

**COMMONWEALTH OF MASSACHUSETTS**

**HAMPSHIRE, ss**

**TRIAL COURT OF  
THE COMMONWEALTH  
SUPERIOR COURT DEPT.  
INDICTMENT NO. 08-56**

**COMMONWEALTH**

**v.**

**JASON VASSELL**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

***Introduction***

In the early morning hours of February 3, 2008, a student at the University of Massachusetts (“UMass”) discovered two intoxicated men peering into his first floor dormitory window. When the student told the two men to leave, they invited him outside to fight, then smashed his window when he declined the invitation.

In response to this unprovoked assault, the student tried to deescalate the situation by calling a friend for help. When the student went to the lobby of his dorm to let his friend in, the two men followed the friend into the lobby and continued to threaten the student. Eventually, as the two intruders became more aggressive, the student took out a pocketknife and told them that he did not want to use the weapon but was prepared to do so if necessary. Ignoring this warning, the larger of the two drunken men punched the student in the face, breaking his nose.

As the two intruders attacked with their fists, the student defended himself with the knife. When the student finally fled behind a locked door, the two men screamed obscenities at the student and demanded that he to return to finish the fight.

In the wake of this altercation, the Commonwealth had to decide whom to prosecute and what charges to bring. As the following discussion will make clear, the prosecution ultimately made these decisions based on the race of the parties involved. In doing so, it disregarded principles embodied in our state and federal constitutions that prohibit the discriminatory enforcement of impartial laws. As a result of this equal protection violation, the above-captioned matter should be dismissed.

### ***Background***

#### **A. “We’re in trouble!”**

On February 3, 2008, at approximately 4:57 a.m., Maria Padilla, the Resident Assistant (“R.A.”) on call at UMass, contacted the University Police Department to report a fight in the basement of Mackimmie Hall. (*See* Discovery No. 000128, File #000.)<sup>1</sup> Padilla told Dispatcher Andrew Dionne that she was informed by a dorm

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<sup>1</sup> To date, the Commonwealth has provided 135 discovery items, which it has chosen to designate as 000001-000135. Among these items are numerous DVDs and CDs that contain audio and visual recordings. The Commonwealth has also provided unnumbered CDs containing audio recordings of interviews with Jonathan Bosse and John Bowes, as well the medical records for the two “victims,” and certain Milton Police Department Incident Reports. All of the discovery items referenced in this memorandum are available for the court’s inspection should it so desire. In the interest of brevity, counsel has refrained from attaching them in an appendix. Counsel has also refrained from attaching copies of: (i) the Commonwealth’s Motion for the Pre-trial Detention of Jason Vassell; (ii) Vassell’s Conditions of Release; (iii) the Commonwealth’s Application for a Criminal Complaint Against John Bowes; (iv) a letter dated April 3, 2008, from undersigned counsel to Assistant District Attorney Frank Flannery; and (v) the Commonwealth’s Motion to Amend the Complaint Against John Bowes. These documents are also available upon request.

resident that knives were involved and that the resident had tried to contact the Mackimmie R.A. to no avail. (*Id.*)

One minute later, Vincent Mullen, the R.A. from Mackimmie, called and reported that the participants in the altercation appeared to now be separated by a security door. (*Id.*, File #001.) During this phone call, Dispatcher Dionne received another call from the State Police stating that they had an individual on the line claiming that he and another “victim” had been stabbed multiple times. (*Id.*, File #004.).

When the State Police transferred this call to Dispatcher Dionne, the caller immediately exclaimed, “We’re in trouble!” (*Id.*)

**B. “He’s in there.”**

At approximately 5:07 a.m.,<sup>2</sup> UMass Police Officers Luis Antonmarchi and Damian DeWolf arrived on the scene and accessed the building via the second floor. (Discovery No. 000012, DeWolf Narrative.) Upon entering the dormitory, the officers heard loud screams coming from the basement. (Discovery No. 000095, Antonmarchi Narrative.) Once they reached the basement door, Officer Antonmarchi heard “yelling and banging” and “believed that the altercation could still be going on, directly on the other side of the door.” (*Id.*) When the two officers opened the basement door, they “observed two white males” with “blood on various areas of their body and clothing.” (DeWolf Narrative.) These two males were subsequently identified as Jonathan Bosse and John Bowes. (*Id.*)

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<sup>2</sup> This is the time that the officers arrived at the scene according to the dorm security cameras. Apparently, the clocks on the two cameras were one minute and forty-nine seconds faster than the clock that recorded the calls to the UMass Police Department. (*See* Discovery No. 000097, Supplemental Thrasher Narrative.)

Both Bosse and Bowes motioned to the other side of a secured door and yelled, “He’s in there.” (*Id.*) After opening the door, the officers saw a black male, later identified as Jason Vassell, standing in the hall. (*Id.*) According to Officer DeWolf, several other individuals in the hall pointed to Vassell and indicated that he had a knife. (*Id.*) During a subsequent pat frisk of Vassell, Officer Antonmarchi recovered “a metallic knife with a red substance consistent with blood on it.” (*Id.*)

**C. “You’ll see they attacked me.”**

As other officers arrived at the dormitory, Officer DeWolf assisted them in administering first aid to Bosse and Bowes. (*Id.*) After Sergeant Jessica Moore read Bosse and Bowes their *Miranda* rights, Bosse “describe[d] a second assailant as a shorter black or Hispanic male wearing a black jacket with a furry collar.” (*Id.*) At approximately the same time, Officer Antonmarchi advised Sgt. Moore of certain “facial/head injuries” Vassell received during the altercation. (Discovery No. 000019, Moore Narrative.)

During his initial interview with Officer Antonmarchi, Vassell stated that Bowes and Bosse instigated the altercation when they saw him in his dorm room and “began yelling racial slurs, calling him a ‘nigger’ and encouraging him to come out and fight.” (*Id.*) He stated that Bosse and Bowes then broke his window and eventually made their way into the basement of Mackimmie Hall. (*Id.*) Once there, Vassell alleged that the two white men continued to yell racial slurs and ultimately attacked him. (*Id.*) He stated his belief that under these circumstances he had no choice but to use physical force to defend himself. (*Id.*) When pressed to explain how exactly he defended himself, Vassell

said: “Everything is on videotape. Everything in that hall is videotaped. You’ll see they attacked me.” (Discovery No. 000096, Antonmarchi Narrative.)

Upon hearing Vassell’s version of the events, Sgt. Moore asked for and obtained Vassell’s consent to check the window in his room. (Moore Narrative.) When the police discovered that the window was in fact smashed, Vassell was “removed from handcuffs and advised that he was not under arrest.” (*Id.*)

**D. “You’re a dirty nigger! . . . Come out and fight me!”**

At this point, Sgt. Moore instructed Officer Jason Minich to speak with four eyewitnesses to the altercation. (Discovery No. 000015, Minich Narrative.) According to Lindsey Toper and Ashley Clancy, “the incident began in Jason Vassell’s room.” (*Id.*)

“Both Ms. Toper and Ms. Clancy were present . . . when a white male was observed looking in the room.” (*Id.*) “Ms. Toper stated that when she opened the window’s shade and saw the white male, he started to ask to hang out with her and said that he wanted to be friends with her.” (*Id.*) Toper told Officer Minich that “she was ‘creeped out’ by his demeanor and the fact that he had been spying on them through the window.” (*Id.*) Toper further provided that “when Vassell told the white male to get away from the window, . . . the white male began . . . shouting racial slurs at Vassell, calling him a ‘nigger’ loudly.” (*Id.*)

This shouting woke up Barbara Rutman, Vassell’s next door neighbor. (*Id.*) Rutman told police that she “heard two white males aggressively yelling racial slurs” including: “You’re a dirty nigger!” “Your whole family is crap!” “You’re a piece of shit!” and “Come out and fight me!” (Discovery No. 000043, Rutman Statement.)<sup>3</sup>

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<sup>3</sup> As Toper put it, “[t]he two boys outside wanted Jason to come outside and fight . . . but Jason wouldn’t go outside.” (Discovery No. 000038, Toper Statement.)

When Vassell “responded by telling them, no, he wasn’t coming out . . . they smashed the window.” (*Id.*)

At this point, Toper said that she “called the Mackimmie cluster office and told them that a basement window had been broken but no one . . . [came] down to see what was going on.” (Discovery No. 000038, Toper Statement.) According to Clancy, Vassell then called a friend for assistance, grabbed “a pocket knife and put it in his pocket.” (Minich Narrative.)

When Clancy went “to alert housing staff,” she saw the “same two white males pounding on the exterior doors of lower lobby.” (*Id.*) Toper, Rutman, and a fourth Mackimmie resident named Jennifer Rogacz all agreed that once Vassell’s friend arrived “the two males gained entry into the lobby and began to argue even louder.” (*Id.*) According to Rogacz, “The shorter one, who was wearing a Brady jersey . . . , was yelling racial slurs and yelling at the African American boy to fight him. He repeatedly was calling him a ‘nigger.’” (Discovery No. 000046, Rogacz Statement.)

As the racial aggression towards Vassell persisted, Rutman saw her dormitory neighbor “pull[] out a knife and sa[y] he didn’t want to use it and they should leave.” (Rutman Statement.). Undeterred, “[t]he two white males continued to verbally assault [Vassell] and threaten him.” (*Id.*) From her vantage point, Rutman said that “it looked like the first punch was thrown by the taller of the white males.” (*Id.*) “When the fight broke out [Toper, Rutman, and Rogacz] shut the door to prevent [the combatants] from coming into the interior of the dorm.” (Minich Narrative.) Rogacz told Officer Minich that she saw Vassell stab at least one of the men. (*Id.*)

One of the officers who had responded to the scene, Officer Brian Green, heard Rutman say: “I saw Jay stab those guys trying to fight them off.” (Discovery No. 000093, Green Narrative.)

During a break in the fight, Rogacz said that Vassell started “banging on the door so they let him in and shut it behind him.” (Minich Narrative.) Rutman indicated that once Vassell escaped into the hallway, “the white males were pounding on the door, screaming racial slurs and screaming that they had been stabbed.” (*Id.*) “When the police arrived the white males immediately pointed the finger at [Vassell] and made it look like he had crazily attacked them . . . .” (*Id.*)

Officer Minich completed his police report at 5:30 a.m., noting that all four witnesses had provided statements. (*Id.*)

**E. “[S]mell[ing] strongly of an alcoholic beverage and . . . slurring their speech.”**

Meanwhile, Bosse and Bowes relayed a very different story to Sgt. Moore. (Moore Narrative.) Specifically, they stated that the altercation began outside when they encountered Vassell “and an unknown Latino male.” (*Id.*) According to Bosse and Bowes, Vassell and this unknown Latino male began “yelling racial slurs at them”<sup>4</sup> and Vassell later “attacked them and slashed at them with a knife” while he “was wearing a ski mask.” (*Id.*) Officer Green later noted that “[b]oth Bosse and Bowes smelled strongly of an alcoholic beverage and were slurring their speech when trying to give statements.” (Green Narrative.)

As the participants in the altercation were being loaded into ambulances, Vishan Chamanlal approached Sgt. Moore and identified himself as the friend whom Vassell had

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<sup>4</sup> In a follow-up police report, Sgt. Moore stated that Bosse and Bowes could not quote or give any specifics concerning the racial slurs that Vassell and Chamanlal allegedly yelled at them. (Discovery No. 000091, Moore Narrative.)

called for assistance. (Moore Narrative.) Chamanlal agreed to accompany Officer DeWolf back to the station for an interview. (*Id.*)

**F. “Looks like a drug deal.”**

At 5:45 a.m., the on-call Lieutenant, Robert Thrasher, contacted University dispatch for an update. (*See* Discovery No. 000128, File #075.) Lt. Thrasher was advised that there was a stabbing; that the police had four witnesses and four suspects; and that three of suspects were en route to the hospital. (*Id.*) When Lt. Thrasher asked if anyone knew “who, what, where and how it all [happened],” he was informed by the dispatcher it was “all on the cameras.” (*Id.*)

At this point, Lt. Thrasher asked to speak with another officer who advised him that the police had already apprehended both of “the stabbers.” (*Id.*)<sup>5</sup> According to this officer, one of the stabbers was waiting for the victims in the lobby for ten minutes with a mask on. (*Id.*) This officer opined that “it looks like a drug deal. Some deal was going on. It wasn’t a normal, random thing. This guy was waiting in the hallway for these other two guys to come.” (*Id.*)

**G. “There’s more to it.”**

At approximately 5:50 a.m., Sgt. Moore spoke with the officer who had told Lt. Thrasher that the fight had occurred in the midst of a drug deal. (*See id.*, File #092.) When this theory was repeated to Sgt. Moore, she said, “there’s more to it. There’s hate

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<sup>5</sup> After further review of the video evidence, the UMass Police concluded that Chamanlal was not only unarmed, he “never threw a punch.” (Discovery No. 000021, Kellogg Narrative.) The initial characterization of Chamanlal as a “stabber” is consistent with studies which indicate that “the threshold for labeling an act as violent [i]s significantly lower when subjects viewed a Black person committing the act than when subjects viewed a White person committing the same act.” Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 404-06 (1996) (citation omitted).

crimes involved with the other two. . . . The white males that got stabbed . . . initiated it outside of the building. . . . They were trying to call this guy out there. They were calling him a nigger. . . . They smashed his window, then they came down here to fight. They were banging on the window.” (*Id.*)

When Sgt. Moore learned that video recordings showed Vassell letting Bosse and Bowes into the dormitory, she said: “Everybody’s probably getting charged.” (*Id.*)

**H. “[H]ow poor of a black kid he is, I don’t know, because I think he is a drug dealer.”**

Approximately ten minutes later, Lt. Thrasher met with Sgt. Moore at the crime scene. [*See* G.J. 6:1-3.] At about the same time, Lt. Thrasher learned of that there were three eyewitnesses to the initial encounter at Vassell’s window and that they were providing statements Officer Minich. [*Id.* at 10:14-20.] Notwithstanding the clear evidence provided by these individuals that drugs had nothing to do with the incident, Lt. Thrasher continued to put stock in that theory of the case. In a call to another officer at 6:25 a.m., Lt. Thrasher stated: “A couple of white kids go in and start harassing some poor black kid in his bedroom. Now how poor of a black kid he is, I don’t know, because I think he is a drug dealer. They get into a fucking knife fight in that lower lobby. [The] cameras did a helluva job of showing me, you know, the fucking crime.” (*See* Discovery No. 000128, File #134.)

**I. “One guy was bleeding before he came in.”**

As Lt. Thrasher spoke the words noted above, Chamanlal was at the police station giving his first recorded interview. (*See* Discovery No. 000131, 1st Chamanlal

Interview.)<sup>6</sup> According to Chamanlal, he was asleep in his room in John Adams Dormitory when Vassell called to say that someone had broken his window and was outside yelling racial slurs at him. (*Id.*) When he arrived at the lower Mackimmie lobby moments later, Chamanlal saw two white men standing outside the door. (*Id.*) When Vassell opened the door for Chamanlal, the two men entered the building and started calling Vassell a “bitch,” “nigger,” and a “pussy.” (*Id.*) According to Chamanlal, Vassell responded by repeatedly telling the two men: “Don’t touch me.” (*Id.*)

Chamanlal stated further that he tried to diffuse the situation, but that the men kept pushing forward and eventually started throwing punches. (*Id.*) During the physical part of the altercation, Chamanlal said that although he never threw a punch the smaller of the two white men hit him in the head. (*Id.*)

Once the parties separated, Chamanlal noticed that there were two or three people behind an interior door and yelled for them to open it. (*Id.*) When they did, Vassell escaped behind the door and Chamanlal exited the lobby through the door he had entered. (*Id.*)

When asked if he noticed either of the two men bleeding, Chamanlal stated that the smaller of the two men had a cut on his hand before he entered the building. (*Id.*)

**J. “What are you doing in there with those two girls?”**

At 6:39 a.m., Vassell consented to having an audio recorded interview with Officer Antonmarchi at Cooley Dickenson Hospital in Northampton. (*See* Discovery No. 000132, First Vassell Statement.) The account that Vassell provided as to how the altercation began did not differ in any material aspects from what the eyewitnesses, Toper

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<sup>6</sup> The clock in the room where the interview took place indicated that the interview began at approximately 6:15 a.m.

and Clancy, had relayed to Officer Minich earlier. He stated that he was in his room hanging out with these two white females when one of them went over to crack a window to let some air in. (*Id.*) As she did, they noticed a white male at the window. (*Id.*) Vassell stated further that within a short period of time, this white male started calling him a “nigger” and demanded to know what he was “doing in there with those two girls.” (*Id.*)

Once Bosse and Bowes gained access to the lobby, Vassell said that they continued to harass and threaten him, saying “nigger this, nigger that.” (*Id.*) Eventually, Vassell said that the two white men attacked him and he defended himself by doing “what [he] had to do.” (*Id.*) When asked what his emotions were at the time of the attack, Vassell indicated that he was terrified and realized that “if I don’t do something, I’m gonna die.” (*Id.*)

Vassell stated that during the altercation, Chamanlal acted as a “mediator” who pleaded with everyone “go back to [their] rooms and call it a night.” (*Id.*) Vassell also stated that the means he used to defend himself were necessary to “ensure [his] survival.” (*Id.*)

Towards the end of the interview, Vassell said that once he left the lobby, Bosse and Bowes “consistently tried to get in and tried to break the glass” in order to get to him. (*Id.*) He claimed further that once he got behind the door, he remained calm and waited for the police to come. (*Id.*) He expressed his belief that the only thing that prevented Bosse and Bowes from continuing their attack was their inability to break the glass on the metal door that separated them. (*Id.*)

At the conclusion of the interview, Vassell stated that he was “very fortunate” to have survived and “many of us haven’t gotten away in the past.” (*Id.*)

**K. “You gonna get a story out of this asshole?”**

At 7:17 a.m, having completing his hospital interview with Vassell, Officer Antonmarchi called Lt. Thrasher. (*See* Discovery No. 000128, File #174.) Upon learning the identity of the caller, Lt. Thrasher asked Officer Antonmarchi whether he was “gonna get a story out of this asshole.” (*Id.*) When Officer Antonmarchi responded that he just conducted a fifteen minute interview with Vassell, Lt. Thrasher asked: “What’s this donkey say?” (*Id.*) As Officer Antonmarchi relayed Vassell’s version of the events, Lt. Thrasher interrupted to say: “Does he know he was on videotape because that’s all horseshit.” (*Id.*) Officer Antonmarchi responded that Vassell believed that the videotapes would corroborate his statement. Lt. Thrasher laughed. (*Id.*) At the end of the phone call, Officer Antonmarchi stated that Vassell still had to get “a load of x-rays” and he was already “almost falling asleep.” (*Id.*) “Good,” Lt. Thrasher stated. “You let him fall asleep. You sit right there with him and you be his teddy bear. You hang right on to him, okay?” (*Id.*)

**L. “At this point, they’re all going to end up getting charged.”**

At 7:41 a.m., Officer Antonmarchi called Lt. Thasher again to ask where he should take Vassell upon his discharge from the hospital. (*Id.*, File #195) After expressing dismay at the thought of Vassell’s release, Lt. Thrasher advised Officer Antonmarchi to “bring him on back here for a quote, unquote statement.” (*Id.*) Later in the conversation, Lt. Thrasher indicated that Vassell was going to “eventually end up getting charged.” (*Id.*)

Notwithstanding his understanding that Vassell was “a little doped up right now,” Lt. Thrasher instructed Officer Antonmarchi to use his “good rapport” with Vassell to get him “on a video” prior to placing him under arrest. (*Id.*) At the close of the conversation, Lt. Thrasher acknowledged that he hadn’t “gotten all this put back together,” but “at this point, they’re all going to end up getting charged.” (*Id.*)

**M. “We’re going to give your name to the *Boston Globe*.”**

At some point after this second conversation with Officer Antonmarchi, Lt. Thrasher left Amherst with Detective Daniel Hagan for Springfield. At approximately 9:28 a.m., these two officers began an interview with Bosse at Bay State Medical Center. (*See* First Bosse Interview.) After reading Bosse his *Miranda* rights, Lt. Thrasher asked him how his night began. (*Id.*)

Bosse replied that he had come to Amherst from Milton with Bowes, Bowes’ brother and another individual named Nick Escoto. (*Id.*) According to Bosse, the purpose of this trip was to visit a few friends who were UMass students. When asked what he was wearing, Bosse indicated that he had on a white Tom Brady Patriots’ jersey. (*Id.*)

According to Bosse, at some point he and Bowes got separated from the other two members of their original group. When asked where he and Bowes were at 5 a.m., Bosse hesitated before stating that “it was all kind of fuzzy . . . . It just happened, everything happened so quick.” (*Id.*) Lt. Thrasher then asked what brought Bowes and him down to Southwest. Bosse claimed that there was a female student from Milton named Aoife O’Sullivan that they were going to see and that he was “pretty sure that she lived in that building,” but admitted that he “had a few beers.” (*Id.*)

In response, Lt. Thrasher quipped: “I wish I had a few beers,” then added: “Just kidding.” “It’s okay,” said Bosse, “you can kid with me.” (*Id.*)

Lt. Thrasher then continued: “So you’re looking for Ms. O’Sullivan and you guys go to the window and you are looking for your friend.” (*Id.*)

“Yeah,” said Bosse, “we were trying to get into . . . [Mackimmie] and I guess we got in.” (*Id.*)

“Do you remember talking to anybody at the window?” Lt. Thrasher asked. (*Id.*)

“I don’t know if those kids let us in or we just got in ourselves,” Bosse replied. (*Id.*)

“You don’t remember talking to any girls at a window?” (*Id.*)

“No, no, there wasn’t any girls. There wasn’t anybody else around. I’m pretty sure there wasn’t anybody else around except for us four. Me and my buddy and him and his buddy.” (*Id.*)

When Det. Hagan pointed out that it was pretty clear that there were “two places” that he had been, Bosse insisted that his first encounter Vassell did not occur at or outside a dorm room. (*Id.*) When asked how he and Bowes managed to gain access to the building, Bosse stated that he was “not sure,” but he was “pretty positive it was those kids because if I think about it they were the only kids around. . . and they were already in there.” (*Id.*) Asked to describe the two kids in the lobby, Bosse said: “Spanish, that’s about it.” (*Id.*) Continuing with his account, Bosse conceded that “words were exchanged back and forth. We were on one side of the hall, they were on one side. And I’m pretty sure my buddy, John, . . . started fighting with one of the kids.” (*Id.*)

When Lt. Thrasher stumped Bosse by asking what Bowes was wearing, Det. Hagan chimed in: “He didn’t have an Eli Manning shirt or something on.” (*Id.*) “No way!” laughed Bosse. “If he had an Eli Manning shirt on, he wouldn’t be my friend. He wouldn’t be my best friend and I wouldn’t be with him at five in the morning. No fucking way. . . . no way.” (*Id.*)

When asked about the particular words that were exchanged, Bosse said, “You know, like fuck you. . . . It wasn’t anything like, ‘fucking white boy,’ ‘you spic.’ It wasn’t anything like that. It was just . . . I’m pretty sure it was just like ‘fuck you’ back and forth. Like ‘you’re an asshole,’ ‘you’re a fucking pussy.’ You know, shit like that. And then . . . it’s kind of all fuzzy. . . . I don’t really know but I’m pretty sure him and John . . . started fighting. They started going at it in that lobby. . . . And then I ran in because that’s my buddy and I gonna take care of him. I ran in and tried to grab the kid or whatever, pull him off, throw a couple punches maybe just to get him off. And then all of a sudden they ran through another door and we were stuck in the lobby, locked in there because . . . we didn’t have a card or anything. And all of a sudden we just noticed that we were bleeding everywhere. . . . So we just sat down and we were like looking at each other. Well, actually, no, no, no, before we noticed that we were bleeding we were screaming through the glass and the doors at each other. They were on the other side. We were on this side. We were still screaming at each other trying to get them to come back. . . .” (*Id.*)

Asked whether or not they realized that they had been cut, Bosse said: “No, no. We didn’t realize it at all. We didn’t even realize it until the EMTs told us that we . . . got stabbed. . . . So we realized that they’re not coming back and we’re just like, we look

at each other and we're bleeding everywhere and we're like, 'dude, this isn't good. This isn't good.' So we sit down and just try to take a breath for a minute and like right as we sit down the EMTs and everybody came in and I'm pretty sure they just rushed right in that door and I think they grabbed the kid. I'm not really sure though because I just started talking to this one guy and I tried to explain to him what happened but . . . I was in shock because I just realized that I got stabbed. . . . I'm not really sure what went on."

*(Id.)*

After discussing what happened when Bosse and Bowes arrived at the hospital, Lt. Thrasher elected to conclude the interview based on his concern that the painkillers might be affecting Bosse's faculties. *(Id.)*

When Det. Hagan then asked about Bosse's shirt, Bosse explained that he did not want the police to take it because the shirt was "from '04. It's been to every parade. . . . If you find stab wounds in it, I'll give it to you guys but if we don't can I keep it?" *(Id.)*

Det. Hagan agreed to let Bosse look at the shirt before they took it. When a nurse brought in Bosse's clothes, he apparently saw the blood on the shirt and quickly consented to its seizure. "Tom Brady!" Bosse lamented. "I've had that shirt for years, man. . . . That was my shirt." *(Id.)*

"I hope you don't bring [the Patriots] bad luck tonight," Det. Hagan deadpanned. "I hope Tom [Brady] doesn't [inaudible] because your shirt is gone." *(Id.)*

Lt. Thrasher then asked Bosse a question regarding the Super Bowl point spread.

"It's on me!" Bosse joked, responding to Det. Hagan. *(Id.)*

"It's all your fault," Det. Hagan continued. "[If the Patriots lose] we're going to give your name to the *Boston Globe*. It's all John's fault." *(Id.)*

A discussion about the point spread and predictions for the outcome of the game ensued. At the conclusion of the conversation, Det. Hagan joked that the police needed to “wrap up” their investigation before “kickoff,” and both officers wished Bosse well. (*Id.*)

**N. “Is he provoking or is he trying to get in the middle to say, ‘Whoa, slow this down?’”**

At approximately 9:55 a.m., Vishan Chamanlal began a second recorded interview at the UMass Police Station. (*See* Discovery No. 000129, 2<sup>nd</sup> Chamanlal Statement.) The purpose of this interview was to show Chamanlal the video footage from the lobby and have him provide narration. According to Chamanlal, when he arrived at the door to the lobby, Bosse and Bowes were standing silently nearby, and it was not clear to him that they were the same two white males who had harassed Vassell and smashed his window. (*Id.*) Vassell opened the door for Chamanlal, and Bowes and Bosse followed him inside and began to verbally accost Vassell. (*Id.*)

According to Chamanlal, Bowes used words like, “retard,” “pussy,” “bitch,” and “nigger.” Vassell kept on saying, “Don’t touch me.” (*Id.*) On two occasions during his narration, Chamanlal reiterated a point he made in his previous interview: Bosse had a cut on his hand and blood on his shirt *before* the altercation turned physical. (*Id.*)

Chamanlal also said that while Bowes was doing the screaming, both men were “talking shit” and using racial slurs. (*Id.*) At one point during his review of the recording, Chamanlal stated: “Now [Bosse’s] provoking.”

In response, a UMass Police Officer said: “What’s he saying? Is he provoking or is he trying to get in the middle to say, ‘Whoa, slow this down?’” (*Id.*)

“No, he’s provoking,” said Chamanlal. (*Id.*)

In spite of his best efforts to calm Vassell down as well, Chamanlal said his friend eventually got “fed up with being called a nigger.” (*Id.*) Chamanlal further explained that as Bosse and Bowes continued to advance, Vassell produced the knife and warned: “Don’t touch me. You see what’ll happen if you touch me.” (*Id.*)

Chamanlal acknowledged that at certain points Bosse seemed as if he might be inclined to keep Bowes at bay. However, he also stated that Bosse would then inevitably adopt a more confrontational posture. He noted again that Bosse was the one who punched him in the head. (*Id.*)

In reviewing the tape of the fight, Chamanlal noted that in the moments before Bowes threw the first punch Vassell was backing up on his own as Bosse and Bowes advanced. (*Id.*)

**O. “Come fight us you pussy niggers!”**

After leaving Bay State Medical Center, Lt. Thrasher contacted Sgt. Jack Richman of the Milton, Massachusetts Police Department. (Discovery No. 000023, Thrasher Narrative.) During their conversation, Sgt. Richman apparently indicated that officers in his department knew Bosse and Bowes due to their involvement in similar incidents in Milton. At the end of the phone call, Sgt. Richman forwarded several reports his department had generated as a result of these incidents. (*Id.*) The following is a summary of the contents of the reports Lt. Thrasher received.

- *Incident No. 1:* On January 31, 2003, Bowes and Bosse were described as persons associated with a “youth disturbance” that resulted in an unspecified injury to one Daniel Quinones.

- *Incident No. 2:* On April 29, 2003, Sgt. William Cawley spoke with David McWhirk about a fist fight he had with Bowes on April 25, 2003. According to McWhirk, during the fight, Bowes struck him above the left eye with the flat end of a hatchet. As a result of this blow, McWhirk received a three inch laceration to his forehead that required ten stitches. McWhirk and his family indicated that they did not wish to pursue charges against Bowes.
- *Incident No. 3:* On September 24, 2004, Patrolman Joseph Fahey spoke with Arthur Willis about a recent incident. According to Willis, he was riding his bicycle through a field earlier in the evening when he was jumped by a group of teenagers that included Bowes. When Bowes was subsequently interviewed, he claimed not to have been anywhere near the location of the attack. However, when Officer Fahey spoke with Bosse, a supposed alibi witness, he did not corroborate Bowes, and Officer Fahey indicated his intention to seek a criminal complaint against Bowes for assault and battery.
- *Incident No. 4:* On January 1, 2005, Sgt. Crawley interviewed Madeline Deshazo. According to Deshazo, she was at a party the previous evening when Bowes arrived under the influence of alcohol. Deshazo stated that Bowes proceeded to scream at her while “lung[ing] forward toward her” in such a way as to put her “in fear of being pushed or grabbed by him.” When Deshazo responded by striking Bowes out of fear, he poured a bottle of beer on her shirt. Deshazo also reported that Bowes repeatedly harassed and abused her at Milton High School by insulting her in the corridors and calling her a “whore” and a “cunt.” She stated further that she was terrified of Bowes and tried to stay away from him

at school. At the conclusion of her interview with Sgt. Crawley, she stated that she did not wish to press charges and requested that the office not inform Bowes that she had spoken with the police. Sgt. Crawley subsequently spoke with Bowes who admitted pouring a beer on Deshazo as an act of “retailiat[ion].”

- *Incident No. 5:* On or around June 26, 2005, Bowes was described as a person associated with another “youth disturbance.”
- *Incident No. 6:* On July 23, 2005, Patrolman Brendan Douglas responded to a report of youths fighting in the street. At approximately 10:15 p.m., Bowes and three white companions flagged down Officer Douglas and informed him that they had just been “jumped” by two African American adolescents named Teion Evans and Ronnie Hughes. During this conversation, Bowes showed Officer Douglas his hand and claimed to have been stabbed by Evans and Hughes. Officer Douglas subsequently located Evans and Hughes and searched them for weapons; none were found. During his conversation with Evans and Hughes, five eyewitnesses emerged and insisted that Evans and Hughes were the actual victims. According to Ivy Sweeting, Evans and Hughes were being chased by four white males who repeatedly used the word “nigger” while chasing them. Hughes and Evans both stated they were walking down the street when a car driven by Bowes approached. Hughes and Evans said that Bowes and his three Caucasian companions proceeded to scream, “Niggers. Come fight us you pussy niggers.” Bowes and his friends then exited the car and began punching Evans and Hughes with closed fists while continuing to scream “pussy niggers.” When an unknown motorist stopped, Bowes and his companions got back in the car and

left the scene. However, Hughes and Evans encountered Bowes' group a short time later. During this second encounter, the victims stated that Bowes was carrying a "small metal club," and his companions armed themselves with sticks that had nails protruding out of them. Bowes and one of his companions then chased Hughes as Bowes' two other companions chased Evans. Hughes stated that Bowes and his companions initiated the attack because they were upset that Hughes was in an interracial relationship with the cousin of one of Bowes' companions. Several adult witnesses later interviewed by Officer Douglas confirmed the account provided Hughes and Evans, stating that they observed black males being chased by white males with sticks. Later in the evening, Bowes came to the police with a parent. When asked if he had been stabbed as he had earlier told the police, Bowes admitted that he had not. When asked if he had a metal stick, Bowes conceded that he had been carrying part of a shovel handle. When Officer Fahey asked Bowes to sign a *Miranda* waiver, he declined. Officer Fahey then placed Bowes under arrest and charged him with assault by means of a dangerous weapon and civil rights violations.

**P. "Based on the available evidence it was determined that we would arrest . . ."**

At some point after his return to the UMass Police Station, Lt. Thrasher was contacted by Assistant District Attorney ("ADA") Michael Cahillane. (Thrasher Narrative.) At 12:13 p.m., Lt. Thrasher reported himself "en route to the crime scene with the DA's office." (Discovery No. 000074, Call Number 08-2350.)

At 12:58 p.m., Vassell called the University Police Department and asked to speak with Officer Antonmarchi. (Discovery No. 000128, File# 363.) When told that

Officer Antonmarchi had left for the day, Vassell stated that he “did not feel safe being on campus” and asked “how long” it would be before he could “press charges.” (*Id.*) Dispatcher Harrison put Vassell on hold and called Lt. Thrasher. Lt. Thrasher instructed Dispatcher Harrison to tell Vassell that they were still “processing the crime scene,” but that Lt. Thrasher would pick him up at the campus center between 3:45 and 4:00 p.m. and bring him back to the station. (*Id.*) When Vassell asked whether he would be permitted to press charges once he got picked up, the dispatch officer said that he could take that up with the Lieutenant. (*Id.*)

At 1:14 p.m., Dispatcher Harrison called Vassell to ask where Lt. Thrasher could pick him up in ten minutes. (*Id.*, File #372.) In response, Vassell stated that he would drive to the police station with his family. (*Id.*) According to Lt. Thrasher, after reviewing the “available evidence, the video tape and the crime scene,” the decision was made to arrest Vassell and charge him with two counts of Armed Assault with Intent to Murder, as well as two counts of Aggravated Assault and Battery with a Dangerous Weapon. (Thrasher Narrative.) Vassell was arrested within one minute of his arrival at the police station. (Discovery No. 000074, Call Number 08-2350.)

During his booking, Vassell said to Officer Antonmarchi, “You know what this dude called me, ‘A gerry-curl’d nigger.’ . . . I really can’t [believe this is happening]. I’m dead serious. I’m still trying to . . . pinch myself.” (Discovery No. 000130, Vassell Booking Video.)

**Q. “ . . . BOSSE was trying to calm VASELL . . . .”**

At 2:54 p.m., Officer Brian Kellogg completed modifications to a police report summarizing Chamanlal’s narration of the dormitory videos. (Discovery No. 000021,

Supplemental Kellogg Narrative.) In this report, Officer Kellogg made no mention of Chamanlal's repeated observations concerning the cut on Bosse's hand, despite its obvious relevance as to the identity of the individual who smashed Vassell's window. Officer Kellogg also neglected to note the numerous instances where Chamanlal indicated that Bosse used racial slurs or sought to provoke or antagonize Vassell. Instead, Officer Kellogg wrote: "CHAMANLAL stated that he believed that BOSSE was trying to calm VASSELL but really wasn't sure . . . ." (*Id.*) Notably absent from the final draft of the report is any reference to Chamanlal's claim that Bosse punched him in the head during the fight.

**R. "Black Son of a Bitch."**

At 3:23 p.m., Det. Hagan contacted Maria Padilla for purpose of having her sign the witness statement she had provided earlier in the day. (Discovery No. 000101, Padilla Statement.) According to Padilla, after reporting fight to the police, she went over to Mackimmie "to see what was happening." (*Id.*) When she arrived at the lobby, Padilla observed Bosse and Bowes "cursing a lot and saying racial comments such as 'Nigger' and 'Black Son of a Bitch' while hitting the glass and trying to break the door open." (*Id.*)

At 3:55 p.m., Detective Hagan obtained Vincent Mullen's signature on the statement he had previously provided. (Discovery No. 000100, Mullen Statement.) According to Mullen, after a resident knocked on his door, he "began to hear loud banging and shouting coming from [his] hallway." (*Id.*) Upon arriving on the scene, Mullen saw Vassell and four females on one side of the security door and two white males on the other. The white males "were shouting the word 'nigger' at Jason, kicking

at the door, and punching the window.” Once he saw that the white males were bleeding, Mullen called the police on his cell phone. Mullen subsequently observed a closed knife in Vassell’s hand and heard him yell at the white men “to stop calling him a nigger and to leave him alone.” According to Mullen, “Jason appeared to be very exhausted and fearful. When Jason saw that I was on the phone he asked me to call the police . . . .”

**S. A Dangerous Person.**

After spending Sunday night at the Hampshire County House of Correction, Vassell was transported to Belchertown District Court on Monday morning, February 4, 2008. At his arraignment, a CPCS attorney was appointed to represent Vassell. Despite the fact that Vassell never left the confines of his dormitory, had never been arrested before, and was completely cooperative with the police, the Commonwealth moved to have him detained as a dangerous person. (*See* Commonwealth Mot. for Order of Pre-Trial Detention.) According to the Commonwealth, “[n]o conditions of release imposed upon the defendant [would] reasonably assure the safety of . . . John Bowes and Jonathan Bosse, or the community.” (*Id.*)

A hearing on the Commonwealth’s motion was scheduled for February 7, 2008, and Vassell was transported back the Hampshire County House of Correction where he would spend the next three days.

**T. “The men agreed to meet in the lobby area to battle each other.”**

At 10:00 a.m. on February 4, 2008, Det. Brian Davies submitted an application for a search warrant to enter Vassell’s dorm room. (Discovery No. 000083, Davies Narrative.) In the affidavit in support of the application, Det. Davies credited Bosse and Bowes’ characterization of Vassell as their “attacker” and neglected to mention that the

confrontation between the three men turned physical when Bowes punched Vassell in the face, breaking his nose. (*Id.*) As Det. Davies put it: “The three men engage in a fighting incident that results is [*sic*] Bowes and Bosse being stabbed and Vassell with facial injuries from being punched.” (*Id.*) According to Det. Davies, apparently neither Bosse nor Bowes broke Vassell’s window; rather “[a]n argument ensued between the men and the crank open window was broken.” (*Id.*) In spite of the fact that none of the eyewitnesses suggested that it was Vassell’s plan to pursue a physical altercation inside or outside Mackimmie, Det. Davies wrote: “The men agreed to meet in the lobby area to battle each other.” (*Id.*)<sup>7</sup>

**U. “I’m not sure I want to answer that at this point.”**

On the afternoon of February 4, 2008, Lt. Thrasher returned to Bay State Medical Center with Det. Lisa Kidwell “to interview and photograph Bosse and Bowes, the victims of the stabbing at MacKimmie Residence Hall.” (Discovery No. 000097, Supplemental Thrasher Narrative.) Prior to doing so, Lt. Thrasher took the time to meet “with the Bowes’ family and then Bosse and his father.” (*Id.*) In a report summarizing the subsequent interviews, Detective Kidwell simply stated that “BOSSE has a limited memory of the events of that evening.” (Discovery No. 000094, Kidwell Narrative.) These limitations included an inability to recall: (i) how he got in the dorm; (ii) what he said; (iii) whether he said anything to Vassell; or (iv) what Bowes said. When asked how the fight started, Bosse once again pled ignorance, then added: “I’m not sure I want to answer that at this point.” (Audio Interview of Jonathan Bosse (Feb. 4, 2008).)

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<sup>7</sup> Pressed on the point during his Grand Jury testimony, even Lt. Thrasher conceded that nobody said, “I’ll meet you down on the corner” or that “type of thing.” [G.J. 39:7-9; *see also* 39:10-16 (acknowledging that Vassell never “made a statement to the effect that Bosse and Bowes should meet him at some place . . . to continue the confrontation . . . .”).]

**V. “I might have, I think I lunged at him.”**

With respect to Bowes’ interview, Detective Kidwell noted in her report that “he related the events of the evening with some changes from the initial interview the previous day.” (Kidwell Narrative.) At the outset of the interview, Detective Kidwell made it clear that Bowes was not under arrest and was not a suspect. (Audio Interview of John Bowes (Feb. 4, 2008).) When asked how he happened to end up at Mackimmie Hall, Bowes said that he, Bosse, and Escoto left a gathering around four o’clock in the morning and arranged to spend the night in the room of two girls who lived in that dormitory. (*Id.*) Bowes stated that when they got to the front of Mackimmie nobody was there, and the girls were not answering their cell phones. (*Id.*) Consequently, they decided to knock on the window of “the kid we had the confrontation with.” (*Id.*) Bowes claimed that when they did this, Vassell started yelling, “Get the fuck out of here,” and “Leave, I’m going to kill you.” (*Id.*) When Bowes and Bosse responded by yelling “fuck you,” Vassell allegedly said: “Alright, I’m coming out.” (*Id.*) “At that point,” Bowes said, “we started walking away.” (*Id.*)

Bowes continued to explain that when they got to the front of the building, he saw Vassell standing in the lobby in a ski mask, and at that point, another kid “kind of came up behind me and John.” (*Id.*) Asked how they all ended up in the lobby, Bowes admitted, “that part’s pretty fuzzy.” (*Id.*) Once in the lobby, however, Bowes told Det. Kidwell that Vassell started taunting him and Bosse, yelling: “What are you gonna do?” (*Id.*) When Vassell proceeded to pull out a knife, Bowes admitted that he and Bosse “got pretty upset.” (*Id.*) While he initially claimed not to “remember how [the physical part of the fight] exactly got started,” he later conceded: “I might have, I think I lunged at

him and he swung the knife at me.” (*Id.*) After that concession, Bowes claimed that, “It just went so fast. He was attacking us and . . . we were attacking him.” (*Id.*)

When questioned as to what he and Bosse said in the lobby, Bowes once again focused on their efforts to get Vassell to put down the knife and Vassell’s threats to kill them. (*Id.*) Asked whether he had been drinking, Bowes said that he had “no more than ten [beers]” so he was by no means “falling over.” (*Id.*)

**W. “I definitely did not break the window.”**

The following morning at approximately ten o’clock, Det. Kidwell returned to Bay State Medical Center for a follow-up interview with Bowes. At the outset of this interview, Det. Kidwell noted that she had come in “fresh” to the previous day’s interview, having not read any of the statements or reports concerning the case. (Audio Interview John Bowes (Feb. 5, 2008).) The purpose of this second interview, she stated, was to assist her in developing a “motive as to why this assault occurred.” (*Id.*) Because Bowes’ memory was “far better” than Bosse’s, Det. Kidwell expressed her hope that he could “help me a little bit more with what the motive is.” (*Id.*)

Directing Bowes’ attention to the moment they arrived at Vassell’s window, Det. Kidwell asked what they were doing there. In response, Bowes explained that they were trying get Vassell to let them in so that they could go upstairs. (*Id.*) However, as soon as Vassell saw them he started “screaming and yelling,” saying “Fuck you! Get the fuck out of here!” (*Id.*) According to Bowes, the two men allowed Vassell to make “four more obscene comments . . . like ‘fuck you’ [and] ‘fight me,’” before Bosse “yelled back.” (*Id.*) He claimed that at this point, Vassell stated: “Meet me out front. I’ll kill you both.” (*Id.*)

When again pressed to comment on what transpired prior to Vassell's verbal tirade, Bowes asserted that neither he nor Bosse said anything; they had simply knocked on Vassell's window seeking his assistance. (*Id.*) When asked whether this knocking caused the window to break, Bowes said that it did not. (*Id.*) Det. Kidwell then wondered whether the window might have been broken prior to Bowes knocking on it. "I don't remember," Bowes said. (*Id.*)

Confronted by witness statements that the parties outside "yell[ed] nigger into the room," Bowes said, "I definitely didn't say that." (*Id.*)

"Could John have said that?" Det. Kidwell asked. (*Id.*)

"Maybe," Bowes said. "Yeah, he definitely could have." (*Id.*)

Backing off that statement, Bowes then admitted "hearing the N-word between tossed around inside, but not outside." (*Id.*) In fact, Bowes then purported to recall that the N-word did not get used until "after we'd been stabbed a bunch of times." (*Id.*) Prior to the physical part of the altercation, Bowes recalled Vassell calling them "'cracker' and 'white boy' a bunch of times." (*Id.*) In response to this provocation, Bowes said that Bosse may have used the N-word, but he "wasn't sure." (*Id.*)

Returning to the subject of the broken window, Detective Kidwell informed Bowes that the window was definitely broken from the outside. In response to this information, Bowes all but placed the blame on Bosse, stating: "I definitely walked to the front of the building before [Bosse] did. . . I definitely did not break the window. If [Bosse] did or not, I don't know." (*Id.*) Bowes then circled back to questioning whether racial slurs preceded the fight and said that for Bosse to call a person a "nigger" it would have to be "extreme circumstances." (*Id.*) He then admitted that while he had no

memory of anyone using the word “nigger,” he “wouldn’t be blown out of the water if [Bosse] had or I had” since Vassell had threatened to kill them. (*Id.*)

**X. Conditions of Release.**

On February 7, 2008, the Commonwealth agreed to withdraw its motion to detain Vassell as a dangerous person in exchange for his assent to: (i) stay away from and have no contact with Bosse and Bowes; (ii) reside at his parents’ house in Mattapan; (iii) abide by a curfew; (iv) report weekly to probation; and (v) post a one thousand dollar bail. (*See* Vassell Conditions of Release.)

**Y. “Bowes is seen on the video . . . striking Vassell in the face breaking his Nose.”**

That same day, Officer Antonmarchi filed an application for a criminal complaint against Bowes. (*See* Dkt. No. 0898CR02, Application for Criminal Complaint (filed Feb. 7, 2008).) In his statement of facts in support of the application, Officer Antonmarchi asserted that Bowes and Bosse “came to the window and started a verbal confrontation with Vassell using racial slurs, specifically the word ‘Nigger’ . . . .” (*Id.*)

After referencing the breaking of Vassell’s window, Officer Antonmarchi described how Bosse and Bowes managed to get inside the dormitory: “it is clear that Chamanlal arrives at the dorm, and is let into the building by Vassell. Bowes and Bosse enter the building, ‘tailgating’ off of Chamanlal.” (*Id.*)

According to Officer Antonmarchi, upon entering the building, Bowes made “repeated statements to Vassell about being a ‘nigger.’” (*Id.*) Finally, Antonmarchi noted that Bowes can be “seen on the video” starting the fight by “reaching over Chamanlal and striking Vassell in the face breaking his nose.” (*Id.*)

Based on these facts, Officer Antonmarchi asked that Bowes be charged with: disorderly conduct; a civil rights violation resulting in bodily injury; and assault and battery to intimidate with bodily injury. (*Id.*) The clerk-magistrate found probable cause for each of these charges and sent a summons to Bowes on February 8, 2008, informing him of his arraignment on February 26, 2008.

On that date, the Commonwealth elected to overlook Bowes' known and well-documented history of racist violence, as well as the fact that he has no ties to the community, and chose not to seek his detention as a dangerous person or impose any conditions on his release.

**Z. “Mr. Vassell just start[s] stabbing randomly the other two men.”**

On March 25, 2008, the Commonwealth presented its case against Vassell to the Grand Jury. The first witness called was Lt. Robert Thrasher. According to Lt. Thrasher, when Officers Antonmarchi and DeWolf arrived on the scene “they found two men that had been stabbed” and were directed to a third individual in possession of a knife who “stated that he committed the crime.” [G.J. 4:6-5:11.] When he was asked “how this assault came about,” Lt. Thrasher could have credited accounts accusing a white man in a Patriots jersey of spying into Vassell’s room before propositioning its female occupants. Instead, Lt. Thrasher told the Grand Jurors that “[t]he young man at the window, identified as Mr. Bowes, was – they were looking for a Miss O’Sullivan that lived in the building.” [*Id.* 11:1-19; *see also id.* 23:6-8 (“Again, they were up to see Miss O’Sullivan that lives in the building.”)]. After neglecting to note the use of the word “nigger” during the “verbal disagreement at the window,” Lt. Thrasher said that as “the verbal exchange . . . got more heated, *Bowes* broke the window to the room.” [*Id.* 11:19-12:2 (emphasis

added).] This latter statement disregarded: (i) Chamanlal’s observation concerning the cuts on Bosse’s hand; (ii) Bowes’ explanation as to how Vassell’s window was broken; and (iii) compelling evidence that the window was broken by *both men* in the midst of a joint venture.

Asked to describe what the lobby videos would show, Lt. Thrasher perpetuated the myth of Bosse as peacemaker by informing the Grand Jurors that they would soon see a “rather heated[]” “verbal altercation” between “ Bowes and Vassell . . . with Bosse and Vassell’s friend kind of in the middle of it trying to keep peace.” [*Id.* 15:22-16:3; *see also id.* 22:16-19 (“Bosse and Vishan kind of get in the middle of the two of them and keep trying to talk this out.”).]

Lt. Thrasher next informed the Grand Jury that once “Mr. Bowes punches Mr. Vassell in the nose causing him some injury . . . Mr. Vassell just start[s] stabbing randomly the other two men.” [*Id.* 16:4-7.]<sup>8</sup> As the Grand Jury began to watch the videos, Lt. Thrasher reprised the unsubstantiated allegation that found its way into Detective Davies’ search warrant affidavit by describing “Mr. Vishan”<sup>9</sup> as “Mr. Vassell’s friend who Mr. Vassell had called down to join the fight.” [*Id.* 18:9-13.] As a matter of fact, Chamanlal never joined the fight, nor had he ever stated that he was called to join a fight. Later, when a Grand Juror asked if Vassell’s “taunting” might be responsible for Bosse’s efforts to break down the door separating them, Lt. Thrasher once again ignored

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<sup>8</sup> In making this statement, Lt. Thrasher ignored the video evidence that shows Vassell fighting for his life and apparently credited a drunken statement by Bowes that Vassell “was just stabbin’, like it was no joke.” (Discovery No. 000093, Green Narrative.)

<sup>9</sup> Throughout his Grand Jury testimony, Lt. Thrasher emphasized Mr. Chamanlal’s “otherness” by stating “I can’t pronounce his last name.” [G.J. 18:10-11; *see also id.* 15:17-18.]

eyewitnesses who either said Vassell was silent or simply told the intruders to stop calling him nigger and leave. “I think at this point they’re both in a verbal altercation,” Lt. Thrasher said. [*Id.* 20:1-5.]

Turning to his trips to Baystate Medical Center, Lt. Thrasher indicated that he attempted to speak with Bosse both on the morning of and the morning after the incident, but he “didn’t recall much of it other than that . . . he had been stabbed and [he] knew that from his injuries.” [*Id.* 26:15-18.]<sup>10</sup> Despite the fact that Bosse’s blood alcohol content was .26% -- i.e. more than three times the legal limit to operate a motor vehicle -- Lt. Thrasher explained that Bosse’s poor memory was “due to his injuries.” [*Id.* 26:15.]<sup>11</sup> Asked by a Grand Juror to explain the “significance of a mask,” Lt. Thrasher did not hesitate to speculate that Vassell was trying to avoid detection by the security cameras. [*Id.* 36:8-14.] However, when asked how Bosse and Bowes got in the building, Lt. Thrasher refused to speculate despite video proof and the conclusion of his police department that the two men “tailgate[ed] off of Chamanlal” when Vassell opened the door for his friend. “I don’t know,” he said. [*Id.* 39:17-40:21.]

**AA. “I think he was there just . . . to scare them off.”**

The next Commonwealth witness to testify before the Grand Jury was Ashley Clancy. After Clancy read her witness statement into the record, one Grand Juror asked if Vassell was “all set for an altercation with these people, to let them in to have an

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<sup>10</sup>As previously noted, during Bosse’s first interview he recalled that neither he nor Mr. Bowes interacted with any females inside Vassell’s dorm room and that no racial slurs were uttered at any point in the altercation; when asked during his second interview how the fight started, Bosse answered, “I’m not sure I want to answer that at this point.”

<sup>11</sup> In fact, although Bowes’ blood alcohol content was .18%, Lt. Thrasher never informed the Grand Jury that either “victim” had consumed “a few beers” before encountering Vassell.

altercation.” [G.J. 51:1-3.] “No,” said Clancy, “when I was there he was just letting his friend in because he had called his friend to help him out.” [Id. 51:4-7.] When another Grand Juror later inquired as to what kind of “help” Vassell wanted, Clancy answered: “I’m not sure what. I think he just needed someone like – if anything was going to happen I think he just wanted his to friend to come talk to him or whatever because when I saw his friend, his friend was just standing there. . . . I think he just wanted some support . . . .” [Id. 53:7-20.] Clancy also indicated that she was aware of no other males in the dormitory that Vassell could have called upon for assistance. [Id. 57:2-20.]

Asked whether Vassell is “normally a very aggressive person,” Clancy responded: “Oh, no. Like from the occasions I’ve . . . hung out with him, he’s very talkative, very friendly. He’s just all-round like a really nice kid.” [Id. 54:17-23.]

Questioned as to why Vassell went down to the lobby armed himself with a knife, Clancy stated: “I think he was there just . . . to scare them off.” [Id. 55:7-16.]

Following up on Clancy’s earlier testimony that she did not recognize Bosse or Bowes, the prosecutor asked if it was “fair to say that you didn’t believe that they were residents of the dorm.” [Id. 58:1-7.] When Clancy indicated that she usually “sees the same people in my dorm,” the prosecutor seized on the remark in an apparent attempt to convince the Grand Jury that Vassell had no reason to believe that Bosse or Bowes could access the dormitory. In making this suggestion, the prosecutor never brought it to the Grand Jury’s attention that approximately 500 undergraduates live in Mackimmie. (*See* Dkt. No. 0898CR0290, Statement of Facts in Support of Application for Criminal Complaint 1 (filed Feb. 7, 2008).)<sup>12</sup>

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<sup>12</sup> The final two witnesses were Lindsey Topper and Barbara Rutman. During her testimony, Topper made it clear that Vassell retreated behind the interior door as soon as

**BB. “[S]triking the words ‘with injury.’”**

On April 3, 2008, undersigned counsel sent the following letter to Assistant District Attorney Frank Flannery:

Dear Mr. Flannery,

I learned from the media that you have sought and obtained an indictment against Mr. Vassell for his role in the altercation that took place in his dormitory on the morning of February 3, 2008. As you know, on more than one occasion I have telephoned you to learn how your office intends to proceed against the instigators of this altercation, Mr. Bowes and Mr. Bosse. I have not received any response other than that Mr. Bowes has been charged with a civil rights violation in the Eastern Hampshire District Court. This is patently inadequate given that the District Court has no jurisdiction over a civil rights violation which results in bodily injury. *See, Commonwealth v. Zawatsky*, 41 Mass. App. Ct. 392, 397-98 (1996) (dismissing district court convictions in “gay-bashing” case for lack of jurisdiction). I assume that you are aware that my client’s nose was broken by the first punch thrown in this incident.

I remain puzzled as to why your office would proceed to indictment against my client but not against the two men who subjected him to a vicious racist assault that took place totally within the confines of his home in the MacKimmie dormitory at the University of Massachusetts. Having reviewed the DVD of the crime and reviewed the police reports and witness statements, there is clearly sufficient evidence to charge both of these men with violations of Chapter 265, sections 13A, 37 and 39 (assault and battery and civil rights violations), as well as Chapter 266, section 17, (entering without breaking with intent to commit a felony) and Chapter 266 section 127 (malicious destruction of property), at a minimum.

My client is the victim of a crime. As such, I respectfully request that you inform me pursuant to Chapter 258B of the Massachusetts General Laws how you intend to proceed against the perpetrators of that crime. Unless we receive some indication from you of your intentions in this matter by April 15, we will be forced to look to other prosecutorial agencies for relief.

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the opportunity presented itself, and no one had to hold him back to prevent him from accepting Bosse’s offer to finish the fight. [G.J. 67:23-68:18.] Rutman confirmed that Vassell never said anything about meeting Bosse and Bowes in the lobby in order to fight. [*Id.* 76:15-18.]

Very truly yours,

David P. Hoose

(Letter from David P. Hoose to ADA Frank Flannery (Apr. 3, 2008).)

As it turned out, the prosecution was well aware of the District Court's lack of jurisdiction over a violation of G.L. c. 265, § 37, if that violation results in bodily injury. However, rather than take the obvious step and proceed with an indictment in the Superior Court, on April 1, 2008, the Commonwealth moved to amend Count Two of the complaint against Bowes "[b]y striking the words 'with injury.'" (*See* Dkt. No. 0898CR0290, Commonwealth's Mot. to Amend Compl.)

In taking this action, the Commonwealth effectively turned a blind eye to: (i) medical records that show Vassell's nose was broken; (ii) its own application for a criminal complaint which states that Vassell's nose was broken; (iii) and a statute that defines bodily injury to include fractures and even something as minor as a subdural hematoma.

At the present time, Vassell faces a maximum sentence of thirty years in state prison; Bowes faces a maximum sentence of four years in the house of correction; and Bosse has not been charged with a single crime. Additional facts will be provided as necessary to inform the argument that follows.

### ***Standard of Review***

It is well established that "[t]he equal protection principles of the Fourteenth Amendment . . . and arts. 1 and 10 . . . prohibit discriminatory application of impartial laws." *Commonwealth v. Lora*, 451 Mass. 425, 436 (2008) (quoting *Commonwealth v.*

*Franklin Fruit Co.*, 388 Mass. 228, 229-230 (1983)). “In order to obtain a dismissal on the basis of selective enforcement, the defendant must initially offer evidence that reasonably permits an inference of unlawful discrimination by showing that (1) a broader group of persons than those prosecuted has violated the law; (2) the failure to prosecute others was either consistent or deliberate; and (3) the decision not to prosecute others was based on an impermissible classification factor such as race . . . .” *Commonwealth v. Palacios*, 66 Mass. App. Ct. 13, 19 (2006) (citations omitted). “[O]nce a defendant has raised a reasonable inference of selective prosecution, the Commonwealth must rebut that inference or suffer dismissal of the underlying [indictment].” *Commonwealth v. An Unnamed Defendant*, 22 Mass. App. Ct. 230, 235 (1986) (citation omitted).

### ***Argument***

#### ***A. Jonathan Bosse has not been Prosecuted Despite Clear Evidence that He Violated Numerous Laws.***

It is well-settled that one defendant may be criminally responsible for the acts of another if the Commonwealth establishes the defendant’s presence at the scene of the crime, his intent to commit the crime or knowledge that another intends to commit the crime, and his willingness and availability by agreement to help another in carrying out the crime if necessary. *Commonwealth v. Netto*, 438 Mass. 686, 701 (2003); *Commonwealth v. Mahoney*, 406 Mass. 843, 845-846 (1990). Further, “where the evidence establishes that two persons are culpable for a crime, but the evidence fails to establish who was the principal and who was the joint venturer, a jury are warranted in inferring that both were either the principal or the joint venturer.” *Commonwealth v. Williams*, 450 Mass. 894, 898 (2008) (citations omitted).

In this case, there is ample evidence to find Bosse guilty of the following felonies as either a principal or joint venturer with Bowes:

- Civil Rights Violation with Bodily Injury – Chapter 265, § 37
- Assault or Battery for Purpose of Intimidation – Chapter 265, § 39
- Entering without Breaking at Night with Intent to Commit a Felony - Chapter 266, § 17
- Malicious Destruction of Property – Chapter 266, Section 127

1. *Chapter 265, Section 37.*

Under the Massachusetts General Laws, it is a crime for anyone to use “force or threat of force” to “willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States.” G.L. c. 265, § 37.

Among the rights and privileges protected by this statute is the right “that all people have the right to be safe and secure and to use their property peacefully,” as well as “the right to occupy housing without intimidation or interference through force or threat of force because of the person’s race, color or national origin.” *Commonwealth v. Stephens*, 25 Mass. App. Ct. 117, 123 (1987) (citations omitted).

To prove a violation of this statute, the Commonwealth need not establish that a victim “actually knew that [he] had or [was] exercising rights and privileges protected by G.L. c. 265, § 37.” *Id.* at 124 (citation omitted). “Nor is it necessary to show that the defendant actually knew that he was depriving a person of a specific right guaranteed by the Constitution or laws of either the United States or the Commonwealth.” *Id.* at 125 (citation omitted). In fact, “[t]he deprivation of civil rights contemplated by G.L. c. 265,

§ 37, does not [even] have to be the predominant purpose of the defendant's acts." *Id.* at 124 (citations omitted).

In the case at bar, there is clear evidentiary basis for finding Bosse guilty of this crime as a principal. First, there is the testimony of Barbara Rutman, who stated that she woke up to the sound of "two white males" outside Vassell's window "aggressively yelling racial slurs" including: "You're a dirty nigger!" "Your whole family is crap!" "You're a piece of shit!" and "Come out and fight me!" This evidence, in and of itself, is sufficient to support a Chapter 265, Section 37 charge, as it demonstrates a clear effort on Bosse's part to use the threat of force to willfully interfere with Vassell's rights to be safe and secure and to occupy housing without intimidation because of his race.

Of course, Rutman's account of the initial encounter at the window is not the only proof of Bosse's involvement as a principal. Compelling evidence suggests that Bosse was principally responsible for smashing Vassell's window. This evidence includes: (i) the cut on Bosse's hand repeatedly noted by Chamanlal; (ii) Bowes' acknowledgment that Bosse could have broken the window since he himself did not; and (iii) the consciousness of guilt exhibited by Bosse when he told Lt. Thrasher and Detective Hagan that he never went near Vassell's dorm room.<sup>13</sup>

Once Bosse and Bowes entered the lobby, Chamanlal alleged that both men continued to violate Chapter 265, Section 37 by "talking shit" and using racial slurs to threaten and harass Vassell. This claim is corroborated by Jennifer Rogacz – a resident of Mackimmie who "didn't know any of the kids" – who noted that Bosse, in particular, was "yelling racial slurs and yelling at the African American boy to fight him."

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<sup>13</sup> As will be discussed, this evidence would also support the charge of malicious destruction of property in violation of Chapter 266, § 127, or defacing of state property in violation of Chapter 266, § 96.

Putting aside, for the moment, Bosse's conduct during the fight, the racist invective he unleashed afterwards while kicking and punching the door and begging Vassell to finish the fight is additional evidence of Bosse's sustained effort to use the threat of force to deprive Vassell of his civil rights.

With respect to Bosse's culpability as a joint venturer, the undisputed evidence shows that he was with Bowes during each of the crimes his "buddy" is charged with committing. The evidence is also overwhelming that Bosse not only knew that Bowes intended to commit these crimes but shared his intent. As noted above, Bosse's "best friend" had a long history of racist violence dating back to their days at Milton High School. It would strain credulity to suggest that when Bowes attacked a back-peddling black man Bosse was caught off guard.<sup>14</sup> Finally, the video evidence of Bosse rolling up his shirtsleeves in the moments before Bowes threw the first punch speaks volumes about Bosse's willingness and availability to help Bowes in carrying out the attack if such help became necessary.

In short, given the circumstances surrounding Bowes' crimes and Bosse's "subsequent participation in the offense[s]," a jury could easily "infer" that Bosse had "the requisite mental state" to find him guilty under a joint venture theory.

*Commonwealth v. Zawatsky*, 41 Mass. App. Ct. 392, 399 (1996) (citation omitted). Since Bosse's violation of Chapter 265, Section 37 resulted in an injury to Vassell, Bosse should have been indicted and prosecuted in Superior Court.

2. *Chapter 265, Section 39.*

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<sup>14</sup> It bears noting here that Bosse exhibited a consciousness of guilt as to the circumstances surrounding the start of the fight when he indicated he did not want to answer a question about that "at this point."

G.L. c. 265, § 39 is another “so-called ‘hate crime’ statute.” *Commonwealth v. Barnette*, 45 Mass. App. Ct. 486, 489 (1998). It provides that “[w]hoever commits an assault or a battery upon a person ... for the purpose of intimidation because of said person’s race, color, religion, or national origin, shall be punished.” G.L. c. 265, § 39 (emphasis added). The “essential elements of the crime are: (1) the commission of an assault or battery (2) with the intent to intimidate (3) because of a person’s race, color, religion, or national origin.” *Barnette*, 45 Mass. App. Ct. at 489.

“[A]n assault is defined as either an attempt to use physical force on another, or as a threat of use of physical force. . . . The latter requires a showing that the defendant engaged in objectively menacing conduct with the intent to put the victim in fear [or apprehension] of immediate bodily harm.” *Commonwealth v. Werner*, 73 Mass. App. Ct. 97, 102 (2008) (quotation marks and citations omitted); *see also Commonwealth v. Ford*, 424 Mass. 709, 711 (1997) (defining assault and battery as an “intentional and unjustified use of force upon the person of another, however slight” (citation omitted)).

In order to satisfy the second element of this offense, the Commonwealth must establish that “the defendant had the specific intent to put his victim[] in fear because of [his] membership in a protected class, not simply the intent to put [him] in fear of an imminent battery.” *Id.* at 491.

Here, the irrefutable evidence is that Bosse began making overtly racist threats at Vassell’s window and did not cease doing so even when Vassell took out a knife and informed the two intoxicated intruders that he was prepared to use it. After Vassell retreated behind a locked door, Bosse persisted in calling Vassell a “nigger” while kicking at the door, and punching the window,” according to Vincent Mullen, the R.A.

There is no question that this assaultive behavior had one purpose and one purpose only: to place Mr. Vassell in mortal fear due to the color of his skin. There is also no question that it succeeded. In his statement, Mullen said that as Bosse demanded that Vassell return to the lobby to finish the fight, “Jason appeared to be very exhausted and fearful.” During the recorded interview he gave at the hospital, Vassell referenced similar attacks on other people of color in making it clear that he viewed the assault he survived as an attempted lynching.

Once again, in choosing not to charge Bosse with a violation of Chapter 265, Section 39, the Commonwealth ignored overwhelming evidence from which a jury could find Bosse guilty of a hate crime both as a principal and as a joint venturer.

3. *Chapter 266, Section 17.*

Even if the Commonwealth were to give Bosse and Bowes the benefit of the doubt and conclude that their “tailgating” off of Chamanlal did not constitute a forceful entry into Mackimmie, *but see Commonwealth v. Cextary*, 68 Mass. App. Ct. 752, 758-59 (2007) (recognizing that “Massachusetts law long has accepted the concept of “constructive breaking,”” which may include an “entry gained through a false pretense” (citation omitted)), there is no question that both men violated G.L. c. 266, § 17. Pursuant to that provision: “Whoever, in the night time, enters without breaking . . . a building . . . with intent to commit a felony, the owner or any other person lawfully therein being put in fear, shall be punished . . . .” *Id.*

As noted above, Bosse and Bowes clearly entered the dormitory with the intent to violate two civil rights statutes. *See Commonwealth v. Maia*, 429 Mass. 585, 587 (1999) (“A finding of intent usually is based upon what reasonably is to be inferred from

conduct.” (citation omitted)). Because the statutes in question are “offenses for which a person may be sentenced to state prison,” they are felonies. *Commonwealth v. Sanchez*, 70 Mass. App. Ct. 699, 701 (2007). Because Vassell was lawfully in Mackimmie and put in fear by the two white intruders’ conduct, Bosse’s behavior ran afoul of Chapter 266, Section 17, as well.

4. *Malicious Destruction of Property.*

G.L. c. 266, § 127 states, in pertinent part: “Whoever destroys or injures the personal property, dwelling house or building of another . . . shall, if such destruction or injury is wilful and malicious, be punished . . . .” *Id.* “The word ‘wilful’ means intentional and by design in contrast to that which is thoughtless or accidental. Malice, on the other hand, refers to a state of mind of cruelty, hostility or revenge.”

*Commonwealth v. Morris M.*, 70 Mass. App. Ct. 688, 691 (2007) (citation omitted).

Proving malice in this context does not require the Commonwealth to show that the defendant knew “the identity of the owner of the property damaged.” *Commonwealth v. Redmond*, 53 Mass. App. Ct. 1, 4 (2001).

As noted above, substantial evidence suggests that Bosse was principally responsible for smashing Vassell’s window at a time when he and Bowes were shouting racial slurs at him. *See supra* note 12 and accompanying text. In light of such evidence, it is clear that the Commonwealth could satisfy its burden of proof with respect to this fourth felony charge.

5. *Pertinent Misdemeanor Offenses.*

Given the fact that Bosse did not throw the first punch and his record of racist violence is not as extensive as Bowes’, an argument could have been made that Bosse

should not have been prosecuted as aggressively as his cohort. However, even if Bosse was given every consideration and the Commonwealth opted not to seek any of the aforementioned felony charges, there is no reason why Bosse should not have been prosecuted for the following misdemeanor offenses:

- Assault and Battery – Chapter 265, § 13A
- Threat to Commit a Crime – Chapter 275, § 2
- Disorderly Conduct – Chapter 272, § 53
- Defacement or Injury to State Building – Chapter 266, § 96
- Trespass on Public Property – Chapter 266, § 123

(a) *Assault and Battery.*

As noted above, an assault and battery is an “intentional and unjustified use of force upon the person of another, however slight.” *Commonwealth v. Ford*, 424 Mass. 709, 711 (1997) (citation omitted). A review of the video reveals Bosse grabbing and striking Vassell on several occasions.<sup>15</sup> It also reveals Bosse striking Chamanlal.

Although Bosse described Chamanlal as a “second assailant” at the scene, there is no question that Chamanlal played the role of a true peacemaker during the conflict, and his efforts to thwart Bosse’s attack of Vassell did not entitle Bosse to attack him.

(b) *Threat to Commit a Crime.*

In Massachusetts, it is against the law to threaten to commit a crime “against the person or property of another.” Mass. Gen. Laws ch. 275, § 2. Proving this offense

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<sup>15</sup> While Bosse may claim that this conduct was justified in defense of Bowes, it is doubtful that Bosse would even be entitled to a defense of another instruction at trial. *See Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 307 (1991) (noting that the requirements for an instruction on defense of another are closely related to those for an instruction on self-defense). In order for Bosse to be justified in using force to protect Bowes, Bowes would have to be justified in using force to protect himself. *Commonwealth v. Kivlehan*, 57 Mass. App. Ct. 793, 795 (2003) (citation omitted). Generally speaking, self-defense “cannot be claimed by a person who provokes or initiates an assault unless that person withdraws in good faith from the conflict and announces his intention to retire.” *Commonwealth v. Evans*, 390 Mass. 144, 153 (1983).

requires satisfaction of the following elements: “(1) an expression of intention to inflict a crime upon another, and (2) the ability to do so (3) in circumstances that would justify apprehension on the part of the recipient of the threat.” *Commonwealth v. Troy T.*, 54 Mass. App. Ct. 520, 522-23 (2002) (citing *Commonwealth v. Robicheau*, 421 Mass. 176, 183 (1995)). Once again, the eyewitnesses to the confrontation both at the window and in the lobby all stated that Bowes and Bosse communicated their intention to cause Vassell bodily harm. The smashing of the window provided Vassell with clear notice that Bosse had the ability to inflict a serious injury, and the prolonged and escalating nature of the assaultive conduct justified apprehension on Vassell’s part. In sum, the threats Bosse made were hardly empty; there were, in fact, criminal.

(c) *Disorderly Conduct.*

G.L. c. 272, § 53 provides that “idle and disorderly” conduct constitutes a punishable criminal offense. Under this statute, disorderly persons are “those individuals who, ‘with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof ...: (a) engage[ ] in fighting or threatening, or in violent or tumultuous behavior; or ... (c) create[ ] a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.’” *Commonwealth v. Chou*, 433 Mass. 229, 232 (2001) (citations omitted).

“Fighting” is descriptive of conduct which by its very nature involves the use of physical force or violence or any threat to use such force or violence if that threat is objectively possible of immediate execution. . . .  
“Tumultuous behavior” is conduct which may be characterized as involving riotous commotion and excessively unreasonable noise so as to constitute a public nuisance.

*Commonwealth v. Sinai*, 47 Mass. App. Ct. 544, 548 (1999) (citations omitted). Remarks of a “threatening nature” may run afoul of Chapter 272, Section 53 “even if they f[a]ll

short of threatening to commit a crime.” *Commonwealth v. Sholley*, 432 Mass. 721, 728 (2000).

From the moment Bosse and Bowes encountered Vassell, their behavior was nothing if not threatening and tumultuous. Outside Vassell’s window, the racist language they used was loud and menacing enough to wake up a neighbor. Inside the lobby, the two intoxicated intruders grew increasingly combative until Bowes made good on his promise to cause Vassell physical harm. After taking the side of the initial aggressor in a two-on-one fight on camera, Bosse finally threw himself completely into the project of attempting to demolish a University door while screaming “nigger” at the top of his lungs.

Suffice it to say, a reasonable jury could find Bosse guilty of disorderly conduct on these facts.

(d) *Malicious Destruction of a State Building*.<sup>16</sup>

(e) *Trespass on Public Property*.

By statute, “[w]hoever willfully trespasses upon land or premises belonging to the commonwealth, or to any authority established by the general court for purposes incidental to higher education, appurtenant to a public institution of higher education . . . shall be punished . . . .’ G.L. c. 266, § 123. Here, although Bosse and Bowes said that they went to Mackimmie to spend the night with a resident of the dormitory, they were never properly admitted as guests and ignored Vassell’s repeated requests to leave the premises. Under these circumstances, Bosse could have been charged with violating Chapter 266, Section 123.

B. *The Failure to Prosecute Jonathan Bosse was Deliberate.*

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<sup>16</sup> See *supra* note 12 and accompanying text.

The failure to charge Jonathan Bosse with a single criminal offense cannot be ascribed to accident, oversight, or mistake. The crimes Bosse committed did not occur on the periphery of a melee. Rather, he was at the core of a prolonged two-on-one assault.

While dorm security cameras captured a great deal of Bosse's criminal conduct, that is not the only evidence that could have been used to prosecute him. When interviewed at the hospital, Bosse provided a completely preposterous account of the fight's beginning, middle, and end. This story was not only inconsistent with the video evidence; it was flatly refuted by Mackimmie residents who were minding their own business until Bosse and Bowes -- two individuals with no absolutely connection to the University -- began tormenting a twenty-three year-old student in the privacy of his dormitory room. In short, the evidence against Bosse is so blatantly obvious no unbiased prosecutor could possibly miss it.

C. *The Decision not to Prosecution Jonathan Bosse was Based upon the Impermissible Factor of Race.*

Prior to raising the specter of an impermissible motive in this case, undersigned counsel conducted a rigorous evaluation of the evidence and sought alternative explanations for each questionable exercise of prosecutorial discretion. Unfortunately, racism is the only plausible explanation for the criminal charges now pending.

Surely, the Commonwealth has no illusions of making Jonathan Bosse, the owner of a blood alcohol content of .26%, its star witness at Jason Vassell's trial. As Det. Kidwell noted during her interview with Bowes, Bosse remembers, or purports to remember, next to nothing about the critical events of the evening. Whether Bosse was so drunk he actually has no memory, or whether his poor recollection is a matter of

convenience, is immaterial. At trial, the most he can say is that at some point he got stabbed. Suffice it to say, this does not loom as a contested issue.

In short, while the Commonwealth is obviously not above overlooking criminal conduct when cutting deals with cooperating witnesses, its general practice is to get something in return. Since Bosse has nothing to offer, this non-discriminatory reason for withholding criminal charges can be ruled out.

A second explanation the Commonwealth will sometimes offer when deciding not to bring criminal charges is an individual's good moral character, as evidenced by his or her history of positive contributions to the community. However, in this case, it is difficult to see how this factor could possibly benefit Mr. Bosse. Neither Bosse nor Bowes lives, works, or attends school in Hampshire County. In addition, although neither man was twenty-one years old at the time of the incident, their sole apparent purpose in coming to the University was to consume large quantities of alcohol.

With respect to Bosse and Bowes' contributions to their own communities, the Commonwealth has not advised the defense that either of these two young men has done a single good work in Milton, Massachusetts or Hancock, New Hampshire. Moreover, it has come to the attention of undersigned counsel that both men are, or at least were, members of a demented group of white supremacists who refer to themselves as the "East Milton Mafia."

In sharp contrast stands Jason Vassell, who was a full time student at the University and also worked almost forty hours a week as a personal care attendant. Within hours of his arrest, students and faculty members at UMass began calling attention to Vassell's diligent work as a student, his dedication to the disabled men he

served professionally, and his commitment to the at-risk youth he tutored. In addition to drawing attention to Vassell's many virtues, these students and faculty members repeatedly characterized the conduct of Bosse and Bowes as an attack on the entire University and pled with the District Attorney's office to reprioritize their prosecution. Ultimately, the District Attorney decided to turn a deaf ear to the community.

A third ostensible reason for declining to bring charges against Bosse might stem from the seriousness of the injuries he suffered.<sup>17</sup> At the Grand Jury, Lt. Thrasher made no secret of the fact that his initial trip to Bay State Medical Center was not merely to collect evidence, but to check on Bosse and Bowes' condition. [G.J. 26:6-9.] During the initial stages of the investigation, empathy for these two non-students soon extended beyond concern for their physical well being.

First, after instructing Officer Antonmarchi to bring a "doped up" Jason Vassell to the police station for a "quote, unquote statement," Lt. Thrasher cut short the initial interview of Jonathan Bosse based on Lt. Thrasher's own concern that Bosse's medication might be having some detrimental impact on his faculties. Second, once that interview officially concluded, Det. Hagan and Lt. Thrasher remained in the hospital to "cheer up" Bosse by talking football and joking about his loyalties to the home team. The sympathy these officers conveyed during this conversation for the loss of Bosse's cherished jersey was not only heartfelt; Det. Hagan deemed Bosse's fondness for the shirt significant enough to note, *in his police report*, that Bosse acquired it in 2004 and had worn the jersey to parades commemorating Super Bowl victories. (*See* Discovery No. 000029,

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<sup>17</sup> That being said, it bears noting that Bosse's injuries were not so severe as to require him to stay at Baystate Medical for an extended period of time. (*See* Discovery No. 000094, Kidwell Narrative (noting Bosse's discharge from the hospital prior to her arrival at 10:09 a.m. on February 5, 2008).)

Hagan Narrative (“At first he was reluctant [*sic*] to give us his shirt unless it had stab wounds because he had it since ’04 at every parade etc.”).) Finally, after declining to speak with Jason Vassell’s parents -- who drove their youngest child to the police station thinking he was going there to press to charges, only to watch in horror as he was taken into custody -- Lt. Thrasher made time for off-the-record conversations with the Bowes and Bosse families at the hospital.<sup>18</sup>

This solicitude for Bosse could hardly be more different than the disdain displayed toward Vassell. Within hours of the incident, Lt. Thrasher labeled Vassell a “donkey” and an “asshole” and characterized his account of the event as “horseshit.”<sup>19</sup> “Given the history of racial stereotypes against African-Americans and the prevalent one of African-Americans as animals . . . , it is a reasonable -- perhaps even an obvious -- conclusion that [Thrasher] intended [a] racial insult . . . .” *United States v. Jones*, 159 F.3d 969, 977 (6th Cir. 1998) (finding a *prima facie* case of selective prosecution based on the “racially motivated” conduct of the arresting officers). However, even if the court were to conclude that Thrasher’s dehumanizing remarks were not overtly racist, there is no denying that they served to discourage any consideration of the trauma that Vassell

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<sup>18</sup> Prior to meeting with him at the hospital, Lt. Thrasher spoke with Bowes’ father when he called the UMass Police Department seeking information regarding the incident. (*See* Discovery No. 000074 (“Jack Bowes (Father) . . . called requesting to speak with someone involved in the incident. Subject transferred to Id 35 [Lt. Thrasher].”))

<sup>19</sup> At the conclusion of the initial interview with Bosse, Det. Hagen inadvertently left the recording device on, and it captured the conversation between him and Thrasher on their way to the parking lot. Although Bosse had just told the two officers that he never went to Vassell’s window and nobody had used racial slurs, neither Thrasher nor Hagan ever questioned Bosse’s credibility or suggested that his account was “horseshit.”

had just endured.<sup>20</sup> If Vassell was, in Thrasher’s words, “an asshole,” the treatment he received from Bosse and Bowes was, on some level, justified.

One apparent reason for Thrasher’s hostility toward Vassell can be traced to the Lieutenant’s inability to get past the thought of Vassell as a “drug dealer.” While this allegation obviously lacked a factual basis, it conformed nicely to a longstanding racial stereotype. Hence, Thrasher persisted in clinging to the notion that Vassell was not a “poor black kid” who was subjected to a racist assault, but rather the perpetrator of a hit on two poor white kids who were guilty, at most, of having substance abuse problems.<sup>21</sup>

Quantifying the ramifications of this racist thinking is no easy task. However, it clearly influenced several important Commonwealth decisions. First, Vassell’s perceived unworthiness as a victim undoubtedly played a part in choosing to disregard the medical evidence and pretend that Bowes caused Vassell no bodily harm. It also appears to have caused the Commonwealth to overlook the ongoing threat posed by the two white assailants.

As noted above, at the time of the incident, John Bowes had a well-documented history of violent behavior, including at least one overtly racist assault and battery on an African-American man, while subjecting him to the same ignorant tirade to which he

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<sup>20</sup> Studies show that “the experience of racism has been implicated in the development of several potentially fatal, stress-related diseases (e.g., high blood pressure, stroke, and cardiovascular disease . . . . In addition, psychiatric disorders (e.g., anxiety, depression and substance abuse . . . ), lowered self-esteem . . . , lowered levels of life satisfaction . . . , and lower academic success . . . have been linked to racial oppression.” Shawn O. Utsey, *Racism and Psychological Well-being of African American Men*, JOURNAL OF AFRICAN AMERICAN STUDIES, VOL. 3, #1, pg. 70 (1997) (citations omitted).

<sup>21</sup> Benjamin D. Steiner & Victor Argothyhe, *White Addiction: Racial Inequality, Racial Ideology, & the War on Drugs*, 10 TEMP. POL. & CIV. RTS. L. REV. 443, 445 (2001) (“[T]he contemporary drug war promulgates a profoundly racist illusion that represents white illicit drug abuse as a private health problem and black illicit drug abuse as a public “criminal” activity.”).

subjected Mr. Vassell. Under these circumstances, the Commonwealth could have: (i) asked the Attorney General to seek injunctive relief against Bowes' pursuant to G.L. c. 12, § 11H;<sup>22</sup> (ii) sought Bowes' detention as a dangerous person; or (iii) insisted on a pretrial condition of release that Bowes stay away from and have no contact with Vassell. In failing to take any of these protective measures, the District Attorney's office demonstrated its indifference to the fate of Jason Vassell, as well as the safety of other people of color in the community.

### ***Conclusion***

“For some reason that I am entirely unable to understand, a sentiment in this county . . . is utterly opposed to the prosecution and conviction of anybody and everybody who took part in this horrible affair.” – Judge William Butler, on the failure to bring members of a Pennsylvania county lynch mob to justice, *as quoted in Philip Dray, At the Hands of Persons Unknown: the Lynching of Black America* 183 (2002).

In this case, there has never been any question as to the identity of the two white men who took part in the violation of Jason Vassell's civil rights. By declining to prosecute one of these men, and bringing inappropriately reduced charges against the other, the District Attorney has engaged in selective prosecution based on the basis of race. As a result of this clear-cut violation of Mr. Vassell's state and federal

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<sup>22</sup> That provision states that: “Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.” G.L. c. 12, § 11H.

constitutional rights, the defendant respectfully requests that this Honorable Court dismiss the above-numbered indictment.

Respectfully Submitted,  
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By \_\_\_\_\_

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