one exception was a young black man who the prosecutor did not challenge…The pattern I see is with respect to age, and age is not a protected category.

3:145-146.

This mode of analysis and thinking gives the Commonwealth the green light to exclude every young juror in the Commonwealth from sitting on a jury. Even more troubling, it provides the Commonwealth with a race-neutral reason to exclude a juror of the defendant's class, in order to entirely prevent a

defendant from having any young, African-American individuals on his jury, i.e., the most closely related "peer" of the defendant. This practice violates both the defendant's right to a jury comprising of a cross-section of the community, it also violates the jurors' Equal Protection rights.

While the age of every one of the Commonwealth's challenges is unclear, it appears that they struck all but one college age student, who had two uncles who were police officers. 2:168-169. The Commonwealth did, however, challenge the four remaining students on the jury. 2:89; 3:61, 89-94, 140.

Not only does a defendant have a right to a jury of his peers – representing a cross-section of the community – jurors also have the right "to participate in the administration of the law." See Curtiss, 424 Mass. at 81 n. 2; Strauder, 100 U.S. at 108. When all jurors under 25 years of age are excluded from the jury for a young defendant, solely because of their age, this violates both the Equal Protection rights of the jurors, as well as the defendant's Equal Protection rights; while older defendants are afforded a jury of their "peers", younger defendants are not solely because of age, and young jurors are excluded from a function of society solely due to their age.

Although this Court in Oberle noted "age is not a discrete grouping defined in the Constitution" and

thus "a peremptory challenge may permissibly be based on age," this was in the context of the *defense's* use of peremptory challenges. See 476 Mass. 539, 545 (2017). Recognizing that the Commonwealth has an "interest in prosecutions that are 'tried before a tribunal which the Constitution regards as most likely to produce a fair result,'" a defendant also has a corollary right to a jury of his peers. Soares, 377 Mass. at 489; Singer v. U.S., 380 U.S. 24, 36 (1965).

Many courts that have determined age is a permissible reason to exclude members of the jury have done so on the basis that age is not a "cognizable class." See Young Adults as a Cognizable Group in Jury Selection, 75 Mich. L. Rev. 1045, 1046-1048 (1977) (cases cited). The Appeals Court found at one point, however, that young adults are a cognizable class for jury selection purposes. See CW v. Bastarache, 10 Mass. App. Ct. 499, 509 (1980) (reversing conviction where young adults were underrepresented in jury venire, and Commonwealth did not offer justification). Cf. CW v. Lussier, 364 Mass. 414, 423 n. 2 (1973); Lopes, 478 Mass. at 598 (determining only whether youth was genuine race-neutral reason for strike).

One decision offering an in-depth definition of a "cognizable class" defined it as a group with a definite composition, is cohesive, and its exclusion might result in bias by juries hearing cases in which

group members are involved. U.S. v. Guzman, 337 F. Supp. 140, 143-44 (S.D.N.Y. 1973). Young adults meet this definition, as recognized by both social scientists and psychologists alike. See Emerging Adulthood: The "In-Between" Developmental Stage, Cynthia Vinney (September 19, 2018) (R60).

Young adults also consist of the largest population age category in Boston. Between 2013 and 2017, there were approximately 103,081 individuals between 18 and 24 in Boston, consisting of 15.3% of the population. The only other age category that comes close is the 25 to 29-year-old age gap, which consisted of 13.8% of the population. R19. According to the Commonwealth, individuals from age 18 to 24 are so similar in mindsets and beliefs they can be lumped into one category when exercising challenges, so it is hard to say they are *not* a cognizable class. Under these circumstances it is hard to see how excluding the largest age subset of the population of Boston could still afford a defendant with a jury comprising of a cross-section of the community.

There is no legitimate reason to believe a young juror could not be fair. In fact, studies found that while individuals do not demonstrate "psychosocial maturity" until well into their 20's, an "ability [that] is important for exercising good judgment when considering whether to hold a young person to adult

standards of criminal responsibility," individuals develop the mental capacity to make decisions which require "deliberation and logical reasoning [] long before they are mature enough" to demonstrate "self-regulation." *Drawing Legal Age Boundaries: A Tale of Two Maturities* (July 3, 2019) (R71). Therefore, the Commonwealth's practice is not grounded in science.

