COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BRISTOL, ss. NO. SJC-11388

COMMONWEALTH,
APPELLEE,

v.

SETH ANDRADE,
DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

BRIEF AND RECORD APPENDIX FOR DEFENDANT-APPELLANT SETH ANDRADE

SETH ANDRADE

By his attorney,

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COMMONWEALTH OF MASSACHUSETTS
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COMMONWEALTH,
Appellee,

v.

SETH ANDRADE,
Defendant-Appellant.

BRIEF AND RECORD APPENDIX FOR DEFENDANT-APPELLANT SETH ANDRADE

ISSUES PRESENTED

I. Whether Mr. Andrade's right to a fair and impartial jury was violated, and a substantial likelihood of a miscarriage of justice created, by the trial judge's question to the jury venire, as requested by the Commonwealth, asking whether they could not convict in this case where the Commonwealth would not present eyewitness testimony, where such question was employed to remove for cause each juror who expressed skepticism about the evidence that the Commonwealth would present at the trial.

II. Whether Mr. Andrade's rights to Due Process and a fair trial were violated by the prosecutor improperly asking Edwin Jorge, a witness given both substantial financial assistance and immunity from prosecution by the Commonwealth, to comment on his own credibility, which also

constituted improper vouching for Edwin Jorge's credibility by the Commonwealth.

III. Whether Mr. Andrade's rights to Due Process and a fair trial were violated by the prosecutor improperly arguing in closing, contrary to the evidence, that the medical examiner knew the order in which the victim received his two wounds, and using that misstatement of the evidence to bolster Edwin Jorge's demonstration to the jury of how Mr. Andrade allegedly showed him how the victim was shot.

STATEMENT OF THE CASE

On April 1, 2010, a Bristol County grand jury returned an indictment in two (2) counts against Seth Andrade ("Mr. Andrade"), one for the first-degree murder of Arthur Burton, in violation of G.L. c. 265, § 1, and one for unlawful possession of a firearm, in violation of G.L. c. 269, § 10(a). *See* A. 2, 8-11.[1]

Mr. Andrade's jury trial (Dortch-Okara, J., presiding), commenced on March 26, 2012. *See* A. 7. On April 3, 2012, the jury found Mr. Andrade guilty of both first-degree murder on the theory of deliberate premeditation and unlawful possession of a firearm. A. 5; Tr. VII/41. The court sentenced Mr. Andrade that same day to the mandatory

[1] References to the record will be cited as follows: to the Appendix as "A. [page number]"; and to the transcript of the trial as "Tr. [vol./page]".

sentence of life imprisonment without the possibility of parole for his conviction for first-degree murder and to a one-year term for his conviction for unlawful possession of a firearm.[2] A. 5; Tr. VII/49. On April 5, 2012, Mr. Andrade filed a timely Notice of Appeal, A. 5, 12-13, and the case was entered in this Court on February 27, 2013.

STATEMENT OF THE FACTS

The jury could have found the following facts:

The Crime.

At about 8:30 P.M. on January 20, 2010, the victim, Arthur Burton, was shot and killed in the backyard at 192 Purchase Street in New Bedford. Tr. II/70, 132, 148-50, 157-58, 161; Tr. IV/106-12; Exhibits 14A-14F, 15, 16A-16B, 17A-17C, 18A-18B, 19A-19B, 20. He was shot twice in the head. Tr. IV/12. One bullet entered the victim's face about a half an inch to midline on his nose and traveled upwards, where it was located at autopsy toward the back of the top of his head. Tr. IV/12, 15, 17. The entrance wound was surrounded by stippling, which indicated that the distance between the gun and the wound was eighteen to

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[2] On December 4, 2012, the trial court corrected this sentence to eighteen months, in recognition of the fact that eighteen months is the mandatory minimum sentence under G.L. c. 269, § 10(a). A. 6. Mr. Andrade filed an affidavit with the trial court stating that he did not object to this

Id. at 73. One of the two people was wearing a brown tannish coat. *Id.* at 72. Vanila Silva-Darosa, who lived at 192 Purchase Street, heard two loud bangs which she thought sounded like someone vandalizing the large dumpster on the other side of her house. Tr. II/132. She saw a young man lying on his back in her backyard. *Id.* at 134. Terrance Bishop had heard fireworks almost all day on January 20, 2010. Tr. II/142. He heard fireworks that evening and looked out his window. *Id.* He saw a body with a gray sweatshirt in the next yard. *Id.* at 143.

Kim Watkins was outside on her back porch, smoking a cigarette, when she heard two pops, one after the other, which she thought were firecrackers. Tr. II/107. She looked out from her porch and saw a man coming out from the back yard at 192 Purchase Street. *Id.* at 108, 113-15. He was wearing a brownish orange heavy canvas jacket, with a hood on his head. *Id.* at 109. He was walking, not running, with his hands in his pockets. *Id.* at 110. After a short time, another person came out from the same area, caught up to the first person, and walked alongside him. *Id.* This person was wearing a dark colored sweatshirt with a hood and a dark blue puffy down jacket. Tr. II/111. They walked down the sidewalk and went into a nearby parking lot. *Id.* at 113. Ms. Watkins lost sight of them after that. *Id.*

Sandra Santos was driving back to her home at 199 Purchase Street sometime after 8:00 P.M. Tr. III/27-28. She noticed three men walking along on a nearby street, Rockland Avenue, wearing their hoods up. *Id.* at 30. She parked her car in her driveway and waited in the car for the three to walk by before she went into her house. *Id.* at 33. They did not pass by her immediately and she heard a loud noise coming from across the street. *Id.* at 34. It sounded like someone was banging on a metal fence across the street. Tr. III/39. She got out of her car and saw two young men running through the Verdean Gardens parking lot, between Purchase Street and Acushnet Avenue. *Id.* at 35-36. One of the men was wearing a red "hoodie" and one man was taller than the other. *Id.* at 36. She believed that they were the same men she had seen on Rockland Avenue. *Id.* at 38.

Events of January 20, 2010 Surrounding the Murder.

At around 12:30 in the afternoon before the murder, Mr. Andrade went to 347 South Second Street, in the south end of New Bedford, to spend time with his friend, Tyrone Solano ("Solano"). Tr. III/76, 165; IV/134; V/85-86; Exhibit 29. Solano lived in Apartment 11 on the first floor of the two-story apartment building, called Verdean Gardens. Tr. III/163-64; V/79, 87. Solano lived with his family in Apartment 11, where he had a bedroom that faced the back

parking lot. Tr. III/164-65; IV/134. Solano sometimes used the back window in his bedroom to get in and out of the apartment. Tr. III/165, 170; IV/134. About an hour later, their friend, Jordan Jorge ("Jordan"), arrived at 347 South Second Street, and the three left shortly thereafter. Tr. V/88-91; Exhibit 29.

At around 6:40 P.M., Solano, Jordan, Mr. Andrade, and the victim returned to 347 South Second Street. Tr. V/91-92; Exhibit 29. At about 7:20 P.M., Star Cab received a call for a cab at 347 South Second Street. Tr. III/75-76, 143-44. The driver sounded the horn and waited about 5-8 minutes. *Id.* at 146. About four to five males came out, between the ages of 19 and 23. *Id.* at 147; Tr. V/93. The person riding in the front seat asked to go to the corner of Kempton and Liberty Streets, which is in the West End of New Bedford. Tr. III/75-76, 147. The distance between the two addresses is about a 5-8 minute cab ride. *Id.* at 148.

At some point during the day, the victim sent a text message to his lifelong friend, Myles Velazquez ("Velazquez"), looking to buy marijuana. Tr. III/95-96, 101, 118. As a result of this message, Velazquez called his cousin, Ross Pires ("Pires") to arrange a sale of marijuana from Pires to the victim. Tr. III/101; IV/47-48. At the time, Velazquez was visiting his godsister, Desire Gibbs,

who lived on the first floor of 592 Kempton Street. Tr. III/98, 103-04, 119, 178-83. At around 7:45 P.M., the victim rang Gibbs's doorbell and Velazquez went out to speak with him. Tr. III/102-03, 184. The victim was with three people, all wearing hooded sweatshirts with the hoods up. Tr. III/105-06, 187-89. Velazquez did not recognize any of the three people, whom he assumed were male. Tr. III/108.

The victim got the money to pay for the marijuana from one of the three people and gave that money to Velazquez. Tr. III/110. Pires drove up shortly thereafter, at around 7:45 to 7:50 P.M., and parked on the sidewalk several houses away from 592 Kempton. Tr. III/112; IV/48, 51, 53. He brought an ounce of marijuana with him. Tr. IV/49. Velazquez and the victim walked down to Pires's car. Tr. III/113; IV/51. The other three people, whom Pires did not know, stayed back near 592 Kempton. Tr. IV/51-52. Velazquez realized that the money the victim handed to him was not real, as it felt too soft. Tr. III/114-15. He handed it to Pires and asked his cousin to "check it." Tr. III/116; IV/52. Pires said, "it's fake," and drove away. *Id.* He did not turn over any marijuana to the victim. Tr. III/118; IV/54.

The victim and the three others left together in a cab after Velazquez returned to them and said that the money was

fake. Tr. III/117. Velazquez went back inside 592 Kempton. Tr. III/119. Later that evening, Velazquez and Pires got together at Pires's mother's house to watch the Celtics game, but did not really discuss the events that happened earlier. Tr. III/132, 137-39; IV/54-55.

Star Cab's dispatch records indicated that one of its cabs picked up a fare at 8:01 P.M. at 590 Kempton, which is at the corner of Liberty and Kempton. Tr. III/77; Exhibit 5. The riders were dropped off at 13 Adams Street, which is in the North End of New Bedford. *Id.* Jordan's brother, Edwin Jorge ("Edwin"), lived at 13 Adams Street with his girlfriend and baby. Tr. VI/19-21. Edwin saw Jordan that evening, at around the same time his daughter was going to bed. *Id.* at 22. He did not see the victim, whom he described as his "godbrother," that evening. *Id.* Jordan stayed at Edwin's house for about fifteen minutes and then left with his girlfriend, Felicia Timoteo ("Felicia"). Tr. VI/22, 71. Jordan was living with Felicia's family at the time, about a half a block away from Edwin's house. Tr. VI/21, 72.

Felicia and Jordan went to Felicia's grandmother's house to watch television. Tr. VI/72-74. At 10:00 P.M., Felicia dropped Jordan off on Weld Street and returned to her grandmother's house. *Id.* at 75-76. She went home at

about 11:00 P.M. and Jordan arrived shortly thereafter. *Id.* at 77-78.

At about 8:20 P.M., a cab picked up three young men at the corner of Adams and County Streets, about three houses away from Edwin's house. Tr. III/78-79, 154. They were dropped off at the corner of Potomska and Acushnet Streets, which is about two blocks from 347 South Second Street. Tr. III/79, 156. The victim was riding in the front seat and paid for the cab. Tr. III/156-57, 159; V/50. The driver conversed with the victim, who was talkative and in a good mood; the two men in the back did not speak. Tr. III/155, 157. One of the men in the back seat had shoulder length French braids. Tr. III/158.

Sometime around midnight, Jordan received a telephone call and left Felicia's house. Tr. VI/79-80. He went into Solano's apartment at 12:10 A.M. Tr. V/93-94. Also around midnight, Edwin received a telephone call from Jordan. Tr. VI/22. Edwin drove to 347 South Second Street, picked up his brother, Solano, and Mr. Andrade. Tr. VI/22-23. He drove them to his mother's house in Fall River. Tr. VI/19, 23. There were a lot of police officers around the area of South Second Street. Tr. VI/23. When Edwin asked them what was going on, his brother started to respond. Tr. VI/24. Mr. Andrade said, "drop it." *Id.* Edwin knew that the

victim was dead before he went to pick them up. *Id.* at 25.

Events Subsequent to the Murder.

On January 26, 2010, New Bedford and State police executed a search warrant at the Solano apartment at 347 South Second Street. Tr. III/166-67; IV/82, 136; V/97-98. Officers discovered a brown Carhartt jacket hanging in the front hall closet, in plain view. Tr. III/168-69; IV/83-85; V/97-98; Exhibit 13. Mr. Andrade had been seen wearing this jacket in the past and witnesses described a photo of this jacket as being similar to that worn by one of the two people seen leaving the area of 192 Purchase Street on the night of the murder. Tr. II/79-80, 112; IV/137.

A forensic chemist for the Massachusetts State Police Crime Lab swabbed the sleeves, cuffs, and inside front pockets of the jacket to collect possible gunshot residue. Tr. IV/139, 141-45. The lower sleeves and cuffs of the jacket tested positive for gunshot residue, as did the inside of the right front pocket. Tr. IV/161-62, 164. Although the positive finding indicated that the jacket had been in the presence of gunshot primer, how long the residue had been on the jacket could not be determined and such residue can be disturbed or moved by friction. *Id.* at 150, 162-63.

The police interviewed Mr. Andrade on February 2, 2010, and Mr. Andrade consented to having the interview recorded. Tr. V/99; Tr. VI/90; Exhibit 31. He initially denied that he was in the back yard of 192 Purchase Street when the victim was killed. Tr. V/107; Tr. VI/3; Exhibit 31. When the police told him that their investigation indicated that a fourth person--in addition to Solano, the victim, and Mr. Andrade--was in the yard that night, Mr. Andrade admitted that he was there. *Id.* He told the officers that the victim was trying to buy marijuana from someone at that address, when a person came into the yard and shot him. *Id.* Faced with the officers' assertion that gunshot residue had been found on his jacket, Mr. Andrade acknowledged that he went shooting on occasion at his aunt's house in Dartmouth.[3] *Id.*

Edwin Jorge, who testified under a grant of immunity and who had been provided both significant financial assistance and witness protection by the Commonwealth, testified on cross-examination that Mr. Andrade had told him that a fourth man came into the yard at 192 Purchase Street and shot the victim. Tr. VI/17, 29, 44, 46, 52, 59-60, 64. He testified on direct examination that, in response to

[3] Mr. Andrade's aunt testified that she had not seen Mr. Andrade at her house in seven or eight years, had not heard gunfire near her property, or seen evidence of guns being

Edwin's statement that the victim had been "done dirty," Mr. Andrade said, "'He did niggers dirty, so he had to go.'" Tr. VI/25-26. Edwin also testified that Mr. Andrade told him that the victim was looking into his phone when Mr. Andrade "popped him, and then he popped him again" and that the victim grabbed his face after the first shot. Tr. VI/27-28. Edwin showed the jury how Mr. Andrade allegedly demonstrated how he shot the victim, pointing straight out for the first shot and pointing downward for the second shot. *Id.* at 27-28. Finally, Edwin testified that Mr. Andrade told him that they had gotten rid of all the evidence, except for the tan jacket. *Id.*

ARGUMENT

I. MR. ANDRADE'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED, AND A SUBSTANTIAL LIKELIHOOD OF A MISCARRIAGE OF JUSTICE WAS CREATED, BY THE TRIAL JUDGE'S QUESTION TO THE JURY VENIRE, AS REQUESTED BY THE COMMONWEALTH, ASKING WHETHER THEY COULD NOT CONVICT IN THIS CASE WHERE THE COMMONWEALTH WOULD NOT PRESENT EYEWITNESS TESTIMONY, WHERE SUCH QUESTION WAS EMPLOYED TO REMOVE FOR CAUSE EACH JUROR WHO EXPRESSED SKEPTICISM ABOUT THE EVIDENCE THAT THE COMMONWEALTH WOULD PRESENT AT THE TRIAL.

The trial judge abused her discretion in asking, at the Commonwealth's request, members of the jury venire whether they believed the Commonwealth must present eyewitness testimony to prove its case beyond a reasonable doubt, where

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fired at the property. Tr. V/35-39.

such a question necessarily invaded the province of the jury and, as employed, had the effect of selecting a jury that was predisposed to convict Mr. Andrade based on the evidence that the Commonwealth would introduce at trial. Such questioning violated Mr. Andrade's constitutional right to a fair trial by an impartial jury under the Sixth Amendment to the United States Constitution and article 12 of the Massachusetts Declaration of Rights. *Commonwealth* v. *Toolan*, 460 Mass. 452, 462 (2011)(citing *Commonwealth* v. *Susi*, 394 Mass. 784, 786 (1985)("The failure to grant a defendant a fair hearing before an impartial jury violates even minimal standards of due process"); *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Commonwealth* v. *Guisti*, 434 Mass. 245, 251 (2001)).

Because Mr. Andrade's counsel did not object to the judge's posing such a question to the jury venire, this Court will "review to determine whether there was error, and if so, whether it created a substantial likelihood of a miscarriage of justice." *Commonwealth* v. *Perez*, 460 Mass. 683, 689-90 (2011)(citing *Commonwealth* v. *Wright*, 411 Mass. 678, 681 (1992)); *see Commonwealth* v. *Franklin*, 465 Mass. 895, 909 (2013)(citing *Commonwealth* v. *Walker*, 460 Mass. 590, 598 (2011)(quoting *Commonwealth* v. *Gonzalez*, 443 Mass. 799, 808 (2005)))(where defense counsel claimed to be

ineffective for failing to object to trial error, review limited to whether there was error and, if so, whether error "'"likely to have influenced jury's conclusion"'"). "'[A]n error creates a substantial likelihood of a miscarriage of justice if it was likely to have influenced the result.'" *Commonwealth* v. *Tolan*, 453 Mass. 634, 645 (2009)(quoting *Commonwealth* v. *Martin*, 427 Mass. 816, 817-18 n.2 (1998)).

A trial judge has broad discretion in determining the scope of juror voir dire, which will not be disturbed in the absence of an abuse of discretion. *Perez*, 460 Mass. at 688-89; *Commonwealth* v. *Garuti*, 454 Mass. 48, 52 (2009). Further, she is required to examine jurors fully when there exists a "'substantial risk that jurors may be influenced *by factors extraneous to the evidence presented to them*.'" *Commonwealth* v. *Heang*, 458 Mass. 827, 856 (2011)(quoting *Garuti*, 454 Mass. at 52; *Commonwealth* v. *Morales*, 440 Mass. 536, 548 (2003))(emphasis added). The fundamental purpose behind questioning potential jurors is to "'provide a defendant with a competent, fair, and unbiased jury.'" *Commonwealth* v. *Lao*, 443 Mass. 770, 776 (2005)(quoting *Commonwealth* v. *Lopes*, 440 Mass. 731, 736 (2004)).

The Commonwealth filed a motion before trial asking that the court conduct individual voir dire concerning the fact that the Commonwealth's evidence in this case would be

purely circumstantial. A. 4; Tr. I/22-23. In light of defense counsel's lack of objection to such a question being asked, Tr. I/22-23, the trial judge asked each potential juror some variation of the following question:

> In this case, you may not hear any testimony from an eyewitness to the actual shooting of Arthur Burton. In other words, the Commonwealth's case will be based largely on testimony and forensic evidence that's often referred to as circumstantial evidence. Circumstantial evidence is proof of a chain of circumstances from which you can infer that a fact exists. Would the fact that you will not hear eyewitness testimony to the shooting in and of itself prevent you from finding the defendant guilty if the Commonwealth, through circumstantial evidence, is able to convince you beyond a reasonable doubt of the defendant's guilt?

E.g., Tr. I/40-41; *see generally* Tr. I/40-208; Tr. II/ 15-46.[4] All thirteen potential jurors who answered this question either affirmatively or ambiguously were dismissed for cause. *See* Tr. I/57 ("I have a slight problem then"); I/80 ("Probably"); I/116-17 ("The degree of this crime and the charges? I probably would"); I/119 ("I don't know"); I/121 ("Yes"); I/142 ("Okay, I don't think so, no"); I/143-45 ("Yes"); I/146-47 ("Probably…yes"); I/157 ("I would have

[4] A second question concerning this issue also was asked of jurors who were not excused based on their answer to the first question: "Would you be able to follow my instructions that there is no difference in the probative value between direct and circumstantial evidence, and that circumstantial evidence may be competent to establish guilt beyond a reasonable doubt?" *E.g.*, Tr. I/41; *see generally* Tr. I/41-208; Tr. II/15-46.

a hard time finding him guilty if no one saw it"); I/179 ("It's too hypothetical…to answer in black and white yes or no without hearing it first to give you a definitive answer…it depends how the evidence presented builds the case one way or the other…."); I/201 ("I think I would want an eyewitness…yes"); I/208 ("Yes"); II/22 ("Yes, it would").

Unlike questions directed to potential jurors concerning the alleged extraneous influence of "CSI"-type programs, which themselves have been viewed by this Court with skepticism, *see Commonwealth* v. *Gray*, 465 Mass. 330, 339 (2013)(discussing *Commonwealth* v. *Perez*, 460 Mass. 683 (2011))("we remain skeptical that there is a need for voir dire questions designed to counter any 'CSI effect[]'"), this question did not address a concern that the jurors might be influenced by a factor that would be extraneous to the evidence that was to be presented to them. Instead, it was concerned only with what the Commonwealth's evidence would be and whether the juror would be able to convict based on that evidence. Absent a concern about an extraneous influence or bias, such a question absolutely invades the province of the jury by pre-selecting jurors who are skewed toward conviction. The question itself, along with the way it was employed to remove any juror who expressed skepticism about the Commonwealth's anticipated

evidence, unquestionably had "the effect of identifying and selecting jurors who were predisposed to convicting the defendant based on evidence the Commonwealth would present." *Perez*, 460 Mass. at 691.

Only four of the thirteen jurors who were removed for cause on the basis of their answer to this question answered "yes" unequivocally. Tr. I/120, 143-45, 208; II/22. The remaining nine, who expressed varying degrees of skepticism, were removed without the trial judge doing any further probing, including asking the second question about whether they could follow the court's instruction that circumstantial evidence could support a verdict of guilty beyond a reasonable doubt. In the absence of any such probing analysis, a number of jurors who could be competent, fair, and impartial and, at the same time, appropriately skeptical about the Commonwealth's evidence were removed for cause to make room for those predisposed to convict.

For example, a juror who responded "I have a slight problem then" was dismissed for cause without further questioning. Tr. I/57. A juror who responded, "I don't know" was dismissed for cause without further questioning. Tr. I/119. Likewise, several jurors who answered by saying that it "probably" would prevent them from convicting were removed without further inquiry. Tr. I/80 ("Probably");

I/117 ("It probably would"); I/146-47 ("Probably"). Indeed, any juror who expressed skepticism about the lack of an eyewitness to the crime was excused. Tr. I/157 ("I would have a hard time finding him guilty if no one saw it"); I/201 ("I think I would want an eyewitness").

Viewing the potential jurors' responses to the question demonstrates the problem with asking it: pulling aside the issue of circumstantial evidence from the context of the evidence itself and appropriate instruction and then presenting it as a hypothetical question eliminated people who could have deliberated fairly. An exchange between the trial judge and a potential juror who was removed for cause demonstrates this problem quite clearly:

> A: [In response to the question]: It's too hypothetical.
>
> Q: What's too hypothetical?
>
> A: To answer in black and white yes or no without hearing it first to give you a definitive answer. It's too hypothetical.
>
> Q: You can't say whether whether that would prevent -- the absence of eyewitness testimony would prevent you from --
>
> A: It depends how the evidence presented builds the case one way or the other. To say black and white would I say no, I can't convict based on circumstantial, just giving the statement, but I would --
>
> Q: Just giving a statement?
>
> A: In answer to your question.

Q: You're not trying to get out of service?

A: Hell no. No. I'm answering the question.

Q: You're excused. You're excused.

Tr. I/179-80. This potential juror gave a very thoughtful, cogent answer to the question, demonstrating that he was competent, fair, and unbiased. *Lao*, 443 Mass. at 776. Nevertheless, he was removed for cause.

Mr. Andrade was entitled to a jury that was representative of a fair cross section of his community, which in the ordinary course may well have included some people who are more difficult to convince than others. That quality should not have disqualified them from jury service in this case; indeed that quality would have made them a valuable addition to the jury. A jury is appropriately instructed at the end of the case that circumstantial evidence alone may suffice to prove a defendant guilty beyond a reasonable doubt and jurors are presumed to follow such instructions. *See Commonwealth* v. *Rosa*, 422 Mass. 18, 28-29 (1996)(jurors presumed to follow instructions); *Commonwealth* v. *McGahee*, 393 Mass. 743, 750 (1985)(citing *Commonwealth* v. *Cinelli*, 389 Mass. 197, 203 n.9, *cert. denied*, 464 U.S. 860 (1983))(circumstantial evidence alone may suffice to prove guilt beyond reasonable doubt). By eliminating every juror who expressed concern, caution, or

skepticism about the Commonwealth's presenting a purely circumstantial case, the sitting jury in Mr. Andrade's case was skewed improperly toward conviction, thereby violating his constitutional right to have a fair and impartial jury determine his fate.

The nature of the question itself shows that skewing the jury in this fashion "was likely to have influenced the result." *Tolan*, 456 Mass. at 645. The Commonwealth's case was far from overwhelming, with no eyewitness testimony, no confession, and forensic evidence limited to a minute amount of gunshot residue on the tan jacket. An immunized witness, who had lied to police and the grand jury on numerous occasions, was the only witness to tie Mr. Andrade to the murder. Mr. Andrade respectfully requests that this Honorable Court reverse the judgment of his convictions and remand the case to the Superior Court for a new trial.

II. MR. ANDRADE'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY THE PROSECUTOR IMPROPERLY ASKING EDWIN JORGE, WHOM THE COMMONWEALTH GAVE BOTH SUBSTANTIAL FINANCIAL ASSISTANCE AND IMMUNITY FROM PROSECUTION, TO COMMENT ON HIS OWN CREDIBILITY, WHICH ALSO SERVED AS AN IMPROPER COMMONWEALTH VOUCHER FOR JORGE'S CREDIBILITY.

The trial court improperly allowed the prosecutor, over the defendant's objection, to ask Edwin Jorge--a crucial Commonwealth witness both granted immunity from prosecution and given significant financial assistance by the

Commonwealth (Tr. VI/17, 52)--whether he "told the truth to the jury today about what Mr. Andrade told you about the murder of Arthur Burton[.]" Tr. VI/68. This question, which, not surprisingly, generated an affirmative response, *id.*, both improperly invaded the province of the jury to determine Edwin Jorge's credibility and improperly allowed the Commonwealth to vouch for Edwin Jorge's credibility, in violation of Mr. Andrade's rights to Due Process and a fair trial. Given that Edwin Jorge's testimony was critical to the Commonwealth's case, as well as the fact that the evidence against Mr. Andrade was far from overwhelming, this error was sufficiently prejudicial to warrant reversal of the convictions.

"It is a fundamental principle that 'a witness cannot be asked to assess the credibility of his testimony or that of other witnesses.'" *Commonwealth* v. *Triplett*, 398 Mass. 561, 567 (1986)(quoting *Commonwealth* v. *Dickinson*, 394 Mass. 702, 706 (1985)). Asking a witness to comment on the credibility of his own testimony invades the province of the jury, as "[t]he fact finder, not the witness, must determine the weight and credibility of testimony." *Id.* (citing *Commonwealth* v. *Dabrieo*, 370 Mass. 728, 734 (1976)). While it is well-settled that a prosecutor may ask a witness to explain inconsistencies between prior and present

statements, simply asking a witness to assess his own credibility is inappropriate. *Commonwealth* v. *Wright*, 444 Mass. 576, 583 (2005) (citing *Dickinson*, 394 Mass. at 706). Furthermore, with respect to a witness who the Government has agreed not to prosecute in exchange for his testimony, the prosecutor "may not explicitly or implicitly vouch to the jury that he or she knows that the witness's testimony is true." *Commonwealth* v. *Ciampa*, 406 Mass. 257, 265 (1989). Such vouching may occur when the prosecutor "indicates that he or she has knowledge independent of the evidence before the jury verifying the witness's credibility." *Id.* (citing *Commonwealth* v. *Shelley*, 374 Mass. 466, 470 (1978)(other citations omitted)).

Because Mr. Andrade's counsel raised a timely objection, this Court will review to determine whether the prosecutor's question and Edwin Jorge's answer constituted prejudicial error. *See Commonwealth* v. *Long*, 17 Mass. App. Ct. 707, 710 ("it cannot be said that the prosecutor's conduct had a nonprejudicial and inconsequential effect on the deliberations of the jury"), *rev. den.*, 392 Mass. 1102 (1984); *Commonwealth* v. *Ward*, 15 Mass. App. Ct. 400, 402 ("[i]n the circumstances of this case, we find no prejudicial error"), *rev. den.*, 389 Mass. 1101 (1983). "An error is nonprejudicial only if the 'conviction is sure that

the error did not influence the jury, or had but very slight effect.'" *Commonwealth* v. *Hrabak*, 440 Mass. 650, 656 (2004)(quoting *Commonwealth* v. *Flebotte*, 417 Mass. 348, 353 (1994), quoting *Commonwealth* v. *Peruzzi*, 15 Mass. App. Ct. 437, 445 (1983)).

There is no dispute that Edwin Jorge had lied in several statements to the police shortly after the murder and lied during his testimony before the grand jury on two occasions. The prosecutor noted, in explaining to the court the Commonwealth's agreement with Edwin Jorge, that "His initial statements and grand jury testimony were not completely truthful." Tr. IV/78. Edwin Jorge himself testified at trial that he told the police that he "threw in some little lies" in prior statements and testimony. Tr. VI/43-44. *See generally* Tr. VI/31-62. As he acknowledged during his cross-examination at trial, it was only when the police threatened to arrest him that he gave a statement, consistent with his subsequent trial testimony, implicating Mr. Andrade in the murder. Tr. VI/30, 31, 47; *see* Tr. VI/48 (after police threaten charges, Jorge agreed to "'say whatever you guys want to hear'"). As a result, the Commonwealth agreed not to prosecute Edwin Jorge for perjury and for being an accessory after the murder in exchange for his testimony at Mr. Andrade's trial. Tr. IV/78 (prosecutor

explains original agreement with witness as "so he was told if you remedy that [prior lies to police and grand jury] and tell the truth, you'll not be prosecuted for misleading us or perjury"); VI/29 (Jorge concurs that this was the agreement).

At trial, however, Edwin Jorge invoked his Fifth Amendment privilege against self-incrimination. Tr. V/72. The trial judge determined, after hearing, that the witness was generally available, but that certain questions, going beyond what was contained in his most recent statement to police, would be off-limits. Tr. V/72-74. The Commonwealth chose to grant Edwin Jorge immunity from prosecution and, after the court's order granting him such immunity, Tr. VI/17, he testified at Mr. Andrade's trial. *See* Tr. VI/18-69.

Further, there is no dispute that Edwin Jorge was a critical witness for the Commonwealth. He was the only witness to testify that Mr. Andrade admitted to the crime in a case with no eyewitnesses and extremely thin forensic evidence. Tr. VI/26-28. Indeed, the Commonwealth responded affirmatively when the judge inquired during discussions whether Jorge was "a major witness." Tr. V/74.

On re-direct examination, after defense counsel appropriately highlighted Edwin Jorge's numerous lies to the

police and grand jury, the prosecutor asked: "Have you told the truth to the jury today about what Mr. Andrade told you about the murder of Arthur Burton?" Tr. VI/68. After the trial judge overruled defense counsel's objection, Edwin Jorge replied, "Yes." *Id.* The question plainly violated the "fundamental principle" that a witness not be asked to comment on his own credibility, a matter that was to be decided by the jury. *Triplett*, 398 Mass. at 567. In addition, however, the question improperly raised the risk that the jury would implicitly understand that the prosecutor knew, from information outside the evidence, that Edwin Jorge was telling the truth. *Ciampa*, 406 Mass. at 265.

As this Court has advised, a prosecutor's position with regard to such a witness is "a delicate one." *Id.* The Commonwealth must be permitted to argue that its witness is credible; it may not, however, "explicitly or implicitly vouch to the jury that he or she knows that the witness's testimony is true." *Id.* This question fell far outside the line of appropriate inquiry and its effect in this particular case unfairly prejudiced Mr. Andrade. That it was the prosecutor's intent to bolster Edwin's credibility is borne out by his statement to the jury in closing, "[a]nd [Edwin] insisted, through teary eyes, that he was here to

tell you the truth about what he was told." Tr. VI/158-59.

As already noted, Edwin Jorge's testimony was critical to the Commonwealth's case; he testified that Mr. Andrade admitted shooting Arthur Burton, Tr. VI/27, that Mr. Andrade gave a reason for the shooting, albeit a vague one ("he did niggers dirty, so he had to go"), *id.* at 26, that Mr. Andrade demonstrated how he shot Arthur Burton (a demonstration recreated by the witness at trial), *id.* at 27-28, and that Mr. Andrade got rid of all the evidence, save the tan jacket. *Id.* at 28. In a case with no eyewitness testimony, no confession, and forensic evidence limited to a minute amount of gunshot residue on the cuff and inside pocket of the tan jacket, Edwin Jorge's testimony indeed was critical to the Commonwealth. And, as already noted, Edwin Jorge's credibility was entitled to a heavy dose of skepticism, for a number of reasons, including his prior lies, as well as the financial inducements and the grant of immunity the Commonwealth provided him. Tr. VI/17, 52.

In a case where the Commonwealth's evidence was far from overwhelming, this question, which improperly asked the witness to comment on his own credibility and also effectively vouched for his credibility, cannot leave this Court with the conclusion that it "'did not influence the jury, or had but very slight effect.'" *Flebotte*, 417 Mass.

at 353 (quoting *Peruzzi*, 15 Mass. App. Ct. at 445). Given the particular circumstances of this case, this one question, in itself, sufficed to invade the jury's province and improperly bolster the jurors' view of Edwin Jorge's credibility, a crucial Commonwealth witness. *See Commonwealth* v. *Powers*, 36 Mass. App. Ct. 65, 71 n.8 (1994)("what is of consequence is not the number of errors made, but rather the quantum of their prejudicial force on the jury").

Because the trial judge overruled defense counsel's objection, the jurors were not provided with a curative instruction about how Edwin Jorge's credibility was for their determination alone. *Cf. Commonwealth* v. *Rosario*, 460 Mass. 181, 188 (2011)(reversal unnecessary where trial judge gave both immediate curative instruction and appropriate final instruction in response to witness's testimony, "if I testify truthfully, this will be taken into consideration"). Furthermore, although the trial judge did provide a final instruction on viewing the credibility of witnesses with agreements with the Commonwealth with particular care, Tr. VII/18, this instruction pertained to two other, non-crucial witnesses as well, Ross Pires and Myles Velazquez. This generic instruction did not suffice to cure the prejudice caused by the prosecutor inviting Edwin Jorge, a critical

witness for the Commonwealth, to bolster his credibility in front of the jury. Mr. Andrade respectfully requests that this Honorable Court reverse the judgment of his convictions and remand the case to the Superior Court for a new trial.

III. MR. ANDRADE'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY THE PROSECUTOR IMPROPERLY ARGUING IN CLOSING, CONTRARY TO THE EVIDENCE, THAT THE MEDICAL EXAMINER KNEW THE ORDER IN WHICH THE VICTIM RECEIVED HIS TWO WOUNDS, AND USING THAT MISSTATEMENT OF THE EVIDENCE TO BOLSTER EDWIN JORGE'S DEMONSTRATING AT TRIAL HOW MR. ANDRADE ALLEGEDLY SHOWED HIM HOW THE VICTIM WAS SHOT.

The prosecutor improperly suggested to the jury, directly contrary to the testimony presented at trial, that the medical examiner knew which of the two wounds the victim received first. He then used that misstatement to improperly bolster Edwin Jorge's demonstration to the jury how Mr. Andrade allegedly showed how Arthur Burton was shot, all of which violated Mr. Andrade's rights to Due Process and a fair trial. It is beyond cavil that "'[p]rosecutors must limit the scope of their arguments to facts in evidence and inferences that may be reasonably drawn from the evidence.'" *Commonwealth* v. *Beaudry*, 445 Mass. 577, 580 (2005)(quoting *Commonwealth* v. *Coren*, 437 Mass. 723, 730 (2002)). Said another way, "A prosecutor may not use 'closing argument to argue or suggest facts not previously introduced in evidence.'" *Id.* (quoting *Commonwealth* v.

Storey, 378 Mass. 312, 324 (1979), *cert. denied*, 446 U.S. 955 (1980)). Because defense counsel objected to this aspect of the prosecutor's closing argument, Tr. VI/165-67, this Court will review for prejudicial error. *Commonwealth* v. *Johnson*, 463 Mass. 95, 112 (2012). "An error is nonprejudicial only if it appears certain that the improper argument did not affect the jury's verdict." *Beaudry*, 445 Mass. at 584 (citing *Hrabak*, 440 Mass. at 654).

The medical examiner testified that Arthur Burton received two bullet wounds to the head, each of which would have been fatal within seconds. Tr. IV/22. The prosecutor then asked, "can you tell from your autopsy which wound was received first?" to which the medical examiner replied, "[n]o, I can't." *Id.* The medical examiner also testified concerning what other matters he could not discern from the autopsy: "I can't tell what the positions were of the people, when the incident occurred, so, I can just record what I'm able to find and document scientifically. To do that, we use the standard anatomic position." Tr. IV/20. He further testified that he could not compare the angles of the two wounds. When asked by the prosecutor, "[t]he path of the bullet, the angle of Wound A, was that at a sharper angle or a flatter angle than the second bullet?" the medical examiner replied, "I don't know how to - determine

that." *Id.* When the prosecutor asked him to assume that Arthur Burton was standing in the anatomic position, he testified, "[a]ll I can say is it was upwards. I don't know the degree of angles. I can't say one was sharper or less steep than the other. I don't recall. I don't think I can answer that question." Tr. IV/21.

Upon this state of the evidence, the prosecutor argued the following in closing:

> Who knows that the second shot was in fact the finishing one, ladies and gentlemen? Well, Dr. Cummings knows. Excuse me. Anyone who's heard Dr. Cummings testify could tell you that the second shot was the finishing shot. Which shot is the second shot, ladies and gentlemen? Mr. Burton is found laying on his back. The first bullet's through here, goes through flat, comes out on the other side. The other bullet is straight in up and ends up in the top of his head. Okay?
>
> Edwin Jorge described which one was the finishing shot. That second one when he stood over him and pointed down and put the bullet in right here, and it went up. He stood at his feet, shot in his face, right up into his head….

Tr. VI/156-57. Dr. Cummings was quite clear in his testimony that he could not tell which shot the victim received first. As such, the prosecutor plainly misstated the evidence by stating that anyone who heard him testify "could tell you which shot was the finishing shot." Tr. VI/156-57. The purpose for the misstatement becomes clear as the prosecutor continued the argument, stating that "Edwin Jorge described which one was the finishing shot."

Id. The prosecutor improperly bolstered Edwin Jorge's credibility by misstating that the medical examiner's testimony was consistent with Edwin Jorge's demonstration of how Mr. Andrade allegedly showed him how Arthur Burton was shot.

Defense counsel objected to this obvious misstatement of the evidence:

> [H]e referred several times to the ME, and he likened it to the defendant and the second shot being the finishing shot. The ME, my memory is he said that both of them could have been fatal. *There wasn't a start and a finish.* And he said the same as the defendant, because only the defendant could have known the second one was the finishing, except for the ME was my brother's inference; and that's not accurate.

Tr. VI/165 (emphasis added). Although the trial judge agreed that the medical examiner testified that either shot would have been fatal, Tr. VI/165, she ultimately determined that the argument was not objectionable, focusing on the fact that the prosecutor did not say that the medical examiner used the term "finishing shot." *See* Tr. VI/167 (Court: "I can't get heads or tails of this….I might have missed something with regard to the medical examiner"). The significant point, however, was that the medical examiner could not testify which shot came first and which came second. The prosecutor's argument, misstating the testimony of a credible witness and then linking it to the

Commonwealth's crucial, but truth-challenged, witness was improper.

This Court will review Mr. Andrade's preserved objection to the prosecutor's closing for reversible error, focusing on:

> (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific and general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions.

Commonwealth v. *Silva-Santiago*, 453 Mass. 782, 807 (2009)(quoting *Commonwealth* v. *Perez*, 444 Mass. 143, 151 (2005), quoting *Commonwealth* v. *Kater*, 432 Mass. 404, 422-23 (2000))(internal quotations omitted). Counsel's immediate objection to this argument was appropriate as it went to the heart of the case. As discussed *supra*, Edwin Jorge, a witness with serious credibility problems, was the Commonwealth's only witness to testify that Mr. Andrade admitted shooting Arthur Burton and he demonstrated for the jury how Mr. Andrade allegedly showed him how Arthur Burton was shot. The prosecutor's misstatement of the medical examiner's testimony provided an improper bolstering of that crucial testimony.

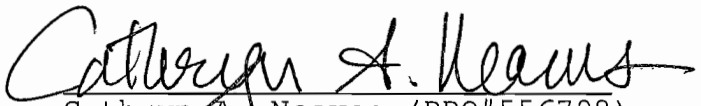
Further, the trial judge gave no curative instructions, either immediately after the argument, or during her final

This error, under the circumstances in this case, including the prosecutor's improper bolstering of Edwin Jorge's credibility during re-direct examination, "possibly made a difference in the jury's conclusions." *Id.* at 807. Mr. Andrade respectfully requests that this Honorable Court reverse the judgment of his convictions and remand the case to the Superior Court for a new trial.

CONCLUSION

For all the foregoing reasons, Mr. Seth Andrade respectfully requests that this Honorable Court reverse the judgment of his convictions, set aside the verdicts, and remand the case for a new trial.

Respectfully submitted,
SETH ANDRADE
By his attorney,



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Dated: October 16, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on October 16, 2013, I served a true copy of the foregoing upon the Commonwealth by mailing a copy of the same, first-class mail, postage pre-paid, to: David B. Mark, Chief of Appeals, Bristol County District Attorney's Office, 888 Purchase Street, P.O. Box 973, New Bedford, Massachusetts 02741.

Cathryn A. Neaves

Cathryn A. Neaves

CERTIFICATE UNDER M.R.A.P. 16(k)

Undersigned counsel certifies that this brief complies with the Rules of Court pertaining to the filing of briefs.

Cathryn A. Neaves

Cathryn A. Neaves

AFFIDAVIT OF COUNSEL PURSUANT TO MRAP 13(a)

I, Cathryn A. Neaves, counsel for the defendant-appellant, Seth Andrade, in the above-entitled matter, hereby certify, in accordance with Massachusetts Rule of Appellate Procedure 13(a), that I mailed the Brief and Record Appendix for Defendant-Appellant, via Priority Mail, on October 16, 2013, the date the brief was due.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 16th DAY OF OCTOBER, 2013.

Cathryn A. Neaves

Cathryn A. Neaves

STATUTORY ADDENDUM

U.S. CONSTITUTION, amend. VI:

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.

U.S. CONSTITUTION, amend. XIV:

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, art. 12:

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 council, 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 his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

G.L. c. 265, § 1:

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. The degree of murder shall be found by the jury.

G.L. c. 269, § 10(a):

Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having complied with the provisions of section one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or

(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either;

(1) being present in or on his residence or place of business; or

(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or

(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or

(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or

(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than five years, or for not less than one year nor more than two and on-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person seventeen years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and seventeen so charged, if the court is of the opinion that

the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...

(l) ...

(m) ...

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2 ½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

(o) ...