

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

SUPERIOR COURT DEPARTMENT OF THE
TRIAL COURT CRIMINAL NO. 86-6254
through -6256¹

COMMONWEALTH OF MASSACHUSETTS

vs.

MARK SCHAND,
Defendant.

DEFENDANT MARK SCHAND'S MOTION FOR STAY OF FURTHER
EXECUTION OF SENTENCE PENDING RULING ON MOTION
FOR NEW TRIAL AND MEMORANDUM OF LAW IN SUPPORT

Motion

_____Defendant Mark Schand moves the Court pursuant to the inherent powers of this Court, which must be exercised "as necessary to secure the full and effective administration of justice," to stay the further execution of his sentences pending final resolution of his motion for a new trial. Mark Schand's motion presents issues worthy of consideration by this Court; he poses no security risk; and his case presents the "exceptional reasons" for staying further execution of his sentences that justify the exercise of this Court's inherent powers.

1

Indictment 86-6254 charged murder; 86-6255 charged assault with intent to kill; 86-6256 charged armed robbery; 86-6257 and 86-6258 were nolle prossed.

Memorandum

A. The Court Has Authority To Stay Further Execution Of Schand's Sentence.

A Superior Court judge has the authority to stay a sentence pending disposition of a motion for a new trial. Commonwealth v. Charles, 466 Mass 63, 73-74 (2013). The same standards that govern applications for a stay of execution pending appeal apply to a request for a stay pending a motion for a new trial. *Id.*, at 77. The first factor is whether there is "some reasonable possibility of a successful decision." The second is whether the defendant's release poses a security risk. *Id.* This memorandum addresses those two factors in that order.

B. Fundamental Fairness And The Interests Of Justice Would Be Best Served By Staying Mark Schand's Sentence Pending Resolution Of His Motion For A New Trial.

Assessment of these factors establishes that Mark Schand should be released from further imprisonment forthwith, as a matter of fundamental fairness. The practice of granting a stay "is grounded in rudimentary notions of justice," because "a conviction may be reversible, but the time spent in prison is not." Mark Schand has been imprisoned continuously since October 29, 1986, nearly 27 years.

1. The Testimony Of Tracy Fisher, Randy Weaver, Martin Smith And Anthony Cooke Present Newly Discovered Evidence That Is Credible And Material, And That "Casts Real Doubt On The Conviction."²

Mark Schand was convicted in November 1987 for the murder of Victoria Seymour, solely on a felony-murder theory, and of the shooting of Anthony Cooke and the armed

²Commonwealth v. DiBenedetto, 458 Mass 657, 664 (2011).

robbery of Charles Stokes, arising out of events that occurred at approximately 11:25 p.m. on September 2, 1986 outside the After Five Lounge in Springfield.

The Commonwealth's witness Tracy Fisher presented the capstone evidence in support of this motion for new trial on September 26, 2013. Schand had previously subpoenaed Fisher and brought him before the Court on August 12, 2013, where Fisher invoked his privilege against self-incrimination. Four reports by investigators of statements Fisher had made to them in which he admitted having played a central role in the events underlying the crimes of which Mark Schand was convicted were admitted as statements against penal interest after this Court determined that Fisher was unavailable as a witness. In each, Fisher declared that Mark Schand was not involved in the events that led up to the shootings and robbery at the After Five, and that Fisher did not see Mark Schand at that scene on September 2, 1986 when the shootings occurred. Fisher's description of his actions are so specific as to foreclose any real doubt that he was present and involved in the melee that resulted in Victoria Seymour's murder.

Thereafter, the Commonwealth applied to this Court for an order of immunity to compel Mr. Fisher to testify and, after that motion was granted³, moved to reopen the evidence and present Fisher's testimony. Mr. Schand did not oppose that motion and Mr. Fisher's testimony was presented yesterday. Fisher testified that he was the individual who snatched drugs from the hands of Charles "Heavy" Stokes as Fisher was negotiating with Stokes about the sale of cocaine, and that gunfire erupted as he ran away. The trial

³The immunity order is attached hereto as Exhibit A.

evidence established that that shooting killed Victoria Seymour, injured Anthony Cooke, and was followed by the armed robbery of Charles Stokes, in a brief, unbroken sequence. Fisher testified that he came to the After Five from Hartford that night in a stolen Audi, and that Randy Weaver, Lonnie Keith, TY Johnson, Tyrone Bridges and a “kid” made the same trip at the same time in Weaver’s blue and grey van. Fisher testified that he knew Mark Schand at that time, but did not associate with him, and that he is currently indifferent to Mark Schand’s situation. Fisher swore that Mark Schand was not involved in the interactions between the six Hartford men before they went to Springfield, that Mark Schand did not accompany him or the Weaver group to Springfield, and that he did not see Mark Schand in Springfield – at the After Five or elsewhere – on September 2, 1986.

