(63)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS. SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS)
V.) No. 17159
BARRY J. JACOBSON)

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
FILED APR 13 2021 FILED
Deborah Shapiro

DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO MASS. R. CRIM. P. 30(b)

Now comes Mr. Jacobson, by and through his counsel, and respectfully moves that this Court, pursuant to Mass. R. Crim. P. 30, grant him discovery, vacate his conviction and grant him a new trial in the above-captioned matter.

Mr. Jacobson, a highly respected business executive from New York, was convicted in 1983 of setting fire to his family vacation home in Richmond, Massachusetts. He was paroled after serving 42 days in custody and paying a $10,000 fine. As set forth more fully in the attached memorandum, the case against him was circumstantial, based on very questionable forensic evidence and tainted by anti-Semitic sentiments expressed by the foreperson of the jury.

Mr. Jacobson has always denied his guilt even after his conviction was upheld on appeal. Indeed between 1987 and 2002 he filed four petitions for pardon relief. At the hearings on each of those petitions, he denied his guilt even though he was repeatedly advised by members of the Board of Pardons that although he qualified in many respects for pardon relief his failure to admit guilt disqualified him for that relief (notwithstanding dissenting votes to the contrary).

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Although it has cost him dearly in his personal and professional life, now for decades, he cannot admit to what he did not do. And so, at age 77, he seeks relief from this court as a last resort.

Respectfully Submitted,

BARRY J. JACOBSON,

By his attorney,

Robert J. Cordy (BBO #099720)
McDERMOTT WILL & EMERY LLP
200 Clarendon Street
Boston, Massachusetts 02116
Telephone: +1 617 535 4000
Fax: +1 617 535 3800
E-mail: rcordy@mwe.com

Dated: April 13, 2021

CERTIFICATE OF SERVICE

I certify that I caused a true copy of this document to be served on counsel for all parties by electronic mail on the date below, per agreement of the parties.

Dated: April 13, 2021

Robert J. Cordy (BBO# 099720)

(64)

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS. SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS)
V.) No. 17159
BARRY J. JACOBSON)

MEMORANDUM IN SUPPORT OF BARRY J. JACOBSON'S MOTION FOR POST-CONVICTION RELIEF

I. INTRODUCTION

On February 10, 1983, Barry Jacobson was indicted on one count of burning a dwelling (his vacation home) in Berkshire County, in violation of M.G.L. c. 266, section 1. The fire occurred on January 29, 1982, and Mr. Jacobson was convicted, along with a friend Patrick Clarke, on November 30, 1983. Mr. Jacobson and Mr. Clarke had traveled from New York to his family vacation home in Richmond, Massachusetts, early on the morning of January 29, to retrieve a jeep that had been stored in the house garage there, and which Mr. Clarke was going to borrow for a trip. When they arrived at the house the garage door would not respond to the door opener, and a board appeared missing from the same. A light was on in the house. Fearing a possible burglary, as there had been several previous burglaries at the house in the months before, and not otherwise having keys to the house, Jacobson and Clarke attempted to drive to the caretaker's home for assistance but were driven off the road into a snowbank. At about this time, a fire alarm in the house was set off, and firefighters began their response. Soon thereafter State Police investigators also arrived. Jacobson, Clarke and the caretaker returned to the scene to assist. The fire was shortly put out.

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The criminal case brought against Mr. Jacobson and Mr. Clarke was circumstantial. They were there in the driveway of the house at or about the time the fire started, and the District Attorney's Office argued that although Mr. Jacobson was a successful, highly regarded and relatively well-off real estate broker/developer in New York, he had increased the insurance on the home and was looking to make more money.[1]

As referenced in the motion, Mr. Jacobson has, for more than 37 years, absolutely denied his guilt. Although he could have readily secured a pardon due to his lifelong extraordinary contributions to and engagement with his community, *see e.g.* Community Achievements, (attached as Exhibit 1, from one of his pardon applications), he has on every occasion – and at at least four pardon hearings – denied his guilt. As a result he has been denied a pardon on each occasion for that very reason. [*See e.g.*, letter dated December 14, 1999, attached as Exhibit 2, from the Board of Pardons, advising that a majority of the Board once again had voted to submit an unfavorable recommendation in spite of his good citizenship because he "continued to fail" in taking responsibility for the crime.] Although Mr. Jacobson understood on each occasion that if he admitted guilt he would likely obtain a pardon thus enabling him to once again obtain a real estate broker's license, and fully resume his profession, he could not bring himself to lie. Hence for decades he has suffered personally and professionally.

