COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. S.J.C. 10479

COMMONWEALTH OF MASSACHUSETTS

Appellee

v.

SINY VAN TRAN, a/k/a TER THAI

Defendant-Appellant

BRIEF FOR THE COMMONWEALTH

ON APPEAL FROM A JUDGMENT OF THE

SUPERIOR COURT

NORFOLK COUNTY

DANIEL F. CONLEY

District Attorney

For the Norfolk District

DAVID D. McGOWAN

Assistant District Attorney

BBO# 670041

One Bulfinch Place

Boston, MA 02114

(617) 619-4070

David.McGowan@State.MA.US

NOVEMBER 2010

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II. Whether the prosecutor's opening statement was reasonable and grounded in good faith, as it was based on evidence that he expected to present in a case involving the execution of five men.

III. Whether the prosecutor in his closing argument appropriately juxtaposed the behavior of the two eyewitnesses, and whether his suggestion that defendant Nam The Tham "would have some ability to speak English" was a reasonable inference based on the evidence.

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V. Whether the motion judge properly denied defendant Siny Van Tran's motion to suppress his recorded 2001 statement where the defendant's oral and written waiver of his *Miranda* rights and his right to a prompt arraignment was knowing, intelligent and voluntary.

VI. Whether reversal is warranted under G.L. c. 278, § 33E.

STATEMENT OF THE CASE

On June 29, 1999, a Suffolk County grand jury returned indictments against the defendant Siny Van Tran, otherwise known as "Toothless Wah," for five counts of murder, in violation of G.L. c. 265, § 1; one count of armed assault with intent to murder, in violation of G.L. c. 265, § 18; and one count of carrying a firearm without a license, in violation of G.L. c. 269, § 10(a) (SUCR1999-10710) (SVT.A. 4, 15-21).[1]

That same day, the grand jury returned identical indictments against the defendant Nam The Tham, otherwise known as "Ah Cheung" (NTT.A. 16-20) (SUCR2005-10432).

On January 3, 2005, the Honorable Patrick F. Brady denied the defendant Siny Van Tran's motion to suppress statements and allowed defendant Nam The Tham's motion

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[1] References to the defendant Siny Van Tran's brief will be cited as (SVT.Br. __), and references to his appendix will be cited as (SVT.A. __). References to the defendant Nam The Tham's brief will be cited as (NTT.Br. __), and references to his appendix will be cited as (NTT.A. __). References to the motion to suppress hearing transcript will be cited by page number as (MTr. [volume]:[page]). References to the trial transcript will be cited by volume and page number as (Tr. [volume]:[page]). References to the trial exhibits will be cited as (Exh. __).

to suppress statements following an evidentiary hearing (SVT.A. 48-59).

On September 13, 2005, a jury trial commenced before the Honorable Stephen E. Neel (Tr. 1:20). On October 5, 2005, the jury found the defendants guilty of murder in the first degree under theories of premeditation and extreme atrocity and cruelty, and guilty of the other charges (Tr. 14:5-11).

That same day, Judge Neel sentenced the defendants to five consecutive terms of life in prison for the murder convictions (Tr. 14:20-24); to a term of nineteen and a half to twenty years in prison for the armed assault with intent to murder convictions, to be served after the fifth life sentence (Tr. 14:20-24); and to four and a half to five years in prison for the possession of a firearm conviction, to be served after the sentences imposed for the convictions of assault with intent to murder (Tr. 14:22-25).

On October 5, 2005, defendant Siny Van Tran filed a notice of appeal (SVT.A. 131); on October 11, 2005 defendant Nam The Tham filed a notice of appeal (NTT.A. 15).

STATEMENT OF THE FACTS

I. The Commonwealth's Case At Trial

In the early morning hours of January 12, 1991, the defendants and a third man shot and killed five men

-- Man Cheung, Van Tram, Chung Wah Son, David Quang Lam and Cuong Khong Luu -- in a Chinatown social club. The defendants shot a sixth man, Pak Wing Lee, in the head, but he survived. The case was proven with the eye-witnesses testimony of Yu Man Young and Pak Wing Lee, the defendants' admissions to police, forensic evidence, and consciousness of guilt evidence.

A. Background

Yu Man Young, whose nickname is "Chou Pei Man" or "Wrinkled Face Man" (Tr. 4:128; 6:83), ran a social club in the basement at 85 Tyler Street (Tr. 4:126; 6:85, 167). People would come to play Mahjong and card games and the unemployed would ask about job opportunities there (Tr. 4:127; 6:86, 166-67). The social club was not open to the public (Tr. 6:87). To enter, one would ring a bell, and Young would see who it was on the closed circuit television, and then the door would be opened manually (Tr. 6:87-90).[2] The gambling house would remain open if people were there and thus its hours would vary (Tr. 4:129; 6:91). Pak Wing Lee had known Young for between six and seven years (Tr. 4:128).

B. The Murders: Yu Man Young's Eyewitness Account

On January 12, 1991, at approximately midnight, Young arrived at the social club (Tr. 6:92). Shanghi

[2] The camera system did not record (Tr. 6:90).

Lo (otherwise known as "Shanhia Man" or "Four Eyed Guy") let Young inside (Tr. 6:93, 101, 111). Lan Guai, Tong Dung, Ah B, Dai Keung and Dai Keung's boy, Ah Wen were inside (Tr. 6:102). They were playing cards (Tr. 6:103).

Shortly after 2:00 a.m., Pak Wing Lee and Dai San Wai arrived separately (Tr. 6:106-08). Also shortly after 2:00 a.m., Tong Dung left (Tr. 6:109).

At approximately 2:30 a.m., the defendant Siny Van Tran (a.k.a. "Toothless Wah") entered, looked around for a minute, then left (Tr. 6:105-06).[3]

Siny Van Tran returned with defendant Nam The Tham (a.k.a., "Ah Cheung") and Hung Sook (Tr. 6:111).[4] The first thing the defendants said was "robbery" (Tr. 6:122). Both of them were carrying guns (Tr. 6:117, 125).

Nam The Tham shot Shanghi Lo when Shanghi Lo opened the door (Tr. 6:125).

Dai Keung and Ah Wen knelt on the floor with their hands behind their head (Tr. 6:123-24). Lan Guai laid his head on the Mahjong table (Tr. 6:124). Ah B hid under the table (Tr. 6:125). Dai San Wai stood behind the Mahjong table (Tr. 6:126).

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[3] Young had known Siny Van Tran for three to four years (Tr. 6:105) and identified him in court (Tr. 6:105-06).
[4] Young had known Nam The Tham for four years and identified him in court (Tr. 6:112).

Siny Van Tran shot Ah Wen in the head (Tr. 6:126, 146). Hung Sook shot Dai Keung many times in the head (Tr. 6:126, 147-48). Lan Guai was shot in the head and his head was on the table with his eye popped out (Tr. 6:146). Young did not see who shot Lee Sui Lung and Dai San Wai (Tr. 6:126) or Pak Wing Lee (Tr. 6:148), but he observed Dai San Wai laying on the floor (Tr. 6:147). The shooting lasted five or six minutes (Tr. 6:129).

Young explained that he was not shot because the shooters had used up their bullets (Tr. 6:148, 152-53). Ah B came out from under the table and "embraced" Hung Sook (Tr. 6:148-50).

When the defendants and Hung Sook left they threw their guns away (Tr. 6:118). The three shooters, Ah B, and Young went up the stairs and left together (Tr. 6:154): "All of us ran" (Tr. 6:158).

The following day, the police came to see Young (Tr. 6:161). Young had not contacted the police because he was very afraid (Tr. 6:161). Young initially denied he was present during the shooting because he was afraid (Tr. 7:15, 36). Instead, Young told the police that he had left "Four Eyes" in charge (Tr. 7:67). Young had denied that he left his cell phone because it would have indicated that he had been present (Tr. 7:31, 37-38). Young went to Puerto Rico

for three months so the police could not talk to him and so he would not be killed (Tr. 7:59). He closed the social club after the murders (Tr. 7:20).

C. The Murders: Pak Wing Lee's Eyewitness Account

On January 12, 1991, at approximately 2:00 a.m., Pak Wing Lee arrived at 85 Tyler Street after work (Tr. 4:129-31).[5] Lee rang the doorbell and Shanghai Man opened the door (Tr. 4:132). Also inside were Yu Man Young, Man Cheung, Ah B, Tong Dung, Dou Pei Man ("Pocked Face Man") and a younger man Lee did not know (Tr. 4:133-35). Young, Ah B, Tong Dung and the young man were playing cards (Tr. 4:135-36). Later, Tong Dung left and his place at the table was taken by Man Cheung (Tr. 4:136-37). When the young man left, Lee took his place at the table and began playing (Tr. 4:138).

Later, Siny Van Tran and "Big Noisy Wai" came into the club together (Tr. 4:138).[6] A few other men came and went during the evening (Tr. 4:143-46, 157-58; 5:81-83). At some point, Siny Van Tran left by himself (Tr. 4:145). Present in the club were Lee, Ah B, Man Cheung, Dai San Wai, Chou Pei Man, Shanghai Man, Dai

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[5] Lee had brought money owed to Young's father for a gambling debt to Young (Tr. 4:131).

