COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-10486

COMMONWEALTH,
Appellee

v.

DAVID COHEN,
Appellant

ON APPEAL FROM A JUDGMENT OF THE NORFOLK SUPERIOR COURT

APPELLANT'S BRIEF AND APPENDIX

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Explanation of Abbreviations

References to the thirty-volume trial transcript, beginning on June 18, 2007, and ending on August 27, 2007, are abbreviated as T. 1 through T. 30.

References to the six-volume hearing transcript of Cohen's motion for new trial, beginning on January 18, 2008, and ending on April 11, 2008, are abbreviated as M.T. 1 through M.T. 6.

References to the Addendum reproduced after the brief are abbreviated as Add.

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ISSUES PRESENTED FOR REVIEW

1. Whether the exclusion of the public, including the press and Cohen's supporters, from jury selection is structural error requiring a new trial.

2. Whether the evidence of witness intimidation was insufficient as a matter of law.

3. Whether the evidence that a police report was materially false was insufficient as a matter of law.

4. Whether error in the charge on attempted extortion, which understated the Commonwealth's burden and went to the heart of the defense, requires a new trial.

5. Whether a pattern of prosecutorial misconduct permeated the investigation and trial of this case.

STATEMENT OF THE CASE

Nature of the Consolidated Appeals.

This is David Cohen's direct appeal and his appeal from the denial of his motion for new trial.

Prior Proceedings and Disposition in the Court Below.

In 2005, a Norfolk County grand jury returned a seven-count indictment charging Cohen, a Town of Stoughton police officer, with offenses arising out of a 2002 incident involving Timothy Hills. A. 21. A separate indictment charged three offenses arising out of a 2000 incident involving Gerald Viverito.

In 2007, a jury found Cohen not guilty of all Viverito charges and three of the Hills charges: kidnaping, assault and battery, and conflict of interest. T. 29, 4-10. He filed a timely appeal from

convictions for attempted extortion, intimidating two witnesses, and filing a false police report. A. 170. He then filed a motion for new trial, asserting that the public was excluded from the courtroom during jury selection in violation of his Sixth Amendment right to a public trial. A. 171. After evidentiary hearings, the trial judge (Dortch-Okara, J.) denied the motion, Add. 1, and Cohen appealed. A. 200.

Facts About Cohen's Involvement in Seeking the Return of Peter Marinilli's Money from Timothy Hills.

This section summarizes the extortion evidence; the evidence on the three related counts of conviction is set forth in the Argument section of the brief.

Overview. In April, 2002, David Cohen had been a police officer for fourteen years and a practicing lawyer for five years. He practiced law by day and then worked the 4-12 p.m. shift as a Sergeant in the Stoughton Police Department. T. 22, 71-91. Timothy Hills owned a business called Club Service Corp, which placed credit card machines in retail stores and processed the transactions. T. 8, 211-212.

The extortion trial was at bottom a duel of credibility between Hills--who solicited $10,000 from Peter Marinilli as a purported investment in a third party's business and then pocketed the money--and

Cohen, who testified in his own defense. That duel was resolved in Cohen's favor on three of the charges.

The Commonwealth's theory of extortion was based on Hills' claim that Marinilli was Cohen's client in his law practice, and that Cohen tried to get Hills to return Marinilli's money by unlawfully threatening, in his role as police officer, to arrest Hills and to keep his towed vehicle impounded unless he paid Marinilli. Cohen testified that Marinilli was never his client; that Hills stole Marinilli's money by fraud; that, as a police officer, he had a lawful right to present Hills with the choice of returning the money or being arrested; that Hills' unregistered, uninsured vehicle was lawfully towed; and that he never conditioned its return on repaying Marinilli.

At trial, the Commonwealth took contradictory positions about the criminality of Hills' conduct with Marinilli. In the Special Prosecutor's opening he declared, "Mr. Hills ... was never guilty of any crime, he was at the misfortune of ... borrowing money from a client and a friend of Cohen's." T. 5, 93. In mid-trial this prosecutor changed his story: "Our theory is not that Mr. Hills didn't do any wrong." T. 10, 4. In closing, another prosecutor admitted that Hills was a

thief, as Cohen had asserted all along:

> [Timothy Hills] had no right to misrepresent himself to Peter Marinilli. He had no right to steal Peter Marinilli's money. Maybe he is a fraud. Maybe he is a cheat. Nobody in this case has ever stated otherwise. T. 24, 151-152.

The Commonwealth's Evidence.

Hills testified that in January, 2002, Steven Yanoff, the owner of a pizza shop called Pizzapalooza, authorized him to raise money for franchising Yanoff's business. Neither Hills nor his company owned any interest in Pizzapalooza. Hills proceeded to solicit $10,000 from Peter Marinilli, proffering a contract which promised that his investment in Pizzapalooza would be held in escrow and returned to him by a certain date unless additional investment funds were raised by that date. Marinilli signed the contract and gave Hills $10,000 in two payments.

Hills promptly deposited Marinilli's money in the bank account of Hill's company, Club Service Corp, and withdrew it for his own use, leaving a balance of less than $600. Hills admitted that he took the money rather than putting it in escrow for Pizzapalooza, as promised in the contract, and that he falsely reassured Marinilli that his investment was "doing fine." T. 8, 211-219, T. 9, 87-94, 101-102, 108, 127.

In mid-April, Marinilli asked for his money back, and Hills gave him a check drawn on an account without funds to cover it. According to Hills, he then received a voice mail from David Cohen. T. 8, 220-223. Hills claimed that Cohen said the following:

> Tim Hill, this is David Cohen. I'm calling in regard to Peter Marinilli. He came to me to handle something about this investment he made with you. And I realize that I might know you. You need to get in touch with me as soon as possible to resolve this matter for $10,000. Mr. Hill, we can either handle this through this office or my other job. Call me back.

T. 8, 228-229. The audiotape of this purported voice mail "disappeared" during the investigation. A motion judge found, "Inexplicably, there was no longer a tape of this conversation at the time of the grand jury proceedings." Add. 24.[1] The Commonwealth used Cohen's purported statement about "either handling this through this office or my other job" as its "foundation of extortion." T. 24, 148. The jury, however, acquitted

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[1]Hills said he "gave [the tape] to Lt. Blount" of the Stoughton Police Department. T. 8, 223, T. 9, 178-180. Blount kept no record of any material Hills gave him, conceded that he received a tape of other Cohen voice mails, claimed that he never heard the "missing" one, and conceded that he made no effort to locate it. T. 17, 182-189. The trial judge ruled that Blount engaged in prejudicial misconduct by failing to produce a variety of other discovery materials and told the jury that it could consider this misconduct in its evaluation of the evidence. T. 17, 176-177.

Cohen of conflict of interest, thus discrediting Hills' claim that Cohen ever dealt with him as Marinilli's lawyer. T. 5, 84; T. 24, 148; A. 165.

Hills testified that he responded to this message by going directly to Cohen's law office, accompanied by his Club Services employee, Brian Sexton. Cohen, Hills said, was "dressed as an attorney," gave him his card, and had a file with the Pizzapalooza contract in it. Hills agreed that he owed Marinilli money and told Cohen he would pay him. Over the next few days, Cohen and he had a couple of "cordial phone calls" back and forth about whether he was ready to pay. Cohen wanted Hills to pay as soon as possible. After five days, Hills "wanted to show some good faith," so he called Cohen and said he would give him $1,000 while "waiting for the rest of the money." On April 26, a Friday, Hills delivered a cashier's check to Cohen at a restaurant; the check was for $1,000 and made out to Peter Marinilli. Over the next few days, he and Cohen continued to speak.

According to Hills, they agreed to meet again on April 30 at 12:30 p.m. at Cohen's law office but Cohen was in a meeting when Hills arrived, again accompanied by Sexton. Hills told the secretary that he would

return. The jury then heard a tape recording of a voice mail from Cohen, which Hills said he received after leaving Cohen's office:

> Tim Hill, this is David Cohen at 12:30 and as you imagine, I'm not too happy with you right now. Um, I told you. You told me you were going to be here by noon. And, ah, Tim, I'm pretty much at the end of my rope as far, um, your story goes, and I want to hear back from you shortly. If I don't hear back from you shortly, um, I guess I'm going to do what I have to do. It might not be pretty, so get in touch with me.

