COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NORFOLK COUNTY NO. 2018-P-0528

COMMONWEALTH

V.

NATHAN LUGO

BRIEF OF THE DEFENDANT ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

KATHERINE C. ESSINGTON

ATTORNEY FOR THE DEFENDANT

190 BROAD ST, 3W
PROVIDENCE, RI 02903
(401) 351-2889
BBO # 675207
katyessington@me.com

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STATEMENT OF THE CASE

The defendant, Nathan Lugo, was convicted, following a jury trial in Dedham, Conners, J. presiding, of the lesser-included offense of second degree murder, armed robbery, conspiracy to violate the controlled substance laws, illegal possession of ammunition, and possession of a firearm without a license[1]. (See TR19)[2]. He was found not guilty of

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[1] The indictments resulted from two separate grand jury proceedings. Mr. Lugo's original murder indictment in

conspiracy to commit armed robbery. (TR19 5). On November 9, 2015, the Court sentenced Mr. Lugo to a total effective sentence of life with the possibility of parole after fifteen years. (TR19 25).

On November 16, 2015, Mr. Lugo filed a timely Notice of Appeal. His appeal was stayed for the purpose of filing a motion for a new trial. After a nonevidentiary hearing, the motion judge denied Mr. Lugo's Rule 30 motion on March 27, 2018. (A68-92). The defendant filed a timely Notice of Appeal. That appeal was thereafter consolidated with his direct appeal.

STATEMENT OF THE FACTS

On November 26, 2011, seventeen year old Mr. Lugo, his girlfriend, Alison Deshowitz, and two friends, Devante Thames and Brian Moulton, arranged to meet Kyle McManus, in order to obtain four ounces of

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case No 2011-1153 was dismissed (the other charges remained), and he was reindicted on the murder charge as well as several other charges in case No. 2014-0673. All of the indictments were tried together and both cases are the subject of this appeal.

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

marijuana. (TR14 99-100, 105-107, 117). Deshowitz, who had previously dated McManus, set up the meeting. (TR14 107, 114; TR15 20). The agreed upon price was eleven hundred dollars ($1100.00), but Mr. Lugo and his friends intended to take the marijuana from McManus without paying for it. (TR14 105, 107, 112; TR5 49-50). The plan was to obtain the marijuana by trickery, and the use a weapon or other force was not discussed or contemplated. (TR16 20, 22).

Mr. Lugo and the others met McManus at a bar where he was drinking with his friends, Neil Doherty, Brittany Mofford, and Clayton Maddrey. (TR14 109, TR12 17, 21-22). Deshowitz went inside by herself. (TR14 110). Mr. Lugo, Thames, and Moulton remained in Mr. Lugo's mother's Jeep Cherokee. (TR14 108). Mr. Lugo was in the driver's seat, Moulton in the passenger seat, and Thames was in the back. (TR14 108). McManus came out with Deshowitz and got in the backseat. (TR14 111). He was intoxicated. (TR15 106). They drove a short distance to McManus' house in Randolph. (TR14 113). On the way, McManus made statements indicating that he had a gun and could shoot people in the car in the legs and get away with it. (TR15 106-7; TR16 28-30). Deshowitz told Mr. Lugo and the others that one

of McManus' friends had displayed a gun at the bar and offered to give it to McManus. (TR15 17-18).

When they arrived at McManus' house, Thames and McManus got out and went inside to retrieve and weigh the marijuana. (TR14 113-14). The rest of the group stayed in the car in the driveway. (TR14 114). Approximately fifteen minutes later, McManus and Thames came back outside. (TR14 117). In the meantime, McManus' friends from the bar arrived to retrieve a set of keys from him, and were standing on the porch. (TR12 29, 35-6; TR14 118-19). Mr. Lugo and the others saw them arrive. (TR15 108). Deshowitz told the group that McManus' friends were "strapped," meaning carrying weapons. (TR15 67, 108). Moulton testified that Mr. Lugo flashed the butt of a gun on his hip to him and told him not to worry about it.[3] (TR16 109-110).

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

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[3] Moulton and Thames testified pursuant to cooperation agreements whereby the Commonwealth agreed to dismiss the murder charges against them. (See TR15 , 123). Moulton did not state that Mr. Lugo's flashed the gun in the car in either of his two statements to police or in his cooperation agreement. (TR16 36).

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

McManus, whose upper body was in the car, began hitting Mouton and grabbed onto him. (TR14 120, 122; TR15 111-2). He ran alongside the car and screamed for his friends to help, and for the car to stop. (TR12 43; TR15 63; 112). He threw a beer bottle he was carrying into the car. (TR14 120, 122-3; TR15 112). Doherty joined McManus at the passenger's window. (TR12 43). He could not see who was in the car because of the lighting conditions, and because the other windows were up. (TR12 44, 69, 70, 81) Deshowitz was screaming. (TR16 45). Moulton ducked down and leaned forward to avoid being hit or shot by McManus or his friends. (TR16 46-7, 49-50). When the car reached the end of the driveway, Thames testified that Mr. Lugo put his arm over Moulton's back and discharged a single shot from a revolver. (TR14 120-1, 123). McManus fell away from the car. (TR14 121, 126).

Mr. Lugo sped off and drove back to his house. (TR14 126). Moulton testified that on the ride home, Mr. Lugo stated that he thought McManus had a gun. (TR16 52). No one in the car knew whether McManus had been hit. (TR16 51, 56). McManus died from a gunshot wound to the heart that first passed through his wrist. (TR14 121, 126).

SUMMARY OF THE ARGUMENT

The Massachusetts sentencing statutes for juveniles convicted of second degree murder are unconstitutional because they do not allow the judge to exercise his or her discretion to impose anything less than a life with parole sentence. The judge erred in denying Mr. Lugo's motion to continue his sentencing so that he could present evidence related to his juvenile status. The judge also erred in not instructing the jury on accident as well as the lesser included offenses of involuntary manslaughter, and voluntary manslaughter based on provocation or sudden combat, and defense counsel was constitutionally ineffective for not requesting these instructions at a charging conference and/or objecting to their omissions after including them in his written requests to charge. Finally, the judge erred in denying Mr.

Lugo's motion to suppress evidence based on the warrantless pinging of his cell phone because the emergency exception did not apply in this case.