[6] Lee had known Siny Van Tran since 1984 (Tr. 4:139) and identified him in court (Tr. 4:142).

Keung and "his boy," a young man who was always following Dai Keung (Tr. 4:144-45, 157-58).

Siny Van Tran returned and then left again (Tr. 4:162). He then returned again with Hung Sook and Nam The Tham (Tr. 4:162-63). Nam The Tham entered first, followed by Siny Van Tran and Hung Sook third (Tr. 4:183-84).[7] All three of them had guns in their hands (Tr. 4:177). Nam The Tham said "all of you don't move. All of you squat down" (Tr. 4:176).[8] Lee got down on his knees, hunched over, his hands behind the back of his head with his head down towards the ground (Tr. 4:183). Nam The Tham held a revolver, and Hung Sook held a .380 semi-automatic; Lee did not remember what kind of gun Siny Van Tran held (Tr. 4:177-78). Nam The Tham walked over to Dai Keung's friend (Tr. 4:184). Dai Keung asked Nam The Tham not to shoot, but Nam The Tham shot Dai Keung's friend (Tr. 4:184). Lee then heard several shots (Tr. 4:186-87). Lee kept his head down because he was afraid (Tr. 4:191).

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[7] Lee had known Hung Sook for four years (Tr. 4:163). Lee had known Nam The Tham for three or four years (Tr. 4:163), and identified him in court (Tr. 4:164).

[8] Lee clarified that Nam The Tham said "everybody down," but both Nam The Tham and Siny Van Tran said it (Tr. 6:14-15). The first time Lee said Nam The Tham said it was at trial (Tr. 6:15-16). Lee had told the grand jury that the shooters did not say anything (Tr. 6:26).

Lee heard Young say, "Hung Sook, no, no, doesn't matter how much money you want, I'll give it to you. If you want money, you want all, I give you all" (Tr. 4:194).[9] Hung Sook replied, "I can spare your life" (Tr. 4:195).

Lee then heard and then saw Hung Sook walking towards him (Tr. 4:195-96). Ah B, who was sitting next to Lee, asked that his life be spared: "if you spare my life, I can work like a cow or a horse for you" (Tr. 4:196). Hung Sook placed the gun to the back of Lee's head (Tr. 4:197). Lee asked him not to fire the gun (Tr. 4:197). He then heard a bang and then nothing (Tr. 4:197).

When Lee regained consciousness there were dead bodies around him (Tr. 4:198). He could not stand up so he crawled toward the rear door and called for help (Tr. 4:198-99).

Lee was in the hospital for approximately a week (Tr. 5:128). He remembered being visited by officers many times and looking at photographs (Tr. 5:19). The first two occasions he was shown photographs he could not identify anybody because he had problems with his vision and could not see clearly (Tr. 5:19-20). At some point, he identified Siny Van Tran, Nam The Tham, and Hung Sook in photographs (Tr. 5:21).

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[9] Young denied negotiating for his life (Tr. 7:55).

D. Investigation

On January 12, 1991, a cold, snowy night, Harold "Bud" Farnsworth was working as a security officer at the New England Medical Center emergency room on Harrison Avenue (Tr. 3:153-54, 157-59, 248). At 3:30 a.m., Farnsworth was standing in front of the ER with another officer, Lloyd King, when he heard what sounded like between four and six gunshots (Tr. 3:159-61). King thought the sound had been a plow going over a manhole cover (Tr. 3:162). Farnsworth did not notice anything out of the ordinary (Tr. 3:162).

At approximately 4:00 a.m., an Asian couple told Farnsworth that there was somebody on the ground in the parking lot (Tr. 3:163, 184). Farnsworth walked across the parking lot to the area abutting 85 Tyler Street and observed an Asian man inside a gate and leaning out, moaning and bleeding from his head (Tr. 3:163-65). Farnsworth observed a second man also within the gated area lying on the ground (Tr. 3:166-67). Farnsworth yelled for help (Tr. 3:167-68) and flagged down a passing police cruiser (Tr. 3:170).

At approximately 4:13 a.m., Boston Police Officers Eric Bulman and William Griffiths were flagged down in the area in front of 85 Tyler Street (Tr. 3:208-11, 170, 222) and were directed to the rear of 85 Tyler Street (Tr. 3:211). There, Officer Bulman observed an

Asian male who appeared to be suffering from a gunshot wound lying on his stomach with his arms hanging through a locked ornamental security gate (Tr. 3:211-12). When asked what happened, the man could not speak, but made a shooting gesture with his index finger and his thumb (Tr. 3:212-13).

The officers and Farnsworth ran around to the front of the building and encountered another locked gate (Tr. 3: 171-72, 215). They returned to the back gate, which they had to manually pry open with a tire iron (Tr. 3:168-71, 175, 214, 217). They then entered the wooden interior door into the basement of 85 Tyler Street (Tr. 3:175-76, 217), where they observed "dead people all over the place" (Tr. 3:176), all of whom appeared to have been shot in the head (Tr. 3:217). One of the victims was still gasping for breath (Tr. 3:178, 220). Two of the victims were taken to the hospital; only one survived (Tr. 3:250).

The five victims -- Man Cheung, Van Tram, Chung Wah Son, David Quang Lam and Cuong Khong Luu -- died as a result of their gunshot wounds (Tr. 7:95-122). Man Cheung was shot twice in the head; one was a very close range shot (Tr. 7:95-98). Van Tran suffered a near contact through-and-through gunshot wound to the left side of his head (Tr. 7:102-04). Chung Wah Son was shot twice in the head and suffered a third gunshot

wound to his left hand (Tr. 7:106-12). David Quang Lam was shot twice in the head and once in the chest (Tr. 7:113-17); one of the head wounds indicated that the gun barrel was held tightly against his head (Tr. 7:114-15). Chung Khand Luu was shot twice in the head (Tr. 7:119-22).

E. Forensic Evidence

Boston Police Detective William Fogerty responded to 85 Tyler Street, when he went into the basement and observed the dead bodies of four of the victims (Tr. 3:247-50). Firearms, shell casings, spent projectiles, and live rounds of .38 caliber ammunition were collected (Tr. 3:252; 4:40, 70). A .38 caliber, five shot, snub nosed revolver was on a table (Tr. 3:250; 4:43; Ex. 29), and a .380 semi-automatic handgun was found on the floor underneath a table behind a chair (Tr. 3:250; 4:47; Ex. 28). There were several tables; some overturned (Tr. 3:250). There were cards and money on the tables and floor (Tr. 3:250). There was also a cell phone on the floor (Tr. 3:250). A video of the crime scene made by Detective Fogerty was played for the jury (Tr. 3:264-67; Ex. 5).

Boston Police Sergeant Detective James O'Shea, a firearms examiner, concluded that the .380 semi-automatic handgun had been fired four times

(7:157, 160; 8:20) and the .38 revolver had been fired five times (Tr. 8:24). Some of the bullets recovered from the victim's bodies had been fired from the revolver (Tr. 8:21-23). The .380 was recovered in the locked back position, meaning the magazine had been emptied (Tr. 8:59). The recovered live rounds of .380 ammunition bore the marking of the recovered .380 semi-automatic magazine (Tr. 8:9-11, 13-14), indicating they may have been manually ejected from the gun (Tr. 8:11-12). Sergeant Detective O'Shea concluded some of the ballistic evidence (live ammunition, spent bullet, casings) was consistent with being fired from the recovered .380 firearm (Tr. 8:17). Sergeant Detective O'Shea concluded that the third unrecovered firearm would have been an automatic or semi-automatic (Tr. 8:67).

The gunshot residue on Pak Wing Lee's jacket indicated that the gun was held fairly close to the collar of the jacket, under twelve inches, when fired (Tr. 8:102-03). The gunshot residue on Man Cheung's jacket indicated the nozzle of the gun was in direct or near direct contact when fired (Tr. 8:105-07).

No fingerprints were recovered (Tr. 8:110).

F. United Airlines Documents: Ticket Inquiry & Passenger Manifest

The Commonwealth introduced two United Airlines documents -- a ticket inquiry and passenger manifest -- through the testimony of David Contarino, the Business Manager in the Boston office of United Airlines (Tr. 11:9-10). The ticket inquiry identified three tickets (Ex. 75; SVT.A. 129), all of which were issued on the same day (Tr. 11:43, 73, 81). The three ticket numbers are consecutive, which typically meant they were issued one after the other (Tr. 11:81). The first ticket was for "Nam The Tham" for a flight departing on January 31, 1991, at 11:30 a.m., from John F. Kennedy Airport in New York to Hong Kong, connecting through Norita airport in Tokyo (Tr. 11:72-76, 84). The round trip ticket was "open," meaning that the return trip is infinitely flexible (Tr. 11:77). The inquiry confirmed the ticket had been collected from the passenger during boarding in Norita and Hong Kong (Tr. 11:77-78). The second ticket was for "Hung Tien Pham" for a flight departing on February 1, 1991, from New York to Hong Kong, connecting through Norita airport in Tokyo (Tr. 11:78-80). The return portion of the ticket was also open (Tr. 11:79). The inquiry confirmed the ticket had been used (Tr. 11:79-80). The third ticket was for "Wah Tran" for a flight departing on February

1, 1991, from New York to Hong Kong, connecting through Norita airport in Tokyo (Tr. 11:80-83). The ticket was used (Tr. 11:82). The return portion of the ticket was open (Tr. 11:82). The passenger manifest indicated that individuals named "Nam The Tham" and "Wah Tran" had checked into the flight (Tr. 11:86) and were traveling together (Tr. 11:86-87). Contarino did not know whether the names in the passenger manifest and ticket inquiry corresponded to any particular person (Tr. 11:99-100), because in 1991, identification was not required to order a ticket (Tr. 11:97).

G. Apprehension & The Defendants' Statements

On December 21, 2001, Joseph Tamuleviz, a special agent with the United States Drug Enforcement Administration assigned in Boston, traveled to San Francisco, California with two FBI Special Agents and a United States Marshall, to transport the defendants to Boston (Tr. 8:120-21, 132 162-63). The next morning they returned to Boston through Washington, D.C. (Tr. 8:163). Agent Tamuleviz, who was sitting next to them, told Tham that if he acted like a gentlemen on the flight he would be treated like a gentlemen (Tr. 8:134). Tham replied "I was there, they gave me a gun but I didn't kill anybody" (Tr. 8:135).

The next day, December 22, 2001, Sergeant Detectives Harrington and Paul Barnicle met with Siny

Van Tran, with the assistance of Officer Cary Chin, who translated (Tr. 9:17-18). Tran waived his *Miranda* rights and right to a prompt arraignment and made a phone call (Tr. 9:23-27, 32-34; Exs. 70-71). He then gave a tape-recorded statement regarding the incident in January 1991 (Tr. 9:23; Ex. 72), which was played for the jury without objection (Tr. 9:38-43). The jury was also provided with a transcript (Ex. 73; SVT.A. 61-107).

Siny Van Tran stated that had gone to the Tyler Street basement (SVT.A. 89). Ten minuets later, Hung Sook and another man entered and began shooting people (SVT.A. 72-73, 89-92, 106). Siny Van Tran escaped by running outside (SVT.A. 79, 92). The next day, he took a bus to Atlantic City for a couple days "to gamble and to have fun" (SVT.A. 82). He then went to Philadelphia, then Hong Kong for two or three days, then to the Quangxi province of China (SVT.A. 82-83, 96-98).

SUMMARY OF THE ARGUMENT

I. The United Airline documents were properly admitted as business records pursuant to G.L. c. 233, § 78, because they were issued and kept in the ordinary course of business and United Airlines does not deviate from this practice (pp. 18-28).

II. The prosecutor's opening statement was reasonable and grounded in good faith as he began to present evidence in a case involving the execution of five men (pp. 28-31).

III. The prosecutor's juxtaposition, in closing argument, of the behavior of the two eyewitnesses was not vouching, and his suggestion that Nam The Tham "would have some ability to speak English" was a reasonable inference based on the evidence (pp. 32-38).

IV. The judge properly denied the defendant Siny Van Tran's motion for severance where his defense was not antagonistic to that of the codefendant and where eyewitness testimony presented by the Commonwealth was sufficient to warrant a conviction (pp. 38-41).

V. The motion judge properly denied defendant Siny Van Tran's motion to suppress his December 22, 2001 recorded statement where the defendant's oral and written waiver of his *Miranda* rights and his right to a prompt arraignment was knowing, intelligent and voluntary and did waive those rights (pp. 42-59).

VI. Because the evidence amply shows that the defendants murdered five men in cold-blood, their convictions for first degree murder should stand (pp. 59-60).

ARGUMENT

I. THE UNITED AIRLINE DOCUMENTS WERE PROPERLY ADMITTED AS BUSINESS RECORDS PURSUANT TO G.L. C. 233, § 78, WHERE THEY WERE ISSUED AND KEPT IN THE ORDINARY COURSE OF BUSINESS, AND UNITED AIRLINES DOES NOT DEVIATE FROM THIS PRACTICE.

The defendants claim that their right to a fair trial was violated by the admission of two one-page United Airlines documents: (1) OTIS Ticket Inquiry; and (2) ACI/passenger manifest (SVT.Br. 11-27; NTT.Br. 26-40). Specifically, the defendants complain that the documents were not authenticated or, in the alternative, were inadmissible hearsay admitted in violation of their confrontation rights (SVT.Br. 11-27; NTT.Br. 26-40).

At trial, the Commonwealth sought to use the airline records to demonstrate that the defendants, known by these names, fled to China following the murders. The defendants objected and the trial judge sustained their objection that the business records needed further corroboration (Tr. 7:129-55; 9:65-71). The Commonwealth petitioned the Single Justice, who concluded that this ruling was an error of law and that the Commonwealth was "not prohibited from entering these records into evidence, assuming that the testimony establishes the regular procedure by UA in 1991 for the keeping of the records" (SVT.A. 120-28).

The trial judge found, after a voir dire, that the proper foundation had been laid and admitted the documents (Tr. 10:79-80; 11:61, 70). This Court must review the trial judge's decision to determine if there was error and, if so, whether the error was prejudicial. *See Commonwealth v. Deramo*, 436 Mass. 40, 49 (2002). There was no error because the records were properly admitted as business records.

A. The Two United Airline Documents Were Properly Qualified As Business Records.

Business records are admissible under an exception to the hearsay rule, G.L. c. 233, § 78, if they were "(1) made in good faith; (2) made in the regular course of business; (3) made before the action began; and (4) [it was] the regular course of business to make the record at or about the time of the transaction or occurrences recorded." *McLaughlin v. CGU Ins. Co.*, 445 Mass. 815, 819 (2006) (quoting *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 815 (2005)). Moreover, "[s]uch records are presumed to be reliable and therefore admissible because such entries in these records are routinely made by those charged with the responsibility of making accurate entries and are relied on in the course of doing business." *Wingate v. Emery Freight Corp.*, 385 Mass. 402, 406 (1982). "It is well-established that G.L. c. 233, § 78, should be

interpreted liberally to permit the receipt of relevant evidence." *Beal Bank, SSB v. Eurich*, 444 Mass. 813, 817 (2005) (two computer printouts showing amount owed on debt properly admitted as business records).

The trial judge properly found that the statutory preconditions required by G.L. c. 233, § 78 were established (Tr. 10:79-80). David Contarino, a United Airlines Business Manager, had reviewed hundreds of United Airlines ticketing documents and passenger manifests (Tr. 11:18-19, 65). There is nothing materially different between a United Airlines ticket issued in 1991 and one issued today, and they would appear the same and contain the same information (Tr. 11:32). A ticket would be created at the time of purchase (Tr. 11:16, 38). United Airlines tickets are issued and kept in the ordinary course of business and United Airlines does not deviate from this practice (Tr. 11:16-17, 38-39). Ticket records are retained in order to comply with federal regulations and also for revenue collection from credit card companies (Tr. 11:16, 39). A passenger manifest is created for every flight (Tr. 11:68), and there is no deviation from that usual business practice (Tr. 11:68-69). The passenger manifest notifies flight crew who is on board the aircraft (Tr. 11:62). Contarino had seen manifests identical to this one on a regular basis (Tr. 11:66).

This testimony established the foundation that United Airlines's normal business routine was to record the information contained in the ticket inquiry and passenger manifest. *See American Velodur Metal, Inc. v. Schinabeck*, 20 Mass. App. Ct. 460, 468-69, *rev. denied*, 396 Mass 1101 (1985), *cert. denied*, 475 U.S. 1018 (1986) (law firm's billing records were properly admitted because they were made in good faith in the regular course of practice of law and were reliable, even though they were prepared after lawsuit was brought); *Commonwealth v. Reed*, 23 Mass. App. Ct. 294, 299 (1986), *rev. denied*, 399 Mass. 1102 (1987) (information in retail store computer printout as to inventory of particular types of clothing was business record); *see also United States v. Fujii*, 301 F.3d 535, 538-39 (7th Cir. 2002) (check-in and reservation records were properly admitted as business records where they were compiled and maintained in Korean Airlines' ordinary course of business, a Korean Airlines Assistant Manager testified that the records were made from information transmitted from a person with knowledge, the entries were made at or near the time the information was received, it was the regular business practice of Korean Airlines to make the entries into the computer system, and the records were kept as part of Korean Airlines' regular business

activity); *United States v. Clovis*, 1996 U.S. Dist. LEXIS 20808, 3-7 (D.V.I. Feb. 12, 1996) (admission of a document entitled "passenger manifest" from Liat airline flight 520 which included the names of the passengers on that flight and an attached document entitled "checked baggage reconciliation manifest" which listed the name of each passenger, the number of pieces of luggage that the passenger checked, and the baggage tag numbers assigned to each piece of luggage were properly admitted under the business records); *Jones v. State*, 513 So. 2d 8, 14-15 (Ala. Crim. App. 1986) (a passenger name list of Republic Airline Flight 234 was properly admitted as a business record where a Customer Service Manager of Republic Service Airlines stated that such a list is drawn up in the ordinary course of business for the airline every day for every flight and that once the persons who boarded the flight have been checked off the list the list is then kept on file for a year at the local office in the ordinary course of business).