T. 8, 242-245. Hills said that when they next spoke, Cohen apologized for the message, saying he had not been told that Hills showed up. They agreed to meet at a restaurant where Hills was having lunch. T. 8, 245-247; T. 12, 70-71.

There, Hills testified, Cohen insisted that he pay the rest of Marinilli's money that day and offered to hold his check "as a lawyer" until Hills deposited money to cover it. Hills testified that this event took place on April 30, but the $9,000 check he gave Cohen was dated April 29. Hills wrote on it: "Loan repaid. Deposit with notification." T. 8, 247-250. Hills conceded that he then told Marinilli that the money was in Hills' account and he could go ahead and cash the check. T. 9, 148-150.

Between 3:30 and 4 p.m. on April 30, Cohen went to

Hills' bank in police uniform. He showed the teller, Jamie Kelly, Hills' check and asked if it was good. She told him that it was not good and that Hills had "a history of bounced checks." T. 11, 123-126, 133-138.

At around 4 p.m., Hills testified, Cohen called him and said that he needed to see him because there was "a big problem." Hills told Cohen to come to the Club Services office. Minutes later, when Hills was outside his building, he saw a patrol car behind his truck. Cohen got out of the cruiser in police uniform, asked where they could talk, and Hills brought him to his office. Cohen was angry. He said he had taken the $9,000 check to the bank and learned that Hills didn't have funds to cover it. He demanded that Hills produce the money. Hills said he couldn't and that he needed to talk to an attorney. Cohen then handcuffed him[2] and purportedly said, "You basically have a choice, ... $9,000 in cash or you could get locked up." He would take off the handcuffs, but Hills was going to have to "do something for him." Cohen took off the handcuffs, and Hills wrote and signed a note at Cohen's direction:

[2]The handcuffing incident was the basis of the kidnaping and assault and battery charges. Cohen testified that he cuffed Hills because in reasonable fear for his safety, T. 21, 249-267, and the jury found him not guilty of both offenses. A. 163, 168.

"$9,000 cash to Peter Marinilli by 4:00 p.m. on 5/1/02 to be delivered by me to the Stoughton Police Department." Cohen said he would be arrested if he did not bring the money. T. 8, 256-269, T. 22, 270-271.

Cohen then received a call and asked Hills to go downstairs. There, a tow truck was about to haul away Hills' truck, which had an expired, out-of-state registration. Cohen told him to take what he wanted from the truck, and Hills removed some mail. He claimed that Cohen opened the mail in order to inventory it and seized some bank receipts and a deposit slip; he also kept Hills' Texas driver's license. Cohen purportedly told Hills, "If you want your truck back, $9,000, Stoughton Police Department, 4:00 the next day." T. 8, 271-274. Cohen returned to the police department and, at 4:34 p.m., opened a criminal complaint file on Hills. T. 11, 56.

The next morning, May 1st, knowing he was in trouble, Hills began a counterattack on Cohen: he complained about him to the District Attorney, the Attorney General, and the Bar Association. T. 11, 61. He also received another voice mail from Cohen:

> Tim, David Cohen, Stoughton Police Department. I guess you didn't live up to your obligations to make good on those felonious bad checks that you wrote. I guess we will have to deal with this

> thing the other way... Talk to you later. Bye.
>
> Around 4 p.m., Cohen left Hills another message:
>
> Hey, Tim, it's David Cohen from the Stoughton Police Department. Just confirming our appointment today, $9,000 in cash. Stoughton Police Department, 26 Ross Street, Stoughton, Mass. Hope you get down, Tim. See you later.

T. 9, 28-30, T. 12, 71-72. Hills did not go to the police department on May 1st, nor did he return Marinilli's money. T. 9, 31-32.

At 6:20 p.m., Cohen completed his police report on Hills, including an application for a complaint. His report consisted of three typewritten pages summarizing his investigation, with attached exhibits including the Pizzapalooza investment contracts; notes from Cohen's conversation with Pizzapalooza's owner, who said he never authorized Hills to solicit money; Hills' bank records, including eight notices of insufficient funds; notes from Hills to Cohen, including the promise to pay by May 1st; Hills' checks to Marinilli (a check for $13,115 dated April 22, 2002, and a check for $9,000 dated April 29, 2002); a record check showing that Hills' company was not incorporated; an impounded vehicle inventory record; a motor vehicle citation; and a computer printout of Hills' expired registration. Based on this material, a police prosecutor signed

Cohen's application and brought it to a clerk magistrate. At 6 p.m. on May 3rd, the magistrate issued an arrest warrant and a complaint charging Hills with larceny by false pretense in a commercial transaction, G.L. c. 266, § 33, and two counts of uttering a forged instrument, G.L. c. 267, § 5. T. 10, 156, T. 11, 55-61, T. 16, 105; T. 18, 178-180; A. 98-99.

That same evening, May 3rd, Hills went to the police department to complain about Cohen to his shift commander, Lt. Francis Wohlgemuth. Wohlgemuth declined to return Hills' bank records, made a call authorizing his unregistered truck to be towed to his home, told him that there was a warrant for his arrest, and arrested him. Hills was jailed and then bailed for $25. At arraignment, he was served with a citation for driving an unregistered, uninsured motor vehicle. In 2003, after he cooperated with the police department's internal investigation of Cohen, the D.A. nol prossed Hills' charges. T. 9, 31-46, 59-60; T. 10, 152-156.

Hills conceded that his contract with Marinilli contained many false statements. He never intended to put Marinilli's money in escrow, as the contract promised. T. 9, 108. The contract stated that Hills' company, Club Services Corp, was a Texas corporation;

he knew CSC was not incorporated in Texas or anywhere else. The contract said Pizzapalooza was a "fully integrated provider of business financial services" which "anticipates making substantial expenditures in connection with its Internet operations;" Hills knew that Pizzapalooza was just a pizza shop with no internet operations. The assertion that the company had "completed the development of two locations" was also a lie. T. 9, 94-117, 123-128.

Lt. Blount, a Stoughton police officer who admitted that he had "no special expertise in police work" and whom the judge found engaged in misconduct by failing to turn over exculpatory documents, T. 16, 157-159, T. 18, 171, was allowed to give a variety of opinions. These included: Cohen "had no right to threaten [Hills] with prosecution," no right to have Hills' truck towed, and no right to seize Hills' bank records found during an inventory search. T. 17, 54-64, 75, 102.[3] Under cross-examination, he modified these opinions. For example, he agreed that police officers can engage in dispute resolution and try to

[3]In closing, the prosecution conceded that Hills stole from Marinilli and that the charges could have been amended. T. 24, 151-152. Until then, it had created a confusing dispute as to whether Cohen charged the right crimes. T. 17, 102, T. 19, 147-148, 192-196.

resolve a case without a criminal complaint. T. 17, 241-242, T. 18, 5, 100, 151.

Brief Summary of the Defense Evidence.

To challenge Lt. Blount's opinion testimony, the defense called Lt. Robert Devine, also a Stoughton police officer. He testified that it was proper for Cohen to try to resolve Marinilli's complaint against Hills without resort to criminal prosecution, including threats of prosecution; that towing Hills' uninsured vehicle from a private lot was a proper public safety measure; and that Cohen properly seized Hills' bank records during an inventory search. T. 19, 130-143.

David Cohen testified that Marinilli, a good friend's younger brother, called him during the third week of April, 2002, and then came to the police station. Marinilli had the Pizzapalooza documents and told Cohen that Hills, claiming to be a licensed securities broker, had scammed him for $10,000. He also produced a bad check Hills had given him--one of several ploys Hills had used to avoid giving the money back. Cohen told Marinilli that Hills had committed several crimes. Marinilli said he wanted the money back, preferably without going through the criminal process. Cohen said he would try. At no time was he

acting as Marinilli's lawyer. T. 22, 170-198.

Cohen described how he gathered evidence against Hills and, at the same time, tried to get him to pay Marinilli the money and resolve the matter without criminal process. T. 22, 192, 199-275, T. 23, 6-23. He freely acknowledged that he told Hills that if he did not repay Marinilli by May 1, 2002, at 4 p.m., he would be arrested. He also made no bones about having Hills' unregistered and uninsured truck towed. He denied ever telling him that he had to pay Marinilli to get it back. T. 22, 241-245, 267; T. 23, 6-18.

