COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11933

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

ANTHONY ROBERTSON,
Defendant-Appellant.

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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II. Whether the prosecutor stayed within the proper bounds of strong advocacy in his closing argument.

III. Whether the judge abused his discretion by declining to question potential jurors about racial bias and determining there was no discriminatory pattern by the Commonwealth's use of peremptory challenges.

IV. Whether the motion to suppress cell site location information was properly denied where the affidavit originally submitted in support of the § 2703(d) order provided the requisite probable cause.

V. Whether testimony that detectives had information about a phone number independent from phone records was inadmissible hearsay.

VI. Whether judge erred in admitting testimony regarding the condition of the apartment in which the defendant was found hiding.

VII. Whether the defendant should be precluded from filing a separate *pro se* brief where his appointed attorney has filed a substantive brief and raised *Moffett* claims.

VIII. Whether the Court should exercise its powers under G.L. c. 278, § 33E.

STATEMENT OF THE CASE

On September 27, 2011, a Suffolk County grand jury returned four indictments charging the defendant, Anthony Robertson, with: murder in violation of G.L. c. 265, § 1; two counts of armed robbery, in violation of G.L. c. 265, § 17; and carrying an unlicensed firearm (RA 1-4, 9).[1]

On August 15, 2013, the defendant filed a motion to suppress cell site location information (RA 13, 47-58). The Honorable Patrick F. Brady, denied the defendant's motion on the second day of trial, February 12, 2014 (RA 16, 65-67).

On February 7, 2014, the defendant filed a motion to exclude in-court identification by percipient eyewitnesses (RA 15, 21). Following a hearing on February 10, 2014, Judge Brady denied the defendant's motion (MTr 84-94).

The defendant's jury trial began on February 11, 2012, with Judge Brady presiding (RA 16). On February 25, 2014, the defendant was convicted of first degree murder based on deliberate premeditation, armed robbery of the victim, Aaron Wornum, and carrying a firearm without a license (RA 18, 22-23, 25; 10:9-10). He

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[1] References to the defendant's brief will be cited as (DBr __); to the defendant's record appendix as (RA __); the defendant's *pro se* brief as (PSBr __); to the motions *in limine* transcript as (MTr __); and to the trial transcript by volume and page number as (__:__).

was acquitted of the armed robbery of Hicks, a percipient witness to the murder (Count 3) (RA 18, 25; 10:10). Later that day Judge Brady sentenced the defendant to the mandatory sentence of life in prison without the possibility of parole for first-degree murder (Count 1), eighteen to twenty years in prison for armed robbery (Count 2), and four to five years in prison for carrying an unlicensed firearm (Count 4), with all the sentences to be served concurrently (RA 18; 10:19-21). On February 27, 2014, the defendant filed a timely notice of appeal (RA 18, 26).

STATEMENT OF FACTS

I. The Commonwealth's Case

A. The Crime

On the night of June 26, 2011, Erik Hicks and Jason Heard were socializing with the victim, Aaron Wornum, at his house (3:253-256; 4:86). After having worked on music for about an hour, the victim told Hicks and Heard that he would drive them to Hicks' house, but that he first had to meet a friend who owed him money (3:255, 259; 4:87).

After leaving his house, the victim drove to the parking lot of a KFC located on Columbia Road (3:259-260; 4:91). The victim got out of the car and spoke to someone on his cellphone (3:260; 4:90, 92). He then got back in the car, drove around the block, and spoke on his phone again trying find the person he was meet-

ing (3:260, 262; 4:92, 96). As he drove down Sumner Street and approached the intersection of East Cottage Street, the victim told the person he was speaking with, "I'm pulling up now; where are you; oh, I see you, there you go" (3:262, 264; 4:96). He then stopped the car, got out,[2] and walked towards two men who were walking onto Sumner Street from East Cottage Street (3:264-465; 4:97). The victim spoke to the men for a few minutes before an argument ensued and the victim began backing up towards his car (3:267-268; 4:102, 104). As the victim was backing up towards the passenger's side of the car, Heard saw that one of the men, later identified as the defendant, had a gun (4:104).[3] As the victim ran around the car to the driver's side, the defendant pointed the gun at Hicks while the second man, later identified as Emmitt Perry,[4,5] took a pack of cigarettes from Hicks' pockets and his two

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[2] Hicks and Heard remained in the car (3:99).

[3] Later, when Hicks exited the car to help the victim, Hicks also saw a gun in the defendant's hand (3:268-269). Hicks described the gunman as a 5'9", light-skinned black male, who was wearing a Bluetooth (3:275). Heard described the gunman as approximately 5'10" tall with a complexion similar to his own, and wearing a Bluetooth (4:114-115)

[4] Emmitt Perry was also charged with the murder and robbery (1284CR10837), but pleaded guilty to manslaughter and robbery prior to trial (Mr 18-19).

[5] Hicks described Perry as being approximately the same height as the gunman, but darker-skinned and having braids (3:276). Heard described Perry as a slim dark-skinned black male with braids (4:116).

cell phones from the front seat of the car (3:269-270). The defendant then pointed the gun at the victim, who said, "Ant, what are you doing" or "it doesn't have to be this way" (3:217).[6] The defendant fired one shot in the direction of the victim, and then ran around the car to the driver's side and fired a "few" more shots at the victim who was already on the ground (3:272-273).[7] The defendant and Perry then fled, running up Sumner Street in the opposite direction of East Cottage Street (3:273-274).

Hicks saw the victim lying face-down on the ground, bleeding (3:274). When he rolled the victim over, he did not see the gold chain and cross the victim habitually wore and was wearing earlier that night (3:296-297). The victim was transported to the hospital where he was pronounced dead (3:220). He had been shot three times: one bullet grazed the back of his neck, while the other two travelled through his right arm into his torso, where one bullet severely damaged his cervical spinal cord and the other struck his right carotid artery (6:189, 195, 204, 208). Both of these wounds were fatal (6:207, 208, 214-215).

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[6] Heard also heard the victim say something to that effect, but did not hear him call the defendant "Ant" (4:107).

[7] Only Hicks witnessed the shooting (3:272). After hearing the victim say something to the defendant, Heard ran from the scene and heard five to six shots before he stopped running (4:109).

B. The Investigation

When officers arrived on scene, they saw Hicks on the ground next to the victim (3:108). Hicks was transported to BPD headquarters, where he briefly spoke with police (3:280; 6:23-24; 7:16).[8] Hicks told detectives that he did not want to be recorded and then gave "very basic information about what had occurred" (7:17, 20). Hicks said the gunman was a black male approximately 5'9" tall, and told police he might be able to recognize the gunman if he saw him again (7:22-23).

Two days later, one June 28, 2011, both Hicks and Heard were interviewed separately by detectives (3:280; 4:114; 7:24, 27). Hicks told detectives that he had not been entirely forthcoming in his first interview, and he proceeded to provide a more detailed account of the events leading up the shooting and of the two men involved. He described the gunman as wearing a Bluetooth and being approximately 5'6" to 5'9" tall, clean-cut, with an athletic build, medium complexion, short hair (7:31), and the gunman's companion as taller than the gunman, with a dark complexion, braids, and a "grizzly beard" (7:32). He also told detectives that before the victim was shot, he said, "Ant, you ain't got to do this" or "Ant, you ain't

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[8] Heard did not speak with police that night (4:108-112).

gonna do me like this" (7:33-34). Heard described the gunman as being about 5'10", 160 to 165 pounds, with a medium complexion, and wearing a Bluetooth earpiece (7:39-40). He gave a more "generic" description of the gunman's companion, stating that he was taller and darker skinned than the gunman (7:40).

On July 2, 2011, Hicks looked at two sets of photo arrays (3:283-285; 6:64-65; 7:43). The first array included Perry's picture (7:42-73; Exh. 4). Hicks did not identify anyone from this array (3:283). The second array included a picture of the defendant (7;42-43; Exh. 5). Hicks picked the defendant's picture out of the array to the exclusion of all others and stated it was a "strong possibility" and "good possibility" that this was the gunman (RA 30; 3:284-285; Exh. 6).[9] At trial, over the defendant's objection, Hicks identified the defendant (3:276; 4:74-75).

On July 18, 2011, before Heard testified in the grand jury, he was shown two sets of photo arrays, one containing the defendant's picture and the other containing Perry's picture (7:44-45). Heard selected the defendant's picture to the exclusion of all others in first array stating, "this could be the suspect possibly. . . . that's the only - that's probably the face

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[9] An audio recording of Hicks' viewing of the photo arrays was played for the jury and admitted in evidence (3:293; Exh. 6).

so far that has brought up, you know, any remembrance at that moment" (RA 35-36; 4:118; Exh. 11). Heard did not select Perry's picture from the second photo array; rather, he selected the picture of a person unrelated to the investigation (RA 36-38; 7:71-72). At the conclusion of these photo arrays, Heard stated, "there was that first one that I looked at from the - from the first set, the actual first first picture that I somewhat maybe I felt like probably resembled the guy but then I got to the other one and I kind of felt stronger about that one, to be honest with you. . . . I feel like that - that, uh . . . that - that one that I signed on kind of - kind of fit the description for me personally" (RA 39; Exh. 11).[10] At trial, Heard identified the defendant on direct examination woutout objection (4:118-119, 148).[11]

During the investigation, detectives learned that Tinea Jones, who had a child with Perry, lived near the corner of Sumner Street and Stoughton Street (3:159, 160). Jones had known the defendant since he was eight years old and stated he went by the nickname "Ant" (3:161-162). On the night of the murder, Jones hosted a barbeque that the defendant and Perry had at-

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[10] An audio recording of Heard's viewing of the photo arrays was played for the jury and admitted in evidence (4:118; Exh. 11).