ARGUMENT

I. Mr. Lugo's Mandatory Sentence Of Life With Parole Was Unconstitutional And The Trial Judge Violated His Right To Due Process During The Sentencing Hearing.

A. Additional Facts In Support Of This Claim.

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

> I would like a little bit of time. Mr. Lugo, at the time of this incident was seventeen years old. I think the courts, not just locally but nationally have recognized that people that have juvenile status at the time of the commission of the crime present unique differences that the Court should consider. Sentencing is certainly a constitutionally important part of any trial. I understand that there's no leeway in second degree charge. I don't pretend to know what the Commonwealth wants to do with the armed robbery. I know the guideline is five to seven—and-a-half I believe. To the extent that they want to offer or ask the Court to impose something that goes

> beyond that and comes closer to the parole eligibility date of fifteen years for the second, I certainly think that for me to represent Mr. Lugo effectively I should probably present the Court with a sentencing memorandum to present to the Court, things about, not just about his background but you might remember during this trial I had retained in my pretrial preparation Frank D. Cataldo could certainly present a report or an affidavit to the Court that, as an expert, tell the Court about the unique things about juveniles, their perception, their need for instant gratification, their likelihood of success and rehabilitation, all things that are important. (TR19 15).

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

In denying Mr. Lugo's motion for resentencing pursuant to Rule 30, the motion judge relied on *Commonwealth v. Okoro*, 471 Mass. 51 (2015), finding:

> Review of the Okoro ruling makes clear that a person in Lugo's position is not under the law as presently enunciated in a position to argue that he must receive an individualized sentencing hearing after his conviction for second degree murder, an offense which requires the imposition of the mandatory sentence called for in c. 265 sec. 2. (Memo 9; A76).

B. Preservation.

Trial counsel did not argue that the second degree murder sentencing statutes in effect in 2011, Mass. Gen. L. ch. 265, sec. 2 and ch. 127, sec. 133A,

were unconstitutional.[4] Mr. Lugo, however, raised this issue in his Motion For A New Trial And For Resentencing pursuant to Rule 30. Defense counsel noted his objection to the court's denial of his motion for a continuance of the sentencing hearing. (TR19 17-18). That issue is therefore preserved.

C. Standard of Review

A judge's decision denying a motion pursuant to Rule 30 is reviewed to determine whether there "has been a significant error of law or other abuse of discretion." *Commonwealth v. Grace*, 397 Mass. 303, 307 (1986). The decision of the trial court will not be reversed unless it is manifestly unjust or the trial was infected with prejudicial constitutional error. *Commonwealth v. Russin*, 420 Mass. 309, 318 (1995). A reviewing court gives "special deference" to the

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[4] Mr. Lugo was sentenced under the 2011 versions of Mass. Gen. L. ch. 265, sec. 2 and ch. 127, sec. 133A which provided that all persons convicted of second degree murder had to be sentenced to a life with parole eligibility after fifteen years. (See TR16 157). In 2012, these law were amended to give the sentencing judge discretion to set the parole eligibility to a terms no less than fifteen years and no more than twenty-five years for adults, and fifteen years for defendants less than seventeen at the time of the offense. See Mass. Gen. L. ch. 119, sec. 72B. In 2013, the legislature included seventeen year olds in the protections afforded by ch. 119, sec. 72B. See *Okoro*, 471 Mass. at fn 4.

decision of a judge who was, as here, also the trial judge. *Commonwealth v. Murphy*, 442 Mass. 485, 499 (2004). This Court reviews de novo the constitutionality of the sentencing statutes. *Commonwealth v. McGhee*, 472 Mass. 405, 412 (2015).

D. Applicable Law

The Eight Amendment and art. 26 prohibit cruel and unusual punishment. Those provisions also require a sentence to be proportional to both the offender and the offense. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 2463 (2012); *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655, 669 (2013) (Diatchenko I).

The United States Supreme Court has held that the Eighth Amendment forbids the imposition of mandatory life without parole sentences for defendants who commit murder before the age of eighteen. *Miller*, 132 S.Ct. at 2474-75. See also *Graham v. Florida*, 560 U.S. 48, 82 (2010)(life without parole sentences for juvenile non-homicide offenders is unconstitutional). In *Montgomery v. Louisiana*, ___ U.S. ___, 136 S.Ct. 718, 734 (2016), the Supreme Court held that *Miller* set forth a substantive (and retroactive) rule addressing the rights of juvenile offenders whose

crimes reflect "the transient immaturity of youth."

Miller's holding was based in large part on *Graham*. In *Graham*, 560 U.S. at 76, the Supreme Court highlighted some of the differences between juveniles and adults that science has revealed.

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. [Roper v. Simmons, 543 U.S. 551 (2005)] at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Accord *Miller*, 132 S.Ct. at 2464 (not only do "children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk taking," they "are more vulnerable...to negative influences and outside pressures including from their family and peers.")

In *Miller*, 132 S.Ct. at 2467-8, the Supreme Court recognized "the mitigating qualities of youth," and directed judges in cases involving juveniles to consider a number of factors at sentencing, including immaturity, the "failure to appreciate risks and consequences," "family and home environment," family

and peer pressures, "an inability to deal with police officers or prosecutors" as well as defense attorneys, and "the possibility of rehabilitation." This Court has "fully accept[ed] the critical tenet of *Miller* that children are constitutionally different from adults for purposes of sentencing, with diminished culpability and greater prospects for reform." *Okoro*, 471 Mass. at 57.

In *Okoro*, 471 Mass. at 62, the Supreme Judicial Court (SJC) held that a mandatory life with parole sentence for juveniles convicted of second degree murder was not unconstitutional. The Court left for a later day, however, the question of "whether juvenile homicide offenders require individualized sentencing." *Id.* at 58.

The SJC also left open the possibility that it would reconsider its decision in *Okoro* at a future date, stating:

> [T]he determination that youth are constitutionally distinct from adults for sentencing purposes has strong roots in recent developments in the fields of science and social science. Scientific and social science research in adolescent brain development and related issues continues. At this point, we cannot predict what the ultimate results of this research will be or, more importantly, how it will inform our understanding of constitutional sentencing as applied to youth. In short, we

> appear to deal here with a rapidly changing field of study and knowledge, and there is value in awaiting further developments. *Id.* at 59-60

The Court also noted that the law relating to juveniles and sentencing was still developing. *Id.* at 60.

