COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPDEN COUNTY

No. SJC-10461
A.C. No. 2008-P-0786

COMMONWEALTH

V.

JASON LOADHOLT

ON APPEAL FROM A JUDGMENT
THE HAMPDEN COUNTY SUPERIOR COURT

BRIEF FOR THE COMMONWEALTH

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ISSUES PRESENTED

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II. WHETHER THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED DURING THE EXECUTION OF THE ARREST WARRANT, SINCE, AFTER A ROUND OF HOLLOW-POINT AMMUNITION WAS FOUND IN THE DEFENDANT'S POCKET, THE POLICE PROPERLY SEARCHED THE APARTMENT TO SECURE A HANDGUN IN ORDER TO PROTECT THE SAFETY OF THE OFFICERS AND THE OCCUPANTS OF THE APARTMENT?

III. WHETHER THE COMMONWEALTH AGREES THAT THE LIMITED PORTION OF THE JURY INSTRUCTIONS RELATIVE TO THE ELEMENTS OF G.L. c.269, §10(n) OMITTED ANY REFERENCE TO THE FACT THAT, IN ORDER TO CONVICT THE DEFENDANT UNDER THAT STATUTE, THE COMMONWEALTH MUST PROVE THAT THE DEFENDANT VIOLATED EITHER G.L. c.269, §10(a) OR §10(c) AND, THEREFORE, THE DEFENDANT'S CONVICTION ON THAT CHARGE ALONE SHOULD BE VACATED?

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V. WHETHER THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AS TO EACH AND EVERY ESSENTIAL ELEMENT OF THE OFFENSE OF FURNISHING A FALSE NAME TO A LAW

ENFORCEMENT OFFICER FOLLOWING HIS ARREST, IN VIOLATION OF G.L. c.268, §34A?

VI. WHETHER THE PROSECUTION OF THE DEFENDANT FOR POSSESSION OF A FIREARM AND AMMUNITION DID NOT VIOLATE HIS SECOND AMENDMENT RIGHTS TO KEEP AND BEAR ARMS, PURSUANT TO <u>DISTRICT OF COLUMBIA V. HELLER</u>, --- U.S. ---, 128 S.Ct. 2783 (2008)?

VII. WHETHER THIS COURT SHOULD REJECT THE DEFENDANT'S CLAIM THAT THE BALLISTICS CERTIFICATE VIOLATED HIS CONFRONTATION-CLAUSE RIGHTS BECAUSE THE SUPREME JUDICIAL COURT HAS ALREADY RESOLVED THE ISSUE; AND, EVEN IF THE SUPREME COURT WERE TO HOLD OTHERWISE, THERE WAS NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE BECAUSE THE ONLY ISSUE AT TRIAL WAS POSSESSION, NOT WHETHER THE FIREARM WAS OPERABLE?

STATEMENT OF THE CASE

The Commonwealth is not dissatisfied with the defendant's Statement of the Case.

STATEMENT OF THE FACTS

A. Defendant's Motion to Suppress

After a two-day evidentiary hearing, the motion judge made the following written findings of fact:[1]

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[1] The citations used in this brief are as follows: the transcript of the motion to suppress hearing, which consists of two volumes dated February 15 and 16, 2007, is cited as (Mo.Tr.volume/page); the trial transcript, which consists of three volumes, dated February 20, 21 and 22, 2007, is cited as (Tr.vol./page); the defendant's brief is cited as (Def.Br./page); the record appendix is cited as (R.A./page); and the Commonwealth's addendum, which contains the motion judge's finding of fact and rulings of law on the defendant's motion to suppress, in accordance with Mass. R. App. P. 16(a)(6), is cited as (Add./page).

On April 25, 2006, eight law enforcement officers led by State Trooper Michael Sullivan traveled to 149 Allen Street, Apt. A, for the purpose of serving three warrants on the defendant. The warrants were in the name of Antonio Flowers, which is the defendant's alias. Trooper Sullivan and 3 other officers took up position at the front door of the apartment; two at the back door; and 3 others outside. Trooper Sullivan had the 3 warrants on his person. The address on the warrant was 149 Allen Street, Apt. A. One warrant had issued from the Superior Court to arrest the defendant for assault and battery, dangerous weapon. The two other warrants had issued from the District Court for motor vehicle offenses. Trooper Sullivan knocked on the door. There was agitated noise from inside. Finally Ms. Lawanda Hill opened the door. She was holding a small child. Ms. Hill was very upset. The troopers told her why they were there, as other officers looked into a bedroom. Within a moment Trooper Sullivan found the defendant hiding in the closet of a child's bedroom. As this was occurring, Ms. Hill told Trooper O'Toole they could search the apartment for the defendant. Trooper O'Toole frisked the defendant and found a hollow point round in the defendant's left front pants pocket. He immediately asked the defendant if there was a gun present. The defendant directed him to the closet in another bedroom where the defendant said a gun was wrapped in a blanket was located. A loaded gun was found in that closet.

Trooper O'Toole knew the defendant from past dealings. In fact, he had searched for him for at least a year. The trooper knew the defendant had several aliases, including Antonio Flowers. The trooper was part of the front door team. Ms. Wanda Hill was the tenant for apartment A. She did not open the door at first; instead she called through the door to the police asking then what they wanted. Trooper O'Toole replied they had warrants for the defendant. She denied he was there and the only persons present were herself and child. Eventually she opened the door and looked at the warrants. She was shaking

and denying that the defendant was present. Trooper O'Toole told her he thought the defendant was in the apartment based on the voices they heard through the door when they first arrived and the fact that the officers at the rear door observed a pair of men's athletic shoes to the side of the back door. Ms. Hill told the trooper the officers could stay but she wanted to leave. Trooper O'Toole calmed her and explained again why the troopers were there and for a second time reviewed the warrants with Ms. Hill. She remained nervous, but again told the trooper the police could look for him in the apartment. The officers' guns were drawn as they searched because the defendant has a specific history of assaultive behavior and carrying a firearm. As stated earlier, the defendant was found hiding in a closet with a live round of ammunition in his pocket. Several officers immediately asked where the gun was. Sergeant Sullivan in particular demanded to know where the gun was.

The entire apartment had not yet been searched. The defendant told Sergeant Sullivan where the gun was. Once the gun was recovered, the defendant was given his Miranda[2] warnings and right by Trooper O'Toole. The defendant explained that Lawanda (Ms. Hill) had nothing to do with the firearm. Officers brought the defendant to a police cruiser to be transported to police headquarters.

Trooper O'Toole then sat down with Ms. Hill and explained the police wanted to thoroughly search the apartment for weapons. He told her the police knew she was not involved in the commission of any crime. The trooper told her they would apply for a search warrant and she did not have to give her consent to a further search. Ms. Hill asked to call her mother. The trooper told her she had every right to contact her. Ms. Hill called her mother who came over to the apartment. Ms. Hill and her mother spoke privately with each other and thereafter Ms. Hill signed a consent to search form. No other

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

> weapons were found in the apartment. Only women's clothes were in the apartment. Ms. Hill said she was the only tenant and lived in the apartment with her child. Ms. Hill's statement is consistent with a prior incident where Spfld [sic] police officers attempted to serve an arrest warrant on the defendant for receiving stolen property. On that prior occasion Ms. Hill claimed she and her child were the sole occupants of the apartment and that she did not know the defendant.

(Add./1-2,3-4).[3] The motion judge also made oral findings of fact on the record at the close of the hearing on the defendant's motion to suppress (Mo.II/87-94). The Commonwealth will refer to the judge's oral findings as necessary in its argument.

B. Trial

The Commonwealth's Case:

On or about April 25, 2006, troopers from the Massachusetts State Police and officers from the Springfield Police Department approached the apartment building at 149 Allen Street in Springfield (Tr.I/132,204). The officers had reason to believe that the defendant, Jason Loadholt, was at that address in Apartment A, and were attempting to arrest

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[3] As a courtesy to the Court, the Commonwealth transcribed the motion judge's handwritten findings, which are difficult to decipher in parts (Add./1-2). The Commonwealth's transcription is nearly identical to that of the defendant (R.A./19-24). Any differences are minor and do not impact the clear meaning of the motion judge's findings and rulings.

him (Tr.I/132). The building at 149 Allen Street was a multi-family apartment complex in a residential area (Tr.I/133).

Sergeant Sullivan, Troopers O'Toole and Devlin and Officer Leonard entered the building into a common hallway (Tr.I/134). The group of officers approached the front door of Apartment A, while Officers Croteau and Ingham approached the rear door (Tr.I/134,205). As they approached the front door, the men could hear music, and more than one voice in conversation (Tr.I/135,205). Trooper O'Toole knocked on the front door of the apartment and announced, "Police Department" (Tr.I/136,205). He noted that, after his knock, the music was turned down or off, and a female voice asked, "Who?" (Tr.I/136,205). Trooper O'Toole repeated that it was the police, but no one opened the door (Tr.I/136,206). Instead, he heard the sounds of running, scampering or scuffling inside the apartment (Tr.I/136,205).

Upon hearing what sounded like several people running inside the apartment, Trooper O'Toole radioed to the officers at the back door to notify them of his observations (Tr.I/137,138). One of the officers at the back door responded that he observed a pair of

men's sneakers outside the back door (Tr.I/138). Trooper O'Toole continued to knock and announce the presence of the police, to no avail (Tr.I/139).

After approximately three to four minutes, during which time Trooper O'Toole knocked and announced the police presence continuously, a female finally opened the front door of the apartment (Tr.I/139,140,206). The woman was later identified as Lawanda Hill (Tr.I/140). She did not allow the police inside the apartment, but stood in the door and asked what they wanted (Tr.I/104,206). She was carrying a young child, who was later identified as her two-and-one-half year old son, Zierre (Tr.I/140,206).

Trooper O'Toole told Ms. Hill that the police were at the apartment to arrest Jason Loadholt (Tr.I/140,206). Ms. Hill stated that she was alone in the apartment with her child and Mr. Loadholt was not present (Tr.I/140). She was extremely nervous during this exchange, and Trooper O'Toole noted that she was evasive, shaking, trembling, and pacing, she did not make eye contact, and she continuously looked back into the apartment (Tr.I/141,207). She repeatedly denied that Mr. Loadholt was in the apartment (Tr.I/141). Trooper O'Toole asked Ms. Hill if the

officers could enter the apartment and look for Mr. Loadholt (Tr.I/142). Ms. Hill consented to the entry of the officers, but asked if when they entered, she could leave with her child (Tr.I/142). Trooper O'Toole asked Ms. Hill to remain in the apartment and wanted to speak to her (Tr.I/143,202).

Once inside the apartment, Trooper O'Toole entered the living room while Sergeant Sullivan and Officer Leonard entered what appeared to be a child's bedroom (Tr.I/145). After looking under the bed and around the room, the officers approached the closed closet door (Tr.I/210). Sergeant Sullivan opened the closet door and found the defendant hiding inside (Tr.I/146,210-212). Sergeant Sullivan yelled for the defendant to put his hands where the officers could see them, and to exit the closet (Tr.I/146,210). Officer Leonard physically pulled the defendant out of the closet, and he and Trooper O'Toole placed the defendant on his stomach on the floor (Tr.I/148,211).

For the safety of the officers, Trooper O'Toole conducted a pat frisk of the defendant, and located a live .380 caliber hollow point bullet in his left front pants pocket (Tr.I/148,150,212,213). Trooper O'Toole immediately informed the other officers of the

presence of the ammunition, and, in order to protect the safety of both the officers and of Ms. Hill and her child, Sergeant Sullivan asked the defendant where the gun was located (Tr.I/152-153,213). As Trooper O'Toole continued to pat-frisk him to find the gun, the defendant responded that it was not on his person, but was in the closet of the other bedroom (Tr.I/153,213). Sergeant Sullivan and Officer Leonard approached the second bedroom and, after ensuring that no other individuals were present in that room, opened the closet (Tr.I/153,214). Sergeant Sullivan located a .380 caliber semi-automatic handgun on the shelf in the closet (Tr.I/153,214-217). A further examination of the handgun revealed that its attached magazine contained three live rounds of .380 caliber hollow-point ammunition which was the same as the round recovered from the defendant's pocket (Tr.I/219; Tr.II/7,9). The gun was later determined to be operable and to meet the definition of a firearm pursuant to Massachusetts law (Tr.I/222).

While Sergeant Sullivan and Officer Leonard located the firearm, Trooper O'Toole remained with the defendant (Tr.I/153). The defendant stated that the gun was his and that he did not want Ms. Hill to "get

into trouble" (Tr.I/154-155). Trooper O'Toole then told the defendant to stop talking, and advised him of his Miranda rights (Tr.I/155). The defendant agreed to speak to Trooper O'Toole and repeated that the gun was his, that he had hidden it in the closet, and that Ms. Hill did not know that it was in the apartment (Tr.I/156). The defendant was then taken out of the apartment and to a waiting police cruiser (Tr.I/156; Tr.II/43). In response to preliminary booking questions, the defendant told Officer Bohl that his name was Antonio Flowers (Tr.II/44).

After the defendant was removed from the apartment, Trooper O'Toole spoke to Ms. Hill, told her that a gun and ammunition had been found, and requested her consent to search the rest of the apartment for her safety, as well as that of her son (Tr.I/157; Tr.II/16). In the presence of her mother, Ms. Hill signed the consent to search form allowing the officers to search the rest of the apartment (Tr.I/159; Tr.II/17). In a bureau in the same bedroom where the gun was recovered, officers found a box of live .380 caliber ammunition (Tr.I/160; Tr.II/17).

At the police station, Trooper O'Toole reviewed the booking information that the defendant provided to

Officer Bohl (Tr.I/164). Trooper O'Toole reviewed the defendant's records, his biographical information and photographs, and compared them to the defendant on April 25, 2006 (Tr.I/171-173). As a result of this investigation, Trooper O'Toole determined that the defendant's name was Jason Loadholt, not Antonio Flowers, and Antonio Flowers was the defendant's alias (Tr.I/162,165,166,172).

The Defendant's Case:

The Commonwealth is not dissatisfied with the defendant's statement of the evidence that he presented at the trial (Def.Br./15-16).

SUMMARY OF THE ARGUMENT

I. The defendant's claim that the motion judge improperly denied his motion to suppress his statement to the police regarding the location of a firearm must fail. Having located the defendant hiding in a closet with a live round of hollow-point ammunition in his pocket, and knowing the defendant was facing numerous arrest warrants for charges involving violence and firearms, the police officer was fully justified in asking the defendant the location of the firearm under the public safety exception enumerated in New York v. Quarles, 467 U.S. 649, 653 (1984). While the

officer's question about the location of the firearm preceded the defendant's Miranda warnings, he was entitled to ask the question to protect the safety of the other officers and the woman and child in the apartment (pp.16-21).

The defendant continued to speak with the officers after revealing the location of the firearm, and stated that the gun belonged to him and not to his girlfriend. That statement was voluntary and spontaneous, and was not the subject of police interrogation. As a result, it was not subject to suppression, and the motion judge properly denied the defendant's motion to suppress that statement (pp.21-25).

Since the actions of the officers did not violate the defendant's rights, the evidence seized as a result of the defendant's statements was not "fruit of the poisonous tree" and the motion to suppress those items was properly denied (p. 25).

II. The motion judge properly denied the defendant's motion to suppress the gun and ammunition seized during the search of Ms. Hill's apartment, since the search was justified by the public safety exception to the warrant requirement, and the police

had the written consent of the apartment's sole occupant to conduct the search (pp. 26-31).

III. The Commonwealth agrees that the defendant's conviction pursuant to G.L. c.269, §10(n) must be vacated, since he was not charged under either G.L. c.269, §10(a) or §10(c) (pp. 31-33).

IV. The trial judge properly denied the defendant's motion for a required finding of not guilty because the evidence adduced, along with the reasonable inferences that could be drawn therefrom, when viewed in the light most favorable to the Commonwealth, was sufficient to allow a reasonable factfinder to conclude that the defendant violated G.L. c. 268, §34A. Through investigation of photographs, biographical information, and police reports, the defendant was known to the police by the name "Jason Loadholt." When he was arrested, he gave the name "Antonio Flowers" and did not tell the police that he had been known previously by a different name. As a result, the defendant knowingly provided a false name to a member of law enforcement at the time of his arrest. Furthermore, since the evidence was sufficient to sustain the defendant's conviction, he

was not deprived of his Federal due process rights (pp. 33-38).

V. The trial judge properly instructed the jury on each and every essential element of the charge of furnishing a false name to law enforcement upon arrest, in violation of G.L. c.268, §34A. The trial judge instructed the jury that the Commonwealth must prove that the defendant (1) knowingly and intentionally, (2) furnished a false name, (3) to a law enforcement officer, (4) upon his arrest (Tr.II/119-120). See G. L. c.268, §34A. Since the trial judge properly instructed the jury on each element of the charge, and since judges are not required to use any specific or particular words so long as the necessary instruction is given, the defendant failed to demonstrate that the instruction created a substantial risk of a miscarriage of justice (pp.38-42).

VI. The defendant's claim that, based on the recent United States Supreme Court case of District of Columbia v. Heller, --- U.S. ---, 128 S. Ct. 2783 (2008), his prosecution violated his Second Amendment right to bear arms, must fail. The Second Amendment applies only to the Federal government, and explicitly

was not incorporated into the Fourteenth *Amendment* due process clause. As a result, the Second Amendment does not apply to the states. The prosecution of the defendant was proper (pp. 42-44).

VII. The Court should reject the defendant's claim that the admission of the ballistics certificate violated his confrontation clause rights. Under Commonwealth v. Verde, 444 Mass. 279 (2005), the defendant's confrontation clause rights were not violated by the admission of similar drug analysis certificates. This Court has no power to overrule the Supreme Judicial Court.

Furthermore, while the United States Supreme Court is currently considering a similar claim, a decision to the contrary would not affect the defendant's case. The defendant did not challenge whether the firearm was operational, or whether it constituted a "firearm" under the relevant statute. As a result, the admission of the ballistics certificate, to which the defendant did to object at trial, did not create a substantial risk of a miscarriage of justice. The defendant's claim must fail (pp. 44-46).

ARGUMENT

I. THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE, SINCE THE PRE-MIRANDA STATEMENTS WERE NOT THE RESULT OF INTERROGATION BUT WERE SPONTANEOUS AND VOLUNTARY; AND, THE DEFENDANT'S POST-MIRANDA STATEMENTS WERE VOLUNTARY AND, THEREFORE, THE FIREARM RECOVERED AS A RESULT OF THE DEFENDANT'S STATEMENT WAS ALSO PROPERLY ADMITTED.

The defendant's first claim -- that the motion judge erred in denying the defendant's motion to suppress since his statements that the gun was located in the bedroom closet and that the gun belonged to him were made before he had the benefit of his Miranda warnings and thus were inadmissible -- must fail. Where the defendant's motion to suppress was denied, this Court "accept[s] the judge's findings of fact, in the absence of clear error, and grant[s] substantial deference to the conclusions of law based thereon." Commonwealth v. Cast, 407 Mass. 891, 897 (1990). This Court also defers to the motion judge's determination of "the weight and credibility to be given oral testimony presented at the motion hearing." Commonwealth v. Wilson, 441 Mass. 390, 393 (2004). However, the motion judge's "ultimate findings and conclusions of law, especially those of constitutional dimensions, are open to independent review on appeal."

Commonwealth v. Selby, 420 Mass. 656, 657 (1995). See Commonwealth v. Sykes, 449 Mass. 308, 310 (2007). In this case, the motion judge's findings of fact were not clearly erroneous, and her conclusions of law were proper.

A. Defendant's first statement that the gun was located in the bedroom closet

The motion judge properly denied the defendant's motion to suppress his first statement to the police that a gun was located in a bedroom closet in the apartment. "The general rule is that 'Miranda warnings must precede police questioning whenever [a] person is deprived of his freedom of action in any significant way.'" Commonwealth v. Clark, 432 Mass. 1, 13 (2000), quoting Commonwealth v. Haas, 373 Mass. 545, 552 (1977). But a person in custody, as was the defendant, is not entitled to Miranda warnings if he is not subjected to interrogation. Commonwealth v. Torres, 424 Mass. 792, 796-797 (1997). "Miranda warnings are only required when 'a person in custody is subjected to either express questioning or its functional equivalent.'" Torres, 424 Mass. at 796-797, quoting Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980).

The Commonwealth acknowledges that, in the instant case, the defendant was in custody at the time of the police questioning relative to the location of the gun, and, thus, in certain situations was entitled to be informed of his Miranda rights prior to any police interrogation.[4] However, the United States Supreme Court has held that there are circumstances in which "concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in Miranda." New York v. Quarles, 467 U.S. 649, 653 (1984). See Commonwealth v. Bourgeois, 404 Mass. 61, 65-66 (1989). The motion judge, basing her decision on the reasoning in Quarles, explicitly found that

> Faced with a man who was accused of a violent offense and who had a history of illegal firearm use, the police acted well within their right and in furtherance of their duties when they instantly demanded the defendant tell them where the gun was, even though Miranda warnings had not yet been given. Overriding considerations for the physical safety of those present fully justified the officers' pre-Miranda demand of the defendant. Commonwealth v. A Juvenile, 47 Mass. App. Ct. 271 (1999) and Commonwealth v. Clark,

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[4] The officers were armed with three arrest warrants for the defendant for a series of crimes, and the defendant was on the floor on his stomach, with his hands cuffed behind his back (Mo.Tr.I/18,20,27,31; Mo.Tr.II/6,21). The defendant was clearly seized and in the custody of the arresting officers.

432 Mass. 1, 13 (2000) - both cases citing New York v. Quarles, 467 U.S. 649 (1984).

(Add./5,8). In light of the overwhelming safety issue involved, the judge correctly ruled that the defendant's responses were thus admissible, despite the absence of Miranda warnings. Clark, 432 Mass. at 13. See Quarles, 467 U.S. at 653 (because of safety threat, no need to give Miranda warnings before asking rape suspect where he had hidden his gun).

After the defendant was located hiding in a child's closet, he was pat frisked for the safety of the police officers (Mo.Tr.I/29,31-32; Add./4,6). The officers were aware that several of the arrest warrants were for crimes involving weapons, and, in order to protect themselves from harm, the officers conducted a pat frisk (Mo.Tr.I/1,19-20,27; Mo.Tr.II/21). Trooper O'Toole recovered a live .380 caliber hollow point round of live ammunition (Mo.Tr.I/32,33). Sergeant Sullivan was immediately concerned for his own safety, as well as that of the other officers and of Ms. Hill and her child, since the apartment had not been fully secured at that time (Mo.Tr.I/32,34). Sergeant Sullivan was aware that there were other rooms in the apartment that had not

been searched, and did not know if any individuals were in the apartment apart from Ms. Hill and the defendant (Mo.Tr.I/34,35). Sergeant Sullivan asked the defendant where the gun was located and stated that he did not want anyone to get hurt, and the defendant told him that the gun was not on his person, but was located in the closet of the second bedroom (Mo.Tr.I/33-35). The police inquiry preceded the defendant's Miranda warnings, but was proper.

"Police officers are 'not required to gamble with their personal safety,'" Commonwealth v. Varnum, 39 Mass. App. Ct. 571, 576 (1995), quoting from Commonwealth v. Robbins, 407 Mass. 147, 152 (1990), and "[the Court] should not be 'penalizing officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public.'" Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 598, rev. denied, 423 Mass. 1104 (1996), quoting from Quarles, 467 U.S. at 658 n.7. In this case, the police officers were faced with a man with a history of violent offenses involving illegal firearm use, with a live .380 caliber hollow point round of ammunition in his pocket, in an apartment where a woman and her two-and-one-half year old child lived

(Mo.Tr.I/18-20,24,27,32; Add/5,8). The police were justified to demand to know where the gun was located and to immediately secure it, to protect the safety of all involved. See Clark, 432 Mass. at 13 (officer justified in asking defendant where the gun was located to insure that further danger to the public did not result); A Juvenile, 47 Mass. App. Ct. at 275 (the presence of a loaded gun in or about a private residence may present a substantial threat to a number of persons including an arresting officer). The motion judge's denial of the defendant's motion to suppress the defendant's statement relative to the location of the firearm was proper.

B. Defendant's statement that the gun belonged to him and that Ms. Hill was unaware of the gun's presence in her apartment

Next, the defendant claims that the motion judge's factual finding regarding the gun's ownership -- that the defendant's admission that the gun belonged to him and that Ms. Hill was unaware of the presence of the gun in the apartment was voluntary and spontaneous -- was clearly erroneous and that the statement was the subject of custodial interrogation thus necessitating a waiver of his Miranda rights. This claim must fail, since there was no evidence that

the defendant's statements were the subject of police questioning, which would have necessitated a waiver of his Miranda rights.

The motion judge's factual findings were fully supported by the testimony at the defendant's motion to suppress hearing, and were not clearly erroneous. See Commonwealth v. James, 427 Mass. 312, 314 (1998); Commonwealth v. Allen, 54 Mass. App. Ct. 719, 720 (2002)("clearly erroneous" standard). Trooper O'Toole testified that, after the defendant was removed from the closet and admitted where the gun was located, he was taken into the living room (Mo.Tr.II/27). Once there, the defendant "was having conversation with [the police]" and "was more or less ... trying to explain the situation to [them]" (Mo.Tr.II/27-28). At no time did Trooper O'Toole testify that he asked the defendant any questions about the gun or its ownership. The defendant's contention that "Trooper O'Toole 'continued to have conversation' with Loadholt" (Def.Br./25) is not accurate. Trooper O'Toole actually testified that, after the defendant revealed the whereabouts of the gun, he continued to have conversation with the police (Mo.Tr./27-28). The testimony reveals that the defendant was the

individual continuing the conversation, not the police officers (Mo.Tr./27-28). As a result, the defendant's claim that the motion judge's factual finding that the police did not question the defendant was clearly erroneous is without merit.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." Commonwealth v. Brant, 380 Mass. 876, 883, cert. denied, 449 U.S. 1004 (1980). When a defendant volunteers a statement to the custodial officers, his statement is admissible even if Miranda errors are otherwise present because such statements are not the product of custodial interrogation. Commonwealth v. Diaz, 422 Mass. 269, 271 (1996); Commonwealth v. Smallwood, 379 Mass. 878, 885, 886-887 (1980); Commonwealth v. O'Brien, 377 Mass. 772, 776 (1979); Commonwealth v. Clark C., 59 Mass. App. Ct. 542, 544-545 (2003); Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 644-645 (2002), rev. denied, 439 Mass. 1102 (2003); Commonwealth v. Doyle, 12 Mass. App. Ct. 786, 794 (1981). "Miranda safeguards were not intended to prevent a defendant from [spontaneously making an inculpatory statement or] volunteering incriminating information."

Commonwealth v. Byrd, 52 Mass. App. Ct. 642, 649, rev. denied, 435 Mass. 1106 (2001).

The motion judge properly denied the defendant's motion to suppress his second statement to the police. Where the defendant's statement precedes the receipt of his Miranda warnings, the Commonwealth must establish that the defendant's statement was "unsolicited" and "spontaneous." See Commonwealth v. Woods, 427 Mass. 169, 172-173 (1998). The Commonwealth did so in this case. Trooper O'Toole testified that, after telling the officers where the gun was located, the defendant continued to speak to the police (Mo.Tr.II/27-28). The defendant sought to protect his girlfriend from any blame and told the officers that the gun was his and that Ms. Hill was not involved (Mo.Tr.II/28). When the defendant made the inculpatory statements, Trooper O'Toole immediately told him to stop talking and read him his Miranda rights (Mo.Tr.II/28). There was no testimony, either during direct or cross-examination, that Trooper O'Toole either questioned or interrogated the defendant prior to reading him his Miranda rights. The testimony -- which the motion judge credited -- supported the Commonwealth's claim that the defendant

spontaneously and voluntarily made statements to the police officers in an attempt to protect his girlfriend from blame and possible arrest (Add./5,8).

Since the defendant's initial statements were spontaneous and voluntary, there was no "presumptive taint" of his subsequent repetition of the statement after receiving and waiving his Miranda rights. Contrast Torres, 424 Mass. at 799 (1997)(police questions were designed to elicit information from the defendant about the murder with which he was ultimately charged, without having informed the defendant of his Miranda rights, were improper; thus, all information that was discovered after the improper questioning was "tainted"). The motion judge properly rejected the defendant's challenge to his second statement to the police relative to the ownership of the firearm. As a result, any evidence ultimately recovered as a result of the defendant's statements, including the firearm itself and the box of ammunition, was not "fruit of the poisonous tree" and was properly admitted at the defendant's trial. See Wong Sun v. United States, 371 U.S. 471, 487-488 (1963); Commonwealth v. Pietrass, 392 Mass. 892, 900-901 (1984).

II. THE MOTION JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED DURING THE EXECUTION OF THE ARREST WARRANT, SINCE, AFTER A ROUND OF HOLLOW-POINT AMMUNITION WAS FOUND IN THE DEFENDANT'S POCKET, THE POLICE PROPERLY SEARCHED THE APARTMENT TO SECURE A HANDGUN IN ORDER TO PROTECT THE SAFETY OF THE OFFICERS AND THE OCCUPANTS OF THE APARTMENT.

The defendant's next claim -- that the discovery of the live round of .380 caliber hollow point ammunition recovered from the defendant's pocket did not justify a warrantless search of the closet in the second bedroom for the gun -- must fail. As an initial matter, the defendant did not demonstrate that he had a reasonable expectation of privacy in the closet, since he did not claim that he lived in the apartment where he was found. The defendant's affidavit in support of his motion to suppress merely states that he "stayed in the apartment at 149 Allen Street" on April 25, 2006 (Add./3). While Massachusetts recognizes that, "[a]n overnight guest of a lawful occupant has standing to raise privacy claims in respect to a search of that occupant's premises[,]" Commonwealth v. Morrison, 429 Mass. 511, 513 (1999)(also holding that an overnight guest violating a protective order had no cognizable privacy interest), the defendant did not claim to be an

overnight guest, but merely that he was visiting the apartment on the day of the search (Add./3).

In addition, even if this Court were to conclude that the defendant had automatic standing to challenge the seizure of gun under Commonwealth v. Amendola, 406 Mass. 592, 600-601 (1990), he would not be relieved of the burden to demonstrate that he had a constitutionally protected reasonable expectation of privacy in the area that the police searched. See Commonwealth v. Carter, 424 Mass. 409, 411-412 (1997); Commonwealth v. Rise, 50 Mass. App. Ct. 836, 841, rev. denied, 434 Mass. 1102 (2001). See also Commonwealth v. Frazier, 410 Mass. 235, 244 n.3 (1991)("In cases where possession is an essential element of the crime we think it is best to separate the issue of standing from the question whether there has been a search for constitutional purposes"). In other words, automatic standing does not permit a defendant to "assert the constitutional rights of someone in no way involved with his allegedly criminal conduct." Carter, 424 Mass. at 411 n.3. See Grasso & McEvoy, Suppression Matters Under Massachusetts Law § 3-5[f] (2006-2007 ed.).

If, arguendo, the defendant had a reasonable expectation of privacy in Ms. Hill's apartment, the motion judge properly denied the defendant's motion to suppress the warrantless initial search for the gun, based on exigent circumstances. In order to support a warrantless search on the basis of exigent circumstances, "the Commonwealth must demonstrate that the police had probable cause and were faced with exigent circumstances such as danger to their lives, danger to the lives of others, or the destruction of evidence, such that it would be impracticable to obtain a warrant." Commonwealth v. Moore, 54 Mass. App. Ct. 334, 338 (2002). See Commonwealth v. Forde, 367 Mass. 798, 800 (1975); Commonwealth v. DiToro, 51 Mass. App. Ct. 191, 195 (2001). In order to determine if exigent circumstances existed at the time of the search, the Court must conduct an evaluation of all of the attendant circumstances. Moore, 54 Mass. App. Ct. at 338. See Commonwealth v. Hall, 366 Mass. 790, 801-803 (1975). See also Smith, Criminal Practice and Procedure § 262, at 194 (2d ed.1983)(in situations where the defendant challenges the exigency supporting the warrantless search, the Court must determine whether the authorities had reasonable grounds to

believe that an exigency existed; and whether the actions of the authorities were reasonable under the circumstances).

The actions of the police in this case were reasonable. The defendant, who was accused of violent offenses and had a history of illegal firearm use, was discovered hiding in a child's closet with hollow-point ammunition in his possession, inside an apartment that had not been fully cleared of other individuals, and that housed a young child.

> Regardless of how finely the law of search and seizure is parsed and labeled, the ultimate touchstone of art. 14 and the Fourth Amendment is whether a search or seizure was reasonable in the circumstances. The officers were entitled to act to insure their safety, the safety of others in the apartment, and the public.

Moore, 54 Mass. App. Ct. at 340. Both Sergeant Sullivan and Trooper O'Toole testified that they were concerned about their safety as well as the safety of Ms. Hill and her son (Mo.Tr.I/34; Mo.Tr.II/25).

Furthermore, "the search did not exceed the scope justified by the exigency and probable cause to believe that [a] gun remained on the premises." Moore, 54 Mass. App. Ct. at 340, citing Cady v. Dombrowski, 413 U.S. 433, 447 (1973)(emergency doctrine justified entry of impounded vehicle to retrieve loaded

revolver); Boston Housing Authority. v. Guirola, 410 Mass. 820, 829 (1991)(warrantless entry to secure shotgun reasonable in circumstances); U.S. v. Lopez, 989 F.2d 24, 26-27 (1st Cir.), cert. denied, 510 U.S. 872 (1993)(search of bathroom ceiling for sawed-off shotgun which had been displayed moments earlier deemed reasonable). Sergeant Sullivan and Officer Leonard went directly to the second bedroom and, after securing the room, proceeded to the closet that the defendant indicated (Mo.Tr.I/.36-37). The officers did not search in other areas of the apartment for the gun, and thus, the scope of their search was limited and reasonable to serve their purpose of protecting their safety as well as that of Ms. Hill and her son. Thus, "[t]he search was limited in scope and occurred at a time when the suspicion of danger had not been dispelled." Commonwealth v. Tam Bui, 419 Mass. 392, 396, cert. denied, 516 U.S. 861 (1995).

Finally, as argued supra, in Argument I, the search was not conducted in violation of the defendant's Miranda rights. Where there is an immediate threat to the safety of the officers and the civilians in the apartment, the Quarles exception applied and Trooper O'Toole was not required to recite

the defendant's Miranda warnings before asking where the firearm was located. Contrast Commonwealth v. Smith, 412 Mass. 823, 826 (1992)(where interrogation without exigency or Miranda warnings led to evidence). The motion judge properly denied the defendant's motion to suppress the evidence seized pursuant to the limited search for the firearm.

III. THE COMMONWEALTH AGREES THAT THE LIMITED PORTION OF THE JURY INSTRUCTIONS RELATIVE TO THE ELEMENTS OF G.L. c.269, §10(n) OMITTED ANY REFERENCE TO THE FACT THAT, IN ORDER TO CONVICT THE DEFENDANT UNDER THAT STATUTE, THE COMMONWEALTH MUST PROVE THAT THE DEFENDANT VIOLATED EITHER G.L. c.269, §10(a) OR §10(c) AND, THEREFORE, THE DEFENDANT'S CONVICTION ON THAT CHARGE ALONE SHOULD BE VACATED.

The defendant raises an issue relative to his conviction under G.L. c.269, §10(n), since he was not charged with either G.L. c.269, §10(a) or 10(c), as required by the statute (Def.Br./36-37). The defendant also challenges the jury instructions for the offense carrying a loaded firearm, since the jury was not instructed that the defendant must be convicted of either G.L. c.269, §10(a) or 10(c) in order to be convicted under G.L. c.269, §10(n) (Def.Br./37-40). The defendant did not object to the propriety of the indictment before the trial, see G.L. c.277, §47A, and did not object to the jury

instructions. Where, as here, the defendant did not object to the judge's allegedly faulty jury instruction, or where he waived the current challenge by not raising it at the appropriate time, he must demonstrate that the alleged error created a substantial risk of a miscarriage of justice. See Commonwealth v. Randolph, 438 Mass. 290, 296-298 (2002); Commonwealth v. Alphas, 430 Mass. 8, 13 (1999); Commonwealth v. McDuffee, 379 Mass. 353, 357 (1979); Commonwealth v. Freeman, 352 Mass. 556, 563-564 (1967). See also Mass. R. Crim. P. 24(b), 378 Mass. 895 (1979). "[W]hen the claim of error pertains to the definition given to the jury of the crime charged, the possibility of a substantial risk of a miscarriage of justice is inherent." Commonwealth v. Hall, 48 Mass. App. Ct. 727, 730 (2000).

The Commonwealth agrees with the defendant's claim. Section 10(n) of G.L. c.269 states that the Commonwealth must prove that the defendant violated either G.L. c.269, §10(a) or §10(c), "by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun...," and that the sentence imposed must run "from and after the expiration of the sentence for the violation of [§10](a) or [§10](c)." G.L. c.269,

§10(n). The Commonwealth agrees that, in order to properly convict the defendant under §10(n), he must first be charged under pursuant to G.L. c.269, §10(a) or §10(c). That did not occur in this case. The defendant's conviction on indictment number 06-679-4, charging the defendant with unlawful possession of a loaded firearm in violation of G.L. c.269, §10(n) must be vacated.

IV. THE TRIAL JUDGE PROPERLY DENIED THE DEFENDANT'S MOTION FOR A REQUIRED FINDING OF NOT GUILTY SINCE THE EVIDENCE, TOGETHER WITH REASONABLE INFERENCES WHICH COULD BE DRAWN THEREFROM, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE COMMONWEALTH, WAS SUFFICIENT FOR THE JURY, AS THE FINDER OF FACTS, TO CONCLUDE THAT THE DEFENDANT FURNISHED A FALSE NAME TO A LAW ENFORCEMENT OFFICER FOLLOWING HIS ARREST, IN VIOLATION OF G.L. c. 268, §34A.

The Commonwealth adduced sufficient evidence that the defendant furnished a false name to law enforcement officials in violation of G.L. c. 268, §34A. The defendant filed a motion for a required finding of not guilty at the close of the evidence (Tr.I/46-47; R.A./12). The question for this Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). "Whether an

inference is warranted or is impermissibly remote must be determined, not by hard and fast rules of law, but by experience and common sense." Commonwealth v. Drew, 4 Mass. App. Ct. 30, 32 (1976). "Neither juries nor judges are required to divorce themselves of common sense, but rather should apply to facts which they find proven such reasonable inferences as are justified in the light of their experience as to the natural inclinations of human beings." Commonwealth v. Arias, 29 Mass. App. Ct. 613, 618 (1990), aff'd., 410 Mass. 1005 (1991), quoting United States v. Smith, 680 F.2d 255, 260 (1st Cir. 1982), cert. denied, 459 U.S. 1110 (1983). The inferences "need not be necessary or inescapable, as long as they are reasonable, possible, and not unwarranted." Commonwealth v. Saez, 21 Mass. App. Ct. 408, 410, rev. denied, 396 Mass. 1107 (1986), quoting Commonwealth v. Chinn, 6 Mass. App. Ct. 714, 716 (1978); Commonwealth v. Walter, 10 Mass. App. Ct. 255, 257 (1980).

The Commonwealth proved that the defendant furnished a false name to law enforcement officers, in violation of G.L. c.268, §34A. That statute reads, in relevant part, "[w]hoever knowingly and willingly furnishes a false name ... to a law enforcement

officer ... following arrest shall be punished." See G.L. c.268, §34A. On appeal, the defendant does not challenge the sufficiency of the evidence that he was under arrest at the time he gave the officers the name "Antonio Flowers," or that Trooper O'Toole or Officer Bohl were law enforcement officers (Def.Br./40-42). The defendant claims that the evidence that the name he provided to police was false was insufficient (Def.Br./40-42). This argument must fail.

In Commonwealth v. Clark, 446 Mass. 620 (2006), the Supreme Judicial Court interpreted G.L. c.268, §34A to "make[] it a crime to give a false name to a law enforcement officer or official following an arrest." Clark, 446 Mass. at 625. Furthermore, for the purposes of the statute,

> a false name is one that a person has assumed for a dishonest purpose. In the context of the statute, dishonest purposes include, without limitation, concealing one's criminal record for purposes of being charged (avoidance of multiple offender status), concealing one's criminal record for purposes of bail, concealing one's identity to avoid answering to an outstanding warrant, or creating a new identity with the intent to default and avoid prosecution.

Clark, 446 Mass. at 626 (emphasis added).

The Commonwealth adduced evidence that the defendant held himself out to be "Jason Loadholt" in

prior dealings with the police, since the police were searching to arrest the defendant under that name (Tr.I/132,162,204). Thus, the defendant adopted the name "Jason Loadholt." Clark, 446 Mass. at 626-627. In the instant case, the defendant provided the officers with a name -- "Antonio Flowers" -- that differed from the name with which they were familiar -- "Jason Loadholt" (Tr.I/162,164,165,170,171; Tr.II/44). The Commonwealth's witnesses identified the defendant as "Jason Loadholt," and Trooper O'Toole specifically recognized the defendant and knew him as Jason Loadholt (Tr.I/146,153,162,164,165,171). Trooper O'Toole testified that the defendant's true identity, based on a review of police records, biographical information and photographs, was "Jason Loadholt," and that the defendant gave a different name during booking (Tr.I/165,171; Tr.II/44). Since it is not reasonable to conclude that the defendant had two legitimate names, it was reasonable to infer that the defendant gave the police the name "Antonio Flowers" for the dishonest purpose of avoiding identification as "Jason Loadholt" -- under which name the he was being sought.

When viewed in the light most favorable to the Commonwealth, a reasonable factfinder could conclude that the defendant held himself out to be "Jason Loadholt" on previous occasions, was known by that name to the members of law enforcement, and thus adopted that name. Clark, 446 Mass. at 626-627. On this occasion, the defendant furnished the police officers with a name that was different from that which he had adopted. Thus, the name "Antonio Flowers" was a false name, and a reasonable jury could conclude that the defendant violated G.L. c.268, §34A. See Clark, 446 Mass. at 628 (the use of the name [Antonio Flowers] without disclosing his prior use of the name [Jason Loadholt] was consistent with an intent to conceal prior criminal activity under the name [Jason Loadholt]). The defendant received his federal right to due process of law, since the Commonwealth adduced sufficient evidence on each element of the crime charged. See Commonwealth v. Salemme, 395 Mass. 594, 602 (1985).

Nor did the Commonwealth's case deteriorate after the defense presented its case. See Commonwealth v. Kelley, 370 Mass. 147, 150 n.1 (1976). In fact, the Commonwealth's case was bolstered by the defendant's

testimony that his name was Jason Loadholt, not Antonio Flowers (Tr.II/48). The defendant also testified that the police knew that his name was Jason Loadholt, and that he did not remember giving a different name at booking (Tr.II/58). Based on the evidence adduced at trial, a required finding of not guilty was not warranted, either at the close of the Commonwealth's case or at the close of all of the evidence.

V. THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY AS TO EACH AND EVERY ESSENTIAL ELEMENT OF THE OFFENSE OF FURNISHING A FALSE NAME TO A LAW ENFORCEMENT OFFICER FOLLOWING HIS ARREST, IN VIOLATION OF G.L. c. 268, §34A.

The defendant now challenges the trial judge's instructions to the jury relative to the offense of furnishing a false name to a law enforcement officer following his arrest (Def.Br./42-44). Where, as here, the defendant did not object to the judge's allegedly faulty jury instruction, he must demonstrate that the alleged error created a substantial risk of a miscarriage of justice. See Alphas, 430 Mass. at 13; McDuffee, 379 Mass. at 357; Freeman, 352 Mass. at 563-564. See also Mass. R. Crim. P. 24(b), 378 Mass. 895 (1979)("No party may assign as error the giving or the failure to give an instruction unless he objects

thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection"). "[W]hen the claim of error pertains to the definition given to the jury of the crime charged, the possibility of a substantial risk of a miscarriage of justice is inherent." Hall, 48 Mass. App. Ct. at 730.

The defendant now challenges the trial judge's instruction which stated:

> On Indictment Number 5, the defendant is charged with furnishing false name or social security number to a law enforcement officer or official. There's not an allegation in this particular case as to a number. That's the title of the particular law that this is charged under. The Commonwealth is proceeding on that portion of the law that refers to furnishing a false name.
>
> Under Chapter 268, 34A, the Commonwealth must prove beyond a reasonable doubt that the defendant, Mr. Loadholt, knowingly and willfully gave a false name to a law enforcement officer following an arrest.
>
> An arrest occurs when a person is detained by a law enforcement officer, knows that the person is a law enforcement officer. And the arrest does not even need to be a formal arrest: Sir, you're under arrest. It is -- arrest occurs when a person is not free to leave the custody of the law enforcement official and knows he is not free to leave the custody of the law enforcement official. That's when an arrest occurs.
>
> If a person gives a false name, knowing that to be the case, and it is a law enforcement official he is giving the false name to, and the Commonwealth proves all of those elements beyond

> a reasonable doubt, it's your duty to find the defendant guilty of Count 5.
>
> If the Commonwealth has not proven each of those elements beyond a reasonable doubt, it's your duty to return a verdict of not guilty.

(Tr.II/119-120). The trial judge's charge properly instructed the jury of each and every element that the Commonwealth must prove beyond a reasonable doubt in order to find the defendant guilty under G.L. c.268, §34A.

The defendant claims that, since the term "false name" was not further defined, the instruction created a substantial risk of a miscarriage of justice. The defendant's reliance on the Clark case, however, is misplaced. In Clark, the Supreme Judicial Court did not require that the trial judge instruct in any specific words, but merely states that a jury "may" be instructed that the failure to disclose the "prior use of a different name permits an inference that his failure to make such a disclosure was for dishonest purposes." Clark, 446 Mass. at 628. Nothing in the Clark case required that the suggested instruction be given. Clark, 446 Mass. at 628.

The Court "evaluate[s] the instruction[s] as a whole, looking for the interpretation a reasonable

juror would place on the judge's words," rather than "scrutiniz[ing] bits and pieces removed from their context." Commonwealth v. Niemic, 427 Mass. 718, 720 (1998), quoting Commonwealth v. Trapp, 423 Mass. 356, 361, cert. denied, 519 U.S. 1045 (1996), and Commonwealth v. Perez, 390 Mass. 308, 313 (1983). As "specific" or "particular" words are not required in a jury instruction, "so long as all necessary instructions are given in adequate words," the defendant must demonstrate that the instruction, as given, created a substantial risk of a miscarriage of justice. Commonwealth v. Torres, 420 Mass. 479, 484 (1995). See Commonwealth v. Chasson, 383 Mass. 183, 188 (1981) ("judge is not bound to instruct in the exact language of particular requests for instructions"); Commonwealth v. Sinnott, 399 Mass. 863, 878 (1987)("judges are not required to deliver their instruction in any particular form of words, so long as all necessary instructions are given in adequate words"). This the defendant failed to do.

A reasonable reading of the jury instruction given by the trial judge clearly enumerates each element of the offense of furnishing a false name to law enforcement upon arrest, as set forth in G. L.

c.268, §34A. The jury was instructed that, in order to find the defendant guilty of the offense, they must find beyond a reasonable doubt that the defendant (1) knowingly and intentionally, (2) furnished a false name, (3) to a law enforcement officer, (4) upon his arrest (Tr.II/119-120). See G. L. c.268, §34A. While the trial judge omitted the instruction regarding the inference that could be drawn against the defendant for failing to inform the officers that he once used a different name, such an instruction was not legally required, and would not have benefitted the defendant. A reasonable reading of the entire instruction clearly demonstrates that the trial judge properly instructed the jury as to each essential element of the offense charged. In light of the completeness of the jury instruction, as well as the overwhelming evidence of the defendant's guilt, as set forth in Argument IV, supra, the defendant failed to demonstrate that the trial judge's charge created a substantial risk of a miscarriage of justice.

VI. THE PROSECUTION OF THE DEFENDANT FOR POSSESSION OF A FIREARM AND AMMUNITION DID NOT VIOLATE HIS SECOND AMENDMENT RIGHTS TO KEEP AND BEAR ARMS, PURSUANT TO DISTRICT OF COLUMBIA V. HELLER, --- U.S. ---, 128 S.Ct. 2783 (2008).

For the first time on appeal, the defendant claims that, pursuant to the recent Supreme Court case of District of Columbia v. Heller, --- U.S. ---, 128 S.Ct. 2783, 2797-2798 (2008), the defendant's Second Amendment right to keep and bear arms cannot be abridged by a state without showing that such an abridgement is necessary to promote a compelling state interest. The defendant's reliance on Heller, however, is misplaced.

The Supreme Court's decision in Heller has no effect on Massachusetts gun laws. The court left undisturbed the portions of Presser v. Illinois, 116 U.S. 252, 265 (1886), and Miller v. Texas, 153 U.S. 535, 538 (1894), that reaffirmed that the Second Amendment applies only to the Federal Government, and explicitly stated that it does not apply to the states. See Heller, 128 S.Ct. at 2813, n.23. Unless the Supreme Court incorporates the Second Amendment into the Due Process Clause of the Fourteenth Amendment -- which has not happened -- it does not apply to the States.

Furthermore, the current law in Massachusetts holds that the Second Amendment forbade only federal laws that restrict the rights to bear arms, and did

not extend the same limitation to the state. Commonwealth v. Davis, 369 Mass. 886, 890 (1976). As a result, the Second Amendment does not preclude prosecution of the defendant for violations of the state's firearms laws.

VII. THIS COURT SHOULD REJECT THE DEFENDANT'S CLAIM THAT THE BALLISTICS CERTIFICATE VIOLATED HIS CONFRONTATION-CLAUSE RIGHTS BECAUSE THE SUPREME JUDICIAL COURT HAS ALREADY RESOLVED THE ISSUE, AND; EVEN IF THE SUPREME COURT WERE TO HOLD OTHERWISE, THERE WAS NO SUBSTANTIAL RISK OF A MISCARRIAGE OF JUSTICE BECAUSE THE ONLY ISSUE AT TRIAL WAS POSSESSION, NOT WHETHER THE FIREARM WAS OPERABLE.

For the first time on appeal, the defendant makes a confrontation clause claim relating to the admission of the ballistic certificates (Def.Br./48-50).[5] Because the ballistic certificate *did not* implicate the confrontation clause, his claim is without merit. The defendant contends that the admission of the ballistics certificates "violated the defendant's right to confront and cross-examine the witnesses against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution" (Def.Br./48-49). Although acknowledging that the Supreme Judicial Court has held the law to be

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[5] The defendant did not object to the admission of the ballistics certificates when the Commonwealth introduced them at the defendant's trial (Tr.I/222).

otherwise, see Commonwealth v. Verde, 444 Mass. 279 (2005), the defendant nonetheless argues that "such decision is contrary to the plain language of Crawford and should be overruled" (Def.Br./49).

Of course, this Court is without power to overrule the Supreme Judicial Court. See Commonwealth v. Healy, 26 Mass. App. Ct. 990, 991 (1988). "In fact, from the very earliest decisions [this Court] issued and continuing to this day, [this Court] ha[s] uniformly and unequivocally held [it] ha[s] no power to alter, overrule or decline to follow the holding of cases the Supreme Judicial Court has decided." Commonwealth v. Dube, 59 Mass. App. Ct. 476, 485 (2003).

The United States Supreme Court has agreed to review a Massachusetts case that presents this issue. See Melendez-Dias v. Massachusetts, 69 Mass. App. Ct. 1114 (2007), cert. granted, 128 S.Ct. 1647 (2008). But even if the Supreme Court were to overrule Verde during the pendency of this appeal, the defendant does not explain how the violation of his confrontation rights created a substantial risk of a miscarriage of justice. He did not object on confrontation grounds to the ballistic certificate's introduction

(Tr.I/222). So the question is "whether the lack of confrontation so jeopardized the proceedings that there is a substantial risk that the result would have been different" had the ballistician testified. Commonwealth v. Amirault, 424 Mass. 618, 651 (1997). "This burden is a heavy one," id., and it belongs to the defendant. The defendant's minimal argument fails to carry this burden.

Of course, there was no risk of a miscarriage of justice because the theory of defense had nothing to do with whether the weapon recovered from 149 Allen Street, Apartment A was an operable firearm within the meaning of the statute. "[W]hether a particular element of a crime was contested at trial is important to a determination whether a trial error resulted in a substantial risk of a miscarriage of justice." Commonwealth v. Gabbidon, 398 Mass. 1, 5 (1986). Here, the issue was whether the defendant possessed the firearm or whether, as the defense claimed, since he did not live in the apartment, it belonged solely to Ms. Hill, a mysterious, unknown boyfriend of Ms. Hill, or her thirteen year old son (Tr.II/69-71). The defendant's claim must fail.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Honorable Court to affirm the defendant's convictions on indictment numbers 2006-679, counts 1, 2, 3 and 5.

Respectfully submitted,

THE COMMONWEALTH,

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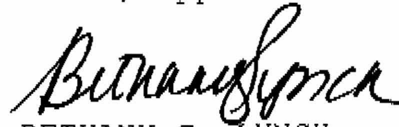

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MASS. R. APP. P. 16(k) CERTIFICATE OF COMPLIANCE WITH THE RULES PERTAINING TO THE FILING OF BRIEFS

I hereby certify, as required by Mass. R. App. P. 16(k), that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, the following: Mass. R. App. P. 16(a) &(b); Mass. R. App. P. 16(d)-(h); and Mass. R. App. P. 20.

January 30, 2008

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loadholt jason brief/g,q