COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-10486

COMMONWEALTH,

Appellee

V.

DAVID COHEN,

Defendant-Appellant

ON APPEAL FROM JUDGEMENTS IN THE NORFOLK SUPERIOR COURT

COMMONWEALTH'S BRIEF AND SUPPLEMENTAL APPENDIX

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July, 2009

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2.&3. Was there ample evidence of the defendant's intimidation of two witnesses, both of whose truthful accounts he attempted to remold, and of a material false statement in a police report that falsely accused a victim of having had a weapon?

4. Was there any error in a jury instruction that clearly defined the requisite wrongful intent?

5. Did the defendant provide appellate argument of prosecutorial misconduct?

STATEMENT OF THE CASE

In March, 2005, David M. Cohen, his police chief, and a fellow Stoughton police officer were indicted by a Norfolk County grand jury. Trial commenced in Norfolk Superior Court on June 18, 2007[1] before Dortch-Okara, J.; on July 30 the defendant was convicted of intimidating two witnesses, attempted extortion of another victim, and filing a false police report.[2]

STATEMENT OF FACTS

In January, 2002, Timothy Hills entered into a contract with Peter Marinilli, the attorney-defendant's best friend's brother, who along with other fam-

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[1] Trial transcript references are noted by volume and page number(s). Page references to hearings on the motion for new trial are preceded by date and "MH." "SA" precedes references to the Supplemental Appendix.

[2] On August 27, 2007 the defendant was sentenced to two concurrent two-and-a-half to three-year terms, a concurrent one-year term, and probation (29:5-8,12-22).

ily members was among the defendant's legal clients; Marinilli wanted Hills to return a $10,000 investment he had failed to put in escrow (8:214-21,232; 10:83; 17:17; See 11:61;22:169;23:69). On April 22, 2002, the defendant, who also worked a 4:00 p.m. to midnight shift as a Stoughton Police Sergeant, left Hills a message[3]:

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

Brian Sexton worked with Hills and drove him to the defendant's Stoughton law office, where, in casual business attire, the defendant handed Hills a business card and opened a folder that held Marinilli's contract (8:230-33,253;13:13-17;Ex.29). Hills said he would accelerate efforts to pay Marinilli, and on April 26 he met the defendant at a restaurant and gave him $1,000 (8:233,235-41; Exs. 25,26).

On Monday, April 29, the defendant called Hills, who agreed to meet at his law office at 12:30 the next day; Hills arrived at noon but left after being

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[3] Exhibit ("Ex.") 24; 7:17; 8:220-29; 12:67-8; 13:4-6,10-12; 15:229; 16:11; 17:176.

told the defendant was in a meeting (8:242-6; 13:19-20). He then received a voicemail message (Ex.27)[4]:

> Tim Hills, this is David Cohen at 12:30. And as you can imagine, I'm not too happy with you right now. Um, I told you - you told me you were going to be here[5] 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.

The defendant wanted the remaining money that day (8:247-49; 13:21-23). Hills met the defendant and his friend Jack Arico at about 1:00 at a restaurant where they discussed business enterprises; the defendant, in casual business attire, asked Hills for a check, saying he would hold it and as a lawyer could not do anything with it (8:247-52). Hills told the defendant he would need to wait to deposit the check because the account did not then have sufficient funds, and made a notation: "Loan repaid. Deposit with notification."[6]

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[4] See also 8:227,244-45;12:70-71;13:20-1;17:39;23:56.

[5] "[H]ere" referred to the defendant's law office (See 8:227,242-46;12:70-71;13:19-21;17:39;23:56).

[6] Ex.28; 17:148-49. The attorney-defendant, a police sergeant, first told Lt. Michael Blount, a Stoughton Police Department internal affairs investigator, that he never saw the notation, then that "even if he had seen it he would not have known what that meant" (17:149). He claimed not to know "what the banking regulations are, as to what they can disclose and what they can't disclose," and admitted going in uniform to the bank right after Hills gave him the "[d]eposit with notification" check (23:103).

Between 3:30 and 4:00 p.m., the defendant went in uniform to Hills' bank and told teller Jamie Kelly that a customer was writing bad checks and "that they needed to catch him" (11:123-26; 15:198). He showed her Hills' check and asked if it was good; Kelly said the account did not have sufficient funds.[7]

At approximately 4:00 p.m., the defendant called Hills and said, "We have a big problem. I need to meet you"(8:254). Hills was at his office, where the defendant arrived in a patrol car; they went to Hills' office, which Sexton was asked to leave (8:254-5, 259; 12:17;13:26-30). The angry defendant, armed with a revolver and mace, said, "We need to do something about this today"[8] and told Hills "to steal [the funds] if [he had] to" and that he would "lock [him] up" un-

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[7] It was not the custom and practice of the Stoughton Police Department to have an officer attempt to negotiate a check or request private banking information without a court order (14:231; 15:62,190; 17:68). Kelly did not give the defendant information about excessive checks, and told her branch manager that the defendant had asked about the account's overdraft history (11:124-25;15:192). The manager determined Hills' checks had not been presented for payment; his account was in good standing and was in no danger of being closed; and there was no excessive overdraft history (15:195-97; See 8:253, A. 133).

[8] Hills said he could not pay that day; the defendant repeatedly told him to shut up and that "he didn't care" about their earlier conversation, and wanted to know "right now" where Hills was going to get the money, saying Hills' girlfriend's father (also a client of the defendant's) had money (8:259-62).

less he "[did] this today in cash" (8:259-61; 13:26,29). Hills said he could not produce cash that day and might need to talk to an attorney; the defendant said he was going to "lock [him] up," and ordered him up, put a hand on the back of his neck, and handcuffed him, saying, "If this is the way you want to do it, you know, you basically have a choice, you know, $9,000 in cash or you could get locked up" (8:262-3; See 8:210-14). The defendant said he would take the handcuffs off but Hills was "going to have to do something for" him; they sat down at Hills' desk and the defendant said, "This is what you're going to do," and in a "very demanding" and angry tone had Hills write a note saying he would pay Marinilli cash (SA 17 [Ex. 30];8:264-69). The defendant did not like the way Hills signed his name, and made him sign again (8:268). He repeated his demand for $9,000 in cash by 4:00 the next day (8:269,270-1). There was a tow truck when they went downstairs; the defendant asked if Hills wanted anything from his truck before it was towed,[9] and Hills took mail from the console (8:271-2).

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[9] The defendant told the tow truck driver, "I don't care how much money somebody comes down there with, nobody gets this truck without me--without asking me," repeated his demand to Hills for $9,000, and told Hills to get out of the patrol car into which he had

The defendant repeated his demand for money and took Hills' mail, opening it and removing the contents; Hills said he could not do that. The defendant said, "I can do what I want" (8:273;9:22).

Hills contacted an attorney who told the defendant he "understood that there was a dispute of a debt situation" and he had gone to Hills' office and placed Hills in handcuffs (9:31;12:56-57;16:15).[10] The defendant denied handcuffing Hills, then asked, "Are there any witnesses?" (12:58-59).

At approximately 3:00 p.m. the next day, May 1, the defendant called Hills' office and asked Sexton to poke his head in the conference room and ask Hills "if there was an envelope for him" (13:34).

The defendant called Hills during the day to make sure he would produce $9,000, and left a message (Ex. 32; 9:28-29;12:71-72;23:90):

> Hey Tim, it's Dave Cohen from the Stoughton Police Department. Just confirming our appointment

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ordered him (8:273-4;9:23; See 13:29-32). When Hills tried to collect his vehicle from the towing company, whose owner was a friend of the defendant's who had referred a Stoughton automobile accident case to him (11:117-20), he was told he could not "see his truck until David Cohen said so" (9:34-37;13:35-36).

[10] Hills returned to his office and called several offices to make a complaint, as well as the attorney who called the defendant (9:23-25,31;12:56-57;16:15). The defendant, who had kept Hills' license, later called Hills at his home two or three times (9:25-27).

> today, nine thousand in cash. Stoughton Police Department, 26 Rose Street, Stoughton, Mass. Hope you get down, Tim. See you later.

Stoughton Police Department custom and practice did not permit demanding cash, threatening anyone with arrest or prosecution, or accepting cash payment even for a parking ticket (17:102,134-135; See 23:56).

At close to 4:00 p.m., the defendant again called Hills (9:30; 12:71; Exs. 33,34):

> 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.[11] Um, I guess we will have to deal with this thing the other way, I guess. Um, talk to you later, Bye.

Hills called the police station to speak to Chief Cachopa, whom he was told was out both that day and the next (9:27-28).[12] On May 3 Hills went to the sta-

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[11] The defendant acknowledged to Hills' attorney that there was no basis to charge larceny by check, and nonetheless charged Hills under a statute that excludes checks (12:60-61;See 17:75,102-03). All charges against Hills were dismissed by *nolle prosequi* in March of 2003 (See 9:40,59-60;12:199-200).

[12] Cachopa, whose home the defendant called, was a good friend of the defendant's, and his wife had been employed at the defendant's law office(10:148-150; 12:191-92; 13:32;16:9-15; 17:97-98,137; Exs.48A-C,49; See 23:134). Cachopa later denied Lt. Michael Blount's request to complete his internal affairs investigation into Hills' complaints and demanded Blount turn over his investigative files and a recording, later missing from the Stoughton Police Department, of the defendant's calls to Hills (Ex. 23; 9:40,59-60;10:159-62;12:63-64,161,163; 17:13-14,18,145; 18:190-91; See 8:91). In July, 2004, Acting Chief Chamberlin sent Hills' complaint to the District Attorney and a spec-

tion to make a complaint, and was arrested on a warrant based on the defendant's police report (8:73-74;9:32-4,38-9;10:152-8,165-7;12:63;13:34-7). The defendant referred Marinilli to a good friend, attorney Glen Hannington, to sue Hills. The day after Hills' arrest, Hannington cashed Marinilli's check for a suit against Hills and gave the defendant an $825 cash payment--a third of Hannington's legal fee (12:180-3,187-9,263;11:121;12:185-9,194,198-9,204-5; See 14:198-9).[13]

The defendant called Kelly a few weeks before she went before the grand jury in 2004, wanting "to go over the incident with [her]"; she answered the defendant's questions after he said Hills was taking her to court, and told the defendant she did not agree with his account of their interactions; he wanted to "meet with [her] and go over it," and "to sign a statement that he wrote up for the court" (11:126-28,131,147). She did not feel right about doing so and

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ial prosecutor was appointed (15:224-27). Cachopa was convicted of being an accessory after the fact to the attempted extortion (Norfolk Sup. CR05-0130-001-03).

[13] Asked by defense counsel whether the defendant "did not tell *you, did he*: Oh, I arrested [Hills] because he didn't pay a civil debt, did he?" Hannington answered, "I believe he did" (12:258-59). Cachopa attempted to broker a deal with Hills regarding the civil case, and Hannington kept both him and the defendant informed about it (12:195-6,202,205).

did not "agree with what he was saying" (11:131).[14] He called her "close to ten times"; she was not comfortable and "felt intimidated" (11:130,132,147).

Sexton had given a statement to Hills in 2002,[15] and in August, 2004 heard from the defendant's friend James Marathas (13:14-16,38). Marathas approached Sexton, claiming to have a questionable signature of Sexton's that Sexton agreed to come see (13:39). When he arrived at Marathas' Stoughton restaurant, close to the police station, he went to a basement office where Marathas could not produce the supposedly suspicious signature, and instead brought up Sexton's 2002 statement about "the thing that's going on with David Cohen" (13:41-42,194). Marathas asked Sexton, who was to testify before the grand jury, "Have you thought about writing out another statement?" and said he was going to call the defendant; Sexton said, "No, no. Don't call" him (13:43-45). Marathas called the defendant, a grand jury target, who showed up with Sexton's

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[14] What the defendant "was trying to say - he was going over things of the incident, but I did not think it was the way it happened, so I just- I never met up with him";"It just seemed like what he was saying was not what happened....I just didn't agree with it. That isn't what I thought happened" (11:129-30).

[15] The defendant knew he was under criminal investigation when he sought new statements from Kelly and Sexton(21:288-99,300-02;22:15-19,26-28,270;23:193-98).

2002 statement[16]; the defendant went through it, talking about "Dave Cohen's side" of events Sexton had witnessed (13:46-49,203). He wanted Sexton to "adjust" his 2002 statement and write another statement to discredit Hills (13:49-51,137). When the defendant said he needed a new statement that day, Sexton said,

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[16] The defendant had multiple sources of what transpired before the grand jury, including his friends Edward Marinilli and Hannington (11:152,154; 12:191,199-200;13:6-15,20-21), as well as Schneiders (n. 17, *infra*), who represented Dennis Elia--who in turn discussed his own grand jury testimony with Schneiders (whom Elia thought tried to put words in his mouth); Schneiders admitted he "may have" relayed his client Elia's information to the defendant (7:10-12; 14:8-10,24-25,149; See 13:246-52; 22:24).

Elia's girlfriend made a $1,000 car deposit to a Stoughton car dealership (6:50,52,208-209,214-16; 7:195;13:253-7;14:55-6,77-8,93); Schneiders spoke to the defendant, who told the salesman he would jail him if he did not immediately provide the deposit he was "coming down to collect"; within six minutes of a claimed after-hours complaint that Elia himself denied making (7:140-150,200; 14:85) the defendant and multiple armed colleagues--some not even in the appropriate sector--descended on the dealership and arrested and jailed the salesman, then charged the dealership's owner(Exs.38-41;5:146,149-59,163-66;6:66,88-98,129-31, 136-52,161-9; 7:107-08,113-16;8:98-101;10:116-25,129; 11:16-20,98-100;20:105-13,122;21:157,130-5,193-94,198-9). Handwritten logs were missing only from the shift the defendant supervised (8:33-6,40,44,49-52,67-8,75-9; Exs.14,18,19;10:115-16). Charges against both the salesman and owner were dismissed (6:167-9; See 8:92-3,96-7;20:151-53;Ex. 6). Later,the owner was arrested and handcuffed to a rail in the Stoughton Police station, where the defendant approached him and invoked the salesman's name; at a later "sit-down," the owner agreed to refer accident clients to the defendant's legal practice, an arrangement the defendant deemed "an amicable idea" (6:173-94).

"Whoa, whoa, hold on a second now. Before I do anything, I want to talk to my attorney" (13:51). His attorney was Robert Schneiders, who, unbeknownst to Sexton, was a close friend and business associate of the defendant's (7:156; 11:96,161; 12:184; 13:51).[17]

Sexton was taken to Marathas' small basement office, where the defendant spent more than two hours typing up a new statement that was not completely truthful; Sexton refused to sign it under pains and penalties of perjury (13:52-55,56-57,66-69,72-79,194). After Sexton said he had never seen a knife in Hills' office, the defendant wanted him to say Hills had something that resembled a black folding knife (13:37,75-79). Sexton felt intimidated and did not have sufficient time to consult an attorney: the

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[17] The defendant left a message for his good friend and business associate Schneiders, an attorney (and police officer in a neighboring town) with whom he shared fees and referrals (7:10-12,156;13:232-34,259; 14:200;21:112;22:95); Sexton wanted him to look over the statement the defendant wrote and make sure it did not "take away from" the truthful initial statement (13:52,59,68-69,201-202,210;Ex.31). Schneiders conceded the statement the defendant prepared for Sexton was intended "to clear" the defendant, was "strange," and he did not know why his client "wanted to sign this" (13:79,14:28-30,40). He was aware Sexton's first statement was damaging to the defendant, subject of a criminal investigation in which Sexton was a witness; he also advised Sexton not to talk to the internal affairs investigator investigating Hills' complaint (14:158-159; See 10:159-162;17:13-14,18;13:57-58,81).

defendant "wanted it done" and "was pushing [him] to get it done"(13:224).[18] The defendant emailed the statement to Schneiders from Sexton's account. When Sexton went to his attorney's office to sign it, Schneiders was not there; the defendant showed up and took the statement from him (13:59,196-97).

SUMMARY OF THE ARGUMENT

A Sixth Amendment violation involves distinct elements, not one of which was present here: wrongful closure of a public proceeding of constitutional import without a defendant's assent. Here the claimed "closure" involved a portion of an assented-to sidebar individual voir dire process,[19] which by definition is

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[18] Sexton had asked the defendant to remove statements that "didn't seem right" (13:54-55). Questioned by the defense, he noted the defendant wanted a new statement "quickly"; Sexton "asked him if this was something we should be doing because" he "didn't know if this was right," "started feeling more intimidated and pressured," and "asked him if this was something he should be doing, and he just shook it off." Id.

[19] Defense counsel determined that confidential sidebar voir dire of prospective jurors best would *secure a jury "that was in the eyes of the Defendant and myself and other counsel a jury...the most receptive and responsive to the theories that we were espousing in the case"* (Mar. MH:133). Indeed this defendant's strategic ideal was a *completely closed courtroom* bereft of watchful eyes: "what I would have loved to have was individual voir dire conducted by the attorneys with no one else in the room but the [prospective juror] and the judge" (Mar. MH:134). Defense counsel "believed" that "having jury voir dire at the sidebar was appropriate," and asked that room be made only for family members, who always were

not a public proceeding. Not only was the courtroom never closed, let alone wrongfully closed, but its gallery was full. Defense counsel knew the gallery would be filled and was granted his only request: to seat his family members elsewhere inside the courtroom. He cannot plausibly suggest the packed courtroom contained insufficient watchful eyes on the empanelment process he desired, which yielded the jury he wanted (Argument, pp. 14-45, *infra*). That properly instructed jury heard abundant evidence to warrant the defendant's convictions (Argument, pp. 45-55, *infra*).

ARGUMENT

I. THE DEFENDANT WANTED SIDEBAR VOIR DIRE, TO WHICH THERE IS NO SIXTH AMENDMENT RIGHT OF CONTEMPORANEOUS PUBLIC ACCESS, AND WHICH TOOK PLACE BEFORE A LARGE AUDIENCE IN A COURTROOM THAT WAS NOT CLOSED.

The defendant determined that sidebar voir dire would secure the fairest possible jurors.[20] He was

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present (Add. 3-6; 25 Jan. MH:55-57,89; Mar. MH:118-120). He did not ask if room could be made for any other supporters, who have no elevated Sixth Amendment status above other members of the public to enter a courtroom. See U.S. v. Owens, 483 F.3d 48, 62 & n.12 (1st Cir. 2007)(defendant has no elevated interest in having "supportive" spectators extracted from public at large to fill available seats).

[20] The judge explained how empanelment would proceed (1:94-96; See Mar. MH:133-34) without objection from experienced defense attorneys familiar with the standard practice of sidebar voir dire, consistent with G.L. c. 234,§28; no personal "waiver" was required (See 25 Jan.:87,99; Apr. MH:52). Horton v. Allen, 370 F.3d 75, 82 (1st Cir. 2004), *cert. denied*, 543 U.S. 1093 (2005). See Comm. v. Glacken, 451 Mass. 163, 170

aware at the outset that crowding precluded additional spectators, and room was set aside inside the bar enclosure for both defendants' families and the press before empanelment began with a full gallery of prospective jurors (Add. 6). Without the trial judge's knowledge,[21] a court officer taped a handwritten sign

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(2008)(no merit to claim judge should have engaged in waiver colloquy, which is "neither constitutionally required nor appropriate to the fair management of a trial."). See also Comm. v. Wells, 360 Mass. 846 (1971)("there was no improper denial of any right...to a public trial...by the proceedings at trial in which [the defendant] and competent counsel acquiesced."); Levine v. U.S., 362 U.S. 610, 618-19 (1960)(waiver of public trial claim by failure to make timely objection and request to open pertinent proceeding to public); Crawford v. Minnesota, 498 F.3d 851, 855 (8th Cir. 2007)(implicit agreement to partial closure). Waiver of a public trial, like other rights attendant to empanelment, may be inferred, and is among strategic choices routinely made by counsel. Peretz v. U.S., 501 U.S. 923,936 (1991); Comm. v. Horton, 434 Mass. 823 (2001); Comm. v. Owens, 414 Mass. 595(1993)(failure to object waived public trial claim and precluded finding of prejudice from sidebar jury selection process). See Taylor v. Illinois, 484 U.S. 400, 417-18 & n.24 (1988) (defendant bound by counsel's strategic decisions); Boyd v. U.S., 86 F.3d 719,723 (7th Cir. 1996)(jury challenges "entrusted to counsel," not "defendants personally"). Contrast Comm. v. Dussault, 71 Mass. App. Ct. 542,547(2008)(personal waiver of right to trial by jury). *Sua sponte* colloquies about protected tactical choices would *undermine* a defendant's "ability to participate in [the trial] process." Id.

[21] The defendant misrepresents the record, writing "[t]he judge acknowledged she knew about the sign and denied mistrial," Def. Br. 18. In fact "[t]he court did not see the sign [on a door *defense counsel and their lawyer-client used,* while court staff used another (Add. 2,11)] until it was brought to her attention by counsel for the defendant" on the *fourth day*

to the courtroom door used by defense counsel; it read "do not enter-jury selection in progress" (Add. 4).[22]

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of empanelment; only then did she have an opportunity to reflect on why a court officer might have put it up, and accordingly note independently sufficient courtroom management issues: additional spectators initially could not have entered the room without sitting among panel members filling the gallery, disrupting the process and risking jury contamination (Add.4,6;4:7-8). See Presley v. State, 674 S.E.2d 909, 911-12 (Ga. App. 2009)(no public trial deprivation where spectator's admission would have required intermingling with potential jurors); Wilson v. State, 814 A.2d 1,11-14 (Md.App. 2002)(*Waller v. Georgia*, 467 U.S. 39 (1984), did "not apply" when judge unaware of officers' order no one enter crowded room); Boyd v. U.S., *supra* at n. 4 (permissible to restrict public entry during trial for security reasons or to limit interruptions or distractions); Williams v. Artuz, 237 F.3d 147, 153 & n. 3 (2d Cir. 2001)(trial judge's perception of need to avoid distraction justified locking courtroom doors to late arrivers); U.S. v. Lampley, 127 F.3d 1231, 1239 (10th Cir. 1997)(trial judge's managerial authority to restrict times when public could enter available courtroom seating).

[22] The sign could not have effectuated even a partial "closure" given the presence of a full gallery and absence of wrongful motivation or public proceeding of constitutional dimension capable of "closure" given the sidebar voir dire (See, e.g., 25 Jan. MH:89-90), and no findings were required; in any event, the judge could not have made earlier "findings in support of" an act of which she was unaware (Add. 4). See Gibbons v. Savage, 555 F.3d 112,117-18 (2d Cir. 2009); Wilson, *supra*; Peterson v. Williams, 85 F.3d 39,41-44 (2d Cir. 1996)(no relief where judge unaware courtroom door unjustifiably locked while defendant testified). The defendant did not ask for any alternative to the sidebar voir dire process, including courtroom arrangements; when he complained, the sign was taken down, resolving the claimed "closure" without any need to consider hypothetical "alternatives" (Add. 9). He "may not rely on possible alternatives that no one suggested at the time. There is good reason not to allow the defendant to sandbag the trial judge by

The judge had the sign removed when the defendant chose to bring it to her attention after additional seating became available (Add.9).[23] No closure findings

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refraining from suggesting an alternative to closure at the time," and later claiming the judge "was compelled to consider" it. Gibbons, *supra* at 117-18; Horton v. Allen, *supra*; Comm. v. Skinner, 34 Mass. App. Ct. 490,492 (1993); Longus v. State, 968 A.2d 140,150-51 (Md. App. 2009); Tinsley v. U.S., 868 A.2d 867,879 (D.C. 2005)(judge "not obliged to invent novel alternatives out of thin air, nor to bring up dubious options that the parties themselves have not ventured to propose"); Bowden v. Keane, 237 F.3d 125,131 (2001) (judge "has no responsibility to assess...alternatives *sua sponte*."); Williams v. Artuz, *supra* at 153; Ayala v. Speckard, 131 F.3d 62,71 (2d Cir.1997)(*en banc*).

A "defendant forfeit[s] the right to assert a violation of his public trial right when he fail[s] to make a timely objection...that would have permitted the court to... [take corrective action] if needed and address any legitimate concerns." State v. Ndina, 743 N.W.2d 722,727,729-30(Wis.App.2007), *aff'd* 761 N.W.2d 612, 640(2009)(Prosser,J., concurring). Timely, appropriately framed objection permits a judge to address and resolve an issue, as this judge did when the defendant chose to object: at that point there was room for yet more spectators, and the sign was removed (Add.4,9,15-16;4:7-8;25 Jan. MH:7,44,82,106).

[23] While seeking appellate stays of sentence, defense counsel made multiple false statements about these critical facts (SA 1-2,7,10,12,14). Shortly after the trial he falsely informed both this tribunal and the Appeals Court that he had objected to the sign from the outset, *each and every day for six days*. He falsely claimed he "did object every day, all day," *daily* asking "for a hearing" and "findings," and "to create some other alternative" and "take down the sign" and have "the court officers be instructed to permit people in"--all, he claimed, "with no corrective action (Compare Add. 8-9 & Tr. Vols. 1-5,5:57 with SA 1-2,7-14;Apr. MH:59-60,62-65;See Mar. MH:78,91,94-95). Each one of these assertions was false; in making them he unwittingly betrayed the truth: although the record proved in fact he did *not* "object every day,

are required when a courtroom is not closed; nor could the trial judge have entertained never-requested alternatives to an empanelment procedure agreed to by experienced defense counsel, or a sign she did not know about until the defendants' strategically-delayed objection. No findings were required in support of a

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all day"--but rather only on *one* day, upon which the trial judge promptly addressed the matter (Add. 9,15-16)—his claims to have made continuous objections from the outset *demonstrate he did see and know of the sign* at the outset, and deliberately and strategically withheld objection in an attempt to manufacture an appellate issue. See notes 22, *supra* & 57, *infra*.

In fact, there were only four days (and a fraction of a fifth) of empanelment, and even when the defendant made his strategically belated and narrow complaint, he moved only for mistrial (4:7-8,131-2). He did not ask for *any* alternative procedure. He did not request smaller panels be brought in, or any change in gallery seating arrangements (Compare SA with, e.g., 25 *Jan.* MH:128). *He did not move to strike* any juror or panel. Cf. Comm. v. Clemente, 452 Mass. 295,324 (2008)(motion to strike venire). Under oath, defense counsel retrenched even from his claim to have offered immediately to call witnesses, saying he did not "know if [he] was prepared to call witnesses" when he named them; in fact they were unavailable at the time (Add. 10;Compare Mar. MH:168-9 with SA 16).

Most significant, he understandably did not ask that prospective jurors (many of whom aired extremely negative, inflammatory information at sidebar; See n. 49, *infra*) publicly speak. The defendant did not want to be at the bench himself, and did not exhaust his peremptory challenges or express any dissatisfaction with the jury derived from the voir dire process. Plainly he did not want new jurors or a different voir dire process, but to hold an appellate issue in abeyance in the event of conviction (Add. 15-16). He did not once simply ask that the sign be removed, although the judge had it removed when he complained (Add. 4;4:7-8;25 Jan. MH:45,88-90,122).

"closure" that never occurred, just as no findings would be required in order for a court officer to post a sign barring public entry even during a jury charge before an empty gallery.[24]

Denial of a motion for new trial is reviewed "only to determine whether there has been a significant error of law or other abuse of discretion." Reversal "is particularly rare" where, as here, the trial judge denied the motion. Comm. v. Kobrin, 72 Mass. App. Ct. 589, 611 (2008). See Comm. v. Benson, 453 Mass. 90, 99 (2009).[25] She properly invoked her knowledge of what transpired in her courtroom. Comm. v. Robidoux, 450 Mass. 144, 151 (2007)(judge noted unrecorded observations during trial); Comm. v. Quino-

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[24] A trial judge properly may limit and indeed foreclose public access even to a presumptively public proceeding of constitutional import. For example, no findings are required before a "keep out" sign may be posted on a courtroom door—even if the gallery is *empty*-to prevent jurors from being distracted by people wandering in and out of a courtroom during a jury charge, an intrusion significantly less disruptive than having people walk in and *sit down among* potential jurors filling a courtroom gallery. Comm. v. Dykens, 438 Mass. 827,835-836 (2003)(no "closure" findings required to bar public from entering courtroom during presumptively public jury charge); Comm. v. Patry, 48 Mass. App. Ct. 470,476 n. 5 (2000).

[25] "The denial of a motion for new trial is reviewed for abuse of discretion," and "will be affirmed unless 'no conscientious judge, acting intelligently, could honestly have taken the view expressed by [her].'" Comm. v. Gomez, 450 Mass. 704, 711 (2008).

nes, 414 Mass. 423,432 (1993)("contemporaneous record properly may be reconstructed by the trial judge's recitation [of recollections] in a memorandum of decision")[26]; Comm. v. Rebello, 450 Mass. 118, 131 (2007) (judge "properly [relies] on her 'knowledge and evaluation of the evidence at trial'"); Comm. v. Williams, 71 Mass. App. Ct. 348 n. 11(2008)(denial of post-conviction relief recalled observation "within the vision of the Court.").[27] She was "entitled to rely on [her] *own observations* at the trial and on [her] customary practice," Comm. v. Morales, 453 Mass. 40,47 (2009).[28]

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[26] The defendant frivolously contends the trial judge improperly took "judicial notice" of what happened in her courtroom (Def. Br. 39-40). The term "judicial notice" does not appear in her findings, and she did not purport to take "judicial notice" of any contested fact. The defendant's characterization is particularly ironic given that it was his counsel who repeatedly asked the judge to take judicial notice of aspects of empanelment at hearings on his motion for new trial (18 Jan. MH:79,248; See also 25 Jan. MH:6).

[27] The trial judge is entrusted to assess demeanor and make credibility assessments and factual determinations. Comm. v. Torres 453 Mass. 722, 735 (2009); Comm. v. Boyarky, 452 Mass. 700, 714 (2008); Comm. v. Nhut Huynh, 452 Mass. 481, 488(2008).

[28] The judge correctly foretold that "an unusually large number of prospective jurors" would be needed, and in fact the panels were exhausted by Thursday and empanelment had to be concluded in a second week (Add. 2). Initially "prospective jurors filled the spectator seating in the courtroom" (Add. 6). The judge's knowledge of the courtroom defeated defense claims about "public" seating room. For example, the defendant's friend's courtroom sketch misrepresented as purportedly available "spectator seating" an area

A. The Courtroom Was Never Closed.

Waller simply does not apply when a courtroom is not closed. The defendant's argument wrongly "presupposes that the courtroom was indeed closed to the public." U.S. v. Scott, 564 F.3d 34,37 (1st Cir. 2009). *It was not*: "there wasn't a 'closure of the courtroom'" (23:214). Not only was there no *wrongful* closure, but "the courtroom was never closed" (Add. 12): there was no motion for, and the trial judge never ordered, closure. Members of both defendants' families always were present.[29] Court personnel "observ[ed] the proceedings," and "other members of the public unrelated to the defendants were present when there was room for them to be seated without the risk of

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within the bar enclosure to which members of the public generally were not permitted; similarly, the judge's knowledge of her courtroom underscored the deceptiveness of defense questioning of a court officer as to whether there was "always room over here where I'm standing in this section"—an area actually *inside* the bar enclosure where the sidebar voir dire took place (25 Jan. MH:103-04 ["I would know [this] ...,but an Appellate Court would not"];Add. 3-4;Apr. MH:119;See 25 Jan. MH:70-73,82,84,103). The defendant continues such machinations on appeal; for example, he uses the term "just behind the bar" to depict as "public" seating areas in fact *inside* the bar enclosure, *not* in the public gallery (Compare Def.Br. 26 n. 12 with Add. 3-4;25 Jan. MH:104), one section used for media and one for family members (Add. 3-4).

[29] Additional spectators entered the gallery when they could do so without contaminating the venire, and there was no other legitimate reason (like sequestration) for any *individual* not to be inside (Add. 8).

tainting prospective jurors" (Add. 5-6,10,14). Contrast Waller v. Georgia, *supra* (complete closure); U.S. v. Owens ("Owens IV"), 517 F.Supp.2d 570,574 & n. 7(2007)(same); Comm. v. Marshall, 356 Mass. 432 (1969) (all spectators, including defendant's relatives, excluded for entire trial). Cf. Gibbons v. Savage, 555 F.3d 112,114-21 (2d Cir. 2009)(trial judge's exclusion of all spectators during empanelment deemed "trivial" under *Waller*, although *Waller* inquiry would not even have applied if some spectators had been "allowed to attend" but not all spectators could be seated); Lauria v. U.S., 2006 WL 3704282, 16-17 (D. Conn.) (given size of venire panel and courtroom and absence of request for alternatives, no error in excluding all spectators, including defendant's family members).

Initially there was no room for additional spectators to enter without sitting amidst venire members filling the gallery (Add. 6). A courtroom is not "closed" when it physically cannot accommodate people beyond those who must be present for the process appropriately and securely to function.[30] See

[30] The defendant confounds a 6th Amendment "closure" claim with his belated and baseless claim that an *individual*, for reasons personal to him, was "escorted from" the courtroom *after the sign was taken down* (Add. 4,9,12). See Comm. v. Stetson, 384 Mass. 545,

Wilson v. State, *supra* at 16 (*Waller* findings not required where trial judge unaware of officers' orders no one else enter and later noted he had not ordered room closed). The courtroom was "packed" with venire members who, prior to being either declared indifferent or excused, themselves comprised a large cross-

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548-550 (1981); Comm. v. Martin, 39 Mass. App. Ct. 44, 45-48 (1995); State v. Sowell, 2008 WL 2600222 (Ohio App.)("[t]he trial court is certainly entitled to rely upon the assertions of court officers"). The lone individual asked to leave never claimed the sign was still up when he came into the courtroom; he was asked to leave because he was sitting among "a good amount" of people in the gallery in what appeared to be police uniform, contrary to an order the defendant does not challenge (4:87-8,131;18 Jan. MH:205;25 Jan. MH:53,87; See Mar. MH:33-35,37). He left without any complaint or attempt to correct that impression, and conceded he "absolutely" could have come back if his schedule had allowed (18 Jan. MH:174-6,183-6;189-91,195,196-7;See 4:87-8; Mar.MH:34-5,37,60,62,64-5,71,75,95,107; MH Ex. 7). The defendant had no standing to claim "exclusion" of any individual who did not timely make such a claim, to give the trial court an opportunity to determine if there was some reason (like sequestration--applicable to three of the defendant's purportedly "excluded" affiant-friends [1:90;4:26-27;18 Jan. MH:224-226;Mar. MH:152-153]) for that person not to be in the room. See Flaherty, petitioner, 452 Mass. 1020(2008)(individual promptly sought relief from sequestration order); Comm. v. Bianco, 388 Mass. 358, 369 (1983); Comm. v. Adamides, 37 Mass. App. Ct. 339, 341 (1994); Comm. v. Duncan, 71 Mass. App. Ct. 150 (2008); Comm. v. Jaynes, 55 Mass. App. Ct. 301, 312 & notes 11&13 (2002)("serious" question whether defendant would have standing to challenge *complete closure* during jury voir dire when defendant himself was in courtroom). See also Comm. v. Young, 73 Mass. App. Ct. 479,486 (2009); Comm. v. Jones, 71 Mass. App. Ct. 568, 571-72 (2008)(exclusion of individual spectators entrusted to trial judge and is not "closure").

section of the public. Holland v. Illinois, 493 U.S. 474,476 (1990)(venire is cross-section of community); Lauria v. U.S., *supra* at 17("large number of potential jurors" in courtroom benefitted defendant, although no room left even for his family members). Cf. Brown v. Kuhlmann, 142 F.3d 529,536-37 (2d Cir. 1998)(no unjustifiable exclusion where "representatives of the community," including jurors and alternates, not "wholly exclude[d]").

This was no "secret proceeding." Even apart from the considerable public audience of 358 prospective jurors (Add. 4), the defendant's family members' presence alone would dispose of his claim: prospective jurors had no way of knowing whether decorously-behaved spectators were partisans, so whatever permissible effect is to be served by spectators' presence was served by the defendants' cohorts.[31] See Press-Enterprise Co. v. Sup. Ct. of Cal.("I"), 464 U.S. 501, 513 (1984)(Blackmun, J., concurring)(although additional spectators could have been accommodated, "'an audience remain[ed] to ensure the fairness of the proceedings.'"), *quoting* U.S. v. Osborne,

[31] "The Sixth Amendment does not guarantee a defendant an audience," let alone an audience of a certain size, or sympathetic disposition. See, e.g., Fayerweather v. Moran, 749 F.Supp. 43,45 (D.R.I. 1990).

68 F.3d 94,98-99 (5th Cir. 1995); U.S. v. Scott, *supra* at 38 (presence of some spectators "cast the sharp light of public scrutiny on the trial proceedings," providing "the protections anticipated by the public trial provision"); Wilson, *supra* (parties not "shielded from the illuminating glare of public scrutiny as they performed their respective duties"); People v. Woodward, 4 Cal.4th 376,385 (1992), *cert. denied sub nom.* Woodward v. California, 507 U.S. 1053 (1993) (where observers present, no Sixth Amendment violation when trial judge had bailiff post sign on door reading "trial in progress-please do not enter"); U.S. v. Shyrock, 342 F.3d 948,974 (9th Cir. 2003)(no "closure" where defendant's family members always present).

There is no "exclusion" or "closure" where there is not enough room to seat spectators without risking jury contamination. "Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats," Estes v. Texas, 381 U.S. 532, 588-89 (1965)(Harlan, J., concurring).[32] See Globe Newspaper Co. v. Superior Court, 383 Mass. 838,

[32] The Sixth Amendment requires "only that the court must be open [during a significant public proceeding] to those who wish to come, sit in the available seats, [and] conduct themselves with decorum..." Id.

845 n. 10 (1981)("danger of overcrowding" among "countervailing interests" which long have justified trial judges in overriding limited rights of public and press[33] to courtroom access). The physical fact of

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[33] The defendant does not have standing to make a claim on behalf of the press. Comm. v. Adamides, *supra* at 341 and n. 2 (1994). The press was not excluded: a media area was set aside (Add. 3,9-10;18 Jan. MH:45, 111-112; See 28 Feb. MH:35), and at minimum a reporter (whom two defense witnesses saw inside the courtroom on "opening day") was present (Add. 10;18 Jan. MH:63,68; 25 Jan. MH:62; Apr. MH:87,91,103). A cable newsman also covered the trial (See Add. 10; 6:250; Apr. MH:152; 6:248-56). Two novice reporters produced *seven months later* knew a press area had been available to them (18 Jan. MH:46,56,63,68,98-100; 25 Jan. MH:83,100,153-154; See 4:7-8), yet neither asked to enter it, nor evinced any interest in the content of sidebar proceedings by requesting transcripts. Id. See Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539,546 &n. 9 (1977)(invoking "general principle of publicity" of judicial proceedings does not authorize access to all such proceedings; judges retain "sound discretion to impose reasonable cloture, including impoundment" and there is a "variety of reasons... [to] limit, or authorize limitation of access to court proceedings and official records."); Comm. v. Blondin, 324 Mass. 564, 571 (1949); Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156,158 (1945); Cowley v. Pulsifer, 137 Mass. 392,394 (1884); U.S. v. Mitchell, 551 F.2d 1252,1259-60(D.C. Cir. 1976), *sub nom.* Nixon v. Warner Communications, Inc., 430 U.S. 944 (1977).

The defendant cites Antar, which did not remotely hold that even improperly curtailed courtroom access yields a new criminal trial; it "simply unsealed voir dire transcripts" to the press. U.S. v. Hunter, 548 F.3d 1308,1314 (10th Cir. 2008)(news organization could seek transcripts' unsealing, but "criminal cases in which courts have permitted non-party appeals...[do] not disturb a final judgement" in the criminal case). Here not only was there no restriction upon access to transcripts, but no one even requested them. Indeed, defense witnesses (including a reporter) disavowed any

limited courtroom space is not a "closure."[34] U.S. v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949)(right to public trial does not require room to accommodate everyone who might desire to attend). A trial judge possesses the authority and duty comfortably to accommodate, without tainting, those whose presence is necessary to conduct the proceedings. See Estes v. Texas, *supra* at 588-589; Owens IV, *supra* at 574 & n. 7.[35] Defense counsel did not ask that room be made (had it physically been possible to do so) for any additional spectators.[36] The sign was taken down when

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interest in the voir dire; they were waiting for opening arguments to begin (18 Jan. MH:55-56; Apr. MH:127, 145,148-149). See Press-Enterprise I, *supra* at 512; U.S. v. Valenti, 987 F.2d 708 (11th Cir. 1993)(no findings needed to preclude access to bench conference; after-the-fact findings may impound transcripts).

[34] A Sixth Amendment "right to public trial is not...absolute and inflexible." Comm. v. Stetson, *supra* at 550, quoting Comm. v. Bohmer, 374 Mass. 368, 380 (1978). The "need for and extent of security measures in a courtroom during trial are within the sound discretion of the trial court." U.S. v. Evans, 272 F.3d 1069, 1093 (8th Cir. 2001).

[35] Even where voir dire is not at sidebar, it is acceptable "standard practice" for a trial judge to "[order] the courtroom cleared...to make sufficient room for the entire venire so that he would only have to swear in the potential jurors and ask the panel questions a single time." Owens III, *supra*.

[36] A defendant has no standing to assert on "behalf" of any third party a right of contemporaneous access to a proceeding he did not want overheard (and indeed was so concerned that prospective jurors *not* be overheard that defense counsel himself asked a potential juror's voice be kept down at sidebar

he lodged his strategically-delayed objection,[37] and while it was up there always were spectators inside

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[4:22]). Cf. Globe Newspaper Co., *supra* at 840,842 n. 5,847 (newspaper immediately sought order permitting it to attend trial); Gannett Co. v. DePasquale, 443 U.S. 368 (1979)(Sixth Amendment right is personal and confers no separately enforceable right of public or press access). Moreover, the defendant claimed to have divined a (spurious) "press access" claim at least four days *before empanelment ended* (Mar. MH:18,37; See 4:7-8;132;5:57), yet never raised it during empanelment, and no such claimant was produced until seven months later (18 Jan. MH:45,54,59,90,103). A First Amendment objection must timely be raised by the party claiming exclusion, and the Sixth Amendment confers upon press and the general public only a limited right of access to criminal trials, that timely must be asserted. Crawford v. Minnesota, *supra* at 855; U.S. v. Black, 483 F.Supp. 2d 618,623 n. 4 (N.D. Ill. 2007). The press has no special right of access to sidebar proceedings, which *are not public trial proceedings*. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555,598 n. 23 (1980)(Brennan, J., concurring); Globe Newspaper Co., *supra* at 887. See Branzburg v. Hayes, 408 U.S. 665, 684 (1972)(1st Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally."); Garrett v. Estelle, 556 F.2d 1274, 1279 (5th Cir. 1977)(1st Amendment "does not accompany the press where the public may not go."). Indeed, press and public access to information properly may be curtailed or foreclosed even when a defendant himself has a right to it. See Comm. v. Silva, 448 Mass. 701 (2007); U.S. v. Black, *supra* at 621,622 & n. 3)(juror information properly redacted when press sought transcripts); U.S. v. Gurney, 558 F.2d 1202,1210 (5th Cir. 1977)(discretion to preclude press access to sidebar conferences' contents). See also, e.g., U.S. v. Edwards, 823 F.2d 111,120 (5th Cir. 1987)(upholding redactions from transcripts of confidential hearings).

[37] When the defendant chose to object, the claimed "barrier" to entry *was removed* (Add. 4). Moreover, the judge immediately made the finding that independently would have sufficed had he objected at the outset (even had voir dire *not* been at sidebar): *there was*

the courtroom, including both defendants' family members and legions of members of the public who comprised the venire (Add. 3-6,10-12).[38]

B. Sidebar Voir Dire is Not a Public Proceeding.

There is no Sixth Amendment right of public access to a *nonpublic proceeding* like sidebar inquiry.[39] Press-Enterprise Co. v. Super. Ct. ("II"), 478

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not room for yet more spectators to enter without tainting the venire when empanelment began (4:7-8; Add. 6). Even defense counsel evidently agreed the jury could be contaminated were *any* putatively available gallery space packed with a partisan spectator: he conceded it "obvious" the court would not want the supporters he had asked to be accommodated "interspersed with the prospective jurors" (Mar. MH:116).

[36] The court directed court officers to allow anyone who wanted to come into the courtroom to enter when there was room to do so without disrupting and tainting the venire (Add. 4;25 Jan. MH:12,50-51,103; 4:7-8). The defendant was aware at the outset of the gallery crowding (in the largest available courtroom) given the large incoming panels, yet made no timely request that any additional "supporters" enter the courtroom and never asked for any change in seating arrangements (Add. 2-3;Mar. MH:29-30,120;Apr. MH:74-78,128;MH Ex. 12;18 Jan. MH:51,100-01,234,237; 25 Jan. MH:47,55-7,68-9,86,95,103,127-8).See People v. Benson, 251 Ill. App.3d 144,150 (1993)(even where public proceeding closed and space *not* a problem, when defendant became aware family members would be accommodated, "the burden shifted to [him] to specifically identify each spectator...he wished to exempt from the closure order," giving judge timely opportunity to address).

[39] A defendant has no Sixth Amendment right of public access to a proceeding he tactically forecloses from such access. This attorney-defendant determined sidebar voir dire conducted by his counsel alone would best identify members of his community who would be transformed into the fairest and "most receptive and responsive" jurors (See, e.g., 25 Jan. MH:91,137-39; Mar. MH:133); he waived his own right to be at the

U.S. 1, 8 (1986)(Sixth Amendment not implicated where criminal defendant does not want proceeding open to public); Globe Newspaper Co., 383 Mass. at 887 (no public right of access to sidebar: public has no presumptive "right to observe the process" of private juror interview; "sidebar discussions" are among "numerous litigation-related events to which the public does not have a constitutional or any other right of access."). Sidebar individual voir dire necessarily is outside contemporaneous public consumption, and a defendant's assent to it forfeits any "public trial" claim.[40] Horton v. Allen, *supra*

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bench during inquiry and never objected to sidebar voir dire (Add. 7;Mar. MH:144). Comm. v. Horton, *supra* at 832-3; Comm. v. Wells, *supra* at 846. In these circumstances, it is doubtful whether he even had standing to make any public trial complaint. See Comm. v. Jaynes, *supra* at 312 & notes 11&13; State v. Wise, 200 P.3d 266, 272 (Wash. App. 2009)(defendant who assents to private jury voir dire has no standing "to defend the public's right to an open trial" regarding it).

[40] Even a *wrongful* and *complete* courtroom closure *during sidebar* voir dire could not entitle a defendant who elected to be represented by his counsel at sidebar to a new trial: "'Whatever benefit [he] would gain from being within hearing range of the jurors' responses during the voir dire [was] available to him through the presence of his counsel' who was there to confer with [him] during the voir dire examinations." Comm. v. Skinner, *supra* at 492, *quoting* Comm. v. Owens, *supra* at 605-06. If a defendant *himself* harmlessly may *erroneously* be excluded from sidebar voir dire--unlike here, where he voluntarily absented himself--he cannot assert a "public trial" right to have third parties simultaneously privy to the same process.

(defense counsel's election of confidential voir dire even completely outside courtroom and therefore public access sufficient to waive public trial claim). The choice not to have potential jurors publicly voice their disqualifying sentiments objectively was reasonable.[41] Id. The right to a "public trial" simply does not apply to a portion of that trial that by its nature is not public. Waller, *supra* at 48. This defendant did *not* "wish for a public trial" (Def. Br.

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[41] The defense made an eminently reasonable strategic decision to encourage prospective jurors to be forthcoming by *not* having them publicly air potentially disqualifying sentiments: while a defendant who, unlike this one, wants individual voir dire heard may "insist that the entire voir dire be conducted publically...the strategic advantage that he received from the individual voir dire taking place in private cannot be ignored. Defense counsel's decision to agree to a closed individual voir dire was an objectively reasonable strategy designed to elicit forthcoming responses from the jurors," Horton v. Allen, *supra* at 82-83("Privacy provides for closer questioning of jurors, and, perhaps, more honest answers."); Owens III, *supra* at 66. A defendant's objectively reasonable tactical interest in such disclosure distinguishes it from aspects of a trial from which the public wrongfully could be barred without a defendant's assent and as to which there is no apparent strategic defense interest in confidentiality. Horton, *supra*. Contrast Owens IV, *supra* and n. 5 (distinguishing strategic reasons for sidebar voir dire with absence of strategic impetus for closing court during *open court* venire responses); Comm. v. Baran, 74 Mass. App. Ct. 256,293-5 (2009)(no strategic basis to acquiesce in judge's decision to close courtroom "during the most crucial phase of the trial proceedings," the victims' testimony); Comm. v. Patry, *supra* at 474-5 (no strategic reason for public not to hear answers to supplemental questions).

37) as to *these sidebar proceedings, or he would have asked the venire members publicly to speak.*[42] His choice of sidebar voir dire necessarily forfeited a Sixth Amendment claim, because the constitutionally significant portions of voir dire are the verbal disqualification exchanges that occurred at sidebar[43]

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[42] The "right to a public trial" is incompatible with and trumped by a defendant's strategic choice of any interstitial trial procedure--like sidebar voir dire--designed *not* publicly to be heard. Horton v. Allen, *supra* at 82 ("interest in protecting the...right to a completely public trial may give way to other concerns, such as maximizing the accused's chance of obtaining a favorable jury composition"; "juror privacy [may be protected] in order to encourage honest answers to the voir dire questions.'"); Press-Enterprise I., *supra* at 501; U.S. v. Koubriti, 252 F.Supp.2d 424,431(E.D. Mich. 2003)("potential jurors will be more candid in their responses if they do not have to worry about what the public's opinion of those responses might be."). The defendant's choice not to have juror responses overheard alone disposes of any public trial claim: he "had no right to have the general public present" during confidential sidebar proceedings. Levine, *supra* at 618.

[43] Waller applies only to *wrongful closure of public trial proceedings* that are of *constitutional import*. Id. at 46-47,49-50 & n. 9. Many interstitial components of an otherwise public trial do not require an audience, just as there are many non-critical trial components as to which the absence of counsel may be deemed harmless: the presence of counsel in those instances, as with the presence of (*additional*) spectators here, would not have any "significant consequences for the accused." Bell v. Cone, 535 U.S. 685,695-6(2002); Comm. v. Gordon, 422 Mass. 816,819, 823-24(1996)(hardship exchanges not of constitutional import; entire public, including defendants' families, harmlessly excluded from such venire inquiries); Comm. v. Barnoski, 418 Mass. 523, 530-31 (1994)(non-critical components of voir dire).

and which the defendant *did not want to be overheard*: in accordance with G.L. c. 234, §28, individual voir dire to assess whether a juror stands indifferent is closed to the other venire *members'* hearing in order to prevent their *contamination*.[44] See U.S. v. Vázquez-Botet, 532 F.3d 37, 52 & n.11 (2008)(6th Amendment not implicated when hearing closed to ensure keeping subject matter "from reaching the jury's eyes and ears."). A defendant who (unlike this one) wants disqualifying sentiments publicly aired[45] has the trifling burden to *ask* for public individual voir

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[44] G.L. c. 234, §28 delineates those portions of the spoken exchanges between potential jurors and the court which would be of constitutional dimension for 6th Amendment purposes if a defendant were to insist such verbal responses regarding possibly disqualifying beliefs and experiences be spoken in open court.

[45] The Anglo-French etymology of the term "voir dire" derives from the phrase "to speak the truth," and by definition comprises oral examination to determine a juror's competency through spoken responses. *Black's Law Dictionary* (6th ed.). The defendant determined it was in his interest to have that oral examination occur *outside public hearing*. Potential jurors were forbidden from speaking until they were at sidebar, where each and every verbal interchange between them and the trial judge took place (Add.14; See 1:99;2:112;3:81-82,210; 4:42,134, 141;5:7). Where a defendant strategically wants every word that passes between prospective jurors and the trial judge to take place in confidence at the bench; it is the *defendant* who ensures no one present may "*heare* [sic] *from the mouth of the depositors...what is saide* [sic]," Press-Enterprise I., *supra* at 506.

dire.[46] Horton v. Allen, *supra* at 82; Comm. v. Skinner, *supra* at 491 n. 2 (1993). Absent such a request, the trial court has a duty to ensure the sidebar's confi-

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[46] Only upon such a request would a trial court have an opportunity to determine if the remainder of the venire even could be accommodated elsewhere without contamination, let alone address any special security considerations in the case at hand. Here, for example, the fraught atmosphere included uniformed police officers—one of whom arrived at the courthouse with a firearm (and first claimed "exclusion" half-a-year after his friend's trial was over); such events understandably posed a concern for the Chief Court Officer (Add. 5; 25 Jan. MH:136,169,174-175). Measures short of complete closure designed to secure orderly proceedings and maintain jury integrity are within a trial judge's discretion. U.S. v. DeLuca, *supra* at 41 (trial judge must make "difficult judgments [as] matters of courtroom governance which require 'a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential security or publicity problems that may arise during the proceedings[.]"); U.S. v. Ivester, 316 F.3d 955,958 (9th Cir. 2003). Particular security issues involved partisans (See 6:248-56; 9:188-9; 19:168-9,175). See Comm. v. Berrigan, 590 Pa. 118,133 (1985)(trial judge may ameliorate atmosphere that imperils "the peace and tranquility of the courtroom" and risks intimidation of prospective jurors); Ndina, *supra* at 642; Illinois v. Allen, 397 U.S. 337 (1970); Waller, *supra* at 48. The judge's concerns about the atmosphere, heightening the intrinsic need to maintain courtroom security and not intermingle spectators with the venire, were borne out: the "atmosphere surrounding the trial was tense," and "[t]here were occasions throughout the trial...[when] concerns [were] raised about what was perceived as offensive statements or conduct by spectators," including a spectator's complaint "that a threatening gesture involving a closed fist was made in his direction by another spectator seated outside the courtroom" (Add. 5).

dentiality and guard against tainting the venire.[47] Where a defendant "waives his right to ask prospective jurors sensitive personal questions in public,"[48] he

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[47] Court officers' functions under G.L. c. 234, §28 include protecting a defendant's right to an untainted jury by ensuring third parties cannot hear what transpires at sidebar (25 Jan. MH:86-87,89-90,93,154). See G.L. c.221, §70A; G.L. c.221, §70; G.L. c. 234A, §78. Court officers also are concerned with minimizing noise so that the court reporter can fulfill her duty to record what transpires at the sidebar (See 25 Jan. MH:154; G.L. c. 221, §82).

[48] Prospective jurors were probed at sidebar about their backgrounds, disclosing in confidence such private matters as being a recovering alcoholic, being in therapy, taking psychotropic medication, and experiencing post-traumatic stress syndrome as an incest survivor, and difficulty dealing "with any type of violence" (4:112-13). The defendant benefitted from the frank airing of venire members' personal criminal histories, and revelation of feelings of having been "wronged," "mistreated," illegally searched, as well as bearing "minimal animosity" towards police officers and having been "kind of railroaded" by them (2:31-3,43-4,67,142,169,190-1,225-6; 3:34-5,107,126,230,241; 4:65-6,83,85,194-7). They discussed personal histories of court involvement (2:56-7,128-9, 249;3:37,177,190, 244;4:86,101-02,107,109) and spouses', children's, parents', and siblings' criminal histories (2:24,28, 43-8,58-9,74-5,197-8,242,244; 3:53-4,62,205-06;4:217). Some had emotional responses to sidebar queries, disclosing murders of friends and family members--at least one "tearing up" at the bench--and revealed and discussed their victimization by crimes including sexual assault (2:25,28-9,56,63-4,68-69,172,194-5,242; 3:24,38,75-78,126-27,172,227-29; 4:83,103,211,218,252, 260). They divulged health issues, including addiction, and confided what medications they and their family members were taking (2:34-5,54,80,84,126-7,176-7,180,183-5,198,221; 3:118-19,137,150,155-6,177;4:112-13,116,148,204-05,207,213). In the confidence of sidebar, potential jurors were comfortable in disclosing such beliefs as "I think anybody brought to trial

cannot "be heard to complain that his constitutional right to an open trial was prejudicially violated as a result." State v. Wise, *supra* at 273(public trial waived when voir dire outside courtroom, yielding benefit of "candid answers, some of which would have tainted the entire venire if stated in open court").

In the confidence of sidebar, this defendant-officer was able to elicit from venire members such information as "a family member of mine was brutally beaten by the Stoughton Police" (2:195) and "I have heard that the cop was pushing people around in the town....That's what I believe" (2:168).[49] He exercised

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usually is guilty (4:164)," and thus promptly excused without the defense having to expend a challenge.

[49] The defendant's strategic interest in confidential sidebar voir dire vividly was borne out: venire members drawn from the same county in which the police officer-defendants were charged with crimes against civilians were able to air beliefs and experiences crucial for the defense to know about—and to keep *others from overhearing*. *See, e.g.*, 4:249 ("the opinion in the house of the Stoughton Police is not good");4:238 ("I'm leaning towards a guilty verdict. From what I have been hearing, I have been watching the Stoughton channel"; 4:257 ("It really doesn't surprise me. My idea of the police isn't all that high.");2:77 ("I was a program director of a Victim of Violence Program and went on record publicly about those who deserve the public's trust and abuse of power, very frequently it was the Stoughton Police Department.");2:202 (read "for quite a few years" about "a pattern of corruption in the Stoughton Police Department.");3:72 ("I live in the Town of Stoughton. I have read extensively about the case," which "has torn the town apart....Police abuse, power, abuse of

his right to select the fairest possible jury *and* not be exposed to unfavorable publicity during empanelment by ensuring that no prospective juror spoke such sentiments publicly.[50] There existed no public proceeding capable of "closure" (rightful or wrongful,[51] or as to which "alternatives to closure" could

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authority.");3:64-65("corruption" in Stoughton Police Department");2;181-182 ("I know some [police officers] do some things wrong that they shouldn't....I do feel it is guilty.");2:191("I think sometimes policemen sometimes think they are above the law."); 3:136 ("I have a bias against police officers"); 3:241 (cops "are on a power trip."). The defense desire not to risk having such sentiments publicly aired also disfavored their instantaneous publication to the community from which this jury was being drawn. See Kennedy v. Justice of the Dist. Ct., 356 Mass. 367,376-78 (1969) (inquests among judicial proceedings which may be closed, and transcripts impounded; noting "wisdom of taking action to diminish" publicity dangers to "actual defendants"); Delaney v. U.S., 199 F. 2d 107,115(1st Cir. 1952).

[50] In Owens IV, *supra* at 574, voir dire responses publicly would have been uttered and heard had not *all* spectators (including family members) been locked out-dramatically unlike sidebar voir dire (with an always-present audience including family members) under G.L. c. 234, §28, which this defendant availed himself of for strategic reasons (See,e.g., Mar. MH:133-4).

[51] "The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom" for a reason *unrelated to* the court's duties to maintain order and safeguard potential jurors from contamination. U.S. v. Al Smadi, 15 F.3d 153, 155(10th Cir. 1994). To trigger *Waller*, there must not only be a closure but a *wrongful* one: limitations due to considerations of security or courtroom space do not fall within that category, and here the court officer's sign sought to prevent juror contamination due to additional spectators wandering in among the

have been weighed): there is no public (or press) right to attend or contemporaneously to hear sidebar proceedings.[52] Globe Newspaper, 383 Mass. at 887. See

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venire already filling the gallery (See 4:7-8; Add. 2-6). See Woodward, *supra* at 385. Even where a proceeding is not at sidebar; where no party seeks a closure order and none is issued, a case "lacks two elements that would trigger" a *Waller* analysis. State v. Wise, *supra* at 441; See Woods v. Kuhlmann, 977 F.2d 74,77 (2d Cir. 1992). Although *Waller* did not apply here because, among other reasons, there was no closure; when the defendant chose to point out the sign, the judge promptly addressed the matter and immediately noted case-specific concerns which would have sufficed in a *Waller* inquiry: the court officer logically sought to avoid contaminating the venire through spectators walking into the room and sitting amongst the venire (4:7-8; See Add. 2,6). See, e.g., Simone v. SCI Greene, 2009 WL 1023980, 10 n. 7 (E.D. Pa. 2009) (trial court need not "record its reasons" for removing spectator, defendant's father); Carson v. Fisher, 421 F.3d 83,93 (2d Cir. 2005)(findings not required for spectator's removal, which did not implicate public trial right); Williams v. Artuz, *supra*; U.S. v. Osborne, 68 F.3d 94,99 (5th Cir. 1995)(detailed record not required to justify trial court action).