While the parties are permitted to exercise peremptory challenges in any manner as long as not for impermissible purposes, denying a defendant the right to a jury of his peers *is* an impermissible purpose. Although this Court has found age is not a "protected class", where a defendant is only 20-years old we should look at the Commonwealth's challenges to ensure it is not systematically preventing the defendant from being tried before a jury of his peers. Looking at the Commonwealth's challenges with higher scrutiny is not novel; in fact, at its origination, only the defendant was permitted to exercise peremptory challenges. Soares, 377 Mass. at 483, *citing*, Pointer v. U.S., 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused."). See also *The Unconstitutionality of Criminal Jury Selection*, 26 Wm. & Mary Bill Rts. J. 1059 (2018) (R74) ("allowing prosecutors to participate equally in jury selection undermines the rationale for the

defendant's Sixth Amendment right to a jury…The right to a jury trial belongs exclusively to the criminal defendant, and its purpose is to protect the defendant from governmental overreach.").

Limiting the "jury of peers" inquiry into whether members of a protected class were discriminated against is too narrow. A defendant has the right to a jury that consists of the fairest cross section of the community that the jury pool and "for cause" strikes allow for. See Soares, 377 Mass. at 483. To achieve this end, excluding "any large and identifiable segment of the community" cannot stand. Peters v. Kiff, 407 U.S. 493, 503 (1972).

In Soares, this Court equated the term "jury of peers" to a cross-section of the community. The Supreme Court, however, has afforded almost the same definition to the term "impartial jury" embedded in the Sixth Amendment of the U.S. Constitution. Where the Massachusetts right is broader – and specifically includes the mandate of "peers" – this Court should interpret the rights under Article XII of the Massachusetts Declaration of Rights broader. The definition of peer is "one that is of equal standing with another, *especially:* one belonging to the same societal group especially based on age, grade or status." See https://www.merriam-webster.com/dictionary/peer. Under the ordinary

meaning of peer, age matters when determining whether a defendant has been afforded a jury of his peers.

Under the current standards of “protected class” in our Constitution, a party could exclude all members of a certain sexual orientation, socioeconomic class or underserved region of Boston simply because of that person’s membership in that group and not for any other reason. It is difficult to see how these strikes could be deemed permissible when they exclude entire portions of the population, even though these are not “protected classes.” It begs the question of whether the Court would raise an eyebrow, and whether it would withstand scrutiny, if the Commonwealth struck all gay members of the venire under the rationale that those individuals would be too compassionate towards a criminal defendant, or some other stereotype.

Additionally, the definition of a “protected class” set forth in Soares is too limited, where it restricted the delineated groups to discrimination based on sex, race, color, creed or national origin. See Soares, 377 Mass. at 488. This Court has already expanded that list to religion in the jury selection context. Obi, 475 Mass. at 551. In Obi, the alleged victim wore a headscarf, and the excluded juror wore a headscarf. Id. Therefore, it cannot be said that the jurors here were properly excluded simply because they were “similar” to the defendant, where such a reason

would not stand in the religious context and whether the juror would improperly align herself with the victim in the case. See id.

If the goal is to achieve the fairest jury possible, there is no rational reason to permit the Commonwealth to exclude every single potential juror who most closely resembles a "peer" of the defendant. In fact, at least one study shows that individuals in the group excluded by the Commonwealth tend to be *more* fair. See Young Adults as a Cognizable Group in Jury Selection, 76 Mich. L. Rev. 1045, 1078-1079 (1976) (R130-131) (individuals 18-30 answered affirmatively far less than older groups to questions such as "A witness who takes the fifth amendment is probably hiding his or her guilt of a crime" and "Young people have less respect for the law than older people").

Ultimately, the Commonwealth challenged almost every young juror, and this had the effect of excluding the largest age subset of the population of Boston, such that it cannot be said a fair cross-section of the community sat on Grier's jury. Under the circumstances, the use of peremptory strikes in this case violated Grier's rights to a jury of his peers and his Equal Protection rights, as well as the Equal Protection rights of those jurors. See Soares, 377 Mass. at 488; Robertson, 480 Mass. at 390 ("the equal protection clause of the Fourteenth Amendment to

the U.S. Constitution and art. 12 of the Massachusetts Declaration of Rights placed limitations on the use of peremptory challenges); Taylor, 419 U.S. at 528. This structural error requires reversal, even though it was not objected to at trial.

V. The prosecutor's closing argument was improper in this case where he appealed to juror's emotions, and improperly bolstered the credibility of Tratasia Day, suggesting he had specialized knowledge of her role, and improperly used her cooperation agreement.

The prosecutor's arguments in this case went well over the line of proper advocacy – both in opening and in closing – and repeatedly referred to the victim's age, emphasized that the jurors stood in the very spot where the young victim was "executed" and in vouching for the credibility of Tratasia Day, the Commonwealth's most important witness.

As has been made clear by this Court, a prosecutor has an obligation to argue a case forcefully and aggressively, but "repeated references to a victim's personal characteristics" fails in the obligation to "state[] the evidence clearly and fairly…rather than sympathy for the victim…" CW v. Santiago, 425 491, 494-95 (1997) (improper for prosecutor to refer to victim as 17 and pregnant 7 times in opening and 7 times in closing), *citing* Berger v. U.S., 295 U.S. 78, 88 (1935).

The Commonwealth violated the principles set forth in CW v. Ciampa, 406 Mass. 267, 275 (1989). During closings, the Commonwealth suggested that (1) the grand jury declined to indict Day on murder, and only indicted her as an accessory after the fact, and (2) unfairly bolstered her testimony by suggesting Grier implicated her in a murder, and then the Commonwealth provided her with a deal because she was wrongly implicated, and (3) that the Commonwealth chose to put Grier on trial, suggesting they had special knowledge of his guilt:

> [L]et's talk about Tratasia Day for a moment. Now, Tratasia Day, her big mistake that particular morning, on December 1st of 2008, was not going to school. She didn't go to school, and it wound up being the biggest mistake of her life. Why? Because she came within a whisper of being indicted for murder. She was charged, she was arrested, arraigned in Dorchester District Court, her charges were upgraded to murder, and when it came out of the grand jury she was charged with accessory after the fact and unlawful possession of a firearm. And who put her in that situation? She says the defendant, a lifelong friend, someone she grew up with, someone she spent time with every day, someone she talked to every day. And from December 24 1st of 2008, day after day, after day, after day, she was in custody for the next six to seven months because someone had implicated her in not a murder, let's call it what it is, an execution of a 16-year- old boy at Washington and Lyndhurst Street on the morning of December 1st of 2008.
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> 12:77-78.
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> But there is only one person on trial in this particular case, even though you may not think so based on the number of questions that were asked about Jaquan Lewis during the course of this trial. and the one person who is on trial is this defendant, Patrick Grier, not Jaquan Lewis. Tratasia Day is not on trial before you.
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> 12:82.

As reaffirmed in Commonwealth v. Webb, even if the defense challenges the credibility of a cooperating witness, the Commonwealth cannot suggest any specialized knowledge with respect to the witness, or in any way imply the Commonwealth knows the witness is telling the truth. 468 Mass. 26, 33 (2014). This is exactly what the Commonwealth did in this case, however.

Day was not an insignificant witness. She was found with the murder weapon just after the shooting, but claimed Grier threw it to her just after the shooting. When officers asked her to take off her gloves so they could conduct a gunshot residue swab, she smacked her gloves together as if she was trying to clear off any evidence. Almost the entirety of Grier's defense was to cast doubt on Day's claim Grier was the shooter, and implicate third parties in the area, or suggest Day was, in fact the shooter. The Commonwealth's argument served to undermine Grier's entire defense, suggesting the Commonwealth had inside knowledge Grier was the shooter, such that either they did not seek an indictment for murder as to Day, or the grand jury did not find probable cause. All of these suggestions were improper. See Webb, 468 Mass. at 33; U.S. v. Young, 470 U.S. 1, 18 (1985).

This also improperly garnered sympathies for Day, and suggested she was victimized by Grier, her lifelong friend, because he dragged her into the incident. This representation also suggested the Commonwealth had

specialized knowledge as to her involvement, or lack thereof, and improperly bolstered her testimony.

The prosecutor also unfairly appealed to the jury's emotions, by repeatedly referring to the victim as a teenager, arguing "[a]n unarmed, defenseless 16-year old gets blasted right in the head, and [Day] finds herself in custody," and by attempting to outrage the jury by highlighting the shooting was committed in broad daylight, in the morning hours while law-abiding citizens were traveling to work and to do errands, was improper. See Santiago, 425 Mass. at 494-95 ("repeated references to a victim's personal characteristics" fails in obligation to "state[] the evidence clearly and fairly…rather than sympathy for the victim…"); Berger v. U.S., 295 U.S. 78, 88 (1935).

The Commonwealth did not proceed under a theory of extreme atrocity and cruelty, so flourishing the details of the incident had no relevancy, and served only to inflame the jury. Cf. CW v. Wilson, 427 Mass. 336, 351 (1998) (emphasizing details of crime relevant to extreme atrocity and cruelty theory).

The prosecutor argued the following:

> After De'Andre Barboza was shot, after the craniotomy, after his organs were harvested, and finally after he was pronounced dead on December 3rd of 2008, Sergeant Devane is left with his duty and his responsibility to investigate, to investigate who brutally executed a 16-year-old boy in broad daylight, in your city, in a place bustling with activity. Can there be a place any busier on a Monday morning, a post office with a bank across the street where people are running their errands?

> 12:85.
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> You went out on the view after you were selected to sit on the jury. You stood, you stood in the very spot at Washington and Lyndhurst Street where De'Andre Barboza's life, for all intents and purposes, ended. You stood in that very spot.
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> 12:91.
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> [W]hat happened on that street corner…the shooting death of De'Andre Barboza, it's one of those things I would suggest to you, ladies and gentleman, that you don't forget. An execution in broad daylight on a busy city street corner, a traumatic and disturbing event no matter how you slice it, okay? 12:102-103.

The Commonwealth also shifted the burden of proof throughout the closing argument. CW v. Cyr, 433 Mass. 617 (2001). The Commonwealth first highlighted the evidence that was not presented to implicate Jaquan Lewis in the shooting – which was Grier's main defense – then argued, "[t]here isn't a shred of evidence that he shot a gun that day, or that he had a gun that day…And I'd suggest what defense is asking you to do, no, begging you to do is to speculate." 12:82.

> Ladies and gentleman of the jury, I suggest to you that this defendant is now out of time. There's no more time to say everyone else is mistaken. No more time to say Jaquan Lewis did it, or Tratasia Day was involved somehow with Jaquan Lewis. No more time to blame the police for inefficiencies or for manufacturing evidence. You know this defendant is out of time…
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> 12:106.

These statements suggested Grier had some obligation to present evidence to undermine the

Commonwealth's case. See CW v. Waite, 422 Mass. 792 (1996); CW v. Fletcher, 435 Mass. 558 (2002).

The Commonwealth also undermined the Bowden defense, and misstated the law as to how the jury may consider an absence of evidence:

> Ladies and gentleman, don't be fooled. You need to focus on the evidence that was presented in the four corners of this courtroom…So, no matter how many questions were asked, and no matter how artfully they were crafted or put to a witness, the absence of certain evidence in this case doesn't negate the quality or the quantity of the evidence that's been introduced during the course of this trial. Questions are what a skilled, experienced and competent attorney in the face of powerful and very incriminating evidence wants you to do: to speculate on what's not before you opposed to what is.
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> 12:83.
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> Countless questions have been asked and they've been answered, and there are no longer any places to run or any places to hide in this courtroom.
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> 12:87.
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> And it will be your job to decide this case as you were sworn to do…not based on speculation, but on the evidence that's been introduced in this courtroom.
>
> 12:91.

These statements, coupled with the jury instruction that they "are not to engage in any guesswork about any unanswered questions that may remain in your mind or to speculate about what the facts might or may not have been beyond what has been proved by the evidence." 12:112; CW v. Alvarez, 480 Mass. 299, 318 (2018) (instruction "runs risk that jury may interpret this sentence as undercutting the defendant's Bowden

argument"); Chambers v. MI, 410 U.S. 284, 294 (1973) (court cannot remove defense from jury consideration).

Over the years, this Court and the Appeals Court have repeatedly warned prosecutors about improper closing arguments. See CW v. Dirgo, 474 Mass. 1012 (2016). Most convictions, however are not reversed as result, so prosecutors continue to step well over the line of permissible argument. This case involved one of the most seasoned prosecutors in Suffolk County. It can hardly be said that he was unaware of what constitutes proper argument, and what does not constitute proper argument. Until convictions are overturned based on egregious closings such as this one, the practice will continue.

Given the importance of Day's testimony, and the improper use of her cooperation agreement, this created a substantial risk of miscarriage of justice requiring reversal. See Berger v. U.S., 295 U.S. 78, 88 (1935).

VI. The Court impermissibly permitted the lead detective to narrate the video evidence in this case, which served to undermine Grier's theory of defense, and improperly bolstered the Commonwealth's case.

Over objection, Sgt Det Devane was permitted to narrate the video evidence in this case, and render an opinion as to which direction the individuals in the video – who the Commonwealth alleged were Grier and Day – were walking, that the person standing near a

moving truck who they alleged was Grier raised his arm in a shooting motion, to point out details on the clothing of the alleged shooter, and used this opinion to attempt to undermine Grier's entire defense that he was not the shooter, and was merely present in the vicinity when the true culprits shot the victim. Grier attempted to pursue this defense by suggesting an individual observed passing the post office just prior to the shooting was Grier.