The defendants complain that Contarino did not personally produce the records and did not know when they were printed (SVT.Br. 13; NTT.Br. 28, 32-33), but neither is a requirement for admissibility. "The business records exception statute makes it clear that the personal knowledge of the entrant or maker of a

record is a matter affecting the weight rather than the admissibility of the record." *McLaughlin*, 445 Mass. at 819; *see Reed*, 23 Mass. App. Ct. at 299 ("fact that the manager was unaware of how the system worked is also irrelevant to admissibility, although that point could pertain to the weight to be given the evidence by the fact finder"). Evidence may be admitted under the exception even if the information contained in the record originated with an outsider so long as the creator of the entry would normally have recorded such information as a matter of business duty or business routine. *See Wingate*, 385 Mass. at 406. "Although the preparer's hearsay sources must carry the same indicia of reliability and be shown to have been reported as a matter of business duty or business routine, this can be accomplished by presenting evidence of normal business practice, rather than by producing each speaking." *Beal Bank*, 444 Mass. at 816. Such is the case here: United Airlines would normally have recorded the information recorded on these documents and the information would appear the same today as in 1991 (Tr. 11:32). *See Commonwealth v. Viriyahiranpaiboon*, 412 Mass. 224, 230 (1992) ("Alleged defects in the chain of custody usually go to the weight of the evidence and not its admissibility"). Accordingly, the trial judge did not err.

B. The Two United Airline Documents Were Properly Authenticated.

The defendants also claim that the documents were not properly authenticated (SVT.Br. 12-16; NTT.Br. 30-33). "An item of real evidence must be authenticated or 'identified' as the thing the proponent represents it to be." *Commonwealth v. Herring*, 66 Mass. App. Ct. 360, 365 (2006); *accord Commonwealth v. LaCorte*, 373 Mass. 700, 704 (1977). This can be done in one of two ways. First, a witness can identify the item. *See, e.g., LaCorte*, 373 Mass. at 704; *Herring*, 66 Mass. App. Ct. at 365-66. Second, the proponent can provide circumstantial evidence "'which impl[ies] that the thing is what its proponent represents it to be.'" *LaCorte*, 373 Mass. at 704 (quoting W. Barton Leach & Paul J. Liacos, *Massachusetts Evidence* 265 (4th ed. 1967)). *See also United States v. Safavian*, 435 F. Supp. 2d 36, 38 (2006) ("The Court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so"); *United States v. Reilly*, 33 F.3d 1396, 1404 (3rd Cir. 1994) ("burden of proof for authentication is slight"); *United States v. Holmquist*, 36 F.3d 154, 168 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995) ("standard for authentication, and

hence for admissibility, is one of reasonable likelihood").

Here, the jury could rationally conclude that the documents were United Airlines business records based on Contarino's testimony and the documents themselves. Contarino specified which indicators contained on the face of the ticket established that the ticket was issued on behalf of United Airlines (Tr. 11:19-20, 74). The ticket number began with "016" and the airline was identified as a "UA" both of which were codes unique to United Airlines (Tr. 11:19-20, 34, 72, 74). He then identified the tickets as tickets issued by United Airlines (Tr. 11:34). The information contained in the tickets corresponded to information contained in tickets generated from 1999 to present (Tr. 11:49).[10] In addition, the flight number indicated the ticket was issued on behalf of United Airlines because "Flight 801" represents United Airlines Flight 801 from JFK to Tokyo (Tr. 11:19-20, 74). Contarino had regularly seen passenger manifests identical to this one (Tr. 11:66) and concluded the manifest to be a United Airlines passenger manifest based on the flight number and "ACI Report," the name of United Airlines' computer system (Tr. 11:66; Ex. 76; SVT.A. 130). There is an "M" designating a passenger as a Mileage Plus member,

[10] Contarino began working for United Airlines in 1999.

United Airlines' frequent flyer program (Tr. 11:67). The passengers' connecting flights were all United Airlines flights (Tr. 11:67-68). Based on this information, he specifically concluded that United Airlines issued these tickets (Tr. 11:34). Last, Siny Van Tran's statement that he flew to China provides additional circumstantial evidence (SVT.A. 83).

Any alleged infirmity regarding any lack of testimony from a person with personal knowledge of the defendants' purchase and presence on the plane or at the airport goes to the weight of the evidence, not its admissibility. *Commonwealth v. Franks*, 359 Mass. 577, 580 (1971). To be sure, the defendants clearly argued that the evidence should be given little if any weight, both on cross-examination (Tr. 11:90-123)[11] and during closing arguments (Tr. 12:16-17, 46-47, 59-60). *See Reed*, 23 Mass. App. Ct. at 299 ("We note also that the defendant's trial counsel cross-examined extensively on possible inaccuracies in the information contained in the printout, drawing out facts to be evaluated on the issue of the weight to be given the evidence").[12] Accordingly, the trial judge did not err.

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[11] Indeed, Siny Van Tran offered twenty copies of a version of the ACI report that had been intentionally altered to include the trial judge's name (Tr. 11:92-93, 114; Ex. 77) to make his point clear.

[12] Moreover, the fact that the defendants successfully eluded arrest should not redound to their benefit. *See*

C. The Defendants' Rights of Confrontation Were Not Implicated.

There is no merit to the defendant Siny Van Tran's claim that the admission of these two documents violated his right to confrontation under the Sixth Amendment as interpreted in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) (SVT.Br. 11-12). Where these documents constitute business records, they are not testimonial hearsay under *Melendez-Diaz*; "[b]usiness and public records are generally admissible absent confrontation . . . because -- having been created for the administration of an entity's affairs and not for the purpose of establishing of proving some fact at trial -- they are not testimonial." *Melendez-Diaz*, 129 S.Ct. at 2539-40. *See also Commonwealth v. Weeks*, 77 Mass. App. Ct. 1, 3 (2010) (certified records of the defendant's prior convictions were not testimonial hearsay under *Melendez-Diaz* because they qualified as business records); *Commonwealth v. Martinez-Guzman*, 76 Mass. App. Ct. 167, 171 n.3, *rev. denied*, 456 Mass. 1104 (2010) (records of the Massachusetts Registry of Motor Vehicles were not testimonial). Because these two documents are not

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United States v. Algee, 599 F.3d 506, 516 (6th Cir. 2010) ("Jury trials are fluid by nature. The law recognizes this reality and allows for some play in the joints when it comes to reviewing the conduct of a trial to ensure its fundamental fairness.").

testimonial, the defendant's Sixth Amendment rights were not implicated.

II. THE PROSECUTOR'S OPENING STATEMENT DID NOT CONTAIN AN INAPPROPRIATE APPEAL TO SYMPATHY WHERE HIS STATEMENTS WERE REASONABLE AND GROUNDED IN GOOD FAITH AS HE BEGAN TO PRESENT EVIDENCE IN A CASE INVOLVING THE EXECUTION OF FIVE MEN.

The defendants' claim that their right to a fair trial was violated by aspects of the prosecutor's opening statement (SVT.Br. 46-47; NTT.Br. 45-46) is without merit. In reviewing a claim of improper opening statement, appellate courts view the prosecutor's remarks not only in light of the whole statement, but also in the context of the judge's instructions to the jury. *Commonwealth v. Cohen*, 412 Mass. 375, 382 (1992). Here, the trial judge instructed the jury prior to openings: "The opening statements of the attorneys are not evidence. They're somewhat like roadmaps from the attorneys to explain to you what they expect lies ahead. We have opening statements to assist you to understand what the evidence is expected to be" (Tr. 3:79). The cautionary instruction given in this case was clear.

First, the defendants complain that the following two statements were an improper appeal to sympathy (SVT.Br. 46-47; NTT.Br. 45-46): "But there was nothing quiet about the early morning hours of January 12, 1991 and by the time Bud Farnsworth had finished his shift

that morning, he had witnessed some of the greatest horrors any human being should ever have to witness; things that he saw, that he keeps with him and will stay with him for the rest of his life" (Tr. 3:89-90); and "What [Farnsworth] heard was a mass execution of five men. One of the worst and most violent days in the history of Boston" (Tr. 3:91).[13]

These statements were proper. *See Commonwealth v. Staines*, 441 Mass. 521, 535 (2004) ("The proper function of an opening is to outline in a general way the nature of the case which the counsel expects to be able to prove or support by evidence. . . . [E]xpectation must be reasonable and grounded in good faith"). In cases involving murder in the first degree, references to the gruesomeness of the crime are relevant to the issue of whether the defendant's actions constituted extreme atrocity and cruelty. *Commonwealth v. Johnson*, 429 Mass. 745, 748 (1999); *accord Commonwealth v. Wilson*, 427 Mass 336 (1998). In *Johnson*, the victim was stabbed twenty times and was pronounced dead after emergency surgery. *Johnson*, 429 Mass. at 746-47. The defendant argued the description of the murder as a "bloody massacre" in the prosecutor's closing statement constituted reversible

[13] Defendant Nam The Tham objected only to the second statement and defendant Siny Van Tran failed to object to either (Tr. 3:113).

error. *Id.* at 749. The Court disagreed, explaining: "'To the degree the recitation of the evidence was inflammatory, that was inherent in the odious . . . nature of the crime[s] committed,'" and therefore, was proper. *Id.* (quoting *Commonwealth v. Sanchez*, 405 Mass. 369, 376 (1989)). Here, the prosecutor's statements were reasonable, and grounded in good faith as he began to present evidence in a case involving the execution-style murder of five men and the attempted murder of a sixth. The characterization of this horrific event as "[o]ne of the worst and most violent days in the history of Boston" (Tr. 3:91) was reasonable, especially where "[a] certain measure of jury sophistication in sorting out excessive claims on both sides may fairly be assumed." *Commonwealth v. Sanna*, 424 Mass. 92, 107 (1997) (quoting *Commonwealth v. Kozec*, 399 Mass. 514, 517 (1987)). Further, the prosecutor expected Farnsworth to tell the jury how he observed "dead people all over the place" (Tr. 3:176), an observation that would reasonably stay with him for the rest of his life. *See Commonwealth v. Rodriguez*, 437 Mass. 554, 566 (2006) (internal citations omitted) ("prosecutor is entitled to tell the jury something of the person whose life [has] been lost in order to humanize the proceedings.").