This motion presents an opportunity to right that wrong. Although his conviction was affirmed by the Appeals Court in 1985, *see* Commonwealth v. Jacobson, 19 Mass. App. Ct. 666,[2] history has since taught us that not all injustices are corrected on Appeal, and not all convictions represent the truth. *See e.g.* Convicting the Innocent: Where Criminal Prosecution Go Wrong, by

[1] Mr. Jacobson repaired the home in about two weeks time at a cost of $20,000. Most of the damage was smoke damage requiring cleaning and painting. The insurance on the house had been raised at the recommendation of the insurance broker to keep pace with inflation and market conditions. No insurance claim was ever filed.

[2] In that same appeal, Patrick Clarke's conviction was reversed by the Appeals Court which found the evidence to sustain it was insufficient.

Brandon Garrett, Harvard University Press, 2011. The trial suffered from flaws in several meaningful respects that should give us pause and warrant revisiting. This motion is largely based on two of those flaws. First, that the conviction for arson rested on the test results of an exhibit of very suspicious origin, which never should have been admitted into evidence; and second, that the verdict was tainted by anti-Semitic sentiments expressed by the foreperson of the jury.

A. The Flawed Evidence

The District Attorney's case that arson had occurred, rested largely on an unsealed vile of liquid that tested positive for gasoline residue. The investigating state police officers, Richard Smith and Robert Scott, apparently testified at trial that the liquid had been squeezed from a carpet sample that they had cut out and believed was at the point or origin of the fire.[3] The authenticity and admission of this evidence was particularly troubling for the following reasons:

1. The carpet samples that were obtained by the troopers at the scene on January 29, 1982, from the alleged point of origin, were promptly brought to the State Laboratory and tested. No flammable residue, gasoline or otherwise, was detected on any of the samples. [*See* lab report dated February 10, 1982, attached as Exhibit 3.]

2. It wasn't until a year after the fire, days before the Grand Jury heard the case on February 10, 1983, that this "unsealed" vile was "found" in one of the trooper's lockers and was brought to the State Laboratory for testing.

Trooper Smith, who testified before the Grand Jury on February 10th, apparently called the state chemist just before he testified and got an oral confirmation that gasoline residue had

[3] I say that the officers "apparently" testified in this way because, although the Appeals Court has what appears to be a transcript of the trial as part of the appellate record in the case, the two volumes containing the testimony of the troopers is suspiciously missing from those files. Also missing is the trial testimony of the state chemist.

been detected in the liquid. The lab report itself is dated February 13, 1983. [*See* lab report attached as Exhibit 4.]

3. Indeed, the only evidence that was presented to the Grand Jury with respect to this flammable liquid was Trooper Smith's testimony that he had squeezed the liquid from a carpet sample at the scene, and that the fluid had tested positive for gasoline residue. [*See* Grand Jury excerpt attached as Exhibit 5.] Nothing was presented about the negative test results of the many carpet samples (done in February of 1982), from which this fluid was allegedly taken, nor was the Grand Jury informed that this vile had been "located" a year after the fire, and had just been tested. A motion to dismiss for the prosecutor's intentional failure to present this evidence to the Grand Jury was denied by the trial judge in 1983. With respect to the admissibility of the vile and its test results, insofar as the State Police troopers testified that they obtained the fluid from the carpet and had unexplainably kept it in their lockers for a year after the fire, that was apparently the only chain of custody that mattered, and the trial judge denied the defense motion to exclude the evidence at trial, holding that any weaknesses in the chain of custody would go to the weight of the evidence and not its admissibility. *See*, e.g., Commonwealth v. Penta, 423 Mass. 546, 556 (1996). But the failure to establish an adequate chain of custody of the sole evidence of arsonous material, which was inherently unreliable, having allegedly been squeezed from the very carpet samples that tested negative for flammable fluid just after the fire, created a real question regarding the authenticity of evidence crucial to the prosecution's case. Because of this serious defect in the chain of custody of the "sample" which was eventually analyzed, evidence concerning it should not have been admitted.

