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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIMINAL ACTION
NO. 93-0135

-----X
COMMONWEALTH :

V. :

MICHAEL ELBERY :
-----X

MOTION TO VACATE

STAY OF EXECUTION

BEFORE: THE HON. DANIEL F. TOOMEY

A P P E A R A N C E S

FOR THE COMMONWEALTH:

MICHAEL BALL,
ASSISTANT DISTRICT ATTORNEY

FOR THE DEFENDANT:

SHEKETOFF & HOMAN
84 STATE STREET
BOSTON, MASSACHUSETTS 02109
BY: ROBERT L. SHEKETOFF, ESQ.

WORCESTER SUPERIOR COURT
WORCESTER, MASSACHUSETTS
AUGUST 10, 1994
RM. 204

JANE ELIZABETH ESPOSITO
OFFICIAL COURT REPORTER

LASER STOCK FORM B

THE CORBY GROUP, 1-800-255-5040

I N D E X

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MOTION TO VACATE STAY OF EXECUTION

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LASER STOCK FORM B

THE CORBY GROUP 1-800-255-5040

1 (12:10 P.M.)

2 (AUGUST 10, 1 994)

3
4
5 MOTION TO VACATE STAY OF EXECUTION:

6 THE CLERK: MAY WE HAVE MR.
7 ELBERY, MR. BALL AND MR. SHEKETOFF.

8 THE COURT: MR. ELBERY IS IN THE
9 COURTROOM. MR. SHEKETOFF IS HERE.

10 THE CLERK: MAY THE RECORD REVEAL
11 THAT ON INDICTMENT 93-0135, TWO
12 INDICTMENTS PRESENTING, IN ORDER,
13 ASSAULT WITH INTENT TO MAIM, DISORDERLY
14 PERSON, AND A THIRD MATTER, ASSAULT AND
15 BATTERY, ON JULY 15, 1993, ON THIS
16 MATTER, YOUR HONOR IMPOSED A SENTENCE.
17 ON JULY 2ND, A VERDICT OF GUILTY WAS
18 RETURNED BY A WORCESTER COUNTY JURY OF
19 GUILTY ON ALL THREE MATTERS.

20 THE MATTER IS HERE FOR
21 DISPOSITION. ON AUGUST 8TH, BAIL WAS
22 REVOKED. THE DEFENDANT WAS HELD ON A
23 THOUSAND DOLLARS CASH. HELD FOR HEARING
24 THIS DAY.

1 MR. ELBERY IS HERE, REPRESENTED BY
2 COUNSEL.

3 THE COURT: THANK YOU.

4 MR. BALL.

5 MR. BALL: YOUR HONOR, I ASKED THE
6 CASE BE HERE TODAY FOR A MOTION TO
7 VACATE STAY OF EXECUTION. THE COURT
8 COMMITTED MR. ELBERY BACK IN AUGUST OF
9 1993. THE REASON FOR THAT BEING, ON
10 AUGUST 5TH OF 1994, A STORAGE
11 COMPARTMENT THAT MR. ELBERY RENTED IN
12 SHREWSBURY, MASSACHUSETTS WAS THE
13 SUBJECT OF A SEARCH WARRANT.

14 THE SHREWSBURY POLICE DEPARTMENT
15 DISCOVERED IN THAT STORAGE AREA FIVE
16 GUNS, A KNIFE, AN UZI, THREE A.K.
17 FORTY-SEVENS, A SHOTGUN, A REMMINGTON
18 EIGHT SEVENTY TWELVE GAUGE SHOTGUN,
19 ALONG WITH AMMUNITION.

20 MR. ELBERY WAS ARRESTED FOR THOSE
21 OFFENSES; AND BECAUSE OF THAT, I WOULD
22 ASK THE COURT TO VACATE THE STAY OF
23 EXECUTION.

24 THE COURT: MR. BALL, IS THERE ANY

1 INDICATION THAT MR. ELBERY HAD ANY
2 CONNECTION WITH THAT RENTAL PROPERTY?

3 MR. BALL: ALSO, WHILE THE
4 POLICE -- WHAT OCCURRED WAS THERE WAS A
5 FIRE AT THE --

6 THE COURT: WAS HE THE LESSEE?

7 MR. BALL: YES. I DON'T HAVE A
8 COPY OF THE LEASE. HOWEVER, HE DID
9 APPROACH THE OFFICERS THAT DAY THAT THEY
10 WERE EXECUTING THE SEARCH WARRANT.
11 THERE WAS ALSO A CORVETTE INSIDE. HE
12 TOLD THEM THAT WAS HIS CORVETTE, AND IT
13 WAS HIS STORAGE LOCKER, AND IT SHOULD BE
14 LOCKED BEFORE THEY LEFT. THAT WAS PRIOR
15 TO THEIR DISCOVERY OF THE GUNS.