Cohen opened a criminal file on Hills after their encounter on April 30th. When Hills did not produce the money on May 1st, Cohen completed his report, attached his collected evidence, and gave it to the police prosecutor. A magistrate found probable cause and issued a complaint and arrest warrant. T. 23, 19-26.

SUMMARY OF ARGUMENT

Court officers posted a sign--"Jury selection in progress, Do Not Enter"--on the courtroom door during at least four days of empanelment, and did their best to exclude the public, except for arrangements made for a few of Cohen's close family members. There was no evidence that anyone else entered with permission or

that any member of the press or friend of Cohen ever gained entry; the judge found that two reporters and six Cohen friends were excluded. Because she knew her officers planned to exclude the public, purportedly for overcrowding, she violated her duty to give notice to those in the courtroom, consider alternatives, and make advance findings justifying closure. She showed no interest even when defense counsel gave her a list of Cohen's excluded friends. Br. 16-19. Her after-the-fact reasons not only came too late, they are both *constitutionally deficient and inconsistent with the* reasons she gave at trial. She improperly blamed the people who were excluded and defense counsel for constitutional error committed by her court officers, with her knowledge. Br. 22-33. At no time did Cohen waive his right to public trial. Br. 33-40. This structural error requires reversal.

Cohen is entitled to judgments of acquittal on the witness intimidation charges. The evidence on the theory of "intimidation" was legally insufficient, as there was no evidence from which a jury could find that Cohen tried to put either Sexton or Kelly in fear. Br. 41-47. The other theory, "misrepresentation," does not apply where, as here, it was uncontested that Cohen and

each witness were comparing memories of the same event. Br. 47-49. If the evidence was sufficient on this theory, however, there must be a new trial because the intimidation evidence was insufficient and the jury returned a general verdict. Br. 49. Also legally inadequate was the evidence on filing a materially false police report. All statements in the report material to the inquiry--whether there was probable cause that Hills committed a crime--were true. Br. 50.

Error in the jury charge requires a new trial on attempted extortion. Cohen freely admitted he threatened Hills with arrest unless he paid Marinilli; his defense was that this was lawful police conduct. The charge deprived Cohen of this defense, understating the Commonwealth's burden to prove unlawful, malicious intent and giving no guidance on how to decide if a police officer's conduct is unlawful. Br. 51-53.

A wide range of prosecutorial misconduct is also briefed. Br. 53-55.

ARGUMENT

I. EXCLUSION OF THE PUBLIC FROM COHEN'S JURY SELECTION DENIED HIM HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

A. Relevant Legal Principles.

The Sixth Amendment right to a public trial

creates a strong "presumption of openness" in court proceedings, Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984), including jury selection. Owens v. United States, 483 F.3d 48, 61-62 (1st Cir. 2007). There are four constitutional prerequisites to closure: (1) the party seeking closure must state an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect compelling State interests, (3) the trial judge must consider reasonable alternatives to closure, and (4) the trial judge must make findings adequate to support the closure. Waller v. Georgia, 467 U.S. 39, 48 (1992). "Closure may not be retroactively validated." United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994). The error is structural, requiring reversal. Owens, supra, at 63.

B. The Issue As Raised at Trial and the Judge's Belated Ruling Justifying Closure.

On the fourth day of jury selection, defense counsel moved for a mistrial, stating that he had just learned that the public had been excluded from the courtroom, in violation of Cohen's right to a public trial. Counsel directed the Court's attention to a hand-lettered sign on the door: "Jury selection in progress. Do Not Enter." A. 201. He had discovered

that this sign had been up throughout jury selection and that court officers had been excluding people. The prosecutor flatly declared, "[N]obody has been denied access to the courtroom." T. 4, 4-7.

The judge acknowledged she knew about the sign and denied mistrial, ruling (1) the sign was to prevent "people coming and going through;" (2) there had initially been a problem with "space for the venire" but "that is no longer a problem;" (3) the sign also prevented D.A.'s "coming in inadvertently;" (4) she wanted to "shield" spectators from prospective jurors and prevent "co-mingling;" and (5) she would have let anyone in who asked permission. T. 4, 7.[4] Nowhere in the record is there any evidence that this condition for entry--a request for permission--was made known to the public or that the Court granted permission to a single person. A court officer had given Cohen's close family members special seats. T. 4, 6-7, M.T. 1, 56-57.

Defense counsel asked for an evidentiary hearing, asserting that at least two people had told Cohen that they had not been allowed in. The court refused. T. 4, 4-8. Throughout the day counsel revisited the issue, first making an offer of proof of the names of

[4]See A. 84-97 for relevant trial transcript pages.

nine people who would testify that they were denied access. T. 4, 26-27. Later, counsel pointed out that a spectator who had just entered was being ushered out by court officers. The Court said, "Larry, who was that coming into the courtroom?" A court officer replied, "It was one of the Stoughton Police Officers." Defense counsel challenged this reason for exclusion and renewed his mistrial motion, which was denied. T. 4, 87-88. Still later, counsel informed the court that this man was not a police officer but Cohen's civilian friend, Peter Rappoli. He represented that "there was plenty of space in the courtroom for him to sit" and "hardly any jurors back there;" neither the prosecutor nor the judge disagreed. T. 4, 130-132. Counsel's third mistrial motion was denied. T. 4, 132. Jury selection ended on the fifth day of trial. T. 5, 33.

After judgment, defense counsel filed a motion for a new trial based on the violation of Cohen's right to a public trial. A. 171. Evidentiary hearings were held over several days.

C. The Judge's Post-Trial Findings.

The judge found that a court officer posted a sign on the only door through which the public can enter: "Jury selection in progress. Do Not Enter." This sign

was up during the first three days of empanelment and was taken down at some point on the fourth day, June 21. She also found that "it is the practice at Norfolk Superior Court to exclude the public (other than the media) from jury empanelment if there is no room for spectators." She "was aware ... that there would be no space available to the general public during portions of the empanelment" and was "concerned about the contamination of jurors [by] placing prospective jurors in close contact with spectators." She left court officers in charge of logistics. Add. 3-4, 7, 12.

The judge credited the testimony of two newspaper reporters[5] and six of Cohen's friends and supporters[6]

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[5]Allan Stein was a freelance reporter for the *Patriot Ledger* and *Brockton Enterprise*, who was carrying his notepad and pen, M.T. 1, 37-44, and Jeff Mucciarone was a reporter for the *Stoughton Journal* and the *Canton Journal*, who, with his editor and a photographer, had been sitting in the media section of the courtroom during the motion session preceding jury selection. M.T. 1, 81-92, 100. Mucciarone's *Stoughton Journal* article documented the exclusion of the public from the first three days of jury selection. A. 202.

[6]Michael Cubell, a businessman who traveled from North Carolina to support Cohen and returned home after three days without entering the courtroom, M.T. 1, 117-126; Peter Rappoli, whose ejection is documented in the record, T. 4, 87-88, 130-132, and who left humiliated, M.T. 1, 173-182; Edward Lennon, another businessman, M.T. 1, 215-218; Roy Minnehan (State Police), M.T. 2, 8-11; Paul Williams and James O'Connor (Stoughton Police), M.T. 2, 163-169, 202-208; and Richard Levine (continued...)

that they wanted to attend jury selection but were prevented from doing so by the "Do Not Enter" sign, by court officers' ordering them not to enter, and, in the case of Rappoli, by court officers' ejecting him from the courtroom. Add. 9-10. There was no evidence that a single representative of the media[7] or a single friend and supporter of Cohen (other than immediate family) gained entry at any time during jury selection.

The judge found that several spectators did get in despite the "Do Not Enter" sign: John White, who had an animus against Cohen, "saw the sign, but ignored it" and entered on the afternoons of June 18 and June 20; a nameless couple with whom White spoke on the 18th; and unidentified people purportedly seen entering by prosecution witness Robert Hallamore. Add. 10-11. The judge had squarely ruled that asking permission was a precondition for entry, T. 4, 7-8, but she nowhere

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[6](...continued)
(Stoughton selectman), M.T. 6, 86-89. The judge credited all their testimony except Lennon's, whom she omitted from her findings, and discredited just one aspect of O'Connor's testimony about his intent to return after being excluded on June 18. Add. 10.