On August 9, 2013, Randy Weaver testified similarly before this Court, in testimony that strongly corroborates Tracy Fisher’s testimony on each of the points mentioned above. On March 28, 2013, Weaver passed a polygraph test administered by Massachusetts State Police Tpr. Juan Colon addressing the core elements of this account. Martin Smith’s August 9, 2013 testimony, although less detailed than Weaver’s, also corroborated both Weaver’s and Fisher’s testimony. Anthony Cooke, one of the victims of the shootings, testified on August 9, 2013 that he falsely identified Mark Schand in Schand’s November, 1987 trial as the man who shot him and robbed Charles Stokes. He did so to obtain pretrial release and to avoid prison on criminal charges that he was facing at that time. Cooke’s testimony also corroborates that of Fisher, Weaver and Smith: Cooke testified here that he does not know who shot him and did not see Mark Schand at the After Five that night.

It is stipulated that all of this evidence is newly discovered within the meaning of that term as defined in Commonwealth v. Grace, 397 Mass 303, 305 (1986). This evidence was developed first by Schand's investigators⁴ and attorneys, turned over to the Commonwealth, and independently investigated by the District Attorney's State Police investigators. There can be no serious dispute that this evidence, had it been presented at trial, "would have been a real factor in the jury's deliberations. *Id.* The fact that Mark Schand has served nearly 27 years of a life without parole sentence establishes that his continued incarceration amounts to a "manifest injustice" and establishes the "exceptional reasons" that justify staying further execution of his sentence pending resolution of this proceeding. Charles, *supra* at 74.

2. Mark Schand Poses No Security Risk.

Mark Schand poses no risk of flight, and no danger to either the general public or any specific person. Following his October 29, 1986 arrest, Schand waived rendition to Massachusetts. He has been incarcerated continuously since then. His prison record over these past 27 years is virtually spotless. He was married to Mia Williams-Bey on May 31, 1992 in Shirley Medium. They have been together since 1985 and have maintained close contact throughout this entire period; she has kept his family intact and his children and grandchildren visit him frequently. The Schands were living in Hartford when Mark was arrested. The family residence has been in Windsor, Connecticut for the past twenty years.

4

Principally Centurion Ministries of Princeton, New Jersey and Richard Williams of Springfield, MA.

The Schands have two grown sons and two grandchildren. Mia Schand is employed in two jobs: she works at Pink Chairs, a beauty salon in Windsor owned by Rosa Brown; and at Community Residents, a group home for teenaged girls who have disabilities. The Court has seen his family in both hearing sessions on this motion for new trial. Moreover, Mark Schand has a serious medical condition that would plague him in the event he became a fugitive. He has a brain aneurism that requires close medical monitoring and causes him to suffer frequent, severe headaches.

When he is released Mark will live with his family in Windsor, Connecticut at 28 Ford Road, Windsor, CT 06095. He will sign a waiver of rendition as a condition of the stay. Owing to the unusual circumstances of this case, Mark Schand should be released on his own recognizance, with light supervision such as period telephone contact with the probation department.

CONCLUSION

This is an extraordinary case. There is no factual dispute regarding the newly discovered evidence grounds for this motion for a new trial. Mark Schand is serving a life sentence for a murder he did not commit. Simple fairness requires that he be released from imprisonment pending the disposition of his Motion for a New Trial. This Court has the power to do justice in this way.

Respectfully submitted,
MARK SCHAND, DEFENDANT

By _____
John M. Thompson, BBO #496780

Linda J. Thompson, BBO #496840
THOMPSON & THOMPSON, P.C.
1331 Main Street, Suite 320
Springfield, MA 01103
[413] 739-2100
[413] 739-2300 fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Amended and Substituted Motion has been served in hand and by email on District Attorney Mark Mastroianni this 27th day of September, 2013.

John M. Thompson