16 THE COURT: AND, SIR, IS THERE ANY
17 INDICATION WITH RESPECT TO THE
18 CIRCUMSTANCES OF THE WEAPONS?

19 MR. BALL: AT THIS POINT, NO,
20 JUDGE. THEY ARE BEING TRACKED BY THE
21 FEDERAL AUTHORITIES.

22 THE COURT: NO INDICATION HE HAS A
23 LICENSE FOR THEM?

24 MR. BALL: JUDGE, HE HAD A LICENSE

1 AT THE TIME, BUT THAT WAS REVOKED AS A
2 RESULT OF THE FINDING IN THE CASE BEFORE
3 THE COURT, BACK IN AUGUST OF 1993.

4 THE COURT: THANK YOU, SIR.

5 MR. SHEKETOFF.

6 MR. SHEKETOFF: THANK YOU, YOUR
7 HONOR.

8 WHEN I WAS IN THE WESTBORO
9 DISTRICT COURT ON MONDAY, BAIL WAS SET
10 ON THE NEW CASE AT FIVE THOUSAND DOLLARS
11 CASH. I ASKED FOR A BAIL APPEAL, NOT
12 BECAUSE I WANTED TO APPEAL THAT BAIL,
13 BUT BECAUSE I FELT -- THIS IS AFTER
14 CONSULTATION WITH MY CLIENT -- THAT IT
15 SHOULD COME BACK TO WORCESTER SUPERIOR
16 COURT. WE COULD HAVE MADE THE FIVE
17 THOUSAND DOLLARS CASH BAIL AND WALKED
18 OUT THE DOOR, BUT IT SEEMED OBVIOUS TO
19 ME AND MY CLIENT THAT WE SHOULD GET UP
20 TO WORCESTER SUPERIOR COURT SO IT WOULD
21 COME TO YOUR HONOR'S ATTENTION THAT HE
22 WAS HERE.

23 THE COURT: THE QUESTION OF BAIL
24 IS NOT IN FRONT OF ME. AS I UNDERSTAND,

1 HE WITHDREW HIS REQUEST FOR BAIL
2 YESTERDAY. WHAT IS BEFORE ME IS THE
3 MOTION TO VACATE THE STAY OF EXECUTION
4 IN THE MAYHEM CASE.

5 MR. SHEKETOFF: EXACTLY, YOUR
6 HONOR.

7 THE COURT: SO TELL ME WHY MR.
8 BALL IS WRONG WHEN HE ASKES ME TO VACATE
9 THE STAY.

10 MR. SHEKETOFF: WELL, FOR A NUMBER
11 OF REASONS, YOUR HONOR. FIRST OF ALL,
12 AS A MATTER OF LAW, A LICENSE IS NOT
13 REVOKED WHEN THERE IS A CONVICTION IN
14 THE SUPERIOR COURT. THE LICENSING
15 AUTHORITY HAS TO SEND NOTICE AND
16 ACTUALLY NOTICE THE INDIVIDUAL. THAT
17 WAS NOT DONE IN THIS CASE. SO HE HAS
18 HAD AND HAS A FIREARM IDENTIFICATION
19 CARD. THAT IS A VALID CARD, BECAUSE IT
20 HAS NOT BEEN REVOKED.

21 SECONDLY, YOUR HONOR, THERE WAS A
22 FIRE IN THIS EASY MART, OR WHATEVER IT'S
23 CALLED, WHERE YOU CAN STORE VARIOUS
24 ITEMS. THERE IS A LOCK ON INDIVIDUAL

1 STORAGE BINS, WHICH, FOR SOME REASON,
2 THE SHREWSBURY POLICE, BEFORE THEY GOT A
3 WARRANT, DECIDED THAT THEY COULD BREAK
4 AND GO INTO THAT STORAGE BIN. THEN THEY
5 SUPPOSEDLY MADE OBSERVATIONS, AND THEN
6 THEY GOT A WARRANT. THERE WAS NO FIRE
7 DAMAGE TO THIS STORAGE BIN. THERE WAS
8 NO EXCUSE FOR SNAPPING THE LOCK OFF THE
9 DOOR.

10 SO HE HAS -- FIRST OF ALL, IT'S NOT
11 A CRIME IF HE HAD HIS F.I.D. CARD, AND
12 HE DOES. NUMBER TWO, THERE IS A SERIOUS
13 QUESTION ABOUT WHETHER THE SEARCH WAS
14 EVEN LAWFUL IN THIS CASE. I SUPPOSE,
15 FOR PURPOSES OF THE PENDING APPEAL, THE
16 FIRST ISSUE IS MUCH MORE IMPORTANT.

17 THE COURT: I THINK SO. I AM NOT
18 SO SURE ADDRESSING THE CONSTITUTIONALITY
19 OF THE SEARCH IS APPROPRIATE AT THIS
20 TIME; BUT YOUR POSITION AT THE MOMENT IS
21 THAT THE GENTLEMAN'S POSSESSION OF THE
22 WEAPONS, IF HE DID INDEED POSSESS THEM,
23 WAS PERMITTED.

24 MR. SHEKETOFF: BECAUSE HE HAD THE

1 CARD. I DON'T KNOW HOW SHREWSBURY
2 DECIDED IT WAS REVOKED, IF THEY DECIDED
3 IN THEIR MINDS AT SOME POINT IN TIME IT
4 WAS REVOKED. THEY ACTUALLY HAVE TO
5 SERVE NOTICE ON THE DEFENDANT BECAUSE
6 THEN HE HAS A RIGHT TO APPEAL TO A
7 HEARING ON THAT REVOCATION. THAT WAS
8 NEVER DONE, AT LEAST -- I HAVE RAISED
9 THIS IN THE WESTBORO DISTRICT.

10 THE COURT: LET ME ASK MR. BALL,
11 DO YOU HAVE ANY INFORMATION, SIR, AS TO
12 WHETHER OR NOT THE GENTLEMAN WAS
13 NOTIFIED OR ATTEMPTED TO BE NOTIFIED OF
14 IRREVOCATION OF HIS LICENSE TO CARRY AND
15 HIS F.I.D?

16 MR. BALL: I DON'T KNOW THAT. ALL
17 I KNOW IS THE INFORMATION FROM THE
18 SHREWSBURY POLICE DEPARTMENT, YOUR
19 HONOR, THAT HIS LICENSE TO CARRY
20 FIREARMS WAS REVOKED.

21 THE COURT: THANK YOU.

22 MR. BALL: I AM NOT SURE THE
23 RECORD REFLECTS THAT, BUT I THINK BACK
24 AT THE TRIAL, WHEN HE WAS CONVICTED, HE

1 WAS ASKED TO TURN IN THAT LICENSE. I
2 DON'T HAVE A RECORD OF THAT.

3 THE COURT: I HAVE NO MEMORY OF
4 THAT, SIR.

5 THE CLERK: I DON'T KNOW IF THAT'S
6 ON THE PAPERS. THE ANSWER IS NO.

7 THE COURT: ANYTHING FURTHER,
8 GENTLEMEN?

9 MR. SHEKETOFF: YOUR HONOR, I
10 DON'T KNOW WHAT YOUR POSITION ON THIS
11 IS. IT WOULD SEEM TO ME THAT I DON'T
12 THINK THE COMMONWEALTH EVEN HAS A PRIMA
13 FACIE CASE. HE DID HAVE A LICENSE.
14 IT'S IN HIS POSSESSION. I HAVE SEEN IT
15 WITH MY OWN EYES, SO I KNOW THAT IT
16 EXISTS. I LOOKED AT IT.

17 I MET WITH HIS WIFE THIS MORNING.
18 SHE GAVE ME THE NEWSPAPER ARTICLE AND
19 LET ME LOOK AT THE LICENSE. SO I KNOW
20 IT EXISTS. IT SEEMS TO ME IT WOULD BE
21 UNFAIR TO REVOKE HIS BAIL. UNLESS THE
22 COMMONWEALTH CAN MAKE A --

23 THE COURT: I WOULD AGREE WITH
24 YOU, MR. SHEKETOFF. CERTAINLY IF WE

1 WERE TRYING THE CASE AT THIS POINT, THE
2 COMMONWEALTH'S CASE WOULD BE INADEQUATE,
3 BUT THIS IS A LITTLE DIFFERENT STAGE OF
4 THE PROCEEDINGS.

5 WHAT I AM GOING TO DO IS I AM
6 GOING TO VACATE THE STAY OF EXECUTION IN
7 THE MAYHEM CASE. YOU MAY, OF COURSE, IF
8 IT TURNS OUT IN THE NEXT COUPLE OF
9 MONTHS OR WEEKS OR WHATEVER THAT THERE
10 IS AN INDICATION THAT HE INDEED WAS NOT
11 IN VIOLATION OF LAW IN TERMS OF
12 POSSESSING THOSE PARTICULAR FIREARMS,
13 YOU MAY ADDRESS THE COURT AGAIN ON
14 REINSTITUTING THE STAY.

15 BUT AT THIS POINT, BASED UPON
16 REPRESENTATION BY THE DISTRICT ATTORNEY
17 THAT THE LOCAL POLICE HAVE REVOKED HIS
18 LICENSE AND HIS F.I.D. CARD, WHATEVER IT
19 IS HE HAS TO HAVE, I AM GOING TO VACATE
20 THE STAY OF EXECUTION ON THE OTHER
21 SENTENCE, AND THE GENTLEMAN WOULD BE
22 REMANDED TO SERVE A SENTENCE. BUT I
23 WILL HEAR YOU AGAIN IF SOMETHING ELSE
24 COMES UP.

1 ANYTHING FURTHER?

2 MR. SHEKETOFF: YOUR HONOR, WOULD
3 YOU CONSIDER KEEPING A VERY HIGH BAIL ON
4 THIS, AS OPPOSED TO REVOKING --

5 THE COURT: NO, SIR.

6 MR. SHEKETOFF: WHAT ELSE CAN I
7 SAY, YOUR HONOR?

8 THE COURT: I UNDERSTAND, SIR.
9 YOU MAY BE HEARD AGAIN, IF THE
10 CIRCUMSTANCES CHANGE.

11 MR. SHEKETOFF: THE PROBLEM IS,
12 YOUR HONOR, MY EXPERIENCE WITH THE
13 WORCESTER DISTRICT ATTORNEY'S OFFICE, MY
14 MOST VERY RECENT EXPERIENCE, THEY HAVE
15 ALREADY ASKED FOR AN EXTENSION ON THE
16 BRIEF. AS YOUR HONOR ORDERED, WE FILED
17 OUR BRIEF IN A TIMELY FASHION. THEY
18 HAVE ALREADY ASKED FOR ONE EXTENSION. I
19 AM SURE NOW THAT HE IS GOING TO BE
20 LOCKED UP, THEY ARE GOING TO BE ASKING
21 FOR SUBSEQUENT EXTENSIONS.

22 THE COURT: THEY MAY PROCEED
23 PROMPTLY. I AM NOT SURE THAT'S IN FRONT
24 OF ME AT THE MOMENT. ALL I AM TELLING

1 YOU, SIR, IS IF THAT LICENSE
2 SITUATION -- AND I AM TRYING NOT TO
3 SHIFT THE BURDEN OF PROOF HERE, BUT IF
4 THAT LICENSE SITUATION DOES APPEAR TO BE
5 MORE FAVORABLY INCLINED TOWARDS YOUR
6 CLIENT THAN IT APPEARS AT THE MOMENT, I
7 WILL HEAR YOU AGAIN ON THE NARROW
8 QUESTION OF WHETHER THE STAY OUGHT TO BE
9 REVIVED.

10 THANK YOU, SIR.

11 THE CLERK: THE STAY OF EXECUTION
12 IS HERE BY REVOKED. THE DEFENDANT IS
13 SENTENCED TO M.C.I. CONCORD FOR A PERIOD
14 OF TEN YEARS, CREDIT FOR THE SUM OF
15 THREE DAYS.

16 THIS HEARING IS CONCLUDE.

17 MR. SHEKETOFF: YOUR HONOR, IT'S
18 MY UNDERSTANDING THAT HE IS STILL HELD
19 IN THE WORCESTER COUNTY HOUSE OF
20 CORRECTION ON THE FIVE THOUSAND DOLLARS
21 BAIL AND THAT THAT IS FIRST IN LINE.

22 THE COURT: I DON'T KNOW THAT IT
23 IS FIRST IN LINE. I DON'T KNOW THAT IT
24 IS FIRST IN LINE, SIR.

1 MR. SHEKETOFF: THAT'S WHAT I AM
2 ASKING.

3 THE COURT: I DON'T KNOW. I
4 CONFESS IGNORANCE. ALL I KNOW IS THAT
5 HE IS SERVING MY SENTENCE RIGHT NOW.
6 FOR WHAT IT'S WORTH, HE IS CERTAINLY
7 GETTING CREDIT FROM THIS DAY ON.

8 THE CLERK: THIS HEARING IS
9 CONCLUDED.

10
11 (THE HEARING THEN SUSPENDED
12 AT 12:25 P.M.)

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C E R T I F I C A T I O N

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4 I, JANE ELIZABETH ESPOSITO,
5 OFFICIAL COURT REPORTER, HEREBY CERTIFY THAT
6 THE FOREGOING TRANSCRIPT OF THE EVIDENCE IN
7 THE CASE OF COMMONWEALTH VERSUS MICHAEL
8 ELBERY, TAKEN BEFORE THE HONORABLE DANIEL F.
9 TOOMEY, WORCESTER SUPERIOR COURT, WORCESTER,
10 MASSACHUSETTS, ON AUGUST 10, 1994, IS A TRUE
11 AND ACCURATE TRANSCRIPT OF MY STENOGRAPHIC
12 NOTES TO THE BEST OF MY SKILL, KNOWLEDGE AND
13 ABILITY.
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JANE ELIZABETH ESPOSITO
OFFICIAL COURT REPORTER