E. A Mandatory Life With Parole Sentence For Juveniles Is Unconstitutional Under The Eighth Amendment And Art. 26 Because It Does Not Allow The Court To Impose A Sentence Of Less Than Life.

Mr. Lugo contends, contrary to *Okoro*, that because judges lack discretion to fashion offender specific sentences of less than life with parole for juveniles convicted of second degree murder based on the *Miller* factors, the statutes governing sentencing for juveniles convicted of that offense are unconstitutional. Mr. Lugo does not contend that parole eligibility after fifteen years is cruel and unusual or disproportional to the offense, but is instead challenging the legislature's one size fits all determination that a life sentence is necessary for every juvenile convicted of second degree murder.

While a life sentence with parole review after fifteen years may be appropriate in some of these cases, lifetime parole may not be appropriate in others, especially where the homicide, which does not

rise to the level of first degree murder, can largely be attributed to the poor decision making that often accompanies immaturity and youth. A mandatory sentence of life with parole for juveniles, which necessarily encompasses lifetime supervision, "disregards the possibility of rehabilitation even when the circumstances most suggest it." *Diatchenko I*, 466 Mass. at 661, quoting *Miller*, 132 S. Ct. at 2468.

Recent developments in the law in other states signal an increasing belief that mandatory sentences for juveniles are unconstitutional. In *State v. Houston-Sconiers*, 391 P.3d 409 (Wash. 2017), the Washington Supreme Court struck down a statutory scheme that did not allow the sentencing judge to exercise his discretion for juvenile offenders, stating:

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

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

Several other state courts have struck down mandatory sentences for juveniles, relying on language in *Miller*. See e.g., *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014)(finding mandatory minimums for juveniles to be unconstitutional under the Iowa Constitution); *Horsley v. State*, 160 So.3d 393, 408 (Florida 2015)(striking down sentencing scheme that precluded individualized sentencing for juvenile homicide offenders). See also *State v. Jefferson*, 798 S.E.2d 121, 126, review denied, 370 N.C. 214 (2017), *cert. denied*, 138 S. Ct. 1169 (2018)("there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity"). Thus, there have been significant changes in the law since *Okoro* was decided, warranting a reexamination of the issues raised in that case.

In addition, there have been further developments in social science and our understanding of the

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

In the study, 13 to 25 year olds were placed in a brain scanner while asked to do a task that required restraint with either positive arousal, negative arousal, or no arousal. *Id.* Requarth explains the results:

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

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

Requarth concludes:

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

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

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

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

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

In a death penalty case, due process requires that the sentencer "not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record." *Lockett v. Ohio*, 438 U.S. 586, 604 (1976)(plurality opinion)(striking down Ohio's death penalty statute which did not permit the consideration of mitigating factors such as age and lack of specific intent to cause death). See also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (mandatory death sentence for first degree murder held to be unconstitutional under the Eighth Amendment). Citing the *Lockett* and *Woodson* cases, the *Miller* Court effectively extended these due process protections to juveniles who are sentenced to life. 132 S.Ct. at 2464, 2467 ("Graham's '[t]reat[ment] [of] juvenile

life sentences as analogous to capital punishment,' makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty.") (citation omitted).

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

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

In *Diatchenko v. District Attorney For Suffolk Dist II*, 471 Mass. 12, 24, 27, 32 (2015)(*Diatchenko II*), this Court extended certain due process protections to juveniles sentenced to life appearing before the parole board. See also *Okoro*, 471 Mass. at 62-3 (due process protections of *Diatchenko II* apply to juveniles convicted of second degree murder). Those due process protections, including the right to court appointed counsel, are not required under the 5th or 14th Amendments to the U.S. Constitution. See 471 Mass. at 24. Thus, in *Diatchenko II*, this Court held that art. 12 affords greater due process for juvenile homicide offenders than the Fifth and Fourteenth

Amendments to the U.S. constitution. Mr. Lugo contends that even if there was no federal due process violation in his case, the judge violated his due process rights under the Massachusetts Constitution.

The judge here imposed the mandatory life sentence without allowing counsel time to prepare and present testimony or evidence concerning the *Miller* factors. Although the judge stated that he understood and appreciated, "the issues that have been raised by our State Supreme Court as well as by the US Supreme Court concerning juveniles," (TR19 16), he did not have sufficient information to impose a constitutional sentence that took into account specific factors related to Mr. Lugo's immaturity at the time of the offense as well as his potential for rehabilitation. See *State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013)("We think the direction from the Supreme Court that trial courts consider everything said about youth in *Roper*, *Graham*, and *Miller* means more than a generalized notion of taking age into consideration as a factor in sentencing").

Mr. Lugo should not have to wait until a parole hearing to present this evidence. Evidence available to him at the time of sentencing, such as the

testimony of counsel's juvenile expert, may no longer be available at the time of a parole hearing. At a minimum, evidence showing his mental state and immaturity at the time of the homicide will be extremely stale then. The judge should have considered the types of evidence related to youthfulness described in *Miller*, for its effect on Mr. Lugo at the time of his offenses. The denial of his motion to continue the sentencing wrongly deprived him of an opportunity to make a record of his mental, emotional, and physical state at the time, evidence that will be necessary to assess his potential for rehabilitation as he ages and matures.

II. The Trial Judge Erred In Refusing The Defendant's Request To Instruct The Jury On The Defense Of Accident.

A. Additional Facts In Support Of This Claim.

The Commonwealth called Brian Canavan with the Massachusetts State Police as an expert in firearms and ballistics. (TR14 5). On cross-examination, he testified as follows:

Q: In this case, you have to actually manually put your thumb or finger or something on that serrated edge of the hammer and caulk it back?
A: Correct.
Q: However, you don't have to do that immediately upon firing the gun, prior to firing, do you?

A: No.

Q: You can caulk that hammer, and that hammer can remain locked and caulked indefinitely; correct?

A: Correct.

Q: So the hammer can be caulked in the morning and stay that way all day?

A: Correct.

Q: The hammer could be caulked and stay that way all week, all month, or all year; correct?

A: Correct.

Q: Because it's a single action, the force required on the trigger is significantly less than a double action handgun; correct?

A: Correct.

Q: As a matter of fact, as part of your examination you took a look at trigger pressure in this case, right?

A: Yes.