[52] "Although many governmental processes operate best under public scrutiny," some "would be totally frustrated if conducted openly." Press-Enterprise II, *supra* at 8. By definition, a defendant's purposes in confidentially screening jurors at sidebar would be defeated if a non-party overheard them. A defendant's interest in sidebar voir dire is at least two-fold: to insulate jurors from exposure to prejudicial disqualifying sentiments, and to safeguard his right to a fair trial against public dissemination and publication of such frankly-disclosed sentiments while empanelment remains ongoing in the community shared by his potential jurors (a danger logically at its most acute were prejudicial juror commentary promptly disseminated in publications "geared to the citizens of Stoughton" [18 Jan. MH:82]). See Owens IV, *supra* at 577; U.S. v. Koubriti, *supra* at 431 ("Full and frank answers from potential jurors" are "essential to the

Richmond Newspapers, *supra* at n. 23 (trial judge "not required to allow public or press intrusion upon the huddle" of a sidebar exchange[53]); U.S. v. Smith, 787 F.2d 111,114 (3d Cir. 1986)("the public does not have

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process of selecting" jury; "fear of publicity that might be given to answers of venirepersons during voir dire may so inhibit or chill truthful responses that an accused is denied the fair trial to which he is entitled"); U.S. v. King, 911 F.Supp. 113,118-120 (S.D.N.Y. 1995), *aff'd on other grounds*, 140 F.3d 76 (2d Cir. 1998)(voir dire appropriately closed "to avoid impairing candor of prospective jurors");In re South Carolina Press Ass'n, 946 F.2d 1037 (4th Cir. 1991)(defendant's paramount desire for closed voir dire to protect right to fair trial). Sidebar voir dire enabled the defendant not only to screen and select the best jurors, but also to avoid prejudicial publicity within and outside the courtroom as empanelment was underway. Had anyone requested transcripts, the judge could have considered the defendant's *competing* right to protecting jurors' "frankly disclosed" statements as empanelment continued. Cf. Pixley v.Comm.,453 Mass. 827,835(2009)(transcripts impounded "to prevent disclosure entirely").

[53] As the Supreme Court has noted, "the presumption of public trials is, of course, not at all incompatible with reasonable restrictions," including exclusion of public and press from chambers and bench conferences; such proceedings are distinct from public trial proceedings for Sixth Amendment purposes. Id. at 598 n. 23. See Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596, 609 n. 25; U.S. v. Gurney, *supra* at 1210 ("bench conferences...outside of public hearing are an established practice,...[and] an integral part of the internal management of a trial"), *cert. denied*, Miami Herald Publishing Co. v. Krentzman, 35 U.S. 968 (1978), *overruled in part on other grounds*, Nixon v. Warner Communications, 435 U.S. 589 (1978). Even had *Waller* applied; given the purposes the right to public trial is designed to serve, in these circumstances the claimed "closure" would have been trivial and would not entitle the defendant to a new trial. See U.S. v. DeLuca, 137 F.3d 24,33 (1st Cir. 1998); Waller, *supra* at 46-7;Boyd, *supra* at n. 4; Gibbons, *supra* at 119-21.

the 'right to intrude uninvited into conferences at the bench'"); Rovinsky v. McKaskle, 722 F.2d 197, 201 (5th Cir. 1984). See also Press-Enterprise II, *supra* at 8; In Re Capital Cities/ ABC Inc's. App., 913 F.2d 89, 92-94 (3rd Cir. 1990).

The defendant baselessly claims a right to have had yet additional partisan spectators sit among prospective jurors *for events not involving any verbal response whatsoever from the venire.*[54] Def. Br. 34. Settled law defeats his premises that wrongful closure occurred and that any such non-verbal aspect of jury selection was of constitutional import:

- The courtroom was never closed: at minimum, the defendants and their family members were present during all aspects of the process; additional spectators also attended empanelment (Add. 5-6,12-14);
- Even some oral voir dire exchanges are not considered proceedings of constitutional import to which there is any Sixth Amendment right of access. Comm. v. Gordon, 422 Mass. 816,823-4 (1996). Of yet less significance than hardship inquiries are panel "preliminaries" and ministerial matters. Cf. Gibbons v. Savage, *supra* at 121 (even wrongful exclusion of only spectator "trivial," where private juror interviews conducted in another room "out of the hearing and sight of the other jurors," and "nothing of significance happened during the part of [empanelment] that

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[54] Curiously, the defendant asserts "closure" during "the swearing of the jury," Def. Br. 34 (citing 5:33): the record does not reflect any verbal response by the jurors at that juncture, and in any event the defendant neglects to note that the jury was sworn in on June 25, four days after the sign was taken down (Add. 12).

took place in the courtroom, including reading indictment and "ask[ing] questions of a few jurors"); Owens IV, *supra* at 574 (trial judge may clear courtroom to make room for panel for initial preliminary matters); Globe Newspaper, 383 Mass. at 887;

- A criminal defendant has no right to have his friends and associates, or anyone else, "eyeball" his prospective jurors: no constitutional significance attaches to a defendant's *own* "capacity to observe jurors" during voir dire, and this defendant absented himself from, and entrusted to his counsel at sidebar, all phases of examination under G.L. c. 234, §28; in so doing it was he who ensured that "the public [would] not hear the *jurors' responses*" (Add. 15). Comm. v. Owens, *supra* at 605; Comm. v. Campbell, 378 Mass. 680,696(1979)("deprivation of an opportunity for observing a prospective juror's demeanor lacks legal significance."); Comm. v. Skinner, *supra* at 490,492 (inconsequential claimed "loss of opportunity to study the visage of a prospective juror"); Comm. v. Tracy, 27 Mass.App.Ct. 455,465 (1989). If a defendant has no right visually to appraise his own prospective jurors, he has no right to have third parties perform the same meaningless appraisal.
- Relevant "preliminary" information, such as the charges, readily was available to the public and press, amply serving the distinct "public access" purposes of both the First and Sixth Amendments. See Nixon v. Warner, *supra* at 597; Anderson v. Cryovac, Inc., 805 F.2d. 1,13 (1st Cir. 1986); U.S. v. Black, *supra* at 624; Ayala v. Speckard, *supra* at 72 (public sources of subject matter of "closed" proceeding); Herring v. Meachum, 11 F.3d 374,379-80(2d Cir. 1993); Brown v. Kuhlmann, *supra* at 538 (information elicited during "closed" proceeding cumulative or ancillary).
- "Preliminaries" had *concluded* by the time a single prospective juror was excused from a given large panel after his or her sidebar responses (Add. 6), thus even arguably opening up a *single seat* in which to wedge another defense partisan among the venire.

C. The Defendant Forfeited Any Sixth Amendment Claim.

The defense knew at the outset of empanelment of the circumstance it later claimed comprised a (partial) closure: the posting of a sign of which the

judge herself was unaware (Add. 3-4,15-16). The defense made no objection until days later, when empanelment was anticipated to end. This tactical delay in objecting to the sign was an independently effective waiver beyond that occasioned by strategic assent[55] to sidebar voir dire. To the extent the sign even arguably effected a "partial closure" despite the sidebar voir dire--by definition, a non-public process thereby *incapable* of "closure"--and the *continuous presence of an audience*; "[w]here a defendant, with knowledge of the [claimed] closure...fails to object, [he] waives his right to a public trial." U.S. v. Hitt, 473 F.3d 146,155 (5th Cir. 2006).[56]

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[55] Even a wrongful *partial* closure of a public proceeding of constitutional import does not comprise structural error. Horton v. Allen, *supra*; U.S. v. DeLuca, *supra* at 41; Boyd, *supra* n. 4.

[56] See also, e.g., State v. Drummond, 854 N.E.2d 1038, 1055 (Ohio 2006). The defendant sought to manufacture an appellate issue in the event of conviction notwithstanding his complete satisfaction with the jurors he chose (Add. 15-16; Sec 3:3-4;4:201,203-06,262,264; Apr.MH:81;). "He was not entitled to secrete an error for use on appeal in case the verdict went against him." Comm. v. Cheek, 374 Mass. 613, 615 (1978); Comm. v. North, 52 Mass. App. Ct. 603 n. 12 (2001)(defense counsel's phrasing of objections demonstrated "embarking upon a strategy of creating an appellate issue."). See Whitmarsh v. Comm., 366 Mass. 212,216-7(1974)(party's conduct during proceedings "indicates that either he or his counsel, or both," had adopted deliberate strategy to test constitutional issue by means that inherently forfeited competing constitutional claim). See also Comm. v. Nicoll, 452

The trial judge unsurprisingly did not credit the claim that not one of three experienced defense attorneys (or the attorney-defendant) noticed a "do not enter" sign on the door through which they passed many times a day.[57] By delaying objection for four

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Mass. 816,821 (2008) (public trial waiver); Comm. v. Williams, 379 Mass. 874,875-6 (1980)(consideration of extent to which public trial claim "was waived by what may have been a trial tactic of counsel in this case"); Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); Purvis v. Crosby, 451 F.3d 734,738-43 (11th Cir. 2006). "[I]t would be difficult to concoct a clearer example of forfeiture than this defendant's failure to register a timely objection to" a sign *he swore under oath to another tribunal was present from the outset* and to which he falsely represented to a single justice soon after trial he "did object every day, all day" (SA 1-2,12,15;11 Sep. 2007 order, 2007-J-394]). Ndina, *supra* at 644. (The latter misrepresentations [SA 5-16] were submitted by the defendant's current counsel--yet again seeking a stay--to a single justice two months after the trial judge found them starkly to conflict with a trial record which established they were untrue [Add. 9; Tr. Vols. I-V].)

[57] It is little wonder the trial judge did not indulge defense counsel's claim to have "had no idea what was going on at the time" (Mar. MH:185), given their awareness of the gallery's limitations (and crowding so acute that family members had to be seated elsewhere inside the courtroom), and that one was so "attuned" to the nuances of "closure" law that he had litigated a claim of "constructive closure." See U.S. v. DeLuca, *supra* at 41. The judge found credible a trial witness (11:116-21) who had seen a defense attorney (whose nephew, Marathas, was among the defendant's affiant-friends) photograph the sign on the *first day* of empanelment (SA 3;MS Apr.:18-22; See 21:270;22:14,22). Defense counsel implausibly claimed they and their lawyer-client repeatedly daily passed without noticing a "do not enter" sign (supposedly immediately perceived by non-lawyer partisans who themselves made no complaint to the court) on the door

days[58] and not expressing dissatisfaction with the jury selected by this process, the defendant independently forfeited any Sixth Amendment protest.[59] He "was fully

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of a courtroom in which lead counsel had practiced criminal law for 35 years, and where he contended there had been a perennial practice to post precisely such a sign (Add. 2;18 Jan. MH:88;25 Jan. MH:126; Mar.MH:22,107-08,135-37,162;Apr. MH:34,37,205). It was not lost on the judge that the defendant waited until jury selection was anticipated to end and every one of his supposedly "excluded" friends was unavailable (one having left the state after supposedly being at the courthouse all week) before making his first and only request for inquiry of them, or even furnishing a single purportedly "excluded" partisan's name(Add. 10, 15;4: 7-8; 22:77,107-08; 23:130,154,189;18 Jan MH:120, 144-5,163,226-30,244-5;MH Exs. 8,11; 25 Jan. MH:15,22-4,27,35-7,85,100-01,215-19,221-23; Apr.MH:155,164-74, 191-95; Compare SA 16 with Mar. MH:26,97-100,233-35).

[58] Even where a public proceeding wrongfully has been completely closed, a defendant is "not relieve[d]...of the obligation to enter a timely objection," Ndina, *supra* at 644. This defendant was "required to object to the exclusion of [additional friends] from the courtroom at the time they [purportedly] were excluded inasmuch as he (and his counsel) knew exactly what was happening and why." Id.

[59] Even a legitimate claim of structural error may be forfeited. See, e.g., Waller, *supra* at 42,46-50 & notes 2,9; Levine, *supra* at 619; Crawford v. Minnesota, *supra* at 854. The requirement of timely and apt objection seeks to preclude strategic gamesmanship and preserve a trial court's ability "to avoid or correct any error with minimal disruption of the judicial process." Ndina, *supra*. Absent such objection, "prejudice must be established," to discourage "improper manipulation of the justice system...so as to ensure automatic reversal on appeal." Id.; Comm. v. North, *supra* at n. 12. Applying a structural error standard would "encourage defense counsel to forgo [timely] objecting to any [claimed] public trial closures," and wait to see if the jury selected from sidebar questioning nonetheless delivers a "verdict [that] is adverse." Id.; Add. 15-16; State v.

aware of the circumstances," knowing of the space limitations and tense atmosphere heightening the presumptive security demand that spectators not be intermingled with prospective jurors (See 4:7-8; Add. 3). The only plausible reason for his delay in objecting was, as the judge found, a tactical choice to wait until the gallery overcrowding lessened and until purportedly "excluded" friends were unavailable (Add. 6-10,15-6), and then ask *not* for any change in the empanelment process or its result--or even *that the sign be removed* (although it was)--but for mistrial: he did not want new jurors, but wanted to place an

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Butterfield, 784 P.2d 153, 157(Utah 1989)(structural error standard does not apply without timely and valid claim, so as not to enable strategic defense abuse). The defense was aware that when an objection was made, the judge would address the matter and take any necessary action (Add. 15). His delay was cost-free: he knew there was no room for additional spectators when empanelment commenced and for some time thereafter (Add. 6), and no point in objecting earlier or requesting alternative gallery seating or courtroom management procedures (and prolonging the already lengthy process consuming his potential jurors' time) in a gallery where sidebar voir dire ensured there was *nothing for spectators to hear* from the venire. Alerting the judge to the claimed "closure" earlier in the process would have had the formidable downside of precluding the defense from holding an appellate issue in abeyance: once alerted, she immediately could have dealt with any courtroom issue, including any additional spectator who supposedly might have wanted to enter the gallery, and evaluate as a threshold matter whether there even was room for anyone else securely to enter at a given time.

appellate issue on the record (Add. 15-6). He wanted sidebar individual voir dire, to secure precisely the jury with which he was content--and that acquitted him of multiple charges (29:4-10).[60] Levine,[61] *supra* at 617.

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[60] Manifestly he was satisfied with the jury selected by this process: he retained unused peremptory challenges. Comm. v. Tracy, *supra* at 465; Comm. v. Fudge, 20 Mass. App. Ct. 382, 387-9 (1985).

[61] The right to public trial cannot sensibly be invoked unless there is *both* a timely objection *and* demand the relevant proceeding publicly be heard: "Unlike an ordinary judicial inquiry, where publicity is the rule," sidebar exchanges do not comprise "a public proceeding." Levine, *supra* at 618. The defendant's "counsel was present and...fully active in behalf of his client throughout the proceedings," and could have "insisted" that individual voir dire publicly be heard, but plainly did not want that. Horton v. Allen, *supra* at 82. Moreover, "[t]here was no obvious point at which, in light of the presence of counsel, it can be said that the onus was imperatively upon the trial judge to interrupt the course of proceedings" and compel public inquiry; indeed, such intrusion would have violated the defendant's superseding right to obtain the fairest possible jury through sidebar questioning. "This is not a case where it is or could be charged that the judge deliberately enforced secrecy...to be free of the safeguards of the public's scrutiny; nor is it urged that [more] publicity would in the slightest have affected the conduct of the proceedings or their result. Nor are we dealing with a situation where prejudice, attributable to secrecy, is found to be sufficiently impressive to render irrelevant failure to make a timely objection....Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought" to nearly complete, satisfactory jury selection through sidebar inquiry he deemed tactically beneficial. Levine, *supra* at 619-20.

"Just as the Constitution affords no protection to a defendant who waives...rights, so it gives no assistance to [one] who strategically declined to demand" jurors publicly air negative commentary about him, or object to any aspect of voir dire. Peretz, *supra* 937.

II. WITNESS INTIMIDATION OVERWHELMINGLY WAS PROVED.

The purpose of the witness intimidation statute "is to protect witnesses from being intimidated or harassed so that they do not become reluctant to give truthful evidence in investigatory or judicial proceedings." Comm. v. Cruz, 442 Mass. 299, 309 (2004).[62] Overwhelming evidence supported convicting this defendant, who while a grand jury target sought to reconfigure witnesses' recollections of his acts--some while armed and in police uniform--in the attempted extortion of another civilian.[63]

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[62] The same purpose guided the statute's previous incarnation, under which the defendant was convicted. G.L. c.268, §13A, as amended through St. 1996, c. 393, §§2-4. See Comm. v. Drumgoole, 49 Mass. App. Ct. 87,90 (2000)(overriding statutory purpose to prevent interference with administration of justice). See also Comm. v. Henderson, 434 Mass. 155,157-58 (2001); Comm. v. Belle Isle, 44 Mass. App. Ct. 226,229 (1998). That goal necessarily is compromised both by attempts to intimidate and by telling falsehoods in an effort to subvert truthful testimony or willingness to give it.

[63] Motions for required findings of not guilty must be denied where, considered most favorably to the Commonwealth, evidence permits any rational trier of fact "to infer the existence of the essential elements of the crime charged." Comm. v. Morgan, 449 Mass.

The defendant contends there was insufficient evidence he "tried to put either [witness] in fear." Def. Br. 42.[64] A reviewing court is not permitted "to reread the record from the defendant's perspective." Comm. v. Rocheteau, 74 Mass.App.Ct. 17, 19, 21 (2009). Proof of intent can be inferred[65] from "reasonable and

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343,349 (2007); Comm. v. Latimore,378 Mass. 671,676-677 (1979). The defendant and his emissary lured one victim to a basement room to "rewrite" his account of what he had seen transpire between the defendant and Hills. That witness was "scared" and "nervous" that the defendant was among those who might retaliate against him if it became known that he "was working with [Hills] on his statement";the defendant--a police sergeant--had the upper hand in creating a new and less-than-truthful statement seeking to clear the defendant (13:116,204,206). In uniform, the defendant had extracted information from the second victim-witness, whose account of their interactions he also sought to revise when she became a grand jury witness. Comm. Br. 3-4, 8-12, *supra*.

[64] He has it wrong: in fact the requisite specific intent is to interfere with a witness, and not specific intent to do so by placing a victim in fear or by any other of the statutorily disjunctive means by which one intentionally may interfere with a witness. Comm. v. Gordon, 44 Mass. App. Ct. 233, n. 3 (1998); Comm. v. Conley, 34 Mass. App. Ct. 50, 53 (1993).

[65] See, e.g., Comm. v. Robinson, 444 Mass. 102,109, 111 (2005)(aiming camera at victim's family was act "of sufficient hostility" that jury "could reasonably infer that the defendant intended to intimidate."); Comm. v. McCreary, 45 Mass. App. Ct. 796,799 (2007); Comm. v. Gordon, *supra* at 236 (behavior need not be "overtly threatening"). Sexton had seen what the defendant, an armed and uniformed police sergeant, did to another civilian who had not complied with his directives, and the statement the defendant wanted promptly revised truthfully had recounted Sexton's observations. As the defendant typed up a less inculpatory statement in a basement room, Sexton, who had "no

possible" inferences." Comm. v. McPherson, 74 Mass. App. Ct. 125, 128 (2009)[66]; Comm. v. Perez, 47 Mass. App. Ct. 605, 609 (1999)(necessarily inferential proof of element of intimidation). In addition to both victims' direct accounts, "there was direct corroborative evidence of several endeavors by the defendant [improperly] to influence the witness[es]," to discourage them from providing truthful testimony and instead prompt them to do this police sergeant's bidding in reconfiguring their accounts of what they had seen him do.[67] Comm. v. Lester, 70 Mass. App. Ct. 55,69 (2007).[68]

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intention" of producing a new statement that day, felt coerced, under duress, and intimidated (13:60,207).

[66] See Comm. v. Moran, 453 Mass. 880,885(2009) ("Direct evidence of a person's specific intent is not always available, but may be inferred from the facts and circumstances presented."); Comm. v. Erikson, 74 Mass. App. Ct. 172,177 (2009), *further rev. denied* July 9, 2009. Indeed, defense counsel urged jurors to draw favorable inferences about his client's purported intent (See, e.g., 19:256; 24:80).

[67] The defendant admitted that while under criminal investigation he repeatedly sought a meeting with Kelly, a grand jury witness, calling her at her home and "attempting to get a statement from her" and meet with her regarding events she had witnessed (23:41-44,165). He admitted typing out (in a basement room) a new statement for Sexton, which Sexton would not sign under pains and penalties of perjury (23:37,41).

[68] "[A]ttending circumstances, such as demeanor, prior behavior, and statements, may be relevant to probe" intent. Comm. v. Troy T., 54 Mass. App. Ct. 520,526-7,529 (2002). The defense itself urged jurors to draw inferences based upon demeanor, such as when implying that the armed defendant may have "feared" Hills' tone or countenance (18:102). Jurors also were

The jurors were instructed they had to find proof beyond a reasonable doubt of the wrongful "specific intent of influencing, impeding, obstructing, delaying, or otherwise interfering with that person as a witness or a potential witness" (25:46).[69] The judge

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able to assess whether Kelly's and Sexton's demeanors reflected susceptibility to being put in fear of providing truthful testimony against this defendant (See, e.g., 11:141,143,151 ("Am I done?" COURT: "Yes, Ma'am, you're done." WITNESS: "Thank God.").

[69] The defendant inexplicably quibbles with what he characterizes as the verdict's failure to "differentiate" a "'misrepresentation' theory." Def.Br. 46-49. He did not ask for and was not entitled to either a specific or general unanimity instruction, and never even moved for a bill of particulars "to specify more particularly the acts constituting the offense." Comm. v. Kelley, 184 Mass. 320,324 (1903). See Comm. v. Senior, 454 Mass. 12,15 (2009). Moreover, *his own relevant jury request employed the term "misrepresentation"* (A. 149), as disjunctively set forth in the statute under which he was charged. He never asked any such election be put to the jury because there was no basis to do so (A. 149,157,166-67). Comm. v. Cyr, 433 Mass. 617, 621 (2001). Cf. Comm. v. Roman, 74 Mass. App. Ct. 251,253-4(2009). His trial counsel presumably understood that the evidence as to these charges afforded no basis to seek any unanimity instruction or special verdict forms: there were no charged "separate occurrences" unrelated by time or geography, but rather "the *same occurrences" of intimidation* afforded alternative factual bases for finding an element had been proved. Comm. v. Ramos, 31 Mass. App. Ct. 362,366(1991); Comm. v. Laurore, 437 Mass. 65,82 (2002); Comm. v. Santos, 440 Mass. 281, 288-90 (2003)(defense claim "erroneously elevates the related and overlapping subcategories of a single element into separate 'theories.'");Comm. v. Keevan, 400 Mass. 557,565-7(1987); Comm. v. Comtois,399 Mass. 668,675-7(1987). Trial counsel surely perceived the abundant evidence upon which jurors also could have determined his client made misrepresentations to his victims, seeking to have them revise

emphasized the Commonwealth's burden to prove knowing and material falsehoods, and instructed it must prove that the defendant willfully and wrongfully specifically intended to intimidate the witnesses by putting them in fear and *actually put them in fear* (25:49-51). To the defendant's considerable benefit, the jury was instructed it had to find *additional proof not statutorily required*: specific intent to influence by means of intimidation, and actually placing victims "in fear for the purpose of influencing [their] conduct"

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truthful statements to conform with his own inaccurate self-serving accounts (pp. 9-12, *supra*); the defendant also falsely told Kelly, whose eyewitness account he sought to have her revise, that Hills was going to take *her* to court (11:126-8). The defendant could not have wanted to place before the jury a basis for convicting him on a *lesser* standard of proof. See Gura v. Dias, 74 Mass. App. Ct. 1106 (2009)(person who utters misrepresentation "need not [even] know the statement is false if its truth is reasonably discernible through a modicum of diligence."); In re Crossen, 450 Mass. 533 (2008)(qualifying attorney as having "*deliberately* misrepresented" fact, implying "misrepresentation" need not even be deliberate). Defense counsel did not baselessly request an "alternate verdict" that not only would have directed jurors to possible conviction on a *lesser standard of proof* regarding the intent element, but also likely would have alerted the court to the defendant's unwarranted windfall benefit, inhering in an instruction that the jury had to find specific and successful intent to place the victims in fear: such specific intent is *not* an element of witness intimidation by misrepresentation, *and there is no requirement* a victim actually have been placed in fear or apprehension of actual harm. Comm. v. Casiano, 70 Mass. App. Ct. 705, 708 (2007); Comm. v. Gordon, *supra* at 235 and n. 3.

(25:46). Comm. v. Robinson, *supra* at 109; Comm. v. Gordon, *supra* (intimidation need *not* succeed in placing victim "in fear or apprehension of actual harm"; intent need *not* be to influence by elected means).

III. THERE WAS AMPLE EVIDENCE OF MATERIAL FALSITY.

There was abundant evidence that the defendant filed a false written report "knowing the same to be false in any material manner." G.L. c. 268, §6A. A falsity "is material if it 'tend[s] in reasonable degree to affect some aspect or result of the inquiry.'" Comm. v. D'Amour, 428 Mass. 725,744 (1999). "The jury are free to believe or disbelieve any or all of the evidence they hear,"[70] and need not have gone any further than crediting the victim's testimony--which the defendant admitted (23:64)[71]-that his report

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[70] Comm. v. Merry, 453 Mass. 653,661 (2009). Defense questioning acknowledged conflicting versions of critical components of the report, and jurors could credit the victim, whom he asked to characterize the truth or falsity of numerous aspects of a report the defendant admitted was inconsistent with claims he made to the Board of Bar Overseers (9:44-46,50-57; 10: 47-50,52,55,60;18:92-3,201-02;17:20-24,41-4;23:49,98).

[71] This officer of the law and of the court did not correct his report once he concededly knew of that falsity, although aware it was his "job to correct" inaccurate statements in a police report (22:72,148). While under investigation he drew up "fill-in-the-blanks" affidavits which he had Marinilli circulate among Hills' business associates, seeking to have them buttress the admittedly false claim of a knife in the report that yielded Hills' arrest—an arrest followed by cash payment to the defendant of a third of the fee

falsely accused Hills of having had a folding knife (Compare A. 106 with 13:37,74-76,85), the predicate for his claim to have handcuffed Hills for his "safety"; jurors instead could have found this conduct a show of force to place the victim in fear of the consequences if he did not produce $9,000 by the next day. Additional material falsehoods included claims:

- that a teller said Hills' account had a negative balance and "was scheduled to be closed for the number of bounced checks"(Compare A.108 with 15:195-97), and, directly contrary to the testimony and notation on the check (8:249-251;Ex. 28 [A. 133]), that the victim assured him that the check was covered (Compare A. 105 with Ex. 28;8:249-51;9-56).[72]
- that Hills had been charged with two vehicular offenses, when he was not given or mailed any citation(Compare A. 106 with 9:22,40-3;G.L. c. 90C, §2);
- that Hills' vehicle was towed (by the defendant's friend) because it was "unregistered" (Compare A.106 with 9:43;13:26,32;17:48-56,58-62,70,247,251-52) and "[a]n inventory search" yielded financial documents[73] (Compare A.106 with 9:50);
- that this armed, uniformed officer was placed in fear by Hills, who supposedly became "irate and raised up out of his seat and began to yell" (Compare A. 106 with 9:47), and handcuffed Hills for his

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to the lawyer-friend to whom the defendant sent Marinilli to sue Hills (SA 5;11:121; 12:185-9,194,198-9,204-5,258-9; 23:73-; Ex.53).

[72] Defense counsel evidently conceded that falsity's materiality (See 18:126[examination concerning element of knowledge of insufficient funds in charges brought against Hills based on defendant's police report]).

[73] The defendant gave contradictory accounts: at trial he contended the documents were in "plain view," rather than the fruit of an inventory search, as claimed in his report (23:12-15); he admitted to Lt. Blount that he grabbed personal documents from Hills' hands (See 12:66;17:139-140,232-236;18:197).

"safety"--despite profound evidence of consciousness of guilt, including the defendant's statement to Hills' attorney (contrary to the police report) that he had *not* handcuffed Hills, followed by the defendant's telling query: "Are there any witnesses?";

- that Hills had a folding knife and that the defendant--despite being armed with a gun, mace, and handcuffs--feared for his safety (a representation jurors could have found glaringly inconsistent with, for example, the defendant's failure to seize the "knife")(Compare A. 106 with 9:47-49;17:82-83,85-88, 141;18:128;See 23:91-93,97,101,116).

IV. THE TRIAL JUDGE CORRECTLY EXPLAINED THE MALICIOUS STATE OF MIND REQUIRED TO PROVE ATTEMPTED EXTORTION.

The jurors correctly were instructed that conviction of attempted extortion required proof beyond a reasonable doubt that the defendant's "threatening communication was undertaken maliciously" and that he "intended to inflict injury or otherwise do wrong without legal excuse" (25:36-37). They were required to find specific criminal intent: that "the threat [was made] with the intent to extort money, or for pecuniary or monetary advantage, or to compel another person to do any act against his or her will" (25:39). They had to find beyond a reasonable doubt that the defendant specifically and wrongfully intended "to coerce the settlement of a civil claim, or the surrender of money or property," and that he "must have had it in his mind to do the proscribed act" (25:39-40). The judge emphasized the need to prove specific wrongful intent and the "wrongful use of fear to compel the

alleged victim to surrender something of value" (25: 40).[74] The instructions "correctly stated the law." Comm. v. Serrano, 74 Mass. App. Ct. 1,5 (2009); Comm. v. DeVincent, 358 Mass. 592 (1971); Comm. v. Pelletier, 264 Mass.221,223(1928)(officers' malicious threats to accuse victim of committing crime); Comm. v. Corcoran, 252 Mass. 465,483-4 (1925)(attorney-defendant's extortionate threat to use information victim committed crime or forgo pursuing criminal charge if paid); Att'y Gen. v. Pelletier, 240 Mass. 264,274,326 (1922) (abetting attempted extortion, by official's threats of criminal prosecution, to coerce settlement of civil claim); Comm. v. Coolidge,128 Mass. 55,59 (1880).[75]

The defendant's demand that jurors be instructed to find him not guilty—that they "must presume that the acts of [the defendant], being a police officer, were done legally, in good faith, and within the scope

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[74] Malicious extortionate intent was manifest from the defendant's own recorded words, ordering one victim to disgorge $9,000 in cash after warning it "might not be pretty" (Ex. 27) if his victim did not do as he said. Consciousness of guilt evidence included intimidation of two percipient witnesses and drafting false "fill-in-the-blanks" affidavits (SA 5).

[75] See also, e.g., U.S. v. French, 628 F.2d 1069, 1075 (8th Cir. 1980)(no defense to extortion "that the money collected thereby was in satisfaction of a legitimate debt."); People v. Maranian, 359 Mich. 361, 369 (1960)(construing parallel statute: "collection of a valid, enforceable debt does not permit malicious threats...if payment is not made.").

of his official duty"[76] (23:225)—contravenes Massachusetts law. G.L.c. 265, §25, far from presuming police officers incapable of committing crimes, expressly criminalizes extortion *by police officers*.[77] The judge followed the Model instructions and explained the required mental state, including specific intent maliciously to communicate a threat for which there was no legal excuse. See Comm. v. Silva, 388 Mass. 495,507 (1983); Comm. v. Serrano, *supra* at 5(judge may "choose the form of expression best adapted to make the law intelligible to jurors."). The "instruction itself was correct," and "[t]he charge as a whole, particularly

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[76] The defendant mischaracterized a fragment of half-century old dictum in State v. Williams, 148 A.2d 22,36 (N.J. 1959), interpreting extra-jurisdictional law differentiating intent to do grievous bodily harm from intent to do less harm when a police officer was charged with murder by discharging a firearm.

[77] Among those penalized is "any police officer... [who] maliciously and unlawfully uses or threatens to use against another the power or authority vested in him, with intent thereby to extort money or any pecuniary advantage, or...to compel any person to do any act against his will," G.L. c.265, §25. The Commonwealth does not "presume" those with badges incapable of committing crimes. See City of Boston v. Boston Police Patrolmen's Ass'n., 403 Mass. 680 (2005)("A police officer who uses his position of authority to make false arrests and to file false charges...corrodes the public's confidence in its police force"; there is a "strong [legislative] instruction that such individuals not be entrusted with the formidable authority of police officers."); Comm. v. LaFontaine, 32 Mass.App.Ct. 529 (1992)(police officers' threats to use powers to extort money and removal of handcuffs after cash was disgorged).

with the judge's directive that it was the Commonwealth's burden to prove that the defendant" acted with specific malicious intent, "fairly instructed the jury." Comm. v. Whitman, 453 Mass. 331,350-351 (2009).

V. THE DEFENDANT HAS NOT PRESENTED APPELLATE ARGUMENT OF "PROSECUTORIAL MISCONDUCT."

Without citation to apt fact or authority or development of appellate argument, the defendant's brief closes with a laundry list of supposed instances of "prosecutorial misconduct."[78] Typical is a fleeting reference to grand jury proceedings in a case in which he never even moved to have the minutes of an eighteen-month investigation[79] made part of the record; and in which he neglects to identify any flaw in, let alone provide appellate argument challenging, the relevant ruling. The scattershot "unsupported argument... does not rise to the level of appellate argument," and should not be considered. Comm. v. Niels N., 73 Mass. App. Ct. 689,703 n.19 (2009). Mass. R. A. P. 16(a)(4); Comm. v. Cintron, 435 Mass. 509,520 n. 5 (2001).

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[78] On page 53 of his brief the defendant claims "space limitations." With no limit on length or breadth of arguments he could have advanced in his Rule 30 motion, he did not chance presenting these claims for the judge's consideration; nor did any of his serial appellate stay petitions claim them worthy of presentation to an appellate court. See SJC-10462.

[79] A defense witness alluded to "thousands of pages" of grand jury transcripts (20:82).

Respectfully submitted,
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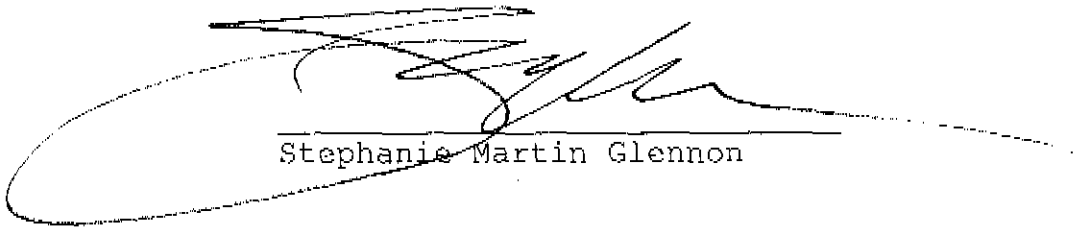
CERTIFICATION OF COMPLIANCE

I, Stephanie M. Glennon, Esq., hereby certify that the within brief complies with the rules of court that pertain to the filing of appellate briefs, including, but not limited to: Mass. R. A. P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R. A. P. 16(e)(references to the record); Mass. R. A. P. 16(f)(reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h)(length of briefs, subject in this instance to motion to allow filing of 56-page brief, one page in excess of the length of the 55-page brief filed by the defendant); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).



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