4. Years later, in connection with consideration of one of several pardon petitions filed by Mr. Jacobson, this firm obtained the discovery of all the investigative reports generated by the state police in their investigation. A careful review revealed that there were no

contemporary police notes, inventories or reports documenting the collection of any liquid from the carpet samples being obtained or preserved in a vile. Indeed the only report regarding the collection of the liquid squeezed from a carpet sample, was written by Trooper Smith on February 9, 1983, the day before the Grand Jury indictment. It appears in no other report.

5. Based on the very unusual set of circumstances regarding the alleged collection and preservation of this critical evidence, on January 6, 2021, a request was made of the District Attorney's Office for records of any communication between the District Attorney's Office and the State Police "regarding the discovery, collection and use" of the evidence contained in the vile. [*See* Exhibit 6] There has been no response to this request. This information is critically important to a determination of its authenticity, and we would request the Court's authorization to subpoena such records for the purpose of further developing and considering this motion.

B. Anti-Semitism

As noted, the case against Messrs. Jacobson and Clarke was entirely circumstantial – based largely on coincidence. But lurking behind the evidence was a rising tide of anti-Semitism. Barry Jacobson after all was a "rich Jew from New York", who had a vacation home in Berkshire county. It surfaced in how the case was presented and, most significantly, in the thoughts and prejudices of at least one of the local jurors. And following the jury verdict evidence of that bias began to surface. Sworn statements from a sitting juror and an alternate juror were filed with the court. In her sworn statement the sitting juror, Shirley Cimini advised the court that:

> From the beginning of our deliberations, the forelady of the jury, Mrs. Gagliardi, repeatedly made references to Mr. Jacobson as being 'one of those New York Jews who think they can come up here and get away with anything.' Other similar anti-Semitic remarks were made by her and others throughout the deliberations.

Alternate Juror Hunt similarly averred that:

[W]hen the jury first went out to deliberate they had only been in there, I would say less than five minutes, when I overheard one of the ladies say to the other, 'Well, this is not going to take very long. We should finish this real quick because you know he's guilty.' And says, 'All those rich, New York Jews come up here and think they can do anything and get away with it'.[4]

Cimini reaffirmed her sworn affidavit in a February 3, 1984 hearing testifying as follows:

Q. All right, Mrs. Cimini, could you tell us whether or not any matter came up at any stage of the jury's meeting together to deal with your duties as jurors in the cases of Jacobson and Clarke which dealt with the religion or background or creed of any Defendant?

A. Well, the very first thing when we went back to deliberate, our Forelady – I think the very first words out of her mouth were, "These New York Jews could come over here and think they can get away with anything."

Q. Now, can you give me any idea of whether that was said in a particular way?

A. I took it as being malicious. Whether she meant it that way or not –

Q. Was anything said in response to that by any other juror?

A. No.

Q. Now, was anything like that said at any other time?

A. Oh, I think she said it several times, you know, during deliberations, "These Jews think we're hicks" and stuff like that.

[*See* pp. 4-5, Transcript of February 3, 1983 hearing attached as Exhibit 7]. Cimini also testified that she confronted the forelady. "That was on the second day we were deliberating, and I told her right out I thought she was very biased, and she just denied it." (Id. at p. 16).

Judge Simon subsequently conducted a Fidler-type hearing three months after the conclusion of the trial, asking the other jurors, under oath, whether he or she had heard any juror make reference to Jacobson's religion. [*See* Transcript of February 13, 1982 hearing attached as Exhibit 8.]