Q: And the Ruger Single-Six only requires about 3 pounds of trigger pressure to discharge a bullet?

A: Correct.

Q: Most standard handguns are 8 to 12 pounds of pressure; correct?

A: For double action.

Q: Okay, what do they say about these Single-Sixes is it's easier than opening a can of Coca Cola; true?

A: I haven't heard that before.

Q: It's one of the reasons that these Single-Sixes. Though, because the hammer can stay caulked like that and the trigger pressure is so low, these Single-Sixes are blamed for most of the accidental shootings in the United States, correct?

MS. KRIFFENDORK: Objection, Your Honor.

THE COURT: Sustained.

Q: It is an inherent danger in this gun, in your training and experience, correct the 3 pounds of trigger pressure?

A: No, I wouldn't say so.

Q: Well, it makes it easier to pull; correct?

A: Correct. (TR14 44-5).

The defendant submitted proposed jury instructions that included the model instruction, sec.

3.13 on accident. (A63-4). In addition, during a charging conference, counsel stated:

> There is - - No one actually sees Mr. Lugo pull the gun out, but it's, the state of the evidence, in the light most favorable to the Commonwealth is, at some point, the gun comes out. We knew that because it's discharged. We have, for what it's worth, Mr. Moulton's characterization of the scene as fairly chaotic. The ballistician testified that, once cocked, that hammer could've been cocked all day, all week, for a month, for a year. Once cocked, it's fairly easy for that gun to go off. There's only three pounds of trigger pressure required.
>
> Given the scenario that was unfolding, the jury might well believe that the actual discharge was an accident. And that's bolstered by the fact that, when they left, none of the people in that car knew whether Mr. McManus had actually been shot. So there was no one that could say that the gun was actually pointed directly at Mr. McManus and that it even struck Mr. McManus.

The judge responded that he would look at the case law, but that "I wouldn't be optimistic." (TR16 167). There was no further discussion on the instruction, and the court did not give an accident instruction.

B. Preservation, Applicable Law, And Standard Of Review.

The issue is arguably preserved due to counsel's request for the instruction in writing as well as during a charging conference, despite the absence of an objection at the end of the charge. See *Commonwealth v. Kaeppeler*, 473 Mass. 396, 406, citing

Commonwealth v. Prater, 431 Mass. 86, 97 (2000)(defendant requested instruction at charging conference). In the event that this Court determines that the issue is not preserved, it should review Mr. Lugo's claim pursuant to the substantial risk of a miscarriage of justice standard.

Accident negates the element of malice in second degree murder. *Commonwealth v. Zezima*, 387 Mass. 748, 756 (1982)(new trial ordered where judge's instruction failed to state that proof of malice depended on proof of the absence of accident). A defendant is entitled to have the judge instruct the jury, upon request, that the Commonwealth has the burden of disproving that a shooting was accidental where the issue is fairly raised by the evidence. *Commonwealth v. Power-Koch*, 69 Mass. App. Ct. 735, 737, *review denied*, 449 Mass. 1113 (2007). When analyzing whether a trial judge erred in not giving an accident instruction, a reviewing court should analyze the evidence in the light most favorable to the defendant. *Commonwealth v. Figueroa*, 56 Mass. App. Ct. 641, 651 (2002), *cert. denied*, 439 Mass. 1102 (2003).

C. The Evidence Was Sufficient to Warrant The Instruction.

Defense counsel's cross-examination of the firearms expert raised the issue of accident. Moreover, his testimony that, once cocked, the gun only required three pounds of pressure to discharge supported the theory of accident. Compare *Power-Koch*, 69 Mass. App. Ct. at 736 (accident instruction required despite firearms expert's testimony that slightly more pressure was required to pull the trigger than for the average gun of that type).

Other evidence at trial also supported this theory. Mr. Lugo had one hand on the steering wheel and was backing out of the driveway when the gun discharged. (TR14 120, 123). His hand holding the gun was on or behind Moulton's back. (TR14 129). He therefore may not have had full control of the gun. None of the Commonwealth's witnesses saw Mr. Lugo cock the gun, aim, or pull the trigger. Moulton ducked down and could not see what was happening behind him. (TR15 112). Thames initially stated that he saw Mr. Lugo shoot, but, on cross-examination, testified that he only saw the gun come out, followed by a flash. (TR 123-4; TR15 67-8). No one in the car knew whether McManus had been hit. (TR16 51, 56). From all of this

evidence, the jury could have reasonably inferred that the discharge of the gun was an accident.

In closing argument, counsel suggested an accidental shooting in addition to self-defense, stating:

> There's no evidence of Nathan Lugo cocking the gun right before firing. There's no evidence from Devante Thames. No evidence from Brain Moulton. The ballistician conceded that that could have been cocked for an hour, for a day, a week or a month. And even if it wasn't, he conceded it's not very difficult. You put a finger on the serrated edge, cock it and fire it. And to fire it, it's only three pounds of trigger pressure. Very, very easy for that gun to discharge on a single occasion. And this is important because there's no evidence that anyone maliciously then reached the gun out of the window and kept firing at Kyle. (TR17 76).

Reference to an accident in closing argument has been held to be sufficient to fairly raise the issue for purposes of requiring a jury instruction where there is some testimony supporting the charge. See *Commonwealth v. Jewett,* 442 Mass. 356, 370 (2004).

Based on all of the foregoing, the judge erred in not giving the instruction at Mr. Lugo's request. In addition, the judge's reliance on *Commonwealth v. Evans*, 390 Mass. 144 (1983) in support of his denial of the defendant's Rule 30 motion was misplaced. (See Memo 12; A79). In *Evans*, the defendant was convicted

of first degree felony murder. *Id.* at 145, 151. Accident is not a defense to felony murder. *Commonwealth v. McCauley,* 391 Mass. 697, 704 (1984), *cert. denied*, 534 U.S. 1132 (2002). Here, the jury did not convict Mr. Lugo of felony murder, but instead of the lesser included offense of second degree murder.

D. The Failure To Give The Instruction Was Prejudicial.

In cases where a reviewing court has found error in the trial court's failure to give an accident instruction, reversal is usually required. See e.g., *Zezima*, 387 Mass. at 756-7 (error in instructions on malice and failure to instruct on accident deprived the defendant of due process requiring a new trial despite the judge's reference to "accidental firing" in his instructions on involuntary murder). See also *Power-Koch*, 69 Mass. App. Ct. at 740 (new trial required on involuntary manslaughter where an accident instruction was warranted). Contrast *Jewett*, 442 Mass. at 370 (finding new trial not required under the substantial risk of a miscarriage of justice standard where the judge, "twice instructed the jury that the Commonwealth had to prove that the death was the result of an unlawful killing, and that an unlawful killing does

not include a killing which is the result of an accident").

Here, where Mr. Lugo requested an accident instruction, and the other instructions made no reference to an accident or to the Commonwealth's burden to disprove an accidental shooting, the error cannot be said to have been harmless.

III. The Trial Judge Erred In Not Instructing The Jury On Involuntary Manslaughter And Trial Counsel Was Ineffective For Not Objecting To Its Omission.

A. Additional Facts In Support Of This Claim.

Defense counsel included an instruction on involuntary manslaughter in his written proposed instructions, but did not argue it in any of the charging conferences. (A64). In his affidavit, counsel stated that his failure to ask for the instruction during a charging conference was "not a strategic decision on my part, but was instead an unintentional omission." (A66-7).

B. Preservation, Standard of Review, and Applicable Law.

This issue was raised in the defendant's motion for a new trial. Because the instruction was not requested in the charging conference, however, and counsel did not object to its absence, any error is

unpreserved. This Court should review the issue to determine if there was a substantial risk of a miscarriage of justice. See *Commonwealth v. Torres*, 420 Mass. 479, 482 (1995)("It is a fundamental rule of practice that where a party alleges error in a charge he must bring the alleged error to the attention of the judge in specific terms in order to give the judge an opportunity to rectify the error, if any"). This issue was raised in the Defendant's Motion for a New Trial And Resentencing.

The Sixth and Fourteenth Amendments and art. 12 provide a defendant in a criminal case with a constitutional right to effective representation. See *Commonwealth v. Fuller*, 394 Mass. 251, 256 n. 3 (1985)(concluding that if the standard for effective assistance of counsel under the Declaration of Rights is satisfied, the federal standard is satisfied also).

There is a two-stage analysis to determine whether an act or omission on the part of counsel constitutes ineffective assistance of counsel. *Commonwealth v. Pagels*, 69 Mass. App. Ct. 607, 616, *review denied*, 449 Mass. 1113 (2007). The first step is to examine whether there has been "serious incompetency, inefficiency, or inattention of

counsel," i.e., behavior falling below that expected "from an ordinary fallible lawyer." *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). The second step is to determine whether the act or omission of counsel deprived the defendant of an otherwise available, substantial ground of defense. *Id.* See also *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(deficient performance of counsel must have materially prejudiced the defense). Defense counsel's strategic decisions at trial do not amount to ineffective assistance of counsel unless they are "manifestly unreasonable." *Commonwealth v. Rondeau*, 378 Mass. 408, 413 (1979).

Involuntary manslaughter is an unintentional killing occurring while a defendant is engaged in wanton or reckless conduct that creates a high degree of likelihood that substantial harm will result to another. *Power-Koch*, 69 Mass. App. Ct. at 736-7. An instruction on involuntary manslaughter is required where "any view of the evidence will permit a finding of manslaughter and not murder." *Commonwealth v. Pierce*, 419 Mass. 28, 33 (1994). Where the evidence indicates that the defendant pointed a loaded gun at a person or a group of people and intentionally pulled the trigger, the court does not err in failing to give

an instruction on involuntary manslaughter. See e.g, *Commonwealth v. Alebord*, 68 Mass. App. Ct. 1, 7 (2016), *review denied*, 448 Mass. 1105 (2007)(noting that the likelihood of death under such circumstances is "plain and strong indeed"). An involuntary manslaughter instruction is called for, however, when the evidence supports the conclusion that the gun was discharged by "accident or wanton or reckless conduct." *Commonwealth v. Clark*, 363 Mass. 467, 471-472 (1973).

C. The Instruction Was Warranted By The Evidence And Counsel Was Ineffective For Not Arguing It In The Charging Conference And In Not Objecting To the Court's Failure To Give It.

There was evidence in this case from which a jury could infer an accidental discharge. See sec. II of this brief. In addition, there was also evidence from which the jury could reasonably infer that Mr. Lugo's conduct was merely wanton or reckless and he lacked the intent to kill or even injure McManus. Based on the general chaos of the scene, as well as testimony from Thames and Moulton that the group had not discussed using a weapon to obtain the marijuana, the jury could have reasonably inferred that Mr. Lugo pulled out the gun only to effectuate his and his

companions' flight from the driveway, not to harm McManus. Compare *Clarke*, 363 Mass. at 472 (gun had been displayed and was held on prospective purchasers of heroin before fatal shot).

Counsel aptly referred in his closing statement to this being "a warning shot, if anything." (TR17 77). At the time the gun discharged, both McManus and Doherty were at Moulton's window and McManus was hanging onto the car screaming and striking Moulton. (TR12 43; TR14 120, 122; TR15 111-2). His upper body was still in the car. (TR14 120-2). He and Doherty, who had joined him at the window, therefore presented an obstacle to the getaway of Mr. Lugo and his companions. After the gun discharged and McManus fell away from the window, Mr. Lugo did not fire any additional shots. Compare *Commonwealth v. Niemic*, 472 Mass. 665, 669 (2015)(involuntary manslaughter instruction would have been properly denied where the defendant stabbed the victim six times).

None of the Commonwealth's witnesses testified that Mr. Lugo specifically aimed the gun at McManus. In *Commonwealth v. Iacoviello*, 90 Mass. App. Ct. 231, 245, *review denied*, 476 Mass. 1107 (2016), the court distinguished the *Alebord* line of cases on the basis

that the jury could have reasonably inferred that *Iacoviello* brought the gun to school for the purpose of scaring rather than harming the victim and his group, and that he did not aim at the group. Based on this finding, the *Iacoviello* Court held that the judge's failure to instruct the jury on involuntary manslaughter was prejudicial. Id. at 245.

The jury here could have similarly inferred that Mr. Lugo brought the gun in the event it was needed to scare McManus. They could have also inferred that when he reached for it, his purpose was simply to frighten McManus and Doherty in order to get McManus to let go of the car so they could speed away. Thus, the evidence at trial, when viewed in the light most favorable to Mr. Lugo, supported the instruction, and trial counsel was ineffective in not objecting to its absence. See *Commonwealth v. Acevedo*, 446 Mass. 435, 445 (2006)(finding reversible error based on ineffective assistance of counsel for failure to request voluntary manslaughter instruction). See also *Commonwealth v. Gilliard*, 46 Mass. App. Ct. 348, 351, *review denied*, 429 Mass. 1105 (1999)(counsel was constitutionally ineffective for not requesting a lesser included instruction where there was a large disparity

between the possible sentences).

The motion judge cited *Commonwealth v. Mack*, 423 Mass. 288 (1996), and *Commonwealth v. Sires*, 413 Mass. 292 (1992), in support of his conclusion that the evidence at trial did not warrant the instruction. In *Mack*, the defendant fired the gun multiple times at the victim. 423 Mass. at 290. In *Sires*, the defendant shot his mother while she lay in bed. 413 Mass. at 293. Thus, in those cases, the circumstances indicate a plain and strong likelihood of death whereas the jury in this case, due to the chaos that immediately preceded the discharge of the gun and Mr. Lugo's immaturity, could have found that Mr. Lugo only knew there a strong likelihood that "substantial harm" would result to McManus.

D. The Error Resulted In A Substantial Risk Of A Miscarriage Of Justice.

In *Commonwealth v. Woodward*, 427 Mass. 659, 664-665 (1998), this Court stated:

> The doctrine [favoring instructing juries on lesser included offenses] serves the public purpose of allowing the jury to convict of the offense established by the evidence, rather than forcing them to choose between convicting the defendant of an offense not fully established by the evidence or acquitting, even though the defendant is guilty of some offense.

Here, the jury rejected the Commonwealth's contention that this was first degree murder. Moreover, there was scant evidence that this was an intentional killing. Compare *Commonwealth v. Neves*, 474 Mass. 355, 370 (2016)(error but no substantial risk of a miscarriage of justice in failure to give involuntary manslaughter instruction where evidence under a theory of felony murder was overwhelming). Based on the evidence at trial and the jury's rejection of first degree murder, there is a reasonable possibility that the jury, had they had the option, would have found Mr. Lugo guilty of involuntary manslaughter rather than second degree murder.

IV. The Judge Erred In Not Instructing The Jury On Reasonable Provocation And Sudden Combat In Connection With Voluntary Manslaughter And Trial Counsel Was Ineffective For Not Arguing It At the Charging Conference And Objecting To Its Omission.

A. Additional Facts In Support Of This Claim.

Defense counsel included instructions on provocation and sudden combat in his written proposed instructions, but did not argue them in any of the charging conferences. (See TR16 161-2; A61-2). The judge instructed the jury on voluntary manslaughter

and imperfect self defense, but not on reasonable provocation or sudden combat. (TR17 172-6). In his affidavit, counsel states that his failure to ask for the instructions during the charging conference or to object to the court's failure to give the instructions was an unintentional omission, not a strategic decision. (A66-7).

B. Preservation, Standard of Review, And Applicable Law.

See sections IIIB of this brief for preservation, standard of review, and the applicable law with respect to ineffective assistance of counsel. This issue was raised in the defendant's motion for a new trial.

Voluntary manslaughter is a "killing committed in a sudden transport of passion or heat of blood, upon a reasonable provocation and without malice, or upon sudden combat." *Commonwealth v. Colon*, 449 Mass. 207, 220, *cert. denied*, 552 U.S. 1079 (2007). A jury instruction on voluntary manslaughter is warranted "if there is evidence of provocation deemed adequate in law to cause the accused to lose his self-control in the heat of passion, and if the killing followed the provocation before sufficient time had elapsed for the

accused's temper to cool." *Commonwealth v. Schnopps*, 383 Mass. 178, 180 (1981). "The definition of voluntary manslaughter does not contain any express requirement that physical contact is necessary in order for the jury to consider reasonable provocation or sudden combat." *Commonwealth v. Morales*, 70 Mass. App. Ct. 526, 532 (2007).

"A jury must be able to infer that a reasonable person would have become sufficiently provoked, and that the defendant was in fact provoked." *Commonwealth v. Pierce*, 419 Mass. 28, 31 (1994). The evidence must be viewed in the light most favorable to the defendant. *Commonwealth v. Seabrooks*, 425 Mass. 507 (1997).

C. The Instructions Were Warranted By The Evidence And Counsel Was Ineffective For Not Arguing It In The Charging Conference And In Not Objecting To the Court's Failure To Give Them.

In this case, reasonable provocation came from McManus hitting Moulton, attempting to climb into the front seat of the car, throwing the beer bottle at the occupants of the front seat, and Doherty's arrival at

the car window to help McManus[6]. These actions would have caused a reasonable person to feel an "immediate and intense threat," and to act in the heat of passion, especially where there was reason to believe that McManus and/or Doherty had a gun. See *Commonwealth v. Fortini*, 68 Mass. App. Ct. 701, 705-707, *cert. denied*, 449 Mass. 1104 (2007)(because the jury could have found that the defendant "was genuinely surprised" when the victim aggressively approached him on foot, he was entitled to an instruction on provocation even though the victim did not make contact, and did not display a weapon before the defendant shot and killed him). See also *Commonwealth v. Berry*, 431 Mass. 326, 334-5 (2000), abrogated in part on other grounds by, *Commomwealth v. Zanetti*, 454 Mass. 449 (2009)(fight initiated by the victim in which the victim struck the defendant with his bare hands and a bottle warranted voluntary manslaughter instruction). Contrast *Commonwealth v. Curtis*, 417 Mass. 619, 629 (2009)(evidence that the victim tried to hit the defendant with a bottle was

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[6] Thames initially testified that McManus threw the beer bottle over Moulton, but later testified that he threw it at Moulton. (TR14 122-3).

insufficient to require an instruction on sudden combat where it was the defendant who first hit the victim); *Commonwealth v. Zukoski*, 370 Mass. 23, 29 (1976)(defendant not entitled to a voluntary manslaughter instruction where he struck the victim and kicked her while she was on the ground after she threw a glass at him because any danger posed by her throwing the glass had long passed).