[7]Contrary to the judge's finding, Stein never said he saw "another female reporter **in the courtroom** on June 18." Add. 10; M.T. 1, 63. The judge had excluded an article written by this reporter during jury selection, because it nowhere suggested that she had been in the courtroom. M.T. 5, 208-209, 212-217.

found that any of these people had obtained permission, and there was no such evidence.

D. The Judge's Retroactive Validation of Closure Is Unconstitutional.

After the fact, the trial judge justified the exclusion of the press and Cohen's friends based on (1) insufficient space; (2) "contamination of jurors" and (3) the failure of those excluded to complain to the judge or the Acting Chief Court Officer. Notably, she omitted two primary reasons she gave at trial: to keep people and ADAs from coming and going. T. 4, 7. Her 2008 decision is the first time she acknowledged actual closure. T. 4, 7 ("No one has been denied access").

Setting aside the constitutional deficiency of these reasons, they improperly seek to validate closure after the fact. There are certain "unyielding ... protections that *must* be satisfied before a trial can be closed," including "specific, individualized findings articulated on the record *before* closure ...." United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994), emphases in original, cited in Owens v. United States, 483 F.3d 48, 62 (1st Cir. 2007).

Where, as here, findings justifying closure are first placed on the record long after closure, there is *per se* constitutional error. "Under the procedure

established in Press-Enterprise [Co. v. Superior Court of California, 464 U.S. 501 (1984)] and the subsequent right of access cases, closure may not be retroactively validated." Antar, supra, at 1361. These procedures apply to Cohen's Sixth Amendment right to a public trial. Waller v. Georgia, 467 U.S. 39, 47 (1992).

That the Superior Court made no formal order of closure is legally irrelevant; what matters is that the press and Cohen's friends did not enter the courtroom because of a sign forbidding entry and because of court officers' orders. Antar, supra, at 1359. The Sixth Amendment right is equally damaged, whether closure is effected by court officers or by a judge. Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007); United States v. Smith, 426 F.3d 567, 571-572 (2nd Cir. 2005);

Here, the trial judge indisputably knew about the closure. Her lobby officer testified that she knew, M.T. 2, 43, and she herself conceded that she knew that officers would put up the sign[8] and keep the public out, unless there was space to separate them from

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[8]In an unseemly evasion, the judge found that she did not **"see"** the sign until defense counsel pointed it out. Add. 4. At trial she made clear that she **knew about** "that sign" before counsel said a word. T. 4, 4-7. Her lobby officer testified that she knew; he puts up a similar sign in every case. M.T. 2, 43, 83-84.

prospective jurors "by rows of benches or by an aisle," to prevent "contamination." Add. 11.

With this knowledge came the constitutional duty to hold a hearing, to consider alternatives, and to put all justifications on the record before allowing court officers to bar public access. Owens, 483 F.3d at 61-62 and cases cited; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n. 25 (1982). This judge had direct experience with the consequences of excluding the public from a trial. Commonwealth v. Patry, 48 Mass. App. Ct. 470, 474-475 (2000). Her awareness called for action, not passive trust in the discretion of her officers. Add 4, 11.

The Superior Court's failure to provide a hearing to those in the courtroom prior to closure--such as the *Stoughton Journal* trio and Detective O'Connor, M.T. 1, 83-86, M.T. 2, 203-204--and to make advance findings justifying closure is *per se* reversible error. Post-Enterprise Co. v. Superior Ct. of California, 464 U.S. 501, 511 (1984) and 520 (Marshall, J., concurring); U.S. v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994); U.S. States v. Raffoul, 826 F.2d 218, 225 (3d Cir. 1987); State v. Brightman, 122 P.3d 150, 156 (Wash. 2005).

If this Court agrees, it need not reach the

inadequacy of those justifications, discussed below.

E. The Court's Justifications for Closure Are Constitutionally Inadequate.

1. Space in the courtroom.

The justification of "no space available for the general public" is untenable. Add. 4.

a) Court officers testified that the public is excluded even when space is available.

Sullivan, the lobby officer, testified that he "excluded all members of the public from the jury selection process" for all five days. M.T. 2, 41-55, 128-129. Acting Chief Court Officer Bellotti agreed that the courtroom is closed "whether there's twenty jurors in the pool or a hundred jurors in the pool." Only after the jury is sworn do court officers "allow the rest of the people in." They close the courtroom to protect the venire from contamination, distraction, and disruption--for example, to shield them from the "disturbance" of "people opening and closing the doors." M.T. 2, 130-135, 139-141, 147-150, 154-156.

Demonstrably, lack of space was not the real reason for closing the courtroom. On the morning of June 18 the *Stoughton Journal* trio were approached by a court officer when they were still in the "designated

section" which is normally "reserved for the press."[9] Without waiting to assess the actual space available when empanelment began after lunch, the officer stated that the three would have to "leave the courtroom during jury selection." Add. 3, 13, M.T. 1, 46, 86, 90, 100, M.T. 2, 83.

b) There was always space for the public.

Based on the Superior Court's own subsidiary findings, there was always space in the courtroom for spectators. V Mark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 617 n.8 (1994) (appellate court may find ultimate fact based on subsidiary findings).

The judge found that the courtroom can accommodate 120 people behind the bar: 100 in the main area,[10] and 20 on either side of the courtroom.[11] Add. 3.

Assuming *arguendo* the accuracy of these figures,[12]

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[9]The finding that they were excluded because they wore no "press credentials," Add. 9, is insupportable.

[10]This finding refers to twenty benches, ten on each side of the aisle; each seats five. A. 210.

[11]These areas, A. 209, 211-215, in fact seat thirty people. On one side are two five-person benches and four chairs, seating fourteen. On the other side are three benches and one chair, seating sixteen.

[12]The judge's findings not only understate by ten the seating in the two enclosures (n. 11), they omit two benches just behind the bar, seating ten; a bench (continued...)

even when the maximum number of prospective jurors was in the courtroom, there was room for spectators throughout the time that the press, Cohen's friends, and everyone else who obeyed the sign were excluded.

On the afternoon of June 18, when jury selection began, the judge found that 78 prospective jurors were brought in and "several" family members[13] were seated on the side. Before a single member of the venire was excused or seated, of the 120 available seats there was thus room for more than 35 spectators. A. 204. White said that "most of the benches"--i.e., not all of them--"were filled with prospective jurors." M.T. 6, 125. On that afternoon, when White and the nameless couple got in by ignoring the sign, court officers excluded reporters Mucciarone and Stein and Cohen friends Cubell and O'Connor. Add. 9-10.

On June 19, when the first panel of 78 was exhausted, a new panel of 88 was brought in, thus

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[12](...continued)
and five chairs in front of the court officer stations, seating ten; and the 16-20 seat jury box near side bar. A. 209-215. The judge erroneously left out these latter seats because spectators sitting there could hear voir dire. The statute requires only that jurors be separated **from each other** during this phase, not from spectators or the press. G.L. c. 234, § 28.

[13]Sullivan remembered three family members: Cohen's mother, father and wife. M.T. 1, 73-74.

leaving space for more than 25 spectators (in addition to the family members) before a single prospective juror was either excused or seated. Sullivan conceded that there were seats available. M.T. 2, 31-32. On June 20, when this second panel was exhausted, a panel of 79 was brought in, leaving space for at least 35 additional spectators; White said that at least two rows of benches were empty. M.T. 6, 149-150. On these days both reporters as well as Cohen's friends Levine and Lennon were kept out. M.T. 1, 215-218, M.T. 2, 163-169, M.T. 6, 86-89. On June 21, after the judge ruled that space was "no longer a problem," Cohen's friend Rappoli was ejected. T. 4, 7, 87-88, 131.

With one exception, the judge did not even *find* that there was insufficient space for spectators, and her one finding was clear error. On the first day, she found, "[t]he court remembers that prospective jurors filled the spectator seating in the courtroom, at least until a number of people were excused." Add. 24, 5. The availability of seats for the public at this time was a disputed fact. A. 191-192, ¶¶ 38-44. Resolution of this dispute based on the judge's memory is an improper use of judicial notice. Brodin & Avery, MASSACHUSETTS EVIDENCE § 2.8.2, p. 53 (8th ed. 2007).

2. "Shielding" jurors from "contamination."

Neither on June 21, when the judge found that *prospective jurors* had to be "shielded" from "co-mingling" with spectators, T. 4, 7, nor in her post-trial finding about the need to avoid "contamination of jurors," Add. 4, did she identify an overriding interest which *in this case* required excluding spectators unless there was space to separate them from the venire "by rows of benches or by an aisle." Add. 11. Waller v. Georgia, 467 U.S. 39, 48 (1984).[14]

The court thus relied on an unconstitutional blanket rule permitting exclusion of the public from the courtroom whenever there is insufficient room to "shield" prospective jurors from other members of the community. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-609 (1982) (courts must determine on a case-by-case basis whether closure is necessary). Indeed, "shielding" the venire from spectators defeats the purpose of the Sixth Amendment right: the conviction

[14]While a judge may exclude spectators who behave in an intimidating or disruptive manner, Commonwealth v. Bohmer, 374 Mass. 368, 380 (1978), the record contains no evidence of such behavior at the time of closure, M.T. 1, 101-103, nor did the judge include this reason in her contemporaneous justifications. T. 4, 7. At the motion hearings, just one witness mentioned disruption *at sentencing*. M.T. 6, 140-141.

that jurors are more "forthcoming about biases and past experiences" when "faced with the public." Owens v. United States, 483 F.3d 48, 65 (1st Cir. 2007).

Assuming *arguendo* that the judge had a concern--albeit, never articulated--about prospective jurors talking with spectators or overhearing their chat, three alternatives would have managed this issue without any closure. Waller v. Georgia, 467 U.S. 39, 48 (1992); Owens v. United States, 483 F.3d 48, 61-62 (1st Cir. 2007). The size of the jury pools could have been reduced to make room for both jurors and spectators, with the desired separation. Or, as jurors were seated or excused, officers could have (but did not[15]) consolidate the rest on one side of the courtroom or in alternate benches. Or all seats could have been filled, with a warning that anyone talking would be removed.[16]

With respect to the "lack of space" justification, an instructive case is Watters v. State, 612 A.2d 1288

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[15]M.T. 2, 39-40, 67-68, 88-90.

[16]This order would have better shielded jurors from prejudicial talk than the "Do Not Enter" sign. White entered by ignoring the sign and overheard the nameless couple talking about "how upsetting this case was" and how "divisive this situation was to the town." White added his own comments. M.T. 6, 126, 146-147. While the press and Cohen's friends were kept out, jurors were being exposed to negative gossip.

(Md. App. 1992). There, as here, officers excluded the press and public from jury empanelment because of purported overcrowding, and defense counsel moved for mistrial when he discovered the closure. Because, as here, a court officer conceded there were "some seats" available, and because the means used to prevent overcrowding were not narrowly tailored to protect that interest, the court reversed. Id. at 1289-1294.[17]

3. The failure of the excluded to complain.

Rather than focusing on the structural error inherent in barring the public from the courtroom, Owens, 483 F.3d at 63-64, the trial judge unfairly placed the blame on those citizens who were ordered to stay out. Nowhere on the record is there any notice to the press or public of the precondition the judge established for entry--special permission--and there was thus no opportunity to comply. Add. 5-7. Contrast, United States v. DeLuca, 137 F.3d 24, 32-33 (1st Cir. 1998) ("partial" closure, with preconditions for entry, bars only those who elect not to comply).

The court also erroneously attached constitutional significance to the fact that those excluded from the

[17]In Watters, family members were also excluded. Family and close friends are fungible in this context. Carson v. Fischer, 421 F.3d 83, 91-92 (2nd Cir. 2005).

courtroom did not immediately complain to someone in charge. Add. 6, 9-10. Cohen does not rely on the considerable injury to those excluded. He relies on the damage to his own right to a public trial, which cannot turn on whether would-be spectators have the courage or knowledge to challenge court officers' authority to order them out. Their presence was crucial to Cohen: "it was important structurally that they be permitted to attend because of their potential effect on the venire persons." United States v. Owens, 517 F.Supp.2d 570, 573 n.3 (D. Mass. 2007) (citation omitted).

Blaming the excluded for their exclusion highlights the court's dereliction of its own constitutional duties. A court that fails to adhere to the procedures set forth in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n. 25 (1982) and progeny[18] deprives interested spectators of the *opportunity* to complain. United States v. Alcantara, 396 F.3d 189, 202 (2nd Cir. 2005); United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994); Storer Broadcasting Co. v. Gorenstein, 388 N.W. 633, 637 (Wis. App. 1986); contrast, Commonwealth v. Jaynes, 55 Mass. App. Ct. 301 (2002). As a

[18]See, e.g., Commonwealth v. Martin, 417 Mass. 187, 194 (1994), citing Waller, 467 U.S. at 48.

Washington appellate court recently observed,

> ... It is not the public's responsibility to safeguard these rights; it is the responsibility of the courts to take the appropriate [substantive and procedural] steps. . . to ensure and protect the defendant's and the public's right to open proceedings before any courtroom closure.

State v. Erickson, 189 P.3d 245, 250 (Wash. App. 2008).

E. Cohen Never Waived His Right to a Public Trial.

The judge ruled that Cohen waived his right to a public trial by agreeing not to be present at sidebar during individual voir dire; and that his counsel waived his rights by not objecting sooner. Add. 14-16.

As with the rulings blaming spectators for their exclusion, these rulings improperly shift the blame for courtroom closure to the defendant and his lawyer.

1. Cohen himself never waived his rights.

There is no evidence on this record of Cohen's knowing, intelligent, voluntary waiver of his right to a public trial. Commonwealth v. Patry, 48 Mass. App. Ct. 470, 474-475 (2000). The fact that he chose not to be present sidebar at mandatory individual voir dire, G.L. c. 234, § 28[19]--one discrete part of jury selection--has no legal bearing on his Sixth Amendment right to have the public present in the courtroom. His mistrial

[19]Commonwealth v. Owens, 414 Mass. 595, 599 (1993).

motions covered the exclusion of the public from all phases of jury selection: questioning on sources of bias *in open court*, T. 1, 98-115, Commonwealth v. Gordon, 422 Mass. 816, 823 (1996), G.L. c. 234, § 28; jurors' raising of hands showing an affirmative answer to these questions *in open court*, T. 1, 98-99; the individual questioning conducted "outside the presence of other persons about to be called as jurors or already called" but still "*in open court*," T. 1, 121-122, Commonwealth v. Horton, 434 Mass. 823, 831 (2001), Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510-511 and n.11 (1984); the exercise of peremptory challenges *in open court*, T. 2, 60-61, Press-Enterprise, supra, at 506 (1984); and the swearing of the jury *in open court*, T. 5, 33. G.L. c. 234, §§ 25, 28, 29.

An accused's right to be present at individual voir dire and his right to have the public present at jury selection are distinct constitutional guarantees and serve distinct purposes. The purpose of Cohen's right to be present at individual voir dire, subject to harmless error review, is "to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges." Commonwealth v. Owens, 414 Mass. 595, 602-603 (1993). Cohen, who chose not to be

at side bar, T. 1, 130, may have done so for a number of tactical reasons. By contrast, the purpose of his right to have the public present at jury selection, the violation of which is structural error, is because of the conviction that "judges, lawyers,... and jurors ... perform their respective functions more responsibly in an open court than in secret proceedings." United States v. Owens, 483 F.3d 48, 64-65 (1st Cir. 2007). Nowhere on the record did he waive this right, nor is there any conceivable tactical reason why he would not have wanted the public, especially his friends, present. Commonwealth v. Marshall, 356 Mass. 432, 435 (1969); Commonwealth v. Jones, 71 Mass. App. Ct. 568, 571 (2008); Owens, supra.

Neither Cohen's willingness to forego attendance at individual voir dire nor his acquiescence in this statutorily-mandated procedure constituted a knowing, intelligent waiver of his right to have the courtroom open for the entire process. Commonwealth v. Patry, 48 Mass. App. Ct. 470, 474-475 (2000). The sole evidence bearing on waiver came from his counsel, who testified that Cohen wanted the public and his friends present and never waived his right to a public trial. M.T. 5, 23-29. As in State v. Frawley, 167 P.3d 593 (Wash. App.

2007), Cohen "was never presented with an opportunity to waive his right to have the public present at the individual voir dire" and thus "cannot have knowingly and intelligently waived that right." Id. at 596.

2. Defense counsel's objection on the fourth day of jury selection was hardly a waiver.

Cohen's trial counsel, the late Richard Egbert, testified that he became aware that the public and press were being excluded from the courtroom on Thursday, June 21; he had been out ill the day before. When he entered the courtroom he noticed a sign on the door. At his request, the co-defendant's counsel took a photo of the sign; the photo bears the electronic date, June 21, 2008.[20] T. 23, 213, A. 201. After speaking to Sullivan, who agreed this conversation took place, M.T. 2, 106-108, 113-114, Egbert learned that the sign had been up all week. He then spoke with Cohen about it and learned of specific people who had been kept out. Egbert explained to Cohen the Sixth Amendment requirement of an open and public trial, and it was agreed that Egbert would object to the prior closing of the courtroom and seek mistrial. Egbert testified that at no time did Cohen "indicate ... in any way that he intended to waive

[20]The co-defendant's counsel testified that his camera's date-stamp is accurate. M.T. 6, 11-14.

his right to have a public trial." He moved for mistrial when court convened that day. M.T. 5, 16-29.

The judge nonetheless found that it "defies logic" that counsel did not know about the sign[21] or the exclusion of Cohen's supporters before Thursday, and ruled that counsel held "the issue in abeyance as an appellate issue in the event of a conviction." By not raising the issue earlier, the court ruled, counsel waived it. Add. 15-16.

Regardless of these untenable findings about defense counsel's intent, discussed below, there could be no waiver of the right to public trial without a knowing, intelligent waiver by Cohen himself, and the motion hearings produced not a shred of evidence of any such thing. Commonwealth v. Patry, 48 Mass. App. Ct. 470, 474-475 (2000); contrast, Martineau v. Perrin, 601 F.2d 1196, 1199-1200 (1st Cir. 1979) (counsel decided not to seek mistrial, told defendant he could do so personally, and defendant made no objection). Cohen's wish for a public trial is embodied in his counsel's objections and repeated motions for mistrial on June 21: the classic means by which a constitutional issue is

[21]In stark contrast with this finding, the judge took pains to find that she herself did not "see" the sign until counsel told her about it. Add. 4.

preserved. Mass. R. Crim. P. 22; T. 4, 5, 87-88, 132.

The judge's findings, suggesting that defense counsel did not really want a mistrial, pervert the settled meaning of ordinary legal practice. When counsel objected to the closure and pressed hard for mistrial, it was clearly erroneous for her to conclude that all he wanted was an "appellate issue." What he repeatedly pressed for was mistrial.[22] As a matter of law, this motion "makes known to the court the action which [counsel] desires the court to take...." Mass. R. Crim. P. 22. The trial judge improperly twisted defense counsel's principled efforts to protect Cohen's rights into both a waiver of those rights and an occasion for slurring his professionalism.[23]

"[C]ourts indulge every reasonable presumption against waiver" and "do not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304

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[22]The judge even disparaged counsel's proper use of the word "mistrial." Add. 7. For purposes of the right to public trial, trial begins with empanelment. Press- Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 and n.8 (1984). See, e.g., Commonwealth v. Gordon, 422 Mass. 816, 822 (1996).

[23]In a similar vein, the judge quotes defense counsel's stay pleading--filed two months after jury selection, without benefit of a transcript, A. 13--and unfairly insinuates that he misrepresented, rather than misremembered, the way he preserved the error. Add. 9.

U.S. 458, 464 (1938). As there was no evidence of Cohen's own knowing, intelligent waiver of his right to public trial, the judge's waiver ruling is wrong.

F. The Trial Judge's Use of Judicial Notice to Resolve Disputed Facts Violated Due Process.

Already noted is the trial judge's improper reliance on her own observations in finding that "prospective jurors filled the spectator seating" and that she "did not see the sign until it was brought to her attention by counsel for the defendant." Add. 4, 6; pp. 23, 28, *infra*. This affront to basic principles of our adversary system reached its nadir in the court's finding that on June 21st she issued a "directive" to Sullivan to "allow anyone who wanted to come into the courtroom" and an "order" to allow spectators in "as space is available." Add. 12, 14.

Whether Sullivan opened the courtroom after defense counsel objected was a disputed issue of fact. A. 188-189, ¶¶ 15-26. Resolution of this dispute in Cohen's favor would have shown that the error persisted despite defense counsel's objection.

The judge improperly resolved this dispute against him by finding that she herself issued an "order" which Sullivan obeyed. Add. 12, 14. Nowhere in the trial record, the record of the Rule 30 hearings, or on the

docket is there a word about any such corrective action taken by the judge. Sullivan explicitly testified that he took the sign down on his own and not at anyone's instructions. M.T. 2, 45. The judge's use of her own purported memory to shore up a record bare of judicial action is not only legally improper, Brodin & Avery, MASSACHUSETTS EVIDENCE § 2.8.2, p. 53 (8th ed. 2007), it does violence to our system of justice. Taking post-hearing judicial notice of disputed facts "turn[s] the doctrine into a pretext for dispensing with a trial," deprives the accused of due process, and frustrates appellate review. Garner v. Louisiana, 368 U.S. 157, 173 (1961) (citations omitted). To his Sixth Amendment claim, Cohen must add these due process violations. U.S. Const., am. 14; Mass. Decl. of Rts., art. 12.

G. The Trial Judge Mischaracterized the Evidence of Rappoli's Removal From the Courtroom.

Proof that the judge issued no "order" opening the courtroom on June 21 is the on-the-record ejection of Cohen's friend Rappoli later that same day. The judge's findings about this incident lack record support.

The transcript shows that, after defense counsel objected to a man's removal, Sullivan told the judge that he "was one of the Stoughton police officers" and defense counsel protested this reason. Sullivan did not

say, as the court found, "the man was a police officer *in uniform,*" nor did the court take any steps to "determine that he was not in police uniform." Add. 8. So far as the record shows, the court did nothing. Later that day, she neither remembered nor showed any interest in the incident when counsel informed her that the man was not a police officer. T. 4, 87-88, 130-132.

Rather than properly investigating Rappoli's ouster when it occurred, the court misstated the record after the fact by finding that she was told that he was "in uniform." Because Stoughton police officers were not allowed to attend the trial in uniform, Add. 5, this clearly erroneous finding provided her with an unwarranted excuse for taking no action on his removal.

Had the judge made the requisite prompt inquiry, she would have discovered that he was Cohen's friend--a spectator deserving special attention under the Sixth Amendment. Comparable circumstances in a New York State case resulted in habeas relief in Guzman v. Scully, 80 F.3d 772, 775-778 (2nd Cir. 1996).

II. THE EVIDENCE WAS LEGALLY INSUFFICIENT ON BOTH COUNTS OF WITNESS INTIMIDATION.

At the close of the Commonwealth's case, the judge denied Cohen's motion for required finding of not guilty on the charges of intimidating witnesses Jamie Kelly--

the bank teller who gave him information about Hills' account--and Brian Sexton--Hills' former employee--in violation of G.L. c. 268, § 13B.[24] T. 19, 13-16, 39. The jury, charged on separate statutory theories of intimidation and misrepresentation, returned general verdicts. T. 25, 45-47, T. 30, 18, A. 166-167.

A. Insufficient Evidence of Intimidation.

This theory required proof that Cohen intentionally tried to intimidate these witnesses. Commonwealth v. Robinson, 444 Mass. 102, 109 (2005). Intimidation "is putting a person in fear for the purpose of influencing his or her conduct." Commonwealth v. McCreary, 45 Mass. App. Ct. 797, 799 (1998), 613 (2007). There was no evidence that Cohen tried to put either one in fear.

