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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 19-P-0428

SUFFOLK, ss.

COMMONWEALTH, Appellee

v.

JOSIAH WATKINS, Appellant

On Appeal from a Judgment after Jury Trial and Order,
pursuant to Mass. R. Crim. P. 30(b), of the Suffolk Superior Court

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Substitute Brief for the Appellant, JOSIAH WATKINS

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STATEMENT OF ISSUES

I. Whether Mr. Watkins's conviction for possessing a firearm without a license, under M.G.L. c.269, s.10(a), should be vacated and reversed where the Commonwealth did not meet its burden of proving that he knew that the weapon that he briefly posed with for a Snapchat video was an operable firearm as required by M.G.L. c.140, s.121.

II. Whether, the trial judge incorrectly instructed the jury that if the weapon is "a conventional firearm with its obvious dangers, the Commonwealth is not required to prove that the Defendant knew that the item met the legal definition of a firearm" where the Commonwealth is required to prove Mr. Watkins's knowledge of a working firearm under M.G.L. c.269, s.10(a).

III. Whether the trial court wrongly denied Mr. Watkins's motion for a new trial by failing to find that trial counsel provided constitutionally ineffective assistance when he did not move to suppress evidence on the grounds that the information provided in the warrant application was stale and, thus, did not supply probable cause for a search.

IV. Whether the admission of the Commonwealth's ballistician's report, which repeated his live testimony, was a prejudicial error since it bolstered the reliability of his opinion both by its cumulative nature and where it

included an assertion that his findings had been confirmed by a secondary examiner.

V. Whether the trial court abused its discretion and erred in denying Mr. Watkins's motion for new trial without first ordering discovery concerning the manner in which the police intercepted his Snapchat communications upon which this prosecution was based.

STATEMENT OF THE CASE

The Commonwealth alleged that, on May 8, 2017, Mr. Watkins (Indictment 001) possessed a large capacity weapon, an Intratec 9mm pistol, in violation of M.G.L. c.269, s.10(m), and (Indictment 002) carried it without a license, outside his home or residence, in violation of M.G.L. c.269, s.10(a). (R.A. 53-54). [1] He plead not guilty to these indictments and was appointed Attorney John MacLachlan. (R.A. 8). Mr. Watkins's motion to dismiss the indictments was denied by the Hon. Jeffrey A. Locke on February 18, 2018. (R.A. 11-12). A motion to suppress evidence was not filed by the defense.

A two day jury trial commenced on May 8, 2018 before the Honorable Robert N. Tochka. (R.A. 13). He denied defense counsel's motions for a required finding of not guilty at the close of the Commonwealth's case and at the close of all

[1] The Record Appendix as cited as "(R.A. __)." The trial transcript is in four volumes and cited chronologically by volume and page as "(Tr. ___ /___)." The trial judge did not hold an evidentiary hearing on Mr. Watkins's Rule 30(b) motion.

evidence. (R.A. 14). The jury found Mr. Watkins guilty on both indictments on May 9, 2018. (Id.). Thereafter, the trial court sentenced him on Indictment 001, the large capacity indictment, to two and one-half years to two and one-half years and one day in state prison. (R.A. 14-15). On Indictment 002, for unlawfully carrying of a firearm, it sentenced him to two and one-half years to two and one-half years and one day in prison. (R.A. 15). On June 25, 2018, the trial judge heard Mr. Watkins's motion for a required finding of not guilty and the Commonwealth's motion to address convictions. (R.A. 16). No action was taken on Mr. Watkins's motion while the Commonwealth's motion, pursuant to Commonwealth v. Rivas, 466 Mass. 184 (2013)(duplicative convictions), was allowed. (Id.). In response, the trial court vacated and dismissed Mr. Watkins's conviction on Indictment 001 while resentencing him to eighteen months in the house of corrections on Indictment 002. (Id.). Mr. Watkins filed a timely notice of appeal. (R.A. 15-16, 21-22).

On October 19, 2018, Mr. Watkins moved, pursuant to Mass. R. Crim. P. 30(b), to vacate his conviction, ("Rule 30(b) motion"), for related postconviction discovery and to stay the execution of his sentence pending his appeal, pursuant to Mass. R. Crim. P. 31. (R.A. 17-18). The Commonwealth filed written opposition to the stay and opposed the Rule 30(b) motion orally at two nonevidentiary hearings. (R.A. 18, 94). Mr. Watkins filed a "Memorandum of Law Concerning the

Commonwealth's Unsubstantiated Argument for this Court's Waiver of the Defendant's Claim for Reversal on the Grounds of Insufficiency of Evidence." (R.A. 122). The trial judge denied his Rule 30(b) motion by Memorandum of Decision and Order on March 11, 2019 and he filed timely notice of appeal on March 18, 2019. (R.A. 125-137). He also denied Mr. Watkins request for a stay of the execution of his sentence pending appeal. (R.A. 138). This consolidated appeal from conviction after jury trial and the denial of his Rule 30(b) motion entered this Court on March 20, 2019.

STATEMENT OF THE FACTS

On May 8, 2017, Officers Zachary Crossen and Joseph Connolly of the Boston Police Youth Violence Strike Force observed videos of the defendant, Josiah Watkins, posted on Snapchat, a social media platform. (R.A. 60-61, 63; Tr. II/142-150). The Commonwealth alleges that Mr. Watkins brandished a TEC-9 firearm alone in one video and he was depicted with Mr. Santos in a second video. (R.A. 139-144; Tr. II/146-150). The magazine was separated from the weapon and not pictured while Mr. Watkins held it but Mr. Santos is seen attaching a magazine into it in his video. (Id.). In neither video is ammunition present. (Id.). The Commonwealth alleged that the videos appear to have been taken in a bedroom. (Id.).

On that day and time, Mr. Santos was wearing a global positioning device, ("GPS"), which was monitored by the Department of Youth Services, ("DYS"). (Tr. III/79-82). DYS District Manager Jennifer Resil testified that Mr. Santos did not leave his residence, 339 Adams Street, Apartment 4, Dorchester, Massachusetts, on May 8, 2017, according to GPS monitoring. (Tr. III/82). The GPS monitoring records that she relied upon were admitted in evidence at trial. (Tr. III/79-83; R.A. 65-71). Between May 8, 2017 and May 16, 2017, the police did not conduct surveillance on 339 Adams Street and were unaware of the movement of individuals and items to and from that residence. (Tr. II/176). However, the GPS records detail significant movement by Mr. Santos away from his home between May 9, 2017 and May 16, 2017. (R.A. 67-71).

On May 14, 2017, the police obtained a search warrant for Mr. Watkins's residence at 2030 Columbus Avenue, Roxbury, Massachusetts. (Tr. III/35). Along with his personal papers, they recovered a memorial pin and necklaces with medallions, which they believed Mr. Watkins wore in the Snapchat videos. (Tr. III/35-37). No firearm-related paraphernalia or contraband were recovered during the search of that location. (Id.). On May 16, 2017, the police obtained and executed a search warrant for Mr. Santos's home. (R.A. 77-83). Officer Connolly testified that he participated in the search where the police recovered the subject firearm and ammunition secreted in a book bag in the bedroom closet along with

personal papers of Mr. Santos. (Tr. II/163, 169, 172). Rachel Kerry, a Boston Police latent fingerprint expert, did not recover a fingerprint from the seized firearm, magazine or cartridges during her examination. (Tr. III/76-77). Christopher Finn, a criminalist for the Boston Police Firearm Analysis Unit, testified, upon inspection and test-firing, that the police recovered an Intratec Tec-9 that met the statutory definition of a firearm under Massachusetts law. (Tr. III/94). In particular, he noted that he could not determine if the firearm was operable just from a review of the videos and still photographs and he opined that holding it for ten seconds would not have been enough to reach his conclusion that was based upon inspection and test-firing. (Tr. III/97-98).

SUMMARY OF THE ARGUMENT

Mr. Watkins stands convicted, under M.G.L. c.269, s.10(a), for holding what the Commonwealth claims is an operable firearm to film an eight (8) second video that was uploaded to Snapchat. There is no evidence that Mr. Watkins previously possessed this weapon or sought to use it in the future and, to the contrary, it was recovered approximately one week later from another individual's bedroom. Mr. Watkins presents five (5) issues in this appeal upon which this Court should vacate this unjust conviction.

First, Mr. Watkins's conviction cannot stand where the Commonwealth is required to prove, beyond a reasonable doubt, that he knew that he held an

operable "firearm" as defined in M.G.L. c.140, s.121. See *infra* at 19-31. This burden is supported by the Supreme Judicial Court's recent jurisprudence interpreting the mens rea for conviction under Sections 10(h), 10(m) and 10(n) of Chapter 269 of the General Laws. See *infra* at 20-25. Where Mr. Watkins did not purchase this weapon, load this weapon, fire this weapon or observe it in operation and no ammunition is depicted in the video in which he held the weapon, no inferences could be drawn that he was aware it conformed to M.G.L. c.140, s.121. See *infra* at 25-31. Vacatur and reversal of his conviction is, therefore, warranted as the Commonwealth failed to prove each element of M.G.L. c.269, s.10(a) to sustain his conviction beyond a reasonable doubt. See *infra* at 19-31.

Second, given this requirement of proof of his knowledge of the firearm's operability, the trial judge wrongly instructed the jury that they could disregard this element if it appeared to be a conventional firearm. See *infra* at 31-32. This instruction unconstitutionally lessened the Commonwealth's burden of proof by allowing conviction even if Mr. Watkins did not know it met the requirements for a firearm under M.G.L. c.140, s.121. See *infra* at 31-35. A new trial is warranted to correct this error. See *infra* at 35.

Third, the trial judge wrongly denied Mr. Watkins's Rule 30(b) motion on the grounds that he found trial counsel was not ineffective for foregoing the filing of a motion to suppress the firearm and ammunition seized from the warrant search

of Mr. Santos's bedroom. See *infra* at 37-47. His decision is wrongly based on a finding that such a motion was devoid of merit. See *infra* at 37-39. On the contrary, the search warrant application did not establish when the Snapchat videos were filmed as distinct from when they were uploaded on the application. See *infra* at 37-47. This fact was critical in determining their timeliness. See Id. Moreover, even assuming that the upload times are the same as the time of filming, the information did not support a search eight days later upon a belief that the evidence sought would still be located in Mr. Santos's bedroom. See Id. The failure to suppress the firearm and ammunition prejudiced Mr. Watkins where the case was unlikely to proceed to trial and, thus, vacatur of his conviction is warranted. See *infra* at 47-48.

The admission of the firearm examiner's report into evidence after his live testimony amounts to a prejudicial error for which a new trial is warranted. See *infra* at 48-53. Here, it contained the hearsay assertion by a secondary examiner, confirming the primary examiner's opinion and merely repeated the primary examiner's live testimony. See Id. This report added nothing probative to the evidence and its only effect was to bolster the credibility of the examiner's opinion that the firearm met the statutory definition to support conviction. See Id. Where the trial judge noted the importance of this evidence and operability was a live

issue at trial, the trial judge abused his discretion and Mr. Watkins was unduly prejudiced. See Id.

Lastly, the trial judge abused his discretion in denying Mr. Watkins's claim that trial counsel was ineffective in discovering the means that the police intercepted Snapchats related to this case without ordering discovery where it could have supported constitutional violations like the ones at issue in Commonwealth v. Dilworth, Add. at 147. See *infra* at 53-55.

ARGUMENTS

I.

MR. WATKINS'S CONVICTION FOR POSSESSING A FIREARM WITHOUT A LICENSE, UNDER M.G.L. c.269, s.10(a), SHOULD BE VACATED AND REVERSED WHERE THE COMMONWEALTH DID NOT MEET ITS BURDEN OF PROVING THAT HE KNEW THAT THE WEAPON THAT HE BRIEFLY POSED WITH FOR SNAPCHAT VIDEOS WAS AN OPERABLE FIREARM AS REQUIRED BY M.G.L. c.140, s.121.

A. STANDARD OF REVIEW

The Commonwealth failed to prove that Mr. Watkins knew that he held a working firearm while making an eight (8) second long Snapchat video and, thus, his conviction under M.G.L. c.269, s.10(a) cannot stand as a matter of law. See In re Winship, 397 U.S. 358, 364 (1970); Commonwealth v. Cassidy, 479 Mass. 527, 536-538 (2018); Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), Due Process Clause of the Fifth and Fourteenth Amendments. This issue is preserved for appellate review where the trial court denied Mr. Watkins's request for a

directed verdict, (Tr. III/103), and also this argument raised again in his Rule 30(b) motion. See Latimore, 378 Mass. at 676-677. The requirement that the government meet its burden of proving each element of the crime charged beyond a reasonable doubt is of state and federal constitutional dimension under the Fourteenth Amendment to United States Constitution and Article Twelve of the Massachusetts Declaration of Rights. In Re Winship, 397 U.S. at 364; Commonwealth v. Brown, 26 Mass. 475, 482 (1998). Mr. Watkins's conviction should be reviewed to determine “whether the evidence received, viewed in a light most favorable to the Commonwealth, is sufficient so that the jury might properly draw inferences, not too remote in the ordinary course of events, or forbidden by any rule of law, and conclude upon all the established circumstances and warranted inferences that the guilt of the defendant was proved beyond a reasonable doubt.” Commonwealth v. Anderson, 396 Mass. 306, 311 (1985). Whereas it is paramount that the question of guilt is not left to conjecture or surmise, Id. at 312, and justice is not achieved by incarceration absent proof, Mr. Watkins's conviction should be vacated and reversed. See Latimore, 378 Mass. at 676-677.

B. M.G.L. c.269, s.10(a) REQUIRES THE COMMONWEALTH TO PROVE BEYOND A REASONABLE DOUBT THAT MR. WATKINS KNEW THAT HE POSSESSED A WORKING FIREARM.

It is fundamental that, in a criminal prosecution, every essential element of the offense must be proved beyond reasonable doubt. See Apprendi v. New Jersey,

530 U.S. 466, 477 (2000); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). Here, where Mr. Watkins is charged with the unlicensed carrying of a firearm outside his residence or place of business, the Commonwealth was required to prove that he "**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[.]" M.G.L. c.269, s.10(a). A firearm is defined as "a pistol, revolver or other weapon of any description, loaded or unloaded, **from which a shot or bullet can be discharged** and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun[.]" M.G.L. c.140, s.121. Thus, Mr. Watkins's conviction under Section 10(a) may only stand if the Commonwealth proved, through sufficient evidence, that he knew he possessed an operable weapon, namely one "from which a shot or bullet can be discharged." Id.; see also Latimore, 378 Mass. at 676-677. The trial judge correctly stated the Commonwealth's burden, noting that "[t]he Supreme Judicial Court expressed in Commonwealth v. Jackson that G.L. c.269, §10(a) is to be interpreted as 'requiring, as a necessary element of the offense, proof that the accused knew that he was carrying a firearm[,]' 369 Mass. 904, 916 (1976)[,]" and, "[s]ince Jackson, the legislature added the express knowledge requirement to G.L. c.269, §10(a) in 1990." R.A. 128; contrast Commonwealth v. Papa, 17 Mass. App. Ct. 987, 988 (1984)(interpretation of knowledge under prior version).

Interpreting M.G.L. c.269, s.10(a) so as to require proof of knowledge of an operable firearm is consistent with the Supreme Judicial Court's decision in Cassidy, 479 Mass. at 534-538. There, the court examined M.G.L. c.269, s.10(m) to determine the appropriate mens rea for possession of a large capacity weapon. See 479 Mass. at 534-538. It recognized that Section 10(m) punishes "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 . . ." See Id. at 534. Based upon the rules of statutory construction, the court held that,

> as one of the elements of a charge under G. L. c. 269, § 10(m), the Commonwealth must prove that a defendant either knew a firearm or feeding device he or she possessed qualifies as having a large capacity under the statute or knew that the firearm or feeding device is capable of holding more than ten rounds of ammunition.

Id. at 536. The use of the adverb "knowing" is consistent between Sections 10(a) and 10(m) and, thus, the Commonwealth should be required to prove that Mr. Watkins knew that the object that he held in the Snapchat videos met the statutory definition of a firearm as set forth in M.G.L. c.140, s.121, just as Mr. Cassidy was required to know that he possessed a large capacity weapon or feeding device that conformed to the statutory definition. Id.

Section 10(h) has been interpreted consistent with Mr. Watkins's claim. In Commonwealth v. Johnson, 461 Mass. 44, 51-53 (2011), the defendant argued that his conviction of unlawful possession of ammunition under M.G. L. c.269, s.10(h), was duplicative of his conviction of unlawful possession of a loaded firearm under M.G. L. c.269, s.10(n), and thus subjected him to unconstitutional double jeopardy by punishing him twice for possession of the same ammunition. Relevant to Mr. Watkins instant claim and its finding of double jeopardy, the court observed that "[t]o convict the defendant of unlawful possession of ammunition, the Commonwealth was required to prove that the defendant knowingly possessed ammunition that met the legal definition of ammunition[, s]ee G. L. c. 269, § 10 (h)," which is set forth in M.G. L. c.140, s.121. Id. at 53. In addition, "[t]o convict the defendant of unlawful possession of a loaded firearm, the Commonwealth was required to prove that the defendant knowingly possessed a firearm that was loaded with ammunition and met the legal requirements of a firearm as defined by G. L. c. 140, § 121. Id. at 52-53. The court held that "[a]ll of the required elements of unlawful possession of ammunition were encompassed by the elements of unlawful possession of a loaded firearm, and, therefore, the former crime was a lesser included offense of the latter crime." Id. The determination that a defendant must have actual knowledge that ammunition conforms to its statutory definition is

consistent with the Commonwealth's burden to prove that Mr. Watkins knew the weapon met the statutory definition of a firearm as set forth in M.G.L. c.140, s.121.

Moreover, the requirement of proof of knowledge of an operable firearm is consistent with the Supreme Judicial Court's decision in Commonwealth v. Brown, 479 Mass. 600 (2018). There, the defendant argued that the Commonwealth was required to prove that he knew the firearm in his possession was loaded under M.G.L. c.269, s.10(n), which provides a sentencing enhancement to the crime of unlicensed possession of a firearm where an unlicensed firearm was loaded. Id. at 604. Section 10(n) provides that "[w]hoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished..." The court noted that the "absence of any explicit language requiring knowledge in the enhancement provision... is not dispositive." 479 Mass. at 606. Looking to its past holding in Johnson, 461 Mass. at 52-53, concerning the element of knowledge for possession of ammunition, it held that "[b]ecause the Commonwealth is required to prove that a defendant knowingly possesses ammunition that meets the legal definition of ammunition,... we conclude that the Commonwealth also must prove the element of knowing that the firearm was loaded with ammunition in order to convict a defendant of unlawful possession of a loaded firearm under G.L.c. 269, § 10(n)." Id. at 607-608. Knowledge that a weapon is operable and, therefore, meets the legal definition of a

"firearm" as required under M.G.L. c.140, s.121 is on all fours with the requirements under M.G.L. c.269, ss.10(a), (h), (m) and (n).

Applying the knowledge requirement to Section 10(a) is also in harmony with the Supreme Judicial Court's prior jurisprudence. In addition to Jackson, as noted *supra*, the Brown court noted the following precedential history supporting its decision:

> We previously have concluded that other provisions of the firearms statute that do not explicitly contain a mens rea requirement, among them G. L. c. 269, § 10 (c) and (h), and previous versions of G. L. c. 269, § 10, implicitly require knowledge. See [Commonwealth v.] Johnson, 461 Mass. [44] at 53 [(2011)]; Commonwealth v. O'Connell, 432 Mass. 657, 663 (2000)(requiring knowledge of possession, but not knowledge of barrel length, to be convicted of possession of sawed-off shotgun with barrel less than statutory minimum, G. L. c. 269, § 10 [c]); Commonwealth v. Jackson, 369 Mass. 904, 916 (1976)(concluding that implicit knowledge requirement existed in previous version of G. L. c. 269, § 10 [a]); Commonwealth v. Boone, 356 Mass. 85, 87 (1969)(concluding that knowledge requirement was implicit in former G. L. c. 269, § 10, predecessor to current G. L. c. 269, § 10 [a]). With respect to G. L. c. 269, § 10 (a), the Legislature ultimately revised the statutory language to include the element of "knowing" after our decision in Jackson, supra; it has not modified other provisions such as G. L. c. 269, § 10 (c) or (h).

Brown, 479 Mass. at 606-607. Interpreting Section 10(a) as a "strict liability offense" as suggested by the Commonwealth below, (R.A. 99), disregards this comprehensive precedent above and its consistency in statutory interpretation. See Brown, 479 Mass. at 606.

Accordingly, based upon this precedent and the construction of M.G.L. c.269, s.10, this Court should hold that the Commonwealth must prove beyond a reasonable doubt that Mr. Watkins knew that he possessed a firearm, which was capable of discharging a bullet and, therefore, in conformity with M.G.L. c.140, s.121, in order to sustain his conviction under Section 10(a).

C. THE COMMONWEALTH'S EVIDENCE WAS INSUFFICIENT AT TRIAL TO PROVE THAT MR. WATKINS KNEW THAT HE HELD A WORKING FIREARM IN THE ABSENCE OF ANY AMMUNITION, EXPERIENCE WITH THE WEAPON OR KNOWLEDGE OF THE ITS PAST FIRING.

In the instant case, viewing the trial evidence in the light most favorable to the Commonwealth under the Latimore standard, no "rational trier of fact could have found" that Mr. Watkins knew that he possessed a firearm capable of discharging a bullet "beyond a reasonable doubt." 378 Mass. at 677; quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979). "Proof of possession of [contraband] may be established by circumstantial evidence, and the inferences that can be drawn therefrom." Brown, 479 Mass. at 609; citing Commonwealth v. Romero, 464 Mass. 648, 653 (2013)(citation omitted). However, inferences must be "reasonable and possible" and not veer into the province of speculation and conjecture. See Commonwealth v. Dinkins, 415 Mass. 715, 725 (1993).

Below, the trial judge, reviewing this claim under Mass. R. Crim. P. 30(b), wrongly held that Mr. Watkins had knowledge that the firearm discharged a bullet.

(R.A. 129). He speculated that Mr. Watkins's was aware of ammunition found secreted in Mr. Santos's bedroom closet at the time of the execution of the search warrant over a week later. (Id.). Specifically, he found that

> [a]t trial, the Commonwealth put forth evidence of the Defendant holding and brandishing the weapon while pointing it toward the Snapchat camera. One of these videos shows the Defendant and Santos, with Santos loading the weapon with a magazine. Further, evidence was presented that ammunition was recovered at Santos' home with the TEC-9 found in his closet.

(Id.). However, noticeably absent from both the trial judge's finding and the Snapchat videos is a depiction of the ammunition in plain view of Mr. Watkins at the time of filming. The ammunition is not visible either inside the magazine or otherwise in the video. (R.A. 139-144). Therefore, the trial judge erred in drawing an inference that Mr. Watkins knew the firearm could discharge a bullet because ammunition was later seized from Mr. Santos during the warrant search. In the absence of evidence that Mr. Watkins was aware of the same, this Court should wholly disregard this finding. Likewise, the "brandishing" of what appears to be a TEC-9 firearm in a video does not establish its operability. (R.A. 129). If, as the trial judge seemingly implies, that the video was made for intimidation, a nonworking weapon sends the same message and, based on its appearance alone, can be dangerous. See Commonwealth v. Powell, 433 Mass. 399, 401 (2001)(the standard definition of "dangerous weapon" also "includes items that are used or displayed in a way such that they reasonably appear capable of causing serious

injury or death"); citing Commonwealth v. Henson, 357 Mass. 686, 693-694 (1970)(upholding conviction of assault by means of a dangerous weapon even though defendant's revolver had only blank cartridges); Commonwealth v. Garafolo, 23 Mass. App. Ct. 905, 907 (1986)(defendant used toy handgun to commit armed assault with intent to rob). Furthermore, where its functionality would produce the same desired result against one's adversaries, the Latimore standard is not met because where inferences, based on circumstantial evidence, are equally reasonable and probable, the trier of fact must draw the one that favors the defendant since he does not have any burden of proof. See Commonwealth v. Wallis, 440 Mass. 589, 596, n. 8 (2003); see also Commonwealth v. Robertson, 408 Mass. 747, 754 (1990); Commonwealth v. Lowe, 391 Mass. 97, 108-112 (1984).

Contrary to the trial judge's unreasonable inferences from the evidence, this Court should be guided by the Supreme Judicial Court's analysis of the defendants' knowledge in Cassidy and Brown. In Cassidy, a warrant search of the defendant's apartment revealed two firearms, four feeding devices and ammunition and he was later convicted of unlawfully possessing large capacity firearms and feeding devices. See 479 Mass. at 529. The court examined M.G.L. c.269, s.10(m) and, as discussed *supra*, determined that, "as one of the elements of a charge under G. L. c. 269, § 10 (m), the Commonwealth must prove that a defendant either knew a

firearm or feeding device he or she possessed qualifies as having a large capacity under the statute or knew that the firearm or feeding device is capable of holding more than ten rounds of ammunition." Id. at 536. Applying this burden, the court held that the evidence permitted the jury to conclude that the defendant was aware of the nature of the firearms and magazines to sustain his convictions based upon the fact that he purchased the items, he had a long period of ownership and history with firearms and he had loaded and shot the firearms. Id. at 537-538; compare Commonwealth v. Erickson Resende, No. 16-P-1532 (Mass. App. Ct. October 5, 2018)(applying Cassidy, *supra*, the court held that the Commonwealth did not prove that the defendant knew that a firearm secreted in his waistband during an investigatory stop was a large capacity weapon where there was no evidence that he knew anything in particular about that firearm or magazine, which he admitted he acquired from a friend).

In Brown, a loaded firearm was found secreted in a vehicle during an inventory search and the defendant, the driver, acknowledged he was aware of the firearm but he claimed it belonged another before he put it in the vehicle with the intent to dispose of it. Id. at 602-603. The court found there was no evidence that would permit someone to know whether the firearm was loaded simply by its appearance where the magazine was inserted inside its handle and "the Commonwealth did not present any evidence from which an inference could be

drawn that the defendant was aware that the firearm was loaded." Id. at 608. Thus, it held that the Commonwealth had not sustained its burden of proof to convict him of possessing a loaded weapon. Id.; contrast Resende, *supra* (applying Brown, *supra*, but holding it distinguishable where the circumstantial evidence permitted jury's inference that the defendant knew the firearm was loaded since it was found in his waistband and it was a commonsense inference that he would have checked to see if it was loaded where he was familiar with firearms and, moments earlier, made threatening statements to someone with reference to a firearm).

In applying the factors reviewed in Brown and Cassidy to the case at bar, this Court should find that the Commonwealth did not prove Mr. Watkins knew that he held an operable firearm in the moments that he briefly held it to make a Snapchat video. There was no evidence that Mr. Watkins had a history of possessing this weapon, had purchased this weapon or possessed this type of weapon in the past. Contrast Cassidy, *supra.* Further, there was no evidence that he had observed this weapon discharge a bullet or that this weapon had ever discharged a bullet before police testing after its seizure. Contrast Cassidy, *supra.* When he posed with the weapon, it did not contain a magazine, appeared unloaded and no ammunition was observed in the video. Compare Brown, *supra*. The Commonwealth's expert ballistician/criminologist also testified that merely holding the weapon for a few seconds, like Mr. Watkins did for the Snapchat video, is

insufficient to determine if it was a working firearm, which met the definition in M.G.L. c.140, s.121. (Tr. III/98). Where, as here, the Commonwealth offered no direct or circumstantial evidence to prove that Mr. Watkins knew that he held an operable firearm, which was capable of discharging a bullet and, thus, conforming to the statutory definition set forth in M.G.L. c.140, s.121, it failed to sustain its burden of proof to warrant his conviction.

Accordingly, this Court should vacate and reverse Mr. Watkins's conviction under M.G.L. c.269, s.10(a) as unconstitutional in the absence of proof of each and every element of the charge. See In re Winship, 397 U.S. at 364.

II.

WHERE PROOF OF MR. WATKINS'S KNOWLEDGE OF A WORKING FIREARM FOR CONVICTION UNDER M.G.L. c.269, s.10(a), THE JURY WAS ERRONEOUSLY INSTRUCTED THAT IF THE WEAPON IS "A CONVENTIONAL FIREARM WITH ITS OBVIOUS DANGERS, THE COMMONWEALTH IS NOT REQUIRED TO PROVE THAT THE DEFENDANT KNEW THAT THE ITEM MET THE LEGAL DEFINITION OF A FIREARM."

A. STANDARD OF REVIEW

Trial counsel did not object to the judge's instruction that "[i]f it was a conventional firearm with its obvious dangers, the Commonwealth is not required to prove that the Defendant knew that the item met the legal definition of a firearm." (Tr. III/140). This instruction, which mirrors Model Jury Instructions for Use in District Court, Instruction 7.620 (2006), lessens the Commonwealth burden

of proof by misstating its obligation to prove Mr. Watkins's knowledge that the firearm is operable as set forth *supra* in Argument I(B). However, at the time of trial, the Supreme Judicial Court had not yet decided Cassidy and Brown, upon which the instant claim is based. Therefore, this Court should review this matter under the prejudicial error standard. See Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 16-17 (1986). Even if unpreserved, however, a substantial risk of a miscarriage of justice resulted nonetheless where the instruction at issue eliminated an element of proof from the jury's deliberation, namely whether Mr. Watkins knew that he held a firearm as defined by M.G.L. c.140, s.121.

B. THE TRIAL JUDGE'S INSTRUCTION REMOVED FROM THE JURY'S DELIBERATION AN ELEMENT OF THE OFFENSE OF UNLAWFUL CARRYING OF A FIREARM AND, THUS, UNCONSTITUTIONALLY LESSENED THE COMMONWEALTH'S BURDEN OF PROOF THAT MR. WATKINS'S KNEW THE WEAPON WAS OPERABLE.

As argued *supra*, Argument I(B), and as noted by the trial judge in his memorandum of decision on Mr. Watkins's Rule 30(b) motion, the Commonwealth was required to prove that Mr. Watkins knew that the firearm that he briefly held during a Snapchat video was capable of discharging a bullet. (R.A. 128-129). With regard to the applicable mens rea, the trial judge instructed the jury as follows:

> The second element the Commonwealth must prove beyond a reasonable doubt is that the Defendant knew that he possessed the firearm. In this context, knowingly means that the Defendant consciously, voluntarily, and purposely knew that he possessed the

> item. A person's knowledge, like his or her intent, is a matter of fact that may or may not be susceptible to proof by direct evidence.
>
> If it is not susceptible to proof by direct evidence, then the Commonwealth may prove knowledge by circumstantial evidence and the inferences reasonably drawn from that evidence. ***The Commonwealth must also prove the Defendant knew that the item was a firearm within the common meaning of that term. If it was a conventional firearm with its obvious dangers, the Commonwealth is not required to prove that the Defendant knew that the item met the legal definition of a firearm.***

(Tr. III/139-140). While this instruction mirrors Model Jury Instructions for Use in District Court, Instruction 7.620 (2006), it is, nevertheless improper as it unconstitutionally lessens the Commonwealth's burden of proof by omitting the requirement that it prove Mr. Watkins knew the weapon was a working firearm as examined earlier in Argument I(B). See In Re Winship, 397 U.S. at 364; Commonwealth v. Denis, 442 Mass. 617, 621 (2004); see also Fourteenth Amendment to United States Constitution and Article Twelve of the Massachusetts Declaration of Rights.

The error in the Model Instruction stems from a decision of this Court concerning a past version of the statute, which predated "the legislature add[ing] the express knowledge requirement to G.L. c. 269, § 10(a) in 1990." (R.A. 128). Particularly, the Model Instruction cites Papa, 17 Mass. App. Ct. at 987-988, for the proposition that the "defendant need not know that the firearm met the legal definition." There, this Court reasoned that

"the statute 'is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that [carrying a gun] is not an innocent act" and, thus, the Commonwealth "need not also prove knowledge of that fact by the defendant, where the latter knows he is carrying a conventional firearm." Id.

Papa and, thus, the model instruction based upon it, which was utilized in the instant case, are no longer authoritative and correct statements of the law. The legislature amended the subject statute in 1990 so as to provide an express requirement of knowledge. As discussed *supra* at Argument I(B), the statutory language set forth in M.G.L. c.269, s.10(a) must be interpreted consistently with Section 10 as a whole in light of Brown, Cassidy and Johnson. They are consistent with requiring proof of knowledge and ensuring that an individual, like Mr. Watkins, who merely holds a weapon for seconds, absent any indicia of knowledge of its operability, is not convicted for unlawfully carrying it. See Argument I(B).

Accordingly, this Court should find that the trial judge erred by instructing the jury that the Commonwealth was alleviated from its burden of proving that Mr. Watkins knew that he held an operable firearm simply because it appeared to be a conventional weapon as it contradicts our established jurisprudence.

C. MR. WATKINS WAS PREJUDICED BY THIS INCORRECT INSTRUCTION BECAUSE IT LOWERED THE COMMONWEALTH'S BURDEN OF PROOF AND CAUSED THE JURY NOT TO DELIBERATE ON AN ESSENTIAL ELEMENT OF THE CRIME CHARGED, NAMELY, WHETHER MR. WATKINS KNEW HE POSSESSED AN OPERABLE FIREARM.

The jury are presumed to follow the instructions of the trial judge, Commonwealth v. Watkins, 425 Mass. 830, 840 (1997), even where, as here, the trial judge unconstitutionally instructed them so as to lower the Commonwealth's burden of proof. Where Cassidy and Brown were decided after Mr. Watkins's trial, while the case was awaiting appeal, this Court should review under the prejudicial error standard. See Miranda, 22 Mass. App. Ct. at 16-17. Even if this Court found trial counsel should have objected and the issue is not preserved, the outcome does not change because the prejudice is so severe as to create a substantial risk of a miscarriage of justice based upon its violation of our state and federal constitutional rights. See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999)(an error creates a substantial risk of a miscarriage of justice unless it did not materially influence the guilty verdict after considering the strength of the Commonwealth's case against the defendant, the nature of the error, whether the error is sufficiently significant in the context of the trial to make plausible an inference that the jury's result might have been otherwise but for

the error, and whether it can be inferred from the record that counsel's failure to object was not simply a reasonable tactical decision).

Where the jury instruction permitted a finding of Mr. Watkins guilt absent proof of each and every element of the crime charged, his constitutional rights were violated and his trial prejudiced. As noted *supra* Argument I(C), the Commonwealth presented an insufficient case to establish that Mr. Watkins knew that he held an operable firearm. The trial judge wrongly, but explicitly, instructed the jurors that they did not need to deliberate on this element since it was a conventional looking weapon. (Tr. II/139-140). However, its operability could not be gleaned from momentary possession and observation and, thus, the jury could have acquitted Mr. Watkins based on the weakness of the Commonwealth's proof of this element had they been correctly instructed.

Accordingly, given that the erroneous jury instruction is of constitutional dimension, this Court should find that Mr. Watkins was prejudiced, vacate his conviction and order him a new trial.

III.

THE TRIAL COURT WRONGLY DENIED MR. WATKINS MOTION FOR A NEW TRIAL BY FAILING TO FIND THAT TRIAL COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE WHEN HE DID NOT MOVE TO SUPPRESS EVIDENCE ON THE GROUNDS THAT THE INFORMATION PROVIDED IN THE WARRANT APPLICATION WAS STALE AND, THUS, DID NOT SUPPLY PROBABLE CAUSE FOR A SEARCH.

A. STANDARD OF REVIEW

The trial judge erred in denying Mr. Watkins a new trial on the grounds that "justice may not have been done" where trial counsel failed to move to suppress the TEC-9 and other evidence seized during a warrant search. Mass. R. Crim. P. 30(b). It is well settled that a new trial may be ordered where a defendant, like Mr. Watkins, receives the ineffective assistance of counsel at any time during his case in violation of his rights under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984); Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). In order to establish ineffective assistance of counsel, Mr. Watkins must show that (1) trial counsel's conduct fell "measurably below that which might be expected from an ordinary fallible lawyer" and (2) he was prejudiced therefrom. Saferian, 366 Mass. at 96. In determining prejudice, "the effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence […]: 'a verdict or conclusion only weakly supported by

the record is more likely to have been affected by errors than one with overwhelming record support.'" United States v. Gray, 878 F.2d 702, 711 (3rd Cir. 1989); quoting Strickland, 466 U.S. at 696. In other words, "in a case where ineffective assistance of counsel is charged, there ought to be some showing that better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). While the Rule 30(b) motion is addressed to the trial judge's sound discretion, Commonwealth v. Smith, 381 Mass. 141, 142 (1980), this Court has the authority to reverse his disposition where it is "manifestly unjust," Commonwealth v. Little, 384 Mass. 262, 269 (1981), "the trial was infected with prejudicial constitutional error[,]" Commonwealth v. Stewart, 383 Mass. 253, 257 (1981), or there has been an abuse of discretion or error of law, see Commonwealth v. Lavoie, 464 Mass. 83, 89 (2013); Commonwealth v. Alvarez, 433 Mass. 93, 100-101 (2000); Commonwealth v. Grace, 397 Mass. 303, 307 (1986).

In the instant case, this Court should grant Mr. Watkins a new trial because his trial counsel provided ineffective assistance when he failed to move to suppress the firearm on the grounds that the information provided in the warrant application was stale and, thus, did not establish probable cause to search Mr. Santos's home.

B. THE TRIAL JUDGE WRONGLY HELD THAT A NEW TRIAL WAS NOT WARRANTED BECAUSE MR. WATKINS'S CLAIM TO SUPPRESSION LACKED MERIT EVEN THOUGH THE INFORMATION USED TO OBTAIN THE WARRANT EIGHT (8) DAYS LATER WAS UNTIMELY.

Trial counsel did not move to suppress the firearm seized from Mr. Santos's home at 339 Adams Street "because [he] was not aware of legal grounds to do so [and his] decision not to file such a motion was not a strategic one." (R.A. 74). The trial judge denied Mr. Watkins's claim for a new trail, finding that he did not meet his burden to demonstrate “a likelihood that the motion to suppress would have been successful[,]” Commonwealth v. Comita, 441 Mass. 86, 91 (2004), because the police's information was not stale and established probable cause. (R.A. 130-131). This holding is erroneous where the warrant affidavit did not set forth the necessary, continuing, nexus between Mr. Santos's home and the evidence sought. See Commonwealth v. Derek Hart, 18-P-409 (Mass. App. Ct., April 11, 2019).

In the case at bar, on May 16, 2017, the police applied to search Mr. Santos's apartment at 339 Adams Street, Dorchester, on the belief that Snapchat messages and GPS records established that a Tek-9 firearm was illegally secreted inside that location. (R.A. 77-83). The police specifically noted that Snapchat communications were uploaded by Mr. Santos and Mr. Watkins to their respective accounts on May 7, 2017, May 8, 2017 and May 14, 2017 depicting a firearm;

however, no information was provided as to the date of their creation. (R.A. 79-81).

The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights require that this warrant may only issue upon probable cause. See M.G.L. c.276, s.1; see also Commonwealth v. Valerio, 449 Mass. 562, 566 (2007); Commonwealth v. Upton, 394 Mass. 363 (1985). "[T]he sufficiency of the search warrant application always begins and ends with the 'four corners of the affidavit.'" Commonwealth v. O'Day, 440 Mass. 296, 297 (2003); quoting Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995). In order to establish probable cause, "[a]n affidavit must contain enough information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues." Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983). "[T]he affidavit should be read as a whole, not parsed, severed, and subjected to hypercritical analysis." O'Day, 440 Mass. at 301; quoting Commonwealth v. Blake, 413 Mass. 823, 827 (1992). However, the paramount principle remains that probable cause must be shown in the affidavit through sufficient, particularized detail of the underlying circumstances "if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." Commonwealth v. Reddington, 395

Mass. 315, 325 (1985); quoting United States v. Ventresca, 380 U.S. 102, 109 (1965).

A magistrate should also review a warrant application to verify that the facts supporting probable cause are "so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Commonwealth v. Atchue, 393 Mass. 343, 349 (1984); quoting Sgro v. United States, 287 U.S. 206, 210-211 (1932). The affiant's timeliness in seeking a warrant should "be determined by the circumstances of each case" with respect to its reasonableness and the freshness of information provided to the magistrate. Id. Whether or not information is stale depends upon a number of factors, including, but not limited to, the nature of the property to be seized, the nature of the criminal activity involved and the nature of the premises to be searched. See Commonwealth v. Fleurant, 2 Mass. App. Ct. 250, 254-255 (1974); see also Commonwealth v. Blye, 5 Mass. App. Ct. 817, 817-818 (1977). "[I]f an affidavit recites activity indicating protracted or continuous conduct, time is of less significance" than when the affidavit pertains to a singular, past incident. Commonwealth v. Beliard, 443 Mass. 79, 85-86 (2004); quoting Commonwealth v. Vynorius, 369 Mass. 17, 25 (1975). However, to establish probable cause, a search warrant affidavit must demonstrate a "'fair probability that contraband or evidence of a crime will be found in a particular place.'" United States v. Grubbs, 547 U.S. 90, 95 (2006); quoting Illinois

v. Gates, 462 U.S. 213, 238 (1983). Since the probable cause requirement, "looks to whether evidence will be found when the search is conducted..." Id., "the facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of sometime in the past." Grubbs, 547 U.S. at 95 n. 2; quoting United States v. Wagner, 989 F.2d 69, 75 (2d Cir. 1993).

Here, Detective Ball's application failed to show, by a measurable likelihood, that a firearm would still be present in Mr. Santos's home. In particular, the Boston Police sought to search 339 Adams Street for a firearm that they observed in Snapchat communications. (R.A. 79-81). They described Snapchat as follows:

> Snap Chat is a mobile application that allows users to send out pictures or short videos to their "friends". The Snap Chat website describes the application as such: "Snapchat is a mobile application made by Snap Inc. and available through the iPhone App Store and Google Play. The application provides a way to share moments with photos, videos, and text". The user is allowed to send out a picture or video to individual friends or to everyone on their friends list. The public messages, available to all the user's friends, are referred to as "stories" These picture and video messages automatically delete after 24 hours. Snap Chat does not retain the images or videos on their servers.

(R.A. 79)(grammatical errors in original). While describing the period an uploaded picture or video message is visible, they did not provide any methodology for

determining when the picture or video was actually filmed. (Id.). No information was provided to the magistrate that previously created pictures or videos could not be uploaded through this application at a later date. (Id.).

Specific to this case, in May 2017, members of the Boston Police were investigating Luis Santos and monitoring his Snapchat communications along with those of Mr. Watkins. (Id.). Detective Ball set forth the following concerning intercepted messages:

> Shortly after 5/8/17, this Affiant was informed by Officer Joseph Connolly that he was monitoring the Snap Chat page for Mr Luis Santos. Officer Connolly stated that on 5/8/17 at approximately 9:22PM he observed a video posted by Mr Santos of him holding a firearm magazine. The magazine was observed to be loaded with live rounds of ammunition. The video was time stamped with "10h ago", meaning that the time it was filmed and sent out was approximately 11:22AM. In addition, on 5/14/17, Officer Connolly also observed an image posted by Mr Santos of a Tek 9 firearm. The image was captioned with, "Shyt change on my block trust issues I got put all my trust in semi autos".
>
> This Affiant was also contacted by Boston Police Officers Zachary Crossen and James O'Loughlin JR, both assigned to District B2. They informed me that they were monitoring Mr Santos' Snap Chat page as well and observed him in possession of a firearm, believed to be the same Tech 9 firearm observed by Officer Connolly. They also informed me that while monitoring a Snap Chat page belonging to Josiah Watkins, an associate of Mr Santos, they observed the same distinctive Tek 9 firearm. Specifically, they observed Mr Watkins holding the firearm with the magazine separated from the firearm. In the next "story" sent out by Mr Watkins, Mr Watkins posted a video of Mr Santos holding the Tek 9 and putting the magazine back into the firearm. This video was posted on 5/8/17 and viewed at 1:16PM. The time the video was sent out was listed as 9 minutes ago and seven minutes ago for the respective videos. Based upon this it is believed

> that the video was shot and sent out at approximately l:05PM to 1:09PM.
>
> Officers and Crossen also observed a video "story" shot sent out on Mr Santos' account where he assembled the Tech 9 and magazine on a bed and laid out ammunition to spell "44 SL". This video was observed at on 5/8/17 at 7:56AM with a times stamp of 11h ago, meaning that it was filmed and sent out on 5/7/17 at approximately 9PM.

(R.A. 79-80)(grammatical errors in original). Detective Ball averred that DYS GPS monitoring placed Mr. Santos at his residence at 339 Adams Street during "the times the videos were filmed and posted on Snap Chat." (Id.). Based upon his belief that the firearm was "real" and Mr. Santos unlicensed status and past firearm related charges, the magistrate approved the application to search 339 Adams Street. (Id.).

As a preliminary matter, the trial judge's decision wholly disregards the fact that Detective Ball did not explain how he knew when the photo or video messages were filmed as opposed to uploaded to the Snapchat application. (R.A. 130-131). Detective Ball's assertion that he knew "the times the videos were filmed" is unsubstantiated and did not inform the magistrate how he reached this conclusion. (R.A. 79-80). While he provided dates and/or times of their upload and observation by police, he did not explain how this information related to determining the time of the actual filming of the image at the place he believed the item would be located. Notably, the creation of the photographs and videos could significantly

pre-date their transmission to Snapchat as there are methods and even third party applications which make old messages, photographs and videos appear as if they are current Snapchats. Thus, the magistrate would have been unaware of the temporal proximity between the individuals' actual possession of a firearm and date the warrant was sought to determine timeliness. Moreover, Detective Ball averred that he cross-referenced the upload times of the messages with Mr. Santos's GPS monitoring records to determine that he was then located at his residence. However, the location where the photos or videos were uploaded is inconsequential. Detective Ball provided no rationale for determining the time, let alone, the place that the photographs or videos were filmed. The time that each video or photograph was created was vital as it is the proof of when the object was allegedly in each individual's possession. In contrast, Detective Ball provided no eyewitness account, whether law enforcement or informant, who observed that weapon in Mr. Santos's possession or in his home and these messages were the only grounds to believe this item would be located at 339 Adams Street at the time of the search.

Even if the videos observed by the police were filmed on May 7, 2017 and May 8, 2017, the police, nevertheless, did not act timely in seeking a warrant. Eight days had elapsed since May 8, 2017 before the warrant application. (R.A. 77-83). During that time, the police did not conduct any surveillance of Mr. Santos or

his residence or obtain any information for an informant to establish his continued possession of the item at his home. (Tr. II/176). The police were unaware what individuals came and went and if the weapon may have been moved from the property. (Id.). While Detective Ball averred that "on 5/14/17, Officer Connolly also observed an image posted by Mr Santos of a Tek 9 firearm[,]" no timestamp was given for its upload and there is no indication when the video was actually filmed.[2] (R.A. 79-80). Again, this picture could have been created and uploaded at an earlier time and no rationale was provided for the magistrate to assess the timeliness of this information. The trial judge likewise did not explain how the officer proved that the time of filming mirrored the upload time onto Snapchat and, thus, erred in finding probable cause. (R.A. 130-131).

Accordingly, the trial court erred in denying Mr. Watkins's a new trial and this Court should find that trial counsel erred in failing to file a meritorious motion to suppress the evidence seized from the search of Mr. Santos's bedroom.

C. MR. WATKINS WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE FIREARM AS IT WAS NECESSARY EVIDENCE TO PROVE HIS CONVICTION UNDER M.G.L. c.269, s.10(a).

Whereas trial counsel was ineffective because the firearm and ammunition seized should have been suppressed, his "choice not to file the suppression

[2] Mr. Santos traveled extensively on May 14, 2017 and was not at his home all day. Notably, he traveled in Boston, Milton, Canton, East Walpole, Sharon, Foxboro, Plainville, Wrentham, North Attleborough, Mansfield and Quincy. (R.A. 69-70).

motion... 'likely deprive[d Mr. Watkins] of an otherwise available, substantial ground of defense." R.A. 131; citing Saferian, 366 Mass. at 96. Here, the firearm, ammunition and any other evidence seized from the search of Mr. Santos's bedroom should have been suppressed. See Wong Sun v. United States, 371 U.S. 471, 481-482 (1963). Absent the firearm's use in evidence and its examiner's testimony concerning its analysis, the Commonwealth could not prove that the item that it believed that Mr. Watkins held in a video met the definition of a "firearm" under M.G.L. c.140, s.121. Thus, Mr. Watkins was prejudiced because the charges against him should not have proceeded to trial if this evidence were properly suppressed or he would have been found not guilty at trial for unlawfully carrying a firearm.

Accordingly, this Court should hold that Mr. Watkins was prejudiced by trial counsel's deficient performance, vacate his conviction and allow him a new, fairer trial where evidence seized as a result of the warrant search is excluded.

IV.

THE ADMISSION OF THE COMMONWEALTH'S BALLISTICIAN'S REPORT, WHICH REPEATED HIS LIVE TESTIMONY, WAS A PREJUDICIAL ERROR SINCE IT BOLSTERED THE RELIABILITY OF HIS OPINION BOTH BY ITS CUMULATIVE NATURE AND WHERE IT INCLUDED AN ASSERTION THAT HIS FINDINGS HAD BEEN CONFIRMED BY A SECONDARY EXAMINER.

A. STANDARD OF REVIEW

The admission of Mr. Finn's firearms analysis report, (R.A. 91-92), was erroneous. Questions of relevancy of evidence and the prejudicial effect stemming from their admission are left to the trial judge's discretion and reversed for "palpabale error." Commonwealth v. McGee, 467 Mass. 141, 156 (2014). Where, as here, trial counsel timely objected to the report's admission, this Court should review for prejudicial error, which, for the foregoing reasons, requires the vacatur of Mr. Watkins's conviction unless "the error did not influence the jury, or had but very slight effect." Commonwealth v. Peruzzi, 15 Mass. App. Ct. 437, 445 (1983); quoting Kotteakos v. United States, 328 U.S. 750, 764-765 (1946).

B. THE TRIAL JUDGE ERRED IN ADMITTING THE FIREARM EXAMINER'S NOTARIZED REPORT WHERE IT CONTAINED AN IMPROPER HEARSAY ASSERTION BY A SECONDARY EXAMINER AND WAS CUMULATIVE OF HIS LIVE TESTIMONY, BOTH CAUSING UNDUE PREJUDICE WITHOUT PROVIDING ANY ADDITIONAL PROBATIVE VALUE.

In the instant case, Christopher Finn, a criminalist with the Boston Police Department's Firearm Analysis Unit, testified that the weapon in evidence was an

Intratec Tec-9 firearm that was capable of discharging a bullet and met the statutory definition of a "firearm" under M.G.L. c.140, s.121. (Tr. II/83-84). Thereafter, prior to the conclusion of his direct examination and after having already elicited this expert opinion, the trial court allowed, over objection, the introduction of Mr. Finn's notarized report, reproduced at R.A. 91-92. (Id.). Detective Camper not only notarized this report but also signed as the reviewing (also known as "secondary") Firearms Examiner. (R.A. 91-92). The trial judge incorrectly allowed the admission of this report where (1) it contained an impermissible hearsay assertion of the reviewing examiner, (2) it was cumulative of the evidence from Mr. Finn's testimony, (3) the notarization provided a badge of enhanced propriety and (4) each of these factors only served to bolster the credibility of the examiner while providing no probative value. (Tr. II/94).

First, the second page of the report indicates that it was "Reviewed by" Detective Tyrone Camper, a Firearms Examiner. (R.A. 92). In reviewing this claim as part of Mr. Watkins's Rule 30(b) motion, (R.A. 53-54), the trial judge wrongly held that this "secondary examiner" did not make a "hearsay assertion." (R.A. 135-136). “Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.” Mass. G. Evid. § 801(c); see also Commonwealth v. Cohen, 412 Mass. 375, 393 (1992)(internal citations omitted). “A ‘statement’ is (1) an oral or written

assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Mass. G. Evid. § 801(a); see also Bacon v. Charlton, 61 Mass. 581, 586 (1851); Commonwealth v. Baker, 20 Mass. App. Ct. 926, 928 n.3 (1985). Here, Mr. Camper's signature as the reviewing examiner is the functional equivalent of testifying that he has reviewed and accepts Mr. Finn's analysis and findings. It is his statement, made out of court, for the proof of the matter asserted, that the firearm tested meets the statutory definition and, thus, is a hearsay statement, which should be held inadmissible without any exception. Mass. G. Evid. § 802; see also Mass. G. Evid. §§ 803-804 (emphasis supplied).

Moreover, the trial judge is incorrect in his belief that M.G.L. c.140, s.121A allows for the introduction of this certificate, which contained a hearsay assertion by a reviewing examiner. First, this statute does not provide for or require that a secondary examiner review and sign the certificate and, thereby, makes it an appropriate practice for evidence. M.G.L. c.140, s.121A. Second, and most important, the Supreme Judicial Court in Commonwealth v. Muniz, 456 Mass. 166, 167-169 (2010), held that these certificates, like drug certificates considered inadmissible in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), are testimonial hearsay, which would violate the defendant's right to confrontation. See Sixth Amendment to the United States Constitution; see also Article 12 of the Massachusetts Declaration of Rights. While the primary examiner testified at trial,

Detective Camper, the reviewing examiner did not and, thus, the inclusion of his opinion, which corroborated the Mr. Finn's review, was unconstitutional and should have been excluded. Id. M.G.L. c.140, s.121A, neither makes lawful the admission of Detective Camper's hearsay statement nor contemplates its propriety after Muniz for use in a jury trial.

Additionally, even though Detective Camper testified in court, the admission of this certificate in further support of his live testimony was improper as cumulative evidence. A trial judge has the discretion to exclude evidence that is cumulative, repetitive or confusing. See Hamling v. United States, 418 U.S. 87, 127 (1974); see also Commonwealth v. Durling, 406 Mass. 485, 497 (1990). Here, the admission of this report, even if evidence of Detective Camper's review was redacted, still serves no additional probative value as it is merely repetition of his in court testimony. (Tr. II/83-91). Evidence whose probative value is “substantially outweighed” by risk of unfair prejudice, confusion, or waste of time should be excluded even if it is otherwise relevant. Commonwealth v. Bonds, 445 Mass. 821, 831 (2006); see also Mass. G. Evid. § 403. Here, while providing no additional relevant evidence, the repetition of his report only served to bolster the credibility of his live testimony by notifying the jury that his earlier findings were consistent with his testimony on that day. The fact that these findings in his report were notarized simply provided it an additional level of perceived integrity that only

risked further impropriety.

Accordingly, where M.G.L. c.140, s.121A does not authorize the use at trial of hearsay assertions of a secondary examiner and the admission of the report in this case was simply cumulative, risking the unfair bolstering of Mr. Finn's live testimony, this Court should find its admission erroneous and an abuse of the trial judge's discretion to assure a fair and impartial trial.

C. THE ADMISSION OF MR. FINN'S REPORT AMOUNTS TO A PREJUDICAL ERROR BECAUSE IT IMPROPERLY BOLSTERED HIS OPINION THAT THE COMMONWEALTH HAD PROVED ALL ELEMENTS NECESSARY FOR CONVICTION, NAMELY THAT THE TEC-9 WAS A WORKING FIREARM THAT MET THE STATUTORY DEFINITION.

The notarized report, which repeated Mr. Finn's testimony and included Detective Camper's hearsay assertion of his corroboration of that opinion, prejudiced Mr. Watkins because it bolstered Mr. Finn's credibility and provide no new, relevant evidence as discussed *supra*. This error meets the prejudicial error standard because this Court "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." Peruzzi, 15 Mass. App. Ct. at 445. The trial judge highlighted the importance of Mr. Finn's opinion to the Commonwealth's case and Mr. Watkins's conviction, stating that "the firearm

analysis report went to the elements of the offense, namely that the TEC-9 was a working firearm and the magazine recovered was capable of holding more than ten rounds of ammunition, both of which were elements of the offenses the Defendant was charged with." (R.A. 136). Where operability was a live issue at trial, it was necessary for conviction under M.G.L. c.269, s.10(a) and the defense argued that Mr. Watkins lacked knowledge that it could discharge a bullet, the admission of this report was prejudicial. (Tr. II/97-98, 112-115). There was no probative value in the admission of this report, where it simply repeated Mr. Finn's live testimony, and its sole effect was to improperly bolster Mr. Finn's opinion.

Accordingly, this Court should hold that the admission of Mr. Finn's report is a prejudicial error, vacate his conviction and order a new trial.

V.

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING MR. WATKINS'S MOTION FOR NEW TRIAL WITHOUT FIRST ORDERING DISCOVERY CONCERNING THE MANNER IN WHICH THE POLICE INTERCEPTED HIS SNAPCHAT COMMUNICATIONS UPON WHICH THIS PROSECUTION WAS BASED.

Mr. Watkins argued that counsel was ineffective by failing to move for discovery regarding how the police intercepted his and Mr. Santos' Snapchat communications. (R.A. 24). Mr. Watkins moved for the production of unredacted police reports, (R.A. 60-63), and, if an informant's name was to remain confidential, for an explanation as to "how the police gained access to the private

Snapchat communications of Mr. Watkins and Mr. Santos in order for defense counsel to determine whether their action constituted impermissible government intrusion and required a probable cause showing for a warrant." (R.A. 145). The trial judge denied Mr. Watkins's claim without ordering discovery based upon the Commonwealth's representation that "the police obtained this information from an informant" and, thus, the "argument that his reasonable expectation of privacy was invaded and the search unconstitutional" lacked merit. (R.A. 131-132).

The trial judge noted that "Defendant concedes that the use of an informant was mentioned in a motion in limine." (R.A. 131). Then, the prosecutor stated "that Boston Police made observations on the social media platform Snapchat..." and "[t]he Commonwealth's position is that any further information relative to how they obtained that video on social media is privileged, **as it's akin to a surveillance privilege, as well as it's also somewhere between the nexus of the privilege as to a confidential informant.**" (Tr. I/5-6). Given the equivocal statement about the use of a human informant and based on the pending litigation in Commonwealth v. Richard Dilworth, et al, SJ-2019-0171, it is unclear whether an informant existed or another method was used.

In Dilworth, the Commonwealth appeals from an order of discovery on how Boston Police use Snapchat as an investigative tool. (Add. at 147). There, the police created an account and "friended" Dilworth to gain access to his

communications in the absence of an informant and an initial showing shows that this method was used almost exclusively against black males. (Add. at 147-150). A claim of discriminatory investigation and prosecution violates the equal protection guaranteed under the Fourteenth Amendment and Articles CVI and 10 of the Declaration of Rights.

The Dilworth matter was being litigated by the Commonwealth in the same Superior Court as Mr. Watkins's case but was never disclosed below. However, it impacts Mr. Watkins, a black male, who, like Dilworth, sought discovery of how his Snapchats were intercepted. The Commonwealth's explanation in limine makes it likely that no human informant existed and Mr. Watkins was targeted like Dilworth. Had the trial judge ordered discovery and reviewed the unredacted reports, a claim of discriminatory enforcement may have had merit. Therefore, the motion judge abused his discretion in denying Mr. Watkins's claim that trial counsel was ineffective absent discovery and this Court should vacate his order and remand for discovery. See Commonwealth v. Figueroa, 422 Mass. 72, 73 (1996).

CONCLUSION

WHEREFORE, for the reasons set forth in Argument I, this Court should vacate and reverse Mr. Watkins's conviction. Alternatively, for Arguments II-IV, this Court should vacate Mr. Watkins conviction for a new trial. For Argument V, this Court should vacate the denial of his motion for new trial and order discovery of the interception of Snapchat communications.

Respectfully submitted,
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ADDENDUM

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STATUTES

Article CVI of the Massachusetts Declaration of Rights

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 10 of the Massachusetts Declaration of Rights

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

Article 12 of the Massachusetts Declaration of Rights

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 14 of the Massachusetts Declaration of Rights

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation

of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Fifth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the U.S. Constitution, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourth Amendment to the U.S. Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Mass. Gen. Laws, Chapter 140, Section 121

As used in sections 122 to 131Q, inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Ammunition", cartridges or cartridge cases, primers (igniter), bullets or propellant powder designed for use in any firearm, rifle or shotgun. The term "ammunition" shall also mean tear gas cartridges.

"Assault weapon", shall have the same meaning as a semiautomatic assault weapon as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(30) as appearing in such section on September 13, 1994, and shall include, but not be limited to, any of the weapons, or copies or duplicates of the weapons, of any caliber, known as: (i) Avtomat Kalashnikov (AK) (all models); (ii) Action Arms Israeli Military Industries UZI and Galil; (iii) Beretta Ar70 (SC70); (iv) Colt AR15; (v) Fabrique National FN/FAL, FN/LAR and FNC; (vi) SWD M10, M11, M11/9 and M12; (vi) Steyr AUG; (vii) INTRATEC TEC9, TECDC9 and TEC22; and (viii) revolving cylinder shotguns,

such as, or similar to, the Street Sweeper and Striker 12; provided, however, that the term assault weapon shall not include: (i) any of the weapons, or replicas or duplicates of such weapons, specified in appendix A to 18 U.S.C. section 922 as appearing in such appendix on September 13, 1994, as such weapons were manufactured on October 1, 1993; (ii) any weapon that is operated by manual bolt, pump, lever or slide action; (iii) any weapon that has been rendered permanently inoperable or otherwise rendered permanently unable to be designated a semiautomatic assault weapon; (iv) any weapon that was manufactured prior to the year 1899; (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable assault weapon; (vi) any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition; or (vii) any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.

"Conviction", a finding or verdict of guilt or a plea of guilty, whether or not final sentence is imposed.

"Deceptive weapon device", any device that is intended to convey the presence of a rifle, shotgun or firearm that is used in the commission of a violent crime, as

defined in this section, and which presents an objective threat of immediate death or serious bodily harm to a person of reasonable and average sensibility.

"Firearm", a pistol, revolver or other weapon of any description, loaded or unloaded, from which a shot or bullet can be discharged and of which the length of the barrel or barrels is less than 16 inches or 18 inches in the case of a shotgun as originally manufactured; provided, however, that the term firearm shall not include any weapon that is: (i) constructed in a shape that does not resemble a handgun, short-barreled rifle or short-barreled shotgun including, but not limited to, covert weapons that resemble key-chains, pens, cigarette-lighters or cigarette-packages; or (ii) not detectable as a weapon or potential weapon by x-ray machines commonly used at airports or walk- through metal detectors.

"Gunsmith", any person who engages in the business of repairing, altering, cleaning, polishing, engraving, blueing or performing any mechanical operation on any firearm, rifle, shotgun or machine gun.

"Imitation firearm", any weapon which is designed, manufactured or altered in such a way as to render it incapable of discharging a shot or bullet.

"Large capacity feeding device", (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells; or (ii) a large capacity ammunition feeding device as defined in the federal Public

Safety and Recreational Firearms Use Protection Act, 18 U.S.C. section 921(a)(31) as appearing in such section on September 13, 1994. The term "large capacity feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with,.22 caliber ammunition.

"Large capacity weapon", any firearm, rifle or shotgun: (i) that is semiautomatic with a fixed large capacity feeding device; (ii) that is semiautomatic and capable of accepting, or readily modifiable to accept, any detachable large capacity feeding device; (iii) that employs a rotating cylinder capable of accepting more than ten rounds of ammunition in a rifle or firearm and more than five shotgun shells in the case of a shotgun or firearm; or (iv) that is an assault weapon. The term "large capacity weapon" shall be a secondary designation and shall apply to a weapon in addition to its primary designation as a firearm, rifle or shotgun and shall not include: (i) any weapon that was manufactured in or prior to the year 1899; (ii) any weapon that operates by manual bolt, pump, lever or slide action; (iii) any weapon that is a single-shot weapon; (iv) any weapon that has been modified so as to render it permanently inoperable or otherwise rendered permanently unable to be designated a large capacity weapon; or (v) any weapon that is an antique or relic, theatrical prop or other weapon that is not capable of firing a projectile and which is not intended for use as a functional weapon and cannot be readily modified through a combination of available parts into an operable large capacity weapon.

"Length of barrel" or "barrel length", that portion of a firearm, rifle, shotgun or machine gun through which a shot or bullet is driven, guided or stabilized and shall include the chamber.

"Licensing authority", the chief of police or the board or officer having control of the police in a city or town, or persons authorized by them.

"Machine gun", a weapon of any description, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged by one continuous activation of the trigger, including a submachine gun.

"Purchase" and "sale" shall include exchange; the word "purchaser" shall include exchanger; and the verbs "sell" and "purchase", in their different forms and tenses, shall include the verb exchange in its appropriate form and tense.

"Rifle", a weapon having a rifled bore with a barrel length equal to or greater than 16 inches and capable of discharging a shot or bullet for each pull of the trigger.

"Sawed-off shotgun", any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon as modified has one or more barrels less than 18 inches in length or as modified has an overall length of less than 26 inches.

"Semiautomatic", capable of utilizing a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and requiring a separate pull of the trigger to fire each cartridge.

"Shotgun", a weapon having a smooth bore with a barrel length equal to or greater than 18 inches with an overall length equal to or greater than 26 inches, and capable of discharging a shot or bullet for each pull of the trigger.

"Violent crime", shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

"Weapon", any rifle, shotgun or firearm.

Where the local licensing authority has the power to issue licenses or cards under this chapter, but no such licensing authority exists, any resident or applicant may apply for such license or firearm identification card directly to the colonel of state police and said colonel shall for this purpose be the licensing authority.

The provisions of sections 122 to 129D, inclusive, and sections 131, 131A, 131B and 131E shall not apply to:

(A) any firearm, rifle or shotgun manufactured in or prior to the year 1899;

(B) any replica of any firearm, rifle or shotgun described in clause (A) if such replica: (i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition; or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; and

(C) manufacturers or wholesalers of firearms, rifles, shotguns or machine guns.

Mass. Gen. Laws Chapter 140, Section 121A

A certificate by a ballistics expert of the department of the state police or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such expert, shall be prima facie evidence of his findings as to whether or not the item furnished is a firearm, rifle, shotgun, machine gun, sawed off shotgun or ammunition, as defined by section one hundred and twenty-one, provided that in order to qualify as an expert under this section he shall have previously qualified as an expert in a court proceeding.

Mass. Gen. Laws, Chapter 269, 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.

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.

Mass. Gen. Laws Chapter 269, Section 10(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).

Mass. Gen. Laws Chapter 269, Section 10(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 21/2 years or in state prison for not more than 5 years.

Mass. Gen. Laws Chapter 269, Section 10(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.

Mass. Gen. Laws Chapter 269, Section 10(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 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

Mass. Gen. Laws Chapter 276, Section 1

A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant

identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for the following property or articles:

First, property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

Second, property or articles which are intended for use, or which are or have been used, as a means or instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;

Third, property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under sections forty-two through fifty-six, inclusive, of chapter one hundred and thirty-eight;

Fourth, the dead body of a human being.

Fifth, the body of a living person for whom a current arrest warrant is outstanding.

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for

which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

The word "property", as used in this section shall include books, papers, documents, records and any other tangible objects.

Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws or under the common law.

Notwithstanding the foregoing provisions of this section, no search and seizure without a warrant shall be conducted, and no search warrant shall issue for any documentary evidence in the possession of a lawyer, psychotherapist, or a clergyman, including an accredited Christian Science practitioner, who is known or may reasonably be assumed to have a relationship with any other person which relationship is the subject of a testimonial privilege, unless, in addition to the other requirements of this section, a justice is satisfied that there is probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue. Nothing in this paragraph shall impair or affect the ability, pursuant to otherwise applicable law, to search or seize without a

warrant or to issue a warrant for the search or seizure of any documentary evidence where there is probable cause to believe that the lawyer, psychotherapist, or clergyman in possession of such documentary evidence has committed, is committing, or is about to commit a crime. For purposes of this paragraph, "documentary evidence" includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description.

Sixth Amendment to the U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

RULES OF COURT

Mass. R. Crim. P. 30(b)

New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge

shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

Section 801. Definitions

The following definitions apply under this Article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that

(1) the declarant does not make while testifying at the current trial or hearing, and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement

(A) (i) is inconsistent with the declarant's testimony; (ii) was made under oath before a grand jury, or at an earlier trial, a probable cause hearing, or a deposition, or in an affidavit made under the penalty of perjury in a G. L. c. 209A proceeding; (iii) was not coerced; and (iv) is more than a mere confirmation or denial of an allegation by the interrogator;

(B) [for a discussion of prior consistent statements, which are not admissible substantively under Massachusetts law, see Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements]; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and

(A) was made by the party;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject, or who was authorized to make true statements on the party's behalf concerning the subject matter;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator or joint venturer during the cooperative effort and in furtherance of its goal, if the existence of the conspiracy or joint venture is shown by evidence independent of the statement.

NOTE

Subsection (a). This subsection is taken from Commonwealth v. Baker, 20 Mass. App. Ct. 926, 928 n.3 (1985), quoting with approval the definition of a "statement" contained in Fed. R. Evid. 801(a) and Proposed Mass. R. Evid. 801(a).

To be hearsay, the statement, whether verbal or nonverbal, must be intended as an assertion. See Bacon v. Charlton, 61 Mass. 581, 586 (1851) (distinguishing between groans and exclamations of pain, which are not hearsay, and anything in the nature of narration or statement). Cf. Commonwealth v. DeJesus, 87 Mass. App. Ct. 198, 201–202 (2015) (checkmarks on photocopies of currency made to indicate a match with bills in defendant's pocket are hearsay when offered to prove the match).

"[C]onduct can serve as a substitute for words, and to the extent it communicates a message, hearsay considerations apply." Commonwealth v. Gonzalez, 443 Mass. 799, 803 (2005). "[O]ut-of-court conduct, which by intent or inference expresses an assertion, has been regarded as a statement and therefore hearsay if offered to prove the truth of the matter asserted. See Bartlett v. Emerson, [73 Mass. 174, 175–176] (1856) (act of pointing out boundary marker inadmissible hearsay)." Opinion of the Justices, 412 Mass. 1201, 1209 (1992) (legislation that would permit the Commonwealth to admit evidence of a person's refusal to take a breathalyzer test violates the privilege against self-incrimination because it reveals the person's thought process and is thus tantamount to an assertion).

Computer Records. For hearsay purposes, whether a computer record contains a statement depends on if the record is "computer-generated," "computer-stored," or a hybrid of both. Commonwealth v. Thissell, 457 Mass. 191, 197 n.13 (2010). Computer-generated records are created solely by the electrical or mechanical operation of a computer. Id. See Commonwealth v. Royal, 89 Mass. App. Ct. 168, 171–172 (2016) (examples include "automated teller machine receipts, log-in records from Internet service providers, and telephone records"). "Because computer-generated records, by definition, do not contain a statement from a person, they do not necessarily implicate hearsay concerns." Commonwealth v. Thissell, 457 Mass. at 197 n.13 (reliability of generative process that created record addressed by rules of authentication). See, e.g., Commonwealth v. Woollam, 478 Mass. 493, 498 (2017) (cellular telephone call logs); Commonwealth v. Perez, 89 Mass. App. Ct. 51, 56 (2016) (automatically generated bank withdrawal records). Conversely, computer-stored records are electronic records generated by humans that are maintained on a computer system. Commonwealth v. Thissell, 457 Mass. at 197 n.13. See Commonwealth v. Royal, 89 Mass. App. Ct. at 171–172 (examples include "electronic mail messages, online posts, and word processing files"). Computer-stored records generally implicate the hearsay rule because these records contain human statements and assertions that have been reduced to electronic form and are merely stored on a computer system. Commonwealth v. Thissell, 457 Mass. at 197 n.13. See, e.g., Commonwealth v. Royal, 89 Mass. App. Ct. at 171–172 (Registry of Motor Vehicle records requiring human action to create and retrieve the records). Hybrid records are comprised of both computer-stored records (containing human statements) and computer-generated data. Commonwealth v. Thissell, 457 Mass. at 197 n.13 (hybrid records may implicate both hearsay and authentication issues).

Subsection (b). This subsection is identical to Fed. R. Evid. 801(b). While no Massachusetts case has defined "declarant," the term has been commonly used in Massachusetts case law to mean a person who makes a statement. See, e.g., Commonwealth v. DeOliveira, 447 Mass. 56, 57–58 (2006); Commonwealth v. Zagranski, 408 Mass. 278, 285 (1990). See also Webster's Third New International Dictionary 586 (2002), which defines "declarant" as a person "who makes a declaration" and "declaration" as "a statement made or testimony given by a witness."

Subsection (c). This subsection is derived from Commonwealth v. Cohen, 412 Mass. 375, 393 (1992), quoting McCormick, Evidence § 246, at 729 (3d ed. 1984), and Fed. R. Evid. 801(c). See Commonwealth v. Cordle, 404 Mass. 733, 743 (1989); Commonwealth v. Randall, 50 Mass. App. Ct. 26, 27 (2000). See also Commonwealth v. Silanskas, 433 Mass. 678, 693 (2001) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted."); G.E.B. v. S.R.W., 422 Mass. 158, 168 (1996), quoting Commonwealth v. Keizer, 377 Mass. 264, 269 n.4 (1979) ("Hearsay is an 'extrajudicial statement offered to

prove the truth of the matter asserted.'"); Commonwealth v. DelValle, 351 Mass. 489, 491 (1966) ("The broad rule on hearsay evidence interdicts the admission of a statement made out of court which is offered to prove the truth of what it asserted."). If a witness at trial affirms the truth of a statement made out of court, the witness adopts it and it is not hearsay. Commonwealth v. Sanders, 451 Mass. 290, 302 n.8 (2008). Whether the witness has adopted his or her out-of-court statement is a question of fact for the jury and not a preliminary question for the judge. Id. at 302. See Commonwealth v. Bradshaw, 94 Mass. App. Ct. 477, 481 (2018) (live-witness testimony based on direct experience not hearsay).

"The theory which underlies exclusion is that with the declarant absent the trier of fact is forced to rely upon the declarant's memory, truthfulness, perception, and use of language not subject to cross-examination." Commonwealth v. DelValle, 351 Mass. at 491.

Evidence Admitted for Nonhearsay Purpose. "The hearsay rule forbids only the testimonial use of reported statements." Commonwealth v. Miller, 361 Mass. 644, 659 (1972). Accord Commonwealth v. Fiore, 364 Mass. 819, 824 (1974), quoting Wigmore, Evidence § 1766 (3d ed. 1940) (out-of-court utterances are hearsay only when offered "for a special purpose, namely, as assertions to evidence the truth of the matter asserted"). Thus, when out-of-court statements are offered for a reason other than to prove the truth of the matter asserted or when they have independent legal significance, they are not hearsay. There are many nonhearsay purposes for which out-of-court statements may be offered, such as the following:

- ***Proof of "Verbal Acts" or "Operative" Words.*** See Commonwealth v. Alvarez, 480 Mass. 1017, 1019 (2018) (statement in a text message asking to buy drugs is composed of the words of a crime and does not constitute hearsay); Commonwealth v. McLaughlin, 431 Mass. 241, 246 (2000) ("[e]vidence of the terms of that oral agreement was not offered for the truth of the matters asserted, but as proof of an 'operative' statement, i.e., existence of a conspiracy"); Charette v. Burke, 300 Mass. 278, 280–281 (1938) (father's remark to a child before leaving the child to go into the house ["Wait where you are while I go inside to get you a cookie"] was a "verbal act" and not hearsay); Commonwealth v. Perez, 89 Mass. App. Ct. 51, 55–56 (2016) (withdrawal and deposit slips used by defendant accused of theft from customer bank accounts were legally operative verbal acts and not hearsay); Shimer v. Foley, Hoag & Eliot, LLP, 59 Mass. App. Ct. 302, 310 (2003) (evidence of the terms of a contract used to establish lost profits is not hearsay because it is not an assertion).

- ***To Show Notice or Other Effect on Hearer.*** See Commonwealth v. Santana, 477 Mass. 610, 621–622 (2017) (interrogating police officer's statement that he had information that defendant had been inside apartment where murder was committed admissible to "contextualize" defendant's "arguably exculpatory" statement that he had been just outside apartment, thus avoiding improper suggestion that defendant had gratuitously placed himself at murder scene); Commonwealth v. Spinucci, 472 Mass. 872, 882–883 (2015) (statements made within defendant's earshot, indicating codefendant's possession of a knife, were not hearsay when offered to show defendant's knowledge that codefendant had a knife); Pardo v. General Hosp. Corp., 446 Mass. 1, 18–19 (2006) (memorandum admissible to show notice); A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund, 445 Mass. 502, 515–516 (2005) (knowledge of insurance reserves not listed in response to question on insurance application regarding potential losses); Commonwealth v. Bregoli, 431 Mass. 265, 273 (2000) (other declarants' knowledge of facts relating to crime to rebut Commonwealth's claim that only killer would be aware of facts); Vassallo v. Baxter Healthcare Corp., 428 Mass. 1, 17 (1998) (other complaints about product admissible as evidence that manufacturer was on notice of defect); Mailhiot v. Liberty Bank & Trust Co., 24 Mass. App. Ct. 525, 529 n.5 (1987) (instructions given to the plaintiff by bank examiners about how to handle a problem were not assertions and thus not hearsay). Cf. Commonwealth v. Daley, 55 Mass. App. Ct. 88, 94 n.9 (2002) (a passerby's remark ["Hey, are you all right?"], if offered as an assertion that the victim was in distress, would be hearsay, but if offered to explain why the defendant fled, and thus not as an assertion, would not be hearsay), S.C., 439 Mass. 558 (2003).

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– ***To Show "the State of Police Knowledge."*** Out-of-court statements to a police investigator may sometimes be admitted for the nonhearsay purpose of showing "the state of police knowledge," because "an arresting or investigating officer should not be put in the false position of seeming just to have happened upon the scene; he should be allowed some explanation of his presence and conduct." Commonwealth v. Cohen, 412 Mass. 375, 393 (1992). See Commonwealth v. Miller, 361 Mass. 644, 659 (1972) (out-of-court statements are admissible when offered to explain why police approached defendant to avoid misimpression that police acted arbitrarily in singling out defendant for investigation). However, "[t]estimony of this kind carries a high probability of misuse, because a witness may relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports[,] even when not necessary to show state of police knowledge" (quotation omitted). Commonwealth v. Rosario, 430 Mass. 505, 510 (1999). Such evidence, therefore, (1) is permitted only through the testimony of a police officer, who must testify only on the basis of his or her own knowledge; (2) is limited to the facts required to establish the officer's state of knowledge; (3) is allowed only when the police action or state of police knowledge is relevant to an issue in the case. Commonwealth v. Sullivan, 478 Mass. 369, 376 (2017). Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

– ***As Circumstantial Evidence of Declarant's State of Mind.*** Where the declarant asserts his or her own state of mind (usually by words describing the state of mind), the statement is hearsay and is admissible only if it falls within the hearsay exception. See Section 803(3)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition, and the accompanying note. However, when the statement conveys the speaker's state of mind only circumstantially (usually because the words themselves do not describe the state of mind directly), it is not hearsay. See, e.g., Commonwealth v. Cruzado, 480 Mass. 275, 280 (2018) (testimony that victim had concluded that defendant had stolen his cell phone properly admitted to show ill will between defendant and victim); Commonwealth v. Romero, 464 Mass. 648, 652 n.5 (2013) (defendant's statement that passenger in his vehicle had shown him a gun was admissible to show defendant's knowledge that gun was in car, as well as being admission of a party-opponent); Commonwealth v. Montanez, 439 Mass. 441, 447–448 (2003) (evidence of victim's statement to her friend was properly admitted to establish victim's state of mind [concern for her family's shame and diminished economic circumstances if abuser were removed from her home], which helped explain her delay in reporting an episode of sexual abuse and thus was not hearsay). Contrast Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition.

– ***As Circumstantial Evidence of the Nature of a Place or a Thing.*** Sometimes out-of-court statements that do not directly describe the nature or character of a place or an object can nevertheless be probative of that nature or character. In such cases, the statements are treated as nonhearsay. See, e.g., Commonwealth v. Massod, 350 Mass. 745, 748 (1996) (statements over telephone not hearsay when used to show that telephone was apparatus used for registering bets on horse races); Commonwealth v. DePina, 75 Mass. App. Ct. 842, 850 (2009) (conversation of police officer on defendant's cellular telephone was admissible as evidence of nature of the cellular telephone as instrument used in cocaine distribution); Commonwealth v. Washington, 39 Mass. App. Ct. 195, 199–201 (1995) (conversations of police officer with callers to defendant's beeper not hearsay when used to show that beeper was used for drug transactions). See also Commonwealth v. Purdy, 459 Mass. 442, 452 (2011) (words soliciting sexual act have independent legal significance and are not hearsay); Commonwealth v. Mullane, 445 Mass. 702, 711 (2006) (portion of conversation regarding negotiation for "extras" between police detective and "massage therapist" were not hearsay).

Prior Statements Used to Impeach or Rehabilitate. Ordinarily, the out-of-court statements of a testifying witness are hearsay if they are offered to prove the truth of the statement. Prior inconsistent statements are usually admissible only for the limited purpose of impeaching the credibility of the witness. But see Subsection (d)(1)(A) and the accompanying note. A witness's prior consistent statements are not

admissible substantively under Massachusetts law, but they may be admissible for certain other purposes. See for example Section 413, First Complaint of Sexual Assault, and Section 613(b), Prior Statements of Witnesses, Limited Admissibility: Prior Consistent Statements. Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes.

Nonverbal Conduct Excluded as Hearsay. See Commonwealth v. Todd, 394 Mass. 791, 797 (1985) (explaining that the destruction of her marriage license could be considered "an extrajudicial, nonverbal assertion of the victim's intent which, if introduced for the truth of the matter asserted, would be, on its face, objectionable as hearsay"); Bartlett v. Emerson, 73 Mass. 174, 175–176 (1856) (testimony about another person's act of pointing out a boundary marker was an assertion of a fact and thus inadmissible as hearsay); Commonwealth v. Ramirez, 55 Mass. App. Ct. 224, 227 (2002) (a business card offered to establish a connection between the defendant and a New York address on the card was hearsay because it was used as an assertion of a fact); Commonwealth v. Kirk, 39 Mass. App. Ct. 225, 229–230 (1995) (conduct of a police officer who served a restraining order on the defendant offered to establish the identity of that person as the perpetrator was hearsay because its probative value depended on the truth of an assertion made in the papers by the victim that the defendant was the same person named in the complaint).

When an out-of-court statement is offered for a nonhearsay purpose, after considering the effectiveness of a Section 105 limiting instruction it is necessary to weigh the risk of unfair prejudice that would likely result if the jury misused the statement. See Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. In criminal cases, that risk can have confrontation clause implications.

Cross-Reference: Section 105, Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes; Section 803(3)(B)(ii), Hearsay Exceptions; Availability of Declarant Immaterial: Then-Existing Mental, Emotional, or Physical Condition.

Subsection (d). This subsection addresses out-of-court statements that are admissible for their truth. Section 613, Prior Statements of Witnesses, Limited Admissibility, addresses prior statements for the limited purposes only of impeachment and rehabilitation.

Subsection (d)(1)(A). Massachusetts generally adheres to the orthodox rule that prior inconsistent statements are admissible only for the limited purpose of impeaching the credibility of a witness's testimony at trial and are inadmissible hearsay when offered to establish the truth of the matters asserted. See Section 613(a)(1), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statements: Examining Own Witness, and Section 613(a)(2), Prior Statements of Witnesses, Limited Admissibility: Prior Inconsistent Statements: Examining Other Witness. However, in Commonwealth v. Daye, 393 Mass. 55, 66 (1984), the Supreme Judicial Court adopted the principles of Proposed Mass. R. Evid. 801(d)(1)(A) allowing prior inconsistent statements made before a grand jury to be admitted substantively. The Daye rule has been extended to cover prior inconsistent statements made in other proceedings as well. See Commonwealth v. Sineiro, 432 Mass. 735 (2000) (probable cause hearings); Commonwealth v. Newman, 69 Mass. App. Ct. 495 (2007) (testimony given at an accomplice's trial). Commonwealth v. Ragland, 72 Mass. App. Ct. 815, 823 n.9 (2008), made it clear in dicta that the same principles would apply to admission of prior inconsistent deposition evidence given under oath. See also Commonwealth v. Belmer, 78 Mass. App. Ct. 62, 64 (2010) (prior inconsistent statement may be admissible for its full probative value where the witness has signed a written affidavit under penalties of perjury in support of an application for a restraining order pursuant to G. L. c. 209A and that witness is subject to cross-examination).

Two general requirements for the substantive use of such statements are (1) that there is an opportunity to cross-examine the declarant and (2) that the prior testimony was in the declarant's own words and was not coerced. In addition, if the prior inconsistent statement is relied on to establish an essential element of a crime, the Commonwealth must offer at least some additional evidence on that element in order to support a conclusion of guilt beyond a reasonable doubt. Commonwealth v. Daye, 393 Mass. at 73–75. However, the additional evidence need not be sufficient in itself to establish the element. Commonwealth v. Noble, 417 Mass. 341, 345 & n.3 (1994). The corroboration requirement thus concerns the sufficiency of the evidence, not its admissibility. Commonwealth v. McGhee, 472 Mass. 405, 422–423 (2015); Com-

monwealth v. Clements, 436 Mass. 190, 193 (2002). The prior testimony should be introduced by having it read directly into the record, either by a single reader or by two persons reading responsively, making clear which portions are questions and which are answers. Commonwealth v. Andrade, 481 Mass. 139, 144 (2018).

Feigning Lack of Memory. Prior statements included in Section 801(d)(1)(A) may be admitted substantively against a witness as inconsistent with a claimed lack of memory if that witness is available for cross-examination and subject to the requirements of this subsection, Section 801(d)(1)(A), provided the trial judge follows the requirements set forth in Commonwealth v. Daye, 393 Mass. 55, 73–74 (1984), and Commonwealth v. Sineiro, 432 Mass. 735, 745 & n.12 (2000). Before admitting such testimony, the judge must make preliminary findings of fact that (1) the witness is in fact feigning lack of memory, (2) the testimony was not coerced, and (3) the testimony was in the witness's own words and is more than a mere confirmation or denial of an allegation by the interrogator. Commonwealth v. DePina, 476 Mass. 614, 620–621 (2017). See Commonwealth v. Evans, 439 Mass. 184, 190 (2003); Commonwealth v. Silvester, 89 Mass. App. Ct. 350, 355–356 (2016). At a party's request, the judge may conduct a voir dire to make these findings. Commonwealth v. Sineiro, 432 Mass. at 739. A trial judge's findings are "entitled to substantial deference and are 'conclusive as long as . . . supported by the evidence.'" Commonwealth v. DePina, 476 Mass. at 621, quoting Commonwealth v. Maldonado, 466 Mass. 742, 756, cert. denied, 134 S. Ct. 2312 (2014), quoting Commonwealth v. Sineiro, 432 Mass. at 742 n.6. "[W]here grand jury testimony relates to an essential element of the offense, the Commonwealth must offer corroborative evidence, in addition to that testimony, in order to sustain a conviction." Id. at 621 n.5 (corroboration requirement "goes to the sufficiency of the evidence rather than to its admissibility"). A judge's finding of witness feigning is often based on a careful examination of the witness's demeanor and testimony in light of the judge's experience. See Commonwealth v. Sineiro, 432 Mass. at 740; Commonwealth v. Newman, 69 Mass. App. Ct. 495, 497 (2007). See, e.g., Commonwealth v. Figueroa, 451 Mass. 566, 573–574, 576–577 (2008) (judge concluded that witness was feigning when he was able to recall many specific events of the evening in question but was unable to recall the portion of his grand jury testimony in which he said the defendant admitted to shooting someone, and a transcript failed to refresh his memory); Commonwealth v. Tiexeira, 29 Mass. App. Ct. 200, 204 (1990) (judge observed how the witness's detailed account of the evening was conspicuously vague regarding the defendant's encounter with the victim). Regardless of the judge's conclusion at voir dire, the jury shall not be told of the judge's preliminary determination that the witness is feigning. Commonwealth v. Sineiro, 432 Mass. at 742 n.6.

"Where a witness testifies at trial and is cross-examined, any limitation on the effectiveness or substance of that cross-examination stemming from feigned memory loss generally does not implicate the confrontation clause." Commonwealth v. DePina, 476 Mass. at 622. See also Commonwealth v. Stewart, 454 Mass. 527, 533 (2009) (genuine total loss of memory preventing cross-examination may preclude admission of grand jury testimony).

Cross-Reference: Introductory Note (a) to Article VIII, Hearsay.

Subsection (d)(1)(B). In Commonwealth v. Cruz, 53 Mass. App. Ct. 393, 401 & n.10 (2001), the Appeals Court noted that the Supreme Judicial Court has not adopted Proposed Mass. R. Evid. 801(d)(1)(B) as to the admission of prior consistent statements as substantive evidence, rather than merely for the purpose of rehabilitating the credibility of a witness-declarant who has been impeached on the ground that his or her trial testimony is of recent contrivance. See also Commonwealth v. Thomas, 429 Mass. 146, 161–162 (1999) (prior consistent statement admissible to rebut suggestion of recent contrivance); Commonwealth v. Kater, 409 Mass. 433, 448 (1991) ("prior consistent statements of a witness may be admitted where the opponent has raised a claim or inference of recent contrivance, undue influence, or bias"); Commonwealth v. Zukoski, 370 Mass. 23, 26–27 (1976) ("[A] witness's prior consistent statement is admissible where a claim is made that the witness's in-court statement is of recent contrivance or is the product of particular inducements or bias. . . . Unless admissible on some other ground to prove the truth of the facts asserted, such a prior consistent statement is admissible only to show that the witness's in-court testimony is not the product of the asserted inducement or bias or is not recently contrived as claimed").

Cross-Reference: Section 413, First Complaint of Sexual Assault.

Subsection (d)(1)(C). This subsection is derived from Commonwealth v. Cong Duc Le, 444 Mass. 431, 432, 436–437 (2005), where the Supreme Judicial Court "adopt[ed] the modern interpretation of the rule" expressed in Proposed Mass. R. Evid. 801(d)(1)(C), which, like its Federal counterpart, states that "[a] statement is not hearsay . . . if '[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person [made] after perceiving [the person].'" It is not necessary that the declarant make an in-court identification. See Commonwealth v. Machorro, 72 Mass. App. Ct. 377, 379–380 (2008) (police officer allowed to testify to extrajudicial identification of the assailant by two victims who were present at trial and subject to cross-examination even though one victim could not identify the assailant [although she recalled being present at his arrest and was certain that the person arrested was the assailant] and the other victim was not asked to make an identification at trial). The third party's testimony about the identification may not be admitted until after the Commonwealth has questioned the eyewitness about the identification. Commonwealth v. Herndon, 475 Mass. 324, 335 (2016). This subsection applies to an out-of-court identification based on a witness's familiarity with the person identified and is not limited to a photographic array, showup, or other identification procedure. Commonwealth v. Adams, 458 Mass. 766, 770–776 (2011). Multiple versions of an extrajudicial identification may be admissible for substantive purposes. Id. at 773.

Under this subsection, whether and to what extent third-party testimony about a witness's out-of-court identification may be admitted in evidence no longer turns on whether the identifying witness acknowledges or denies the extrajudicial identification at trial. See Commonwealth v. Cong Duc Le, 444 Mass. at 439–440. The third-party testimony will be admitted for substantive purposes as long as the cross-examination requirement is satisfied. Id. As the court explained, it is for the jury to "determine whose version to believe—the witness who claims not to remember or disavows the prior identification (including that witness's version of what transpired during the identification procedure), or the observer who testifies that the witness made a particular prior identification." Id. at 440. Prior identification evidence, even if disputed, may be considered in light of all the other evidence relevant to the perpetrator's identity. Id. See also Commonwealth v. Silvester, 89 Mass. App. Ct. 350, 357 (2016) (admission of videotape of witness selecting photograph of defendant from photo array did not violate defendant's confrontation rights where witness was available for cross-examination).

Cross-Reference: Section 1112(d), Eyewitness Identification: Testimony of Third-Party Observer.

Facts Accompanying an Identification. Identification evidence has no meaning absent context, and the extent of the statement needed to provide context varies from case to case. Commonwealth v. Adams, 458 Mass. 766, 772 (2011). Thus, the contents of a witness's statement are admissible under this rule only so far as they are relevant to the issue of identification. Id. This issue should be the subject of a motion in limine. Id. See also Commonwealth v. Walker, 460 Mass. 590, 608–609 (2011).

Cross-Reference: Section 1112, Eyewitness Identification.

Subsection (d)(2). This subsection defines admissions by a party-opponent as not hearsay, consistent with recent Supreme Judicial Court decisions, the Federal Rules of Evidence, and the Proposed Massachusetts Rules of Evidence. See Commonwealth v. Mendes, 441 Mass. 459, 467 (2004); Commonwealth v. Allison, 434 Mass. 670, 676 n.5 (2001); Commonwealth v. DiMonte, 427 Mass. 233, 243 (1998), citing Proposed Mass. R. Evid. 801(d)(2); Fed. R. Evid. 801(d)(2); Proposed Mass. R. Evid. 801(d)(2). In some cases, the court has ruled that out-of-court statements by a party-opponent are admissible as an exception to the hearsay rule. See Commonwealth v. DeBrosky, 363 Mass. 718, 724 (1973); Commonwealth v. McKay, 67 Mass. App. Ct. 396, 403 n.13 (2006).

Subsection (d)(2)(A). This subsection is derived from Commonwealth v. Marshall, 434 Mass. 358, 365–366 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.8.1 (7th ed. 1999). See also Commonwealth v. McCowen, 458 Mass. 461, 485–486 (2010) (defendant's out-of-court statement offered for its truth is hearsay and not admissible when not offered by the Commonwealth); Care & Protection of Sophie, 449 Mass. 100, 110 n.14 (2007) (no requirement that the statement of a party-opponent be contradictory or against the party-opponent's interest); Commonwealth v. Bonomi, 335 Mass. 327, 347 (1957) ("An admission in a criminal case is a statement by the accused, direct or implied, of facts pertinent to the issue,

which although insufficient in itself to warrant a conviction tends in connection with proof of other facts to establish his guilt"); Hopkins v. Medeiros, 48 Mass. App. Ct. 600, 613 (2000) ("The evidence of [the defendant's] admission to sufficient facts was admissible as an admission of a party opponent."); Section 410, Pleas, Offers of Pleas, and Related Statements.

A defendant's unequivocal denial that he or she has committed a charged crime is not admissible in evidence. Commonwealth v. Nawn, 394 Mass. 1, 4 (1985). Both the denial and the accusation it denies are inadmissible as hearsay. Commonwealth v. Spencer, 465 Mass. 32, 46 (2013). The rule barring evidence of a defendant's denial applies only to denials of accusations of criminal activity and not to other denials. See Commonwealth v. Cruzado, 480 Mass. 275, 277–278 (2018) (investigators' questions about whether defendant recognized a photograph of murder victim and defendant's denials properly admitted because questions did not accuse defendant of criminal activity). This rule does not prohibit evidence of a defendant's false factual statements or omissions to show consciousness of guilt. See Commonwealth v. Lavalley, 410 Mass. 641, 649–650 (1991) (impeachment of defendant's trial testimony by showing difference from his pretrial statement to police was evidence of consciousness of guilt and did not amount to impermissible comment on his denial or failure to deny the offense). See also Commonwealth v. Lewis, 465 Mass. 119, 127 (2013) (defendant's ambiguous statement that could be construed as consciousness of guilt ["I'll beat this"] is admissible and subject to parties' arguments about proper interpretation).

While a discussion of the constitutional and common-law principles governing the admissibility of confessions is beyond the scope of this Guide, the law is that a statement, admission, or confession by a person is not admissible in a criminal proceeding if it was not made voluntarily. See, e.g., Commonwealth v. Cryer, 426 Mass. 562, 571 (1998); Commonwealth v. Tavares, 385 Mass. 140, 146 (1982); Commonwealth v. Mahnke, 368 Mass. 662, 679–691 (1975).

Discovery Material. Under this subsection, deposition answers by an opposing party, Mass. R. Civ. P. 32(a)(2), interrogatory answers by an opposing party, G. L. c. 231, § 89, and responses to requests for admission of facts, Mass. R. Civ. P. 36(b), are not subject to a hearsay objection and thus may be used by the opponent for any permissible purpose. See Federico v. Ford Motor Co., 67 Mass. App. Ct. 454, 460–461 (2006); Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 484 n.8 (2000).

Criminal Cases. The principle that the admission of a party-opponent, without more, is admissible is superseded by the requirements of the confrontation clause:

> "[W]here a nontestifying codefendant's statement expressly implicates the defendant, leaving no doubt that it would prove to be powerfully incriminating, the confrontation clause of the Sixth Amendment to the United States Constitution has been offended, notwithstanding any limiting instruction by the judge that the jury may consider the statement only against the codefendant."

Commonwealth v. Vallejo, 455 Mass. 72, 83 (2009) (discussing Bruton v. United States, 391 U.S. 123 [1968]). See also Commonwealth v. Resende, 476 Mass. 141, 150 (2017) ("Where a nontestifying codefendant's statement does not inculpate a defendant directly, but does inculpate the defendant when combined with other evidence, a limiting instruction [that the statement may not be used as evidence against the defendant] may be sufficient to cure the prejudice."); Commonwealth v. Vasquez, 462 Mass. 827, 842–844 (2012) (statement made by nontestifying defendant to police admissible where statement did not expressly or "obviously" refer directly to defendant).

Subsection (d)(2)(B). This subsection is taken verbatim from Fed. R. Evid. 801(d)(2)(B) and is consistent with Massachusetts law. See also Proposed Mass. R. Evid. 801(d)(2)(B). "Where a party is confronted with an accusatory statement which, under the circumstances, a reasonable person would challenge, and the party remains silent or responds equivocally, the accusation and the reply may be admissible on the theory that the party's response amounts to an admission of the truth of the accusation." Commonwealth v. MacKenzie, 413 Mass. 498, 506 (1992). Accord Commonwealth v. Braley, 449 Mass. 316, 320–321 (2007); Zucco v. Kane, 439 Mass. 503, 507–508 (2003); Commonwealth v. Silanskas, 433 Mass. 678, 694 (2001). This is commonly referred to as an "adoptive admission."

Admission by Silence. For an admission by silence to be admissible it must be apparent that the party has heard and understood the statement, had an opportunity to respond, and the context was one in which the party would have been expected to respond. Commonwealth v. Olszewski, 416 Mass. 707, 719 (1993), cert. denied, 513 U.S. 835 (1994). See Commonwealth v. DePina, 476 Mass. 614, 624 (2017); Leone v. Doran, 363 Mass. 1, 16, modified on other grounds, 363 Mass. 886 (1973). "Because silence may mean something other than agreement or acknowledgment of guilt (it may mean inattention or perplexity, for instance), evidence of adoptive admissions by silence must be received and applied with caution." Commonwealth v. Babbitt, 430 Mass. 700, 705 (2000). See generally Commonwealth v. Nickerson, 386 Mass. 54, 61 n.6 (1982) (cautioning against use of a defendant's prearrest silence to show consciousness of guilt and indicating such evidence is admissible only in "unusual circumstances"). Accordingly, adoption by silence can be imputed to a defendant only for statements that "clearly would have produced a reply or denial on the part of an innocent person." Commonwealth v. Brown, 394 Mass. 510, 515 (1985).

> "No admission by silence may be inferred, however, if the statement is made after the accused has been placed under arrest[, see Commonwealth v. Kenney, 53 Mass. 235, 238 (1847); Commonwealth v. Morrison, 1 Mass. App. Ct. 632, 634 (1973); Commonwealth v. Cohen, 6 Mass. App. Ct. 653, 657 (1978)], after the police have read him his Miranda rights[, see Commonwealth v. Rembiszewski, 363 Mass. 311, 316 (1973)], or after he has been so significantly deprived of his freedom that he is, in effect, in police custody[, see Commonwealth v. Corridori, 11 Mass. App. Ct. 469, 480 (1981)]."

Commonwealth v. Stevenson, 46 Mass. App. Ct. 506, 510 (1999), quoting Commonwealth v. Ferrara, 31 Mass. App. Ct. 648, 652 (1991).

Admission by Conduct. "An admission may be implied from conduct as well as from words." Commonwealth v. Bonomi, 335 Mass. 327, 348 (1957). For instance,

> "[a]ctions and statements that indicate consciousness of guilt on the part of the defendant are admissible and together with other evidence, may be sufficient to prove guilt. . . . [T]his theory usually has been applied to cases where a defendant runs away . . . or makes intentionally false and misleading statements to police . . . or makes threats against key witnesses for the prosecution . . . ."

Commonwealth v. Montecalvo, 367 Mass. 46, 52 (1975). See also Olofson v. Kilgallon, 362 Mass. 803, 806 (1973), citing Hall v. Shain, 291 Mass. 506, 512–513 (1935). For a thorough discussion of the evidentiary and constitutional issues surrounding the use of a defendant's prearrest silence or conduct to establish consciousness of guilt, see Commonwealth v. Irwin, 72 Mass. App. Ct. 643, 648–656 (2008). "[A] judge should instruct the jury [1] that they are not to convict a defendant on the basis of evidence of [conduct] alone, and [2] that they may, but need not, consider such evidence as one of the factors tending to prove the guilt of the defendant" (citation omitted). Commonwealth v. Toney, 385 Mass. 575, 585 (1982).

Subsection (d)(2)(C). This subsection is derived from Sacks v. Martin Equip. Co., 333 Mass. 274, 279–280 (1955).

This subsection covers the admissibility of statements by an agent who has been authorized by the principal to speak on his behalf. See Simonoko v. Stop & Shop, Inc., 376 Mass. 929, 929 (1978) (concluding there was no showing of the manager's authority to speak for the defendant). Contrast Subsection (d)(2)(D), which deals with statements of agents.

Subsection (d)(2)(D). This subsection is derived from Ruszcyk v. Secretary of Pub. Safety, 401 Mass. 418, 420–423 (1988), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 801(d)(2)(D). Under some circumstances, inconsistent statements by a prosecutor at successive trials may be admissible as admissions of a party-opponent. See Commonwealth v. Keo, 467 Mass. 25, 33 n.21 (2014).

To determine whether a statement qualifies as a vicarious admission, the judge first must decide as a preliminary question of fact whether the declarant was authorized to act on the matters about which he or she spoke. See Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 791 (1996). If the judge finds

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that the declarant was so authorized, the judge must then decide whether the probative value of the statement was substantially outweighed by its potential for unfair prejudice. Id. In so doing,

> "the judge should consider the credibility of the witness; the proponent's need for the evidence, e.g., whether the declarant is available to testify; and the reliability of the evidence offered, including consideration of whether the statement was made on firsthand knowledge and of any other circumstances bearing on the credibility of the declarant. Ruszcyk v. Secretary of Pub. Safety, [401 Mass.] at 422–423" (footnote and quotation omitted).

Thorell v. ADAP, Inc., 58 Mass. App. Ct. 334, 339–340 (2003). The out-of-court statements of the agent are hearsay and thus inadmissible for the purpose of proving the existence of the agency; however, the agency may be shown through the agent's testimony at trial. Campbell v. Olender, 27 Mass. App. Ct. 1197, 1198 (1989).

Subsection (d)(2)(E). This subsection is derived from Commonwealth v. Bongarzone, 390 Mass. 326, 340 (1983), which relied on Proposed Mass. R. Evid. 801(d)(2)(E) and the identical Fed. R. Evid. 801(d)(2)(E). See also Commonwealth v. Rakes, 478 Mass. 22, 38–43 (2017); Commonwealth v. Carriere, 470 Mass. 1, 10 (2014). This exception is based on the belief that the shared acts and interests of coventurers engaging in a criminal enterprise tend to some degree to assure that statements made between them will be at least minimally reliable. Commonwealth v. Bongarzone, 390 Mass. at 340.

"[A] statement made by a coconspirator or joint venturer may be admitted for its truth against the other coconspirators or joint venturers." Commonwealth v. Mattier, 474 Mass. 261, 276–277 (2016). Before admitting such evidence, a judge "must find, by a preponderance of the evidence, the existence of a joint venture independent of the statement being offered." Commonwealth v. Holley, 478 Mass. 508, 534–535 (2017). "This determination permits the statement to be placed in front of the jury, but does not suffice for the jury to consider it as bearing on the defendant's guilt." Commonwealth v. Rakes, 478 Mass. 22, 37 (2017). Instead, before they consider the statement for such purpose, "the jury must make their own independent determination, again based on a preponderance of the evidence other than the statement itself, that a joint venture existed and that the statement was made in furtherance thereof" (quotation omitted). Commonwealth v. Holley, 478 Mass. at 534. "Alternatively, the statement may be admitted provisionally, subject to a motion to strike should the evidence presented . . . fail to establish the existence of a joint venture." Commonwealth v. Rakes, 478 Mass. at 37 n.11. A statement otherwise inadmissible under the joint venture exception may be admissible for nonhearsay purposes. Commonwealth v. Brown, 474 Mass. 576, 587–588 (2016) (statement may serve as "foundation for later showing, through other admissible evidence," that defendant's statements were false).

Statements probative of a declarant's intent to enter into a joint venture are admissible under the joint venture exception even if the joint venture has not yet begun. Commonwealth v. Rakes, 478 Mass. at 39. Statements made after completion of a crime may be admissible if made in an effort to conceal a crime, even if made years after the crime. Commonwealth v. Winquist, 474 Mass. 517, 522–524 (2016). This exception extends to situations where "the joint venturers are acting to conceal the crime that formed the basis of the criminal enterprise," Commonwealth v. Ali, 43 Mass. App. Ct. 549, 561 (1997), quoting Commonwealth v. Angiulo, 415 Mass. 502, 519 (1993), but it "does not apply after the criminal enterprise has ended, as where a joint venturer has been apprehended and imprisoned." Commonwealth v. Colon-Cruz, 408 Mass. 533, 543 (1990). Cf. Commonwealth v. Rakes, 478 Mass. at 41–42 (statement made by incarcerated coventurer approximately fifteen years after commission of the crime deemed admissible because it demonstrated that joint venturers "remained actively engaged in an effort to conceal their . . . crimes"). Thus, a confession or admission of a coconspirator or joint venturer made after the termination of the conspiracy or joint venture is not admissible as a vicarious statement of another member of the conspiracy or joint venture. Commonwealth v. Bongarzone, 390 Mass. 326, 340 n.11 (1983), citing Commonwealth v. White, 370 Mass. 703, 708–712 (1976). Cf. Commonwealth v. Leach, 73 Mass. App. Ct. 758, 766 (2009) (although statements made by codefendants occurred after they were in custody, statements were made shortly after crime and for purpose of concealing crime and thus became admissible against each defendant).

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Use of Depositions at Trial. In addition to substantive evidentiary issues, which are resolved in the same manner as if the deponent were testifying in court, the use of depositions at trial sometimes raises hearsay issues. The deposition of an adverse party or an authorized agent of a party is not hearsay under Section 801(d)(2). See Mass. R. Civ. P. 32(a)(2). Rule 30A(m) of the Massachusetts Rules of Civil Procedure creates a hearsay exception for certain audiovisual depositions of treating physicians and expert witnesses taken by the party offering the witness. Objections to the deposition testimony taken under this rule are waived if not brought to the court's attention twenty-one days before trial. Rothkopf v. Williams, 55 Mass. App. Ct. 294, 298–299 (2002). The audiovisual recording of a deposition offered at trial becomes part of the record, but should not be admitted as an exhibit. McSweeney v. Build Safe Corp., 417 Mass. 610, 612 (1994). See Mass. R. Civ. P. 30A(k)(4).

Any party may introduce the deposition testimony of a witness who is unavailable at trial. Mass. R. Civ. P. 32(a)(4). In addition to the grounds for unavailability enumerated in Rule 32(a)(4), a witness who holds a valid Fifth Amendment privilege is deemed unavailable. Hasouris v. Sorour, 92 Mass. App. Ct. 607, 614–615 (2018).The proponent of the use of the deposition must demonstrate the witness's unavailability (unavailability cannot be presumed; the trial judge must make a particularized inquiry). The party against whom the deposition testimony is offered must have had the opportunity to cross-examine the witness prior to trial. Frizzell v. Wes Pine Millwork, Inc., 4 Mass. App. Ct. 710, 712 (1976). A deposition from an unrelated action is not admissible against a party who was not present or represented at the earlier deposition. Martin v. Roy, 54 Mass. App. Ct. 642, 647 (2002); Kirby v. Morales, 50 Mass. App. Ct. 786, 790 (2001). "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts." Mass. R. Civ. P. 32(a)(4). Cf. Section 106, Doctrine of Completeness.

Cross-Reference: Section 804(b)(1), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Prior Recorded Testimony.

Section 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

(a) case law,

(b) a statute, or

(c) a rule prescribed by the Supreme Judicial Court.

NOTE

This section is derived from Commonwealth v. Markvart, 437 Mass. 331, 335 (2002) ("hearsay not otherwise admissible under the rules of evidence is inadmissible at the trial . . . unless specifically made admissible by statute"). There is no "innominate" or catchall exception to the hearsay rule in Massachusetts whereby hearsay may be admitted on an ad hoc basis provided that there are circumstantial guarantees of trustworthiness. See Commonwealth v. Pope, 397 Mass. 275, 281–282 (1986); Commonwealth v. Meech, 380 Mass. 490, 497 (1980); Commonwealth v. White, 370 Mass. 703, 713 (1976). Contrast Fed. R. Evid. 807.

In addition to exceptions established by case law, several Massachusetts statutes and rules provide exceptions to the rule against hearsay, including, but not limited to the following:

G. L. c. 79, § 35 (assessed valuation of real estate);

G. L. c. 111, § 195 (certain lead inspection reports);

G. L. c. 119, § 24 (court investigation reports);

G. L. c. 119, §§ 51A, 51B (Department of Children and Families reports);

G. L. c. 123A, §§ 6A, 9 (sexually dangerous person statute);

G. L. c. 152, §§ 20A, 20B (medical reports);

G. L. c. 175, § 4(7) (report of Commissioner of Insurance);

G. L. c. 185C, § 21 (housing inspection report);

G. L. c. 233, § 65 (declaration of deceased person);

G. L. c. 233, § 65A (answers to interrogatories of deceased party);

G. L. c. 233, § 66 (declarations of testator);

G. L. c. 233, § 69 (records of other courts);

G. L. c. 233, § 70 (judicial notice of law);

G. L. c. 233, § 79B (publicly issued compilations of fact);

G. L. c. 233, § 79C (treatises in malpractice actions);

G. L. c. 233, § 79F (certificate of public way);

G. L. c. 233, § 79G (medical and hospital bills);

G. L. c. 233, § 79H (medical reports of deceased physicians);

G. L. c. 239, § 8A, ¶ 3 (board of health inspection report if certified by inspector who conducted the inspection);

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Mass. R. Civ. P. 32(a)(3) (depositions); and

Mass. R. Crim. P. 35(g) (depositions).

If no objection to the hearsay statement is made and it has been admitted, it "may be weighed with the other evidence, and given any evidentiary value which it may possess." Mahoney v. Harley Private Hosp., Inc., 279 Mass. 96, 100 (1932). In a criminal case, the admission of such a statement will be reviewed to determine whether its admission created a substantial risk of a miscarriage of justice. See Commonwealth v. Keevan, 400 Mass. 557, 562 (1987).

Section 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. [Exception not recognized]

(2) Excited Utterance (Spontaneous Utterance). A spontaneous utterance if (A) there is an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of the observer, and (B) the declarant's statement was a spontaneous reaction to the occurrence or event and not the result of reflective thought.

(3) Then-Existing Mental, Emotional, or Physical Condition.

(A) Expressions of present physical condition such as pain and physical health.

(B) **(i)** Statements of a person as to his or her present friendliness, hostility, intent, knowledge, or other mental condition are admissible to prove such mental condition.

(ii) Statements, not too remote in time, which indicate an intention to engage in particular conduct, are admissible to prove that the conduct was, in fact, put in effect. Statements of memory or belief to prove the fact remembered or believed do not fall within this exception.

(iii) Declarations of a testator cannot be received to prove the execution of a will, but may be shown to show the state of mind or feelings of the testator.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for the purpose of medical diagnosis or treatment describing medical history, pain, symptoms, condition, or cause, but not as to the identity of the person responsible or legal significance of such symptoms or injury.

(5) Past Recollection Recorded.

(A) A previously recorded statement may be admissible if (i) the witness has insufficient memory to testify fully and accurately, (ii) the witness had firsthand knowledge of the facts recorded, (iii) the witness can testify that the recorded statement was truthful when made, and (iv) the witness made or adopted the recorded statement when the events were fresh in the witness's memory.

(B) The recorded statement itself may be admitted in evidence, although the original of the statement must be produced if procurable.

(6) Business and Hospital Records.

(A) Entry, Writing, or Record Made in Regular Course of Business. A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that

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(i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

(B) Hospital Records. Records kept by hospitals pursuant to G. L. c. 111, § 70, shall be admissible as evidence so far as such records relate to the treatment and medical history of such cases, but nothing contained therein shall be admissible as evidence which has reference to the question of liability. Records required to be kept by hospitals under the law of any other United States jurisdiction may be admissible.

(C) Medical and Hospital Services.

(i) Definitions.

(a) Itemized Bills, Records, and Reports. As used in this section, "itemized bills, records, and reports" means itemized hospital or medical bills; physician or dentist reports; hospital medical records relating to medical, dental, hospital services, prescriptions, or orthopedic appliances rendered to or prescribed for a person injured; or any report of any examination of said injured person including, but not limited to, hospital medical records.

(b) Physician or Dentist. As used in this section, "physician or dentist" means a physician, dentist, or any person who is licensed to practice as such under the laws of the jurisdiction within which such services were rendered, as well as chiropodists, chiropractors, optometrists, osteopaths, physical therapists, podiatrists, psychologists, and other medical personnel licensed to practice under the laws of the jurisdiction within which such services were rendered.

(c) Hospital. As used in this section, "hospital" means any hospital required to keep records under G. L. c. 111, § 70, or which is in any way licensed or regulated by the laws of any other State, or by the laws and regulations of the United States of America, including hospitals of the Veterans Administration or similar type institutions, whether incorporated or not.

(d) Health Maintenance Organization. As used in this section, "health maintenance organization" shall have the same meaning as defined in G. L. c. 176G, § 1.

(ii) Admissibility of Itemized Bills, Records, and Reports. In any civil or criminal proceeding, itemized bills, records, and reports of an examination of or for services rendered to an injured person are admissible as evidence of the fair and reasonable charge for such services, the necessity of such services or treatments, the diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity, if any, proximately resulting from the condition so diagnosed, provided that

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(a) the party offering the evidence gives the opposing party written notice of the intention to offer the evidence, along with a copy of the evidence, by mailing it by certified mail, return receipt requested, not less than ten days before the introduction of the evidence;

(b) the party offering the evidence files an affidavit of such notice and the return receipt is filed with the clerk of the court after said receipt has been returned; and

(c) the itemized bill, record, or report is subscribed and sworn to under the penalties of perjury by the physician, dentist, authorized agent of a hospital or health maintenance organization rendering such services, or by the pharmacist or retailer of orthopedic appliances.

(iii) Calling the Physician or Dentist as a Witness. Nothing contained in this subsection limits the right of a party to call the physician or dentist, or any other person, as a witness to testify about the contents of the itemized bill, record, or report in question.

(7) Absence of Entry in Records Kept in Accordance with Provisions of Section 803(6). The absence of an entry in records of regularly conducted activity, or testimony of a witness that he or she has examined records and not found a particular entry or entries, is admissible for purposes of proving the nonoccurrence of the event.

(8) Official/Public Records and Reports.

(A) Record of Primary Fact. A record of a primary fact, made by a public officer in the performance of an official duty, is competent evidence as to the existence of that fact.

(B) Prima Facie Evidence. Certain statutes provide that the admission of facts contained in certain public records constitute prima facie evidence of the existence of those facts.

(C) Record of Investigations. Record of investigations and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records, unless specifically authorized by statute.

(9) Public Records of Vital Statistics. A town clerk's record of birth, marriage, or death is prima facie evidence of the facts recorded, but nothing contained in the record of a death that refers to the question of liability for causing the death is admissible in evidence.

(10) Absence of a Public Record. Testimony—or a certification under Section 902—that a diligent search failed to disclose a public record or statement is admissible in evidence if the testimony or certification is offered to prove that

(A) the record or statement does not exist, or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

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(11) Records of Religious Organizations. [Exception not recognized]

(12) Marriage, Baptismal, and Similar Certificates. [Exception not recognized]

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker or a similar item is admissible in evidence.

(14) Records or Documents Affecting an Interest in Property. A registry copy of a document purporting to prove or establish an interest in land is admissible as proof of the content of the original recorded document and its execution and delivery by each person who signed it. However, the grantee or entity claiming present ownership interest of the property must account for the absence of the original document before offering the registry copy.

(15) Statements in Documents Affecting an Interest in Property. Statements of a person's married or unmarried status, kinship or lack of kinship, or of the date of the person's birth or death which relate or purport to relate to the title to land and are sworn to before any officer authorized by law to administer oaths may be filed for record and shall be recorded in the registry of deeds for the county where the land or any part thereof lies. Any such statement, if so recorded, or a certified copy of the record thereof, insofar as the facts stated therein bear on the title to land, shall be admissible in evidence in support of such title in any court in the Commonwealth in proceedings relating to such title.

(16) Statements in Ancient Documents. A statement in a document that is at least thirty years old and whose authenticity is established is admissible in evidence.

(17) Statements of Facts of General Interest. Statements of facts of general interest to persons engaged in an occupation contained in a list, register, periodical, book, or other compilation, issued to the public, shall, in the discretion of the court, if the court finds that the compilation is published for the use of persons engaged in that occupation and commonly is used and relied upon by them, be admissible in civil cases as evidence of the truth of any fact so stated.

(18) Learned Treatises.

(A) Use in Medical Malpractice Actions. Statements of facts or opinions on a subject of science or art contained in a published treatise, periodical, book, or pamphlet shall, insofar as the court shall find that the said statements are relevant and that the writer of such statements is recognized in his or her profession or calling as an expert on the subject, be admissible in actions of contract or tort for malpractice, error, or mistake against physicians, surgeons, dentists, optometrists, hospitals, and sanitaria, as evidence tending to prove said facts or as opinion evidence; provided, however, that the party intending to offer as evidence any such statements shall, not less than thirty days before the trial of the action, give the adverse party or that party's attorney notice of such intention, stating the name of the writer of the statements; the title of the treatise, periodical, book, or pamphlet in which they are contained; the date of publication of the same; the name of the publisher of the same; and wherever possible or practicable the page or pages of the same on which the said statements appear.

(B) Use in Cross-Examination of Experts. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence, but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. A reputation within a family as to matters of pedigree, such as birth, marriage, and relationships between and among family members, may be testified to by any member of the family.

(20) Reputation Concerning Boundaries or General History. Evidence of a general or common reputation concerning the existence or nonexistence of a boundary or other matter of public or general interest concerning land or real property is admissible.

(21) Reputation Concerning Character. A witness with knowledge may testify to a person's reputation as to a trait of character, as provided in Sections 404, 405, and 608.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction is admissible if

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by confinement for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. [Exception not recognized]

(24) Out-of-Court Statement of Child Describing Sexual Contact in Proceeding to Place Child in Foster Care.

(A) Admissibility in General. Any out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, or the circumstances under which it occurred, or identifying the perpetrator offered in an action brought under G. L. c. 119, §§ 23(C) and 24, shall be admissible; provided, however that

(i) the person to whom the statement was made, or who heard the child make the statement, testifies;

(ii) the judge finds that the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort;

(iii) the judge finds pursuant to Subsection (24)(B) that such statement is reliable; and

(iv) the judge's reasons for relying on the statement appear in the judge's findings pursuant to Subsection (24)(C).

(B) Reliability of Statement. A judge must assess the reliability of the out-of-court statement by considering the following factors:

(i) the timing of the statement, the circumstances in which it was made, the language used by the child, and the child's apparent sincerity or motive in making the statement;

(ii) the consistency over time of a child's statement concerning abuse, expert testimony about a child's ability to remember and to relate his or her experiences, or other relevant personality traits;

(iii) the child's capacity to remember and to relate, and the child's ability to perceive the necessity of telling the truth; and

(iv) whether other admissible evidence corroborates the existence of child abuse.

(C) Findings on the Record. The judge's reasons for relying on the statement must appear clearly in the specific and detailed findings the judge is required to make in a care and protection case.

(D) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, an out-of-court statement offered against the defendant for its truth must first satisfy a hearsay exception and then satisfy the confrontation clause. Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 421 (2018). For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 803, refer to the Introductory Note to Article VIII, Hearsay.

Subsection (1). To date, the present sense impression exception has not been adopted in Massachusetts. See Commonwealth v. Mandeville, 386 Mass. 393, 398 n.3 (1982).

Subsection (2). This subsection is taken nearly verbatim from Commonwealth v. Santiago, 437 Mass. 620, 623 (2002). See also Commonwealth v. McLaughlin, 364 Mass. 211, 221–222 (1973); Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 424 n.9 (2018) (describing history of excited utterance or spontaneous exclamation exception). In determining whether a statement qualifies under this exception, the trial judge should consider whether the statement was made "under the stress of an exciting event and before the declarant has had time to contrive or fabricate the remark" (citations omitted). Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017). The judge should consider such factors as whether the statement was made in the same location as the precipitating event, the temporal proximity to the event, and the age, spontaneity, and degree of excitement of the declarant. Id. "The statement itself may be taken as proof of the exciting

event.” Commonwealth v. Nunes, 430 Mass. 1, 4 (1999). See Commonwealth v. King, 436 Mass. 252, 255 (2002). The proponent of the evidence is not required to show that the spontaneous utterance qualifies, characterizes, or explains the underlying event as long as the court is satisfied that the statement was the product of a startling event and not the result of conscious reflection. See Commonwealth v. Santiago, 437 Mass. at 624–627.

> “[T]he nexus between the statement and the event that produced it is but one of many factors to consider in determining whether the declarant was, in fact, under the sway of the exciting event when she made the statement. . . . It illuminates the second aspect of the test; it is not an independent requirement, in the same respect that the lapse of time between the startling event and the declarant’s statement is not an independent requirement.”

Commonwealth v. Santiago, 437 Mass. at 625–626. See Commonwealth v. Gomes, 475 Mass. 775, 788 (2016) (“[t]he circumstances of being the target of a drive-by shooting and actually being shot were certainly enough to permit a reasonable finding” that declarant was “sufficiently startled to render inoperative his normal reflective thought processes”).

“[T]here can be no definite and fixed limit of time [between the incident and the statement]. Each case must depend upon its own circumstances.” Commonwealth v. McLaughlin, 364 Mass. at 223, quoting Rocco v. Boston-Leader, Inc., 340 Mass. 195, 196–197 (1960). See Commonwealth v. Crawford, 417 Mass. 358, 362 (1994) (statements need not be strictly contemporaneous with the exciting cause; a child’s statement five hours later correctly admitted). See also Commonwealth v. Grant, 418 Mass. 76, 81 (1994) (same). “But the length of time between the incident and statement is important; the further the statement from the event, the more difficult it becomes to determine whether the statement is the result of reflection, influenced by other factors.” Commonwealth v. DiMonte, 427 Mass. 233, 239 (1998). See Commonwealth v. Barbosa, 477 Mass. 658, 672–673 (2017) (witness’s emotional demeanor and physical illness sufficient to demonstrate that statements were spontaneous reaction to murder).

A writing may qualify as a spontaneous utterance. See Commonwealth v. DiMonte, 427 Mass. at 238–240. See also Commonwealth v. Mulgrave, 472 Mass. 170, 176 (2015) (text message). However, “[b]ecause a writing is more suspect as a spontaneous exclamation than is an oral statement, the circumstances of the writing would have to include indicia of reliability even more persuasive than those required for an oral statement before [the court] could conclude that the writing qualified as a spontaneous exclamation.” Commonwealth v. DiMonte, 427 Mass. at 239. The “heightened indicia of reliability” requirement does not impose an additional test for written statements but is meant “only to ensure that a writing, which generally is a product of reflection, meets the spontaneity requirement.” Commonwealth v. Mulgrave, 472 Mass. at 177. Other than increased scrutiny on the spontaneity element, “the analysis is the same as for an oral statement.” Id.

A bystander’s spontaneous utterance may be admissible. See Commonwealth v. Harbin, 435 Mass. 654, 657–658 (2002). “Although witnesses may not testify unless evidence is introduced sufficient to support a finding that they have personal knowledge of the matter about which they are testifying, there is no requirement that the declarant have been a participant in the exciting event” (citation omitted). Id. at 657. But see Commonwealth v. Alcantara, 471 Mass. 550, 558–559 (2015) (recording of 911 call containing information outside of caller’s personal knowledge was admissible as excited utterance where information was acquired by caller from person who had personal knowledge and whose statement to caller also was excited utterance).

A statement made in response to a question may qualify as a spontaneous utterance. See Commonwealth v. Simon, 456 Mass. 280, 296 (2010); Commonwealth v. Wilson, 94 Mass. App. Ct. 416, 423–424 (2018) (declarant’s responses to questions during 911 call and initial response to police questioning at the scene concerning defendant’s whereabouts admissible as excited utterances); Commonwealth v. Guaman, 90 Mass. App. Ct. 36, 42–43 (2016) (nine-year-old’s call to 911 to report her uncle was driving drunk with his young son in the car, made because of caller’s concern that her cousin was in danger, was admissible as excited utterance even though some statements were made in response to dispatcher’s questions). But see Commonwealth v. McCoy, 456 Mass. 838, 849 (2010) (statements made

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by victim of sexual assault during interview by sexual assault nurse examiner at hospital lacked requisite degree of spontaneity to qualify as excited utterances).

Confrontation in Criminal Cases. "When the Commonwealth in a criminal case seeks to admit the excited utterance of a declarant who is not a witness at trial or has completed his testimony at trial, the judge should conduct a careful voir dire, evidentiary if needed, before admitting the excited utterance in evidence." Commonwealth v. Hurley, 455 Mass. 53, 68 n.14 (2009) (statement, if testimonial, would be barred by the confrontation clause).

Subsection (3)(A). This subsection is derived from Murray v. Foster, 343 Mass. 655, 658 (1962). See Weeks v. Boston Elevated Ry. Co., 190 Mass. 563, 564–565 (1906) (witness permitted to testify that decedent remarked that the "carriage never rode so hard before"; "[t]his may well be regarded as an expression and indication of then present pain or weakness"); Simmons v. Yurchak, 28 Mass. App. Ct. 371, 373–375, 375 n.6 (1990) (upholding trial court's refusal to apply Proposed Mass. R. Evid. 803[3] while noting that "[i]t is not self-evident that Proposed Mass. R. Evid. 803[3] propounds a more expansive hearsay exception than the common law 'expression of pain'").

Subsection (3)(B). The principle contained in the following three subsections is also known as the "state-of-mind exception." This exception applies only to statements that assert the declarant's own state of mind directly (usually by words describing the state of mind). See, e.g., Commonwealth v. Woollam, 478 Mass. 493, 499 (2017) (text messages were admissible under state of mind exception to hearsay rule because they "were offered to show proof of motive for the killing"); Pardo v. General Hosp. Corp., 446 Mass. 1, 18–19 (2006) (memorandum and letter admissible to show nondiscriminatory state of mind at time employment actions were taken); Commonwealth v. White, 32 Mass. App. Ct. 949, 949 (1992) (in prosecution for sexual abuse of a child, mother's out-of-court statement that, even if defendant didn't do it, "I still hope that all sorts of nasty things happen to him" was admissible under state-of-mind exception as an expression of her hostility toward defendant to prove her bias as prosecution witness). But see Commonwealth v. Whitman, 453 Mass. 331, 341–342 (2009) (defendant's statement that he heard voices inadmissible, as it pertained to the past, not the present). For statements that convey the declarant's state of mind circumstantially or that are probative of another's state of mind, see the Note "Evidence Admitted for Nonhearsay Purpose" to Section 801(c), Definitions: Hearsay.

Evidence of a person's state of mind, whether hearsay (and offered under this exception) or nonhearsay, is admissible only if the state of mind is relevant and if the probative value of the proffered evidence is not substantially outweighed by the risk of unfair prejudice to the opponent. See Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason. Statements offered to show state of mind often include assertions of facts that led to that state of mind (e.g., the victim's out-of-court statements describing the defendant's threats or assaults offered as evidence of the victim's determination to end the relationship with the defendant). The out-of-court statement of those facts would ordinarily be inadmissible hearsay, and the trier of fact's reliance on the truth of those facts would therefore be unfairly prejudicial to the opponent. This danger is especially acute in criminal cases, where confrontation clause rights are also at stake when hearsay is admitted against a defendant. See Introductory Note to Article VIII, Hearsay. Before such evidence is admitted, the trial court must conduct a careful review of the probative value of the evidence and the risk of unfair prejudice under Section 403. See Commonwealth v. Magraw, 426 Mass. 589 (1998) (new trial granted because of erroneous admission of murder victim's statements to show her fear of defendant). In addition to carrying this enhanced risk of unfair prejudice, evidence of the victim's state of mind often has limited probative value. A murder victim's statements of fear of the defendant alone are not relevant to prove motive. Commonwealth v. Qualls, 425 Mass. 163, 169 (1997). When a victim's state of mind is offered to prove a defendant's motive, it is usually not relevant unless the state of mind was known to the defendant, and the defendant was likely to respond to it. Id. at 167. See Commonwealth v. Watkins, 473 Mass. 222, 238 (2015). See also Commonwealth v. Castano, 478 Mass. 75, 85–86 (2017) (victim's intent to end relationship with defendant). However,

> "[a] murder victim's state of mind becomes a material issue if the defendant opens the door by claiming that the death was a suicide or a result of self-defense, that the victim would

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> voluntarily meet with or go someplace with the defendant, or that the defendant was on friendly terms with the victim."

Commonwealth v. Magraw, 426 Mass. at 594.

> "Where evidence of the victim's state of mind is admitted, it may only be used to prove that state of mind, and not to prove the truth of what was stated or that a defendant harbored certain thoughts or acted in a certain way. Therefore, on the defendant's request, the jury must be given an instruction on the limited use of state of mind evidence."

Id. at 594–595, citing Commonwealth v. Costa, 354 Mass. 757 (1968).

Subsection (3)(B)(i). This subsection is taken nearly verbatim from Commonwealth v. Caldron, 383 Mass. 86, 91 (1981). See Commonwealth v. Mendes, 441 Mass. 459, 466 (2004); Commonwealth v. Ferreira, 381 Mass. 306, 310–311 (1980); Commonwealth v. Wampler, 369 Mass. 121, 123 (1975).

Subsection (3)(B)(ii). The first sentence of this subsection is taken verbatim from Commonwealth v. Ferreira, 381 Mass. 306, 310 (1980). Accord Commonwealth v. Trefethen, 157 Mass. 180, 183–184 (1892) (murder conviction reversed because trial judge improperly excluded evidence that victim, who was unmarried and pregnant at time of her death, told fortune teller the day before her drowning that she was going to drown herself). See Commonwealth v. Ortiz, 463 Mass. 402, 409–410 (2012) (murder victim told family she was going to go meet defendant after dinner); Commonwealth v. Fernandes, 427 Mass. 90, 95 (1998) ("A declarant's threat to 'get' or kill someone is admissible to show that the declarant had a particular state of mind and that he carried out his intent."); Commonwealth v. Vermette, 43 Mass. App. Ct. 789, 801–802 (1997) (proper to admit statement of intention to lie and confess to shooting for purpose of showing that declarant carried out that intent). In a prosecution for murder, a victim's statement of intent to meet with the defendant, made immediately before the murder, is sometimes admissible. See Commonwealth v. Britt, 465 Mass. 87, 90 (2013) (admission of victim's statement that he was going to meet defendant to get his money not error, as statement did not necessarily mean that defendant had previously agreed to a meeting, and it was cumulative of other evidence of a preplanned meeting). See also Commonwealth v. Ortiz, 463 Mass. at 409–410 (murder victim's statement to daughter that she was going to pick up defendant at a restaurant admissible, because statement expressed only victim's "present intent to act," not defendant's, and there was other evidence that defendant was with victim at time of murder). In each of the above cases, there was independent evidence of the defendant's presence at the place in question.

The second sentence of this subsection is derived from Commonwealth v. Lowe, 391 Mass. 97, 104–105, cert. denied, 469 U.S. 840 (1984). See Commonwealth v. Pope, 397 Mass. 275, 281 (1986) ("exception applies only to the declarant's present intent to act, not to past conduct"). See also Commonwealth v. Seabrooks, 425 Mass. 507, 512 (1997) ("[a]llowing hearsay statements generally under the state-of-mind exception would entirely eviscerate the hearsay rule and its important purpose of securing the correctness and completeness of testimony through cross-examination"). Accord Shepard v. United States, 290 U.S. 96, 105–106 (1933).

Subsection (3)(B)(iii). This subsection is taken nearly verbatim from Mahan v. Perkins, 274 Mass. 176, 179–180 (1931). See id. at 180 ("[Testator's] declarations showing her intention, plan or purpose should not be received to support the proponent's contention that the will was signed by her and attested by [the witness].")

Subsection (4). This subsection is derived from Commonwealth v. Comtois, 399 Mass. 668, 675 (1987), and Commonwealth v. Howard, 355 Mass. 526, 528–529 (1969). See Commonwealth v. Arana, 453 Mass. 214, 231 (2009); Commonwealth v. DeOliveira, 447 Mass. 56, 62 (2006). If made for the purpose of receiving medical advice, the statements are admissible under this subsection even if made after the commencement of the action. Barber v. Merriam, 93 Mass. 322, 326 (1865).

While the appellate cases cited in this note related to physicians, nothing in the reasoning of those cases exclude other health care professionals. See Bouchie v. Murray, 376 Mass. 524, 527–528 (1978).

Cross-Reference: Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services.

Subsection (5)(A). This subsection is derived from Commonwealth v. Nolan, 427 Mass. 541, 543 (1998), and Commonwealth v. Bookman, 386 Mass. 657, 663–664 (1982). A witness does not have to have a complete lack of memory; all that is required is that the witness cannot testify fully. Commonwealth v. Nolan, 427 Mass. at 544.

"As to the fourth element of the foundation, where the recording was made by another, it must be shown that the witness adopted the writing 'when the events were fresh in [the witness's] mind'" (emphasis omitted). Commonwealth v. Evans, 439 Mass. 184, 189–190 (2003), quoting Commonwealth v. Bookman, 386 Mass. at 664. See Commonwealth v. Fryar, 414 Mass. 732, 746 (1993), cert. denied, 522 U.S. 1033 (1997). The requirement that the recording be made when the events were fresh in the witness's memory has been interpreted broadly. See Catania v. Emerson Cleaners, Inc., 362 Mass. 388, 389–390 (1972) (holding that statement given approximately eight months after accident admissible as a past recollection recorded). But see Kirby v. Morales, 50 Mass. App. Ct. 786, 791–792 (2001) (one year insufficient).

Subsection (5)(B). This subsection is derived from Fisher v. Swartz, 333 Mass. 265, 267–271 (1955). In Fisher, the court cautioned that it was not

> "laying down a hard and fast rule that in every 'past recollection recorded' situation the writing used by the witness must always be admitted in evidence, and that it is error to exclude it . . . . It is conceivable that there might be situations where the probative value of the writing as evidence might be outweighed by the risk that its admission might create substantial danger of undue prejudice or of misleading the jury. In such a case the trial judge in the exercise of sound discretion might be justified in excluding the writing."

Id. at 270. See Commonwealth v. Bookman, 386 Mass. 657, 664 (1982) (error to admit grand jury testimony of the witness as past recollection recorded). The witness may read from the writing during the witness's testimony, or the writing may be admitted.

The past recollection recorded exception should not be confused with the doctrine of refreshing memory. See Section 612, Writing or Object Used to Refresh Memory. For a discussion of the distinction between the two, see Fisher v. Swartz, 333 Mass. at 267.

Subsection (6)(A). This subsection is taken nearly verbatim from G. L. c. 233, § 78. See Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005); Commonwealth v. Trapp, 396 Mass. 202, 208 (1985). See, e.g., Commonwealth v. Fulgiam, 477 Mass. 20, 39–43 (2017) ("ten-print" fingerprint cards); Adoption of Paula, 420 Mass. 716 (1995) (in care and protection proceeding, police report containing officer's firsthand account of conditions in the marital home during execution of search warrant was admissible as business record); Johnson v. MBTA, 418 Mass. 783, 786 (1994) (results of laboratory test); Commonwealth v. Sellon, 380 Mass. 220, 230 & n.15 (1980) (In admitting police journal entry fixing the time a telephone call was received, the Supreme Judicial Court noted that "[t]he operations of the instrumentalities of government constitute 'business' within the meaning of the statute" [citation omitted].); Commonwealth v. Walker, 379 Mass. 297, 302 (1979) (police record of stolen car report); Commonwealth v. Albino, 81 Mass. App. Ct. 736, 737–738 (2012) (notification letters from Sex Offender Registry Board to police department). In a criminal proceeding where the judge admits a business record under this exception, the questions of fact serving as a basis for its admissibility must be submitted to the jury. G. L. c. 233, § 78. See Commonwealth v. Reyes, 19 Mass. App. Ct. 1017, 1019 (1985). Cf. G. L. c. 233, § 79J (certification, inspection, and copies of business records).

The trial judge may, as a condition to admissibility of business records, require the party offering the business record into evidence to call a witness who has personal knowledge of the facts stated in the record. G. L. c. 233, § 78. See Burns v. Combined Ins. Co. of Am., 6 Mass. App. Ct. 86, 92 (1978). The foundation for the admission of a business record need not be established through the testimony of a designated keeper of records, provided that the testifying witness has an adequate understanding of the business's

record-keeping system. Commonwealth v. Driscoll, 91 Mass. App. Ct. 474, 480 (2017). A trial judge must first determine if the writing itself qualifies as a business record, and then determine "whether all or only some of the material and information contained in the document qualifies as being within the scope of the statutory exception." Wingate v. Emery Air Freight Corp., 385 Mass. 402, 408 (1982) (Liacos, J., concurring). A business record is admissible even when its preparer has relied on the statements of others because the personal knowledge of the entrant or maker affects only the weight of the record, not its admissibility. Id. at 406. However, "unless statements on which the preparer relies fall within some other exception to the hearsay rule, the proponent must show that all persons in the chain of communication, from the observer to the preparer, reported the information as a matter of business duty or business routine." Id. See NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 733–735 (2000) (where records made by one business were transferred to another, latter business unable to admit the records under business record exception because records were made by former business). But see Commonwealth v. Albino, 81 Mass. App. Ct. 736, 738 (2012) (business record of one business may be admissible as business record of second business where record is integrated into records of second business and relied on by that business), citing Beal Bank SSB v. Eurich, 444 Mass. 813, 815 (2005).

"[T]he business records hearsay exception in [G. L. c. 233,] § 78 may not be used to expand the scope of the hearsay exception for hospital medical records." Commonwealth v. Irene, 462 Mass. 600, 616 (2012). "The admissibility of statements in medical records is limited by the provisions in G. L. c. 233 relating to hospital records, including §§ 79 and 79G." Id.

Opinions contained in business records are not admissible unless they fall within some other exception to the hearsay rule. See Julian v. Randazzo, 380 Mass. 391, 392–393 (1980); Burke v. Memorial Hosp., 29 Mass. App. Ct. 948, 949–950 (1990). Cf. Section 803(6)(C), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Medical and Hospital Services (provides, under certain circumstances, for the admission of opinion contained in medical, dental, and other identified records and reports). Even if a document satisfies the business record exception, the trial judge retains the discretion to consider the reliability of the evidence offered. N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 367 n.10 (2013). Cross-Reference: Section 803(17), Hearsay Exceptions; Availability of Declarant Immaterial: Statements of Facts of General Interest.

Police Reports. Police reports are generally admissible as business records under this subsection. Commonwealth v. Walker, 379 Mass. 297, 302 (1979); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 453 (1969). Thus, the reporting officers' firsthand observations as recorded in their reports are admissible. Adoption of Paula, 420 Mass. 716, 727 (1995) (responding officers' description of open beer cans, drinking by underage guests, inadequate sleeping arrangements for the children, broken window, and weapons openly displayed). Such reports are admissible as an exception to the hearsay rule even when the preparer has relied on statements made by others in the regular course of the preparer's record-keeping duties (such as fellow police officers) because, under G. L. c. 233, § 78, "'personal knowledge by the entrant or maker' is a matter affecting the weight (rather than the admissibility) of the record." Wingate v. Emery Air Freight Corp., 385 Mass. 402, 406 (1982), quoting G. L. c. 233, § 78. However, "second-level" hearsay, such as statements of bystanders or witnesses, should be redacted, as these statements are not made admissible by G. L. c. 233, § 78. See Commonwealth v. Happnie, 3 Mass. App. Ct. 193, 199 (1975), overruled in part on other grounds by Commonwealth v. Szerlong, 457 Mass. 858, 869 (2010); Kelly v. O'Neil, 1 Mass. App. Ct. 313, 316–317 (1973). Cf. Commonwealth v. Walker, 379 Mass. at 302 (statements made by unidentified caller to police cadet who authored report not offered for their truth). Further, the admittance of police reports as business records applies only to factual observations and does not permit the admission of opinions contained in the report. Julian v. Randazzo, 380 Mass. 391, 393 (1980). Police reports may be considered as evidence at a probation revocation hearing even when the reporting officer does not testify and even when they contain second-level hearsay, so long as they are deemed sufficiently reliable. See Commonwealth v. Durling, 407 Mass. 108, 120–122 (1990) (personal observations of non-testifying officer); Commonwealth v. Foster, 77 Mass. App. Ct. 444, 450 (2010) (witness statement contained in police report). Police reports relating to prior sexual offenses are admissible in Sexually Dangerous Person proceedings pursuant to G. L. c. 123A, § 14(c), even when they contain hearsay statements. Commonwealth v. Given, 441 Mass. 741, 745–746 (2004).

Criminal Cases. A record or report that qualifies as an exception to the hearsay rule under this subsection may nevertheless be inadmissible if it contains testimonial statements in violation of the confrontation clause. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–311 (2009). Additionally, Massachusetts statutory law provides that in criminal cases tried to a jury, "all questions of fact which must be determined by the court as the basis for the admissibility of the evidence involved shall be submitted to the jury." G. L. c. 233, § 78. As a result, in criminal cases involving business records, unless the defendant agrees otherwise, the judge not only must make the four preliminary determinations of fact set forth in Subsection (6)(A), but must instruct the jury that they too must find these facts by a preponderance of the evidence before they consider the contents of the business record. See Commonwealth v. Oppenheim, 86 Mass. App. Ct. 359, 367 (2014).

Subsection (6)(B). This subsection is derived from G. L. c. 233, § 79. See Commonwealth v. Sheldon, 423 Mass. 373, 376 (1996). A hospital record is admissible at trial if the trial judge finds that (1) it is the type of record contemplated by G. L. c. 233, § 79; (2) the information is germane to the patient's treatment or medical history; and (3) the information is recorded from the personal knowledge of the entrant or from a compilation of the personal knowledge of those under a medical obligation to transmit such information. Bouchie v. Murray, 376 Mass. 524, 531 (1978). See Commonwealth v. Ackerman, 476 Mass. 1033, 1034 (2017) (even where medical record does not expressly state that blood alcohol test was performed as part of medical treatment, circumstances surrounding test may permit that inference). Compare Commonwealth v. Sheldon, 423 Mass. at 375–377 (blood alcohol tests conducted solely to prove the defendant's sobriety, in circumstances in which there was no hospital protocol for conducting such a test, do not qualify for admission under G. L. c. 233, § 79), with Commonwealth v. Dyer, 77 Mass. App. Ct. 850, 855–856 (2010) (blood alcohol test results ordered by physician exclusively for the medical evaluation and treatment of the defendant qualify for admission under G. L. c. 233, § 79). The party offering the record into evidence has the burden of proving the statutory requirements, Commonwealth v. Dunne, 394 Mass. 10, 16 (1985), and need not give advance notice of the intent to offer the record in evidence, Commonwealth v. McCready, 50 Mass. App. Ct. 521, 524–525 (2000). Cf. G. L. c. 233, § 79G (ten days' advance notice required). The trial judge has discretion to exclude portions of an otherwise admissible medical record in accordance with Sections 402, General Admissibility of Relevant Evidence; 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons; and 611(a), Mode and Order of Examining Witnesses and Presenting Evidence: Control by the Court. See Commonwealth v. Francis, 450 Mass. 132, 138–139 (2007). See also Commonwealth v. Hamel, 91 Mass. App. Ct. 349, 352 (2017) (in prosecution for sexual assault of child, error to admit medical records with diagnosis of "irritant dermatitis" of penis in absence of expert testimony that condition was caused by rubbing described by alleged victim).

"[V]oluntary statements of third persons appearing in the record are not admissible unless they are offered for reasons other than to prove the truth of the matter contained therein or, if offered for their truth, come within another exception to the hearsay rule . . . ." Bouchie v. Murray, 376 Mass. at 531. The Supreme Judicial Court has noted that G. L. c. 233, § 79,

> "may be read to permit the admission of a medical history taken from a person with reason to know of the patient's medical history by virtue of his or her relationship to the patient. Such a history may contain personal knowledge gained from observation or knowledge gained from an intimate relationship. We think that [G. L. c. 233, § 79] should be read to include such statements if made for purposes of medical diagnosis or treatment and if the declarant's relationship to the patient and the circumstances in which the statements are made guarantees their trustworthiness."

Id. at 531. In Commonwealth v. Dube, 413 Mass. 570, 573 (1992), the court noted that Section 79 has been interpreted liberally to allow "the admission of a record that relates directly and primarily to the treatment and medical history of the patient," even if facts pertaining to liability but only incidental to medical treatment have also been admitted. See Commonwealth v. DiMonte, 427 Mass. 233, 242 (1998).

> "[General Laws c. 233, § 79,] relies on a 'pragmatic test of reliability' that permits the introduction of records containing even second level hearsay provided the information in the

> record is of a nature that is relied on by medical professionals in administering health care. . . . While creating an exception to the hearsay rule, the statute does not permit the admission of hospital records that are facially unreliable."

Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 167 (2003), citing Doyle v. Dong, 412 Mass. 682, 687 (1992). See generally Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 287–288 (1987) (privileged material should be redacted).

Illustrations. Notations on Form 2 in the "Sexual Assault Evidence Collection Kit" made by the SANE (sexual assault nurse examiner) based on statements by the complainant about how he or she received his or her injuries are admissible because they assist the SANE in conducting the examination, even though the information is also collected to assist investigators. Commonwealth v. Dargon, 457 Mass. 387, 396 (2010). However, the printed form should not be admitted because it suggests a sexual assault occurred. Id. Notations on hospital intake forms stating that a patient was "assaulted" should be redacted. Commonwealth v. DiMonte, 427 Mass. at 241–242. In DiMonte, several references to the facts of the alleged assault, including "Pt. struck in the face [with] fist" and "reports having a plastic container thrown [at] her which struck her [right] forehead," were admissible. Id. at 241. Statements consisting of self-diagnosis should be redacted. Commonwealth v. Hartman, 404 Mass. 306, 316–317 (1989). In Commonwealth v. Concepcion, 362 Mass. 653, 654–655 (1972), hospital records where (a) under the heading "Nature of Illness" appeared the words "? Assaulted- ? Raped," (b) under the heading "History and Physical Exam" appeared the words "History of recent rape," and (c) under the heading "Diagnosis" appeared the notation "? Rape," the doctor's opinions were related to the treatment and medical history. Blood tests bearing on the patient's degree of intoxication are admissible; entries made by observing nurses are also admissible. Commonwealth v. McCready, 50 Mass. App. Ct. 521, 524 (2000). In Commonwealth v. Baldwin, 24 Mass. App. Ct. 200, 202 (1987), a "[d]iagnosis" of "sexual molestation," a term "synonymous to laymen with indecent assault and battery," should have been redacted. Cf. Commonwealth v. Patton, 458 Mass. 119 (2010) (SAIN [Sexual Abuse Intervention Network] report may be admissible in probation violation hearings).

Subsection (6)(C). This subsection is derived from G. L. c. 233, § 79G. The text in this subsection places the statutory language in more straightforward language and also incorporates the case law. The practitioner, however, is cautioned to check the precise statutory language.

This statute applies to criminal cases as well as to civil cases, and its scope is much broader than that of G. L. c. 233, § 79. Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 798–800 (2001). See generally Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990) (declining to adopt Proposed Mass. R. Evid. 803[6] for the purpose of admitting physician's reports given the "carefully crafted provisions of § 79G").

Scope. This subsection establishes a broad exception to the hearsay rule which overlaps to some degree with the hospital records exception provided in Section 803(6)(B), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Hospital Records. See McHoul, petitioner, 445 Mass. 143, 151 (2005); Ortiz v. Stein, 31 Mass. App. Ct. 643, 645 (1991). But see Brusard v. O'Toole, 45 Mass. App. Ct. 288, 295 (1998) (G. L. c. 233, § 79G, would not allow the admission in evidence of hospital policies and procedures). In some respects, however, this subsection is broader than the exception for hospital records found in Section 803(6)(B) because

> "reports admissible under § 79G may include the 'opinion of such physician . . . as to proximate cause of the condition so diagnosed, . . .' and 'the opinion of such physician . . . as to disability or incapacity, if any, proximately resulting from the condition so diagnosed. . . .' These are not matters usually found in a medical record but do pertain to issues commonly involved in personal injury claims and litigation. Thus, the concerns that require redaction of information not germane to the patient's treatment in medical records under § 79, see, e.g., Bouchie v. Murray, 376 Mass. 524, 531 (1978), are overridden by express language in § 79G."

Commonwealth v. Schutte, 52 Mass. App. Ct. at 799–800. Also, since the term "report" is not defined in G. L. c. 233, § 79G, a properly attested letter from a person's treating physician explaining the patient's medical condition and its effects based on the physician's personal observations can be qualified as a

report. Id. Ambulance records are admissible under Section 79G, as the certification requirements for EMTs are similar in nature to the licensure requirements for other medical personnel contained in the statute whose reports are admissible. Commonwealth v. Palacios, 90 Mass. App. Ct. 722, 726 (2016).

The full amount of a medical or hospital bill is admissible as evidence of the reasonable value of the services rendered to the injured person, even where the amount actually paid by a private or public insurer is less than that amount. Law v. Griffith, 457 Mass. 349, 353–354 (2010), citing G. L. c. 233, § 79G.

Cross-Reference: G. L. c. 233, § 79H (medical records of deceased physicians); Section 411, Insurance; Section 902(k), Evidence That is Self-Authenticating: Certified Copies of Hospital and Other Records of Treatment and Medical History.

Requirements for Admissibility. Reports offered under G. L. c. 233, § 79G, as opposed to G. L. c. 233, § 78, are admissible even if prepared in anticipation of litigation. See O'Malley v. Soske, 76 Mass. App. Ct. 495, 498–499 (2010); Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 799 n.3 (2001). Medical reports which deal with an injured person's "diagnosis, prognosis, opinion as to the proximate cause of the condition so diagnosed, or the opinion as to disability or incapacity," see Section 803(6)(C)(ii), must be by a physician, as that term is defined in the subsection, who treated or examined the injured person. See Ortiz v. Stein, 31 Mass. App. Ct. at 645–646. See also Gompers v. Finnell, 35 Mass. App. Ct. 91, 93 (1993) ("Nothing in § 79G authorizes one not a physician or dentist to offer an expert opinion that a patient's physical symptoms resulted from a particular accident or incident."). If a record contains such an opinion, however, it may satisfy the plaintiff's burden of proof on the issue of causation in a medical negligence case. See Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 234–236 (2005) (explaining that there is no requirement that an expert opinion on causation contain the phrase "to a reasonable degree of medical certainty").

General Laws c. 233, § 79G, requires that a party who seeks to offer the report of a physician or dentist at trial must serve opposing counsel at least ten days in advance of trial with notice and a copy of the report by the physician or dentist. See Adoption of Seth, 29 Mass. App. Ct. 343, 351–352 (1990). However, the attestation by the physician or dentist does not have to be included with the notice so long as it is present when the evidence is offered at trial. See Grant v. Lewis/Boyle, Inc., 408 Mass. 269, 274 (1990); Knight v. Maersk Container Serv. Co., 49 Mass. App. Ct. 254, 256 (2000).

Cross-Reference: G. L. c. 233, § 79H; Section 902(k), Evidence That is Self-Authenticating: Certified Copies of Hospital and Other Records of Treatment and Medical History.

Subsection (7). This subsection is derived from McNamara v. Honeyman, 406 Mass. 43, 54 n.10 (1989), and Commonwealth v. Scanlan, 9 Mass. App. Ct. 173, 182 (1980). See Johnson v. Wilmington Sales, Inc., 5 Mass. App. Ct. 858, 858 (1977). Where testimony is offered, proof of the fact that an entry does not exist does not require the production of the records themselves or the laying of a foundation for the introduction of secondary evidence. Commonwealth v. Scanlan, 9 Mass. App. Ct. at 182. See Commonwealth v. Torrealba, 316 Mass. 24, 30 (1944); Johnson v. Wilmington Sales, Inc., 5 Mass. App. Ct. at 858.

Subsection (8). This subsection is derived from Commonwealth v. Slavski, 245 Mass. 405, 415 (1923). See Custody of Two Minors, 19 Mass. App. Ct. 552, 559 (1985) (noting that it is "sound practice" for judge to give notice to parties if judge intends to use court investigator or guardian ad litem report where neither party offered report into evidence). Cf. G. L. c. 233, § 76 (admissibility of authenticated government records); Mass. R. Civ. P. 44 (proof of official records); Mass. R. Crim. P. 40 (same). The admission of a record of a primary fact created for routine government administrative functions does not violate the confrontation clause. Commonwealth v. Shangkuan, 78 Mass. App. Ct. 827, 833–834 (2011) (officer's return of service, required by court rule to be completed and filed in court, is nontestimonial because it was not "created solely for use in a pending criminal prosecution," even though it might later be used for proving notice to a defendant).

Under the common law, a report or record does not become an official record for the purpose of this exception merely because it is filed with a governmental agency. See Commonwealth v. Williams, 63 Mass. App. Ct. 615, 619 (2005); Kelly v. O'Neil, 1 Mass. App. Ct. 313, 319 (1973). A hearsay statement recorded

in an official record, if made by someone other than the public officer making the record, is not admissible under this exception, although it may be admissible if it falls within another hearsay exception. See Sklar v. Beth Israel Deaconess Med. Ctr., 59 Mass. App. Ct. 550, 556 n.8 (2003). Evaluative reports, opinions, and conclusions contained in a public report are not admissible at common law. Commonwealth v. Nardi, 452 Mass. 379, 387–395 (2008) (ruling that the findings of a medical examiner concerning the nature and extent of the victim's injuries and his or her ultimate opinion as to the cause of death were not statements of fact excluded by the hearsay rule, but instead were evaluative statements that fell outside the public record exception); Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124, 135 (2002). See Middlesex Supply, Inc. v. Martin & Sons, Inc., 354 Mass. 373, 374–375 (1968); Herson v. New Boston Garden Corp., 40 Mass. App. Ct. 779, 792–793 (1996).

The following statutes provide for the admission of facts contained in public records as prima facie evidence (examples of the records covered are in parentheses): G. L. c. 46, § 19 (birth, marriage, and death records); G. L. c. 79, § 35 (assessed valuation of real property); G. L. c. 90, § 30 (records of the Registry of Motor Vehicles); G. L. c. 123A, § 14(c) (public records at trial on whether person is sexually dangerous); and G. L. c. 185C, § 21 (report of housing inspector). But see Commonwealth v. Almonte, 465 Mass. 224, 242 (2013) (the preferred practice is to redact means and manner of death before admitting death certificate into evidence). Conclusions contained in public records may be made admissible by statute. Shamlian v. Equitable Acc. Co., 226 Mass. 67, 69–70 (1917).

Mortality Tables. In Harlow v. Chin, 405 Mass. 697, 714 (1989), the Supreme Judicial Court addressed the admissibility of mortality tables:

> "Mortality tables, though not conclusive proof of life expectancy, help furnish a basis for the jury's estimation. The tables themselves are admissible regardless of the poor health or extra-hazardous occupation of the person whose life expectancy is being estimated. When the opposing side believes that the person in question, because of poor health, has a lower life expectancy than that reflected in the mortality tables, the usual remedy is to offer evidence to that effect and argue the point to the jury." (Citations omitted.)

Criminal Cases. A record or report that qualifies as an exception to the hearsay rule under this subsection may nevertheless be inadmissible if it contains testimonial statements in violation of the confrontation clause. See Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310–311 (2009). See also Introductory Note to Article VIII, Hearsay.

Subsection (9). This subsection is taken nearly verbatim from G. L. c. 46, § 19. See Commonwealth v. Lykus, 406 Mass. 135, 144 (1989), cert. denied, 519 U.S. 1126 (1997). See also Miles v. Edward Tabor M.D., Inc., 387 Mass. 783, 786 (1982). Records from foreign countries are not admissible under G. L. c. 46, § 19, or G. L. c. 207, § 45. Vergnani v. Guidetti, 308 Mass. 450, 457 (1941). Cf. G. L. c. 46, § 19C ("The commissioner of public health shall use the seal of the department of public health for the purpose of authenticating copies of birth, marriage and death records in his department, and copies of such records when certified by him and authenticated by said seal, shall be evidence like the originals."). General Laws c. 46, § 19, makes the town clerk certificate admissible in evidence, but not with respect to liability. See Wadsworth v. Boston Gas Co., 352 Mass. 86, 93 (1967). See also G. L. c. 207, § 45 ("The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar, or a copy thereof duly certified, shall be prima facie evidence of such marriage.").

Subsection (10). This subsection, which is taken from Proposed Mass. R. Evid. 803(10), reflects Massachusetts practice. See Mass. R. Civ. P. 44(b); Mass. R. Crim. P. 40(b); Blair's Foodland, Inc. v. Shuman's Foodland, Inc., 311 Mass. 172, 175–176 (1942).

Subsection (11). No cases or statutes were located on this issue. Cf. Section 803(6)(A), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records: Entry, Writing, or Record Made in Regular Course of Business.

Cross-Reference: Section 804(b)(7), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Religious Records.

Subsection (12). No cases or statutes were located on this issue. Cf. Section 804(b)(7), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Religious Records; Kennedy v. Doyle, 92 Mass. 161, 168 (1865) (baptismal record admissible where maker is deceased).

Subsection (13). This subsection, which is taken from Proposed Mass. R. Evid. 803(13), reflects Massachusetts practice. See North Brookfield v. Warren, 82 Mass. 171, 174–175 (1860). Cf. Section 803(9), Hearsay Exceptions; Availability of Declarant Immaterial: Public Records of Vital Statistics; Section 804(b)(5)(A), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Statutory Exceptions in Civil Cases: Declarations of Decedent.

Subsection (14). This subsection is derived from Scanlan v. Wright, 30 Mass. 523, 527 (1833), and Commonwealth v. Emery, 68 Mass. 80, 81–82 (1854).

Subsection (15). This subsection is taken nearly verbatim from G. L. c. 183, § 5A.

Subsection (16). This subsection is derived from Cunningham v. Davis, 175 Mass. 213, 219 (1900) ("It is a general rule that deeds appearing to be more than 30 years old, which come from the proper custody, and are otherwise free from just grounds of suspicion, are admissible without any proof of execution."). See Whitman v. Shaw, 166 Mass. 451, 460–461 (1896) (ancient plan and field notes); Drury v. Midland R.R. Co., 127 Mass. 571, 581 (1879) (old plans admitted for purposes of establishing location of a creek). Cf. Section 901(b)(8), Authenticating or Identifying Evidence: Examples: Evidence About Ancient Documents.

Cross-Reference: Section 403, Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reason; Section 805, Hearsay within Hearsay.

Subsection (17). This subsection is taken verbatim from G. L. c. 233, § 79B. The word "'compilation,' as used in the statute, connotes simple objective facts, and not conclusions or opinions." Mazzaro v. Paull, 372 Mass. 645, 652 (1977). The trial judge must make "preliminary findings that the proposed exhibit is (1) issued to the public, (2) published for persons engaged in the applicable occupation, and (3) commonly used and relied on by such persons." Id. See Fall River Sav. Bank v. Callahan, 18 Mass. App. Ct. 76, 83–84 (1984); Torre v. Harris-Seybold Co., 9 Mass. App. Ct. 660, 672–673 (1980). The judge has the discretion to consider the reliability of the information as a factor in determining the admissibility of the compilation, even where the statutory requirements are satisfied. See N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 366–367 (2013) (judge did not abuse his discretion in excluding statistical summaries derived from compilation of raw data voluntarily submitted by participating insurance companies where accuracy and reliability of raw data had not been established).

See generally G. L. c. 106, § 2-724 ("Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.").

Subsection (18)(A). This subsection is taken nearly verbatim from G. L. c. 233, § 79C. See Commonwealth v. Johnson, 59 Mass. App. Ct. 164, 170 (2003) ("pill book" purchased from pharmacy purporting to describe effects of prescription drugs not admissible as learned treatise); Simmons v. Yurchak, 28 Mass. App. Ct. 371, 375–377 (1990) (instructional videotape not admissible as learned treatise). Statements from a treatise satisfying the requirements of G. L. c. 233, § 79C, may also be used in medical malpractice tribunals. See G. L. c. 231, § 60B.

"When determining the admissibility of a published treatise under G. L. c. 233, § 79C, we interpret the 'writer of such statements' to mean the treatise author, not the author of each individual item incorporated into the treatise text." Brusard v. O'Toole, 429 Mass. 597, 606 (1999). "[T]he 'writer' of a statement contained in an authored treatise is the author of the treatise, and the 'writer' of a statement contained in a periodical or similarly edited publication is the author of the specific article in which the statement is contained." Id. The biographical data about the author in the front of the treatise may not be used to establish the expertise of the author, see Reddington v. Clayman, 334 Mass. 244, 247 (1956), but an opponent witness who admits that the author of the treatise is a recognized expert in the field is sufficient, see Thomas v. Ellis, 329 Mass. 93, 98, 100 (1952). "The statutory notice of the intent to introduce a treatise required by G. L. c. 233, § 79C, requires that 'the date of publication' of the treatise be specified. The edition of a treatise, if applicable, should be specified, and parties should be permitted to introduce statements from only that edition." Brusard v. O'Toole, 429 Mass. at 606 n.13.

Subsection (18)(B). This subsection is derived from Commonwealth v. Sneed, 413 Mass. 387, 396 (1992), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 803(18). Treatises are not available to bolster direct examination. Brusard v. O'Toole, 429 Mass. 597, 601 n.5 (1999). But see Commonwealth v. Sneed, 413 Mass. at 396 n.8 ("We can imagine a situation in which, in fairness, portions of a learned treatise not called to the attention of a witness during cross-examination should be admitted on request of the expert's proponent in order to explain, limit, or contradict a statement ruled admissible under [Section] 803[(18)]."). This subsection "contemplates that an authored treatise, and not the statements contained therein, must be established as a reliable authority." Brusard v. O'Toole, 429 Mass. at 602–603. The contents of the specific article, web page, or other material must be shown to have been authored or prepared by a person established to be a "reliable authority" pursuant to one of the means spelled out in Section 803(18)(B). Kace v. Liang, 472 Mass. 630, 644 (2015).

> "[The] opponent of the expert witness [must] bring to the witness's attention a specific statement in a treatise that has been established, to the judge's satisfaction, as a reliable authority. The witness should be given a fair opportunity to assess the statement in context and to comment on it, either during cross-examination or on redirect examination. The judge, of course, will have to determine the relevance and materiality of the statement and should consider carefully any claimed unfairness or confusion that admission of the statement may create."

Commonwealth v. Sneed, 413 Mass. at 396. This is a preliminary question of fact for the judge. See Section 104(a), Preliminary Questions: In General.

Subsection (19). This subsection is derived from Butrick v. Tilton, 155 Mass. 461, 466 (1892). See Cadorette v. United States, 988 F.2d 215, 220–222 (1st Cir. 1993). But see Haddock v. Boston & Maine R.R., 85 Mass. 298, 301 (1862).

Subsection (20). This subsection is derived from Enfield v. Woods, 212 Mass. 547, 551–552 (1912) (admitting reputation evidence regarding existence or nonexistence of public ownership of land). See G. L. c. 139, § 9 ("For the purpose of proving the existence of the nuisance the general reputation of the place shall be admissible as evidence."); Commonwealth v. United Food Corp., 374 Mass. 765, 767 n.2 (1978) (G. L. c. 139, § 9, is a statutory exception to hearsay rule).

Subsection (21). This exception deals only with the hearsay aspect of evidence of reputation. For additional restrictions on the use of such evidence, see Sections 404, Character Evidence; Crimes or Other Act; 405, Methods of Proving Character; and 608, A Witness's Character for Truthfulness or Untruthfulness.

Subsection (22). This subsection is derived from Flood v. Southland Corp., 416 Mass. 62, 70 (1993), in which the Supreme Judicial Court adopted Proposed Mass. R. Evid. 803(22). See Commonwealth v. Powell, 40 Mass. App. Ct. 430, 435–436 (1996) (error where trial court instructed jury it could consider prior guilty plea of alleged joint venturer to charge of armed robbery as circumstantial evidence of presence of gun in subsequent trial of other joint venturer on same charge). "[A] plea of guilty is admissible in evidence

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as an admission in subsequent civil litigation, but is not conclusive." Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 747 (1985). Cf. Section 609, Impeachment by Evidence of Conviction of Crime; Section 410, Pleas, Offers of Pleas, and Related Statements; Mass. R. Crim. P. 12(f).

Subsection (23). No cases or statutes were located on this issue.

Subsection (24)(A). Subsections (24)(A) through (A)(ii) are taken nearly verbatim from G. L. c. 233, § 83(a). Subsections (24)(A)(iii) and (iv) are derived from Care & Protection of Rebecca, 419 Mass. 67, 78, 80 (1994). There is no requirement that the child be unavailable. Id. at 76–77. When a care and protection proceeding is joined with a petition to dispense with consent to adoption, admissibility of a child's out-of-court statements should comply with the stricter requirements of G. L. c. 233, § 82, not § 83. Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998).

Subsection (24)(B). This subsection is taken nearly verbatim from Care & Protection of Rebecca, 419 Mass. 67, 79–80 (1994). The judge may question the child through a voir dire. Id. The reliability of statements contained in an investigator's report can be assessed by cross-examining the investigator. Care & Protection of Leo, 38 Mass. App. Ct. 237, 241–242 (1995).

Subsection (24)(C). This subsection is taken nearly verbatim from Care & Protection of Rebecca, 419 Mass. 67, 80 (1994).

Subsection (24)(D). This subsection is taken verbatim from G. L. c. 233, § 83(b).

Section 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify [this criterion not recognized];

(3) testifies to not remembering the subject matter [this criterion not recognized];

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able to procure the declarant's attendance by process or other reasonable means.

But this Subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Prior Recorded Testimony. Testimony that

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one, and

(B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Made Under the Belief of Imminent Death. In a prosecution for homicide, a statement that a declarant, who believed that the declarant's death was imminent and who died shortly after making the statement, made about the cause or circumstances of the declarant's own impending death or that of a co-victim.

(3) Statement Against Interest. A statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else, or to expose the declarant to civil or criminal liability. In a criminal case, the exception does not apply to a statement that tends to expose the declarant to criminal liability and is offered to exculpate the defendant, or is offered by the Commonwealth to inculpate the defendant, unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal History.

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(A) A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, or relationship by blood, even though the declarant had no way of acquiring personal knowledge of the matter stated.

(B) A statement regarding those matters concerning another person to whom the declarant is related [exception not recognized].

(5) Statutory Exceptions in Civil Cases.

(A) Declarations of Decedent. In any action or other civil judicial proceeding, a declaration of a deceased person shall not be inadmissible in evidence as hearsay or as private conversation between husband and wife, as the case may be, if the court finds that it was made in good faith and upon the personal knowledge of the declarant.

(B) Deceased Party's Answers to Interrogatories. If a party to an action who has filed answers to interrogatories under any applicable statute or any rule of the Massachusetts Rules of Civil Procedure dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence in said action by a representative of the deceased party.

(C) Declarations of Decedent in Actions Against an Estate. If a cause of action brought against an executor or administrator is supported by oral testimony of a promise or statement made by the testator or intestate of the defendant, evidence of statements, written or oral, made by the decedent, memoranda and entries written by the decedent, and evidence of the decedent's acts and habits of dealing, tending to disprove or to show the improbability of the making of such promise or statement, shall be admissible.

(D) Reports of Deceased Physicians in Tort Actions. In an action of tort for personal injuries or death, or for consequential damages arising from such personal injuries, the medical report of a deceased physician who attended or examined the plaintiff, including expressions of medical opinion, shall, at the discretion of the trial judge, be admissible in evidence, but nothing therein contained which has reference to the question of liability shall be so admissible. Any opposing party shall have the right to introduce evidence tending to limit, modify, contradict, or rebut such medical report. The word "physician" as used in this section shall not include any person who was not licensed to practice medicine under the laws of the jurisdiction within which such medical attention was given or such examination was made.

(E) Medical Reports of Disabled or Deceased Physicians as Evidence in Workers' Compensation Proceedings. In proceedings before the industrial accident board, the medical report of an incapacitated, disabled, or deceased physician who attended or examined the employee, including expressions of medical opinion, shall, at the discretion of the member, be admissible as evidence if the member finds that such medical report was made as the result of such physician's attendance or examination of the employee.

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party if the court finds (A) that the witness is un-

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available; (B) that the party was involved in, or responsible for, procuring the unavailability of the witness; and (C) that the party acted with the intent to procure the witness's unavailability.

(7) Religious Records. Statements of fact made by a deceased person authorized by the rules or practices of a religious organization to perform a religious act, contained in a certificate that the maker performed such act, and purporting to be issued at the time of the act or within a reasonable time thereafter.

(8) Admissibility in Criminal Proceedings of a Child's Out-of-Court Statement Describing Sexual Contact. General Laws c. 233, § 81, was adopted prior to the United States Supreme Court's decisions in Crawford v. Washington, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006), as well as the Supreme Judicial Court's decisions in Commonwealth v. Gonsalves, 445 Mass. 1 (2005), cert. denied, 548 U.S. 926 (2006), and Commonwealth v. Amirault, 424 Mass. 618 (1997). These decisions call into question the constitutionality of this subsection.

(A) Admissibility in General. An out-of-court statement of a child under the age of ten describing an act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any criminal proceeding; provided, however, that

(i) the statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom the statement was made or who heard the child make the statement testifies,

(iii) the judge finds pursuant to Subsection (b)(8)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(8)(C) that the statement is reliable, and

(v) the statement is corroborated pursuant to Subsection (b)(8)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

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(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement; and

(c) the child's sincerity and ability to appreciate the consequences of such statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

(9) Out-of-Court Statement of Child Describing Sexual Contact in Civil Proceeding, Including Termination of Parental Rights.

(A) Admissibility in General. The out-of-court statements of a child under the age of ten describing any act of sexual contact performed on or with the child, the circumstances under which it occurred, or which identifies the perpetrator shall be admissible as substantive evidence in any civil proceeding, except proceedings brought under G. L. c. 119, §§ 23(C) and 24; provided, however, that

(i) such statement is offered as evidence of a material fact and is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts,

(ii) the person to whom such statement was made or who heard the child make such statement testifies,

(iii) the judge finds pursuant to Subsection (b)(9)(B) that the child is unavailable as a witness,

(iv) the judge finds pursuant to Subsection (b)(9)(C) that such statement is reliable, and

(v) such statement is corroborated pursuant to Subsection (b)(9)(D).

(B) Unavailability of Child. The proponent of such statement shall demonstrate a diligent and good-faith effort to produce the child and shall bear the burden of showing unavailability. A finding of unavailability shall be supported by specific findings on the record, describing facts with particularity, demonstrating that

(i) the child is unable to be present or to testify because of death or existing physical or mental illness or infirmity;

(ii) by a ruling of the court, the child is exempt on the ground of privilege from testifying concerning the subject matter of such statement;

(iii) the child testifies to a lack of memory of the subject matter of such statement;

(iv) the child is absent from the hearing and the proponent of such statement has been unable to procure the attendance of the child by process or by other reasonable means;

(v) the court finds, based upon expert testimony from a treating psychiatrist, psychologist, or clinician, that testifying would be likely to cause severe psychological or emotional trauma to the child; or

(vi) the child is not competent to testify.

(C) Reliability of Statement. If a finding of unavailability is made, the out-of-court statement shall be admitted if the judge further finds,

(i) after holding a separate hearing, that such statement was made under oath, that it was accurately recorded and preserved, and that there was sufficient opportunity to cross-examine, or

(ii) after holding a separate hearing and, where practicable and where not inconsistent with the best interests of the child, meeting with the child, that such statement was made under circumstances inherently demonstrating a special guarantee of reliability.

For the purposes of finding circumstances demonstrating reliability pursuant to this subsection, a judge may consider whether the relator documented the child witness's statement and shall consider the following factors:

(a) the clarity of the statement, meaning the child's capacity to observe, remember, and give expression to that which such child has seen, heard, or experienced; provided, however, that a finding under this clause shall be supported by expert testimony from a treating psychiatrist, psychologist, or clinician;

(b) the time, content, and circumstances of the statement;

(c) the existence of corroborative evidence of the substance of the statement regarding the abuse, including either the act, the circumstances, or the identity of the perpetrator; and

(d) the child's sincerity and ability to appreciate the consequences of the statement.

(D) Corroborating Evidence. The out-of-court statement must be corroborated by other independently admitted evidence.

(E) Admissibility by Common Law or Statute. An out-of-court statement admissible by common law or by statute shall remain admissible notwithstanding the provisions of this section.

NOTE

Confrontation Clause. In a criminal case, a hearsay statement offered against the defendant must satisfy both the confrontation clause and one of the hearsay exceptions. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII, Hearsay.

Introduction. Section 804 defines hearsay exceptions that are conditioned upon a showing that the declarant is unavailable. Section 804(a) defines the requirement of unavailability that applies to all the hearsay exceptions in Section 804(b). The second paragraph of Section 804(a) is consistent with the doctrine of forfeiture by wrongdoing adopted by the Supreme Judicial Court in Commonwealth v. Edwards, 444 Mass. 526, 540 (2005).

The exceptions that apply when the declarant of the out-of-court statement is unavailable address only the evidentiary rule against hearsay, except in the context of forfeiture by wrongdoing. See Section 804(b)(6), Hearsay Exceptions; Declarant Unavailable: The Exceptions: Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. In criminal cases, the admissibility at trial of an out-of-court statement against the defendant also requires consideration of the constitutional right to confrontation under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. For a discussion of the relationship between the confrontation clause and the hearsay exceptions stated in Section 804, refer to the Introductory Note to Article VIII, Hearsay.

A defendant invoking the Fifth Amendment privilege against self-incrimination only makes himself or herself unavailable to another party, but the defendant is not unavailable as to himself or herself. See Commonwealth v. Labelle, 67 Mass. App. Ct. 698, 701 (2006). It should not be presumed that an absent witness may invoke his or her privilege against self-incrimination. See Commonwealth v. Lopera, 42 Mass.

App. Ct. 133, 137 n.3 (1997). But where the declarant is a codefendant and joint venturer in the crimes charged against the defendant, and the declarant's out-of-court statements directly implicate the declarant in the criminal enterprise, the unavailability requirement is satisfied because the defendant undoubtedly would invoke the Fifth Amendment privilege. See Commonwealth v. Charles, 428 Mass. 672, 677–679 (1999).

Cross-Reference: Note "Use of Depositions at Trial" to Section 801, Definitions.

Subsection (a)(1). This subsection is derived from Commonwealth v. Canon, 373 Mass. 494, 499–500 (1977), cert. denied, 435 U.S. 933 (1978) (valid invocation of privilege against self-incrimination rendered witness unavailable). Unavailability is not defined simply in terms of lack of physical presence, but stems from the inability of opposing counsel to cross-examine the witness. Commonwealth v. DiPietro, 373 Mass. 369, 382 (1977). Accord Commonwealth v. Negron, 441 Mass. 685, 688–691 (2004) (valid claim of spousal privilege by defendant's wife rendered her unavailable). However, a claim of privilege will not be presumed simply because a witness might have a basis for asserting it if the witness had appeared and been called to testify. See Commonwealth v. Charros, 443 Mass. 752, 767–768 (2005).

Subsection (a)(2). The Supreme Judicial Court has not yet adopted Proposed Mass. R. Evid. 804(a)(2), which, like the Federal rule, provides that a witness who persists in refusing to testify concerning the subject matter of his or her statement may be deemed to be unavailable. See Commonwealth v. Rosado, 480 Mass. 540, 549 (2018) (explaining that absent the assertion of a privilege against self-incrimination, a witness's refusal to testify does not render the witness unavailable for purposes of the hearsay exception for prior recorded testimony).

Subsection (a)(3). Massachusetts law does not recognize lack of memory of the subject matter of the testimony as a basis for finding that the witness is unavailable. Commonwealth v. Bray, 19 Mass. App. Ct. 751, 758 (1985). Cf. A.T. Stearns Lumber Co. v. Howlett, 239 Mass. 59, 61 (1921) (declining to extend doctrine of past recollection recorded to permit introduction of prior recorded testimony that witness had no present memory of but recalled was the truth).

Subsection (a)(4). This subsection is derived from Commonwealth v. Bohannon, 385 Mass. 733, 742 (1982) ("death or other legally sufficient reason"), and cases cited. See Commonwealth v. Mustone, 353 Mass. 490, 491–492 (1968) (death of witness). In Ibanez v. Winston, 222 Mass. 129, 130 (1915), the Supreme Judicial Court observed that although the death or insanity of a witness would supply the basis for a finding of unavailability, the mere fact that a witness had returned to Spain, without more, did not demonstrate that he was unavailable. However, in Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295 (1995), the Appeals Court noted that

> "[w]hen a witness is outside of the borders of the United States and declines to honor a request to appear as a witness, the unavailability of that witness has been conceded because a State of the United States has no authority to compel a resident of a foreign country to attend a trial here."

In Commonwealth v. Housewright, 470 Mass. 665, 671–674 (2015), the Supreme Judicial Court provided a framework to analyze whether a witness is "unavailable because of illness or infirmity" in criminal cases where the Commonwealth is the proponent of the evidence. The Commonwealth must show that there is "an unacceptable risk that the witness's health would be significantly jeopardized if the witness were required to testify in court" by providing "reliable, up-to-date information sufficient to permit the judge to make an independent finding." Id. at 671. In assessing the probability that the witness's appearance will cause an adverse health consequence, the court should consider "the severity of the adverse health consequence, such as whether it would be life-threatening, the importance of the testimony in the context of the case, and the extent to which the live trial testimony would likely differ from the prior recorded testimony," id. at 672, and whether a continuance of the trial or a deposition of the witness is appropriate, considering both the witness's health and interest of justice. Id. at 672–673. The Commonwealth must make a good-faith effort to produce the witness at trial and must promptly inform the court and the defendant of the

claimed unavailability. See Commonwealth v. Dorisca, 88 Mass. App. Ct. 776, 779–783 (2015) (trial judge erred in basing determination of witness's unavailability on prosecutor's statement that witness had recently gone into labor, without making inquiry into Housewright factors).

Subsection (a)(5). This subsection is derived from Commonwealth v. Charles, 428 Mass. 672, 678 (1999) ("We accept as a basis of unavailability the principles expressed in Rule 804[a][5] of the Federal Rules of Evidence [1985]"). A judge must be satisfied that the proponent engaged in a "good faith effort" to find and produce a witness at trial before allowing prior recorded testimony in evidence. Commonwealth v. Sena, 441 Mass. 822, 832 (2004). Such a determination "depends upon what is a reasonable effort in light of the peculiar facts of the case." Id.; Commonwealth v. Rosado, 480 Mass. 540, 549 (2018) (Commonwealth failed to show that person "served with out-of-State process and ordered to come to Massachusetts" was unavailable where person "informed the prosecutor that she did not want to return" but nothing indicated that "the Commonwealth was unable to compel her appearance"). See Commonwealth v. Roberio, 440 Mass. 245, 248 (2003) (where prosecutor established unavailability before trial of witness who is then located out of State during trial, court is not required to suspend trial to obtain presence of witness); Commonwealth v. Charles, 428 Mass. at 678 (evidence that declarant is a fugitive satisfies unavailability requirement); Commonwealth v. Pittman, 60 Mass. App. Ct. 161, 169–170 (2003) (witness who ignored defense counsel's subpoena and instead attended an out-of-State funeral was unavailable). Contrast Ruml v. Ruml, 50 Mass. App. Ct. 500, 508–509 (2000) (self-imposed exile from Massachusetts does not satisfy unavailability requirement); Commonwealth v. Hunt, 38 Mass. App. Ct. 291, 295–296 (1995) (fact that prospective witness is a foreign national outside United States does not excuse proponent of statement from making diligent effort to locate and secure attendance of witness). "When former testimony is sought to be offered against the accused, the degree of 'good faith' and due diligence is greater than that required in other situations." Commonwealth v. Bohannon, 385 Mass. 733, 745 (1982).

Subsection (b)(1). This subsection is derived from Commonwealth v. Meech, 380 Mass. 490, 494 (1980), and Commonwealth v. DiPietro, 373 Mass. 369, 380–385 (1977). Rule 32(a)(3) of the Massachusetts Rules of Civil Procedure permits the use of deposition testimony in several enumerated situations where the witness is unavailable. Rule 32(a)(4) allows the trial judge to permit the use of deposition testimony in "exceptional circumstances." An audiovisual deposition may be used in the same manner as a stenographic deposition. Mass. R. Civ. P. 30A(i). See Hasouris v. Sorour, 92 Mass. App. Ct. 607, 614–615 (2018) (use of deposition in civil trial where party is unable to provide attendance of witness by subpoena pursuant to Mass. R. Civ. P. 32[a][3][D]). See also Mass. R. Crim. P. 35 (use of depositions in proceedings).

> "The prior recorded testimony exception to the hearsay rule applies 'where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered.'"

Commonwealth v. Fisher, 433 Mass. 340, 355 (2001), quoting Commonwealth v. Trigones, 397 Mass. 633, 638 (1986). The party against whom the testimony is being offered need not actually cross-examine the declarant; only an adequate opportunity to cross-examine the declarant is required. Commonwealth v. Canon, 373 Mass. 494, 499–501 (1977), cert. denied, 435 U.S. 933 (1978). See Commonwealth v. Hurley, 455 Mass. 53, 62–63 (2009) ("A defendant is not entitled under the confrontation clause to a cross-examination that is 'effective in whatever way, and to whatever extent the defense might wish.' Rather, what is essential is that the 'trier of fact [have] a satisfactory basis for evaluating the truth of the prior statement.'" [Citations omitted.]).

In a civil trial, a valid invocation of the privilege against self-incrimination makes a witness unavailable for purposes of admitting deposition testimony under this exception. Hasouris v. Sorour, 92 Mass. App. Ct. at 611–612. A judge must make a particularized inquiry as to whether particular questions or areas of examination or cross-examination would tend to incriminate the party. Id. at 614.

The Supreme Judicial Court has applied this hearsay exception when the prior recorded testimony was given at a probable cause hearing, see Commonwealth v. Mustone, 353 Mass. 490, 492–494 (1968),

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and at a pretrial dangerousness hearing under G. L. c. 276, § 58A. See Commonwealth v. Hurley, 455 Mass. at 63 & n.9 (noting that there is "no general rule that a witness's prior testimony at a pretrial detention hearing is always admissible at trial if that witness becomes unavailable."). See also id. at 66–67 (when an excited utterance is admitted at a pretrial hearing as an exception to the hearsay rule in circumstances in which the defendant is not given an opportunity to cross-examine the declarant about the facts described in the excited utterance, the admission of the evidence violates the confrontation clause). Cf. Commonwealth v. Arrington, 455 Mass. 437, 442–445 (2009) (upholding order that excluded from trial the alleged victim's testimony at a pretrial dangerousness hearing under G. L. c. 276, § 58, on grounds that due to her medical condition [late stage cancer], defense counsel was deprived of reasonable opportunity for cross-examination).

In Commonwealth v. Clemente, 452 Mass. 295, 313–315 (2008), the Supreme Judicial Court held that this hearsay exception is not generally applicable to prior recorded testimony before the grand jury because the testimony of such witnesses is usually far more limited than at trial and is often presented without an effort to corroborate or discredit it. "If, however, the party seeking the admission of the grand jury testimony can establish that the Commonwealth had an opportunity and similar motive to develop fully a (now unavailable) witness's testimony at the grand jury, that earlier testimony would be admissible." Id. at 315.

The declarant's prior testimony must be able to be "substantially reproduced in all material particulars." Commonwealth v. Martinez, 384 Mass. 377, 381 (1981). See G. L. c. 233, § 80 (official transcripts); Commonwealth v. DiPietro, 373 Mass. 369, 392–394 (1977) (unofficial transcripts); Commonwealth v. Vaden, 373 Mass. 397, 400 (1977) (tape recordings, whether official or unofficial); Commonwealth v. Janovich, 55 Mass. App. Ct. 42, 45 (2002) (witness present at prior proceeding).

Subsection (b)(2). This subsection is derived from Commonwealth v. Polian, 288 Mass. 494, 497 (1934), and Commonwealth v. Vona, 250 Mass. 509, 511 (1925). See Commonwealth v. Gonzalez, 469 Mass. 410, 419–420 (2014). This common-law exception is not subject to the defendant's right to confrontation. See Commonwealth v. Nesbitt, 452 Mass. 236, 251 (2008) ("Thus, in the unique instance of dying declarations, we ask *only* whether the statement is admissible as a common-law dying declaration, and not whether the statement is testimonial."). The "dying declaration" allows testimony as to the victim's statements concerning the circumstances of the killing and the identity of the perpetrator. Commonwealth v. Polian, 288 Mass. at 500. It may be in the form of oral testimony, gestures, or a writing made by the victim. See Commonwealth v. Casey, 65 Mass. 417, 422 (1853) (victim who was mortally wounded and unable to speak, but conscious, confirmed identity of perpetrator by squeezing the hand of her treating physician who asked her if it was "Mr. Casey, who worked for her husband"). The Supreme Judicial Court has left open the question whether a defendant's right to confrontation is applicable to the current, expanded concept of the dying declaration exception. See Commonwealth v. Nesbitt, 452 Mass. at 252 n.17, citing G. L. c. 233, § 64 (addressing admissibility of dying declarations of a female whose death results from an unlawful abortion in violation of G. L. c. 272, § 19), and Commonwealth v. Key, 381 Mass. 19, 26 (1980) (expanding the common-law exception by admitting a dying declaration to prove the homicides of other common victims).

The declarant's belief of impending death may be inferred from the surrounding circumstances, including the character of the injury sustained. See Commonwealth v. Moses, 436 Mass. 598, 602 (2002) ("Jenkins had been shot four times shortly before making the statement. Two bullets had pierced his chest, one of which had lodged in his spine. When police and emergency personnel arrived, he was 'very frightened,' grimacing in pain, bleeding, and asking for oxygen. He asked a treating emergency medical technician if he were going to die. She told him that 'it didn't look too good' for him. In the circumstances, it was not error for the judge to find that Jenkins believed at the time he made the statements that death was imminent."); Commonwealth v. Niemic, 427 Mass. 718, 724 (1998) ("The evidence showed that, when the officer found the victim, he had been stabbed in the heart and was bleeding profusely. There was also testimony that, at the hospital, he was 'breathing heavily' and 'appeared to be having a hard time' and that the officer questioning him 'had to work to get his attention to focus.' It was permissible to infer from this that the victim was aware that he was dying.").

Before admitting the dying declaration, the trial judge must first determine by a preponderance of the evidence that the requisite elements of a dying declaration are satisfied. Commonwealth v. Green, 420

Mass. 771, 781–782 (1995). If the statement is admitted, the judge must then instruct the jury that they must also find by a preponderance of the evidence that the same elements are satisfied before they may consider the substance of the statement. Id.

The broader statutory exception for declarations of a deceased person set forth in G. L. c. 233, § 65, applies only in civil cases. Commonwealth v. Dunker, 363 Mass. 792, 794 n.1 (1973).

Subsection (b)(3). This subsection is derived from Commonwealth v. Carr, 373 Mass. 617, 622–624 (1977), and Commonwealth v. Charles, 428 Mass. 672, 679 (1999). See also Williamson v. United States, 512 U.S. 594 (1994). This subsection is applicable only to "statements made by witnesses, not parties to the litigation or their privies or representatives." Commonwealth v. McLaughlin, 433 Mass. 558, 565 (2001), quoting P.J. Liacos, Massachusetts Evidence § 8.10 (7th ed. 1999). This exception against penal interest is applicable in civil and criminal cases. See Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 575 (2008). The admission by a party-opponent need not be a statement against the declarant's penal or proprietary interest. See Section 801(d)(2), Definitions: Statements That Are Not Hearsay: An Opposing Party's Statement.

A declarant's narrative may include self-inculpatory and self-exculpatory elements.

> "[A]pplication of the evidentiary rule concerning declarations against penal interest to a full narrative requires breaking out which parts, if any, of the declaration are actually against the speaker's penal interest. Further, application of the hearsay exception requires determination whether the declaration has an evidentiary connection and linkage to the matters at hand in the trial."

Commonwealth v. Marrero, 60 Mass. App. Ct. 225, 229 (2003). When the self-inculpatory aspect of the narrative is very limited, the trial judge has discretion either to exclude it entirely or "to allow it in with some limited 'necessary surrounding context' to prevent its significance from being distorted" by opposing counsel. Commonwealth v. Dejarnette, 75 Mass. App. Ct. 88, 99 (2009).

The judge's role in determining the admissibility of a statement against interest is to determine "whether, in light of the other evidence already adduced or to be adduced, there is some reasonable likelihood that the statement could be true." Commonwealth v. Drew, 397 Mass. 65, 76 (1986). This means that in accordance with Section 104(b), Preliminary Questions: Relevance That Depends on a Fact, the question whether to believe the declarant's statement is ultimately for the jury. Id.

A statement may qualify for admission as a declaration against penal interest even though it supplies circumstantial, and not direct, evidence of the declarant's guilt. See Commonwealth v. Charles, 428 Mass. 672, 679 (1999). In Commonwealth v. Charles, the Supreme Judicial Court also indicated that even though the exception does not explicitly require corroboration when the statement is introduced against the defendant, it would follow the majority rule and require it in such cases. Id. at 679 n.2. See, e.g., Commonwealth v. Pope, 397 Mass. 275, 280 (1986) (reversing defendant's conviction based on erroneous admission of extrajudicial statement of a deceased witness; "[w]e do not believe that concern for penal consequence would inspire a suicide victim to truthfulness").

In criminal cases, "[i]n applying the corroboration requirement, judges are obliged to . . . consider as relevant factors the degree of disinterestedness of the witnesses giving corroborating testimony as well as the plausibility of that testimony in the light of the rest of the proof." Commonwealth v. Carr, 373 Mass. 617, 624 (1977). The Supreme Judicial Court has explained that

> "behind the corroboration requirement of [Fed. R. Evid.] 804(b)(3) lurks a suspicion that a reasonable man might sometimes admit to a crime he did not commit. A classic example is an inmate, serving time for multiple offenses, who has nothing to lose by a further conviction, but who can help out a friend by admitting to the friend's crime."

Commonwealth v. Drew, 397 Mass. at 74 n.8. The Supreme Judicial Court has stated that

> "[o]ther factors the judge may consider are: the timing of the declaration and the relationship between the declarant and the witness, the reliability and character of the de-

> clarant, whether the statement was made spontaneously, whether other people heard the out-of-court statement, whether there is any apparent motive for the declarant to misrepresent the matter, and whether and in what circumstances the statement was repeated" (citation omitted).

Id. at 76. However,

> "[i]n determining whether the declarant's statement has been sufficiently corroborated to merit its admission in evidence, the judge should not be stringent. A requirement that the defendant corroborate the declarant's entire statement, for example, may run afoul of the defendant's due process rights . . . . If the issue of sufficiency of the defendant's corroboration is close, the judge should favor admitting the statement. In most such instances, the good sense of the jury will correct any prejudicial impact." (Citation omitted.)

Id. at 75 n.10. See Commonwealth v. Nutbrown, 81 Mass. App. Ct. 773, 779–780 (2012) (in deciding whether statement is "trustworthy," trial judge must look only to credibility of declarant, leaving it to jury to determine credibility of witness who testifies to declaration). There is no requirement that when the statement is offered by the defendant, the exculpatory portion must also inculpate the declarant. See Commonwealth v. Keizer, 377 Mass. 264, 270 (1979).

Subsection (b)(4)(A). This subsection is derived from Haddock v. Boston & Maine R.R., 85 Mass. 298, 300–301 (1862), and Butrick v. Tilton, 155 Mass. 461, 466 (1892). In Haddock v. Boston & Maine R.R., 85 Mass. at 298–299, the court allowed a witness to testify that she came into ownership of the property through her mother and grandmother even though the only basis for her knowledge was what the person she alleged to be her mother said to her. In Butrick v. Tilton, 155 Mass. at 466, also a dispute over title to real property, the court permitted the alleged owner's granddaughter to testify as to how her grandfather came into ownership of the real estate, and that a cousin who owned the property before her grandfather died without children, based exclusively on what other family members told her and without any personal knowledge. See also Section 803(13), Hearsay Exceptions; Availability of Declarant Immaterial: Family Records; Section 803(19), Hearsay Exceptions; Availability of Declarant Immaterial: Reputation Concerning Personal or Family History.

Subsection (b)(4)(B). Massachusetts has not yet had occasion to consider Fed. R. Evid. 804(b)(4)(B), which extends the principle of Section 804(b)(4)(A) to others to whom the declarant is related by "blood, adoption or marriage," or to whom the declarant is so "intimately associated with . . . as to be likely to have accurate information concerning the matter declared."

Subsection (b)(5)(A). This subsection is taken verbatim from G. L. c. 233, § 65. This hearsay exception applies in "all civil cases." Harrison v. Loyal Protective Life Ins. Co., 379 Mass. 212, 219 (1979). It does not apply in criminal proceedings. Commonwealth v. Cyr, 425 Mass. 89, 94 n.9 (1997). Nor is it available to a party attempting to perpetuate the testimony of a person who is expected to die shortly. Anselmo v. Reback, 400 Mass. 865, 868–869 (1987). See G. L. c. 233, §§ 46, 47; Mass. R. Civ. P. 27(a) (requirements to perpetuate testimony). The proponent of the evidence has the burden of establishing the foundational requirements of good faith and personal knowledge for the admissibility of the evidence. Kelley v. Jordan Marsh Co., 278 Mass. 101, 106 (1932). Whether the proponent has met this burden, including proof that the statement was actually made, is a preliminary question of fact for the trial judge under Section 104(a), Preliminary Questions: In General. See Slotofski v. Boston Elevated Ry. Co., 215 Mass. 318, 321 (1913).

The only ground of unavailability is the death of the declarant. G. L. c. 233, § 65. In the absence of a finding of good faith, the statement is not admissible. See Barbosa v. Hopper Feeds, Inc., 404 Mass. 610, 620 (1989) (excluding declaration because it was made after the injury suffered by the plaintiff and at the time when the now-deceased person had an incentive to fabricate). "In general [the declarations] must be derived from the exercise of the declarant's own senses as distinguished from opinions based upon data observed by him or furnished by others." Little v. Massachusetts N.E. St. Ry. Co., 223 Mass. 501, 504 (1916). "The declarations of the deceased may be in writing and need not be reproduced in the exact words

used by the declarant" (citations omitted). Bellamy v. Bellamy, 342 Mass. 534, 536 (1961). See id. (oral statements also admissible).

Subsection (b)(5)(B). This subsection is taken verbatim from G. L. c. 233, § 65A. See Thornton v. First Nat'l Stores, Inc., 340 Mass. 222, 225 (1960). See also Mass. R. Civ. P. 33 (interrogatories to parties).

Subsection (b)(5)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 66. In Rothwell v. First Nat'l Bank, 286 Mass. 417, 421 (1934), the Supreme Judicial Court explained the difference between Section 65 and Section 66 of G. L. c. 233. "[Section 66] is narrower than the other, in that it relates to the declarations or conduct of one person in one sort of case. But it requires no preliminary finding of good faith or other conditions. These two statutes operate concurrently and independently." Id. See Greene v. Boston Safe Deposit & Trust Co., 255 Mass. 519, 524 (1926).

Subsection (b)(5)(D). This subsection is taken verbatim from G. L. c. 233, § 79H.

Subsection (b)(5)(E). This subsection is taken verbatim from G. L. c. 152, § 20B. The statutory exception, however, might not overcome the further objection that it contains hearsay-within-hearsay in the form of statements to the employee's physician about how an injury occurred. See Fiander's Case, 293 Mass. 157, 164 (1936).

Subsection (b)(6). This subsection is derived from Commonwealth v. Edwards, 444 Mass. 526, 540 (2005). See Giles v. California, 554 U.S. 353, 373 (2008) (holding that the Sixth Amendment right to confrontation is not forfeited by wrongdoing unless the defendant acted with the intent to render the witness unavailable); Crawford v. Washington, 541 U.S. 36, 62 (2004) ("[T]he rule of forfeiture by wrongdoing [which we accept] extinguishes confrontation claims on essentially equitable grounds."). The Massachusetts common-law doctrine expressed in this subsection is fully consistent with the Federal doctrine set forth in Fed. R. Evid. 804(b)(6):

> "By requiring that the defendant actively assist the witness in becoming unavailable with the intent to make her unavailable, our doctrine of forfeiture by wrongdoing is at least as demanding as Fed. R. Evid. 804(b)(6), which permits a finding of forfeiture where the defendant 'acquiesced' in conduct that was intended to, and did, make the witness unavailable to testify."

Commonwealth v. Szerlong, 457 Mass. 858, 862–863 (2010). See Commonwealth v. Rosado, 480 Mass. 540, 544–545 (2018) (whether the Commonwealth has met its burden to invoke the doctrine of forfeiture by wrongdoing "is a preliminary question of fact on the admissibility of evidence that is decided by a judge"). Even where the right of confrontation is forfeited by wrongdoing, due process requires that the statement be reliable. Commonwealth v. Rosado, 480 Mass. at 544 n.3 (citing Szerlong).

"A defendant's involvement in procuring a witness's unavailability need not consist of a criminal act, and may include a defendant's collusion with a witness to ensure that the witness will not be heard at trial." Commonwealth v. Edwards, 444 Mass. at 540. In Edwards, the Supreme Judicial Court elaborated on the scope of this exception.

> "A finding that a defendant somehow influenced a witness's decision not to testify is not required to trigger the application of the forfeiture by wrongdoing doctrine where there is collusion in implementing that decision or planning for its implementation. Certainly, a defendant must have contributed to the witness's unavailability in some significant manner. However, the causal link necessary between a defendant's actions and a witness's unavailability may be established where (1) a defendant puts forward to a witness the idea to avoid testifying, either by threats, coercion, persuasion, or pressure; (2) a defendant physically prevents a witness from testifying; or (3) a defendant actively facilitates the carrying out of the witness's independent intent not to testify. Therefore, in collusion cases (the third category above) a defendant's joint effort with a witness to secure the latter's

> unavailability, regardless of whether the witness already decided 'on his own' not to testify, may be sufficient to support a finding of forfeiture by wrongdoing." (Footnote omitted.)

Id. at 540–541. "[W]here the defendant has had a meaningful impact on the witness's unavailability, the defendant may have forfeited confrontation and hearsay objections to the witness's out-of-court statements, even where the witness modified the initial strategy to procure the witness's silence." Id. at 541. See also Commonwealth v. Szerlong, 457 Mass. at 865–866 (evidence that defendant married alleged victim of his assault with the intent to enable her to exercise her spousal privilege at trial supported application of the doctrine of forfeiture by wrongdoing and thus the use of his wife's hearsay statements made before the marriage, even though it may not have been defendant's sole or primary purpose).

The proponent of the statement must prove that the opposing party procured the witness's unavailability by a preponderance of the evidence. Commonwealth v. Edwards, 444 Mass. at 542. "[P]rior to a determination of forfeiture, the parties should be given an opportunity to present evidence, including live testimony [and the unavailable witness's out-of-court statements], at an evidentiary hearing outside the jury's presence." Id. at 545. The trial judge should make the findings required by Commonwealth v. Edwards either orally on the record or in writing. Commonwealth v. Szerlong, 457 Mass. at 864 n.9. See also Commonwealth v. Rosado, 480 Mass. 540, 546 (2018) (doctrine of forfeiture inapplicable in circumstances in which defendant's misconduct was directed against testimony by witness at another trial against another person).

Subsection (b)(7). This subsection is derived from Kennedy v. Doyle, 92 Mass. 161, 168 (1865) (where the court admitted a baptismal record showing child's date of birth as evidence of the person's age when a contract had been made, in circumstances in which the entry was in the hand of the parish priest who had been the custodian of the book; Supreme Judicial Court observed that "[a]n entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation."). Contrast Derinza's Case, 229 Mass. 435, 443 (1918) (copies of what purported to be a marriage certificate from a town in Italy not admitted in evidence; Supreme Judicial Court observed that there was no "evidence respecting their character, the circumstances under which the records were kept, or the source from which the certificates came. No one testified that they were copies of an official original. There was no authentication of them as genuine by a consular officer of the United States. There was absolutely nothing beyond the bare production of the copies of the certificates. In the absence of a statute making such certificates admissible by themselves, or something to show that they were entitled to a degree of credence, they were not competent."). See Section 803(6), Hearsay Exceptions; Availability of Declarant Immaterial: Business and Hospital Records.

Subsection (b)(8)(A). Subsections (b)(8)(A) through (b)(8)(A)(iv) are taken nearly verbatim from G. L. c. 233, § 81(a), and Subsection (b)(8)(A)(v) is derived from Commonwealth v. Colin C., 419 Mass. 54, 64–66 (1994). See generally Opinion of the Justices, 406 Mass. 1201 (1989) (concluding that bill on related topic would, if enacted, offend the Massachusetts Constitution). The prosecution must give prior notice to the criminal defendant that it will seek to admit hearsay statements under this statute. Commonwealth v. Colin C., 419 Mass. at 64. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. at 64–65.

Subsection (b)(8)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 81(b). See Section 804(a), Hearsay Exceptions; Declarant Unavailable: Criteria for Being Unavailable. A judge's reasons for finding a child incompetent to testify should not be the same reasons for doubting the reliability of the child's out-of-court statements. Commonwealth v. Colin C., 419 Mass. 54, 65 (1994).

Subsection (b)(8)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 81(c). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Commonwealth v. Colin C., 419 Mass. 54, 65 (1994). See Commonwealth v. Joubert, 38 Mass. App. Ct. 943, 945 (1995). The statement must be substantially reliable to be admissible. Commonwealth v. Joubert, 38 Mass. App. Ct. at 945. See Commonwealth v. Almeida, 433 Mass. 717, 719–720 (2001) (statements of sleeping child were not ad-

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missible because they lacked indicia of reliability). The defendant and his or her counsel should be given the opportunity to attend the hearing if it would not cause the child witness severe emotional trauma. Commonwealth v. Colin C., 419 Mass. at 65.

Subsection (b)(8)(D). This subsection is derived from Commonwealth v. Colin C., 419 Mass. 54, 66 (1994).

Subsection (b)(8)(E). This subsection is taken nearly verbatim from G. L. c. 233, § 81(d).

Subsection (b)(9)(A). Subsections (b)(9)(A)(i) through (iv) are taken nearly verbatim from G. L. c. 233, § 82, and Subsection (b)(9)(A)(v) is derived from Adoption of Quentin, 424 Mass. 882, 893 (1997). See Commonwealth v. Colin C., 419 Mass. 54, 64–66 (1994) (establishing additional procedural requirements for admitting hearsay statements of child under G. L. c. 233, § 81). The Department of Children and Families must give prior notice to the parents that it will seek to admit hearsay statements under this statute. Adoption of Quentin, 424 Mass. at 893. It must also show a compelling and necessary need to use this procedure by more than a preponderance of evidence. Id. See also Adoption of Arnold, 50 Mass. App. Ct. 743, 752 (2001); Adoption of Tina, 45 Mass. App. Ct. 727, 733–734 (1998) (recognizing additional procedural requirements). When a care and protection proceeding is joined with a petition to dispense with consent to adoption, admissibility of a child's hearsay statements should comply with the stricter requirements of G. L. c. 233, § 82, not § 83. Adoption of Tina, 45 Mass. App. Ct. at 733 n.10. The phrase "child under the age of ten" refers to the age of the child at the time the statement was made, not the child's age at the time of the proceeding. Adoption of Daisy, 460 Mass. 72, 78 (2011).

Subsection (b)(9)(B). This subsection is taken nearly verbatim from G. L. c. 233, § 82(b). See Adoption of Sean, 36 Mass. App. Ct. 261, 266 (1994). See also Section 804(a), Hearsay Exceptions; Declarant Unavailable: Criteria for Being Unavailable.

Subsection (b)(9)(C). This subsection is taken nearly verbatim from G. L. c. 233, § 82(c). Note that it appears that the Legislature inadvertently omitted from G. L. c. 233, § 82, the following: "finds: (1) after holding a separate hearing, that such . . . ." We have inserted that language in the subsection above. See Adoption of Quentin, 424 Mass. 882, 890 n.5 (1997) (noting omission). A judge must make sufficient findings of reliability to admit the statements. See Adoption of Tina, 45 Mass. App. Ct. 727, 733 (1998); Edward E. v. Department of Social Servs., 42 Mass. App. Ct. 478, 484–486 (1997). The separate hearing regarding the reliability of the out-of-court statement must be on the record, and the judge's determination of reliability must be supported by specific findings on the record. Adoption of Quentin, 424 Mass. at 893. See Commonwealth v. Colin C., 419 Mass. 54, 65 (1994). See also Adoption of Olivette, 79 Mass. App. Ct. 141, 149–150 (2011).

Subsection (b)(9)(D). This subsection is derived from Adoption of Quentin, 424 Mass. 882, 893 (1997). See Commonwealth v. Colin C., 419 Mass. 54, 66 (1994). See also Adoption of Arnold, 50 Mass. App. Ct. 743, 753 (2001) (examples of corroborating evidence).

Subsection (b)(9)(E). This subsection is taken verbatim from G. L. c. 233, § 82(d).

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POSSESSION OF A FIREARM WITHOUT A LICENSE OUTSIDE HOME OR BUSINESS

The offense found in G.L. c. 269, § 10(a) is commonly referred to as "carrying" a firearm, to distinguish it from the offense of "possession" of a firearm without a firearm ID card, found in § 10(h). The name is no longer really accurate, since St. 1990, c. 511 (effective January 2, 1991) eliminated movement of the firearm as an element of § 10(a).

I. FIREARM WITH BARREL UNDER 16 INCHES

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a firearm unlawfully.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following (three) (four) things beyond a reasonable doubt:

First: **That the defendant possessed a firearm (*or*) (that he [she] had a firearm under his [her] control in a vehicle);**

Second: **That what the defendant (possessed) (*or*) (had under his [her] control in a vehicle) met the legal definition of a "firearm"; (and)**

Third: **That the defendant *knew* that he (she) (possessed a firearm) (*or*) (had a firearm under his [her] control in a vehicle).**

If there is evidence of one of the statutory exceptions, use one of the following:

A. *If there is evidence that it was in the defendant's residence or place of business.*

and *Fourth:* that the defendant possessed the firearm outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. *If there is evidence that the defendant had a license to carry firearms.*

and *Fourth:* that the defendant did *not* have a valid license to possess a firearm outside his (her) home or office.

C. *If there is evidence that the defendant was exempt from the licensing requirement.*

and *Fourth:* that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to possess a firearm outside his (her) home or business.

The statute exempts a defendant who:
"(1) [was] present in or on his residence or place of business; or
(2) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131]; or
(3) [had] in effect a license to carry firearms issued under [G.L. c. 140, § 131F to a nonresident or alien]; or
(4) [had] complied with the provisions of [G.L. c. 140, §§ 129C and 131G, granting certain categorical exemptions from the requirement of a license to carry]; or
(5) [had] complied as to possession of an air rifle or BB gun with the requirements imposed by [G.L. c. 269, § 12B]."

General Laws c. 278, § 7 places on the defendant the burden of producing evidence of one of these exemptions; the Commonwealth must then disprove beyond a reasonable doubt the applicability of the claimed exemption. Until there is such evidence, the exemptions are not at issue. *Commonwealth v. Seay,* 376 Mass. 735, 738, 383 N.E.2d 828, 830 (1978) (former statute); *Commonwealth v. Jones,* 372 Mass. 403, 406-407, 361 N.E.2d 1308, 1310-1311 (1977) (same); *Commonwealth v. Davis,* 359 Mass. 758, 270 N.E.2d 925 (1971) (same); *Commonwealth v. Baker,* 10 Mass. App. Ct. 852, 853, 407 N.E.2d 398, 399 (1980) (lack of license need not be charged in complaint).

A "firearm" is defined in our law as:

> **"a pistol, revolver or other weapon . . . loaded or unloaded,**
>
> **from which a shot or bullet can be discharged**
>
> **and . . . the length of [whose] barrel**
>
> **is less than sixteen inches . . . ."**

That definition can be broken down into three requirements: *First,* it must be a weapon; *Second,* it must be capable of discharging a shot or bullet; and *Third,* it must have a barrel length of less than 16 inches. The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121. *Commonwealth v. Williams*, 422 Mass. 111, 120, 661 N.E.2d 617, 624 (1996) (not necessary that firearm be loaded); *Commonwealth v. Bartholomew,* 326 Mass. 218, 219, 93 N.E.2d 551, 552 (1950) (same); *Commonwealth v. Tuitt,* 393 Mass. 801, 810, 473 N.E.2d 1103, 1110 (1985) (jury can determine from inspection that "firearm"); *Commonwealth v. Fancy,* 349 Mass. 196, 204, 207 N.E.2d 276, 282 (1965) (same); *Commonwealth v. Sampson,* 383 Mass. 750, 753, 422 N.E.2d 450, 452 (1981); *Commonwealth v. Sperrazza,* 372 Mass. 667, 670, 363 N.E.2d 673, 675 (1977) (testimony about "revolver" or "handgun" will support inference that barrel was under 16 inches).

If the firearm may have been "under [the defendant's] control in a vehicle." **To establish that a firearm was under the defendant's "control" in a vehicle, it is not enough for the Commonwealth just to prove that the defendant was present in the same vehicle as the firearm. The Commonwealth must also prove that the defendant knew that the firearm was there, and that the defendant had both the ability and the intention to exercise control over the firearm, although this did not have to be exclusive control.**

See Instruction 3.220 (Possession).

Where the issue is constructive possession rather than actual physical possession, the Commonwealth must prove that "in addition to knowledge and the ability to exercise control over the firearm, the defendant must have the intention to do so." *Commonwealth v. Costa*, 65 Mass. App. Ct. 227, 838 N.E.2d 592 (2005); *Commonwealth v. Sann Than,* 442 Mass. 755, 748, 817 N.E.2d 705 (2004).

Commonwealth v. Brown, 401 Mass. 745, 519 N.E.2d 1291 (1988); *Commonwealth v. Bailey,* 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990); *Commonwealth v. Diaz,* 15 Mass. App. Ct. 469, 471-472, 446 N.E.2d 415, 416-417 (1983); *Commonwealth v. Gray,* 4 Mass. App. Ct. 296, 299, 362 N.E.2d 543, 545 (1977); *Commonwealth v. Mott,* 2 Mass. App. Ct. 47, 53-54, 308 N.E.2d 557, 561-562 (1974).

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (*or*) (had this item under his [her] control in a vehicle), *and* also knew that the item was a "firearm," within the common meaning of that term. If it was a conventional firearm, with its obvious dangers, the Commonwealth

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is not required to prove that the defendant knew that the item met the *legal* definition of a firearm.

See Instruction 3.140 (Knowledge).

Commonwealth v. Sampson, 383 Mass. 750, 762, 422 N.E.2d 450, 457 (1981); *Commonwealth v. Bacon,* 374 Mass. 358, 359, 372 N.E.2d 780, 781 (1978) (knowledge need not be alleged in complaint); *Commonwealth v. Jackson,* 369 Mass. 904, 916-917, 344 N.E.2d 166, 174 (1976); *Commonwealth v. Boone,* 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969) ("control" in vehicle requires knowledge); *Commonwealth v. Papa,* 17 Mass. App. Ct. 987, 987-988, 459 N.E.2d 128, 128-129 (1984).

II. RIFLE OR SHOTGUN

The defendant is charged under section 10(a) of chapter 269 of our General Laws with knowingly possessing a rifle or shotgun unlawfully.

In order to prove the defendant guilty of this offense, the Commonwealth must prove the following (three) (four) things beyond a reasonable doubt:

First: **That the defendant possessed a rifle or shotgun (*or*) (that he [she] had a rifle or shotgun under his [her] control in a vehicle);**

Second: **That what the defendant (possessed) (*or*) (had under his [her] control in a vehicle) met the legal definition of a "rifle" or a "shotgun"; (and)**

Third: **That the defendant *knew* that he (she) (possessed a rifle or**

shotgun) (*or*) (had a rifle or shotgun under his [her] control in a vehicle.

If there is evidence of one of the statutory exceptions, use one of the following:

A. *If there is evidence that it was in the defendant's residence or place of business.*

and *Fourth:* that the defendant possessed the rifle or shotgun outside of his (her) residence or place of business. A person's "residence" or "place of business" does not include common areas of an apartment or office building, but only areas that are under that person's exclusive control.

B. *If there is evidence that the defendant had a license to carry firearms.*

and *Fourth:* that the defendant did *not* have a valid license to carry a firearm.

C. *If there is evidence that the defendant was exempt from the licensing requirement.*

and *Fourth:* that the defendant did *not* qualify for one of the exemptions in the law that are a substitute for having a license to carry a firearm.

See notes to I, above.

A "rifle" is defined in our law as:

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"a weapon having a rifled bore

with a barrel length equal to or greater than sixteen inches,

capable of discharging a shot or bullet

for each pull of the trigger."

A "shotgun" is defined as:

"a weapon having a smooth bore

with a barrel length equal to or greater than eighteen inches

with an overall length equal to or greater than twenty-six inches,

capable of discharging a shot or bullet

for each pull of the trigger."

The term "barrel length" refers to "that portion of a firearm . . . through which a shot or bullet is driven, guided or stabilized, and [includes] the chamber."

G.L. c. 140, § 121.

If the rifle or shotgun may have been "under [the defendant's] control in a vehicle."

To establish that a rifle or shotgun was under the defendant's "control" in a vehicle, it is not enough for the Commonwealth just to prove that the defendant was present in the same vehicle

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as the rifle or shotgun. The Commonwealth must also prove that the defendant knew that the rifle or shotgun was there, and that the defendant had both the ability and the intention to exercise control over the rifle or shotgun, although this did not have to be exclusive control.

See notes to I, above.

As I mentioned before, the Commonwealth must prove beyond a reasonable doubt that the defendant knew that he (she) (possessed this item) (*or*) (had this item under his [her] control in a vehicle), *and* also knew that the item was a "rifle" or "shotgun" within the common meaning of that term. If it was a conventional rifle or shotgun, with its obvious dangers, the Commonwealth is not required to prove that the defendant knew that the item met the *legal* definition of a rifle or shotgun.

See notes to I, above.

SUPPLEMENTAL INSTRUCTIONS

1. Non-firing firearm, rifle or shotgun. **A weapon that was originally a (firearm) (rifle or shotgun) may become so defective or damaged that it will no longer fire a projectile, and then the law no longer considers it to be a (firearm) (rifle or shotgun). But a weapon remains a (firearm) (rifle or shotgun) within the meaning of the law when a slight repair, replacement or adjustment will again make it an effective weapon.**

Commonwealth v. Colton, 333 Mass. 607, 608, 132 N.E.2d 398, 398 (1956) (insertion of ammo clip); *Bartholomew,* 326 Mass. at 220, 93 N.E.2d at 552 (insertion of firing pin); *Commonwealth v. Raedy,* 24 Mass. App. Ct. 648, 652-656, 512 N.E.2d 279, 282-284 (1987) (jury question whether gun that could be fired if inverted was "firearm"; judge who distinguishes between "major" and "minor" repairs need not instruct that Commonwealth must prove that this particular defendant had ability and knowledge to repair gun); *Commonwealth v. Rhodes,* 21 Mass. App. Ct. 968, 969-970, 489 N.E.2d 216, 217 (1986) (not a firearm where bent part rendered inoperable until repaired). See *Commonwealth v. Gutierrez*, 82 Mass. App. Ct. 1118, 977 N.E.2d 105 (No. 11-P-1612, October 25, 2012) (unpublished opinion under Appeals Ct. Rule 1:28) (noting objective "slight repair" standard for operability of firearm).

2. Firearms identification card. **A "firearms identification card" is not the same thing as a "license to carry a firearm." When a person has a valid firearms identification card, that card gives him the right to possess a firearm within his residence or place of business. But it does not give him the right to possess it**

outside of his (her) home or business, which requires a license to possess a firearm.

G.L. c. 140, §§ 129B-129D. A firearms identification card is a defense to a charge of carrying a rifle or shotgun, but not other firearms. G.L. c. 269, § 10(a).

3. *Passenger in vehicle.* **Merely being present in a motor vehicle in which a (firearm) (rifle or shotgun) is found is not sufficient by itself to permit an inference that the person knew about the presence of the (firearm) (rifle or shotgun) without other indications of knowledge.**

Commonwealth v. Albano, 373 Mass. 132, 134-136, 365 N.E.2d 808, 810-811 (1977) (gun in plain view; defendant acted suspiciously); *Commonwealth v. Bailey,* 29 Mass. App. Ct. 1007, 563 N.E.2d 1378 (1990) (gun in plain view near defendant's feet; car had been broken into; attempted escape); *Commonwealth v. Lucido,* 18 Mass. App. Ct. 941, 943, 467 N.E.2d 478, 480 (1984) (gun in glove compartment with defendant's personal letters); *Commonwealth v. Montgomery,* 23 Mass. App. Ct. 909, 910, 499 N.E.2d 853, 854 (1986) (gun on defendant's side of auto and defendant had appropriate ammo clip); *Commonwealth v. Donovan,* 17 Mass. App. Ct. 83, 85-86, 455 N.E.2d 1217, 1219 (1983) (gun under seat of borrowed auto surrounded by defendant's acknowledged property); *Diaz, supra* (gun in plain view on floor in front of defendant). Compare *Commonwealth v. Brown*, 401 Mass. 745, 519 N.E.2d 1291 (1988) (insufficient to prove defendant drove stolen car, in which guns were found under passenger seat and both occupants bent forward in unison when stopped); *Commonwealth v. Almeida,* 381 Mass. 420, 422-423, 409 N.E.2d 776, 778 (1980) (insufficient to prove gun inside console of borrowed auto); *Commonwealth v. Boone,* 356 Mass. 85, 87, 248 N.E.2d 279, 280 (1969) (insufficient to prove defendant a passenger in an auto with a gun under a seat); *Commonwealth v. Hill,* 15 Mass. App. Ct. 93, 94-97, 443 N.E.2d 1339, 1340-1341 (1983) (insufficient to prove gun inside woman's purse at male passenger's feet).

4. *Absence of evidence of license.* **You have heard some reference to (a license to carry a firearm) (a legal exemption from the**

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requirement of a license to carry a firearm). There was no evidence in this case that the defendant had a license to carry a firearm, and no evidence that the defendant qualified for one of the legal exemptions that are a substitute for having such a license. For that reason, the issue of a license or exemption is not relevant to your deliberations in this case, and therefore you should put it out of your mind.

This instruction is recommended only when there has been some reference to, but not evidence of, such a license or exemption in the jury's presence.

5. *Knowledge of licensing requirement.* **You have heard some mention that the defendant did not know that he (she) was required to have a license before carrying a firearm under these circumstances. The Commonwealth is *not* required to prove that the defendant knew that the law required him (her) to have a license before (possessing a firearm) (*or*) (having a firearm under his [her] control in a vehicle) outside of his (her) home or place of business.**

This instruction is recommended only when it is necessary to correct such a misimpression.

NOTES:

1. **Elements.** "To sustain a conviction under G.L. c. 269, § 10(a), the Commonwealth must prove that the defendant knowingly possessed a firearm without either being present in his residence or place of business or having in effect a license to carry firearms or [in the case of a rifle or shotgun] a firearm identification card. The Commonwealth must prove that the gun the defendant possessed met the definition of a working firearm set forth in G.L. c. 140, § 121, that is, that it had a barrel less than sixteen inches long [or was a rifle or shotgun] and was capable of discharging a bullet." *Commonwealth v. White,* 452 Mass. 133, 136, 891 N.E.2d 675, 678 (2008).

2. **Air rifles and BB guns**. In decisions under the earlier version of G.L. c. 269, § 10(a), air guns, BB guns and CO_2 guns were held to be regulated solely by G.L. c. 269, § 12B and not by § 10(a). *Commonwealth v. Fenton,* 395 Mass. 92, 94-95, 478 N.E.2d 949, 950-951 (1985); *Commonwealth v. Rhodes,* 389 Mass. 641, 644, 451 N.E.2d 1151, 1153 (1983). The current text of § 10(a) applies to anyone who carries "a firearm . . . without . . . having complied as to possession of an air rifle or BB gun with the requirements imposed by [§ 12B]." Thus, compliance with § 12B is a defense to a prosecution under § 10(a), just as the possession of a firearm license would be. *Commonwealth v. Sayers,* 438 Mass. 238, 240, 780 N.E.2d 24, 26 (2002).

3. **Ballistics certificate**. "A certificate by a ballistics expert of the firearms identification section of the department of public safety or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such expert, shall be prima facie evidence of his findings as to whether or not the item furnished is a firearm, rifle, shotgun, machine gun, sawed off shotgun or ammunition, as defined by [G.L. c. 140, § 121], provided that in order to qualify as an expert under this section he shall have previously qualified as an expert in a court proceeding." G.L. c. 140, § 121A. The certificate's prima facie effect must be put to the jury in permissive terms. *Commonwealth v. Crawford,* 18 Mass. App. Ct. 911, 912, 463 N.E.2d 1193, 1194 (1984). See Instruction 3.260 (Prima Facie Evidence).

The admission of such a certificate is the "record of a primary fact made by a public officer in the performance of [an] official duty" that raises no Confrontation Clause problem under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). *Commonwealth v. Morales,* 71 Mass. App. Ct. 587, 884 N.E.2d 546 (2008).

4. **Constitutionality.** The one-year mandatory sentencing provision of § 10(a) is constitutional. *Commonwealth v. Jackson,* 369 Mass. 904, 344 N.E.2d 166 (1976).

5. **Flare guns**. A flare gun is not a "firearm" for purposes of G.L. c. 269, § 10(a). *Sampson,* 383 Mass. at 753-761, 422 N.E.2d at 452-456.

6. **Necessity defense**. The Supreme Judicial Court has assumed that a threat of death or serious injury, if it is direct and immediate, may excuse momentary carrying of a firearm. *Commonwealth v. Lindsey,* 396 Mass. 840, 843-845, 489 N.E.2d 666, 668-669 (1986). See *Commonwealth v. Iglesia*, 403 Mass. 132, 135-136, 525 N.E.2d 1332, 1333-1334 (1988); *Commonwealth v. Franklin,* 376 Mass. 885, 888 n.2, 385 N.E.2d 227, 230 n.2 (1978). See Instruction 9.240 (Necessity or Duress).

7. **Notice of affirmative defense**. Massachusetts R. Crim. P. 14(b)(3) requires a defendant who intends to rely upon a defense based upon a license, a claim of authority or ownership, or exemption to file an advance notice of such defense with the prosecutor and the clerk-magistrate. The rule provides that if the defendant does not comply with that requirement, the defendant may not rely upon such a defense. The judge may allow late filing of the notice, order a continuance, or make other appropriate orders.

8. **Notice of license revocation.** See *Police Comm'r of Boston v. Robinson*, 47 Mass. App. Ct. 767, 773, 774, 716 N.E. 2d 652, 656 (1999) (proving notice of license revocation by certified mail requires proof of receipt); *Commonwealth v. Hampton*, 26 Mass. App. Ct. 938, 940, 525 N.E.2d 1341, 1343 (1988) (defendant who purposefully or wilfully evaded notice of license revocation sent by certified mail had constructive notice of license revocation).

9. **Probable cause.** Possession of a firearm, standing alone and without indication that the person was involved in criminal activity, does not provide probable cause to believe that the person was unlicensed to carry that

firearm. *Commonwealth v. Couture,* 407 Mass. 178, 552 N.E.2d 538, cert. denied, 498 U.S. 951, 111 S.Ct. 372 (1990). However, additional evidence of criminal activity and flight would provide such probable cause. *Commonwealth v. Brookins,* 416 Mass. 97, 104, 617 N.E.2d 621, 625 (1993).

10. **"Residence."** See *Commonwealth v. Coren*, 437 Mass. 723, 734, 774 N.E.2d 623, 632 (2002) (defining "residence" to include "all areas in and around a defendant's property, including outside areas, over which defendant retains exclusive control," but not including "public streets, sidewalks, and common areas to which occupants of multiple dwellings have access"); *Commonwealth v. Dunphy,* 377 Mass. 453, 458-460, 386 N.E.2d 1036, 1039-1040 (1979) (jury issue whether backyard was common area); *Commonwealth v. Morales,* 14 Mass. App. Ct. 1034, 1035, 442 N.E.2d 740, 741 (1982) (jury issue whether area was a common area to which other occupants or owner had access); *Commonwealth v. Domingue,* 18 Mass. App. Ct. 987, 990, 470 N.E.2d 799, 802 (1984) (defendant privileged to carry at place of business); *Commonwealth v. Samaras,* 10 Mass. App. Ct. 910, 910, 410 N.E.2d 743, 744 (1980) (no privilege to carry on sidewalk in front of defendant's house).

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48

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 1784CR00548

COMMONWEALTH

vs.

JOSIAH WATKINS

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

On May 9, 2018, the Defendant, Josiah Watkins, was convicted of possession of a large capacity firearm, in violation of G.L. c. 269, § 10(m), and carrying a firearm without a license, in violation of G.L. c. 269, § 10(a). The Defendant was sentenced to a term of imprisonment of two years and six months to two years, six months, and a day, on each count, to be served concurrently. On May 25, 2018, after the Defendant filed a timely motion for a required finding of not guilty and in response to new case law developments from the Supreme Judicial Court, this Court dismissed the conviction under G.L. c. 269, § 10(m), possession of a large capacity firearm. The Defendant remained convicted under G.L. c. 269, § 10(a) and was resentenced to eighteen months in the house of correction. The Defendant then filed this motion for a new trial, pursuant to Mass. R. Crim. P. 30(b). For the following reasons, the Defendant's motion for new trial is **DENIED**.

BACKGROUND

In May of 2017, Boston Police Officers assigned to the Youth Violence Strike Force observed videos of the Defendant that he and Luis Santos (Santos) posted on Snapchat, a social media platform. In one video taken by the Defendant on May 8, 2017, the Defendant appeared to be holding a TEC-9 model firearm with the magazine separated from it. In a subsequent video,

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the Defendant and Santos are in a bedroom, and Santos is loading a magazine into the TEC-9 firearm and aiming it at the camera.

Santos was wearing a global positioning system (GPS) monitor in May of 2017 after having been released by the Department of Youth Services. Police officers contacted the Department of Youth Services and learned that the GPS device placed Santos at his home at 339 Adams Street, Dorchester, Massachusetts, during the time in which the videos were posted to Snapchat on May 8, 2017. Based on these videos, a search warrant was issued on May 16, 2017 and was executed on Santos' home. In Santos' bedroom closet, the police found a 9mm pistol, a TEC-9 model firearm loaded with twenty-three rounds of ammunition in a high capacity magazine, and a loose round of ammunition. A search warrant was issued and executed for the Defendant's home on May 14, 2017 in which the police recovered two necklaces and a pin the police believe was worn by the Defendant in the videos. The Defendant was indicted on August 14, 2017 by a Suffolk County grand jury.

DISCUSSION

I. Standard of Review

A trial judge may grant a new trial at "any time if it appears justice may not have been done." Mass. R. Crim. P. 30(b). A strong policy of finality limits the granting of new trial motions to exceptional situations, and "such motions should not be allowed lightly." Commonwealth v. Ubeira-Gonzalez, 87 Mass. App. Ct. 37, 39-40 (2015) (citations omitted). The defendant "bears the burden of proof on a motion for a new trial." Commonwealth v. Marinho, 464 Mass. 115, 123 (2013). A judge may make the ruling based solely on the affidavits and must hold an evidentiary hearing "only if the affidavits or the motion itself raises a 'substantial issue' that is supported by a 'substantial evidentiary showing.'" Commonwealth v. Scott, 467 Mass. 336, 344 (2014). The decision whether to hold an evidentiary hearing on a motion for new trial is

committed to the discretion of the motion judge. Commonwealth v. Denis, 442 Mass. 617, 628 (2004). When the motion judge was also the trial judge, as is the case here, "he may use his knowledge and evaluation of the evidence at trial in determining whether to decide the motion for a new trial without an evidentiary hearing." Commonwealth v. Riley, 467 Mass. 799, 826 (2014).

The Defendant argues he is entitled to a new trial based on insufficient evidence presented by the Commonwealth, ineffective assistance of trial counsel, and erroneous evidentiary rulings affecting his rights to a fair and impartial trial.

II. Insufficient Evidence

The Defendant first argues that the Commonwealth failed to prove the "knowledge" element of G.L. c. 269, § 10(a) beyond a reasonable doubt. Specifically, he asserts that in order to sustain a conviction under G.L. c. 269, § 10(a), the Commonwealth must prove the Defendant knew he was in possession of a working firearm "for which a shot or bullet can be discharged," pursuant to G.L. c. 140, § 121. In reviewing the sufficiency of the evidence, this Court must review the evidence in the light most favorable to the Commonwealth and determine whether any rational trier of fact could have found the existence of the essential elements of the crimes beyond a reasonable doubt. Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). Inferences drawn from circumstantial evidence "need only be reasonable and possible; it need not be necessary or inescapable." Commonwealth v. Lodge, 431 Mass. 461, 465 (2000) (citations omitted).

The Supreme Judicial Court expressed in Commonwealth v. Jackson that G.L. c. 269, § 10(a) is to be interpreted as "requiring, as a necessary element of the offense, proof that the accused knew that he was carrying a firearm." 369 Mass. 904, 916 (1976). Since Jackson, the legislature added the express knowledge requirement to G.L. c. 269, § 10(a) in 1990. Thus,

reviewing the evidence in the light most favorable to the Commonwealth, this Court must decide if it was reasonable and possible that any rational trier of fact could have found that the Defendant knew he was in possession of a firearm, as defined by G.L. c. 140, § 121.

At trial, the Commonwealth put forth evidence of the Defendant holding and brandishing the weapon while pointing it toward the Snapchat camera. One of these videos shows the Defendant and Santos, with Santos loading the weapon with a magazine. Furthermore, evidence was presented that ammunition was recovered at Santos' home with the TEC-9 found in his closet. As currently interpreted, a rational juror could have found, beyond a reasonable doubt, that the Commonwealth satisfied the knowledge element of G.L. c. 269, § 10(a). Viewing the evidence in the light most favorable to the Commonwealth, it is reasonable and possible that a rational juror could have found that the video evidence of the Defendant brandishing the weapon, the other individual, Santos, in the videos loading the weapon with a magazine, and evidence of the ammunition found with and alongside the TEC-9, to be sufficient circumstantial evidence of Defendant's knowledge that he was possessing a firearm "for which a shot or bullet can be discharged."

III. Ineffective Assistance of Counsel

The Defendant next argues that his motion for a new trial should be granted due to the ineffective assistance of trial counsel. To establish a claim of ineffective assistance of counsel, the defendant must establish that his attorney's performance fell "below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. 668, 688 (1984), such that there is a "probability sufficient to undermine confidence in the outcome." Id. at 694. The motion judge must consider whether the defendant has established "serious incompetency, inefficiency, or inattention of counsel," or in other words, "behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer." Commonwealth v. Watson, 455

Mass. 246, 256 (2009). Furthermore, the defendant must demonstrate that this failing "likely deprived the defendant of an otherwise available, substantial ground of defense." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). See also Commonwealth v. Acevedo, 446 Mass. 435, 442 (2006) (finding defendant must show "better work might have accomplished something material for the defense"). "In post-trial proceedings, the defendant bears the burden to rebut the presumption that [he] had a fair trial." Commonwealth v. Comita, 441 Mass. 86, 91 (2004).

A. Failure to File a Motion to Suppress

The Defendant argues that trial counsel was ineffective in failing to file a motion to suppress the search warrant as it provided no information about the date the Snapchat videos were created. Thus, the Defendant argues, the warrant application lacked probable cause to believe the depicted firearm would be present at 339 Adams Street at the time of the search. In claiming ineffective assistance of counsel for failing to file a motion to suppress, the defendant bears the burden of demonstrating "a likelihood that the motion to suppress would have been successful." Comita, 441 Mass. at 91. Furthermore, the burden is on the defendant to prove facts that are "neither agreed upon nor apparent on the face of the record." Id. at 93. In order to establish probable cause, facts in support thereof "must be 'closely related to the time of the issue of the warrant [so] as to justify a finding of probable cause at that time.'" Commonwealth v. Matias, 440 Mass. 787, 793 (2004) (citations omitted). However, if the "affidavit recite[d] activity indicating protracted or continuous conduct, time is of less significance." Commonwealth v. Cruz, 430 Mass. 838, 843 (2000).

In applying for a search warrant of Santos' home, Boston police officers noted that Snapchat communications were uploaded by Santos and the Defendant on their accounts on May 7, 2017, May 8, 2017, and May 14, 2017 depicting the two of them with a firearm in a bedroom.

This was in conjunction with GPS data indicating that Santos did not leave his home at 339 Adams Street during the relevant times on May 8, 2018. The search warrant of Santos home was issued and executed on May 16, 2017. This information was sufficient to establish that probable cause existed on May 16, 2017, that evidence of the crime would be found at 339 Adams Street. The Defendant has failed to meet his burden in establishing that trial counsel's failure to file a motion to suppress the evidence seized from 339 Adams Street based on probable cause that had become stale had a likelihood to be successful. Trial counsel's choice not to file the suppression motion did not "likely deprive the defendant of an otherwise available, substantial ground of defense." Saferian, 366 Mass. at 96.

B. Failing to Seek Discovery or Cross-Examine

The Defendant further argues that trial counsel was ineffective by failing to move for discovery regarding how the police intercepted the Defendant's and Santos' Snapchat communications. Specifically, the Defendant avers that his Snapchat posts were intended to be viewed only by his social media "friends" and therefore he had a reasonable expectation of privacy in his Snapchat communications. Consequently, he argues, the police viewing the posts constituted an unconstitutional search. To establish that a Fourth Amendment search occurred, the Defendant must establish a government intrusion upon both a subjective expectation of privacy and that society is prepared to recognize that expectation as objectively reasonable. Commonwealth v. Montanez, 410 Mass. 290, 301 (1991).

The Defendant concedes that the use of an informant was mentioned in a motion in limine. That the police obtained this information from an informant would defeat the Defendant's argument that his reasonable expectation of privacy was invaded and the search unconstitutional based on the knowing exposure of his communications. See Smith v. Maryland, 442 U.S. 735, 743-744 (1979) (holding that an individual has no legitimate expectation of

privacy in information he voluntarily conveys to a third party, and the individual assumes the risk that the third party will disclose that information to others, including the government). The Defendant has failed to meet his burden in showing how trial counsel failing to seek discovery and not pressing this issue on cross-examination rises to the level of "behavior falling measurably below that which might be expected from an ordinary fallible lawyer."

IV. Inadmissible Evidence

The Defendant also asserts that unduly prejudicial evidence that was admitted and erroneous evidentiary rulings merit a new trial. In reviewing evidentiary rulings, questions of relevancy and prejudicial effect are left to the trial judge's broad discretion and are not disturbed absent "palpable error." Commonwealth v. Mcgee, 467 Mass. 141, 156 (2014). The burden is on the defendant to establish "an abuse of discretion and its resulting prejudice." Commonwealth v. Rosario, 460 Mass. 181, 193 (2011). In order for evidence to be relevant, it "must have a rational tendency to prove an issue in the case … or render a desired inference more probable than it would have been without it. Commonwealth v. Carey, 463 Mass. 378, 387 (2012).

A. Officer Crossen's Testimony

The Defendant argues that a new trial is warranted based on the testimony of Officer Zachary Crossen referring to the Defendant as the "subject" of an "investigation" which was highly prejudicial as it impugned his character and called on jurors to speculate on matters not in evidence. The Defendant did not object to the testimony to preserve his appellate rights and therefore, this Court must decide whether there is a "substantial likelihood that a miscarriage of justice has occurred." Commonwealth v. Wright, 411 Mass. 678, 681 (1992). "Evidence of a defendant's involvement in uncharged criminal activity 'may be admissible if relevant for some other purpose' than to show the defendant's bad character or propensity to commit the charged offense." Commonwealth v. Snyder, 475 Mass. 445, 456 (2016). Based on the Commonwealth's

burden of proof, it needs "evidentiary depth to tell a whole continuous story." Commonwealth v. Taranovsky, 93 Mass. App. Ct. 399, 404 (2018). However, a witness may not give an opinion regarding the culpability of the defendant. Lodge, 431 Mass. at 467.

Specifically, the Defendant argues that the following testimony on direct examination was erroneously elicited:

> Q: And you indicated that you were involved in an investigation on May 8th of 2017. Who was the subject of that investigation?
> A: It would be the gentleman before us today, Mr. Watkins.

The officer's testimony was not opinion evidence regarding the culpability of the Defendant. Still, the Defendant argues that the testifying officer's reference to the Defendant as the "subject" of an "investigation" impugned his character was unduly prejudicial. Immediately after the officer's statement, when questioned about what he then observed on Snapchat, the testifying officer stated that he "observed two individuals known to us displaying a firearm." As the Defendant points out in his motion, the trial judge then immediately interceded, struck the "known to us" portion of his answer and asked the jury to disregard it.

The probative value of the circumstances showing why officers were looking at the Defendant's Snapchat posts allowed the prosecution to paint a full and accurate picture of the allegations and was not substantially outweighed by any prejudice to the Defendant. Furthermore, any prejudice would have been cured by the trial judge's instruction to the jury, which the jury is presumed to follow. See Commonwealth v. Williams, 450 Mass. 645, 651 (2008). The officer's brief reference to the Defendant as a "subject" of an "investigation" did not create a substantial likelihood of a miscarriage of justice.

B. Lay Witness Testimony

The Defendant further avers the Commonwealth elicited improper opinion evidence when the testifying detective compared the markings of the firearm in a screen shot of a

Snapchat video to a photo of the firearm that was recovered from Santos' home. The detective compared observations, over the Defendant's objection, of similar markings on two photographs of the alleged firearm. An evidentiary claim preserved by objection is reviewed for the existence of prejudicial error. Commonwealth v. Carriere, 470 Mass. 1, 7 (2014). The Court is to consider whether there is a "reasonable possibility that the error might have contributed to the jury's verdict." Id. If the error "did not influence the jury, or had but very slight effect," reversal is not necessary. Id.

Furthermore, a lay opinion is admissible where it is "(a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge." Commonwealth v. Canty, 466 Mass. 535, 541 (2013). Statements of observed facts and conclusions drawn from them that do not require "special learning or experiment" are within the scope of lay testimony. Commonwealth v. Lopes, 34 Mass. App. Ct. 179, 186 (1993).

The detective's testimony was not outside the scope of lay opinion testimony as it was rationally based on the detective's perception and did not require scientific, technical, or other specialized knowledge. The detective testified that: "In my opinion, there are markings on – on both pictures of the firearm that are – consistent." This testimony was based on the detective's observations of the photographs of the firearms. The Defendant further argues that allowing the detective's testimony "risked the jury imparting undue authority upon it where it touched the ultimate issue of guilt in this case." However, the jury was properly instructed on their fact-finding function and are presumed to follow those instructions, specifically that "[the jurors] are the sole and exclusive judges of fact. [The jurors] alone determine what evidence to accept, how important any evidence is that [they] do accept, and what conclusions to draw from all of the

evidence in this case." Detective Ball's testimony was proper lay opinion testimony and it was not prejudicial error to allow it into evidence.

C. Hearsay Statement

The Defendant further alleges that a detective's testimony in regard to the Defendant not having a license to carry a firearm was impermissible hearsay and influenced the jury's deliberation. This claim was preserved by objection and is reviewed for the existence of prejudicial error. Carriere, 470 Mass. at 7. Hearsay is a statement, other than one made by the testifying declarant at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Commonwealth v. Cohen, 412 Mass. 375, 393 (1992). The detective's statement was not hearsay, however, because the testimony that "Mr. Watkins is not licensed to carry a firearm" is not an out of court statement. Furthermore, the possession of a license is an affirmative defense, and lack thereof is not an element of G.L. c. 269, § 10(a). Thus, the Defendant was not prejudiced by the detective's testimony that he did not have a license as it did not contribute to the proof of an element of the offense. The Defendant has failed to show that allowing the statement was prejudicial error.

D. Firearm Analysis Report

Lastly, the Defendant alleges it was prejudicial error to admit the firearm analysis report as it bolstered the testimony of ballistician Christopher Finn and was unduly prejudicial. Questions of relevancy and prejudicial effect are left to the trial judge's broad discretion and are not disturbed absent "palpable error." Mcgee, 467 Mass. at 156. "A trial judge has the discretion to exclude cumulative evidence." Commonwealth v. Durning, 406 Mass. 485, 497 (1990). As the claim was preserved by objection, it is reviewed for the existence of prejudicial error. Carriere, 470 Mass. at 7. During direct examination of Mr. Finn, the Court allowed the introduction of Mr. Finn's analysis report. The fact that the report was notarized did not bolster the credibility of the

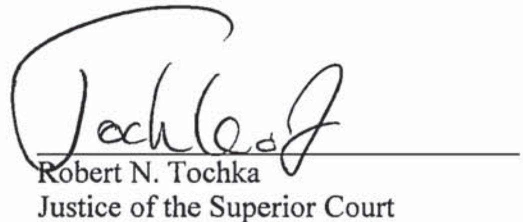
testifying witness nor make this a hearsay assertion by a secondary examiner. G.L. c. 140, § 121A specifically allows for the introduction of

> "A certificate by a ballistics expert of the department of the state police or of the city of Boston of the result of an examination made by him of an item furnished him by any police officer, signed and sworn to by such expert, [to] be prima facie evidence of his findings as to whether or not the item furnished is a firearm."

G.L. c. 140, § 121A. Furthermore, the firearm analysis report went to the elements of the offense, namely that the TEC-9 was a working firearm and the magazine recovered was capable of holding more than ten rounds of ammunition, both of which were elements of the offenses the Defendant was charged with. Given the highly probative nature of the report, any risk of prejudice based on repetitive or cumulative evidence did not substantially outweigh the probative value.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendant's Motion for New Trial is **DENIED**.



Robert N. Tochka
Justice of the Superior Court

Dated: March ~~7~~ 11, 2019

Massachusetts Appeals Court Case: 2019-P-0428 Filed: 7/2/2019 5:53 PM

21

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1884-CR-00453
1884-CR-00469

COMMONWEALTH

vs.

RICHARD DILWORTH

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTIONS FOR DISCOVERY ON ALLEGED SELECTIVE PROSECUTION

Reducing gun violence in Boston is a law enforcement priority and an important matter of public safety and health.[1] In this endeavor, social media can serve as a valuable law enforcement tool.[2] However, the U.S. Constitution and the Massachusetts Declaration of Rights require that race play no part in any decision by police to investigate or prosecute crime.[3]

The defendant, Richard Dilworth ("Dilworth"), a black male, has made an initial, limited statistical showing suggesting that the Boston Police Department ("BPD") uses Snapchat as an investigative tool almost exclusively against black males. Dilworth seeks

[1] See, e.g., City of Boston, "Regional Gun Buyback Program Part of Regional Gun Safety Collaboration," Dec. 15, 2017, https://www.boston.gov/news/regional-gun-buyback-program-part-regional-gun-safety-collaboration (last visited Jan. 2, 2019); Boston Children's Hospital, "Gun Violence and Children: Why it's a public health issue," Thriving, https://thriving.childrenshospital.org/gun-violence-children-issue (last visited Jan. 2, 2019).

[2] See, e.g., Heather Kelly, "Police Embrace Social Media as Crime-fighting Tool," CNN Business, August 30, 2012, https://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/index.html (last visited 12/27/18).

[3] See infra at Section A.

additional discovery that he believes may support a claim of racial discrimination in police use of Snapchat.[4]

This Court held hearings on December 3, 2018 and January 3, 2019. For the below reasons, the Court finds that Dilworth has met the requirements for issuance of a summons under Rule 17 of the Massachusetts Rules of Criminal Procedure ("Mass. R. Crim. P. 17" or "Rule 17"), requiring BPD to produce additional information about its use of Snapchat as an investigative tool. However, the Court will limit the scope and time frame of Dilworth's request to exclude documents related to ongoing investigations and reduce the burden on BPD of identifying and producing the requested information.

RELEVANT FACTS[5]

Snapchat is a social media app that enables users to share video and other content. Snapchat users create personal accounts. An existing Snapchat account can be accessed only by permission from the account holder. The account holder grants access to someone who wants to "follow" the account by "friending" the requestor. "Friends" generally have access to the account holder's postings.

In or around October 2017, a BPD officer submitted a request through the Snapchat app to "follow" a Snapchat account with the username "youngrick44." The officer did not identify himself as a police officer, and he did not use either the name or photo of anyone known to Dilworth. Dilworth as "youngrick44" accepted the request and became "friends" with BPD officers, who were acting in an undercover capacity. While "following" the "youngrick44" account, officers viewed eight separate Snapchat

[4] Dilworth's motion seeks information, not a finding of discrimination or other wrongdoing by BPD, and this Court makes no such finding.

[5] For purposes of this motion only, the parties stipulate to the facts set forth herein.

videos of Dilworth, holding what appeared to be a firearm. There is no evidence that BPD gained access to the "youngrick44" account by hacking into the account or using any means other than "friending" Dilworth while acting in an undercover capacity.

On January 11, 2018, BPD officers arrested Dilworth and recovered a loaded Smith & Wesson revolver from Dilworth's waistband. The District Attorney's office charged Dilworth with multiple offenses arising out of seizure of the revolver. Docket No. 1884-CR-00453. After being released on bail, Dilworth was again seen on Snapchat by BPD officers holding what appeared to be a firearm. He was again arrested by Boston police, on May 11, 2018, in the possession of a firearm, this time a loaded Ruger pistol. The District Attorney's office charged Dilworth with multiple offenses arising out of seizure of the pistol. Docket No. 1884-CR-00469.

In August 2018, in each of his two cases, Dilworth filed a request under Mass. R. Crim. P. 17 seeking training materials and protocols used by BPD in social media investigations. On October 24, 2018, BPD responded to the motion, stating that "the Department has no training materials relating to conducting investigations on social media platforms. Likewise, the Department has no policies, protocols, or procedures in place, written or otherwise, relating to the use of social media platforms in criminal investigations."

On October 31, 2018, in each of his two cases, Dilworth filed Defendant's Motion for Discovery: Selective Prosecution pursuant to Mass. R. Crim. P. 14 (Filing # 12 in Docket No. 1884-CR-00453; Filing # 15 in Docket No. 1884-CR-00469). On November 26, 2018, in each of his two cases, Dilworth filed a motion seeking the same material pursuant to Mass. R. Crim. P. 17 (Filing # 16 in Docket No. 1884-CR-00453; Filing # 19

in Docket No. 1884-CR-00469). The motions seek "all police/incident reports or Form 26 reports generated by the Boston Police Department from June 1, 2016 to October 1, 2018 for investigations that involve the use of 'Snapchat' social media monitoring." The motions excluded "reports for investigations where the police have not yet arrested and charged the suspect." Dilworth subsequently modified his requests to exclude documents related to human trafficking investigations and sexual assault investigations.

In support of the motions, Dilworth submitted affidavits of his attorney, stating that counsel had conducted an "informal survey," sending questions to all Committee for Public Counsel Services ("CPCS") Public Defender Division staff attorneys in Suffolk County and some attorneys who serve as bar advocates in Suffolk County for indigent criminal defendants. Dilworth's attorney estimated that these attorneys collectively are responsible for roughly 25% of the criminal cases that are prosecuted in Suffolk County. The questions included "if lawyers had 'Snapchat' cases, what the race of the defendant was, and whether the defendant was the person being targeted by the investigation." The affidavits further state that counsel received responses identifying defendants in 20 such cases. Of those cases, 17 of the defendants (85%) were black, and three (15%) were Hispanic. There were no non-Hispanic white defendants.

"Incident reports" or "police reports," also known as "1-1's," usually memorialize an initial investigation and arrest and are readily searchable within an electronic database. However, it is the practice of the BPD not to identify Snapchat in incident reports as the investigatory tool that was used, so a search of incident reports will not easily identify "Snapchat cases."

BPD's use of Snapchat and other social media as an investigative tool has typically been memorialized in separate reports, known as Form 26 reports. These reports are prepared on a computer, and the officer who has used the social media submits the reports in paper form or electronically to that officer's supervisor. Apparently, Form 26 reports cannot be electronically searched.

DISCUSSION

A. Despite the Absence of a Constitutional "Search," Dilworth Has a Viable Basis for His Discovery Request, Under Principles of Equal Protection

As an initial matter, this Court rejects the Commonwealth's and BPD's argument that the law on selective enforcement is not applicable here because the police use of Snapchat in this case was not a "search or seizure" for purposes of the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. See Comm. Br. at 4; BPD Br. at 5.[6] The equal protection principles of the Fourteenth Amendment of the U.S. Constitution and articles 1 and 10 of the Massachusetts Declaration of Rights provide protections that are independent of the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. See Commonwealth v. Lora, 451 Mass. 425, 436-437 (2008), citing Whren v. United States, 517 U.S. 806, 813 (1996). Therefore, a claim of discriminatory enforcement does not require the existence of conduct that constitutes a search or seizure for constitutional purposes. In United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997), the court considered it "established in this circuit that the Fourteenth Amendment protects citizens from police action, including the decision to interview an

[6] "Comm. Br." refers to the Commonwealth's opposition brief, and "BPD Br." refers to BPD's opposition brief.

airport patron, based solely on impermissible racial considerations." In the view of that court, it was irrelevant for equal protection purposes that the police do not need probable cause or reasonable suspicion to interview travelers at an airport. By way of analogy, the Massachusetts Department of Revenue does not need probable cause or reasonable suspicion to audit a taxpayer, but it cannot devote its resources to pursuing one particular race, religion or ethic group. Police use of an investigative tool based on a suspect's membership in a protected class violates the equal protection principles of the Fourteenth Amendment and arts. 1 and 10 of the Massachusetts Declaration of Rights.

B. The Appropriate Rule for Dilworth's Request Is Mass. R. Crim. P. 17

The Defendant brings the present motions under Massachusetts Rules of Criminal Procedure 14 and 17. While Mass. R. Crim. P. 14(a)(2) allows a defendant to obtain evidence "within the possession, custody, or control of the prosecutor or persons under his direction or control, it is Mass. R. Crim. P. 17(a)(2) . . . that allows the defendant to summons books, papers, documents, or other objects from third parties." Commonwealth v. Thomas, 451 Mass. 451, 456 (2008) (internal quotations and additional citation omitted).

The Commonwealth and BPD each argue that the respective rule under which it would be required to provide discovery (Rule 14 for the Commonwealth; Rule 17 for BPD) is not applicable to Dilworth's request. See Comm. Br. at 8-11; BPD Br. at 3-5. Although some of the documents sought by Dilworth may well be in the possession, custody or control of the prosecutor assigned to this case and those under her direction or control, the request is directed to BPD as a department, not to any team of prosecutors and agents. As such, Rule 17(a)(2), allowing a party to summons documents from third

parties, is the appropriate vehicle for requesting the documents that Dilworth seeks. See Commonwealth v. Dwyer, 448 Mass. 122, 140 n.22 (2006) ("Pretrial access to the records of third parties can be obtained *only* on a judicial order authorizing the issuance of a rule 17(a)(2) summons.") (emphasis in original); Thomas, 451 Mass. at 454-455 (where defendant was pulled over by State Trooper, materials in the possession of the colonel of State police were not discoverable under Rule 14(a)(1) because the colonel was not "part of the prosecution of the defendants' cases"). The issue for this Court is whether Dilworth has made a sufficient showing under Mass. R. Crim. P. 17(a)(2) to support issuance of a summons for the records that he has requested.

C. Dilworth Has Met the Standard for Issuance of a Summons to BPD for the Requested Information, but the Requested Scope and Time Frame Shall be Narrowed to Exclude Documents Related to Ongoing Investigations and Reduce the Burden on the Department

To obtain documents under Mass. R. Crim. P. 17(a)(2), the party seeking the documents must make a threshold showing that the evidence sought is material and relevant. Thomas, 451 Mass. at 456. Consistent with federal case law under the analogous federal rule of criminal procedure, the Supreme Judicial Court has adopted a four-part test, which requires the defendant to show "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" Commonwealth v. Lampron, 441 Mass. 265, 269 (2004), quoting United States v. Nixon, 418 U.S. 683, 699-700 (1974) (internal quotation marks omitted). If these four

requirements are met, the Court must consider and balance the burden on the Commonwealth of responding to the request. See Commonwealth v. Bernardo B., 453 Mass. 158, 174 (2009) (request "may not impose undue burdens on the Commonwealth").

To meet the threshold showing, which is also the first part of the four-part test under Lampron, Dilworth must present reliable information, in affidavit form, demonstrating a reasonable basis to infer that racial profiling *may* have been the basis for his having been targeted by police for investigation via Snapchat. See Commonwealth v. Betances, 451 Mass. 457, 461-462 (2008) (required preliminary showing "must contain reliable information in affidavit form demonstrating a reasonable basis to infer that profiling, and not a traffic violation alone, may have been the basis for the vehicle stop."). At this stage, Dilworth need not present evidence that would raise an inference that he was, in fact, selectively targeted for investigation. As the Supreme Judicial Court noted in Bernardo B., *supra,* such a requirement would put defendants in a Catch-22 situation. 453 Mass. at 169 (party not required to present evidence raising "'reasonable inference, based on credible evidence,' that the defendant himself was selectively prosecuted," because such a standard "would place criminal defendants in the untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement.").

Dilworth has presented, in affidavit form, the results of an informal survey of criminal defense attorneys in Suffolk County as to the race of their clients in cases in which BPD used Shapchat as an investigative tool. The threshold issue for this Court is whether this statistical showing is sufficient to create an inference that Dilworth's race

may possibly have been a factor in initially targeting him for use of Snapchat as an investigative tool.[7] This is *not* a case in which the defendant has shown that a person of a different race similarly situated to him was treated more favorably by law enforcement than he was treated. Contrast Bernardo B., 453 Mass. at 161, 173 (minor male defendant prosecuted for sex crimes resulting from consensual acts with minor females, who were not prosecuted). Therefore, at this juncture, a statistical showing is Dilworth's only vehicle to obtain information about alleged discriminatory use of Snapchat.

The survey of Suffolk County criminal defense lawyers conducted by Dilworth's counsel has identified 20 instances in which BPD used Snapchat as an investigative tool. Of these 20 instances, 17 of the defendants (85%) are black, three defendants (15%) are Latino/Hispanic, and none are white. One's reaction to whether this statistical showing suggests the possibility of selective enforcement based on race might depend in part on one's overall trust or distrust of the criminal justice system. However, this Court cannot rule based on conjecture, positive or negative, about the motivation for police conduct.

The Court recognizes the presumption of regularity and good faith that attaches to prosecutor and police conduct under our laws. See Lora, 451 Mass. at 437. However, "[n]otwithstanding the presumption of regularity that attaches to prosecutorial decisions, judicial scrutiny is necessary to protect individuals from prosecution based on arbitrary or otherwise impermissible classification." Bernardo B., 453 Mass. at 168. The racial composition of the defendants in the 20 cases identified by Dilworth differs dramatically

[7] Dilworth was charged in case No. 1884-CR-000469 after he was released on bail in case No. 1884-CR-00453, and police officers apparently viewed him again on Snapchat brandishing a firearm. The Court questions whether any statistical showing could defeat the inference that Dilworth was targeted after his first indictment not because of his race, but because he had recently been indicted for unlawful possession of a loaded firearm.

from the racial composition of Boston's population as a whole. Whereas non-Hispanic whites, blacks and African Americans, and Latinos/Hispanics are respectively 44.9%, 25.3% and 19.4% of the Boston population according to recent U.S. Census estimates, non-Hispanic whites, blacks and African Americans, and Latinos/Hispanics are respectively 0%, 85% and 15% of the cases identified by Dilworth's counsel.[8]

The Supreme Judicial Court has encouraged lawyers to make statistical showings under the so-called Lora framework where selective enforcement is suspected. See Commonwealth v. Buckley, 478 Mass. 861, 871 (2018) ("We take this opportunity to encourage lawyers to use the Lora framework in cases where there is reason to believe a traffic stop was the result of racial profiling."). Buckley involved a traffic stop, in which Fourth Amendment and article 14 protections apply. However, for the above-stated reasons, this Court concludes that equal protection principles are equally applicable in the context of police investigations that do not require showings of probable cause or reasonable suspicion. See *supra* at Section A. As a logical corollary to this conclusion, this Court reads Buckley to encourage use of the Lora framework beyond traffic stops to include challenges to police activity in the context presented here, i.e., use of social media as an investigative tool.

On the record before this Court, the defendant has made an initial statistical showing of racial disparity and the Commonwealth has not offered any explanation as to why Dilworth was initially targeted for Snapchat monitoring. Because BPD has no

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[8] See United States Census Bureau, QuickFacts: Boston city, Massachusetts, www.census.gov/quickfacts/bostoncitymassachusetts (last visited Jan. 8, 2019).

policies, procedures or protocols for its use of social media as an investigative tool,[9] the explanation cannot be that BPD was complying with a written policy.[10] In the absence of a BPD policy or procedure and a representation of compliance with that policy or procedure, or some other explanation as to why BPD initially targeted the defendant, Dilworth, the public and this Court can only speculate as to why police initially selected Dilworth as a suspect to be "friended" on Snapchat.[11]

In its opposition memorandum, the Commonwealth relies on two cases in which the Supreme Judicial Court vacated trial court orders for production of documents pertaining to alleged discriminatory enforcement, Betances, *supra*, and Thomas, *supra.*[12] However, both cases are readily distinguishable from this case. In Betances, the defendant sought information about a trooper's prior motor vehicle stops as *mandatory* discovery, and the Supreme Judicial Court concluded that the information sought was not "subject to a[n] order to furnish automatic and mandatory discovery under rule 14(a)(1)(A)." Betances, 451 Mass. at 459-461. Were it otherwise, the Court reasoned, "an arresting officer's motor vehicle citations, or traffic stop reports, would routinely be demanded in every case involving the traffic stop of a minority driver." Id. at 461. Here, Dilworth makes no argument that the documents he seeks should have been provided mandatorily. Additionally, the Court in Betances concluded that the defendant had not

[9] Police department use of social media to investigate crime is not a new phenomenon, having been utilized by police for at least 10 years. See Kelly, *supra* note 2.

[10] In at least one other context, that of inventory searches, compliance with a written policy provides a legitimate basis for police activity that would otherwise not be constitutional. See Commonwealth v. Ellerbe, 430 Mass. 769, 773 n.8 (2000); Commonwealth v. Allen, 76 Mass. App. Ct. 21, 24 (2009).

[11] The Court recognizes that it has no authority to compel BPD to create any policy, procedure or protocol.

[12] See Comm. Br. at 6, 10. BPD also relies on Betances in its opposition brief. See BPD Br. at 5.

made the preliminary showing that would be required for the type of discovery he sought, as the defendant's showing was limited to two police reports in which the trooper had pulled over one black motorist and one Cuban-born motorist in the area where the defendant was pulled over. Id. at 461-462. Here, survey data covering 20 matters provides a more extensive showing.

In Thomas, as in Betances, the defendants sought materials on alleged selective enforcement as mandatory discovery. Thomas, 451 Mass. at 453. Moreover, in Thomas the defendants sought, with regard to the trooper who pulled them over, the trooper's "citation books, audit sheets, and 'any other information' concerning whether [the trooper] had engaged in 'profiling, stereotypical thinking and hunches, or [had] used dubious investigative techniques'" over an approximate six-year time period. Id. In reversing the trial court's discovery order, the Supreme Judicial Court concluded that some of the requested materials were not in the possession of the prosecution team, and also concluded that the "vague and overbroad" request impermissibly ordered the Commonwealth to conduct statistical analyses and make legal evaluations about unspecified "other information" that may or may not have been relevant. Id. at 454-455. Here, by contrast, the Defendant has requested a well-defined set of documents for a specified purpose, such that the request can reasonably be carried out by BPD.[13]

Having found that the requested documents are material and relevant to Dilworth's defense, the Court further finds that Dilworth has satisfied the other three requirements for issuance of a summons under Lampron. As to the first other

[13] The Court further notes that the request in Thomas targeted the long-term history of a particular trooper, whereas the defendant in this case seeks information covering a shorter time frame about the broader practices of BPD.

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requirement, the requested documents "are not otherwise procurable reasonably in advance of trial by exercise of due diligence." Lampron, 441 Mass. at 269. Dilworth cannot obtain the requested documents without a summons. His counsel already made an attempt to do so with only partial success, through the informal survey described herein. Only BPD has access to all of the documents that will be covered by the subpoena.

As to the second other requirement, Dilworth may have a constitutional challenge to the charges against him, and may waive his right to assert the challenge if he does not litigate the issue before trial. Therefore, he "cannot properly prepare for trial without such production and inspection in advance of trial." Id.

As to the third additional requirement, the Court has found that the requested information is relevant to Dilworth's claim that BPD may be using Snapchat in a discriminatory way. See *supra* at 10-12. In this context, the fact that Dilworth does not know what the requested records will reveal does not render the request a "fishing expedition" because, as noted above, requiring a more detailed showing would put Dilworth in the "untenable position of having to produce evidence of selective enforcement in order to obtain evidence of selective enforcement." Bernardo, B., 453 Mass. at 169. Therefore, the Court finds that "the application is made in good faith and is not intended as a general 'fishing expedition.'" Lampron, 441 Mass. at 269.

This Court has fully considered Supreme Judicial Court holdings that "rule 17(a)(2) is not a discovery tool... Rather, it is intended to expedite trial proceedings . . . ." Commonwealth v. Jones, 478 Mass. 65, 68 (2017) (internal quotations and additional citations omitted), and cases cited therein. However, an overly restrictive reading of Rule 17(a)(2) in this context would undermine the Supreme Judicial Court's encouragement to

defendants that they employ the Lora framework to ferret out whether or not discrimination has played any role in law enforcement decisions about whom to investigate or prosecute. See Buckley, 478 Mass. at 871.

Because Dilworth has satisfied the four-part test for issuance of a summons pursuant to Mass. R. Civ. P. 17, the Court must consider the burden that would be imposed on BPD in collecting the Forms 26 covered by the summons. Because Forms 26 apparently are not stored electronically, BPD cannot comply with a summons by performing an electronic word search. Most likely, BPD will need to canvas the supervisory officers in the Department to whom Forms 26 are submitted.

To avoid the production of documents related to ongoing investigations and any undue burden on BPD in complying with this request, and recognizing the possibility of additional requests, the Court will limit both the scope and the time frame of the documents that BPD must produce.

As to scope, BPD will be required to produce Forms 26 only in those cases where the defendant has been charged. In all such cases, any Form 26 that references the use of Snapchat (indeed, all relevant Forms 26) should already have been produced to the defendants in those cases as part of the automatic discovery in those cases. Further, Dilworth voluntarily narrowed his initial request to exclude human trafficking investigations and sexual assault investigations. This Court will also exclude murder investigations, which raise similar issues to human trafficking and sexual assault investigations and often involve voluminous paperwork.

As to time frame, instead of producing Forms 26 for a more than two-year period, as requested by Dilworth, BPD will be required to produce such forms created during the

one-year period from August 1, 2017 to July 31, 2018. This time frame begins roughly two months before police "friended" Dilworth on Snapchat and ends roughly two months after his second arrest.

The one-year set of BPD reports that this Court will summons may reveal a less dramatic discrepancy by race in police use of Snapchat than the 20 cases presented to the Court. Moreover, even if the racial composition of this broader set mirrors the racial composition of the 20 cases presented to this Court, a race-neutral explanation for this discrepancy may well defeat Dilworth's equal protection claim. See Castaneda v. Partida, 430 U.S. 482, 493 (1977) ("an official act is not unconstitutional solely because it has a racially disproportionate impact.").[14] However, the documents covered by the summons are material and relevant, and they will assist the Court in resolving Dilworth's claim.

CONCLUSION AND ORDER

For the above reasons, Dilworth's motions pursuant to Mass. R. Crim. P. 17 (Filing # 16 in Case No. 1884-CR-00453 and Filing # 19 in Case No. 1884-CR-00469) are **ALLOWED,** as modified herein, and his motions pursuant to Mass. R. Crim. P. 14 (Filing # 12 in Case No. 1884-CR-00453 and Filing # 15 in Case No. 1884-CR-00469) are **DENIED**. A summons will issue directing the Boston Police Department to submit to the Clerk of the Court within 45 days of this Order all Form 26 reports prepared by any officer or other employee of the Boston Police Department between August 1, 2017 and

[14] While the Supreme Judicial Court has said that its analysis of racial discrimination in jury selection "is the same under the Federal Constitution and the Declaration of Rights," Commonwealth v. Long, 419 Mass. 798, 806 (1995), the parties do not cite and this Court has not found any case in which the Supreme Judicial Court has articulated this principle in the context of alleged selective enforcement by police.

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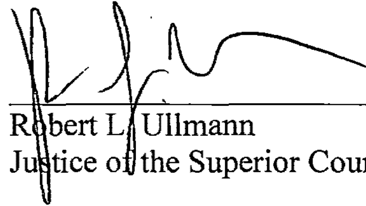
July 31, 2018 that reference the use of Snapchat as an investigative tool in any case in which the subject of Snapchat monitoring has been charged with any offense related to that monitoring. Documents related to human trafficking investigations, sexual assault investigations and murder investigations will not be covered by the summons.



Robert L. Ullmann
Justice of the Superior Court

Dated: January 18, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

- Rule 16(a)(13)(addendum);
- Rule 16(e)(references to the record);
- Rule 16(f)(reproduction of statutes, rules, regulations);
- Rule 16(h)(length of briefs);
- Rule 18 (appendix to the briefs);
- Rule 20 (form and length of briefs, appendices, and other documents); and
- Rule 21 (redaction).

Rule 20 was complied with using 14-Point Times New Roman proportionally spaced font, using Microsoft Office Word 2007. This program verified that there are 10,987 non-excluded words in this brief.

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CERTIFICATE OF SERVICE

Pursuant to Mass. R. A. P. 13(e), I hereby certify, under the penalties of perjury, that on July 2, 2019, I have made service of this Substitute Brief and Substitute Record Appendix, on the behalf of the Appellant, upon the following attorney of record for the Commonwealth, by the Court's electronic filing system:

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