Devane testified that the two people on video appeared to be traveling in the direction of the corner, based on the direction he believed the feet were pointing on the surveillance footage. 10:224. During the crucial moments just prior to and during the shooting, Devane, over objection, testified that there "appears to be an image silhouetted against the white van" with an "arm pointing out away from the body." 10:243. He claimed that the door from Washington Street leading into the post office was obstructing the person's hand. 10:243. While he indicated he could not tell if the person was wearing a hat, he informed the jury that he was focused on a "C" on the left chest area of the person's jacket. 10:249-250.[4] The Commonwealth also introduced a blown-

[4] During deliberations, the jury requested permission to open the package containing the jacket Grier was wearing at the time of his arrest. 13:19-20.

up surveillance still, with an arrow pointing to the "C" on the left chest area of the supposed shooter.

The defense conceded Grier was at the scene,[5] but argued he left prior to the shooting, and Grier was wearing a hat but the person depicted in surveillance footage with his arm stretched was not wearing a hat. 4:80, 91. Toward that end, defense counsel pointed out an individual walking past the post office just prior to when shots were fired. 4:91. To undermine this defense, the prosecutor elicited from Devane that he "could not tell if the person advanced all the way to the corner," and he could not tell if the shooter was wearing a hat. 10:249, 254-255.

A. Sergeant Detective Devane's narration of the video, and opinions as to what was depicted was improper opinion evidence.

This opinion evidence was improper. The jury was fully capable of viewing the video and reaching their own conclusions. The testimony was a backdoor way of undermining Grier's defense and bolstering the credibility of Day. The error is exasperated where the evidence came in through a police officer, "imbued with the imprimatur of authority." See CW v. Wardsworth, 482 Mass. 454 (2019).

[5] Defense counsel told the jury during opening statements that it was undisputed that Grier was there during the shooting, that he wearing a hat, and that he dropped it as he ran down Aspinwall Road after the shooting. 4:84.

Additionally, the blow-up still with an arrow pointing to the supposed “C” on the person’s chest amounted to argument within an exhibit, which served as a “pedagogical device[] that unfairly emphasize[d] part of the proponent’s proof.” See CW v. Suarez, 95 Mass. App. Ct. 562, 571 (2019); CW v. Wood, 90 Mass. App. Ct. 271, 278 (2016). It essentially mirrored the testimony this Court said was impermissible in Wardsworth, and served as an opinion of the officer that the jacket worn by the alleged shooter in the video, matched the jacket Grier was wearing when he was arrested. See Wardsworth, 482 Mass. at 475-476.

Sgt Det Devane’s testimony constituted an improper lay opinion, where the jury was fully capable of drawing their own inferences and conclusions without the aid of his opinion. See CW v. Pleas, 49 Mass. App. Ct. 321, 342 (2000); CW v. Austin, 421 Mass. 357 (1995). U.S. v. Meises, 645 F.3d 5, 16 (1st Cir. 2011) (“The nub of [Rule 701] is to exclude testimony where ‘the witness is no better suited than the jury to make the judgment at issue,’ ‘providing assurance against the admission of opinions which would merely tell the jury what result to reach.’”).

The officer did not have any special familiarity with the events at play; instead he was merely rendering an opinion which matched the Commonwealth’s theory of the case. See Pleas, 49 Mass. App. Ct. at

326 ("such testimony is admissible…when the witness possessed sufficiently relevant familiarity with the defendant that the jury cannot also possess"); CW v. Vitello, 376 Mass. 426, 460 (1978) (opinion admissible only if some basis to conclude witness more likely than jury to correctly identify person in video); CW v. Nassar, 351 Mass. 37 (1966); U.S. v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995).

His opinions did nothing to aid the jury, and there was the distinct risk that the jurors "well might have substituted the officer's[] opinion with his/her own." Wardsworth, 482 Mass. 454. Given the importance of the issues, the error prejudiced Grier, and reversal is required. See CW v. Aviles, 461 Mass. 60, 67 (2011) (preserved error standard).

B. Sergeant Detective Devane's opinion as to the alleged clothing of the shooter was a backdoor means of identifying Grier as the shooter, which was an improper opinion on the ultimate issue.

Over objection, Sgt Det Devane also identified a blown-up still, and in addition to opining that a man could be seen raising his arm as if firing a weapon, he also testified that the jacket depicted a "C" on the chest, and identified a still with an arrow pointing to the "C." This was a backdoor means of identifying Grier as the shooter, where he was later arrested wearing a jacket with a "C" on the chest.

Although the Rules of Evidence do not preclude testimony if it only "embraces" the ultimate issue, the opinion testimony is expressly prohibited where the witness provides an opinion as to the defendant's guilt or innocence. See Mass. R. Evid. 704; CW v. Hamilton, 459 Mass. 422, 439 (2011) (officer impermissibly testified he "interpreted" defendant's message as threat constituted opinion on defendant's guilt in witness intimidation case); CW v. Hesketh, 386 Mass. 153, 162 (1982) ("There is no necessity for this kind of [opinion] evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses."); see also U.S. v. Diaz-Arias, 717 F.3d 1 (1st Cir. 2013); U.S. v. Vasquez-Rivera, 665 F.3d 351 (1st Cir. 2011).

The testimony related to the ultimate issue in the case: whether Grier was the shooter. See State v. Finan, 275 Conn. 60 (2005); U.S. v. Monsour, 893 F.2d 126 (6th Cir. 1990) (identification testimony bore on defendant's guilt where "[t]he primary issue at trial was the identification of [the] defendant as the bank robber"); Mullings v. Meachum, 864 F.2d 13, 15 (2d Cir. 1988) (primary issue was identity of robber).

In Wardsworth, this Court found this exact scenario was improper testimony relating to the

ultimate issue.[6] This Court specifically found "[i]t was the province of the jury, and not the officers, to determine whether the defendant 'appeared to be the same person form the video' or whether 'their attire matched, was a definitive match.'" Wardsworth, 482 Mass. 454, 476 (2019); U.S. v. Vazquez-Rivera, 665 F.3d 351, 361 (1st Cir. 2011) ("Crucially, because the determination of whether [defendant] was the man in the [Internet camera] video could have been properly reached only by considering evidence available to the jury, [officer's] testimony also usurped the jury's role instead of being helpful to it").

Opinion testimony relating to video surveillance is admissible only where the testimony could "aid the jury in determining if the person whose picture had been taken sometime in the past was the same person who sat in the courtroom as the defendant." CW v. Vitello, 376 Mass. 426, 460 (1978). Witnesses who lack familiarity with a defendant, however, may never identify an individual depicted in surveillance footage, or narrate the events depicted; "it is the province of the jury to draw their own conclusions regarding the identity of the person depicted without the witness's assistance." Wardsworth, 482 Mass. at

[6] In Wardsworth, the testimony was unobjected to but here, Grier objected so he is entitled to the more favorable standard of review.

476-477. The Court also made clear that even where the witness *is* familiar with the defendant, the testimony still is not admissible where "the witness is no better-suited than the jury to make the identification." Id.; U.S. v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995). In fact, police are not even permitted to testify that the person's clothing in the video "matches" the clothing the defendant was later observed wearing. Id.

Here, Sgt Det Devane had no familiarity with Grier, and Grier's appearance had not changed since his arrest; the jurors were fully capable of viewing the surveillance footage then determining whether Grier was depicted in the footage or if the clothing was the same. Id.; Vitello, 376 Mass. at 460; CW v. Austin, 421 Mass. 357 (1995) (error to admit lay opinion testimony of police officer that man depicted in surveillance footage was defendant where jurors were capable of drawing that conclusion themselves); U.S. v. Jackman, 48 F.3d 1, 4-5 (1st Cir. 1995).

Sgt Det Devane's testimony constituted an impermissible identification on the ultimate issue, in violation of Grier's due process and fair trial rigths. Reversal is required. See Wardsworth, 482 Mass. at 476; Vazquez-Rivera, 665 F.3d at 361. See also U.S. v. Diaz-Arias, 717 F.3d 1 (1st Cir. 2013).

CONCLUSION

Patrick Grier respectfully requests that this Court reverse the convictions, and order a new trial.

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CERTIFICATE OF COMPLIANCE

I certify that to the best of my knowledge this brief complies with the rules of appellate procedure that pertain to the filing of briefs, including: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to appendices, and other papers). The only modification is the length of pages, and a motion to file a non-conforming brief is filed with this brief.

Dated: January 29, 2021 Signed:/s/ Rosemary Scapicchio

CERTIFICATE OF SERVICE

I hereby certify that the brief and record appendix were served on the counsel of record for the Commonwealth via electronic service.

Dated: January 29, 2021 Signed: /s/ Rosemary Scapicchio