Second, the defendants complain of the following remark:

> Pak Wing Lee had surgery that day to remove bullet fragments but he was able to talk to the police before his surgery and after his surgery and on subsequent days after the surgery. Pak Wing Lee told the police what happened that morning. He had a front row seat to that massacre. Not only did Pak Wing Lee tell the police what happened, he will tell you what happened

(Tr. 3:94; SVT.Br. 40; NTT.Br. 46-47). Defendant Siny Van Tran mistakenly observes this to be a comment on what Pak Wing Lee told the Grand Jury (SVT.Br. 40),[14] when it clearly is not. Defendant Nam The Tham argues this constituted a improper reference to inadmissible hearsay evidence (NTT.Br. 46-47) when it is instead a permissible preview of what the prosecutor reasonably believed would be admitted at trial. *See Staines*, 441 Mass. at 535. The prosecutor's expectation was reasonable, grounded, and in good faith and Pak Wing Lee subsequently told the jury what happened (Tr. 4:123-200; 5:17-172; 6:13-30, 68-81). Accordingly, the prosecutor's opening statement was proper.

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[14] Specifically, the defendant complains that the prosecutor "stated that Pak Wing Lee told the police what happened and that Lee explained to the Grand Jury what happened, as if the prosecutor somehow would know" (SVT.Br. 40).

III. THE PROSECUTOR'S JUXTAPOSITION OF THE BEHAVIOR OF THE TWO EYEWITNESSES WAS NOT VOUCHING, AND HIS SUGGESTION THAT NAM THE THAM "WOULD HAVE SOME ABILITY TO SPEAK ENGLISH" WAS A REASONABLE INFERENCE BASED ON THE EVIDENCE.

There is no merit to the defendants' claims that the prosecutor's summation included improper vouching (SVT.Br. 38-43; NTT.Br. 47-48); and a misstatement of the evidence (NTT.Br. 49). Because the prosecutor properly commented on the evidence presented at trial and asked the jury to draw possible and reasonable inferences from the evidence, the defendants' claim must fail.

During summation, a trial prosecutor is entitled to argue "forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence." *Commonwealth v. Kater*, 432 Mass. 404, 422-23 (2002) (quoting *Kozec*, 399 Mass. at 516). "[E]nthusiastic rhetoric, strong advocacy, and excusable hyperbole" are not grounds for reversal. *Wilson*, 427 Mass. at 350 (citations omitted). The jury is presumed to realize that the prosecutor is an advocate, not a witness. *Commonwealth v. Mitchell*, 428 Mass. 852, 857 (1999); *see also Wilson*, 427 Mass. at 350 (jurors "have a certain measure of sophistication in sorting out excessive claims on both sides") (quoting *Kozec*, 399 Mass. at 517). Remarks made during closing argument are considered on appeal

in the context of the entire argument, in light of the judge's instructions to the jury, and in view of the evidence presented at trial. *Commonwealth v. Barros*, 425 Mass. 572, 581-82 (1997); *Kozec*, 399 Mass. at 516-17. Whether errors in a prosecutor's closing argument require reversal of a conviction depend on the court's consideration of "(1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; (4) whether the error, in the circumstances, possibly made a difference in the jury conclusions." *Commonwealth v. Perez*, 444 Mass. 143, 151 (2005) (quoting *Kater*, 432 Mass. at 422-23).

The judge reminded the jury before closing arguments that "what I say and what the lawyers say is not evidence. It can be helpful and appropriate for you; to help your consideration of the evidence but, please, make that important distinction" (Tr. 12:10).

A. The Prosecutor Permissibly Juxtaposed The Behavior Of The Two Eyewitnesses By Highlighting That One Witness Spoke To The Police And The Other Did Not.

The defendants' claim that the prosecutor improperly vouched for the Pak Wing Lee's credibility (SVT.Br. 38-43; NTT.Br. 47-48) is without merit.

First, the prosecutor juxtaposed the behavior of the two eyewitnesses by arguing the following:

> When you're somebody like Pak Wing Lee and you've got a front row seat to a massacre; in fact, you're gonna be a participant, in the sense that you're gonna be a victim, and you survive, there's one of two things you do. You either tell the truth or you keep your mouth shut, i.e. Yu Man Young.

(Tr. 12:64).

> He told you he was afraid; again, when you're at a front row seat to a massacre, you either tell the truth or you keep your mouth shut

(Tr. 12:67).

> Again, when you're present during this type of massacre, you don't -- You either keep your mouth shut or you tell the truth

(Tr. 12:69). The defendants did not object to these statements. Where a prosecutor's statements on closing argument were not objected to by defendant's trial counsel, an appellate court's inquiry is limited to whether the prosecutor's argument created a substantial likelihood of a miscarriage of justice. *Commonwealth v. Cosme*, 410 Mass. 746, 750 (1991). There was no such risk.

"'Where credibility is at issue, it is certainly proper for counsel to argue from the evidence why a witness should be believed.'" *Commonwealth v. Raposa*, 440 Mass. 684, 694-95 (2004) (quoting *Commonwealth v. Thomas*, 401 Mass. 109, 116 (1987)). "There is no categorical prohibition against suggestion by a

prosecutor that a prosecution witness has no motive to lie." *Commonwealth v. Helberg*, 73 Mass. App. Ct. 175, 179 (2008) (citing *Commonwealth v. Smith*, 450 Mass. 395, 408, *cert. denied*, 129 S. Ct. 202 (2008)). *See Raposa*, 440 Mass. at 694 (prosecutor permissibly argued in closing, *inter alia*, "You've heard from many witnesses, and again they all have to be lying or mistaken or God knows what for it to be any other way," and "Oh, all these people are lying except for [the defendant]"); *Commonwealth v. Ortiz*, 50 Mass. App. Ct. 304, 309-10 (2000), *rev. denied*, 433 Mass. 1102 (2001) (prosecutor's comment that "[Defense counsel] said that Officer Williams has an incredible version of the facts. I don't see what's so incredible about it" was not error where it "amounted to no more than an assertion that the testimony was not, as the defendant had maintained, incredible"); *Commonwealth v. Chavis*, 415 Mass. 703, 713 (1993) (prosecutor may make a fair response to an attack on the credibility of a government witness).

Here, the prosecutor's argument properly suggested that Pak Wing Lee had no reason to lie. It was also necessary for the prosecutor to address the issue of the Lee's credibility after defense counsel had just

argued, at length and on multiple grounds, that his testimony was unreliable.[15]

Second, defendant Siny Van Tran complains of the following portion of the prosecutor's closing argument:

> Five men were executed like animals in the basement of 85 Tyler Street back on January 12, 1991. Two of the three men responsible for those murders are in this courtroom today

(Tr. 12:77; SVT.Br. 40). The defendant objected to this statement (Tr. 12:80) and the trial judge found this statement to be proper (Tr. 12:86). This finding was correct as the prosecutor properly argued to the jury that the defendants committed the offense with which they were charged. *See Kater*, 432 Mass. at 422-23 (prosecutor entitled to argue for conviction based on evidence); *see also Commonwealth v. Avila*, 454 Mass. 744, 759 n.15 (2009) (prosecutor suggested that the victim had been "executed").

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[15] "Pak Lee, this man with a grudge" (Tr. 3:20); "You got a man on fifteen different medications when the cops were going to his bedside trying to get him to ID someone" (Tr. 3:22); "it's the government's burden to come in here and tell you why he should be believed, in spite of the terrible, terrible, injuries he suffered; in which I'm suggesting, to you, affects his capacity to remember, in this case" (Tr. 3:23); "You have an unreliable witness whose testimony can't be relied upon" (Tr. 3:54); "[Lee's] story is completely inconsistent with the other witness; his story is completely inconsistent with what he's previously said" (Tr. 3:56).

B. The Prosecutor's Suggestion That Nam The Tham "Would Have Some Ability To Speak English" Was A Fair Inference And Served To Rebut The Defendant's Suggestion That He Could Never Have Made The Admission To Agent Tamuleviz.

Defendant Nam The Tham claims the prosecutor's suggested inference that Tham "would have some ability to speak English" was unsupported by the evidence (NTT.Br. 49; Tr. 12:73-74). The trial judge overruled the defendant's objection (Tr. 12:81), and found this to be a reasonable inference from the evidence, including that Lee had known Tham for three or four years and Young had known Tham for four years (Tr. 4:139, 6:105),[16] and which served to rebut the defendant's suggestion that he could never have made the admission to Agent Tamuleviz (*see* Tr. 12:57-58).[17] *See Chavis* 415 Mass. at 714 (proper for prosecutor to argue that, contrary to the defendant's assertion, the officer was telling the truth); *Commonwealth v. Correia*, 65 Mass. App. Ct. 27, 31 (2005) (inferences a

[16] In addition, defense counsel for Siny Van Tran challenged Lee's need for a translator in front of the jury (Tr. 5:113).

[17] "In regard to Mr. Tham's knowledge of English, I understood the argument to be an inferential one, 'Look at Lee; look at Young and look at Tham,' and evidence that each of those individuals first language was not English; were in the Boston area for some period of years. And each of them was able to understand some English. And I infer from that that Mr. Young -- that Mr. Tham, who was in this country -- this area for -- the evidence was for several years, might also understand some English, to address your argument that he could not ever said what he said to Mr. Tamuleviz" (Tr. 12:86-87).

prosecutor asks the jury to draw need only be reasonable and possible, not necessary or inescapable). This was not error.

IV. THE JUDGE PROPERLY DENIED THE DEFENDANT SINY VAN TRAN'S MOTION FOR SEVERANCE WHERE THE CODEFENDANT'S DEFENSE WAS NOT ANTAGONISTIC WITH HIS DEFENSE, AND WHERE EYEWITNESS TESTIMONY PRESENTED BY THE COMMONWEALTH WAS SUFFICIENT TO WARRANT A CONVICTION.

The defendant Siny Van Tran next claims that he was denied a fair trial because the trial judge erred in denying his motion to sever his case from Nam The Tham's (SVT.Br. 43-46). Severance, however, is a matter left to the sound discretion of the trial judge. *Commonwealth v. McAfee*, 430 Mass. 483, 485 (1999); *Commonwealth v. Moran*, 387 Mass. 644, 658 (1982). A judge's denial of a defendant's motion to sever does not constitute an abuse of discretion unless "'the prejudice resulting from a joint trial is so compelling that it prevents a defendant from obtaining a fair trial.'" *McAfee*, 430 Mass. at 486 (citing Moran, 387 Mass. at 658). No such prejudice resulted from the judge's ruling here.

Generally, when criminal charges against two or more individuals "arise out of the same criminal conduct," it is presumed that those individuals will be tried together. Mass. R. Crim. P. 9(b). Joinder expedites adjudication of cases, conserves judicial

time, and lessens the burden on jurors and witnesses. *See Commonwealth v. Masonoff*, 70 Mass. App. Ct. 162, 166 (2007) (citing *Moran*, 387 Mass. at 658). A defendant is entitled to severance only if his defense is "'mutually antagonistic [to] and irreconcilable'" with the codefendant's. *Moran*, 387 Mass. at 659.

Severance is not required when the trial strategies of the codefendants are merely inconsistent. *Commonwealth v. Diaz*, 448 Mass. 286, 290 (2007) (citing *Commonwealth v. Cunningham*, 405 Mass. 646, 654 (1989)). In *Diaz*, neither codefendant directly implicated the other; instead they shared a common strategy of impeaching the government's witnesses and raising doubt about whether other persons seen in the area might have been the perpetrators. *Diaz*, 448 Mass. at 290. *See also McAfee*, 430 Mass. at 486 (severance not required in part because both defendants shared common approach of "vigorously attack[ing] the credibility" of eyewitness). As in *Diaz* and *McAfee*, here, the codefendants shared the common strategy of exploiting and impeaching the government's witnesses with prior inconsistent statements and actions and attacking the police investigation (Tr. 3:118-34; 12:12-61).

The defendant Siny Van Tran argues that Pak Wing Lee's inconsistent testimony as to which defendant entered the basement first would not have been admitted

had the codefendants been tried alone, and that this would have precluded Tran from arguing that he was an innocent bystander (SVT.Br. 45-46).[18] This claim is baseless because the factual question of which defendant entered the basement, first raised by Lee's inconsistent testimony, did not create mutually antagonistic defenses (Tr. 4:162-63, 176-78, 183-99; 6:111, 122-29, 146-48). The defendant's argument, in essence, is that he would "have had a better chance of acquittal had he been tried alone." *Moran*, 387 Mass. at 659. This was not a ground for severance. *See Commonwealth v. Kindell*, 44 Mass. App. Ct. 200, 206 (1998) ("[t]hat [the defendant] would have had a better chance for acquittal had he been tried alone did not compel severance"). Further, Siny Van Tran was able to argue that he was an innocent bystander in his opening and closing (Tr. 3:121-22; 12:12-37).[19]

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[18] During direct examination Pak Wing Lee testified that Nam The Tham entered the basement first and ordered everyone to squat down (Tr. 4:176, 183-84). Lee admitted that he had told a detective in 1991 that Siny Van Tran had entered the basement first (Tr. 5:171-72). Lee clarified that both Tran and Tham had said "everybody down" (Tr. 6:14-15). Lee was impeached with his grand jury testimony where he testified that the shooters did not say anything (Tr. 6:25-26).

[19] For example, "Why would Siny Van Tran come back to this country after 14 years, and the first thing he did was sit down for the interview that's here for you, Exhibit 73, and tell a story that makes more sense than any witness that's been in front of you on this case?" (Tr. 12:28).

Regardless, no matter how antagonistic the codefendants' defenses were, severance was not required in light of the eyewitness identifications. *See Commonwealth v. Stewart*, 450 Mass. 25, 31-32 (2007); *compare Commonwealth v. Cordeiro*, 401 Mass. 843, 853 (1988) (joinder was proper where prosecution witness testified that he saw both codefendants participate in rape), *with Moran*, 387 Mass. at 654-55 (severance was required where no prosecution witness saw murder). The Commonwealth based its case mainly on Lee and Young's testimony that the codefendants and Hung Sook were the perpetrators (Tr. 4:162-63, 176-78, 183-99; 6:111, 122-29, 146-48). *See Commonwealth v. Mahoney*, 406 Mass. 843, 849 (1990) (eyewitness testimony of codefendants' joint involvement in deadly attack was relevant to propriety of denying severance). Thus, no matter what defense the defendants espoused, the jury still could have not believed them and instead believed the Commonwealth's eyewitnesses. *See McAfee*, 430 Mass. at 487 (no prejudice resulted from joinder where jury "had the option to disbelieve both defendants' proffered defenses and to credit the testimony of the eyewitnesses instead"). Therefore, the denial of severance did not result in substantial prejudice to the defendant. *See Stewart*, 450 Mass. at 31-32; *McAfee*, 430 Mass. at 486-87.

V. THE MOTION JUDGE PROPERLY DENIED DEFENDANT SINY VAN TRAN'S MOTION TO SUPPRESS HIS RECORDED DECEMBER 22, 2001 STATEMENT BECAUSE IT WAS VOLUNTARILY GIVEN AFTER AN INTELLIGENT AND KNOWING WAIVER OF PROPERLY ADMINISTERED *MIRANDA* AND *ROSARIO* RIGHTS.

The defendant Siny Van Tran claims that his recorded December 22, 2001 statement was obtained in violation of his Fifth Amendment rights because his *Miranda* waiver was not knowing and voluntary and because of a *Rosario* "Safe Harbor" violation (SVT.Br. 27-39). His claim fails because the record makes clear that the officers were meticulous in ensuring that he had the ability and capacity to knowingly, voluntarily, and intelligently waive his *Miranda* and *Rosario* rights, and that he did waive those rights.

Judge Brady found the following facts, in relevant part:

> Members of the Boston Police Department homicide unit met defendants' airplane at Logan Airport, formally arresting them, and brought them to area A-1 police station for booking shortly after 10 p.m. The federal agents provided interpreters fluent in the Cantonese dialect of Chinese who translated for defendants during the booking process. Each defendant was given his *Miranda* warnings. Because the hour was late and the defendants had had a very long flight, Sergeant Detective Robert Harrington, the homicide detective in charge of the investigation at that point, chose not to attempt to interrogate them that night.
>
> Defendant Siny Van Tran was questioned on Saturday, December 22, 2001 beginning at

noon. Sergeant Harrington enlisted the services of Boston police officer Kerry Chin, who spoke Cantonese, to serve as interpreter. Also present during the interview was Sergeant Paul Barnicle. The interview was tape-recorded. Sergeant Harrington, and occasionally Sergeant Barnicle, would ask questions in English; Officer Chin would translate the question for the defendant; defendant would answer in Cantonese; Officer Chin would translate the answer into English. Officer Chin was not an experienced translator. He would from time to time not literally translate what the investigating officer asked, but would instead attempt to explain something in his own way. . . .

Sergeant Herrington first administered the *Miranda* warnings by giving defendant a rights form printed in Cantonese, and having the defendant read each right aloud. The defendant acknowledged understanding each right which he read. When finished, the defendant signed the Cantonese *Miranda* rights form. He agreed to speak with the police without a lawyer present.

Next, Sergeant Harrington explained that because it had been more than six hours since his arrest, the police must give defendant certain additional rights. Harrington explained that the court was closed and that the earliest the defendant would be taken to court would be Monday; and that if he could not afford to hire an attorney, the state would provide him with an attorney at no cost. The translating officer, Officer Chin, here departed from Sergeant Harrington's explanation, saying that the court "will . . . want you to pay money . . . to bail yourself out"; further, that "the court will explain to you why you were under arrest. You can either say you did or didn't." The defendant seemed to grunt a response which Officer Chin took as an acknowledgment of understanding. Officer Chin then attempted to explain Sergeant Harrington's statement that the defendant would have the opportunity for judicial determination of probable cause to arrest, as follows: "He said because you are here, the court has found some evidence

> that you did it, you did it, and they've arrested you over there." Defendant said he understood. Then Sergeant Harrington said "that no statement that he makes six hours or more after his arrest will be accepted by the court unless he waives his right to prompt arraignment." Officer Chin translated this: "He said it's been six hours since your arrest, you have the rights to say anything you want or say nothing." The defendant said he understood. Shortly thereafter, Sergeant Harrington said "Would you ask him that he makes sure that he understands each of these rights and having these rights in mind that he waives his right to prompt arraignment voluntarily and that he wishes to speak to the police now." Officer Chin translated: "Do you understand what I've just . . . told you? Do you understand this?" The defendant said that he did.
>
> Thereafter the substantive questioning commenced. Defendant answered numerous questions concerning the events of January 12, 1991. Questioning was not aggressive or hostile. Defendant's answers were logical and coherent.

(SVT.A. 48-51) (internal citations to the motion exhibits omitted).

In reviewing a motion to suppress, this court will accept the motion judge's findings of fact unless there is clear error. *Commonwealth v. Welch*, 420 Mass. 646, 651 (1995); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743 (1990). The reviewing court then will "make an independent determination of the correctness of the judge's application of constitutional principles to the facts as found." *Commonwealth v. Mercado*, 422 Mass. 367, 369 (1996). Here, the motion judge's ultimate legal conclusion that there was a proper *Miranda* and

Rosario waiver (SVT.A. 48-53, 59) was correct. Therefore, this Court should affirm the motion judge's ruling.

A. The Defendant's Oral And Written Miranda Waiver Was Knowing, Intelligent And Voluntary.

"Because the defendant was advised of, and waived, [his] *Miranda* rights, the issue becomes whether the Commonwealth has proved, by a totality of the circumstances, that the defendant made a voluntary, knowing, and intelligent waiver of [his] rights, and that [his] statements were otherwise voluntary." *Commonwealth v. Tolan*, 453 Mass. 634, 642 (2009). This Court must review "the totality of the circumstances," considering factors such as "conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition . . . and the details of the interrogation, including the recitation of Miranda warnings." *Tolan*, 453 Mass. at 642. In determining whether police officers adequately conveyed the *Miranda* warnings, "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by Miranda.'" *Florida v. Powell*, 130 S.

Ct. 1195, 1204 (2010) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)). Here, the evidence at the motion hearing solidly supports the judge's findings and rulings.

First, as Judge Brady properly found, the defendant was given complete *Miranda* warnings (SVT.A. 50-51). Sergeant Harrington gave the defendant a rights form printed in Cantonese, and had the defendant read each right aloud (SVT.A. 50, 63-65). The defendant said he understood each of these rights (SVT.A. 63-65). *Contrast Commonwealth v. Seng*, 436 Mass. 537, 543-45 (2002) (translated version of *Miranda* rights was deficient in three key respects). The defendant, then signed and dated the Cantonese *Miranda* rights form and agreed to speak to the police without a lawyer present (SVT.A. 50, 65; C.A. 2). *See Commonwealth v. Lopes*, 455 Mass. 147, 167 (2009) (defendant was twice given complete *Miranda* warnings; each time he was read each right verbatim from a form, stated that he understood each right, and signed his name to the form, indicating that he understood the rights and waived them voluntarily and wished to make a statement); *Commonwealth v. Murphy*, 442 Mass. 485, 494 (2004) (police officer's scrupulous administration of *Miranda* warnings where officer stopped to ask defendant whether he understood each right and gave him *Miranda*

form to sign and read, helped show that defendant's *Miranda* waiver was valid); *Commonwealth v. Raymond*, 424 Mass. 382, 393 (1997) ("once the [*Miranda*] warnings are read, the defendant presumably understands that he need not answer any questions the police pose"). At no point during the taped interview did the defendant invoke any of his *Miranda* rights (SVT.A. 61-107). Accordingly, the motion judge correctly concluded that the defendant "freely, intelligently, and voluntarily waived his Miranda rights and spoke to the police" (SVT.A. 51). In other words, the defendant's waiver of these rights was "an informed and intentional relinquishment" of his *Miranda* rights. *Commonwealth v. Torres*, 442 Mass. 554, 571-572 (2004).

Second, the defendant's statements were the products of his "rational intellect and . . . free will." *Commonwealth v. Davis*, 403 Mass. 575, 581 (1988). Judge Brady found that the defendant's "answers to the questions regarding the relevant events indicated a comprehension of the questions, were logical responses, and reflected an effort to exonerate himself" (SVT.A. 51). The record supports his finding that the defendant was alert and was not under the influence of an intoxicating substances (SVT.A. 51). *See Commonwealth v. McCray*, 457 Mass. 544, 552 (2010) ("the motion judge found that the officers' tone

throughout the interview was 'business-like' and 'normal.' He found no evidence of any trickery or coercion. The defendant's responses were appropriate and he appeared to have his self-interest in mind."); *Commonwealth v. Anderson*, 445 Mass. 195, 204 (2005) (defendant's statement was voluntary where he did not appear to be under the influence of drugs and alcohol, and his answers seemed coherent). Indeed, before questioning, the defendant was informed that he could use the telephone and the defendant did so; he called his sister (SVT.A. 62). Furthermore, there was no evidence that the police engaged in any unfair techniques or tactics during the interview designed to extract a statement from the defendant (SVT.A. 51-53). *Cf. Commonwealth v. Williams*, 388 Mass. 846, 853 (1983) (leading police questions were the result of "defendant's limited ability to articulate his sentiments and not the result of unfair police interrogation").

Contrary to the defendant's position there is not, nor should there be, a separate waiver analysis for those of Asian decent to take into account "a culture without civil liberties" and a tendency to be "wholly submissive to an officer in authority and [to] agree with everything he was told" (SVT.Br. 32-34). *See Commonwealth v. Moran*, 75 Mass. App. Ct. 513, 520, *rev.*

denied, 455 Mass. 1105 (2009) (rejecting defendant's claim that statement was involuntary because he was a native of Guatemala, was 21 years old, spoke Spanish, and had no experience in the criminal justice system where there was no evidence that police used coercive measures to induce defendant's confession).

The police detectives were meticulous in ensuring that the defendant had the ability and capacity to knowingly, voluntarily, and intelligently waive his *Miranda* rights. The defendant waived those rights both orally and in writing. Based on the totality of the circumstances amply evidenced in the record, Judge Brady correctly concluded that the defendant's *Miranda* warnings were properly administered, that the defendant intelligently waived those rights, and that his subsequent statement was voluntary.

B. The Defendant's *Rosario* Waiver Was Knowing, Intelligent And Voluntary.

This Court has established a six-hour "safe harbor" during which the police may process and question a newly-arrested suspect without violating his right to prompt arraignment under Mass. R. Crim. P. 7(a)(1). *See Commonwealth v. Obershaw*, 435 Mass. 794, 795 n.1 (2002) (citing *Commonwealth v. Rosario*, 422 Mass. 48, 56 (1996) ("An otherwise admissible statement made to the police is not to be excluded

because of unreasonable delay in arraignment, if the statement is made within six hours of the *arrest*."). This rule is designed to prevent unlawful detention "and to eliminate the opportunity and incentive for application of improper police pressure." *Commonwealth v. Morganti*, 455 Mass. 388, 399 (2009) (quoting *Rosario*, 422 Mass. at 51). "[I]n the absence of exceptional circumstances, a statement made by a defendant more than six hours after his arrest shall not be admitted in evidence unless the defendant waives his right to a prompt arraignment." *Morganti*, 455 Mass. at 399. Presentment rights include the right to be promptly presented "before the court if then in session and if not, at its next session," and "to a judicial determination of probable cause." *Commonwealth v. Jackson*, 447 Mass. 603, 605 (2006).

After the defendant waived his *Miranda* rights, Sergeant Harrington explained to the defendant his presentment rights through Officer Chin (SVT.A. 66). Officer Chin was not a trained Cantonese translator, but had spoken Cantonese his entire life and was very comfortable speaking it (MTr. 1:104-05, 37).[20] The defendant was informed:[21]

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[20] Detective Harrington explained that he did not use a certified translator because he could rely on Officer Chin's availability and cooperation in the ensuing years but had no basis for concluding the same for the

> We want to tell you that since you were arrested for more than six hours, the earliest you will be taken to court is Monday. Today is Saturday, the court is closed, do you understand? He'll take you to the court right away on Monday.

(SVT.A. 66).

> When you are taken to the court on Monday, and even if you cannot afford to hire an attorney, the state of Massachusetts will provide you with an attorney at no cost, okay, it's free. Unless they know you have money.

(SVT.A. 66).

> The court will . . . you, will pay, will want you to pay - - - to bail yourself out.

(SVT.A. 66).

> The court will explain to you why you were under arrest. You can either say you did or didn't. Do you understand? You can say - - - do you understand?

(SVT.A. 67).

> He said because since you are here, the court has found some evidence that you did it, you did it, and they have you arrested over there. Do you understand?

(SVT.A. 67).

> He said it has been six hours since your arrest, you have the right to say anything you want or say nothing. (unintelligible) The court can . . . okay? Do you understand?

(SVT.A. 67).

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linguist specialists who had been present during booking (MTr. 2:42-43).

[21] The following citations are to the questions as translated by the language specialist, denoted as "QC" in the transcript.

> What we gave you to read just now is your rights given by Massachusetts and the federal government. We had you read it just now. Do you understand?

(SVT.A. 67). The defendant then said he wanted to speak with the officers (SVT.A. 67).

The defendant was clearly notified that he would be brought to court on Monday, its next session; that he would be provided an attorney if he could not afford one; that the Court would explain to him why he was under arrest; and that he did not have to speak with them. *See Jackson*, 447 Mass. at 605. The defendant was notified of the arraignment procedure and his accompanying rights. He then said he wanted to speak with the officers. This satisfied the requirements set forth in *Rosario*. *See Morganti*, 455 Mass. at 399. Accordingly, his motion to suppress was properly denied.

In an attempt to follow *Rosario* the Boston Police Department created a Waiver of Prompt Arraignment Form (C.A. 1). In this case the translation of the form was not perfect. Detective Harrington asked Officer Chin to translate the following to the defendant in Cantonese: "[the defendant] will have the opportunity for judicial determination of probable cause to arrest him if that determination has not already been made" (SVT.A. 67); the Officer Chin's translation was: "He

said because since you are here, the court has found some evidence that you did it, you did it, and they have you arrested over there. Do you understand" (SVT.A. 67). If this Court concludes that the mistranslation infirms the defendant's waiver of prompt arraignment, suppression of the defendant's entire statement would not be required because of the "exceptional circumstances" contemplated by this Court. *See Morganti*, 455 Mass. at 399. Although, there is no case that defines what would make a circumstance exceptional, the instant case should qualify.

First, the record makes plain that Officer Chin's mistranslation was not a result of trickery or deceit.[22] Any delay in the defendant's arraignment was not to apply improper pressure on the defendant. There was no application of improper police pressure; the officers thought they had followed Boston Police Department's Waiver of Prompt Arraignment Form verbatim (C.A. 1). There is no police misconduct that would warrant suppression as a deterrent. The record establishes that the officers were meticulous in ensuring that the defendant's statements were freely given. The defendant was given his *Miranda* rights during booking,

[22] Defense counsel conceded at the motion hearing: "I mean, throughout, and I understand that this young police officer, Officer Chin, is probably trying his level best and is not trying to be deceptive in any way" (MTr. 2:89).

following his arrival late Friday night from San Francisco (MTr. 1:23-26); the defendant received his *Miranda* rights a second time and waived them before giving his statement the following morning at 11:55 a.m. (SVT.A. 64-65).

Of course the officers could have pursued the alternative course of attempting questioning following the booking process Friday night, when it was approaching midnight (MTr. 1:26), and seek to conclude an interview before 6:00 a.m. Any statement given then would have fallen within the six-hour safe harbor. *See Commonwealth v. Ortiz*, 422 Mass. 64 (1996) (statements within the six-hour safe harbor). Instead, the officers declined to do so because "[i]t appeared [to Detective Harrington] from talking to the federal agents that there had been some jet lag, so to speak. [The defendants] had traveled a lot. Everybody seemed tired. It didn't appear to be the most opportune time to conduct an interview" (MTr. 2:6; *see* MTr. 1:25).

Moreover, prior to *Rosario*, reviewing courts would consider first, whether delay was "so egregious as to put this aspect [the voluntary nature] of a defendant's statements in doubt"; and second, whether the "the police have engaged in misconduct, other than delay, that would justify suppression as a deterrent against similar future conduct . . . ." *Commonwealth v.*

Butler, 423 Mass. 517, 525 (1996). Under these two factors the defendant's statement would be admissible. The defendant clearly knowingly, voluntarily, and intelligently waived his *Miranda* rights (SVT.A. 50-51). He repeatedly expressed his desire to speak to the police and his answers "reflected an effort to exonerate himself" (SVT.A. 51). The defendant was also informed that he could use the telephone before questioning and he called his sister (SVT.A. 62). Further, another pre-*Rosario* factor taken into account in determining voluntariness is whether physical punishment such as deprivation of food or sleep has been used by the police. *See Commonwealth v. Hunter*, 426 Mass. 715, 722 n.3 (1998) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). Here, there is *no* evidence of physical punishment, but rather a deferral of questioning to the following morning due to the defendant's apparent weariness from travel (MTr. 1:25; 2:6). *Contrast Commonwealth v. Magee*, 423 Mass. 381, 386-87 (1996) (statements involuntary after seven hours of prolonged questioning, while defendant, in exhausted state, cried, and shook uncontrollably).

The policy behind the "safe harbor" rule would not be frustrated because the officers thought they were in complete compliance. *See Morganti*, 455 Mass. at 399-

400 ("danger that triggered the need for the rule -- that police officers would delay a defendant's arraignment in order to procure a confession from an unrepresented defendant"). Suppression would not further a policy of deterring deliberate arraignment delays because the officers were acting in good faith and the record makes clear that the defendant wanted to speak with them. *See Commonwealth v. Brown*, 456 Mass. 708, 715 (2010) ("rigid adherence to a rule of exclusion can only frustrate the public interest in the admission of evidence of criminal activity. . . . To apply the exclusionary rule in these circumstances as the defendant urges would plainly frustrate the public interest disproportionately to any incremental protection it might afford."). Suppression of the defendant's statement due to the innocent mistranslation would be an axiomatic victory of form over substance. Moreover, this case represents the perfect opportunity for this Court to abandon the arbitrary and capricious six-hour limitation and return to an individual evaluation of the reasonableness of any delay in arraignment. *See Commonwealth v. Sylvia*, 380 Mass. 180, 183-84 (1980); *Keefe v. Hart*, 213 Mass. 476, 482 (1913).

Based on the totality of the circumstances amply evidenced in the record, the defendant was properly

informed of his presentment rights and waived those rights. There is no basis for concluding that the defendant's statements were other than the result of his free and voluntary act. There is nothing that puts the voluntary nature of a defendant's statements in doubt.

C. If Erroneous, Admission Of The Defendant's Recorded December 22, 2001 Statement Was Harmless Beyond A Reasonable Doubt Because It Was Cumulative Of The Testimony Of Two Eye-witnesses And Was An Exculpatory Claim That He Was An Innocent Bystander.

If this Court concludes that introduction of the defendant's recorded statement at trial was a violation of the defendant's constitutional rights, this Court must then determine whether the erroneous admission was harmless beyond a reasonable doubt. *Commonwealth v. Dagraca*, 447 Mass. 546, 552 (2006). "In determining whether an error of constitutional dimension is harmless beyond a reasonable doubt, we examine various factors, including the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; the availability or effect of curative instructions; and

the weight or quantum of evidence of guilt." *Dagraca*, 447 Mass. at 552-53.

The defendant's claim that he was in the basement, but was an innocent bystander (SVT.A. 72-73), represented cumulative evidence of his presence. Two eye-witnesses placed the defendant in the basement that night and identified him in court (Tr. 4:139, 142, 162-63; 6:106, 111, 126, 146). *Compare Commonwealth v. Gomes*, 443 Mass. 502 (2005) (incompetent testimony that a substance was "coke," was harmless where two witnesses testified that they saw the defendant shoot the victim, and the defendant fled the scene and the Commonwealth, among other factors) *with Dagraca*, 447 Mass. at 554 ("defendant's statements were of particular importance to the Commonwealth's case -- and were especially damaging to the defendant's case -- because they were the only direct evidence in an otherwise purely circumstantial case that the defendant lived in the house"), *and Commonwealth v. Libran*, 405 Mass. 634, 643 (1989) ("no other trial witness testified to direct knowledge of how and when the defendant obtained a knife, and thus the statements were not cumulative of other evidence"). In addition, the defendant's answers to the police "reflected an effort to exonerate himself" (SVT.A. 51). *See Commonwealth v. Carnes*, 457 Mass. 812, 820 (2010) ("He

wished to give the police his exculpatory account of his whereabouts on the night of the murders."). Finally, at the conclusion of the trial, the judge provided a "humane practice" instruction to the jury pertaining to all of the defendant's statements (Tr. 12:127-28). The defendant's claim fails because the record makes clear that the officers were meticulous in ensuring that he had the ability and capacity to knowingly, voluntarily, and intelligently waive his *Miranda* and *Rosario* rights and did waive those rights.

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

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

For the reasons stated in the previous sections, *supra*, the defendant's claims are without merit. The victims' deaths simply resulted from the defendants'

deliberate, coldblooded, and ruthless acts in the basement. The verdicts must stand.

CONCLUSION

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

Respectfully submitted

FOR THE COMMONWEALTH,
DANIEL F. CONLEY
DISTRICT ATTORNEY
For the Suffolk District

DAVID D. McGOWAN
Assistant District Attorney
BBO#: 670041
One Bulfinch Place
Boston, MA 02114
(617) 619-4070

November 2010