[11] The defendant only objected to Heard's in-court identification on re-direct examination (4:148).

tended (3:166). She told detectives that the defendant and Perry left at some point during the barbeque for 20-30 minutes, and that when they returned, the defendant looked scared and paranoid and took a shower before looking for a ride away from the area (3:167-168, 172-173, 175-176). She called her friend, Sharleen Cirino, who picked the defendant up from Jones' house and gave him a ride to the Roxbury Crossing MBTA station (3:176; 5:85).

Detectives also learned from Stacey Pressey, Perry's girlfriend, that in June 2011 the defendant's phone number was either 857-237-4076 or 857-247-4076 (5:46). At trial, Pressey testified that in June 2011 she frequently called and received calls from the defendant on her cellphone and she agreed that her phone records for June 2011 showed approximately 90 entries between her phone and the 857-237-4076 number (5:45, 52-55). She stated that at the beginning of July in 2011 the defendant changed his phone number and told her he did so because he thought his phone was being "tapped" (5:59). Pressey also stated that she had seen the defendant wearing a Bluetooth device once just before he was arrest (5:48).

Julia Perez, who had known the defendant for approximately a year, said that the defendant went by the nicknames "Ant" or "Animal" (5:113-114, 124). She told detectives that in July 2011 the defendant sold

his cellphone to her and that she had deleted a picture of the defendant wearing a Bluetooth from the phone after the defendant's aunt told her the police might be looking for the phone (5:116-118, 120, 127-128; 8:20; Exh. 115).[12]

The victim's cellphone records showed a series of calls between the victim's number and the 857-237-4076 number in the minutes immediately preceding the murder (4:174, 192-193; 7:102; Exh. 19), with outgoing calls to that number at 9:07:08PM and 9:13:16PM, and two incoming calls from that number, one lasting 8 seconds and the other lasting 46 seconds 9:16:08PM, (4:192-193).[13] The cell site location information (CSLI) for the 857-237-4076 number showed that at the time of the murder, the phone was hitting off a single cell tower that was located approximately a half mile from the of the scene of the murder and a quarter of a mile from Jones house (7:115-116, 119-120). The CSLI also showed

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[12] Perez testified to this effect in the grand jury, but at trial denied deleting a picture of the defendant wearing the Bluetooth before providing the phone to the detectives (5:139-142). The judge found that Perez was feigning memory loss and admitted her grand jury testimony substantively on this discrete issue (8:20; Exh. 115).

[13] Detectives were unable to extract information from the victim's cellphone until early February 2014 when new software became available to conduct the extraction (7:89, 176). The victim's phone log showed an incoming call at 9:16PM on June 26, 2011, from 857-237-4076 with the contact name as "L'il Ant From The Ave" (7:183).

the phone hitting off that same cell tower until approximately 11:30PM, and for the next two hours, the phone traveled up the north shore, hitting off cell towers at North Station, Charlestown, Saugus, Wakefield, Andover, Lawrence, and Haverhill, where it remained until July 1, 2011 (7:115-116, 119-120).

After executing a search warrant on Perry's phone, detectives extracted a picture of a gold chain. The picture was time stamped as being created or modified on June 27, 2011 - the day after the murder (7:184-187, 189-190; Exh. 110). The picture was later shown to the victim's mother who "jumped back out of her chair" and was "shocked" after seeing it (7:124).

II. The Defendant's Case

The defendant employed a misidentification and *Bowden* defense at trial, arguing that the Commonwealth could not prove beyond a reasonable doubt that the defendant was the person who shot the victim because the eyewitness identifications were unreliable and that the police failed to follow best practices throughout their investigation (3:70-71, 73-74; 8:23-33, 34-35, 38-39, 42, 55-56, 61, 64).

SUMMARY OF THE ARGUMENT

I. The in-court identification evidence was properly admitted where the rule announced in *Collins* does not apply, and in any event, the defendant was not preju-

diced by its admission where there was strong circumstantial evidence of his guilt (13-23).

II. The prosecutor properly stayed within the proper bounds of strong advocacy when he stated that Hicks identified the defendant from a photo array (23-27).

III. The judge did not abuse his discretion by declining to voir dire potential jurors about racial bias or by finding there was no discriminatory pattern in the Commonwealth's peremptory challenges (27-36).

IV. The defendant's motion to suppress CSLI was properly denied where he failed to assert a reasonable expectation of privacy in the phone for which the CSLI records were obtained and where the affidavit originally submitted in support of the § 2703(d) order established the requisite probable cause (36-47).

V. The detective's statement that he had other information about the 857-237-4076 number from Boston police officers was not hearsay, and in any event was cumulative of other evidence connecting the defendant to that phone number (47-50).

VI. Det. Bowden's testimony regarding the condition of the apartment in which the defendant was found hiding was probative and relevant to the defendant's consciousness of guilt (50-53).

VII. Because appellate counsel has filed a brief asserting both substantive claims of error and claims pursuant to *Moffett*, this Court should preclude the

defendant from filing a *pro se* brief that asserts addition appellate issues, and where this Court reviews the case pursuant to G.L. c. 278, § 33E (53-56).

VIII. Relief under G.L. c. 278, § 33E should be denied because the verdict are amply supported by the evidence and consonant with justice (56-57).

ARGUMENT

I. THE IN-COURT IDENTIFICATION EVIDENCE WAS PROPERLY ADMITTED WHERE THE RULE ANNOUNCED IN *COLLINS* DOES NOT APPLY, AND IN ANY EVENT, THE IDENTIFICATIONS WERE PROPER, AND THE DEFENDANT WAS NOT PREJUDICED BY ANY ALLEGED ERROR WHERE THERE WAS STRONG CIRCUMSTANTIAL EVIDENCE OF THE DEFENDANT'S GUILT.

There is no merit to the defendant's argument that the in-court identifications of the defendant by Hicks and Heard were improper under the rule in *Commonwealth v. Collins*, 470 Mass. 225 (2014).

First, as the defendant concedes (DBr 21), the rule announced in *Collins* is explicitly prospective and does not apply to this case, tried in February 2014 and before *Collins* was issued in December 2014. *See Collins*, 470 Mass. at 265 ("[T]his new rule shall apply prospectively to trials that commence after the issuance of this opinion . . . ."). "Because the defendant's trial took place before the issuance of . . . *Collins*, . . . [this Court] evaluate[s] the alleged errors under the existing law at the time of

trial." *Commonwealth v. Bastaldo*, 472 Mass. 16, 31 (2015).[14]

Therefore, this Court should consider whether the in-court identifications complained of were properly admitted pursuant to case law that existed prior to *Collins*.[15] At the time of the defendant's trial, "an in-court identification was excluded primarily if, in

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[14] There is no merit to the defendant's claim that he should nevertheless receive the benefit of the prospective rule in *Collins* because he moved *in limine* to exclude the in-court identifications and objected to Hicks' in-court identification on direct examination and to Heard's in-court identification on re-direct examination (DBr 21-23) (RA 21; MTr 84-91; 3:276; 4:74-75, 148-149). Notably, however, "the successful request for a new rule . . . standing alone, is insufficient to merit a retroactive application." *Commonwealth v. Russell*, 470 Mass. 464, 479 (2015). Although in some circumstances this Court has given a defendant the benefit of a prospective rule, *see Commonwealth v. Pring-Wilson*, 448 Mass. 718 (2007), such occurs only in the rare circumstances where "the integrity of the defendant's trial was compromised" and fairness dictates a new trial. *See Commonwealth v. Brescia*, 471 Mass. 381, 390 (2015). As discussed *infra*, nothing on this record calls into question the integrity or fairness of the proceeding.

[15] Even were *Collins* to apply to this case, the Court should rule that the in-court identifications made by Hicks and Heard were admissible where Hicks and Heard had interlocking identifications, thus making them unequivocal. Moreover, in circumstances such as here, where the witnesses were asked to identify someone who was still at large, armed, and had callously murdered their friend right in front of them, the selection of a suspect's picture from an array, should render that witness's in-court identification admissible post-*Collins*. Indeed, Judge Brady noted Hicks' identification "didn't seem like a bad I.D. for an event like that" (5:5).

the totality of the circumstances, it was tainted by an out-of-court confrontation . . . that [was] so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Commonwealth v. Bonnett*, 472 Mass. 827, 836 (2015)(internal quotations and citations omitted)(omission and alteration in original). Additionally, "in some circumstances an identification that has been tainted, but not by the government, may become so unreliable that its introduction into evidence is unfair." *Commonwealth v. Odware*, 429 Mass. 231, 236 (1999). Here, defendant has not shown that either Hicks' or Heard's in-court identification was admitted in error.

As an initial matter, the defendant never filed a motion to suppress the identifications, and during the hearing on his motion *in limine* to exclude the in-court identifications, defense counsel candidly agreed that the photo array identification procedures were not suggestive, stating: "I didn't challenge it. They did it right. They did it right" (MTr 89). Similarly on appeal, the defendant does not suggest that Hicks' pretrial identification procedure was unduly suggestive.[16] Accordingly, Hicks' in-court identification of

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[16] Indeed, Det. MacDonald testified that BPD conducts blind photo arrays and that when he showed Hicks the photo array, he had no knowledge about the case

the defendant was properly admitted under the then-existing case law.

Now, for the first time on appeal, the defendant argues that Heard's out-of-court identification procedure was suggestive because Heard testified on cross-examination that he looked at a set of photographs before he was shown an array at the Suffolk Superior Courthouse on July 18, 2011 (DBr 27-29) (4:140-142). Prior to *Collins*, an in-court identification was only excluded if it was tainted, whether by an unduly suggestive out-of-court confrontation or by some other circumstance violative of common law principles of fairness. *See Commonwealth v. Choeurn*, 446 Mass. 510, 520 (2006). Here, the defendant cannot meet his burden in establishing that the out-of-court identification procedure was impermissibly suggestive. *See Bastaldo*, 472 Mass. at 32 ("defendant's burden to prove by a preponderance of the evidence that any out-of-court confrontation with the victim was so impermissibly suggestive as to create a substantial likelihood of irreparable misidentification").

First, Det. Cummings explicitly testified that Heard was only shown the photo array at the courthouse *before* he testified in the grand jury on July 18, 2011, and that that no members of the BPD Homicide

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and only showed Hicks one photograph at a time (4:64, 66-67).

Unit showed Heard pictures prior to that date (7:44-45). Second, review of Heard's testimony reveals that he was confused about which day he was shown the photo array and was equivocal about whether he had actually seen photos before being shown the array (4:140-145). Heard testified that he thought he and Hicks had looked at a photo array on the same date, but that he "didn't necessarily remember the date" (4:140). When pressed by defense counsel on whether he looked at the photo array twice, Heard responded, "[w]henever the date is they presented it to me" (4:140); and when defense counsel asked whether he had picked out a picture from the array on July 18 in the grand jury, Heard responded, "[n]o, that's incorrect. It was presented to them, the photos that I had picked out, from the initial time of being in the headquarters or C-11 . . . but it wasn't at the Grand Jury in which this is the one that I -- I write my name on" (4:141). When defense counsel attempted to clarify that Heard had not looked at a photo array on July 18, Heard equivocated, "I mean, like I saw the pictures before that, I believe" (4:141-142). Heard continued to evince confusion throughout his responses to defense counsel's questions: one time answering that he had looked at photos before the photo array (4:142), while another time responding that he had never looked at photos of suspects before the array (4:144). Accordingly, where

Det. Cummings testified unequivocally that Heard was never shown photos before the photo array prior to his grand jury testimony, and it is unclear from Heard's own testimony whether he viewed photos before that photo array procedure, the defendant has failed to establish that Heard viewed an array prior to the array at the time of his grand jury testimony, much less that any pretrial identification was unduly suggestive. Moreover, where the defendant took full advantage of the "ample opportunity to expose the jury to any factors tending to discredit [Heard's]" in-court identification (4:139-146), this Court should not conclude that the identification was "so unreliable that [it] should not have been admitted as substantive evidence." *Commonwealth v. Fitzgerald*, 376 Mass. 402, 409-410 (1978). "Rather, the assessment of the reliability of the [identification] in these circumstances was for the jury." *Id.* at 410.

Even were this Court to conclude that Heard's in-court identification was admitted in error under the then-existing case law, or that the rule announced in *Collins* should be applied to this case, neither Hick's nor Heard's in-court identifications merit reversal, regardless whether analyzed for prejudicial error or for substantial likelihood of a miscarriage of justice.

There was strong circumstantial evidence of the defendant's guilt without the in-court identifications of the defendant by Hicks and Heard.[17] Hicks heard the victim call the shooter "Ant" before the shooting (3:271). Jones, who had known the defendant since he was eight years old, testified that one of the defendant's nicknames was "Ant," and Perez testified similarly (3:160-162; 5:124). The contact name for the phone number 857-237-4076, attributed to the defendant in the victim's phone contacts as "L'il Ant from the Ave" (7:183) was also known to be associated with the defendant by Pressey.[18] Both the victim's and the defendant's phone records showed contact between the two phones in the minutes immediately preceding the murder (Tr 4:192-193; Exh. 19 & 20).[19] The victim's call log also showed an outgoing call to "L'il Ant from the Ave" at 9:13PM, and an incoming call from "L'il Ant from the Ave" at 9:16PM (Tr 7:183, 190). That there was contact between the victim and the defendant in

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[17] Indeed, the prosecutor highlighted this evidence in his closing and argued that even if the jury did not credit Hicks' and Heard's testimony about the identification, there was more than sufficient evidence to find the defendant guilty (8:71-101).

[18] Pressey testified that the 857-237-4076 number was the defendant's (Tr 5:46).

[19] The records showed calls between the phones at 9:07PM, 9:13PM, and 9:16PM (Tr 4:192-193; Exh. 19 & 20). First responders were notified to respond to East Cottage and Sumner streets at approximately 9:20PM (Tr 3:205, 223; 4:217; 5:29-30).

the minutes before the murder was corroborated by Hicks' and Heard's testimony that the victim was on the phone and appeared to be attempting to meet up with someone just before the murder (Tr 3:260, 262-264; 4:90-92). Further corroborating such contact was Heard's testimony that the victim was on the phone as they drove down Sumner Street and said, "I'm pulling up now; where are you; oh I see you, there you go," before stopping the car and getting out to speak with two men (Tr 4:96).

The jury was also able to compare the descriptions of the shooter provided by Hicks (approximately 5'6" to 5'9" with an athletic build, medium complexion, short hair, and clean-cut) and Heard (medium complexion, about 5'10", and 160 to 165 pounds) (7:31, 39-40) with the appearance of the defendant as he sat in the courtroom to assess whether the defendant matched that description.

Similarly, the jury was free to consider that both Hicks and Heard described the shooter as wearing a Bluetooth device (3:275; 4:114-115) with the fact that Pressey had seen the defendant wearing a Bluetooth around the time he was arrested (4:47-49), and Perez's telling detectives that she had deleted a picture of the defendant wearing a Bluetooth device from the phone that she had bought from the defendant after

his aunt told her the police might be looking for the phone (5:117-118, 120, 127-128; 8:20; Exh. 115).

Further powerfully probative evidence of the defendant's guilt was CSLI showing that at the time of the murder, the defendant's cell phone was hitting off a cell tower located approximately a half mile from the scene (7:119-120).[20] Meshing with this evidence was Jones testimony that both the defendant and Perry had left her house at 92 Sumner Street for approximately 20 to 30 minutes that night, and when the defendant returned, he took a shower, was acting paranoid, and looking for a ride to leave the area (3:166-168, 172, 175-176).

Further incriminating the defendant was Hicks' testimony that when he rolled the victim over after the shooting, the gold chain necklace and crucifix the victim habitually wore, and had been wearing that night, was gone (III:296-297). After the defendant's companion, Perry, was arrested, police executed a search warrant on his phone and discovered a picture of the victim's gold chain that was time stamped as being created or modified on June 27, 2011 - the day after the murder (7:184-187, 189-190; Exh. 110).

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[20] The closest cell tower was a half mile from the scene of the murder and a quarter of a mile from Jones' house at 92 Sumner Street (Tr 7:115-116).

The defendant also exhibited consciousness of guilt in the immediate aftermath, and days following the murder. *See Commonwealth v. Booker*, 386 Mass. 466, 470 (1982). At the beginning of July the defendant changed his phone number and told Pressey that he had changed it because he thought his phone was being tapped (5:55-56, 59). Moreover, in early July Perez saw the defendant looking at a story about the victim's murder on the BPD website (5:142-143). Finally, when the police came to arrest the defendant, he was found hiding in a closet under a large pile of soiled clothes (6:156).

Finally, the defendant had a full opportunity to cross-examine Hicks and Heard regarding the accuracy of their identifications of the defendant as the shooter (3:329-330, 337, 344, 351; 4:9, 11, 16-23, 140-147). The cross-examination of Hicks and Heard allowed the defendant to draw out and emphasize any issues with the identifications. *See Commonwealth v. Hamilton,* 411 Mass. 313, 320 (1991) (no violation of constitutional rights where defendant had opportunity to cross-examine police officer regarding inconsistent testimony.)

In sum, no prejudice arises from Hicks' and Heard's in-court or out-of-court identifications of the defendant as the shooter because their identifications were entirely proper, defense counsel challenged

the accuracy of those identifications before the jury, and, in any event, the evidence establishing the defendant's guilt was overwhelming.

II. THE PROSECUTOR STAYED WITHIN THE BOUNDS OF PROPER ADVOCACY WHEN HE RECOUNTED THE EVIDENCE AGAINST THE DEFENDANT IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH AND STATED THAT HICKS IDENTIFIED THE DEFENDANT DURING A PRETRIAL PHOTO ARRAY.

The defendant claims that reversal is required because the prosecutor misstated the evidence in maintaining that Hicks identified the defendant from the pretrial photo array (DBr 30-33). Specifically, in his closing argument, the prosecutor stated:

> Listen to those arrays over and over. And I suggest to you that the way Erik Hicks studied that picture, there's a pause for about a minute. The way he studied that picture, you bet he recognized that person as the one who had the gun, the one he focused on
>
> ***
>
> Listen to that. That is called a positive ID, ladies and gentlemen. And it's also called, you know what else? An honest ID, because he said, "I'm not going to lie to you. It was quick, it was dark, we were under a tree."
>
> But Erik Hicks says, "My memory is good and there's something about this picture there's something about this guy." That's an identification. That's what Erik Hicks said on the witness stand (8:113-114).

The prosecutor reiterated this argument later in his summation stating, "Erik Hicks identifies him from a photo array and in-court as the actual person who had the gun" (8:118). Because the defendant did not object

to these statements at trial, this Court's review is limited to whether the statement created a substantial likelihood of a miscarriage of justice. *Commonwealth v. Jenkins*, 458 Mass. 791, 796 (2011).[21] Here, there is no such likelihood because the prosecutor's argument was properly rooted in the evidence.

When considering the propriety of a prosecutor's closing argument, the Court must consider the allegedly improper remarks in the context of the entire argument, the judge's instructions to the jury, and the evidence at trial. *Commonwealth v. Kirker*, 441 Mass. 226, 231 (2004). "[E]nthusiastic rhetoric, strong advocacy, and excusable hyperbole [are] not grounds for reversal." *Commonwealth v. Tran*, 460 Mass. 535, 554 (2011). "A prosecutor is entitled to argue the evidence and fair inferences to be drawn therefrom," *Commonwealth v. Deane*, 458 Mass. 43, 55-56 (2010), and may "argue forcefully for the defendant's conviction." *Commonwealth v. Ruiz*, 442 Mass. 826, 835 (2004) (internal quotation marks omitted). Jurors are presumed

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[21] Because no substantial likelihood of a miscarriage of justice arises from the prosecutor's closing argument, the defendant's claim of ineffective assistance of counsel for failing to object to the closing argument likewise fails (DBr 30). "This claim is reviewed under the substantial likelihood of a miscarriage of justice standard, which is more favorable to the defendant than the standard for ineffective assistance of counsel in other types of cases." *Commonwealth v. Diaz*, 478 Mass. 481, 487 n. 8 (2017) (citations omitted).

"to have a certain measure of sophistication in sorting out excessive claims on both sides." *Commonwealth v. Wilson*, 427 Mass. 336, 350 (1998).

While acknowledging the potential weaknesses in Hicks' extrajudicial identification, the prosecutor properly argued to the jury that Hicks identified the defendant. Hicks positively identified the defendant from a photographic array where he selected one photograph to the exclusion of others and stated that there was a "strong possibility" and a "good possibility" that he was gunman (3:284, RA 30-31; Exh. 5 & 6). *Cf. Commonwealth v. Collins*, 470 Mass. 255, 260 (2014) (identification equivocal because eyewitness initially said "no" after viewing each photo and expressed inability to choose between "one of two [photographs] that looked like" the perpetrator). Hicks also testified that he was able to get a better look at the gunman than the other assailant and had concentrated on him because he was holding a gun (3:275; 4:21-22, 54-55, 58). The recording of the photo array and Hicks' identification of the defendant was in evidence, and the prosecutor urged the jury to listen carefully when weighing Hicks' extrajudicial identification (3:293-294; 8:113-114; RA 31; Exh. 6).

In this posture, the prosecutor properly and fairly argued that Hicks identified the defendant from the array and that the jury should credit this identi-

fication. *See Commonwealth v. Morgan*, 449 Mass. 343, 360 (2007) (Commonwealth may "argue inferences from the evidence favorable to [its] case"); *accord Commonwealth v. Watkins*, 63 Mass. App. Ct. 69, 74 (2005) ("The Supreme Judicial Court . . . has not precluded witness testimony regarding certainty [of an identification], or prohibited counsel from probing the subject or *arguing about it*.") (emphasis added).[22]

Here, defense counsel cross-examined Hicks at length about his identification, and he argued in his closing that Hicks could not be sure of the perpetrator's identity (3:329-330, 344, 351; 4:9, 16-23; 8:31-33, 34-35). "It was then for the jury to determine the weight to give to the identification, including any statements of certainty or uncertainty." *Commonwealth v. Cruz*, 445 Mass. 589, 596 (2005); *see also Commonwealth v. Cowans*, 52 Mass. App. Ct. 811, 814 (2001) ("significance [that] should be given to the level of confidence exhibited by a witness is . . . for the jury to determine, not the court. Counsel is free to argue that the testimony of any witness should or should

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[22] The defendant's reliance on *Commonwealth v. Seminara*, 20 Mass. App. Ct. 789, 795-798 (1985), as support for his claim that the prosecutor's argument was improper is entirely misplaced. Here, unlike in *Seminara*, 20 Mass. App. Ct. at 795-796, evidence of Hicks' extrajudicial identification was properly in evidence, and as appropriate fodder for argument by both parties.

not be credited."); *Commonwealth v. Cincotta*, 6 Mass. App. Ct. 812, 817 (any weaknesses in an identification not of constitutional dimension are matters of weight for jury), aff'd, 379 Mass. 391 (1979).

Moreover, any possible risk of prejudice was mitigated by the trial judge's instructions. The judge instructed that closing arguments are not evidence (8:190-191), that the jury were the sole adjudicators of the facts and that their recollection controls (8:186). The judge's comprehensive instructions on factors the jury should consider when weighing the reliability of an eyewitness identification further allayed any risk of prejudice (8:214-218, 226-227). *See Commonwealth v. Viriyahiranpaibon*, 412 Mass. 224, 232 (1992).

Finally, as discussed *supra* I, even absent evidence of, or argument about, Hicks' and Heard's identifications, the case against the defendant was exceptionally strong. *Commonwealth v. Rock*, 429 Mass. 609, 616 (1999) (strength of case factor to consider when determine whether alleged error prejudiced defendant).

III. THE JUDGE DID NOT ABUSE HIS DISCRETION BOTH IN DECLINING TO VOIR DIRE POTENTIAL JURORS ABOUT RACIAL BIAS WHERE RACE WAS NOT AN ISSUE IN THE CASE AS WELL AS FINDING THERE WAS NO DISCRIMINATORY PATTERN IN THE COMMONWEALTH'S USE OF PEREMPTORY CHALLENGES.

The defendant's claim that the judge abused his discretion by declining to voir dire potential jurors

about racial bias is meritless where the victim and the defendant were the same race, and race was not an issue in the case (DBr 33-35, 37-38).[23]

"'The scope of voir dire rests in the sound discretion of the trial judge, and a determination by the judge that a jury are impartial will not be overturned on appeal in the absence of a clear showing of abuse of discretion or that the finding was clearly erroneous.'" *Commonwealth v. Lao*, 443 Mass. 770, 776-777 (2005) (quoting *Commonwealth* v. *Lopes*, 440 Mass. 731, 736 (2004)) ("'A trial judge, who is aware of the facts of a particular case and can observe firsthand the demeanor of each prospective juror, is in the best position to determine what questions are necessary reasonably to ensure that a particular jury can weigh and view the evidence impartially.'").

There is no requirement that the judge go beyond the questions mandated in G.L. c. 234, § 28, unless "there exists a substantial risk of extraneous issues that might influence the jury." *Id.* at 777. This court

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[23] The defendant requested the following voir dire question: "The defendant in the case is African-American. Does the fact that the defendant is black affect your ability to completely be fair and impartial?" (MTr 31). In denying the defendant's request, the judge noted that while it's "a perfectly legit question in a case where race is an issue in the case, or if it's a let's say, a white victim and a black - or a vice versa I suppose . . . but I don't see how that applies to this case" (1:5-6, 10-11).

has concluded that only "cases involving interracial murder, interracial rape, and sexual offenses against children where the victim and the defendant are of different races present, as a matter of law, a substantial risk that extraneous issues will likely influence prospective jurors, and in such cases, individual questioning with respect to racial prejudice, on request, is mandatory." *Lopes*, 440 Mass. at 737.

Here, the judge was well within his discretion when he ruled that such a voir dire question was unnecessary because the victim, the defendant, and the percipient witnesses were the same race (1:5-6).[24] Indeed, such a question could have instead risked infusing the case with the issue of racial prejudice where there was none. *See Commonwealth v. Ramirez*, 407 Mass. 553, 555 (1990)(noting that a voir dire "concerning juror racial or ethnic bias undoubtedly raises difficult issues of jury psychology with a potential for counter-productivity"). Moreover, while defense counsel made a one-off comment in his closing that the po-

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[24] Hicks appeared to be half African-American and half Caucasian (3:9), and therefore upon the defendant's request, the judge gave a cross-racial identification instruction (8:216). Although he requested this instruction, defense counsel did not use the defendant's race as a method of attacking the reliability of Hicks' identification of the defendant. Instead he argued that each witness gave a generic description of the defendant, and that each witness was unable to get a good look at the defendant because the incident occurred quickly while it was dark (8:23-24, 31-35).

lice should have recorded witness interviews, "especially when you're trying to charge a young black man with no description except for five nine and black"[25] (8:58-59) - defense counsel did not suggest the police failings in their investigation was motivated by the defendant's race (8:25, 42, 49-50, 55-56, 61, 64). Simply put, the defendant has not shown that his trial was infected with racial undertones - explicit or implicit. Thus, there is no error, much less reversible error, in a trial judge's decision not to voir dire potential jurors regarding racial bias where the defendant has failed to show how a lack of such a voir dire prejudiced his case. *Commonwealth v. Otsuki*, 411 Mass. 218, 229 (1991).

