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January 13, 2022

VIA FEDEX

Berkshire County Superior Court
76 East Street
Pittsfield, MA 01201

Re: *Commonwealth of Massachusetts v. Barry J. Jacobson*, No: 17159, Berkshire County Superior Court

ADL (the Anti-Defamation League) respectfully submits this letter brief¹ in support of Barry Jacobson's motion for a new trial in the above-captioned matter.

Statement of Interest of ADL

Founded in 1913 in response to an escalating climate of antisemitism and bigotry, ADL's timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, ADL is often the first call when acts of antisemitism occur, and we serve on the front lines when it comes to fighting against antisemitism and bigotry of all kinds.

This case implicates not only ADL's broad goal of eradicating bigotry, but also our particular focus on protecting the right to a fair trial and ensuring that our justice system is not infected by racial, ethnic, or religious bias. ADL itself was founded at a time when antisemitism was rampant, as illustrated by the trial of Leo Frank, a Jewish businessman who was falsely convicted of rape and murder during the course of an investigation and prosecution rife with antisemitism. *See Frank v. Mangum*, 237 U.S. 309 (1915). We know that when a juror expresses racial, religious or ethnic prejudice during a criminal trial, it not only undermines an individual defendant's constitutional rights, but it also compromises the integrity of and public confidence in the legal system as a whole.

After carefully reviewing the record in this case, we share the concerns Mr. Jacobson has raised regarding the antisemitic undertones of his criminal trial decades ago and, most significantly, in the antisemitic remarks and prejudices of at least one of the jurors. We respectfully request that this court carefully consider this evidence when ruling on Mr. Jacobson's present motion.

Mr. Jacobson's Right to a Fair Trial was Compromised by Juror Bias

Based on our extensive review of the record in this case, evidence of juror bias was readily apparent. According to the sworn statement by a sitting juror, Shirley Cimini, "From the beginning of our deliberations, the forelady of the jury, Mrs. Gagliardi, repeatedly made references to Mr. Jacobson as being 'one of those New York Jews who think they can come up here and get away with anything.' Other similar anti-Semitic remarks were made by her and others throughout the deliberations." According to a sworn statement from an alternate juror, Grace Hunt, "[W]hen the jury first went out to deliberate they had only been in there, I would say less than five

¹ The District Attorney does not object to ADL filing a letter with the Court.

minutes, when I overheard one of those ladies say to the other, ‘Well this is not going to take very long. . . . All those rich, New York Jews come up here and think they can do anything and get away with it’.”² In addition, after the court disclosed that it had received sworn statements that antisemitic statements were made during deliberations, several jurors who had previously denied that such statements had been made withdrew or qualified their initial denials.³

In ADL’s experience, and consistent with our research, one of the most prominent and persistent stereotypes about Jews is that they “are greedy and avaricious, hoping to make themselves rich by any means possible,”⁴ and are “both . . . relentless in the pursuit of wealth and also . . . stingy misers determined not to let any money slip from their grasp.”⁵ This stereotype took hold in the Middle Ages, when Jews were prohibited from owning land or joining tradesmen’s guilds and were instead restricted to jobs that Christians found distasteful or were prohibited by the Church, such as money-lending or tax collecting. This reality made it easy for leaders to position Jews as a scapegoat for a community’s financial woes; it also compounded the perception among some Christian theologians of Jews as immoral and devoid of virtue.⁶

The Prosecution’s Theory Fed Directly Into Centuries-Old Antisemitic Stereotypes and Tropes

The stereotypes that appear to have been invoked during juror deliberations are wholly consistent with the antisemitic trope of Jewish “greed,” were directly tied the alleged motive in this case, and were only reinforced by the prosecution, even if unintentionally. While the Commonwealth’s initial theory appeared to be that Mr. Jacobson tried to burn down his vacation home because he needed the insurance money, after it became clear during the defense case that Mr. Jacobson was Jewish and that he owned a very successful business in New York and was not in need of money, the strategy shifted to picturing him as a greedy avaricious lover of money, hoping to get rich by any means possible. Suggesting, without evidence, that this trait was ***inherent in Mr. Jacobson*** was not only improper,⁷ but it fed directly into the preexisting antisemitic prejudices held by at least one of the jurors, Mrs. Gagliardi. Indeed, her comments indicated that she believed Mr. Jacobson had these characteristics ***because he was Jewish***, and was guilty for this reason alone.

² It is ADL’s understanding that the sworn statements of jurors Hunt and Cimini were included in the Appeals Court appendix, which has not been preserved. These quotes are instead drawn from the appellate briefs filed in this case which have been preserved. See FN 4 of Mr. Jacobson’s Motion for Post-Conviction Relief, dated April 13, 2021.

³ See Mr. Jacobson’s Supplemental Memorandum, dated December 17, 2021, at pp. 8-10.

⁴ See “*Jews Are Greedy*,” *Antisemitism Uncovered: A Guide to Old Myths in a New Era*, available at <https://antisemitism.adl.org/greed/>.

⁵ *Id.*

⁶ *Id.*

⁷ See *Com. v. Conkey*, 430 Mass. 139, 145 (1999) (“Evidence may not be admitted to prove the propensity of an accused to commit the crime charged.”); *United States v. Mitchell*, 172 F.3d 1104, 1108–09 (9th Cir. 1999) (“A rich man’s greed is as much a motive to steal as a poor man’s poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value.”).

This is quintessential juror bias – and directly contrary to a “basic premise of our criminal justice system” that the “law punishes people for what they do, not who they are.” *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (emphasis added); see also *Com. v. McCowen*, 458 Mass. 461, 497 (2010) (quotation omitted) (“The presence of even one juror who is not impartial violates a defendant’s right to trial by an impartial jury.”).

Mr. Jacobson’s Religion Was Not Appropriately Before the Jury for Consideration as to a Possible Motive in this Case

Of equal concern to ADL is the fact that the court’s findings on Mr. Jacobson’s original motion for a new trial⁸ improperly relied, at least in part, on the logic that because Mr. Jacobson’s “religion” was “introduced into evidence” by the defense, it was “appropriately before the jury” and not an “extraneous matter[]” for purposes of deliberations. This is deeply troubling. Mr. Jacobson’s religion simply became known to the jury after Mr. Jacobson’s rabbi provided character witness testimony; it was not appropriately before the jury for consideration **as to a possible motive in this case**. Far to the contrary, any conclusion that Mr. Jacobson was more or less likely to (or did in fact) commit a crime *because* of stereotypes associated with his religious identity would have been wholly improper. See, e.g., *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859 (2017) (holding that the no-impeachment bar may be set aside where juror statements exhibit overt racial bias that cast serious doubt on fairness of deliberations and resulting verdict, and tend to show racial animus was significant motivating factor in vote to convict). We accordingly have serious concerns regarding a miscarriage of justice in this case at a time when antisemitism was particularly rampant and not as well understood.

This new motion presents a unique opportunity for this court to carefully consider whether “a confluence of factors,” including the issues identified by Mr. Jacobson’s arson forensics expert, have created a substantial risk that justice may not have been done.⁹ We urge the court to grant Mr. Jacobson’s motion for a new trial.

Sincerely,



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⁸ See *Memorandum of Findings on Defendants’ Motion for a New Trial*, dated April 6, 1984.

⁹ See *Commonwealth v. Rosario*, 477 Mass. 69, 78 (2017); *Commonwealth v. Ellis*, 475 Mass. 459, 481 (2016) (finding that the motion judge did not abuse her discretion in granting a new trial where a combination of newly discovered evidence together with other evidence presented at trial warranted it).