In addition to evidence that there was reasonable provocation to cause an ordinary person to act in the heat of passion, there was also evidence that Mr. Lugo lost self control and acted out of fear and/or nervous excitement. Mr. Lugo's actions and statements immediately following the shooting, including his statement that he thought McManus had a gun indicate fear. Thames also testified that Mr. Lugo told him after the shooting that he was scared. (TR15 83-4). Moulton testified that after the shooting, everyone in the car was upset. (TR16 51). See *Commonwealth v. Walden*, 380 Mass. 724, 728 (1980)(reasonable provocation is provocation that produced "such a state of passion, anger, *fear*, *fright*, or *nervous excitement* as would eclipse his capacity for reflection or restraint." (Emphasis added).

The motion judge found that there was no error because neither the objective nor the subjective requirements of heat of passion manslaughter had been met. (Memo 21, 23; A87, 89). With respect to the subjective component, the judge incorrectly stated, "there was no probative evidence before the jury that the decedent had a firearm on his person at that time, or that Lugo had so been told." (Memo 23; A89). The motion judge erroneously disregarded testimony that one of McManus' friends had displayed a gun inside the bar, that McManus spoke about shooting someone on the way to his house, and that Deschowitz told Mr. Lugo that McManus' friends were "strapped." (TR15 17-18; TR15 67, 108; TR15 106-7; TR16 28-30).

D. The Error Resulted In A Substantial Risk Of A Miscarriage Of Justice.

The jury could have reasonably rejected voluntary manslaughter based on imperfect self-defense for any one of a number of reasons, including a belief that Mr. Lugo had an opportunity to peacefully retreated from the conflict, but nonetheless found him guilty of voluntary manslaughter based on reasonable provocation or sudden combat. Thus, the court's failure to give these instructions, and counsel's failure to object to

their omission resulted in a substantial risk of a miscarriage of justice. See *Acevedo*, 446 Mass. 435 (2006)(reversible error not to give provocation and sudden combat instructions even where imperfect self-defense given); *Niemic*, 472 Mass. at 679 (judge's failure to give an instruction on reasonable provocation along with errors in closing argument required a new trial because an instruction on reasonable provocation would have been more favorable to the defendant than excessive force in self defense). See also *Commonwealth v. Sirois*, 437 Mass. 845, 855-6, n. 12 (2002)(correct instructions on self-defense do not cure the prejudice resulting from the court's failure to instruct the jury on a lesser included offense based on reasonable provocation).

V. The Judge Erred In Denying The Defendant's Motion To Suppress Evidence Obtained As A Result Of The Warrantless Pinging Of The Defendant's Cell Phone.

A. Additional Facts In Support Of This Claim.

An officer who arrived at the scene moments after the shooting spoke with Doherty who told them to find Deshowitz. (TR2 31, 33). Doherty also told police that the shooter was driving a dark colored Jeep Cherokee. (TR2 34; 37). The officer conveyed this information to

Detective Tuitt who was familiar with Deshowitz because she worked at the Dunkin Donuts he frequented. (TR2 34; 73-4, 77). He went to her house in Stoughton, but she was not home. (TR2 73-5). He contacted her by phone with her sister's help at about 12:40 a.m., and told her he wanted to speak with her. (TR2 75-7; 106). She told him she was out with friends in Abington and could not come home or meet with him. (TR2 77-8). Tuitt felt that something was wrong because, at times, she spoke in a whisper and paused while speaking. (TR2 77-8). He then told her to say the word "Tennessee" if something was wrong. (TR2 78). She said "Tennessee." (TR2 78). He then told her to say "four" if there were people with her and she could not talk freely. (TR2 79-80). She said "four." (TR2 79). Finally, he asked her to say "seven" if she was not really in Abington. (TR2 80). She said "seven." (TR2 80). He asked her if he called her back whether she would be able to answer, and she responded affirmatively. (TR2 80). He did not ask her if she was in danger or if someone was hurting her. (TR2 115-16). He never tried to call her back. (TR2 129).

Tuitt then called Detective McCormick at the police station and asked her to "ping" Deshowitz's

phone to try to locate her. (TR2 81; TR3 66). McCormick had already been instructed by another detective to ping Deschowitz's phone even before Tuitt called her. (TR3 7, 66-7). McCormick contacted Verizon, filled out a form stating that there was an "imminent danger of death or serious bodily injury," and obtained Deshowitz's call history as well as cell site location information (CLSI). One of Deshowitz's recent calls[7] was to a phone number registered to Rachel Lugo. (TR3 32-6). McCormick then contacted Sprint, Lugo's provider, filled out another "exigency" form, and began pinging Mr. Lugo's phone. (TR3 38-45). Neither Tuitt nor McCormick made any attempt to obtain a search warrant before receiving the information from the carriers. (TR2 130; TR3 90-1).

Tuitt sat in his car outside Deshowitz's house for several hours. (TR2 84). He was contacted by McCormick who stated Deshowitz's phone had pinged to an area in Brockton. (TR2 88). He asked Deshowitz's mother whether her daughter had friends in Brockton. (TR2 88-9). Her mother said she had two friends in Brockton, one who lived on Forest Street, and one who

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[7] McCormick asked for call history after 11 p.m. (TR3 76-7).

lived near the high school. (TR2 88-9). Her mother was also concerned that something was wrong. (TR2 85-6). Tuitt drove with her to Mr. Lugo's house, with which she was familiar. (TR2 89). There was a white Cadillac in the driveway, but no Jeep Cherokee. (TR2 90). They then drove up and down Forest Street looking for a dark colored SUV. (TR2 90-1).

Tuitt learned from McCormick that the pings had come from an area right near the Brockton High School football field which the back of Mr. Lugo's house abuts. (TR2 91). Tuitt waited for back up to arrive and, along with other officers, knocked on the door. (TR2 92). Mr. Lugo's mother answered and responded affirmatively when asked if a female was there with her son and his two male friends. (TR2 94-5). Deshowitz and the others were sleeping in Mr. Lugo's room in the basement when the officers entered. (TR2 95). Deshowitz, along with Thamas, was taken to the police station where they both made statements incriminating themselves and Mr. Lugo. Later, Mr. Lugo and Moulton were taken into custody, and a search warrant was executed at Mr. Lugo's house. (TR2 95). The police found a gun buried in the backyard that the

Commonwealth contended at trial was the murder weapon. (TR2 97).

In denying Mr. Lugo's motion to suppress, the judge held that the warrantless search was justified by the emergency aid exception. (See Memo 11-14; A55-8).

B. Preservation, Standard Of Review, and Applicable Law.

The issue is preserved as a result to the defendant's motion to suppress and hearing thereon. When reviewing the denial of a motion to suppress, this Court accepts the judge's findings of fact and will not disturb them absent clear error, but independently determines, "the correctness of the judge's application of constitutional principles to the facts as found." *Commonwealth v. Tremblay*, 460 Mass. 199, 205 (2011).

Pursuant to the 4th Amendment and art. 14, individuals have a privacy interest in CLSI, and its collection by police is a search requiring a warrant. *Commonwealth v. Augustine*, 467 Mass. 230, 246 (2014). One exception to the warrant requirement is the emergency aid doctrine, which is established if the police have an objectively reasonable basis to believe

that someone is injured or in "imminent danger of physical harm." *Commonwealth v. Entwistle*, 463 Mass. 205, 213 (2012), *cert. denied*, 568 U.S. 1129 (2013). The purpose of a search under the emergency aid exception is not to gather evidence of criminal activity, but to respond to an immediate need for assistance. *Commonwealth v. Knowles*, 451 Mass. 91, 96 (2008). Where an exigency is claimed to justify a warrantless search, the court must consider two questions: (1) whether the authorities had reasonable grounds to believe that an exigency existed, and (2) whether their actions were reasonable under the circumstances. *Commonwealth v. Marchione*, 384 Mass. 8, 10 (1981). The Commonwealth bears the burden of proving facts sufficient to establish the exception. *Id.* at 10.

C. The Emergency Exception Did Not Justify The Warrantless Pinging Of The Defendant's Cell Phone.

The evidence presented by the Commonwealth at the suppression hearing was insufficient to establish an objectively reasonable basis for police to believe that Deshowitz was injured or in imminent danger of physical harm at the time of the pinging. McCormick had already been instructed by Detective Bringardner

to ping Deshowitz' phone *before* Tuitt spoke with Deshowitz on the phone. (TR3 67-8). Even if the pinging did not actually occur until after McCormick spoke with Tuitt, Deschowitz never indicated that she was hurt or in physical danger. Instead, she told him she was with friends and could take his call if he called her back. (TR2 129). Tuitt's subjective generalized belief that "something was wrong" based on her responses to his questions and his previous interactions with her was insufficient to meet the requirements of the exception where there was no objective indication that she was injured or in imminent physical danger. (See Memo 13-14; A57-8). Tuitt did not know at that time he authorized the pinging that she had been present at McManus' house during the shooting. All he knew was that Doherty had seen her leave the bar with McManus earlier. (See TR12 44).

In addition, McCormick's and Tuitt's actions strongly suggest that the real purpose of the pinging was to locate Deshowitz so Tuitt could question her about the shooting as opposed to coming to her aid. McCormick was intending to ping her phone before she received any information from Tuitt. (TR3 7; 66). In

addition, on the phone, Tuitt did not ask Deshowitz if she was hurt or in danger. (TR2 115-16). He did not attempt to maintain phone contact with her or call her back even after she said she could take his call. (TR2 129). Instead, he sat in his car near her house for several hours, taking no further action. (TR2 84). Once he received the CSLI, he remained outside Mr. Lugo's house for several more hours waiting for back up before knocking on the door. (TR2 129-30). Upon entering the basement, he did not inquire as to her well being, but sent her upstairs to speak with other officers. (TR2 131-2). Neither he nor McCormick made any attempt to get a warrant for the CSLI or Deshowitz's recent call activity. (TR2 130; TR3 90-1). Their actions were therefore not reasonable under the circumstances.

Even if the emergency aid exception provides a justification for the warrantless pinging of Deshowitz's phone, which it does not, it does not provide one for the warrantless pinging of Mr. Lugo's phone. Tuitt had no information suggesting that Deshowitz was with Mr. Lugo when she met up with McManus. Her mother told Tuitt that she had another friend in Brockton in addition to Mr. Lugo. (TR2 89).

There was also no information connecting Mr. Lugo to McManus or to the homicide. (See TR12 44, 69-70). The only car in his driveway did not match the description of the vehicle involved. (TR2 126).

D. The Motion Judge Erred In Not Suppressing The Fruits Of The Unlawful Search.

Due to the Commonwealth's failure to present evidence sufficient to satisfy the requirements of the emergency aid exception, the motion judge erred in not suppressing evidence obtained as a result of the warrantless pinging of the defendant's cell phone. This evidence included the statements of Mr. Lugo's co-defendants, including Deschowitz, which gave the police probable cause for a search warrant for Mr. Lugo's house and led to the discovery of the gun. See *Commonwealth v. Fredericq*, 16-P-1542 (March 12, 2018) (defendant's statements obtained soon after he was confronted with illegal CSLI had to be suppressed). See also *Commonwealth v. Fredette*, 396 Mass. 455, 458-59 (1985)(under fruit of the poisonous tree doctrine, court must determine whether the police obtained evidence by "exploiting the illegality" of their earlier unlawful conduct).

CONCLUSION

For all of the foregoing reasons, this Court should reverse the judgments of conviction and order a new trial in Mr. Lugo's case. In the alternative, this Court should remand the case to the trial court for resentencing.

Respectfully submitted,

THE DEFENDANT
NATHAN LUGO
BY HIS ATTORNEY,

/S/ Katherine C. Essington
Katherine C. Essington
190 Broad St., Suite 3W
Providence, RI 02903
(401) 351-2889
BBO # 675207
katyessington@me.com

ADDENDUM

United States Constitution

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights

Article Twelve

Article XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

Article Fourteen

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws

Article Twenty-Six

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

CERTIFICATION OF COMPLIANCE

I, Katherine C. Essington, counsel to the defendant, hereby certify that, pursuant to Mass. R.A.P. 16 (k), the defendant's brief complies with the rules of court that pertain to the filing of briefs.

/s/ Katherine C. Essington
Katherine C. Essington

CERTIFICATE OF SERVICE

I, Katherine C. Essington, counsel for the defendant herein, hereby certify that on this 15th day of June, 2018, I mailed a copy of the foregoing Brief, postage prepaid, to Pamela Alford, District Attorney's Office, 435 Shamut Rd., Canton, MA 02021, and to the defendant.

/s/ Katherine C. Essington
Katherine C. Essington