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[4] The sworn statements of jurors Hunt and Cimini were included in the Appeals Court appendix, but I have been advised by the Clerk's office that none of the items in the appendix were preserved. Consequently, these quotes are drawn from the appellate briefs which have been preserved. *See* p. 60 of Appellant's Appeals Court brief attached as Exhibit 10.

The defendants requested, in light of the natural human tendency to deny such behavior, that the judge tell each juror that he had information from other jurors that anti-Semitic comments had been made during deliberations before asking whether they had heard any such comments. The judge overruled the repeated objections of defense counsel concerning the conduct of the hearing however, and waited to mention the sworn statements to the jurors until after their initial answers, all of which were initially denials.

Even with this flaw in the questioning of the jurors, however, some of their answers supported the evidence of anti-Semitic statements made in the jury room. Following the court's disclosure that it had already received sworn statements evidencing the presence of anti-Semitism, several jurors withdrew or qualified their initial denials that such statements had been made.[5] See for example the testimony of Juror Cushman at pages 23 and 24 of the February 13 Transcript. When asked whether the forelady said "something at the very beginning of deliberation along the lines of "all rich New York Jews come up here and think they can do anything and get away with it, work like that; do you recall that happening?", he testified "it might have. Being truthful, it might have been . . ." or the testimony of Juror Mottershead at p. 27 of the Transcript. When asked the same question by the judge she responded "yes, something like that was said . . . I think it was Mrs. Gagliardi that did that, yes."[6]

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[5] Initially, the judge asked each juror:

> Was anything said by any juror that you heard concerning Mr. Jacobson's religion and his place of origin, New York? (Tr. 10).

After the initial answer, he stated to each juror:

> Now, we have information from the other jurors who have given us this information under oath that words were said along those lines: "All these rich New York Jews come up here and think they can do anything and get away with it." (Tr. 10).

[6] Upon further questioning Juror Mottershead testified that Gagliardi may have been talking about "New York people in general", and she was not sure his Jewish religion was specifically mentioned.

Mrs. Gagliardi of course did not qualify the initial denial after being told that others testified of such statements. *See* p. 7 of Transcript. Her self-conscious denial of demonstrated prejudice was to be expected, consistent with the sworn testimony of juror Cimini. Nevertheless, the court found that no anti-Semitic statements were made, and denied the motion for new trial.

The court's findings were clearly erroneous. The judge ignored completely the sworn statements of Hunt and Cimini, although neither Hunt nor Cimini had any conceivable reason to misrepresent what happened in the jury room. Both came forward of their own free will because of their consciousness that injustice had been done and the conclusion that their statements were entirely credible is inescapable. While some allowance may be made for subjective impression, the statements of both Hunt and Cimini leave no doubt that anti-Semitic statements were made by at least one of the jurors. With such evidence of a juror's bias in the record, a new trial should have been ordered. *See* Commonwealth v. McCowen, 458 Mass. 461, 496 (the "statement made by a juror may establish so strong an inference of a juror's actual bias that proof of the statement alone may suffice.") Commonwealth v. Laguer, 410 Mass. 94, 98-99 (if alleged statement – "the goddamned spic is guilty just sitting there . . ." were made by a juror, the judge must find actual ethnic bias); Commonwealth v. Vann Long, 419 Mass. 798, 802 ("The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury").

It is of some interest, although tangential, that in connection with Mr. Jacobson's first petition for pardon, filed in 1987, a strong letter recommending favorable consideration was submitted by his parole officer, William P. Ryan, a 30 year career parole officer and supervisor of the Western Massachusetts Parole Office, who had never before made such a recommendation. In his letter he reports that during his 42 days of incarceration in the Berkshire County Jail, Mr. Jacobson's "performance and adjustment were remarkable in that [he] was a

first offender and was branded as a rich Jew from New York."[7] A not unfamiliar characterization in this case, articulated directly by the Forelady of the jury.

Mr. Ryan's letter goes on to state that he had "come to see Barry as a decent, caring human being, a man of integrity who at this time I am proud to call a friend." Quite a testament, and quite inconsistent with the characterization made repeatedly by the prosecution during the trial. [*See* Exhibit 9]

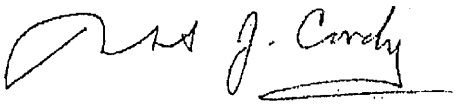
II. CONCLUSION

The history of this case and of Mr. Jacobson's life call out for a reconsideration of whether justice was done at this trial held 37 years ago. The court would benefit from additional discovery and a hearing on the matter, and we would request that the court favorably consider both of these requests.

Respectfully Submitted,

BARRY J. JACOBSON,

By his attorney,



Robert J. Cordy (BBO #099720)
McDERMOTT WILL & EMERY LLP
200 Clarendon Street
Boston, Massachusetts 02116
Telephone: +1 617 535 4000
Fax: +1 617 535 3800
E-mail: rcordy@mwe.com

Dated: April 13, 2021

[7] Mr. Jacobson was, among other things, assaulted at the Berkshire County Jail by a prisoner prominently displaying a Swastika tattoo.

CERTIFICATE OF SERVICE

I certify that I caused a true copy of this document to be served on counsel for all parties by electronic mail on the date below, per agreement of the parties.

Dated: April 13, 2021

Robert J. Cordy (BBO# 099720)

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(67)

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1776CR00159

COMMONWEALTH

vs.

BARRY J. JACOBSON

ORDER RE: DEFENDANT'S MOTION FOR POST CONVICTION RELIEF PURSUANT TO MASS. R. CR. P. 30(b)

The defendant Bary J. Jacobson, has filed a Motion For Post Conviction Relief pursuant to Mass. R. Cr. P. 30(b) (Pl. #63). Because trial Judge William W. Simons, is not available to hear this matter, the case is assigned to Judge Mark D Mason, for any action he may deem appropriate.

Michael K. Callan
Regional Administrative Justice of the
Superior Court

DATED: April 22, 2021.

ENTERED
THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
APR 22 2021

(18)

COMMONWEALTH OF MASSACHUSETTS

8376CR-

SUPERIOR COURT
Docket No. 17159

COMMONWEALTH OF MASSACHUSETTS

v.

BARRY JACOBSON

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

Following a careful review of the facts and circumstances of this case, as well as current case law, the Commonwealth assents to the defendant's *Motion for Post-Conviction Relief*, filed on April 13, 2021, and the *Supplemental Memorandum*, filed on December 13, 2021.

This Court may grant post-conviction relief where "it appears that justice may not have been done." Mass. R. Crim. P. 30(b). "[T]he valuable finality of judicial proceedings must yield to our system's reluctance to Countenance significant individual injustices." *Commonwealth v. Brescia*, 471 Mass. 381, 388 (2015). When considering a motion under Rule 30(b), the court is instructed to consider the "confluence of factors" that contribute to the question of whether justice was done, including information from the earlier trial record, newly discovered evidence, and other relevant circumstances. *Brescia*, 471 Mass. at 338. The Commonwealth agrees with the defendant that his conviction for arson should be vacated under Mass. R. Crim. P. 30(b) on grounds that the jury deliberations were infected by anti-Semitic bias and as a result, the defendant did not receive a trial before an impartial jury.

Background:

On November 20, 1983, the defendant was convicted of arson after trial by a jury. A motion for new trial was denied on April 5, 1984. In 1985, the Appeals Court affirmed the judgment of conviction and the motion for new trial. *Commonwealth v. Jacobson*, 19 Mass. App. Ct. 666, 682 (1985).

Just two months after the defendant's trial, he raised the issue of "jury misconduct" in his motion for new trial. As part of that motion, the defendant included affidavits from an alternate juror and a deliberating juror. The alternate juror reported that "she had overheard one of the jurors referring to Jacobson as 'a rich New York Jew.'" *Id.* at 682. Another juror stated that the "forelady repeatedly made references to Jacobson as 'one of the New York Jews who think they can come up here and get away with anything.'" *Id.*

The trial judge held a hearing in which he interviewed the available jurors, following the procedures set forth in *Commonwealth v. Fidler*, 377 Mass. 196, 200-202 (1979). *Jacobson,* 19 Mass. App. Ct. at 682-683; D. Supp. Memo Ex. 6 at 2.[1] The trial judge found that the statements outlined in the affidavits submitted by the defendant were made during deliberations. *See* D. Supp. Memo Ex. 6 at 3.[2] The alternate juror was in a room "adjacent" to the jury room and was able to overhear some of the deliberations. *Id.*at 1. After the verdict was entered, the alternate and deliberating juror spoke about these statements and the deliberating juror attributed them to the foreperson. *Id.* at 2.

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[1] This post-verdict hearing on the defendant's motion for new trial is also discussed at D. Memo at 5-7; D. Supp. Memo at 5-12. The relevant transcripts appears at D. Memo at Ex. 7 & 8. The judge's order and memorandum appears at D. Supp. Memo Ex. 6.

[2] During the post-verdict hearing, the judge told the foreperson who apparently made the comments that one person said it was made once at the "very beginning of the deliberations" and the other said it happened "at least twice, if not three times, during the course of the deliberations." D. Memo Ex. 8 at 7.

At the time of the defendant's case, *Fidler* was an appropriate process for a jury inquiry of this nature. As the Appeals Court noted when it affirmed the use of this *Fidler* procedure, the Supreme Judicial Court had recently "left open the question whether evidence of remarks reflecting racial prejudice during jury deliberations relates to the jurors' mental processes, thus falling outside the scope of the inquiry permitted by [] *Fidler*." Id. at 683 n.20, citing *Commonwealth v. Tavares*, 385 Mass. 140, 155-156 (1982) (setting forth procedure for pre-verdict allegations of racist comments by a juror).

Using the *Fidler* standard, the trial judge "found that no statement had been made by any of the jurors which would constitute bias and that no conduct or statement by any of the jurors improperly influenced the verdict." *Jacobson*, at 683. The Appeals Court affirmed, stating that "assuming without deciding, that the judge acted properly in conducting a postverdict *Fidler*-type hearing, we find on this record no reason to order new trial." *Id.* at 683-684. The Appeals Court also concluded that there was no abuse of discretion in the method the trial judge used to interview the jurors. The Court also went on to reference the standard set forth in *Tavares*: when there is a claim of racial prejudice infecting a jury's deliberations and the trial judge has interviewed the jurors, it will not disturb the trial court's findings unless they are "'clearly erroneous'" based on its own review of the evidence. *Id.* at 684, quoting *Tavares*, 385 Mass. at 156 (internal quotation omitted). The Court stated that "in so deciding, we in no way condone or approve remarks by jurors, entrusted with the grave responsibility of deciding a defendant's liberty, which in any way reflect bias on their part based on the defendant's race, religion, national origin, or personal beliefs." *Id.* at 684-685. Both the trial court and the Appeals Court relied on the case law and tools that were available at that time. Since that determination, the Supreme Judicial Court has created a more rigorous procedure to protect the fundamental right to a fair and impartial jury trial. In light

of the Commonwealth's strong interest in ensuring that the defendant's constitutional right to a fair and impartial trial is protected, the Commonwealth has determined that applying the process and standard to the present case warrants the relief requested by the defendant.

Changes in the Way Massachusetts Courts Address Juror Bias:

Since the original motion for new trial and appeal, much has changed about the way the courts address allegations that a juror was racially or ethnically biased. In the years following the defendant's case, the SJC has re-visited the issue of jury inquiry in the context of an allegation of impartial jury. For example, in 2010, the SJC made it clear that "'[t]he presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury.'" *Commonwealth v. McGowen*, 458 Mass. 461, 494 (2010), quoting *Commonwealth v. Vann Long*, 419 Mass. 798, 802 (1995). In *McGowen*, the SJC also decided that a challenge to a verdict alleging a juror was racially biased may be based on evidence of what occurred during deliberations, which was an exception to the prior rule which prohibited inquiry into deliberations. *Id.* at 494. In 2017, the Supreme Court adopted this same rule in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). The Supreme Court also stated that racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Id.* at 868.

Whereas *Tavares*, decided in 1982 and referenced in the defendant's Appeals Court case, set forth the procedure for pre-verdict allegations of jury misconduct; *McGowen*, decided in 2010, outlined a different two-step procedure for post-verdict allegations of jury bias.[3] See *Commonwealth v. Quiles*, 488 Mass. 298, 315-316 (2021) (discussing both procedures and

[3] In a post-verdict allegations of juror bias, under *McCowen*, the defendant bears "the burden of proving by a preponderance of an evidence, that the jury were exposed to statements that infected the deliberative process with racially or ethnically charged language or stereotypes" 458 Mass. at 496. If the defendant meets that burden, the burden shifts to the Commonwealth "to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to these statements." *Id.* at 497. The judge focuses on "the probable effect of the statements on a hypothetical average jury" without probing the juror's actual thought process. *Id.*

rejecting the defendant's request that *McGowen* be extended to cases of pre-verdict allegations). *McGowen* is a "more rigorous procedure" to be used when the judge is informed of "racially charged statements made by jurors" after a verdict is returned. *Quiles, 488 Mass. at 316*, quoting *Commonwealth v. Hart*, 93 Mass. App. Ct. 565, 570 (2018). It is with *McGowen*, as well as *Pena-Rodriguez*, in mind that the Commonwealth assents to the defendant's motion here.

The Commonwealth's Position Regarding Juror Bias:

The Commonwealth has a legal, ethical and moral obligation to ensure that jury verdicts are rendered free from bias and misconduct. Guaranteeing a defendant's right to a fair and impartial jury trial is fundamental to the fair administration of justice. The trial and Appeals Court previously followed legal precedent in place at the time through cases like *Fidler* and *Tavares* in considering the defendant's claims. Since those determinations, the courts have evolved in their approach to ensuring that defendants' constitutional right to a fair trial is protected. In light of evolving case law, the trial court today would follow the process set forth in *McCowen* when considering a defendant's post-verdict factual allegations of bias and juror misconduct. Accordingly, both the court and the District Attorney's Office would place greater weight on the impact of that bias and the "probable effect of the statements" on the jury's verdict. *McCowen*, 458 Mass. at 497.

The Commonwealth believes that the two jurors from defendant's trial presented credible testimony and evidence that the foreperson made anti-Semitic statements during jury deliberations. The Commonwealth finds it significant that these anti-Semitic statements made by the foreperson were not random, isolated comments, rather, they were made within the context of evidence that was presented during the trial. The Commonwealth cannot support a verdict where there are serious and legitimate questions as to the fairness and impartiality of the jury that rendered it. As a result, the Commonwealth assents to the defendant's motion for post-conviction relief on

grounds that he did not receive a trial before an impartial jury as a result of the ethnically biased statements made in the context of the evidence by the foreperson during jury deliberations.

Conclusion:

The Commonwealth agrees with the defendant his conviction for arson should be vacated under Mass. R. Crim. P. 30(b). In the interests of justice, if this Court allows the motion, the Commonwealth intends to file a *nolle prosequi* in this matter.

Respectfully submitted,
ANDREA HARRINGTON,
District Attorney
For The Berkshire District

/s/ Jennifer K. Zalnasky

JENNIFER K. ZALNASKY
Chief of Appeals
7 North Street
Pittsfield, MA 01201
Tel. 413-443-5951 X137
jennifer.k.zalnasky2@mass.gov
BBO# 650762

January 21, 2022

CERTIFICATE OF SERVICE

I hereby certify, under pains and penalties of perjury, that I have made service upon Defendant, through his counsel, via email, at: Robert Cordy, rcordy@mwe.com.

Service was also made via email on the following:

Barry Scheck, pro hac vice
bscheck@innocenceproject.org

Robert Trestan
rtrestan@adl.org

Scott Birnbaum
birnbaum@birnbaumgodkin.com

/s/ Jennifer K. Zalnasky
JENNIFER K. ZALNASKY
Chief of Appeals