the 1980 hearing on the plea bargaining process – i.e., testimony suggesting that the plea offer was sheer grace and a second-degree conviction was not otherwise consonant with justice – ought to be disregarded. *See, e.g., Transcript pp. 30-31.* A fairer reading of the record reveals that ADA Thomas Mundy was using every tool in his arsenal to secure a first degree murder conviction against Smith, including manipulation of the plea bargaining process.

II. Employing plea bargaining offers to seek a tactical advantage at trial was apparently not uncommon in ADA Mundy's time.

The strategic use of plea bargaining offers to secure harsher convictions appears to have been a wider practice within the Suffolk District Attorney's Office during the era in which Smith's trial occurred. In one 1981 case, the District Attorney initially charged two men with murder, but later "negotiated a second-degree murder plea with one defendant in hopes of securing a first-degree murder conviction against another." *See* Eileen McNamara, *Examining the record of DA Flanagan: Recent cases renew charges of racial bias, careless work*, Boston Globe, Feb. 121, 1990, at 1, 14. The gambit did not pay off, as the jury returned a second-degree murder verdict, while at the same time finding guilt on other felony charges that would have warranted a first-degree felony murder verdict. See Alan Sheehan, *Burden gets life in nurse's slaying*, Boston Globe, Nov. 4, 1981, at 32. As the case illustrates, prosecutors like Mundy faced the very real risk of a jury returning a second-degree murder verdict in a case like Smith's.

III. Mundy apparently had a pattern of employing ethically fraught tactics to cinch guilty verdicts.

Mundy testified at the 1980 hearing in this case that part of the reason for extending the plea offer was his concern that a "gullible jury" might not convict Smith of first degree murder. *Transcript at p. 23.* A similar concern landed him in trouble in another case, where he improperly encouraged the jury in closing argument not to be "gullible." *Commonwealth v. Palmariello*, 392 Mass. 126, 134-135 (1984) (improper to ask jury to decide case on "general considerations"). Perhaps due to preoccupation with "gullible" juries, Mundy evidently crossed the line of permissible advocacy in a number of other cases as well.

Mundy was repeatedly accused of using language that inflamed the ethnic or racial prejudices of jurors against the defendant. *See, e.g., Commonwealth v. MacDonald*, 368 Mass. 395, 402 (1975) (holding that Mundy's argument to "[tell the] bums, some of whom were in the courtroom during the trial, and all the hoodlums of South Boston and other parts of the city that this Country will not tolerate this type of crime" was improper, but had been remedied by curative instruction); *Commonwealth v. Hogan*, 12 Mass. App. Ct. 646, 652-654 (1981) (holding that Mundy's argument that witnesses should be discounted because "they were all from the 'lower end' of South Boston" was impermissible and that the "numerous transgressions" in his closing required reversal and remand for new trial). *See also Commonwealth v. Johnson*, 372 Mass. 185, 197 (1977) (observing that Mundy "referred repeatedly to the fact that the victim was white and the defendant black and the scene a 'project' with a heavy black population," but concluding that these

IV. Mundy had a history of zealously prosecuting black defendants in spite of strong mitigating factors.

Additionally, Mundy zealously prosecuted black defendants as part of the Newman Flanagan administration, which was widely criticized for its racially biased prosecutorial track record. *See* McNamara, *supra* at 1, 14. Notably, Mundy pursued Willie Bennett as a suspect in the Charles Stuart case and continued to maintain that Bennett could be connected to the case even after Charles was identified as the murderer, despite the fact that no hard evidence tied Bennett to the case. *See* Sean Murphy and Thomas Palmer, *Timing of lineup is questioned in Stuart probe*, Boston Globe, Jan. 29, 1990, at 1, 10. Mundy also tried Albert Lewin in a case involving egregious police misconduct and prosecutorial incompetence by another ADA. *See* McNamara, *supra* at 14; Doris Sue Wong and B.J. Roche, *Lewin is Found Not Guilty: Verdict ends tainted case of slaying of detective*, Boston Globe, Oct. 26, 1990, at 16 (insisting, upon Lewin's acquittal, that "I certainly don't feel the integrity of the distrct attorney's office was in any way impugned by the evidence this jury heard"). *See generally Commonwealth v. Lewin*, 405 Mass. 566 (1989). Mundy also doggedly pursued Lawyer Johnson for murder twice on thin evidence; only after Johnson won a second new trial motion and the principal witness refused to testify again did Mundy "reluctantly" declined to prosecute a third time. *See* Betsy A. Lehman and

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just point out for the record that the second juror accepted is a black man." *Id.* at 245. This is reminiscent of *Soares*, where a single black juror sat on the jury. *See Commonwealth v. Soares*, 377 Mass. 461, 473 (1978). Smith raised the issue of racially discriminatory preemptory challenges in his second motion for a new trial, which was denied. He notes it here simply to provide fuller context for Mundy's pattern of behavior.

comments were not intended to inflame racial prejudice); Alan H. Sheehan, *3 guilty in Puopolo case get life terms, no parole*, Boston Globe, Mar. 25, 1977, at 13 (Mundy referred to black defendants as "protectors" of a group of "robber whores" in Boston's Combat Zone).

Additionally, Mundy was caught employing preemptory challenges to exclude black jurors in the *Soares* case. *See Commonwealth v. Soares*, 377 Mass. 461, 463 (1978) (holding that preemptory challenges may not be used in racially discriminatory manner and that defense had made prima facie showing of discriminatory use). This pattern of behavior was challenged in a number of Mundy's cases. *See Commonwealth v. Mitchell*, 367 Mass. 419, 420 (1975) (denying relief to defendant who asserted that Mundy had "challenged potential black jurors," and that "no blacks sat on the jury," by resting on pre-*Soares* rationale that the court is not to probe motivation for exercising preemptory challenges); *Commonwealth v. Cook*, 364 Mass. 767, 770 (1974) (observing that Mundy had "peremptorily challenged two black jurors, and refused to answer an inquiry whether he was following a policy of challenging all black jurors," but failing to grant relief in light of pre-*Soares* case law). *Cf.* James Burnett III, *The long, hard half-life of Lawyer Johnson*, Boston Globe, Apr. 8, 2012, at A10 (all black and female prospective jurors were dismissed from Lawyer Johnson's first trial, which was prosecuted by Mundy).[2]

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[2] Indeed, in the instant case, Smith objected that Mundy was attempting to eliminate black jurors after seven of his first eleven preemptory challenges were exercised against black jurors. Tr. Vol. II at 244, 246. Mundy's only response was that "the law does not require me to give cause as to exercising preemptory challenges. I would

continued

Joseph M. Harvey, *Murder charge dropped, he's free man again*, Boston Globe, Oct. 20, 1982, at 31 ("Mundy, who was also the prosecutor in the original case, yesterday called Johnson's release a 'travesty of justice.'"). *See also* James Burnett III, *supra* at A10 (Johnson received apology for wrongful conviction in 2008 along with $500,000 settlement from state).

At the same time, Mundy defended taking a more measured approach toward prosecuting white defendants. Mundy "staunchly" defended his office's decision not to prosecute a white restaurant owner who used an unlicensed handgun in self-defense, despite having prosecuted a black individual for doing the same one year prior. *See* Robert A. Jordan, *A question of 'necessity,'* Boston Globe, Dec. 6, 1986, at 13 (quoting Mundy as saying that the white individual "was justified" in shooting a fleeing robber under the doctrine of necessity, while black individual was not because he had been carrying the gun before he saw his assailant). Mundy also defended his office's decision not to bring civil rights charges against white youths who had attacked a black family while hurling racial epithets, maintaining that "[t]he facts of the situation" were not "consistent" with bringing civil rights charges. *See* Kevin Blackistone, *Group calls car-smashing 'racial': Boston Police and Dist. Atty. Flanagan charged with inadequate response*, Boston Globe, Aug. 15, 1982, at 37.

CONCLUSION

The foregoing information provides significant context for assessing whether the plea bargaining process in the instant case was so infected with error and injustice as to warrant redress. In light of Mundy's pattern of conduct, as well as the

fact that Smith might well have been convicted of second degree murder had the case been handled properly, the specter of improper motivation alluded to in the prior memorandum comes into relief. For the foregoing reasons, as well as those set forth in Smith's prior submissions, this Court should find that justice was not done and should vacate the first degree murder conviction under Mass. R. Crim. P. 30.

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I hereby certify that on December 1, 20, this document was served upon the Commonwealth of Massachusetts via email transmission to Assistant District Attorney David A.F. Lewis at david.a.f.lewis@state.ma.us..

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