

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

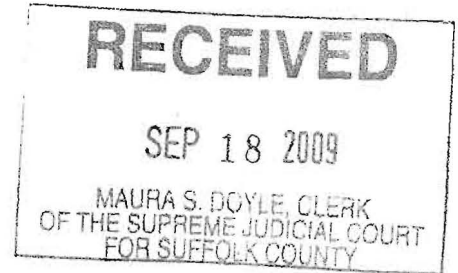
SUFFOLK COUNTY

NO. SJ2009-0203

COMMONWEALTH

v.

CORIE STOKES



**MOTION TO RECONSIDER MEMORANDUM AND ORDER ON
DEFENDANT'S PETITION FOR LEAVE TO APPEAL**

Corie Stokes hereby moves the Court to reconsider its decision denying his Petition for Leave to Appeal on the following grounds:

I. Standard of Review

Mass. G. L. c. 278, Section 33E, provides for the screening out of all but "new and substantial questions" by the Single Justice. Judicial decisions have interpreted that to mean that the Single Justice may screen out only frivolous petitions for leave to appeal.¹ While constitutional challenges to Section 33E based upon the argument that it denies to those convicted of murder the equal protection of the law have failed, that is only so where the statute is understood to allow the screening out

¹ It appears that there is no question but that the issue raised here is new. It was not previously raised in any court. Nor has it been argued that the issue was waived. It is a ground not "generally known and available at the time of trial or appeal." *Dickerson v. Latessa*, 872 F.2d 1116, 1118 (1st Cir. 1989).

of frivolous claims. *Dickerson v. Attorney General*, 396 Mass. 740, 745 (1986) ("frivolous or duplicative claims"); *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir. 1989) ("Section 33E is aimed at screening out frivolous and procedurally waived claims"); *Dickerson v. Latessa*, 688 F. Supp. 797, 801-802(D. Mass. 1988) ("If only frivolous appeals are barred by the single justice, no equal protection challenge can succeed because a state has a perfect right to discourage such a waste of judicial resources.") The Petitioner maintains that his appeal is not frivolous and should be allowed. To deny the Petitioner the opportunity to present a non-frivolous issue would constitute a denial of equal protection of the law since he would be denied the right to appeal that is given to every other defendant not convicted of first degree murder.

II. Substantial Nonfrivolous Grounds Exist for a Determination that the Home Invasion did not Merge with the Murder

A. Introduction

Petitioner was convicted of felony murder in the first degree based upon a predicate felony of attempted armed robbery. The argument that he presented in his motion for new trial was that the court below should have given the jury an instruction that if they found the

predicate offense to be home invasion, they should find him guilty of murder in the second degree. This was based upon a new case decided well after his trial, which held that the armed home invasion statute, Mass. G.L. c. 265, §18C, provided for only a maximum sentence of 20 years in prison, not a life sentence. *Commonwealth v. Burton*, 450 Mass. 55 (2007).

The jury could have found at trial that Petitioner and another went to the apartment of Crystal Rego with guns, knocked on her door, and when she opened the door waved their guns around (inside the apartment) and pointed them at her as well as the victim of the murder, Cecil Smith, Jr., who was on a couch opposite the door. The other home invader who was with Petitioner apparently was found by the jury to have shot the victim. There was very slight evidence that the reason for the home invasion was robbery.

B. The Burton Case

Commonwealth v. Burton, 450 Mass. 55 (2007), is as close to an identical case as can ever be found. If the Court has any doubt about the facts from reading the opinion in *Burton* along with the opinions in *Stokes*, 440 Mass. 741 (2004), and *Taylor v. Commonwealth*, 447 Mass. 49, 50-52 (2006) (a companion case to *Burton*), the entire records of all of those cases are on file in the Supreme Judicial

Court. The facts in the *Burton* case were that Burton and three others entered the apartment of the victim in an attempt to rob him. When the victim appeared to be making a telephone call, one of the three men shot and killed him. Burton was convicted of home invasion and of murder with a predicate of home invasion.

On appeal, the Court in *Burton* held that on the facts presented, and due to its new understanding of the armed home invasion statute, it would order the reduction of the verdict of first-degree felony murder to second degree felony murder. In the plenary review of a first degree murder conviction, the Court had open to it not only the issues raised by the parties, but any issues that were raised by the facts. Indeed, in *Commonwealth v. Gunter*, 427 Mass. 259 (1998), the Court itself raised the issue of merger *sua sponte*. Petitioner's argument that this case is indistinguishable from *Burton* is not frivolous.

The decision of this Court in denying leave to appeal is entirely at odds with *Burton*. Where the facts in the two cases are essentially identical, it is intolerable that the doctrine of merger should be relied upon to preclude a verdict of second degree felony murder on the basis of a predicate of home invasion in the present case, where the

very same predicate offense mandated a verdict of second degree felony murder in *Burton*.

C. The Gunter case

Commonwealth v. Gunter, 427 Mass. 259 (1998), is even more applicable here than the *Burton* case. In *Gunter*, the defendant was convicted as a joint venturer of murder in the first degree on a theory of felony-murder, where the underlying felony was armed assault in a dwelling with intent to commit a felony, G.L. c. 265, §18A. Gunter's joint venturers entered an apartment looking for thieves who had stolen their marijuana as well as the marijuana itself. There were several people in the apartment, but neither the thieves nor the marijuana was found. Those in the apartment were held at gunpoint while the entire apartment was searched. On the way out, one of the joint venturers shot and killed Jack Berry, one of those who were in the apartment. Mr. Berry was named as the victim of the armed assault in the dwelling as well as the murder.

On those facts, the Court held that the indictment for armed assault in a dwelling against Mr. Berry merged with the murder and, therefore, could not function as a predicate on a theory of felony murder. However, the Court upheld the felony murder conviction on the ground that the other people in the apartment who were held at gunpoint

were also victims of armed assault in a dwelling, and those armed assaults could validly be considered predicate offenses.

This Court in its prior decision in this case discussed only the assault against Smith who was the victim of the home invasion alleged in the indictment for home invasion. However, there was indeed another victim of the home invasion upon whom the defendants "while armed with a dangerous weapon, use[d] force or threaten[ed] the imminent use of force" (Mass. G.L. c. 265, §18C) (emphasis added):

[Crystal] Rego testified that when she opened her apartment door, the assailants' feet were "at the threshold of the door" and they were "waving guns ... back and forth really fast" and pointing them at her. Without objection, the judge described Rego's demonstration of this arm-waving as "clearly indicating extended arms, moving left to right." From Rego's testimony and demonstration, a rational jury could infer that one with his feet at the threshold of the apartment would cross that threshold with at least some part of his arm in order to wave the gun back and forth and point it at Rego.

Commonwealth v. Stokes, 440 Mass. 741, 748 (2004).

As in *Gunter*, even if the shooting of the victim Smith merged with the home invasion indictment, the jury could have and should have been instructed on home invasion as a predicate for second degree murder based upon the assault on Rego.

In its Memorandum and Order, the Court stated that the "firing of the fatal shot at the victim also constituted the only use of force or intentional causing of injury that is a necessary element of the crime of home invasion." However, the Court overlooked an alternative element to the use of force or intentional causing of injury, which would make out the offense described in G.L. c. 265, §18C. Thus a person may be found guilty of home invasion if he "uses force or threatens the imminent use of force upon any person within such dwelling place whether or not injury occurs...." Crystal Rego was certainly threatened with the use of force when the gun was pointed at her. Therefore the firing of the gun was not the only violation of Section 18C. The threat to use force against Rego was itself a violation of §18C that could have supported an instruction on second degree felony murder. As in *Gunter*, where the Court held that the predicate offense of assault on the victim merged with the murder, the Court here can look to the assault on one of the other people in the dwelling who were assaulted but not killed to support a murder conviction exactly as it did in *Gunter*.²

² The only difference here being that the predicate

D. The Kilburn case

The instant case also has some similarity to *Commonwealth v. Kilburn*, 438 Mass. 356 (2003). In that case, as in this, upon entering the dwelling, the defendant committed armed assaults on the occupants (here the waving of the guns and pointing them at the occupants) before actually shooting one of the occupants, even though there was little time separating the threat from the shooting. In that case the Court pointed out that either of those assaults, quite apart from the actual shooting, were proper predicates for the felony murder. Here, the waving and pointing of the guns at Rego and Smith each constituted separate offences under §18C. Thus, under a proper instruction, the jury could have found Stokes guilty of second degree murder. See also *Commonwealth v. Roberio*, 428 Mass. 278, 282 (1998) ("The numerous assaults on the victim after the initial robbery assault were sufficiently independent to support the felony-murder conviction and did not require the felony to be merged with the homicide.")


offense supports a second degree felony murder conviction rather than the first degree as in *Gunter*.

III. Conclusion

These arguments are far from frivolous. Due to a misapprehension on the law, the Petitioner was denied the opportunity for the jury to return a lesser verdict of second degree felony murder based on facts clearly present in the record. In these circumstances, the verdict in this case is an injustice. Accordingly, the Petitioner prays that the Court reconsider its prior ruling and grant his petition for leave to appeal from the denial of his motion for new trial.

CORIE STOKES,
By his attorney,

Dated: 9/17/09



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion to Reconsider Memorandum and Order on Defendant's Petition for Leave to Appeal on counsel for the Commonwealth by mailing a copy, first class postage prepaid, to:

Raymond P. Veary, Assistant District Attorney
888 Purchase Street
New Bedford, MA 02740

Dated: _____

9/17/09



Matthew H. Feinberg