Jamie Kelly. Jamie Kelly testified that Cohen called her on the telephone in 2004, a few weeks before she appeared before the grand jury. She had known him for years and thought he was a good guy. He wanted to go over what had taken place when he came to the bank asking about Hills in April, 2002, because he was going

[24]The relevant part of the statute in effect in 2002 provided, "Whoever, directly or indirectly, willfully endeavors ... by misrepresentation [or] intimidation ... to influence, impede, obstruct, delay or otherwise interfere with any witness ... in any stage of a trial, grand jury, or other criminal proceeding ... shall be punished ...."

to court. He asked if she remembered certain facts, and she knew she could say yes or no. She could not remember what he said about what happened but she didn't agree with some of it. He wanted her to sign a statement, but she never saw what he wanted her to sign. He tried to reach her again by phone maybe ten more times, wanting to meet with her. Kelly did speak to him once or twice more but "just never met with him."

Kelly testified that Cohen never raised his voice or threatened her and, despite the prosecutor's improper leading, would not agree that he tried to get her to change her memory. T. 11, 144. She said she "felt a little intimidated with the whole situation," by which she meant she "just didn't feel comfortable with it," she "just didn't feel right." Her discomfort, she explained, was because she thought her memory was different from Cohen's. At the time, she had not remembered telling him in 2002 about Hills' history of bounced checks. At trial, however, she remembered that she had. T. 11, 123-133, 138-151.

Viewed in the light most favorable to the Commonwealth, this evidence does not support a finding that Cohen tried to put Kelly in fear. She felt free to disagree with his memory, and he never said, did, or

implied anything remotely frightening. This includes his many subsequent efforts to reach her by phone; there was no evidence that these had either intimidating content or impact. Contrast, Commonwealth v. Lester, 70 Mass. App. Ct. 55, 69-70 (2007) (homicidal threats).

Brian Sexton. Sexton testified that within weeks of Hills' 2002 arrest, Hills typed out a statement about his meetings with Cohen and asked Sexton to sign it. Sexton said he made some changes and signed. T. 13, 13-16. On his first day before the grand jury, Sexton said that he was intimidated by Hills and felt he "needed to sign" the statement or he would lose his job.[25]

In August, 2004, James Marathas--who owned several restaurants called Center Fields--asked Sexton about this statement. Sexton testified that he "wanted to talk to Cohen" and "wanted to re-do" the statement Hills had him sign. Marathas called Cohen, who called back. Sexton and Cohen agreed to meet at Marathas' Stoughton

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[25]During Sexton's first day at the grand jury, the prosecutor repeatedly interrupted his reasons for wanting to repudiate the Hills statement, whenever those reasons did not suggest intimidation by Cohen. T. 13, 138-142. Afterward, the prosecutor told Sexton what perjury is and recommended that he get a lawyer. Sexton felt he had been "grilled" about the second statement. T. 13, 153-154; T. 14, 125-126. When he was called back to the grand jury, he now said that the second statement was untrue and Cohen had hoodwinked and intimidated him into making it. T. 13, 190-191.

restaurant. T. 13, 38-46, 101-06, 123-28, 134-35, 156.

Sexton brought his Hills statement to the meeting. Cohen asked him if he wanted to provide a new statement, and he said yes. He willingly went with Cohen to the restaurant's office in order to compose the statement together on a computer. Cohen asked questions, Sexton gave answers, and they discussed the statement "back and forth." If Sexton disagreed with something Cohen had typed, Cohen removed it. When they finished the draft, Sexton wanted time to speak with his lawyer, Robert Schneiders, and Cohen agreed. Sexton knew he could talk to any lawyer he wanted, Cohen told him he knew Schneiders well, and Sexton chose Schneiders. T. 13, 186-187. He signed the statement at Schneiders' office a day or two later, after Schneiders said he could "sign if he wanted."[26] Cohen never threatened him, raised his voice, or suggested there would be any consequences if he didn't sign. On the contrary, Cohen said "to do the right thing," which Sexton understood meant "to tell the

[26]Schneiders, a Commonwealth witness, testified that Sexton signed the statement because he felt guilty about the one Hills had him sign. Counsel spoke with Sexton the night he signed it. He did not sound harassed or coerced, nor did he try to slow down the process. He was "very adamant that he wanted to sign." Counsel satisfied himself that Sexton signed it freely and voluntarily and that it was the truth to the best of his knowledge. T. 14, 27-28, 121-130.

truth." T. 13, 44-59, 65, 114, 187, 192-193, 224-225.

Sexton testified that the only purportedly intimidating thing Cohen did was to say "he wanted to do the statement that day" and "I need it for tomorrow." T. 13, 223-227. This facially neutral request, given Sexton's own conceded wish to meet with Cohen and provide a new statement, is a legally insufficient basis for finding that Cohen intended to frighten him. Sexton said he felt "rushed" and "a little bit intimidated because of the speed of the whole thing." T. 13, 60-61. An intent to "rush" Sexton is a far cry from an intent to put him in fear, especially when the "rush" gave Sexton time to consult his lawyer. See, e.g., Commonwealth v. Robinson, 444 Mass. 102, 111 (evidence of argument insufficient to prove intent to frighten); Commonwealth v. Cruz, 442 Mass. 299, 309-310 (2004) (offering leniency to witness with criminal exposure, same); Commonwealth v. Drumgoole, 49 Mass. App. Ct. 87, 92 (2000) (bumping witness in crowded restaurant, same).

With respect to the Commonwealth's intimidation theory, Cohen's motion for required finding should have been allowed on both indictments.

B. Insufficient Evidence of Misrepresentation.

We have found no reported decision discussing the

statutory theory of misrepresentation. It is settled, however, that "a criminal misrepresentation must be *knowingly false and made with the intent that the person* to whom it was made rely on its truth." Commonwealth v. Kenneally, 10 Mass. App. Ct. 162, 177 (1980). See, e.g., Commonwealth v. Mills, 436 Mass. 387, 397 (2002). (disability recipient intentionally understated other income in order to secure maximum benefits).

Viewed in the light most favorable to the Commonwealth, the facts here do not fit a fraud theory. Sexton and Kelly agreed that Cohen's representations were about *his memory of events at which each witness was also present*--i.e., events at which Cohen perforce had no greater claim to the "truth" than Sexton or Kelly. There was not a shred of evidence that he ever suggested that either one lie.

Sexton testified that Cohen explained "his version" of the meetings with Hills and that they then sat down together to prepare Sexton's version. As Cohen typed, he asked Sexton questions about "what he remembered," and Sexton answered. Cohen removed everything that Sexton said he didn't agree with. T. 13, 48-49, 54-55, 143-144. Sexton's lawyer, a Commonwealth witness, testified that he made sure that Sexton affirmed the

truth of the statement before signing. T. 14, 26-30, 124, 130. Sexton told the grand jury that he signed it because "it sounded correct to me." T. 13, 191.[27]

Similarly, Kelly testified that Cohen told her his memory of their interaction at the bank, and she told him that she didn't agree with his version. He wanted her to sign a statement, but she did not know its contents as she never saw it. With respect to the only point of disagreement she could remember--whether or not she had told Cohen about Hills' many bounced checks--Cohen's memory turned out to be correct. T. 11, 128-132, 137, 140-142, 150-151.

For these reasons, Cohen is also entitled to acquittal on the Commonwealth's "misrepresentation" theory under G.L. c. 268, § 13B. In each case, he sought to obtain the statement of a witness--a proper and lawful activity. In so doing, he told them his memory of an event and asked them for their own memories of the same event--a normal, lawful method for obtaining a statement that has nothing to do with fraud.

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[27]Sexton claimed he received the false impression that, if he signed the statement, Cohen would help extract him from his involvement in the Hills-Cohen situation. This impression came from the restaurant owner, Marathas, not Cohen. T. 13, 44-45, 50, 100.

C. If Only the Evidence of Intimidation Was Insufficient, A New Trial is Required on Misrepresentation Because of the General Verdict.

The defense specifically challenged the evidence of intimidation at the close of the Commonwealth's case. T. 19, 13-16. Should this Court conclude that the evidence was insufficient on that theory but sufficient to prove misrepresentation, Cohen must have a new trial on the latter theory, as the jury's verdict did not differentiate between the two. T. 19, 13-16, A. 166-167. Commonwealth v. Berry, 431 Mass. 326, 333 (2000).

III. THE EVIDENCE THAT COHEN FILED A MATERIALLY FALSE POLICE REPORT WAS ALSO INSUFFICIENT AS A MATTER OF LAW.

G.L. c. 268, § 6A, punishes a police officer who

> in the course of his official duties ... files ... any false written report ... knowing the same to be false in any material manner....

"[A] false statement is material if it 'tend[s] in reasonable degree to affect some aspect or result of the inquiry.'" Commonwealth v. D'Amour, 428 Mass. 725, 744 (1999) (citations omitted). Materiality is a jury question. Commonwealth v. McDuffee, 379 Mass. 353, 363-364 (1979). The "inquiry" here was whether there was probable cause for a criminal complaint against Hills.

While there was disputed evidence from which a jury could find that some aspects of Cohen's police report

were inaccurate,[28] there was no evidence that any of this extraneous matter would have reasonably tended to affect the issuance of the complaint against Hills. All aspects of Cohen's report material to that inquiry were demonstrably true and supported by documentation: that Hills, without authorization from Pizzapalooza's owner, fraudulently took Marinilli's money for a purported investment, converted the money to his own use, and then offered bad checks as repayment, telling Marinilli he could cash them. T. 9, 87, 89-91, 94, 108, 127, T. 10, 46-54; T. 11, 59, 123-125, 137; A. 104-142.

Accordingly, the evidence that Cohen knew that his police report was "false in a material manner" was legally insufficient, Commonwealth v. Kelley, 35 Mass. App. Ct. 745, 751 (1994), entitling him to acquittal. Commonwealth v. McGovern, 397 Mass. 863, 867 (1986).[29]

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[28]See T. 9, 44-56. The main dispute was whether Hills had a "large black folding knife in the pen organizer" on his desk when Cohen handcuffed him. T. 24, 161. Whatever the nature of this object, the jury found insufficient proof that Cohen did not fear for his safety because of it and acquitted him of kidnaping and assault and battery. A. 163, 168, T. 25, 32, 44.

[29]This issue, raised in the codefendant's motion for required finding in the Viverito case, was adopted by Cohen's counsel but without specific reference to the false police report charge in the Hills case. T. 19, 19-22, 27.

IV. THE JUDGE MISDEFINED UNLAWFUL MALICE IN HER CHARGE ON ATTEMPTED EXTORTION COMMITTED BY A POLICE OFFICER.

G.L. c. 265, § 25, includes separate theories of extortion: committed by any person and committed by a police officer. The Commonwealth accused Cohen of extortion as "an abuse of police power," T. 5, 77, T. 10, 7, T. 24, 159, and declared that the extortion statute is "specifically tailored to police officers (sic) of misuse of their powers." T. 19, 28.

A distinction between the generic and restricted theories is that an accused police officer must have threatened to use his authority both "maliciously" and "unlawfully." Cohen agreed that he threatened Hills with arrest unless he paid Marinilli back. His defense was that, as a police officer, his intent was proper and lawful. T. 19, 141-143, T. 23, 50-51, T. 24, 79-81.

In defining the statutory elements, the judge declined to give the following language sought by Cohen:

> In determining whether the Commonwealth has proved beyond a reasonable doubt that Cohen acted maliciously, you must presume that the acts of Sgt. Cohen, being a police officer, were done legally, in good faith, and within the scope of his official duty.

A. 155. Her recitation of the elements necessary for conviction included "without legal excuse" but nowhere mentioned police officers and gave no guidance on how to

evaluate the lawfulness of a police officer's conduct. T. 36-40. Different, higher standards must apply when determining whether a police officer acted with lawful authority. People v. Doss, 260 N.W.2d 880, 886-888 (Mich. App. 1979), rev'd on other grounds, 276 N.W.2d 9 (1979); State v. Williams, 148 A.2d 22, 27, 31 (N.J. 1959). These cases recognize, in the criminal context, settled law on the civil side. Clancy v. McCabe, 441 Mass. 311, 317-318 (2004).

The judge made matters worse by instructing that "a malicious threat is criminal if it was intended to enforce the payment of a just debt; that is, money that the alleged victim rightfully may have owed," or "to coerce the settlement of a civil claim." T. 25, 38-39. This charge understated the Commonwealth's burden to prove a malicious, unlawful intent. A threat of criminal prosecution intended to recover stolen property cannot "be considered as made maliciously and with intent to extort property **unless there were other proofs of malice and intended extortion**." Commonwealth v. Coolidge, 128 Mass. 55, 59-60 (1880), emphasis added. As applied to police officers, the charge criminalized a common discretionary act: giving a thief the choice of returning stolen goods or being prosecuted criminally.

As the defense timely objected to this charge, which both reduced the Commonwealth's burden of proof and eviscerated Cohen's defense, he is entitled to a new trial for attempted extortion. T. 25, 35-40, 57-58, 61. Commonwealth v. Conley, 34 Mass. App. Ct. 50, 55-56 (1993); In re Winship, 397 U.S. 358, 364 (1970).

V. THE SPECIAL PROSECUTOR'S TEAM ENGAGED IN A PREJUDICIAL PATTERN OF MISCONDUCT.

In its zeal to pillory a lawyer and police officer, the prosecution team repeatedly crossed the line. Given space limitations, we provide a sampling of low blows with which the defense had to contend: **1) "questionable and improper conduct" at the grand jury,** Add. 42, such as bullying and taunting witnesses, A. 40-77, Commonwealth v. Mathews, 450 Mass. 858, 873 (2008), and aggressive opposition to defense efforts to discover why grand jury tapes were destroyed. T. 2, 4-16; **2) lack of candor**, such as the misrepresentation that "nobody has been denied access to the courtroom," T. 4, 6, without any factual basis or reasonably diligent inquiry, S.J.C. R. Prof. C. 3.3, Comment [2]; **3) discovery misconduct**, including (a) suppression of exculpatory documents by a police investigator, T. 16, 33-105, 141-159, T. 17, 176-177, and undisputed testimony that the prosecutor never

asked him to search for such evidence, T. 16, 61, 67, 73-75;[30] (b) giving last-minute notice of expert testimony, T. 1, 9-30, A. 11, 79, with the disingenuous excuse that the opinions were not by "typical experts," T. 1, 14, 25; (c) trying to elicit, mid-trial, an undisclosed statement of the defendant, with the disingenuous excuse that the prosecutor didn't "know what [his] obligations [were]," T. 14, 241-246, T. 15, 32-37; and (d) proffering mid-trial an exhibit of cross-referenced phone calls, with the disingenuous excuse that the defense had the raw data, T. 15, 257-264, Commonwealth v. Cronk, 396 Mass. 194, 199 (1985); **4) failing to secure and preserve evidence**--a purported audiotape supporting Hills' claim that Cohen said "we can either handle this through this office or my other job," T. 8, 229, p. 5 and n.1, *infra*, and a purported ledger supporting a lawyer's claim that he paid Cohen $825 for referring Marinilli's civil case, T. 12, 204, 213, 266-268, both claims used to prove extortion, T. 24, 148-149, 164-165; **5) attempting to elicit excluded**

[30]See, e.g., T. 13, 25-26 (Sexton testified, over objection, that Hills had a "private parking space") and T. 16, 89-90 (suppressed document shows this to be false and relevant to legality of Cohen ordering Hills' vehicle towed).

evidence[31] **and evidence without a good faith foundation**, T. 12, 52-54; **6) mischaracterizing testimony**, T. 23, 58-59, Commonwealth v. Wynter, 55 Mass. App. Ct. 337, 342 (2002), Commonwealth v. DeMars, 42 Mass. App. Ct. 788, 792 (1997); **7) badgering**, T. 23, 128-139, 147, and **8) arguing excluded evidence**, T. 24, 152, 171, Commonwealth v. Grimshaw, 412 Mass. 505, 508 (1992). A new trial is required by this "persistent course of conduct designed to prejudice the defendant." Commonwealth v. DeMars, 42 Mass. App. Ct. 788, 795 (1997) (Brown, J., concurring).

CONCLUSION

For the foregoing reasons, this Court is asked to vacate these convictions and order judgments of acquittal or, in the alternative, order a new trial.

Respectfully submitted,

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[31]T. 7, 150-55, 223-24, T. 14, 10-17 (excluded grand jury testimony); T. 1, 37-41, T. 10, 6-7, T. 17, 164-66, T. 23, 150-51 (excluded reason Hills' charges nol prossed); T. 12, 196-98, 209-212 (excluded rank hearsay); T. 17, 167-68, T. 18, 184-86 (excluded retaliation evidence).