The defendant also cursorily argues that the judge abused his discretion by not requiring a race neutral reason for the Commonwealth's peremptory challenge of jurors 135 and 180 when the defendant lodged an objection (DBr 35-36).[26] Because the judge did not

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[25] Defense counsel also urged the jury to have empathy for the defendant, stating, "you have to think that you are black in this case, you white people on the jury" (8:59). This was an entirely inappropriate injection of race into this case, and an improper and misguided attempt to bias the jury and appeal to emotion and sympathy. This Court should specifically condone this conduct in no uncertain terms. *See* R. PROF. CONDUCT 3.8(e)(1) & (i).

[26] At trial the defendant objected to the Commonwealth's use of peremptory challenges to jurors 135, 180, and 19 (1:181-186, 302-322; 2:91-96). The judge declined to find a pattern at the time each challenge

abuse his discretion in finding no prima facie case of a discriminatory pattern at the time of either challenge, he did not err by overruling the defendant's objection

"There is a presumption that the exercise of a peremptory challenge is proper. That presumption may be rebutted, however, if [the objecting party shows] that (1) there is pattern of excluding members of a discrete group; and (2) it is likely that individuals are being excluded solely because of their membership in this group." *Commonwealth v. Benoit*, 452 Mass. 212, 218 (2008). "The issue on appeal . . . is not whether the judge was permitted to find that the presumption had been rebutted, but whether he was required to have so found." *Commonwealth v. Issa*, 466 Mass. 1, 10 (2013). Because "[a] trial judge is in the best position to decide if a peremptory challenge appears improper and requires an explanation by the party exercising it," *Commonwealth v. LeClair*, 429 Mass. 313, 321 (1999), this Court "grant[s] deference to a

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was made (1:181-186, 302-322; 2:91-96). It appears from the defendant's brief that he only takes issue with the judge's failure to find a pattern at the time of the Commonwealth's peremptory challenge to jurors 135 and 180, both of whom the defendant classifies as black males or "persons of color" (DBr 35-36) (RA 41; 1:183, 310-313). From the record, it appears that juror 19 was a Hispanic female who was of Dominican descent (RA 43; 2:96). The prosecutor did note that "[h]er skin color is dark" (2:96).

judge's ruling on whether a permissible ground for the peremptory challenge has been shown and will not disturb it so long as it is supported by the record." *Commonwealth v. Rodriguez*, 431 Mass. 804, 811 (2000). This Court will look to the totality of the circumstances to determine whether the trial judge abused his discretion in finding that the defendant failed to rebut the presumption. *Commonwealth v. Scott*, 463 Mass. 561, 571 (2012).[27]

At the time the defendant lodged his first *Soares*[28] objection to the Commonwealth's challenge of juror 135 -- the first black male in the venire (1:183-184) -- the Commonwealth had (1) used a peremptory challenge to strike only a single juror (No. 102): an Indian male who had emigrated from India seven years previously (1:75-79); and (2) had announced itself content with the six seated jurors (Nos. 103, 105,

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[27] Some factors to consider in determining whether the objecting party has met the prima facie showing requirement are: (1) "the number and percentage of group members who have been excluded"; (2) "the possibility of an objective group-neutral explanation for the strike or strikes"; (3) "any similarities between excluded jurors and those, not members of the allegedly targeted group, who have been struck"; (4) "differences among the various members of the allegedly targeted group who were struck"; (5) "whether those excluded are members of the same protected group as the defendant or the victim"; and (6) "the composition of the jurors already seated." *Commonwealth v. Jones*, 477 Mass. 307, 322 (2017).

[28] *See Commonwealth v. Soares*, 377 Mass. 461 (1979).

106, 112, 116,, 120), two of whom were black females (RA 41). At that point, the Commonwealth had yet to exercise a peremptory challenge on any prospective black juror -- male or female.[29] At that point, the judge also noted, "that in [his] general overview of the jury, there are quite a few people of color. I didn't fine tune my observations . . . but I would be very surprised if he were the only black male that comes before the court" (1:184-185).[30] Accordingly, the judge acted well within his discretion finding that the defendant had not made a prima facie showing of discrimination (1:184; 186).

The defendant next objected to the prosecutor's challenge of juror 180 -- a Dominican male -- and argued that the Commonwealth was challenging the juror on the basis of his "color," and that his "client has no one of his color on this jury" (1:310-311, 312).

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[29] Prior to the Commonwealth's challenge, five prospective black jurors (all of whom were female) had come before the Court (RA 41). Three were struck for cause and the other two were sat as jurors without challenge (RA 41).

[30] Indeed, at that time, there remained eleven black prospective jurors in the venire, three of whom were males (Nos. 164, 176, 186). While the use of just one challenge where the venire contains few members of the group entitles the judge in their "broad discretion to require an explanation without having to make the determination that a pattern of improper exclusion exists," *see Commonwealth v. Garrey*, 436 Mass. 422, 429 (2002), the judge is not required to request an explanation such circumstances. *See id.*

First, the judge found that juror 180 was not black, but rather Hispanic (1:311). The judge stated, "he's certainly Hispanic. He's from the Dominican. Now, some Hispanics are black to be sure, and some are not" (1:312). Here, the judge correctly rejected the defendant's assertion that juror 180, whom the prosecutor and judge considered as Hispanic, and who was lighter skinned than the defendant, constituted a "person of color" and therefore should be considered within the same discrete aggregate group. "Although '[t]here is no dispute that Hispanic persons [like African-Americans] are members of a racial or ethnic group protected under art. 1 of the Declaration of Rights,' we are not aware of any authority requiring a trial judge to combine challenges to members of discrete racial or ethnic groups into one 'catch all' category." *Commonwealth v. Sanchez*, 79 Mass. App. Ct. 189, 193 (2011)(finding judge did not abuse his discretion in refusing to consider the prosecutor's challenge of the juror believed to be Hispanic in determining whether the defendant had established a pattern of improper exclusion based on race)(quoting *Commonwealth v. Rodriguez*, 457 Mass. 461, 467 n.15 (2010)). *Accord Gray v. Brady*, 592 F.3d 296, 306 (1st Cir. 2010) (rejecting claim that "minorities" constitute a cognizable group under *Batson v. Kentucky*, 476 U.S. 79 (1976), and expressing "serious" doubt whether classes

such as "minorities" or "non-whites" possess "the definable quality, common thread of attitudes or experiences, or community of interests essential to recognition as a 'group'").

The judge then went further and noted that, even if juror 180 could be classified as a "person of color" or black, no pattern had been established because this was the "second person of color the Commonwealth ha[d] challenged" and noted that two of the nine seated jurors were black (Tr. I:313, 316). *See Issa*, 466 Mass. at 10-11 (seated juror of same race as challenged person suggests no bias on part of prosecution). Indeed, the record reflects that at that time, the prosecutor had challenged six potential jurors (Nos. 102, 135, 140, 152, 167, 177), only one of whom was a black male (No. 135) (RA 41).[31]

Moreover, although the prosecutor was not required to do so, he proffered two race-neutral reasons for challenging juror 180: (1) the juror had entries on his board of probation record that he initially failed to disclose on the juror form; and (2) "he didn't seem like the most intelligent guy. He's like a nice enough guy but he didn't seem all that intelligent" (1:314-315). *See Commonwealth v. Herbert*, 421

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[31] At that time, nine prospective black jurors had already come before the Court (six of whom were female and three of whom were male). The Commonwealth had only challenged one of those prospective jurors (RA 41).

Mass. 307, 315 (1995)("A juror's demeanor and reactions during the voir dire may constitute a sufficient basis for peremptory removal."). This reason not only refutes any claim of a pattern, but provided an adequate and genuine explanation for the challenge that the judge implicitly credited. *Cf. Jones*, 477 Mass. at 324 ("beyond purely numerical considerations," finding possibility juror struck because of race heightened by "the fact that the record reveal[ed] no race-neutral reason that might have justified the strike"). In these circumstances, the judge did not abuse his discretion in concluding that there was no pattern.

IV. THE DEFENDANT'S MOTION TO SUPPRESS THE CSLI WAS PROPERLY DENIED WHERE HE FAILED TO ASSERT A REASONABLE EXPECTATION OF PRIVACY IN THE PHONE FOR WHICH THE CSLI RECORDS WERE OBTAINED, AND IN ANY EVENT, THE AFFIDAVIT ORIGINALLY SUBMITTED IN SUPPORT OF THE § 2703(D) ORDER ESTABLISHED THE REQUISITE PROBABLE CAUSE.

Next, the defendant claims his motion to suppress cell site location information (CSLI) was improperly denied because the CSLI records for the phone number 857-237-4076 were obtained without a showing of probable cause (DBr 39-43). The defendant's claim fails because he never asserted a reasonable expectation of privacy in the cell phone for which the CSLI records were obtained, and in any event, the affidavit origi-

nally submitted in support of the § 2703(d) order established the requisite probable cause.[32]

"In connection with a suppression motion, a defendant has the burden of establishing that the government has intruded on his or her reasonable expectation of privacy, thus establishing that a search has taken place." *Commonwealth v. Pina*, 406 Mass. 540, 544, cert. denied, 498 U.S. 832 (1990). "Then, but only then, the government has the burden to show that its search was reasonable and therefore lawful." *Id.* Rule 13(a)(2) of the Massachusetts Rules of Criminal Procedure requires that "an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached to the pretrial motion." Mass. R. Crim. P. 13(a)(2).

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[32] If the defendant had asserted a reasonable expectation of privacy in that phone, the warrant requirement announced in *Commonwealth v. Augustine*, 467 Mass. 230 (2014) (*Augustine I*) would apply to Commonwealth's efforts to obtain CSLI for 857-237-4076 as the decision in *Augustine I* was issued on the fourth day of trial and the defendant raised the issue of the warrant requirement prior to and during trial (MTr 127-160; 4:148-156; 5:3-11). *See Commonwealth v. Broom*, 474 Mass. 486, 492 (2016) (warrant requirement set out in *Augustine I*, "applies only to those cases in which a defendant's conviction is not final, that is, to cases pending on direct review in which the issue concerning the warrant requirement was raised").

In the present case, the defendant did not submit an affidavit in which he asserted that the cell phone for which the CSLI was sought was one in which he had a reasonable expectation of privacy. Rather, he submitted only an affidavit from his attorney (RA 57-58). His attorney's affidavit was insufficient to meet his initial burden for two reasons. First, his attorney is not a "person with personal knowledge" that the phone, and consequently the CSLI associated with that phone, was in fact the defendant's or one in which the defendant had a reasonable expectation of privacy. *See* Mass. R. Crim. P. 13(a)(2). Second, even his attorney's affidavit does not assert that the defendant had a reasonable expectation of privacy in the cell phone as it only asserted that the records were obtained for a "cellular telephone *allegedly* used by the defendant" (RA 58 ¶¶ 8, 16, 17). Stating that the cell phone may only "allegedly" be the defendant's is insufficient to claim a reasonable expectation of privacy. Because the defendant failed to provide a proper affidavit, "setting forth a factual basis for a claimed expectation of privacy," *see Commonwealth v. Clegg*, 61 Mass. App. Ct. 197, 204 (2004), it failed to satisfy his initial burden of demonstrating any expectation of privacy in the phone and the CSLI associated with that phone. "This failure alone would have warranted denial of the motion to suppress." *Id.* (citing *Commonwealth v.*

Smallwood, 379 Mass. 878, 888 (1980)). *Accord Commonwealth v. Netto*, 438 Mass. 686, 697 (2003) ("it is the defendant [] - not the Commonwealth - who [had] failed to meet [his] burden of proof, as [he is] the one [] who must show that a 'search' in the constitutional sense occurred.").[33]

Similarly, contrary to the defendant's contention (DBr 42 n.29), he does not have automatic standing to challenge the production of the CLSI for the 857-237-4076 number. Only when "a defendant charged with a crime in which possession of seized evidence is an element of the crime is [the defendant] 'deemed to have standing to contest the legality of the search and the seizure of that evidence.'" *Commonwealth v. Carter*, 424 Mass. 409, 409 (1997)(quoting *Commonwealth v. Amendola*, 406 Mass. 592, 601 (1990)). Murder is not a possessory offense, and the defendant was not charged with a crime for which possession of a cell phone is an essential element. He therefore does not have automatic standing to challenge the search of the CLSI.

Even beyond these deficiencies in the defendant's argument, the judge also correctly ruled that the affidavit originally submitted in support of the

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[33] Although this argument was not raised below, an appellate court may affirm a ruling on a motion to suppress evidence "on any grounds supported by the record." *Commonwealth v. Bartlett*, 465 Mass. 112, 117 (2013) (citing *Commonwealth v. Va Meng Joe*, 425 Mass. 99, 102 (1997)).

§ 2703(d) order established probable cause that a crime had been committed and that production of the CSLI records for the phone number 857-237-4076 would provide evidence of that offense (RA 66). "Because a determination of probable cause is a conclusion of law, [this Court] review[s] a search warrant affidavit de novo." *Commonwealth v. Foster*, 471 Mass. 236, 242 (2015). The inquiry as to whether an affidavit supports a finding of probable cause "always begins and ends with the four corners of the affidavit." *Commonwealth v. O'Day*, 440 Mass. 296, 297 (2003). This Court considers the affidavit as a whole and interprets it "in a commonsense and realistic fashion." *Commonwealth v. Kaupp*, 453 Mass. 102, 111 (2009). "[I]nferences drawn from the affidavit need only be reasonable and possible, not necessary or inescapable." *Commonwealth v. Cavitt*, 460 Mass. 617, 626 (2011).

To justify the production of CSLI records associated with a phone number, a supporting affidavit must demonstrate probable cause to believe "that a particularly described offense has been, is being, or is about to be committed, and that [the CSLI being sought] will produce evidence of such offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit such offense." *Augustine I*, 467 Mass. at 256 (quoting *Commonwealth v. Con-*

nolly, 454 Mass. 808, 825 (2009)). *See Commonwealth v. Broom*, 474 Mass. 486, 491 n.8 (2016).

The affidavit at issue stated that on June 26, 2011, at approximately 9:20PM, officers responded to a call for a person shot at the corner of Sumner Street and East Cottage Street, and that the victim was pronounced dead upon arrival at the hospital (RA 60). Accordingly, the affidavit met the first requirement under *Augustine I* as it provided probable cause that a crime, namely a murder, had been committed.

The affidavit also provided probable cause that the CSLI being sought "would produce evidence of the offense." *Augustine I*, 467 Mass. at 256. Two percipient witnesses told officers that the victim was on the phone in the minutes immediately leading up to the murder making plans to meet with someone (RA 61-62). Both witnesses stated that as the victim drove down Sumner Street, he initially told the person he was speaking with on the phone that he could not see him (RA 61-62). After two men turned onto Sumner Street from East Cottage Street, the victim stated "I see you now," stopped the car, and got out (RA 61-62). After a short time, the two men began pushing the victim back towards the car (RA 61-62). Both witnesses saw that one of the men had a revolver and provided a descrip-

tion of that man,[34] and Witness # 1 saw that man shoot the victim (RA 61-62). The victim's phone records[35] revealed that the cell phone number 857-237-4076 appeared seven times as outgoing and incoming calls to the victim's phone, and was listed as the last call received by the victim in the minutes before the murder (RA 63). That information established a substantial basis for the belief of a nexus between the crime of murder, the cell phone associated with the number 857-237-4076 and the individual with whom that cellphone is associated, and the CSLI. *See Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012) (before police may search or seize any item as evidence, they must have "a substantial basis for concluding that" the item searched or seized contains "evidence connected to the crime" under investigation).

Even if the affidavit had only indicated that the victim was on the phone immediately before the murder, speaking with one of the individuals with whom he met and argued before he was shot, and that the last seven

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[34] Witness # 1 described the man with the firearm as "5'6"-5'9" with short hair, a light to medium complexion, clean cut muscular build, [and] that he had a Bluetooth in one ear" (RA 61). Witness # 2 described the man with the firearm as "having a medium complexion, 5'10", medium-stocky build, 160-165lbs" and noted that the man was wearing a Bluetooth (RA 62).

[35] The victim's phone records had been subpoenaed and reviewed prior to the request for the CSLI (RA 63).

calls in his call detail records were between his phone and the 857-237-4076 number, that evidence would be sufficient to establish probable cause to believe the CSLI of the phone associated with 857-237-4076 number would provide evidence of the murder. That this affidavit also included information naming the defendant as the individual associated with the pertinent cellphone number and the nickname "Ant," only adds to what was an already overwhelming showing of probable cause determination.[36]

Therefore, the fact that the affidavit asserts that an unnamed "source" stated that the 857-237-4076 number is the defendant's (RA 63) (DBr 40-41), is at worst, irrelevant. Rather, to get the CSLI records *associated with that particular phone number*, the affidavit need only support a showing of probable cause to believe that the victim was in contact with that particular phone number in the minutes before his murder

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[36] The judge also properly denied the defendant's motion for a *Franks* hearing regarding the representation in the affidavit that Witness # 1 (Hicks) made an identification from a photo array (*Cf.* DBr 41-42) (5:4-11). *See Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). The defendant failed to make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit. *Id.* The judge, having had the benefit of listening to Hicks' identification procedure, correctly determined that Det. MacIsaac did not misrepresent that Hicks did in fact make an identification as Hicks only selected the defendant's photo from the array (5:5).

(as was evidence in the victim's call detail records), was making plans to meet with the cellphone's user, and was speaking with the individual associated with that cellphone just before the murder. Put differently, the cellphone associated with the number 857-237-4076, and the CSLI for that cellphone, was evidence of the victim's murder and his murderer regardless whether that cellphone was linked to the defendant or someone else. In these circumstances, there is no requirement that there be a nexus between the defendant (or a named suspect) and the phone number for which the CSLI is sought; there need only be a showing of probable cause to believe the CSLI would be relevant evidence in the murder under investigation. *See Commonwealth v. Augustine*, 472 Mass. 448, 453-454 (2015) (*Augustine II*).

Although not necessary, for the reasons discussed *supra*, the affidavit also established probable cause to believe the defendant committed the offense and that the defendant was linked to that number independent of the unnamed "source." A percipient witness identified the defendant to the exclusion of others in a photo array as the person who shot the victim (RA 63). Similarly, the affidavit supported the reasonable inference that the 857-237-4076 number was attributable to the defendant where both witnesses stated that the victim said "I see you" to the person he was on

the phone with before getting out of the car, and that the person identified as the defendant by the witnesses had a Bluetooth in his ear (RA 61-62).

Next, the defendant argues that even if the affidavit contained sufficient probable cause for CSLI, the affidavit nevertheless did not establish probable cause for CSLI covering a forty-five day period (DBr 42-43). Setting aside whether forty-five days is theoretically beyond the scope of an otherwise valid warrant, the defendant suffered no prejudice because the salient CSLI used at trial spanned the immediate six hours following the murder, which the police would have been able to obtain without a warrant. *See Commonwealth v. Estabrook*, 472 Mass. 852, 858 (2015) (CSLI request for six hours or less does not implicate search warrant requirement because "such a request does not violate the person's constitutionally protected expectation of privacy").[37] Moreover, it is reasonable that where police were investigating a crime in which a person fled, evidence of CSLI covering the hours immediately following the murder as well as the week directly after the murder would be within the

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[37] At trial Det. MacIsaac testified that the CSLI showed the phone remained in the area of the murder until approximately 11:30PM and then over the next two hours the phone hit off cell towers up the north shore to Haverhill and that the phone remained in Haverhill until July 1, 2011 (7:119-121).

scope of the search warrant, and therefore were relevant and admissible.

Finally, even if the motion to suppress the CSLI was erroneously denied, which it was not, the defendant was not prejudiced by its admission. Here, the CSLI records were not the center piece of the prosecution's case. While the prosecutor did argue in closing that the CSLI corroborated evidence that the defendant was in the area at the time of the murder, he concentrated the jury on the call detail records.[38] He argued: "phone calls can't change their testimony. They are what they are. They give you the exact times, everything fits. . . . The cell towers, they don't do much for you because it puts all the phones in that area at the same time. But go and look at the frequency of the calls that Anthony Robertson makes" (8:98). Moreover, the CSLI was cumulative of evidence from Hicks, Heard, and Jones that the defendant was in the area at the time of the murder as well as Jones' and Cirino's testimony that the defendant sought to leave the area, and did in fact leave that night

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[38] Although the call detail records were obtained through the same § 2703(d) order, it is inapposite if the Court determines that the supporting affidavit lacked probable cause because a showing of probable cause is not required to obtain call detail records. *See Augustine I*, 467 Mass. at 243-244 (no constitutionally protected privacy interest in telephone billing records or call details).

(3:166-168, 172-173, 284-285; 4116, 118; 5:81-83, 85). The defendant's sale of the cellphone in the immediate aftermath of the murder also provided evidence of his consciousness of guilt. *See, e.g., Commonwealth v. Vazquez*, 478 Mass. 443, 446 (2017) (no substantial likelihood of a miscarriage of justice were CSLI cumulative of other strong evidence of guilt). Accordingly, because the CSLI evidence was cumulative and there was other independent strong evidence of guilt, *see supra* § I, the defendant cannot show he was prejudiced by its admission.

V. THE DETECTIVE'S STATEMENT THAT HE HAD OTHER INFORMATION ABOUT THE 857-237-4076 FROM BOSTON POLICE OFFICERS WAS NOT HEARSAY, AND EVEN IF AMOUNTS TO HEARSAY, IT WAS CUMULATIVE OF OTHER PROPERLY ADMITTED EVIDENCE CONNECTING THE DEFENDANT TO THAT PHONE NUMBER.

Next, the defendant's claim that "the judge erred in admitting hearsay suggesting that unspecified police information confirmed that [the defendant] owned the cell phone connected to the shooter" (DBr 43), is completely unsubstantiated by the record.

The defendant takes issue with the following exchange on re-redirect examination between the prosecutor and Det. MacIsaac:

> Q: Aside from the phone records, did you have some other information about that 4076 number?
> A: Yes.
> Q: From other members of the Boston Police?

A: That's correct (7:163).[39]

First, the defendant's assertion that this constitutes hearsay, made without citation to authority, is incorrect (DBr 46). "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *Commonwealth v. Silanskas*, 433 Mass. 678, 693 (2001); Mass. G. Evid. § 801(c) (2017). A "statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Mass. G. Evid. § 801(a) (2017). Here, there simply was no "statement" before the jury. Det. MacIsaac merely indicated that he had other information about that particular number, but notably did not include any further details or content about what he learned. It is for this reason that, contrary to the defendant's argument (D Br 43, 46), the questions posed by the prosecutor, and Det. MacIsaac's direct and succinct answers on this topic, in no way connected that number to the defendant.

Second, the prosecutor elicited this information on re-redirect examination. On cross-examination trial counsel questioned the police failure to look into the payment information linked to this number and the fact that officers only learned this number was associated with the defendant after Pressey was brought into the

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[39] Trial counsel objected after this line of questioning and at the same time the prosecutor indicated he had no further questions (7:163).

grand jury under arrest (7:155, 158). Defense counsel then repeated his suggestion that Pressey was pressured into linking the number to the defendant during recross-examination (7:162-163). It is clear that the now challenged testimony was offered to show the state of the police investigation, and to give context about the manner in which it was investigated. *See, e.g., Commonwealth v. Doyle*, 83 Mass. App. Ct. 384, 389 (2013) (evidence was admissible "as background for the 'state of police knowledge' and not for its truth").[40] Indeed, this was especially relevant in light of the defendant's proffered *Bowden* defense attacking the police investigation.

Finally, even if the Court were to conclude that Det. MacIsaac's testimony amounted to hearsay, it was cumulative of other properly admitted evidence connecting the defendant to this number. "[I]mproperly admitted hearsay does not create a substantial likelihood of a miscarriage of justice . . . where the evidence was largely cumulative of other admitted evidence." *Commonwealth v. Johnson*, 429 Mass. 745, 749 (1999); *Commonwealth v. Burgess*, 450 Mass. 422, 432 (2008) ("erroneously admitted evidence was merely cu-

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[40] It is for this reason too, that Det. MacIsaac's unobjected to testimony that during the course of the investigation he learned that the defendant's middle name was Lashawn, is not hearsay (7:131). *See Commonwealth v. Rosario*, 430 Mass. 505, 508-510 (1999).

mulative of evidence properly before the [fact finder]"). At trial, Pressey testified that the 4076 number was the defendant's phone number and that she spoke to the defendant frequently on this number, which was reflected by her cell phone call detail records (5:46-47, 51-55). Additionally, Perez testified that she spoke with the defendant on the phone frequently in June 2011 and confirmed that there were multiple entries in 4076 phone records between that number and her cell phone number (5:116, 133-134). There was also evidence before the jury that the contact name for the 4076 number in the victim's phone was "L'il Ant from the Ave" (7:183). Accordingly, the defendant cannot show prejudice from Det. MacIsaac's testimony as there was significant evidence before the jury connecting the defendant to this number.

VI. DETECTIVE BOWDEN'S TESTIMONY REGARDING THE CONDITION OF THE APARTMENT THE DEFENDANT HIDING IN WAS PROBATIVE AND RELEVANT TO THE DEFENDANT'S CONSCIOUSNESS OF GUILT.

Next, the defendant contends that the judge erred in admitting Det. Bowden's description of the apartment in which the defendant was found hiding when he was arrested because "the testimony unfairly associated him with repulsive images of vermin as well as severe child neglect" (DBr 47-48). The defendant's claim fails because the deplorable condition of the apartment in which the defendant was found was probative of

the length to which the defendant was willing to go to hide himself and of the defendant's consciousness of guilt.

On direct examination Det. Bowden testified:

> I have to describe how horrible it is inside that apartment. It was probably the worst house I've ever been in in my whole entire life, and without even knowing anything about this case, just them saying the street brings up memories for me about that house and how horrible it was inside and so just being there just for that small period of time it seemed like a million years inside that place, and it was like just rash and maggots and babies crawling in it and feces smell, urine smell, dirty clothes, rotting food, dead animals. It was the worst. I mean we had to search it as far as we could (6:254).

Det. Bowden then proceeded to describe how members of the fugitive unit searched the apartment and found the defendant under a large pile of dirty clothe in a closet in the first bedroom (Tr. VI:255-257). The defendant did not object when Det. Bowden gave this description (4:157-158; 6:254-256). Additionally, trial counsel did not move to strike Det. Bowden's testimony on cross-examination that "[someone would have] to be desperate to hide in there" made in response to the question that people may hide because they are intimidated by the police (6:263-264). Thus, this Court's review is limited to whether the statement created a substantial likelihood of a miscarriage of justice. *Commonwealth v. Jenkins*, 458 Mass. 791, 796 (2011).

"Generally a trial judge is accorded substantial discretion in deciding whether evidence is relevant, and whether relevant evidence should be excluded if it is less probative than prejudicial." *Commonwealth v. Talbot*, 444 Mass. 586, 589 n.2 (2005). Here, the judge did not err in allowing Det. Bowden to testify about the unsanitary condition of the apartment because its probative value was not outweighed by the danger of unfair prejudice to the defendant. Indeed, the state of the apartment was probative of the defendant's consciousness of guilt because it not only established that the defendant was hiding from the police, but it was relevant to the explaining lengths to which he would go to avoid apprehension. *See Commonwealth v. Booker*, 386 Mass. 466, 470 (1982) (evidence of flight or hiding from police relevant as circumstantial evidence of consciousness of guilt). Similarly, it provided the jury context for the manner in which the defendant was found and how the arrest warrant was executed.

Finally, because pictures depicting the state of the apartment, bedroom, and closet in which the defendant was discovered were admitted without objection, Det. Bowden's description of the apartment was cumulative of other properly admitted evidence (6:258-261; Exh. 96, 97, & 98). *See Commonwealth v. Johnson*, 429 Mass. 745, 749 (1999).

Furthermore, contrary to the defendant's claim that Det. Bowden's description prejudiced him by unfairly associating him with a disgusting apartment and potential child abuse (DBr 48), there was no such danger because there was no connection of this particular apartment to the defendant. Det. Bowden testified that 44 Arbutus Street was a rooming house and that the defendant's mother had a room on the first floor of the house (6:245, 246, 247-248). The apartment in which the defendant was found was located on the third floor of 44 Arbutus Street, and Det. Bowden testified on cross-examination that he did not know who lived in that apartment (6:253-254, 262).

Finally, the judge instructed the jury in his final charge that they must be impartial and should not be swayed by emotion or prejudice (8:189). These instructions ensured that the jury did not use the evidence for an improper purpose. *See Commonwealth v. Degro*, 432 Mass. 319, 328 (2000) (jury is presumed to follow the judge's instructions).

VII. BECAUSE APPELLATE COUNSEL HAS FILED A BRIEF ASSERTING BOTH SUBSTANTIVE CLAIMS OF ERROR AND CLAIMS PURSUANT TO *MOFFETT*, THIS COURT SHOULD PRECLUDE THE DEFENDANT FROM FILING A *PRO SE* BRIEF THAT ASSERTS ADDITION APPELLATE ISSUES.

Because the defendant is represented by appellate counsel who has filed a brief on the defendant's behalf that raises a number of substantive appellate is-

sues and includes other claims pursuant to *Commonwealth v. Moffett*, 383 Mass. 201 (1981) (DBr 49-50), this Court should not countenance the defendant's attempt at hybrid representation and should not entertain the issues raised by the defendant in a *pro se* brief (PSBr 1-16).[41] The defendant's filing is especially in appropriate in a case such as this where the court is reviewing the defendant's entire case pursuant to G.L. c. 278, § 33E.

In *Moffett*, this Court adopted the standard to be employed when appellate counsel believes that a defendant's appeal is frivolous, and directs the lawyer to indicate that there are *no* meritorious issues, present what he can "succinctly" in the brief, and dissociate himself from the issues. *Id.* at 202, 208. After counsel does this, the defendant is permitted to file a brief addressing those claims. *Id.*

What *Moffett* does not allow, and what this Court should not accept, is the type of hybrid representation that the defendant utilizes. *See Commonwealth v. Molino*, 411 Mass. 149, 152 (1991) ("There is no constitutional right . . . to hybrid representation"). For example, in the trial courts, a defendant

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[41] Appellate counsel raised four issues pursuant to *Moffett*, from which she disassociated herself (DBr 49-50). In his *pro se* brief, the defendant, raised two of the same issues that his counsel had already addressed as well as an additional new claim (PSBr 1-16).

is not allowed to interject and examine a witness if he believes that his attorney did not ask all the questions desired or supplement counsel's closing argument merely because he thinks that counsel has not touched upon all of the issues that the defendant wanted him to argue. Just as hybrid representation is not tolerated in the trial court, it should not be accepted by an appellate court.

Here, appellate counsel identified and briefed several issues that she deemed meritorious (DBr 21-49). Hence, the defendant should be not entitled to file additional or supplemental issues addressing claims not included in the brief-in-chief.[42] *Moffett* was not intended to permit such a practice.

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[42] In any event, the Commonwealth has reviewed the claims raised by the defendant pursuant to *Moffett*, and each claim lacks merit.

The Commonwealth will note, however, that the defendant is correct that the judge misspoke in a single discreet instance during his charge on second degree murder when he stated "if *the defendant* does not prove beyond a reasonable doubt that the defendant is guilty of any offense charged, you must find him not guilty" (8:167) (PSBr 5-7). Viewed in context, this is a clear slip of the tongue, where immediately preceding this misstatement, the judge stated that the Commonwealth bore the burden of proof. This Court reviews instructions "in the context of the charge as a whole, in order to determine whether a reasonable juror could have used the instruction incorrectly," *Commonwealth v. Powell*, 433 Mass. 399, 405 (2001), and "not by scrutinizing each sentence out of context." *Commonwealth v. DelValle*, 443 Mass. 782, 796 (2005). Indeed, the jury was fully apprised that the burden of proof rested with the Commonwealth from the judge's pretrial in-

Finally, this Court is charged with reviewing this case pursuant to G.L. c. 278, § 33E. *See* § VIII, *infra*. The defendant's conviction of first degree murder receives a "uniquely broad form of review by this court on direct appeal." *Commonwealth v. Gunter*, 459 Mass. 480, 486 (2011). The defendant is owed no more, including the opportunity to exploit hybrid representation.

VIII. RELIEF UNDER G.L. C. 278, § 33E SHOULD BE DENIED BECAUSE THE VERDICT IS AMPLY SUPPORTED BY THE EVIDENCE AND CONSONANT WITH JUSTICE.

This Court must review the whole case on the law and the facts to insure that the verdict is not against the weight of the evidence and is consonant with justice. G.L. c. 278, § 33E. While the reviewing court's powers under §33E are extraordinary, they are to be used sparingly. *Commonwealth v. Schnopps*, 390 Mass. 722, 726 (1984); *Commonwealth v. Dalton*, 385 Mass. 190, 197 (1982). In the instant case, the defendant argues he is entitled to a reduction in the

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structions (3:37) as well as the judge's exhaustive final charge where he explicitly instructed the jury on the burden of proof and correctly reiterated the burden throughout his charge (8:139-142, 145, 146, 149, 150, 155, 156, 157, 158, 161-163, 165, 167, 169, 170, 171, 172,173, 174, 179, 181, 183). Massachusetts courts have repeatedly found that instructions with an isolated misspoken word do not alter the burden of proof if contained in an otherwise correct instruction. *See, e.g., Commonwealth v. Koonce*, 418 Mass. 367, 370-374 (1994). The remaining *Moffett* claims are baseless.

verdict or a new trial under Section 33E based on the alleged errors (DBr 50). For the reasons stated in the previous sections, *supra*, those claims are without merit. The victim's death resulted from the defendant's deliberate, senseless, and ruthless murder and the verdict must stand.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the defendant's convictions.

Respectfully submitted
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ADDENDUM

Article 1 of the Massachusetts Declaration of Rights

All men 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.

18 U.S. Code § 2703

(a) Contents of Wire or Electronic Communications in Electronic Storage.—

A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of Wire or Electronic Communications in a Remote Computing Service.—

> (1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—
>
> > (A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a

State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.

(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service—

(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and

(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records Concerning Electronic Communication Service or Remote Computing Service.—

(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or

other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the—

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for Court Order.—

A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No Cause of Action Against a Provider Disclosing Information Under This Chapter.—

No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other speci-

fied persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter.

(f) Requirement To Preserve Evidence.—

(1) In general.—

A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention.—

Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of Officer Not Required.—
Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

G.L. c. 234, § 28. Examination of jurors

[Text of section effective until May 10, 2016. Repealed by 2016, 36, Sec. 1.]

Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does

not stand indifferent in the case, another shall be called in his stead. In a criminal case such examination shall include questions designed to learn whether such juror understands that a defendant is presumed innocent until proven guilty, that the commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf. If the court finds that such juror does not so understand, another shall be called in his stead.

For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.

Notwithstanding the above, the following procedures shall govern in all criminal and civil superior court jury trials:

> (1) In addition to whatever jury voir dire of the jury venire is conducted by the court, the court shall permit, upon the request of any party's attorney or a self-represented party, the party's attorney or self-represented party to conduct an oral examination of the prospective jurors at the discretion of the court.

(2) The court may impose reasonable limitations upon the questions and the time allowed during such examination, including, but not limited to, requiring pre-approval of the questions.

(3) In criminal cases involving multiple defendants, the commonwealth shall be entitled to the same amount of time as that to which all defendants together are entitled.

(4) The court may promulgate rules to implement this section, including, but not limited to, providing consistent policies, practices and procedures relating to the process of jury voir dire.

G.L. c. 265, § 1. Murder defined

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

G.L. c. 265, § 17. Armed robbery; punishment

Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property which may be the subject of larceny shall be punished by imprisonment in the state prison for life or for any term of years; provided, however, that any person who commits any offence described herein while masked or disguised or while having his features artificially distorted shall, for the first offence be sentenced to imprisonment for not less than five years and for any subsequent offence for not less than ten years. Whoever commits any offense described herein while armed with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years. Any person who commits a subsequent offense while armed

with a firearm, shotgun, rifle, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than 15 years.

G.L. c. 278, § 33E. Capital cases; review by supreme judicial court

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

Mass. R. Crim. P. 13: Pretrial Motions

(a) In General.

* * * *

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be

set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

* * * *

R. PROF. CONDUCT 3.8: Special Responsibilities of a Prosecutor

* * * *

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

* * * *

Mass. G. Evid. § 801. Definitions

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

* * * *

(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.

* * * *

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

KATHRYN E. LEARY
Assistant District Attorney

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11933

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

ANTHONY ROBERTSON,
Defendant-Appellant.

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY