COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Docket No. 2016-P-0613

OMARI PETERSON,
Plaintiff - Appellee

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant – Appellant

BRIEF FOR THE PLAINTIFF - APPELLEE IN RESPONSE TO THE COMMONWEALTH'S APPEAL FROM THE DENIAL OF ITS MOTION TO SUPPRESS BY A JUSTICE OF THE SUFFOLK COUNTY SUPERIOR COURT

SUFFOLK COUNTY

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ISSUE PRESENTED

WHETHER THE MOTION JUDGE PROPERLY DENIED THE COMMONWEALTH'S MOTION TO DISMISS WHERE PETERSON IS WITHIN THE CLASS OF PERSONS WHOSE CONVICTIONS WERE VACATED ON GROUNDS "TEND[ING] TO ESTABLISH INNOCENCE" WITHIN THE MEANING OF *G. L. C. 258D* INSOFAR AS THE BASIS FOR THE REVERSAL OF HIS CONVICTION RESTED UPON A LACK OF REASONABLE SUSPICION AND PROBABLE CAUSE, MEANING A LACK OF SUFFICIENT INDICIA OF CRIMINAL ACTIVITY

STATEMENT OF THE CASE

In 2012, the Plaintiff, Omari Peterson, had his criminal conviction overturned by this Court. The Appeals Court held in reversing Peterson's conviction:

> "In order to expand a threshold inquiry of a motorist and prolong his detention, an officer must reasonably believe that there is further criminal conduct afoot, and that belief "must be 'based on specific and articulable facts and the specific reasonable inferences which follow from such facts in light of the officer's experience.'" *Commonwealth v. King*, supra, quoting from *Commonwealth v. Silva*, 366 Mass. 402, 406 (1974). The question, therefore, is whether the officers had reasonable suspicion to detain further the occupants after the defendant complied with the normal requirements for the traffic violation.
>
> Here, the officers relied on the criminal history of the occupants of the vehicle to justify the interrogation and exit order.[5] The motion judge concluded that the mere presence of the four individuals together, coupled with their criminal history, warranted further questioning by the officers. However, this misses the mark. "A mere hunch . . . on the part of the officer that there is something wrong is insufficient to satisfy the

> requirement of specific and articulable facts." *Commonwealth v. Williams*, 46 Mass. App. Ct. at 184. See *Commonwealth v. Torres*, 424 Mass. 153, 158 (1997) (police may not interrogate passengers unless there is a "reasonable suspicion, grounded in specific, articulable facts" of criminal activity or suspicious behavior)...
> The officers did not see any visible presence of contraband or weapons... Here, the officers testified that they believed that a drug transaction or prostitution may have been occurring, but had no plausible explanation of how they reached that conclusion other than relying on the reputations of the occupants...
> In short, the exit order was a pretext, as it is devoid of any specific articulable facts on which to base a reasonable apprehension of danger or that a crime had been committed. Legitimatizing an exit order that stems from driving in a high crime area and the reputations of the passengers, without more, would set a dangerous precedent." Commonwealth v. Peterson (attached to Defendant's Motion to Dismiss and reported at 82 Mass.App.Ct.1118 (2012)).

On or about November 26, 2014 the Plaintiff, Omari Peterson ("Peterson"), timely filed a civil action pursuant to G.L. c. 258D, properly naming the Commonwealth as the defendant. (Deft RA7-RA14).[1] The Commonwealth moved to dismiss Peterson's Complaint. It claimed that Peterson is not within the class of persons the wrongful conviction law is designed to protect.

[1] References to the record are via reference to the Defendant-Appellant's Record Appendix (and Addendum) and are cited herein as "(Deft RA [page no.])" References to the Defendant-Appellant's Brief are herein cited as "(Deft. Brf., [page no.])"

After a hearing, on February 3, 2016, the Superior Court (Hon. Lauriet, J.) denied the Commonwealth's motion to dismiss. (Deft. RA43-RA47). On February 12, 2016 the Commonwealth filed a notice of appeal, and the case was subsequently entered onto this Court's docket. (Deft RA48-RA49).

STATEMENT OF FACTS FROM UNDERLYING TRIAL[2]

As the Appeals Court's decision in the criminal appeal states:

> "On December 5, 2008, Omari Peterson was stopped by Boston police Officers Brian Dunford and Brendan Lyons for several traffic violations at the intersection of Magnolia and Lawrence Streets in Dorchester,[2] an area known for its dangerousness, firearms, and gang activity. At the beginning of their shift, the officers were told to be aware of the increase of firearms in the area. Once stopped, the defendant produced his license and registration upon a request from Officer Lyons. After the license and registration proved valid, the officers questioned the occupants of the vehicle. Later, Officer Dunford would testify to knowing the reputations of all the passengers and that the front seat passenger, Ms. Cowans, looked out of place. Subsequently, the occupants were ordered out of the vehicle, whereupon the defendant was found with a knife clipped to his jeans."

[2] *See also* Massachusetts Appeals Court Docket No. 2011-P-893 for transcripts of the criminal trial.

Commonwealth v. Omari Peterson (No. 2011-P-893, October 25, 2012) (Deft RA 1-3).

The "knife clipped to [Peterson's} jeans" was, in fact, a simple standard folding knife of the variety found for sale in retail stores like WalMart used for a variety of lawful purposes like fishing, hunting, camping and work tasks. Subsequent to the decision in the criminal case, this Court held unequivocally that such items are not within the dangerous weapons statute. *See* Commonwealth v. Higgins, 85 Mass. App. Ct. 534 (2014) ("...Thus, under the plain language of the relevant portion of the statute, a knife is not prohibited merely because it has a blade that locks into place. Cf. *Commonwealth v. Wynton W.*, 459 Mass. 745, 755 n. 5 (2011) (presence of 'a locking mechanism ... or any other individual feature[ ] is not dispositive of the question whether a knife is dangerous per se under the common law'). Instead, *the Commonwealth would have to prove in addition that there was a 'device or case' that allowed the blade to be drawn at a*

locked position. G.L. c. 269, § 10(*b*).")

(emphasis added).

ARGUMENTS

I. THE MOTION JUDGE PROPERLY DENIED THE COMMONWEALTH'S MOTION TO DISMISS BECAUSE HE PROPERLY FOUND THAT PETERSON IS WITHIN THE CLASS OF PERSONS WHOSE CONVICTIONS WERE VACATED ON GROUNDS "TEND[ING] TO ESTABLISH INNOCENCE" WITHIN THE MEANING OF *G. L. C. 258D*.

A. Peterson is a member of the relevant class within the meaning of *G.L. c. 258D*. As such, the motion judge properly denied the Commonwealth's motion to dismiss.

In a *c. 258D* claim, "the question whether the grounds for relief 'tend to establish' that the plaintiff did not commit the crime is primarily a question of law." Guzman v. Commonwealth, 458 Mass. 354, 365 (2010). As such, whether Peterson is eligible to seek relief under the statute, is a legal issue that must be determined by the court. When the plaintiff establishes the grounds for relief that tend to establish he did not commit the crime for which he was convicted, he is, in fact, ultimately entitled to partial summary judgment in his behalf. Id. Drumgold v. Commonwealth, 458 Mass. 367 (2010). Here, the

plaintiff is resolutely within the class of persons whose convictions were vacated on grounds "tend[ing] to establish innocence" within the meaning of *G. L. c. 258D*. *See* Drumgold, *supra*, at 378-79 ("Because the question whether the grounds for relief "tend to establish" the plaintiff's innocence is primarily a question of law, see Id. at 365, we direct that partial summary judgment be granted against the Commonwealth on so much of Drumgold's claim as alleges that he is eligible to seek relief under the statute. G. L. c. 258D, s. 1 (B) (ii).")

The legal and factual errors committed in Peterson's case related directly and proximately to the issue of criminal liability or lack thereof (i.e., "innocence") were entirely straightforward, and were uncomplicated, despite the Commonwealth's anemic attempt to portray them as such. In its brief, the Commonwealth strains to contend in a scattergun manner, "The reversal of the denial of a motion to suppress does not tend to establish innocence." (Deft Brf, 11). This is simply not the case. That salient issue, as the motion judge in the case at bar properly

recognized, is not the *form* of the judicial relief granted in the criminal case, but the attendant *facts and circumstances surrounding* that judicial relief (i.e., the reversal of Peterson's conviction).

As the Appeals Court held in the criminal case here, *inter alia*, "In short, the exit order was a pretext, as it is devoid of any specific articulable facts on which to base a reasonable apprehension of danger or that a crime had been committed." Because Peterson simply was not engaged in criminal activity at the time of the stop, nor was there any indicia of such activity, this legal fact alone manifestly "tend[s] to establish [his] innocence." *G.L. c. 258D §1(B)(ii)*. That indeed is, for all intents and purposes, alone dispositive of the issue as to whether the motion judge properly denied the Commonwealth's motion to dismiss. The Commonwealth is thus mistaken that simply because the procedural auspices of the grounds for relief was an unlawful search and seizure, this as a matter of law did not sufficiently tend to "establish innocence" within the meaning of *G.L. c. 258D*.

The Commonwealth's claims, grounded as they are in the form of judicial relief and the time-proven incorrect premise that the grant of judicial relief

must somehow proclaim the "innocence' of the plaintiff, are directly contrary to the Supreme Judicial Court's decision in Drumgold. There, the SJC allowed the plaintiff partial summary judgment, specifically finding, "Nor is it necessary that the judge [or appellate court] granting relief make any specific finding as to the likely innocence of the defendant in order for him to be eligible to bring an action under c. 258D" Id. at 378-379.

Any claim that Peterson is not a member of the class referenced in *G.L. c. 258D* because the Appeals Court failed to proclaim his innocence is therefore illogical, inconsistent with the role of the appellate courts, and contrary to the relevant case law. As this court is well aware, appellate courts do not determine guilt or innocence *de novo*. Their review of convictions is limited strictly to errors of law in this context. *See G.L. c. 211A, § 10* (jurisdiction of the Massachusetts Appeals Court).[3] As such, this simply

[3] *See also* Appellate Practice in Massachusetts, MCLE, 2.2(b) (2011 ed.) ("Except in first-degree murder cases (in which the appeal is made directly to the Supreme Judicial Court), the defendant may appeal to the Appeals Court from the judgment of conviction. The defendant also has the right to appeal to the Appeals Court from the denial of most post-conviction

cannot be what the legislature intended when it wrote *G.L. c. 258D*. Indeed, under the Commonwealth's paradigm, there is not a solitary defendant who could successfully sue under the wrongful conviction statute because, after all, he or she can never truly obtain a proclamation from an appellate court (or trial court) that he or she was "innocent." Appellate courts are not triers of fact, as this Court properly reminds the trial courts and litigants repeatedly in its decisions.

The denial of the Commonwealth's motion to dismiss by Judge Lauriet in his careful and thoughtful decision was, therefore, correct. There are reported decisions that establish the precedent for whether it is the Commonwealth or the plaintiff who is entitled to summary judgment, for instance, when a plaintiff seeks relief under *G.L. c. 258D*. A careful review of each of these cases clearly supports that here, the motion judge properly denied the Commonwealth's motion

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motions. The Commonwealth's right to appeal is, of course, more limited, but those appeals, where authorized, are likewise to the Appeals Court; for example, orders dismissing indictments, allowing motions to suppress evidence, allowing motions to set aside jury verdicts, or allowing motions for a new trial are appealable by the Commonwealth.")

to dismiss and, moreover, Peterson is entitled to partial summary judgment in his favor as to this element of his claim as a matter of law.

In Irwin v. Commonwealth, 465 Mass. 834 (2013), the defendant's conviction was reversed because evidence of his consciousness of guilt was erroneously introduced into evidence. In Riley v. Commonwealth, 82 Mass.App.Ct. 209 (2012), the defendant's conviction was reversed based upon the erroneous inclusion of hearsay evidence. The distinction between those cases and Peterson's case is obvious. First, the legal errors committed in Irwin and Riley resulted in a mere *retrial*. Had the court determined that there were facts at trial insufficient to sustain a conviction, no retrial could have been ordered. In stark contrast, *Peterson cannot be retried based on any illegally obtained evidence*. This alone necessarily means that the grounds upon which his conviction was vacated related sufficiently to the issue of "innocence" within the meaning of the wrongful conviction statute.

Second, Peterson's reversal was not based on a mere procedural "technicality"- for example, a statute of limitations violation or an improper closing argument-

but instead on the mixed question of law and fact surrounding the issue of whether he was engaged in criminal activity at the time of his first interaction with the police in the criminal case. Had the Appeals Court found merely an error that related to some collateral procedural consideration, it would have simply vacated the guilty verdict and ordered that Peterson was to receive a new trial. *See e.g.*, Commonwealth v. Scagliotti, 373 Mass. 626, 628-629 (1977); Commonwealth v. Cote, 5 Mass.App.Ct. 869 (1974).

Plaintiffs were granted partial summary judgment in *c. 258D* claims on appeal in Guzman, *supra* and Drumgold, *supra*. In Guzman, the defendant's underlying conviction was reversed based on a claim of ineffective assistance of counsel with respect to a mistaken identification defense. There, the SJC "agree[d] with the Appeals Court that even with the 'more stringent' language, id., the statute does not express an intent to limit eligibility, a threshold question, to individuals whose convictions were vacated or reversed strictly on the basis 'of compelling or overwhelming exculpatory evidence,' id., that is, on the grounds that they were actually

innocent." Id. at 359. In Drumgold, the conviction was reversed based on the recantation by a key witness at trial who had a medical condition that was not previously disclosed to the defense prior to trial.[4] On appeal, the Commonwealth claimed that the defendant was unable to seek relief under *G.L. c. 258D* because the reversal of his conviction was not grounded on 'actual innocence.' The SJC disagreed and in doing so, noted that, "Although the judge stated in her ruling that Drumgold had been deprived of the right to a fair trial, we do not agree with the Commonwealth that a decision based on grounds implicating fair trial rights precludes us from inquiring whether those grounds rest on facts and circumstances probative of the proposition that the defendant did not commit the crime." Id. at 337-378. The holdings in Guzman and Drumgold are directly at odds with the Commonwealth's claim that Peterson's conviction was not reversed on grounds that tend to establish innocence. The motion

[4] In both Guzman and Drumgold, the defendants were awarded new trials. Peterson's claim of innocence is even more prevalent than in Guzman and Drumgold because the Appeals Court granted judgment in his favor in ruling that the evidence should have been suppressed because of the lack of reasonable suspicion or probable cause.

judge's decision, however, is perfectly consistent with those decisions.

In Riley, *supra* at 214, the Appeals Court "reject[ed] the Commonwealth's argument that *Guzman* established a categorical rule barring any plaintiff whose conviction was reversed for a *Bruton* error from seeking compensation." In reaching this result, the Court held

> "The test ultimately adopted by the Supreme Judicial Court requires us to look not only at the legal rationale for judicial relief but also at the 'facts and circumstances' on which the relief rests."[5]

In Peterson's case, it is not the fact that it was a motion to suppress that was improperly denied that forms the basis here for the analysis of the Commonwealth's liability under *G.L. c. 258D*. It is that the erroneous denial of that motion to suppress pertained more generally but

[5] Riley, *supra*, at 214. *See also* Guzman at 362-66 (the mere fact that the grounds for the judicial relief from conviction rested in the ostensibly mere procedural realm of ineffective assistance of counsel did not entitle the Commonwealth to summary judgment; rather, the court must look to the facts and circumstances surrounding the grounds; here that defense counsel's conflict of interest led to him not calling certain witnesses who may have been helpful to the defendant's criminal case).

proximately to the issue of innocence, *i.e.*, the lack of indicia of criminal activity. As the Appeals Court held in the criminal case, "In short, the exit order was a pretext, as it is devoid of any specific articulable facts on which to base a reasonable apprehension of danger or that a crime had been committed." Therefore, the grounds for reversal here wholly "tend[ed] to establish innocence." *G.L. c. 258D §1(B)(ii).* As such, contrary to the Commonwealth's contention, those grounds rested firmly on facts and circumstances probative of the proposition of innocence within the meaning of G.L. c. 258D.

Indeed, the Appeals Court's decision in the criminal case was based on facts and circumstances indicating that Peterson's behavior was entirely consistent with innocent activity- the very essence of the requirement at issue in c. 258D that the grounds relate broadly to establishing the claimant's innocence. *See e.g.,* Crockett v. State, 803 S.W.2d 308, 311 (Tex. Crim. App. 1991) citing Brown v. Texas, 443 U.S. 47 (1979) ("a minimum...the suspicious conduct relied upon by law enforcement officer must be *sufficiently distinguishable from that of innocent people under the*

same circumstances as to clearly, if not conclusively, set the suspect apart from them.") (emphasis added). *See also* Richardson v. Texas, 823 S.W.2d 773, 774 (Tex. Court of Appeals 1992) ("if the activity relied upon by the officer is as consistent with innocent behavior as it is with criminal activity, a detention based on these activities is unlawful"). "The test ultimately adopted by the Supreme Judicial Court requires us to look not only at the legal rationale for judicial relief but also at the 'facts and circumstances' on which the relief rests." Riley v. Commonwealth, 82 Mass.App.Ct. 209, 214 (2012).

In its motion to dismiss, the Commonwealth claimed, "Notably, Plaintiff's Complaint does not deny that he was in possession of the knife in question at the time of his arrest." (Deft RA 15-26) (*see also* Deft Addendum). In fact, this is quite accurate: The Plaintiff does not so much as remotely dispute that proposition. But, the problem for the Defendant is that the Plaintiff's innocence of the unlawful possession of a "dangerous weapon" offense stems not from the issue of possession, but rather from the fact that **the knife he possessed was a perfectly lawful simple folding knife, the type of which any citizen of**

this Commonwealth may purchase and possess without a license at his or her local WalMart.

As a matter of law he therefore was, and remains, innocent of that charge. Commonwealt v. Higgins, 85 Mass. App. Ct. 534 (2014) ("[U]nder the plain language of the relevant portion of the statute, a knife is not prohibited merely because it has a blade that locks into place. … Instead, the Commonwealth would have to prove in addition that there was a "device or case" that allowed the blade to be drawn at a locked position.") He will need, as such, only the Higgins case to prove his innocence by clear and convincing evidence at trial and will file an additional motion for summary judgment at the appropriate time as to this separate element.

The question in determining whether partial summary judgment is appropriate is not whether the defendant is actually innocent but instead whether the grounds for his reversal "tend to establish innocence." This is the determining factor, not whether it would be possible for the Commonwealth to obtain a verdict in its favor at a re-trial with a lesser burden of proof. Indeed the plaintiffs in Guzman, and Drumgold, where partial summary judgment was entered on their behalf

by the SJC, did not prove their actual innocence at the summary judgment phase.

To the contrary, in Guzman, the plaintiff was granted a re-trial not because the court deemed him innocent but because he was deprived of effective assistance of counsel that prejudiced his right to a fair trial by causing the exclusion of testimony crucial to his defense of mistaken identity. Id. at 363-364. Similarly, in Drumgold, the court granted the plaintiff a new trial not because it deemed him innocent but because several government witnesses had since recanted, and a key witness for the Commonwealth had a medical condition that was not disclosed prior to trial. Id. at 375. The trial judge in Drumgold, in allowing the motion for new trial specifically noted, "nor should this ruling in allowing this motion in any way be taken as any finding or determination about this defendant's guilt or innocence in connection with the murder of [the victim]." Id. at. 376. Despite that the Massachusetts Supreme Judicial Court refused to comment on the plaintiff's innocence, he was nonetheless granted partial summary judgment in his subsequent action for wrongful incarceration. Accordingly, Peterson is entitled to have his case

proceed forward, as the motion judge properly concluded. The grounds upon which his conviction was reversed were, indeed, far more supportive of the proposition that they "tend[ed] to support innocence" than in Guzman and Drumgold, both of which were found by the SJC to have been sufficient under *G.L. c. 258D*.

The Commonwealth's comparison of this case to Riley, supra, is unavailing. In its Brief, it asserts, in essence, that the *Bruton* error raised in Riley is the same as the on here involving a motion to suppress. (Deft Brf., 11-12). Again, however, the Commonwealth asks this Court to ignore wholesale this Court's admonition in that same case that in wrongful conviction civil actions, "The test ultimately adopted by the Supreme Judicial Court requires us to look not only at the legal rationale for judicial relief but also at the 'facts and circumstances' on which the relief rests." Riley, *supra*, at 214. The Commonwealth's claim that "As in *Riley*, the jury in Peterson's underlying criminal case had too much information, in that they were permitted to hear evidence, obtained following the exit order, which should have been suppressed or excluded" (Deft Brf., 12), obfuscates entirely the salient issue.

The relevant consideration is, rather, that the complete lack of reasonable suspicion or probable cause here "tend[ed] to support" the proposition of innocence.[6] Accordingly, the Commonwealth's claims must fail as its motion to dismiss was properly denied.

B. The Commonwealth's claim that "[s]ince the judicial relief obtained by Peterson is not based on facts and circumstances which are probative of the proposition that Peterson did not commit the crime of possession of a dangerous weapon, Peterson cannot meet the eligibility requirements of G.L. c. 258D" is devoid of merit because there is no such requirement in the statute of a nexus between the ground entered for judicial relief and the crime for which a defendant is wrongfully convicted.

In its Brief, the Commonwealth further asserts that "[s]ince the judicial relief obtained by Peterson is not based on facts and circumstances which are probative of the proposition that Peterson did not commit the crime of possession of a dangerous weapon,

[6] Similarly, for instance, the Commonwealth asserts "Accordingly, any jury in this case would be allowed to hear the same evidence related to Peterson's possession of the knife that was deemed to have been improperly admitted at Peterson's criminal trial." (Deft Brf., 14). This is at best a *non-sequitor* flavored procedural soup. It has all of nothing to do with an exploration of the facts and circumstances surrounding the claim for judicial relief as applied more broadly to the concept of "innocence."

Peterson cannot meet the eligibility requirements of G.L. c. 258D." (Deft Brf., 16) This contention is wholly devoid of merit. G.L. c. 258D contains no such requirement of a nexus between the ground entered for judicial relief and the crime for which a defendant is wrongfully convicted, contrary to what the Commonwealth now urges this Court.

The statute, rather, plainly provides that a plaintiff (formerly a defendant in a criminal case) is within the class of persons covered by that law where, in relevant part, he is one of "those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual..." (G.L. c. 258D(B)(ii). The Commonwealth asks this Court to read into this element an additional requirement that a plaintiff must also show that this "innocence," within the meaning of the statute, is specifically limited to the offense for which he was convicted and sentenced, and that the grant of judicial relief in his criminal case was similarly limited thereto. However, no such requirement is contained in the statute. The provision does not limit the class of persons entitled to recover to "those who have been granted judicial

relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual *as long as that innocence pertains only to the offense for which the individual was wrongfully convicted and incarcerated.*"

The SJC, moreover, has recently rejected, at least implicitly, such a paradigm. The eligibility requirement is "separate and distinct from the merits of the Claim of relief that a claimant must establish at trial namely that he or she did not commit the charged offense." Renaud v. Commonwealth 471 Mass. 315, 481 (2015).

If this Court were to allow this heretofore novel and extra-statutory construct to become law, the words and purpose of the statute would become substantially frustrated. Had the legislature intended to include this requirement in G.L. c. 258D, as is now theorized by the Commonwealth in this case, it was its prerogative to have done so when it wrote the law. It manifestly did not include any such provision, however. "[A] statutory expression of one thing is an implied exclusion of other things [that had been] omitted from the statute." Harborview Residents Comm. Inc. v. Quincy Housing Authority, 368 Mass. 425, 432

(1975). *See also* Victor V. v. Commonwealth, 423 Mass. 793, 794 (1996) (where a statute is unambiguous, the courts are to interpret the statute in accordance with its plain ordinary meaning). *See also* Tilman v. Brink, 74 Mass. App. Ct. 845, 852-854 (2009) (District Court cannot award attorney's fees under G. L. c. 231, § 6F, because it is not included in statutory definition of "court" under G. L. c. 231, § 6E); Shawski v. Greenfield Investors, 473 Mass. 580, 588 (2016) ("This interpretation is consistent with the statutory maxim, '*expressio unius est exclusio alterius*,' meaning 'the expression of one thing in a statute is an implied exclusion of other things not included in the statute'"); Bank of Am., N.A. v. Rosa, 466 Mass. 613, 619 (2013) (accord). Accordingly, the Commonwealth's claims must fail as its motion to dismiss was properly denied.

C. The Commonwealth's claim that because the motion judge properly noted that the Appeals Court had not addressed the validity of the sufficiency of the evidence as to whether the knife was an unlawful dangerous weapon this was somehow error, is both irrelevant and unavailing

In its Brief, the Commonwealth further maintains as follows:

> "In denying the Commonwealth's motion to dismiss, the Superior Court held that the reversal of Peterson's conviction meant that there has not been a judicial determination that the knife found on Peterson was a "dangerous weapon," and that without such a determination "it would be speculative to conclude that the judicial relief granted by the Appeals Court does not rest on 'grounds tending to establish innocence," and that "[t]his ruling is flawed because it considers factors which go beyond the specific judicial relief obtained by Peterson." (Deft Brf., 17).

To the extent this even warrants addressing, the fact is the motion judge was simply raising the consideration that *there remains in this case a very palpable and disturbing issue of Peterson's factual and legal innocence*. This was in no manner dispositive vis-à-vis Judge Lauriet's careful and thoughtful rationale in his decision.

The denial of the Commonwealth's motion to dismiss was instead based on the following:

> "In order to establish eligibility" the judicial relief that overturned the conviction must have been granted on "grounds which tend to establish the innocence" of the claimant, G,L, t:. 258D § l(B){ii).Guzman *v, Commonwealth,* 458 Mass. 354, 358 *(2010), Drumgold v, Commonwealth,* 458 Mass 367, 376 (2010) . The Supreme Judicial Court has interpreted this to mean that the conviction must be overturned "on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime' *Irwin v. Commonwealth,* 465 Mass. 834, 844 (2013) (quoting *Guzman, supra* at 359). "

(Deft. RA, 6). As such, the Commonwealth is merely baselessly creating an appellate issue out of the motion judge's express observation that this case raises a genuine issue of innocence- in both the legal and factual sense of the term. Clearly, Judge Lauriet in no way grounded his ultimate salient conclusion on this concern, however, whether in whole or in part.

Accordingly, the Commonwealth's claims must fail as its motion to dismiss was properly denied.

CONCLUSION AND REQUEST FOR FEES & COSTS

In light of the fact that the defendant is within the class of persons whose convictions were vacated on grounds "tending to establish innocence" within the meaning of *G.L. c. 258D*, the motion judge's denial of the Commonwealth's motion to dismiss was correct and must be affirmed.

The plaintiff hereby also moves and requests that this Court order that the defendant reimburse him for all costs, expenses and attorney's fees he has and will incur in this appeal. *See* G.L. c. 258D, §6; G.L. c. 231, §6G.

Respectfully
submitted,
Omari Peterson,
By his attorney,

/s/ William S. Smith

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CERTIFICATION PURSUANT TO RULE 16(K)

I, William S. Smith, hereby certify that to the best of my knowledge this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

/s/ *William S. Smith*

_____

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CERTIFICATE OF SERVICE

I, William S. Smith, counsel for the Plaintiff-Appellee herein, hereby certify that on the __27th___ day of Dec-16, I served a copy of the foregoing pleading(s) as well as the Brief and Record Appendix (2 copies if via print) by e-filing, mailing same, first-class, postage prepaid, by facsimile or by in-hand delivery to:

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ADDENDUM

G.L. c. 258D, §1:

Section 1. Erroneous felony conviction claims; class of eligible persons; burden of proof; definitions; right to jury trial

[Text of section applicable as provided by 2004, 444, Sec. 3.]

(A) A claim may be brought against the commonwealth for an erroneous felony conviction resulting in incarceration as provided in this chapter.

(B) The class of persons eligible to obtain relief under this chapter shall be limited to the following:

(i) those that have been granted a full pardon pursuant to section 152 of chapter 127, if the governor expressly states in writing his belief in the individual's innocence, or

(ii) those who have been granted judicial relief by a state court of competent jurisdiction, on grounds which tend to establish the innocence of the individual as set forth in clause (vi) of subsection (C), and if (a) the judicial relief vacates or reverses the judgment of a felony conviction, and the felony indictment or complaint used to charge the individual with such felony has been dismissed, or if a new trial was ordered, the individual was not retried and the felony indictment or complaint was dismissed or a nolle prosequi was entered, or if a new trial was ordered the individual was found not guilty at the new trial; and (b) at the time of the filing of an action under this chapter no criminal proceeding is pending or can be brought against the individual by a district attorney or the attorney general for any act associated with such felony conviction.

(C) In order for an individual to prevail and recover damages against the commonwealth in a cause of action brought under this chapter, the individual must establish, by clear and convincing evidence, that:

(i) he is a member of the class of persons defined in subsection (B);

(ii) he was convicted of an offense classified as a felony;

(iii) he did not plead guilty to the offense charged, or to any lesser included offense, unless such guilty plea was withdrawn, vacated or nullified by operation of law on a basis other than a claimed deficiency in the plea warnings required by section 29D of chapter 278;

(iv) he was sentenced to incarceration for not less than 1 year in state prison or a house of correction as a result of the conviction and has served all or any part of such sentence;

(v) he was incarcerated solely on the basis of the conviction for the offense that is the subject of the claim;

(vi) he did not commit the crimes or crime charged in the indictment or complaint or any other felony arising out of or reasonably connected to the facts supporting the indictment or complaint, or any lesser included felony; and

(vii) to the extent that he is guilty of conduct that would have justified a conviction of any lesser included misdemeanor arising out of or reasonably connected to facts supporting the indictment or complaint, that he has served the maximum sentence he would have received for such lesser included misdemeanor and not less than one additional year in a prison.

(D) The claimant shall attach to his claim certified copies of: the mittimus that shows the claimant's sentence to incarceration and; the warrants necessary to grant a pardon pursuant to section 152 of chapter 127 or; criminal case docket entries or documents related thereto in the case of judicial relief.

(E) For the purposes of this chapter "conviction" or "convicted" shall include an adjudication as a youthful offender, if such adjudication resulted in the youthful offender's incarceration in a house of correction or state prison.

(F) The commonwealth and any individual filing an action for compensation under this chapter shall have the right to a jury trial on any action so filed. In the interest of doing substantial justice, with regard to weight and admissibility of evidence submitted by the claimant or the commonwealth, the court presiding at a jury waived trial shall exercise its discretion by giving due consideration to any difficulties of proof caused by the passage of time, the death or unavailability or witnesses, or other factors not caused by the claimant, or those acting on the claimant's or the commonwealth's behalf. At a jury trial, the court shall consider these same factors as part of the exercise of its discretion when determining the admissibility and weight of evidence, and the court shall instruct the jury that it may consider the same factors when it weighs the evidence presented at trial. No evidence proffered by any party shall be excluded on grounds that it was seized or obtained in violation of the Fourth, Fifth or Sixth amendments to the Constitution of the United States, or in violation of Articles 12 or 14 of Part the First of the Constitution of Massachusetts. Added by St.2004, c. 444, s. 1, eff. Dec. 30, 2004.

G.L. c. 269, §10:

Section 10. Carrying dangerous weapons; possession of machine gun or sawed off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

Section 10. (a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:

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

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

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

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

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

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

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

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

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

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

(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however,

that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

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

[Third paragraph of paragraph (a) effective until August 13, 2014. For text effective August 13, 2014, see below.]

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person seventeen years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and seventeen so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

[Third paragraph of paragraph (a) as amended by 2014, 284, Sec. 89 effective August 13, 2014. For text effective until August 13, 2014, see above.]

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

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

(b) Whoever, except as provided by law, carries on his person, or carries on his person or under his control in a vehicle, any stiletto, dagger or a device or case which enables a knife with a locking blade to be drawn at a locked position, any ballistic knife, or any knife with a detachable blade capable of being propelled by any mechanism, dirk knife, any knife having a double-edged blade, or a switch knife, or any

knife having an automatic spring release device by which the blade is released from the handle, having a blade of over one and one-half inches, or a slung shot, blowgun, blackjack, metallic knuckles or knuckles of any substance which could be put to the same use with the same or similar effect as metallic knuckles, nunchaku, zoobow, also known as klackers or kung fu sticks, or any similar weapon consisting of two sticks of wood, plastic or metal connected at one end by a length of rope, chain, wire or leather, a shuriken or any similar pointed starlike object intended to injure a person when thrown, or any armband, made with leather which has metallic spikes, points or studs or any similar device made from any other substance or a cestus or similar material weighted with metal or other substance and worn on the hand, or a manrikigusari or similar length of chain having weighted ends; or whoever, when arrested upon a warrant for an alleged crime, or when arrested while committing a breach or disturbance of the public peace, is armed with or has on his person, or has on his person or under his control in a vehicle, a billy or other dangerous weapon other than those herein mentioned and those mentioned in paragraph (a), shall be punished by imprisonment for not less than two and one-half years nor more than five years in the state prison, or for not less than six months nor more than two and one-half years in a jail or house of correction, except that, if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction.

(c) Whoever, except as provided by law, possesses a machine gun, as defined in section one hundred and twenty-one of chapter one hundred and forty, without permission under section one hundred and thirty-one of said chapter one hundred and forty; or whoever owns, possesses or carries on his person, or carries on his person or under his control in a vehicle, a sawed-off shotgun, as defined in said section one hundred and twenty-one of said chapter one hundred and forty, shall be punished by imprisonment in the state prison for life, or for any term of years provided that any sentence imposed under the provisions of this paragraph shall be subject to the minimum requirements of paragraph (a).

(d) Whoever, after having been convicted of any of the offenses set forth in paragraph (a), (b) or (c) commits a like offense or any other of the said offenses, shall be punished by imprisonment in the state prison for not less than five years nor more than seven years; for a third such offense, by imprisonment in the state prison for not less than seven years nor more than ten years; and for a fourth such offense, by imprisonment in the state prison for not less than ten years nor more than fifteen years. The sentence imposed upon a person, who after a conviction of an offense under paragraph (a), (b) or (c) commits the same or a like offense, shall not be suspended, nor shall any person

so sentenced be eligible for probation or receive any deduction from his sentence for good conduct.

(e) Upon conviction of a violation of this section, the firearm or other article shall, unless otherwise ordered by the court, be confiscated by the commonwealth. The firearm or article so confiscated shall, by the authority of the written order of the court be forwarded by common carrier to the colonel of the state police, who, upon receipt of the same, shall notify said court or justice, thereof. Said colonel may sell or destroy the same, except that any firearm which may not be lawfully sold in the commonwealth shall be destroyed, and in the case of a sale, after paying the cost of forwarding the article, shall pay over the net proceeds to the commonwealth.

(f) The court shall, if the firearm or other article was lost by or stolen from the person lawfully in possession of it, order its return to such person.

(g) Whoever, within this commonwealth, produces for sale, delivers or causes to be delivered, orders for delivery, sells or offers for sale, or fails to keep records regarding, any rifle or shotgun without complying with the requirement of a serial number, as provided in section one hundred and twenty-nine B of chapter one hundred and forty, shall for the first offense be punished by confinement in a jail or house of correction for not more than two and one-half years, or by a fine of not more than five hundred dollars.

(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

(2) Any person who leaves a firearm, rifle, shotgun or ammunition unattended with the intent to transfer possession of such firearm, rifle, shotgun or ammunition to any person not licensed under section 129C of chapter 140 or section 131 of chapter 140 for the purpose of committing a crime or concealing a crime shall be punished by imprisonment in a house of correction for not more than 2½ years or in state prison for not more than 5 years.

(i) Whoever knowingly fails to deliver or surrender a revoked or suspended license to carry or possess firearms or machine guns issued under the provisions of section one hundred and thirty-one or one hundred and thirty-one F of chapter one hundred and forty, or firearm identification card, or receipt for the fee for such card, or a firearm, rifle, shotgun or machine gun, as provided in section one

hundred and twenty-nine D of chapter one hundred and forty, unless an appeal is pending, shall be punished by imprisonment in a jail or house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars.

[Paragraph (j) effective until January 1, 2015. For text effective January 1, 2015, see below.]

(j) Whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the provisions of chapter one hundred and forty, carries on his person a firearm as hereinafter defined, loaded or unloaded or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of such elementary or secondary school, college or university shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. For the purpose of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university failing to report violations of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than five hundred dollars.

[Paragraph (j) as amended by 2014, 284, Sec. 90 effective January 1, 2015. See 2014, 284, Sec. 108. For text effective until January 1, 2015, see above.]

(j) For the purposes of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged.

Whoever, not being a law enforcement officer and notwithstanding any license obtained by the person pursuant to chapter 140, carries on the person a firearm, loaded or unloaded, or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of the elementary or secondary school, college or university shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 2 years or both. A law enforcement officer may arrest without a warrant and detain a person found carrying a firearm in violation of this paragraph.

Any officer in charge of an elementary or secondary school, college or university or any faculty member or administrative officer of an elementary or secondary school, college or university that fails to

report a violation of this paragraph shall be guilty of a misdemeanor and punished by a fine of not more than $500.

[There is no paragraph (k).]

(l) The provisions of this section shall be fully applicable to any person proceeded against under section seventy-five of chapter one hundred and nineteen and convicted under section eighty-three of chapter one hundred and nineteen, provided, however, that nothing contained in this section shall impair, impede, or affect the power granted any court by chapter one hundred and nineteen to adjudicate a person a delinquent child, including the power so granted under section eighty-three of said chapter one hundred and nineteen.

[First paragraph of paragraph (m) effective until August 13, 2014. For text effective August 13, 2014, see below.]

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the

court to place certain offenders on probation shall not apply to any person 17 years of age or over charged with a violation of this section.

[First paragraph of paragraph (m) as amended by 2014, 284, Sec. 92 effective August 13, 2014 until January 1, 2021. For text effective until August 13, 2014, see above. For text effective January 1, 2021, see below]

(m) Notwithstanding the provisions of paragraph (a) or (h), any person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid Class A or Class B license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

[First paragraph of paragraph (m) as amended by 2014, 284, Sec. 91 effective January 1, 2021. See 2014, 284, Sec. 112. For text effective until January 1, 2021, see above.]

(m) Notwithstanding the provisions of paragraph (a) or (h), any

person not exempted by statute who knowingly has in his possession, or knowingly has under his control in a vehicle, a large capacity weapon or large capacity feeding device therefor who does not possess a valid license to carry firearms issued under section 131 or 131F of chapter 140, except as permitted or otherwise provided under this section or chapter 140, shall be punished by imprisonment in a state prison for not less than two and one-half years nor more than ten years. The possession of a valid firearm identification card issued under section 129B shall not be a defense for a violation of this subsection; provided, however, that any such person charged with violating this paragraph and holding a valid firearm identification card shall not be subject to any mandatory minimum sentence imposed by this paragraph. The sentence imposed upon such person shall not be reduced to less than one year, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served such minimum term of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of
an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

The provisions of this paragraph shall not apply to the possession of a large capacity weapon or large capacity feeding device by (i) any officer, agent or employee of the commonwealth or any other state or the United States, including any federal, state or local law enforcement personnel; (ii) any member of the military or other service of any state or the United States; (iii) any duly authorized law enforcement officer, agent or employee of any municipality of the commonwealth; (iv) any federal, state or local historical society, museum or institutional collection open to the public; provided, however, that any such person described in clauses (i) to (iii), inclusive, is authorized by a competent authority to acquire, possess or carry a large capacity semiautomatic weapon and is acting within the scope of his duties; or (v) any gunsmith duly licensed under the applicable federal law.

(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not

more than 2½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

(o) For purposes of this section, "loaded" shall mean that ammunition is contained in the weapon or within a feeding device attached thereto.

For purposes of this section, "ammunition" shall mean cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun.