COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

HAMPSHIRE, ss. **No. SJC-11839**

COMMONWEALTH of MASSACHUSETTS,
Appellee,

v.

RYAN DANIEL WELCH,
Appellant.

On Appeal from a Judgment of the Superior Court

BRIEF FOR THE COMMONWEALTH

David E. Sullivan
District Attorney
Northwestern District

By: **Cynthia M. Von Flatern**
Assistant District Attorney
BBO # 550493
One Gleason Plaza
Northampton, MA 01060
(413) 586-9225
cynthia.von.flatern@state.ma.us

December, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MASSACHUSETTS CASES

OTHER CASES

Statutes

Other Authorities

ISSUES PRESENTED

I. Whether the Motion Judge Properly Denied the Motion to Suppress Where A.)the Defendant Did Not Manifest a Subjective Expectation of Privacy in the Intensive Care Room He Occupied or in the Notes He Wrote to Medical Staff and Police There and Where Such an Expectation Would Not Have Been Reasonable; and B.) Medical Staff Did Not Act as Agents for the Police and Any Violation of the Federal Health Insurance Portability and Accountability Act of 1996 (HIPPA) Would Not Result in Exclusion of the Defendant's Three Short Notes to Medical Staff that Was Admitted into Evidence.

II. Whether the Motion Judge Correctly Concluded that A.)the Defendant Was Not in Custody and *Miranda* Warnings Were Not Required When Police Conversed with the Defendant in the ICU Room; and B.)the Defendant Did Not Invoke His Right to Remain Silent Until Such Point as He Said He Would Like to See a Lawyer.

III. Whether the Motion Judge Correctly Concluded that the Defendant's Statements to Police and Medical Staff Were Voluntary Where His Will Was Not Overborne by His Physical Injuries or by Pain Medications.

IV. Whether There Was No Error in Admission of Text Messages Between the Victim and the Defendant Where the Messages Were Sent by Password-Protected Phones and the Contents, Subject Matter, and Characteristics of the Texts Established Their Authenticity by a Preponderance of the Evidence.

V. Whether There Was No Error in Admission of Evidence that the Defendant Had Been Arrested for Operating Under the Influence of Alcohol Six Days Before the Murder as well as Evidence that He Had Had an Altercation at Work and Had Been Fired from the Job Weeks Before Where the Evidence Was Relevant to Show the Defendant's State of Mind Toward the Victim and thus his

Motive to Kill and the Evidence Was Not Unfairly Prejudicial.

VI. Whether the Motion Judge, Who Was Also the Trial Judge, Properly Exercised Discretion in Denying Without a Hearing the Motion for New Trial Where the Defendant's Claim that He Could Not Communicate with His Attorney Was Not Credible and the Defendant Did Not Meet His Burden of Showing that Counsel's Performance Was Subpar and Likely to Have Influenced the Jury's Conclusion.

VII. Whether this Case Does Not Present Circumstances for this Court to Use Its Extraordinary Power of Review Pursuant to G.L. c 278, §33E Where the Evidence Showed that the Defendant Had a Motive to Kill the Victim and Acted with Premeditation and that the Murder Was Committed with Extreme Atrocity or Cruelty and the Defendant's Mental Health Problems Were Not Mitigating Circumstances.

STATEMENT OF THE CASE

The Commonwealth is satisfied with the defendant's Statement of the Case.

STATEMENT OF FACTS

Motion to Suppress Hearing

The facts are those found by the motion judge after hearing and located in the Commonwealth's Appendix at (CA/17-31) and the Commonwealth's Addendum at (C Add/79-93). These facts are supplemented by citations to the record cited as (M12-3/page) or (M12-27/page).

Trial

First Responders Find the Victim Deceased and Assist the Injured Defendant

The victim's call came into regional dispatch on February 20, 2012 at 12:04 a.m. (9-11:34-35, 38).[1] The victim said that her boyfriend was trying to kill her and, as the dispatcher tried to get further information, she screamed and the phone went dead (9-11:39). When the dispatcher tried to call the number back, there was no answer (9-11:43-45).

The call was relayed to the Easthampton dispatcher who sent Officers Eric Alexander and Tim Rogers to 27C Ward Avenue (9-11:40, 47, 50-51; 9-15:22). On the short drive, the officers saw neither cars nor foot traffic (9-11:51-52, 54, 79; 9-15:22-23, 57). They arrived two minutes twenty-three seconds after dispatch (9-11:135). Two minutes twenty seconds after arrival, an ambulance and fire truck were dispatched (9-11:44, 47-48).

Officers Rogers and Alexander entered Building 27's common hallway and saw Apartment C on the immediate right (9-11:54). There was nothing out of

[1] Transcripts of the jury trial will be cited as (month-day:page).

the ordinary outside the door (9-11:55; 9-15:23, 27). After receiving no answer to his knocks and finding the door locked, Officer Alexander went outside where he saw lights on in the apartment and a trail of blood leading from the living room around a corner (9-11:54-55, 71, 97; 9-15:23-24). Both officers kicked the door open (9-11:55; 9-15:25).

Inside, there was a futon that had been pushed against this front door (9-11:56; 9-15:25). Squeezing through between the wall and futon, officers went toward where the blood trail led (9-11:56). As soon as they rounded the corner from the open living room/kitchen area into a short hallway, they saw a motionless female, later identified as the victim, Jessica Pripstein, on the ground facing down in a pool of blood with a knife on her back (9-11:56, 75;9-15:25). When Paramedic Stephen King arrived, he saw clearly that the victim was dead due to traumatic injury and loss of blood and pronounced her dead (9-12:10, 12, 22, 59).

Officer Rogers went outside to see if he could see anyone who might have done this, saw nothing, and returned to the apartment (9-15:27). Then, in a back room, officers observed the defendant lying motionless

on his left side, eyes wide open, with blood coming from his head or neck area (9-11:57-58, 77). There was a knife in his back pocket (9-11:111). When noises were heard emanating from him, additional medical personnel entered in order to take him out on a stretcher (9-11:111-112). Sergeant Brian Ross, who accompanied the medics into the room, removed the knife from the defendant's pocket and placed it on a table (9-11:111).

The Victim's Autopsy

Dr. Peter Cummings, Medical Examiner and Director of Forensic Neuropathology at the Chief Medical Examiner's Boston office, conducted the autopsy (9-16:81, 87). He saw a substantial amount of blood on the victim and clothing and a large sharp force injury in the center of her neck (9-16:87-88). He saw small abrasions on both cheeks, and a small contusion on her left thigh and on her back (9-16:89, 120-121). Her left carotid artery, jugular vein, trachea, esophagus and vagus nerves were all severed (9-16:90-92, 111-112). The wound measured approximately two and one-half inches deep and four inches across (9-16:98, 114). No hesitation marks, or initial shallow wounds common in death by suicide, were noted (9-16:85, 98).

From the injury to the left carotid artery and left jugular vein, blood loss would be immediate and death would be in seconds (9-16:98). With this size wound, blood loss from the jugular vein would be a flow out through the wound, leading to loss of consciousness (9-16:100, 102). Loss of blood through the carotid would be by pumping for about five heartbeats, before death (9-16:100, 117). Toxicology exams did not show any substances that would have contributed to the victim's death (9-16:102). Blood alcohol level was .15 percent (9-16:115). He determined that the sharp force injury caused death (9-16:102).

The Defendant is Treated for Injuries at Baystate Medical Center

The defendant was taken to Baystate Medical Center where he underwent surgery led by trauma surgeon Reginald Alouidor (9-16:123). He presented in respiratory distress and hypotensive with a deep slash laceration to his neck going from one side to the other (9-16:123-124). A breathing tube was placed and he was rushed into the operating room (9-16:124). The surgical team tied off multiple blood vessels to control profuse bleeding (9-16:124, 127). Dr. Aldouidor saw four separate cuts making up the wound

high in the defendant's neck (9-16:124-125). The cut went down through the airway to the back of the neck (9-16:124). The membrane between the hyoid bone and the thyroid cartilage was divided as were blood vessels of the interior neck down to the carotid artery and jugular vein (9-16:126). Surgeons took about four hours to reconstruct (9-16:127-128). The defendant's clothes were removed, placed into a property bag, and later given to police (9-16:128).

Police and Forensic Scientists Analyze the Scene of the Murder

State Police Detective Lieutenant Michael Barrett conducted a protective sweep of the apartment about two hours after first responders had arrived (9-12:40-42, 91, 127-128). The apartment's door to the basement was locked and a box and two other items were piled in front of the door (9-12:43-44, 80, 83, 104-105; 9-15:73). The back door was bolted shut (9-12:45).

In the apartment, pursuant to a search warrant, police seized items of the defendant and the victim, including personal papers, the victim's cellphone recovered from the jacket she had been wearing, and the defendant's cellphone from the kitchen floor (9-

12:55-56, 59-60; 9-16:68-71, 140-141, 143). His cellphone was lying next to a napkin on which was written, “I, Jessica Pripstein agree to accept U.S. 20 dollars for the purpose of two millimeter bottles of sauvi blanc deliverable not after 11:59 p.m. 2-19-12” (9-12:95, 98-100; 9-16:145).

Trooper John Riley, one of the case officers, seized a card affixed to a flower bouquet (9-18:135-136). From the kitchen table, he seized the victim’s to-do lists dated February 19 and February 20 (9-18:137). Below those, in a folder, were other to-do lists (9-18:138, 171). He also seized a wine glass from the back of the toilet (9-18:140).

Trooper Michael O’Neil from Crime Scene Services photographed the interior of the apartment (9-15:74-105, 145). He documented the rear door as locked with a deadbolt lock and the living room and bedroom windows as locked (9-15:79, 102-103). Footprints in the apartment were processed and were found to match the known footwear impressions of first responders(9-15:111-113, 121, 124-144, 153; 9-17:44-45; 9-18:16-21, 24, 30). Police saw sock prints in a walking pattern (9-18:28-29). None of the sock prints moved toward the cellar door (9-18:30)

A knife recovered from on top of the bedroom desk showed a partial print that was not sufficient for comparison with known prints of the defendant and victim (9-17:126, 137, 141). On the rail of the futon, four fingerprints were found close together (9-17:126). Three prints were individualized to three fingers on the defendant's right hand (9-17:126, 129-130).

Four prints were recovered from the wineglass and were individualized to fingers on the defendant's right and left hands. The stairs to the basement and the victim's storage area in the basement were processed for blood and none was detected (9-12:146-147, 149-150, 152; 9-17:21-25).

Jennifer Preisig, a forensic scientist in the State Police Crime Lab documented bloodstains and took samples at the scene and from the defendant's and victim's clothing (9-17:50, 73). In choosing samples to test, Preisig was conscious of blood spatter patterns that may occur (9-17:105). Saturation stains come from an abundance of blood that is soaking (9-17:77). In masking, an abundance of a biologic material can cover or mask other biologic material (9-17:89-90, 105-106). In wiping, blood that is already

present is removed or dispersed over an area as the result of a motion (9-17:88). Wiping can be through cloth or skin or other objects (9-17:89). In transfer, biologic material gets transferred to another area (9-17:113). Satellite staining refers to biologic material dripping or splashing from one place to another (9-17:114-115).

DNA analyst Jessica Hart from the Massachusetts State Police Crime Lab DNA unit compared a known blood sample from the victim and a known saliva sample from the defendant with blood samples taken from the apartment (9-18:33, 42). Her work was peer-reviewed (9-18:61-62). In three rounds of testing, she drew these conclusions (9-18:47-57):

The following stains matched the defendant’s DNA profile and did not match the victim: Red-brown stains on the cutting edge of the knife blade found in the victim’s back; red-brown drip stain on her back; red-brown stains from the left hip area of the victim’s pants and her white fleece jacket; red-brown stain in a drip pattern near the door; red-brown drip trail near the futon; other drip trails in the apartment; red brown stains on a bed sheet in the bedroom; a sock print from the living room; red-brown

stains from the defendant’s right and left hands and left foot; and red-brown stains on his clothing (9-18:49, 63, 65-67).

A red-brown stain from the bathroom wall and another from the bathroom floor matched the victim’s DNA and did not match the defendant’s (9-18:49-50). A red-brown stain on the handle of the knife that was found on the victim’s back and a red brown stain on the defendant’s right foot and a sock print, was a mixture of at least two individuals (9-18:50, 64). The defendant matched the major profile on these items (9-18:50, 73-75). The minor profile yielded inconclusive results for comparison with the victim’s known sample (9-18:50-51, 73).

The DNA profile on the wine glass found on the back of the toilet was a mixture of DNA from at least two individuals (9-18:51). The defendant matched the major profile in the DNA mixture and the victim was a potential contributor to the minor profile (9-18:51-52). A red-brown stain on the bathroom door frame and a cutting from a red-brown satellite spatter stain on the front lower legs of the defendant’s pants showed a DNA mixture of more than one source (9-18:52, 76). The defendant matched the major contributor and there

was an insufficient sample to determine the second contributor (9-18:53, 76).

DNA profiles from a ridge detail on the futon's side rail and a cutting from a red-brown spatter stain on the lower leg of the victim's pants were a mixture of DNA from the victim and the defendant (9-18:54).

The victim was a major contributor and the defendant a minor contributor of red-brown stains underneath the victim's right-hand fingernails (9-18:554-56). For red-brown stains underneath the victim's left-hand fingernails, the victim was a major contributor and results were inconclusive for the minor contributor (9-18:56, 73). Lastly, a red-brown transfer stain on the back of the victim's fleece matched the defendant's DNA profile and did not match the victim's DNA profile (9-8:57). In all of the samples tested, Hart did not find a statistical match to anyone other than the victim and the defendant (9-18/58). Hart also explained that DNA can be removed from a scene though wiping or washing (9-18:78).

After Hart's DNA analysis and conclusions, Jennifer Preisig conducted a bloodstain pattern analysis and reconstruction on the stains found within the apartment and on clothing (9-17:82). To do this,

she studied the size, shape, distribution, and appearance of the bloodstains together with the DNA results, fingerprint results, and footwear results and compiled a report and color-coded chart, used as a chalk at trial, to explain events that had occurred (9-18:82-84). In the bathroom, the wine glass on the back of the toilet contained the defendant's fingerprints and he was a major contributor of DNA on the glass and the victim was a potential contributor (9-18:85). Drip stains between the toilet and tub area matched the victim's DNA profile and not the defendant's profile (9-18:85). Stains on the bathroom wall were the victim's (9-18:87). The stains were elliptical-shaped and had tails on them indicating blood moving down and diagonally on the wall (9-18:88, 123). Drip stains on the body matched the defendant's DNA indicating that the defendant had bled over the victim (9-18:90). There was a knife on her back and a wipe stain on her shirt area (9-18:89). Transfer stains on the back of her shirt indicated that the knife was wiped across it then placed back onto it (9-18:89).

A drip pattern of the defendant's blood extended from the hallway to the kitchen to the front door to

the futon that had been pushed in front of the door (9-18:91-93). The defendant's fingerprints appeared on the futon rail (9-18:93). In the area of the futon, it appeared that the defendant had bled heavily (9-18:94). The defendant's blood was also on a coffee table in front of the futon (9-18:94). From the blood pattern, it appeared that the coffee table had been moved and that the bleeding had occurred in flight (9-18:95).[2] There were sock prints containing the defendant's DNA showing movement into the living room and then away from the living room (9-18:96-97, 115). Bloody sock prints also moved toward the bedroom area (9-18:98). On the wall were cast-off stains, made when an object makes a movement such as a swinging motion and blood is cast off (9-18:99). The blood was the defendant's blood (9-18:99). His blood was also found in a finger swipe pattern along the frame of the bathroom door (9-18:99).

At the bedroom door, there was a transfer stain with a fabric impression matching the defendant's DNA profile and consistent with the defendant coming into

[2] There was blood underneath the coffee table (9-18:119). Hart believed that the coffee table had been moved by police when they entered the apartment (9-18:119).

contact with the door with bloody clothing (9-18:100). There was a transfer stain indicating that a bloody object or a person had touched the inside edge of the bedroom door (9-18:100). There was a swipe pattern in the defendant's blood on the bed's footboard, consistent with the defendant moving his hand along it (9-18:101-102). The post cap of the bed was missing from the post and found, bloodied, on the floor below (9-18:102). There was a pool of blood with clotting in this area (9-18:103).

The Victim and the Defendant Have a Boyfriend-Girlfriend Relationship that Deteriorates in the Weeks and Days Before the Murder

In September 2011, the victim sent her friend Lynn Tenerowicz the defendant's photo and said he was her boyfriend (9-16:60-61). Tenerowicz knew that the victim had a previous boyfriend named Rob Walendy (9-16:65-66). On March 1, 2012, Sergeant Popielarczyk interviewed Walendy upon Walendy's return from Florida (9-12:101, 141). Walendy himself testified at trial, explaining that he and the victim were boyfriend and girlfriend on and off beginning at the end of 2009 (9-19:5). The relationship ended in the fall of 2011 but they remained very good friends and sometimes had intimate contact with one another, the last time on

January 14, 2012 (9-19:5, 10). The victim introduced Walendy to the defendant, whom she called her new boyfriend (9-19:7). Walendy helped the victim with her car on February 13 (9-19:6). The following day, he traveled to Daytona Beach, Florida where he stayed with his friend until February 24 (9-19:6, 8-9, 14). At trial, the friend confirmed his presence in Florida on the night of the murder (9-19:14-15).

Stephen Boelcskevy worked with the victim at Adamo's Restaurant on February 19 (9-12:154-155). They were the last two employees working that night(9-12:155). The victim was her usual effusive self (9-12:156). The two had set a date to meet later in the week so that Boekcskevy could work on the victim's computer and then have dinner together (9-12:156; 9-15:16-17).

Boelcskevy recalled that in January and early February, the defendant also worked at Adamo's as head delivery driver (9-12:157; 9-15:11). Boelcskevy was aware that the victim and the defendant had a romantic relationship (9-12:154-155). After the defendant was fired, he told Boelcskevy that he was afraid he would not be able to pay his rent (9-12:162). The defendant told Boelcskevy that, before he was unjustly

terminated from the restaurant, he had an altercation with a kitchen worker named Savino who had had a disagreement with a server named Eve (9-12:164). The defendant "stepped in and things got physical" and "[s]omeone got pushed down" (9-12:165). To Boelcskevy, the defendant seemed stressed by the situation (9-12:162). Also, within two weeks prior to her death, the victim told Boelcskevy that she and the defendant had "broken things off" (9-12:163).

Jonathan Lyman, the victim's upstairs neighbor, had seen the defendant at the victim's apartment daily (9-15:156, 158-159). She had introduced the defendant as her boyfriend (9-15:158). In December, Lyman saw the defendant moving items out of the victim's apartment though the defendant was still at the apartment daily, even when the victim was not there (9-15:159).

Lyman recalled two times where the defendant and the victim appeared to be arguing (9-15:160). The second time, on February 10, Lyman heard the defendant say he wanted to get into the apartment, that he had money for her, and wanted his phone charger back (9-15:161). The victim told him to leave but he did not (9-15:161). When she slammed the door and yelled at

him, he finally left (9-15:161). Three or four days later, Lyman saw the defendant and victim at a local store putting groceries in a car together (9-15:161-162, 169). Finally, on the evening of February 19, between 10:30 and 11:30 p.m., he heard loud thumping, like furniture being moved (9-15:162).

The victim's sister, Lenore Davies, spent the evening of January 18-19 with the victim (9-16:14-15). The victim said that her relationship with the defendant, whom she referred to as her boyfriend, was not going well and that she intended to break it off but that she would do it gently because he had just lost his job and gotten an OUI charge (9-16:13-16, 21-22). The victim told Davies that she had told the defendant that she did not want him in her apartment when she was not there(9-16:24).

The Defendant's Prior Charge of Operating Under the Influence

Easthampton Police Officer Robert Pouska received a report of a one-car accident in the area of 23 Oliver Street on February 14 (9-17:9-10). When he arrived at about 10:04 p.m, he saw a single car in the middle of the road, straddling the center line (9-17:10). The driver, identified as the defendant, said

he had been distracted and hit a telephone pole (9-17:11). The officer observed damage to the right-side front quarter panel (9-17:11). It appeared to the officer that the defendant had failed to negotiate a small curve before hitting the pole (9-17:11-12). The defendant declined medical attention and said he had just been in a fight with his girlfriend and wanted to go home (9-17:12). After further investigation, he was placed into custody and transported back to the station where he was booked and a bail clerk was contacted (9-17:13). He was transferred from the station to the Hampshire County jail (9-17:13).

The Defendant Spends Hours at Amy's Place Bar and Restaurant Where the Victim Meets Him After Her Work Shift Ends

Diana Mendrek, the general manager at Amy's Place, a restaurant and bar in Easthampton, was familiar with the victim and defendant as they would come in about once a week after the victim had ended her shift at Adamo's (9-16:46-47). When she learned that they had both been at Amy's place on February 19, she turned the entire video surveillance system over to police and authenticated the copy that was made (9-16:44-48).

Captain Robert Alberti had watched the video several times (9-16:149). He summarized for the jury the video that was entered into evidence and, in parts, played for the jury (9-16:48, 151-161). Still photos of the video were also entered (9-16:174). The defendant was seen entering the bar at about 6:15 p.m. (9-16:161). He ate and drank, spent a significant amount of time on his cellphone, and interacted quite a bit with the bartender, identified as Daniel Baer (9-16:161, 163).

Alberti noted that the victim arrived at about 10:00 p.m. and joined the defendant (9-16:151). At about 10:18 p.m., the victim was seen reaching in front of the defendant for a napkin (9-16:153). Four minutes later, the defendant is seen handing the victim some money, then taking a napkin from the napkin holder and writing something on it and then having the victim write something (9-16:155, 158). The defendant is then seen lunging toward the victim as the victim puts her arm out toward him and on his chest as if to make some space between them (9-16159). The defendant is then seen standing on the victim's right side while the seated victim has her right hand to her right temple (9-16:160). Before they leave,

the victim pours the wine from the defendant's glass into her own glass (9-16:163). At 11:00 p.m., the defendant and the victim walk out the front door with to-go containers of food (9-16:169).

Daniel Baer, the bartender, also recalled that the victim and the defendant had been coming in together for about six months (9-16:184). On February 19, the defendant came in to eat and drink while he did his laundry next door (9-16:184-185, 212). He told Baer that he had lost his job at Adamo's a few weeks earlier and that he had been arrested for drinking and driving (9-16:185). He complained about the unfairness of the arrest and was aggravated that the victim had not paid forty dollars to bail him out after the arrest even though he had spent seventy dollars for Valentine's Day flowers (9-16:186-187). Baer and the defendant also talked about placing a food order for the victim who got out of work at 10 (9-16:187). The defendant asked Baer to erase the chowder special so she would not know about it and to remove two martinis from the bill so she would not know about them (9-16:187-188). A separate bill was generated and the defendant paid cash for the martinis (9-16:49, 188, 202). On another tab was the

defendant's large food order plus a glass of wine (9-16:50, 189). For the victim, he ordered one item (9-16:189).

When the victim arrived, she did not appear happy (9-16:214). The only time that Baer saw her smile was when she was having a conversation with Judith Ryan who sat on her left at the bar for a time (9-16:152, 214, 218). Baer recalled that the tab came to $53.75 (9-16:189). The couple left forty-five dollars plus a half dollar and two old quarters (9-16:189). Baer explained that he needed the proper amount of payment to cash out his drawer (9-16:189). The defendant remonstrated because he felt that the old coins were worth more (9-16:190). At 10:55 p.m., the victim, appearing embarrassed, put in an extra twenty dollars and also left a tip (9-16:190, 206, 215). The defendant left Baer three old quarters as Baer said it was okay to tip with what the defendant claimed were silver coins worth seventy dollars each (9-16:191). At 11:05 p.m., the defendant and the victim left Amy's Place (9-16:207). The defendant appeared calmer when he left than he did when he arrived hours earlier (9-16:215).

Text Messages Between the Defendant and Victim

Trooper David Swan performed extractions on the defendant's and victim's phones (9-19:26, 26, 28-29). Besides having years of experience as a digital evidence examiner and attending hundreds of hours of conferences and trainings in computer and cellular phone forensics, he was certified in the use of Cellebrite and Lantern forensic tools and had passed proficiency tests (9-19:20). Cellebrite and Lantern programs extract data stored on mobile devices including contacts, emails, history, text messages, multimedia messages, social media content, photos and videos (9-19:19).

Swan examined the victim's Apple iPhone by first placing the phone in airplane mode and in a strongbox to sever the connection between the phone and its network (9-19:21-22). He broke the passcode using a Cellebrite program (9-19:27). He saw that the phone was connected to an email address of jpripstein@gmail.com (9-19:26).

For the defendant's phone, he was also able to break the passcode (9-19:28). The phone was attached to the email address ryandmw751@gmail.com (9-19:29). Each phone had each other's phone number in its

contact list (9-19:30). The defendant's phone contained 7636 text messages, 6977 of them from the victim (9-19:30). Searching the text messages for those that contained the word "pumpkin tits," he found eight texts from October 6 through October 19, 2011 where the victim calls the defendant Pumpkin Tits" as in, "How are you Pumpkin Tits?" (9-19:31, 33-34).

Trooper Swan read to the jury the text messages between the defendant and the victim from February 10 through February 18, 2012 (9-19:35-56). The text messages showed tension between the two over the defendant's belief that he had been harmed in the workplace and his intention to quit work and sue a co-worker and employer (9-19:40-56). There was also tension over the defendant's drinking, including drinking the victim's wine (9-19:48, 49, 54). At some points, the victim ordered the defendant to leave her apartment (9-19:38-39, 47, 49-50, 54). On the afternoon of February 11, after a flurry of texts on February 10, mostly from the defendant to the victim, the victim wrote, "No more us. You blew it finally yesterday" (9-19:57).

In more texts, the defendant continued to lament his work situation and the victim begged him to leave

her alone (9-19:57-59). He professed her “evil”, “selfish and self-centered” (9-19:59-60). She told him the same was true of him and that the relationship was over (9-19:60-61). On the following day, February 12, the defendant kept trying to make arrangements to come to her apartment to drop off some items while the victim kept saying he should not come, that she did not care about these items (9-19:62-68). When the defendant said he would come to her work at the spa the next morning, she said she would call police (9-19:69). Then, the defendant changed course and claimed that he actually was trying to deliver flowers for Valentine’s Day (9-19:70). The victim said she would be home the next day from nine to noon (9-19:70-71).

On February 15, the two corresponded about the defendant’s court case, the defendant’s license being suspended for thirty days, about taking a bus back to Easthampton after court and where the victim would pick him up, and about meeting with his lawyer the next day (9-19:72-76). On February 16, the defendant and victim texted regarding his need to shower, to meet with his lawyer, and to arrange to sell silver coins (9-19:77-78). Arrangements were made for the

victim to pick him up after the appointment with his lawyer (9-19:79-82). Texts in the evening show that the defendant was at the victim's apartment where he slept and ate while she was at work (9-19:83-84).

On February 17, the texts indicate that the defendant was at the victim's apartment and the victim was at work (9-19:85-87). In the evening, the victim asked the defendant if he was sober (9-19:86). On February 18, shortly before 6:00 p.m., the victim was the first to text when she asked him how he was (9-19:87). He noted some research that he had done about his OUI charge (9-19:88, 92). The victim disclosed that she was in the Berkshires (9-19:88-89). There were texts about retrieving the defendant's car (9-19:91).

Finally, for February 19 to February 20, Trooper Swan created a time line of all texts and calls between the defendant, the victim and third parties (9-19:93-94). The defendant and the victim discussed a plan for the defendant to take a taxi from his apartment to downtown to do his laundry and order some food at Amy's Place while the victim was at work (9-19:104-105). Meanwhile, the victim made appointments with two separate clients for the next day (9-19:101-

102).[3] When the victim texted from work that she was busy, the defendant texted: "Let me know when you're not busy. Both of us are on the edge of either excellence or disaster. I hope you choose the former before we both sink into the latter."

The Defendant's Statements to Medical Staff and Police at Baystate Medical

While the defendant was being operated on, Officer Rogers stood in a hallway outside the operating room (9-15:40). Trooper Riley arrived and entered the operating room (9-18:129-130, 163). After surgery, the defendant was transferred to the ICU (9-15:41-42). Trooper Riley and Officer Rogers sat on chairs in the corner of that room (9-15:42). The defendant was at first unconscious (9-15:42). A search warrant was obtained to seize the defendant's clothing and examine the defendant (9-18:132, 135). During execution of the warrant, Riley observed that the bottoms of the defendant's feet were bloody (9-18:133, 135).[4] He saw a small scratch on the

[3] Lynn Tenerowicz confirmed that she and the victim had texted on February 19 regarding a plan to meet on Monday afternoon, February 20 (19-16:57-60).

[4] Police never received the defendant's socks (9-18:160, 185).

defendant's fingers (9-18:134-135, 169). He later learned that the defendant's blood alcohol level was .15 (9-18:166). Also recovered and seized from the defendant's person were coins, his wallet, and some paperwork relating to an OUI arrest (9-18:161-162, 188).

Early on February 21, the defendant, who had a tracheostomy due to his throat injury, began communicating with staff nurse Katherine Walles, first by nodding and shaking his head and later by writing notes (9-12:30-31, 39). His first note asked, "Will I re[c]over. What happens when I leave? Will I speak?" (9-12:33). She answered that he should be able to speak when he got better (9-12:33). On another piece of paper, he asked, "Why was the police officer here?" (9-12:33). Walles responded, "Because of what happened to you in your apartment" (9-12:37). He asked in another note, "Is my girlfriend ok?" (9-12:37). She replied, "No, she's not. I'm sorry."

Easthampton Police Officer Dennis Scribner arrived at about midnight on February 21 (9-16:36). He saw the defendant in the ICU room communicating with nursing staff by writing on a notepad or piece of paper (9-16:36). At about 5:30 a.m., Nurse Walles

approached him with a paper in her hands (9-36-37). She placed the paper on the desk outside of the room, where Scribner had been sitting (9-16:37).

Trooper McMillan arrived at about 7:50 a.m. to relieve Officer Scribner who alerted him to the defendant's note (9-16:37, 68, 71-72, 76). Trooper McMillan took a stationery position in the ICU room (9-16:72). At one point, the attending nurse asked McMillan to stand at the defendant's bedside because the defendant had questions for him (9-16:72). The defendant wrote, "Can she evict me? I am seven weeks behind on rent but I have money" (9-16:75, 77). McMillan said that he did not know but would try to find out though he did not know if he could (9-16:75). McMillan did not ask the defendant any questions but gave him his business card and instructed him that someone would be talking to him later in the day (9-16:75,80).

Trooper Gary Darling was assigned the 4:00 p.m. to midnight shift (9-16:134). Nurse Walles asked Darling if he would like some papers outside of the defendant's room (9-16:134). He took them and logged them into evidence (9-16:134-135).

On Tuesday, February 21, at around 6:30 p.m., after having monitored the defendant's mental status and learning that staff would be performing a test to determine his mental awareness and general level of function, Trooper Riley and Sergeant Popielarczyk approached the defendant in the room (9-18:140-141). They explained that if the defendant did well on the test and he wanted to speak with them afterwards, he could in order to assist them in figuring out what had happened that night (9-18:141-142).

A delirium test administered by Nurse Norberto Duarte was video and audiotaped (9-18:7-8, 141). The defendant received a perfect score indicating that he was oriented to place, time, and person (9-18:8). After the test, Popielarczyk and Riley explained that they were from the Easthampton Police Department and State Police respectively and were working together to try to sort out what had happened (9-18:141). While this was being explained, the defendant gestured as if he wanted to write something (9-18:142). He was provided pen and paper (9-18:142). His multiple writings over the next several minutes were collected along with a stack of notebook papers next to the defendant's bed that he has been writing to his

medical caregivers (9-18:142). Three minutes and fifty seconds into the interview, the defendant wrote, “I was at her house. She was in bathroom hygiene/makeup” (9-18:143).

Riley then told the defendant to stop and to listen to him. He explained to the defendant that he was not under arrest, that they were looking for his cooperation but that he needed to know he had several rights before deciding if he should cooperate (9-18:145). Riley began an explanation of the *Miranda* warnings (9-18:145). When he got to the right to have an attorney present during questioning, the defendant gestured to be handed the pen and paper (9-18:145). He wrote, “What I will say for now is that when I opened the bathroom door, I found her in a pool of blood unconscious” (9-18:145).

Riley then explained to the defendant that when he writes things down they become part of the record (9-18:146). Riley then completed his review of the *Miranda* warnings and asked the defendant if he now wished to communicate (9-18:146). The defendant wrote, “I was in a total state of panic when I saw her and didn’t know what to do. I think maybe this would better be discussed when I am more capable” (9-

18:147). The defendant then wrote, “ASAP I want to talk to you all the same” (9-18:148). Riley responded, “We’re going to finish up. We’ve got a lot of information already but we don’t have things from your perspective and we don’t know a lot about what was going on in your relationship with Jessie” (9-18:149). Responding at about the fifteen-minute mark, the defendant wrote, “It’s too serious to discuss right now. I will do my best. I’m sorry” (9-18:149). Trooper Riley answered by telling the defendant not to write anything else, but to listen (9-18:150). Riley went on to say that he had a great deal of information already and had information from the victim regarding what went on but they would need to make decisions at some point and wanted him to have the opportunity to say what happened (9-18:150). Riley began to pack up his things and said that they were going to take a break, going to leave (9-18:150). He gave the defendant a paper pad and pen and invited the defendant to write anything down that he thought would be important (9-18:150). The defendant, after watching Riley gathering up his things, took the paper and pen and, at the 20 minute and five second mark, wrote, “Is she still alive?” (9-18:151). Intending to

create some doubt in the defendant's mind, Riley responded by saying the victim had some injuries and police have her perspective (9-18:152, 182). The defendant almost immediately wrote, "Prior injuries. Also long-standing psychiatric issues as well" (9-18:153).

Riley responded by saying this information was important and valuable and encouraged him to write down things that came to him (9-18:154). When the defendant pointed to his throat, Riley replied that he should write it down (9-18:154). The defendant wrote, "I injured myself only. I couldn't deal with having to be in this position for no fault of my own. Sorry" (9-18:154). The defendant made a motion with his hand as if to pick up something, then a motion across his throat from left to right, then a motion as if to drop something then repeated the sequence (9-18:155). Riley told the defendant that this way of communicating was too piecemeal and that he should write it down (9-18:156). The defendant wrote, "With the knife I picked up from next to her but both wounds were self-inflicted, as far as I can tell" (9-18:156). The defendant never asked about the victim's well-being or if he could see her (9-18:157).

SUMMARY OF THE ARGUMENT

Argument One A (Pages 44-50) The judge's denial of the motion to suppress should be affirmed where the defendant failed to sustain his burden to show that he had both a subjective and an objectively reasonable expectation of privacy in the ICU room he occupied for about a day. When the premises are not one's home, factors that must be considered to determine whether an expectation of privacy in the premises would have been reasonable are "the nature of the place searched, whether the defendant owned the place, whether he controlled access to it, whether it was freely accessible to others, and whether the defendant took 'normal precautions to protect his privacy' in that place." *Commonwealth v. Porter P.,* 456 Mass. 254, 259, quoting *Commonwealth v. Pina*, 406 Mass. 540, 545, cert. denied, 498 U.S. 832 (1990), and cases cited. The defendant did not assert a privacy interest in the room. The ICU room was open to hospital staff who freely went in and out.

Argument One B (Pages 50-51) There was no evidence presented to support the defendant's claim that hospital staff were acting as agents of police. The motion judge correctly noted that a claimed HIPPA

violation would not result in application of the exclusionary rule. Where the notes that the medical staff gave to police that were ultimately admitted at trial were not inculpatory or prejudicial to the defendant, the exclusionary rule should not apply.

Argument Two A (Pages 51-53) The motion judge properly considered four factors before concluding that the defendant was not in custody on February 21, 2012 when police spoke to him in a hospital ICU room and that, therefore, *Miranda* warnings were not required. These were the place of the interrogation; whether police had conveyed to the defendant that he was a suspect; whether the interrogation was aggressive or casual; and whether, at the time of incriminating statements, the defendant was still free to end the interview. *Commonwealth v. Lopez*, 485 Mass. 471, 479 (2020).

Argument Two B (Pages 53-55) The motion judge was correct in finding that the defendant, familiar with *Miranda* warnings from an arrest six days earlier, did not invoke the right to remain silent until such time as he said he would like to have a lawyer. Once invoked, the right was scrupulously honored.

Argument Three (Pages 56-58) The motion judge correctly ruled voluntary the defendant's statements to medical staff and police made while he was recovering from surgery. To show that a statement is voluntary, the Commonwealth must prove that, in the totality of the circumstances, the defendant's will was not overborne but was the result of a free and voluntary act. *Commonwealth v. Stroyny*, 435 Mass. 635, 646-647 (2002). Where the defendant was mentally alert, sought out assistance when he needed it, and conversed with people when he agreed to, his written statements were voluntary.

Argument Four (Pages 59-62) There was no error where the trial judge could find by a preponderance of the evidence that text messages between the victim and the defendant were authenticated and admissible. The messages came from the defendant's and victim's password-protected cell phones. *Commonwealth v. McNabb*, 97 Mass. App. Ct. 558, 562 (2020). Moreover, texts between them were extremely detailed and covered all aspects of their daily lives together, thus providing confirming circumstances. *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 368 (2014).

Argument Five (Pages 63-67) The trial judge acted well within his discretion in admitting testimony about the defendant's very recent arrest for operating under the influence of alcohol and of an altercation he had had at work where the evidence was probative of the defendant's state of mind and where the judge could conclude that its probative value was not outweighed by potential for prejudice. *Commonwealth v. Crayton*, 470 Mass. 228, 249 (2014); Mass. G. Evid. §404(b)(2).

Argument Six (Pages 68-71) There was no substantial likelihood of a miscarriage of justice in the motion judge's decision to deny the defendant's motion for new trial without a hearing. The judge could exercise his discretion not to credit the defendant's self-serving affidavit claiming that he feared his trial counsel and could not communicate with him. This claim was belied by the record and the judge's own observations of counsel with the defendant at trial. The defendant could not sustain his burden of proving ineffective assistance of counsel. *Commonwealth v. Kolenovic*, 471 Mass. 664, 673 (2015).

Argument Seven (Pages 71-76) Review of this case will show that the jury's verdict is most

consonant with justice. There was no evidence that the victim had been the first aggressor or that the murder was committed in the heat of passion. Contrast *Commonwealth v. Seit*, 373 Mass. 83, 92 (1977). Instead, there was evidence of the defendant's motive which sharpened in the days and hours before the murder. The injuries to the victim and use of force showed extreme atrocity or cruelty. The defendant's mental health problems did not equate to lack of criminal responsibility, and, if this court should choose to review the defendant's medical records, they show a person who opted to blame the innocent victim for his troubles rather than take responsibility for problems which were not insurmountable.

ARGUMENT

I. A. The Motion to Suppress Was Properly Denied Where the Judge Correctly Held that the Defendant Did Not Manifest a Subjective Expectation of Privacy in the Intensive Care Unit Room He Occupied and in the Notes He Wrote to Medical Staff and Police During His Stay and Where, Moreover, Such an Expectation Would Not Have Been Reasonable.

The motion judge's conclusion that the defendant did not manifest a subjective expectation of privacy in the ICU room where he was hospitalized was not erroneous. In reviewing a ruling on a motion to

suppress, this court will "accept the judge's subsidiary findings of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" *Commonwealth v. Clarke*, 461 Mass. 336, 340 (2012), quoting *Commonwealth v. Scott*, 440 Mass. 642, 646 (2004). When findings are based on documentary evidence, such as a videotape, the reviewing court will stand in the same position as the trial judge. *Clarke*, *supra* at 341, citing *Commonwealth v. Novo*, 442 Mass. 262, 266 (2004). However, where a video is considered in light of police officer testimony, the court will apply the deferential standard of review. *Id.*, citing *Commonwealth v. Tavares*, 385 Mass. 140, 145, *cert denied*, 457 U.S. 1137 (1982).

In deciding whether the search of a hospital room violated the Fourth Amendment, art. 14 or G.L. c. 276, §1, one must first decide whether there has been a search in the constitutional sense. *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010), citing *Commonwealth v. Frazier*, 410 Mass. 235, 244 n.3 (1991). "This determination turns on whether the police conduct has intruded on a constitutionally protected reasonable expectation of privacy." *Porter*

P., supra quoting *Commonwealth v. Montanez*, 410 Mass. 290, 301 (1991). A defendant bears the burden to show both that he manifested a subjective expectation of privacy in the object of the search, and that society is willing to recognize that expectation as reasonable. *Porter P., supra*, citing *Montanez, supra.* When the premises are not one's home, factors that must be considered are "the nature of the place searched, whether the defendant owned the place, whether he controlled access to it, whether it was freely accessible to others, and whether the defendant took 'normal precautions to protect his privacy' in that place." *Porter, supra* at 259, quoting *Commonwealth v. Pina*, 406 Mass. 540, 545, *cert. denied*, 498 U.S. 832 (1990), and cases cited.

The defendant did not manifest a subjective expectation of privacy in the ICU room. As the motion judge found, the defendant "was aware of the presence of various police officers and that they were there to inquire into the circumstances surrounding his injury, but he never asked them to leave" (CA/26). The notes the defendant wrote were either in the ICU room or on the table outside the room where the nursing staff left them (12-3:48, 63, 67, 74, 83, 89-90, 149, 151).

The police also took the notes the defendant wrote to Trooper McMillan and Trooper Riley (12-3:94-95; 97-103). The defendant showed no interest in the privacy of these notes. There was no request to safeguard his notes or to safeguard any other items in the hospital room. Contrast *State v. Stott*, 171 N.J. 343, 356 (2002)(patient showed subjective expectation of privacy in hospital room when he hid Xanax pills in hem of hospital room curtains). In fact, not only was there no interest in safeguarding the notes, but they were freely written out to medical staff and police for the purpose of communicating. The defendant's interest was not to protect the privacy of his property, including his thoughts, but to convey information to others for the purpose of obtaining assistance or getting his point across. Contrast *Jones v. State*, 648 So.2d 669, 674 (Fla. 1994)(police seized defendant's clothes from hospital room and never obtained search warrant); *Morris v. Commonwealth*, 208 Va. 331, 334 (1967)(motion to suppress clothes should have been allowed where police entered defendant's hospital room while defendant was sleeping and seized clothes).

It is not surprising that the defendant did not manifest an expectation of privacy in the hospital room as that expectation would not have been reasonable. As the motion judge found, the defendant's medical personnel were in and out throughout the day and night, taking care of all of the defendant's medical needs and monitoring technical equipment such as a tracheotomy tube and intravenous tubes (CA/27)(12-3:38, 45-46, 66). The room was so accessible that the door to the room was not shut (12-3:37, 45). Indeed, no one testifying could say that the room even had a door (M12-3:79). And there were no closed doors in the ICU (M12-3:79). See *Young v. Pena*, 428 F. Supp. 3d 474, 479 n.3 (W.D. Wash. 2019) (indicator of reasonable expectation of privacy in hospital room is whether there is closed door or curtain).

The Commonwealth argued at the hearing and the motion judge so found that the conditions of the ICU room were similar to those of an emergency or trauma room which "by its very nature, functions as a freely accessible area over which a patient has no control and where his privacy is diminished." *State v. Rheaume*, 179 Vt. 39, 42 (2005).

Although an ICU unit may not see the number of emergency personnel coming through that an emergency room does, the number of specialists and medical experts attending a patient would likely be greater than in an emergency room. At least one state has held that a person's privacy rights are not offended when police, with permission of hospital staff, enter an operating room to observe a surgical procedure. *State v. Thompson*, 222 Wis. 2d 179, 192 (1998). And *Rheaume* itself involved a "trauma room" that was within an emergency room. *Rheaume*, 179 Vt. at 40.

There is a distinction, as noted by the motion judge, between the defendant's situation, where he was located very temporarily in a critical care room, from a situation where a patient has a longer stay in a hospital room (CA/27). In the present case, in fact, the defendant was moved overnight between February 21 and 22, first to a room with another patient, then to a private room with an aide (12-3:50, 151-152). When the defendant was placed there, the door to his room was closed. Patients may expect privacy when a situation is more stable and they are in a private room. See *Stott*, 171 N.J. at 356 (defendant who had been civilly committed on day fourteen of twenty-day

commitment in hospital room with bed, nightstand, bureau and curtains had expectation of privacy in pills he hid in hem of room's curtains). In contrast, the defendant was treated briefly, openly, and intensely by medical staff and then moved on. The defendant did not have an objective expectation of privacy in his open ICU room.

I. B. The Defendant Failed to Show that any Purported Violation of the Health Insurance Portability and Accountability Act (HIPAA) Would Require Suppression of the Defendant's Notes Where Medical Staff Did Not Act as Agents of Police.

The motion judge concluded that, even if there had been a violation of the federal Health Insurance Portability and Accountability Act of 1969, Pub. L. No. 104-191, 110 Stat. 1936, (HIPAA), in the present case, the remedy would not be suppression. The defendant cites to no authority that such a violation would result in suppression. At trial, there was testimony that the defendant wrote notes to the medical staff. However, only the three notes to Nurse Katherine Walles, Exhibit 6, at trial, were introduced (9-12:40). There, the defendant asked, "Will I re[c]over? What happens when I leave? Will I speak?" "Why is the police officer here?" "Is my girlfriend

okay?" (9-12:33, 37). Walles asked police if they would like the notes and they were seized (9-16:134). Walles did not act at the officers' behest. See *Commonwealth v. Mahnke*, 368 Mass. 662, 677 (1975), and cases cited (exclusionary rule could apply to agents functioning as instrument or agent of police). Moreover, the notes were hardly inculpatory when the facts were otherwise established that the defendant had been transported from the apartment with severe wounds to his neck as the victim, his girlfriend, lay dead on the floor with her throat slit. This case does not present grounds for suppression based on a claimed HIPAA violation.

II. A. The Motion Judge Correctly Concluded that *Miranda* Warnings Were Not Required Before the Defendant's Arrest as the Defendant Was Not in Custody.

The motion judge was correct in his conclusion that the statements the defendant gave on February 21 did not violate *Miranda* requirements. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In reviewing the judge's decision on this issue, this court will "accept the judge's subsidiary findings of act absent clear error but conduct an independent review of his ultimate findings and conclusions of law.'" *Clarke,*

supra at 340 (2012), quoting *Scott*, *supra* at 646. "Where a defendant challenges the admission of a statement allegedly resulting from custodial interrogation, the defendant bears the initial burden of proving custody." *Commonwealth v. Newson*, 471 Mass. 222, 229 (2015), citing *Commonwealth* v. *Larkin*, 429 Mass. 426, 432 (1999). Circumstances to consider "include, but are not limited to, (1) the place of the interrogation; (2) whether the officers have conveyed to the person being questioned a belief or opinion that he or she is a suspect; (3) the nature of the interrogation; and (4) whether the suspect was free to end the interview. *Commonwealth v. Lopez*, 485 Mass. 471, 479 (2020). The factors are to be considered a framework and the totality of circumstances must be considered. *Commonwealth v. Medina*, 485 Mass. 296, 301 (2020). In the present case, the defendant wrote notes from his hospital bed, a place where numerous medical staff freely entered and exited while caring for the defendant. Although police officers originally stayed inside the room after the defendant returned from surgery and had not awakened, the police then kept watch by the nurses' station outside of the room that the defendant was in. This is far different

than a situation where police control the setting such as a police station interrogation room.

With respect to factors two and three, as noted by the motion judge, the police never conveyed to the defendant that he was a suspect, though he conveyed his belief to them. The officers' tone was extremely cordial and kind (12-3:65-66, 84-87; CA). Moreover, police told the defendant that he could ask them to leave at any time (12-3:86-87;CA/28). The defendant controlled when the officers would speak with him (12-3:97-98; CA/28). The defendant was not subject to custodial interrogation on February 21 and therefore warnings pursuant to *Miranda* were not required.

II. B. The Motion Judge Did Not Err When He Concluded that the Defendant Did Not Invoke His Right to Remain Silent During His Conversation with Police on February 21 Until He Affirmatively Stated that He Wanted to See a Lawyer.

The motion judge properly determined the point at which, on February 21, the defendant chose to invoke his right to remain silent during his written conversations with Trooper Riley and Sergeant Popielarczyk. The Fifth Amendment to the United States Constitution guarantees one the right not to furnish testimony against oneself. The rights

enunciated in *Miranda v. Arizona*, 384 U.S. 436 (1966) make this guarantee applicable to the states. *Commonwealth v. Clarke*, 461 Mass. 336, 341 (2012). In examining whether a defendant has invoked the right to stay silent, the courts of our Commonwealth do not require that a defendant invoke "with utmost clarity." *Clarke*, *supra* comparing *Berghuis v Thompkins*, 560 U.S. 370, 381(2010)(Federal law requires that defendant invoking right must do so unambiguously; police not required to end interrogation or ask questions to clarify).

A review of the defendant's interactions with the officers shows that the defendant invoked his right to remain silent later in the conversation and that invocation was scrupulously observed. The defendant has claimed that the defendant invoked when Trooper Riley introduced the defendant to Trooper Darling while Riley and Officer Popielarczyk took a dinner break and Riley let the defendant know that, if he wanted to talk, he should just let Darling know (12-3:92; CA/21). The defendant responded, "one more day in ICU before I can talk: (12-3:93; CA/21). Officers were then going to dinner and the defendant was subsequently evaluated by medical staff for delirium.

The defendant had a built-in break before the police came in to speak with him a second time. At that time, the defendant set the parameters of his conversation when he said he would talk briefly with them (M12-3:97-98). Thus, the defendant's rights were protected. See *Michigan v. Mosley*, 423 U.S. 96, 103-104 (1975)(exercising option to terminate questioning allows defendant to control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. Having this option counteracts the "coercive pressures of the custodial setting"). Moreover, as the motion judge noted, the defendant was aware of the *Miranda* warnings, having been advised of them a week earlier (12-3:17; CA/28). He then conversed through his written notes until such time as he affirmatively stated, "At this point, I would like to see a lawyer. You kow [sic] where to look now"(CA/22). The defendant clearly invoked his right to an attorney after conversing with police. Before that time, the defendant had not invoked.

III. The Motion Judge Correctly Found that the Defendant's Statements to Medical Personnel and to Police Were Voluntary Where, in the Totality of the Circumstances, it Was Clear Beyond a Reasonable Doubt that the Defendant's Will Was Not Overborne.

The trial judge did not err in finding that the defendant's written statements made from his hospital room were voluntary. In reviewing a judge's decision on voluntariness, the judge's subsidiary findings will not be disturbed if supported by the evidence. *Clarke*, 432 Mass. at 12, citing *Tavares*, 385 Mass. at 144-145. To show that a statement is voluntary, "the Commonwealth must prove beyond a reasonable doubt that 'in light of the totality of the circumstances surrounding the making of the statement, the will of the defendant was [not] overborne,' but rather that the statement was 'the result of a free and voluntary act.'" *Commonwealth v. Colon*, 483 Mass. 378, 386 (2019), quoting *Commonwealth v. Baye*, 462 Mass. 246, 256 (2012), quoting *Commonwealth v. Durand*, 457 Mass. 574, 595-596 (2010), *S.C.*, 475 Mass. 657 (2016), *cert. denied* 138 S. Ct. 259 (2017). Factors to consider include the "conduct of the defendant, the defendant's age, education, intelligence and emotional stability … physical and mental condition, …and the details of the

interrogation, including the recitation of *Miranda* warnings." *Commonwealth v. Bell*, 473 Mass. 131,142 (2015), quoting *Commonwealth v. Hilton*, 450 Mass. 173, 177 (2007). "The fact that a defendant may have been in a disturbed emotional state, or even suicidal, does not automatically make statements involuntary." *Commonwealth v. Richards*, 485 Mass. 896, 910 (2020).

In the present case, the defendant had suffered a serious self-inflicted injury but was well on the mend when he began conversing with pen and paper with medical staff. He sought out Trooper McMillan and later agreed to speak to Trooper Riley and also decided when he would no longer speak with him. The defendant was not intoxicated and had demonstrated perfect scores in cognitive testing. Compare *Richards*, 485 Mass. at 908 (defendant's statements upheld as voluntary where, though he was still under residual effects of pain medicine which would have negatively impacted voluntariness of his statements and he was in pain due to self-inflicted injuries, answers to police interview questions were "rational and appropriate" showing full understanding of the questions); *Bell, supra* (defendant's statements deemed voluntary where, though he was seriously injured and

had consumed intoxicants, he spoke to medical personnel in coherent and appropriate fashion, evinced understanding that he and another had been seriously injured and showed efforts to get her help, and spoke to police about fire and his injuries); *Clarke*, *supra* (defendant's statements held voluntary though he had been shot in head where his eyes were open when he spoke to officer; defendant was aware enough to volunteer that he had been shot and needed help; he responded appropriately to EMT about his medical condition and was alert; he appeared alert and oriented and answered questions appropriately on way to hospital; and he was asked a number of questions to test his cognitive abilities, state of consciousness and depth of injuries and responded appropriately); *Commonwealth v. Stroyny*, 435 Mass. 635, 646-647 (2012) (statement to nurse and police officer ruled voluntary even though defendant had ingested marijuana and valium and was being treated for slashed wrists and was crying and moaning in pain). The circumstances surrounding the defendant's statements clearly show that they were voluntary.

IV. There Was No Error in Admission of Text Messages Between the Victim and the Defendant Where Authentication Was Shown by a Preponderance of the Evidence As the Texts Came from the Defendant's Password-Protected Phone and the Contents, Subject Matter and Distinctive Characteristics of the Texts Established that They Were Sent Between Them.

The trial judge correctly found by a preponderance of the evidence that texts sent from the defendant's phone to the victim in the weeks prior to the murder were properly authenticated. As a preliminary matter, the defendant moved in limine to exclude the text messages, (CA/10), and also objected to the judge's decision allowing the texts to be admitted (9-9:104). The standard of review is therefore the prejudicial error standard. *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005). An error is not prejudicial if it "did not influence the jury, or had but very slight effect. *Id*., quoting *Commonwealth v. Flebotte*, 419 Mass. 348, 353 (1994). There was no prejudicial error.

Before electronic communications such as text messages are admitted into evidence, the trial judge must first "determine whether sufficient evidence exists 'for a reasonable jury to find by a preponderance of the evidence that the defendant

authored' the communication." *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 368 (2014), quoting *Commonwealth v. Purdy*, 459 Mass. 442, 447 (2011); Mass. G. Evid. §901(b). Here, the text messages came from the defendant's phone, registered to the defendant's email address, which was password protected and found at the scene where the defendant was discovered the night of the murder (9-16:143). Unlike social networking websites or email accounts which can be accessed by multiple devices, texts from a password-protected cellphone come from that phone and not from other devices. *Commonwealth v. McNabb*, 97 Mass. App. Ct. 558, 562 (2020). See and compare *Purdy, supra* at 450-451 (emails in defendant's name found on hard drive of defendant's password-protected computer were properly authenticated as coming from the defendant). Contrast *Commonwealth v. Williams*, 456 Mass. 857, 869 (2010)(messages on social website MySpace purported to be from defendant's brother were not sufficiently authenticated where there was no testimony as to how secure webpage was, who could access web page, or whether codes were needed for access); *Commonwealth v. McMann*, 97 Mass. App. Ct. 558, 561-562 (2020) (authentication insufficient where

evidence did not establish limitations on who could access defendant's Instagram account, including whether password was needed for access or how regularly defendant would need to enter password). The secure nature of the phone and its text messages, on its own, was sufficient to show authentication by a preponderance of the evidence in the absence of allegations of "fraud, tampering, or 'hacking.'" *Purdy, supra* at 451.

The Commonwealth need not even rest on the secure nature of text messages from a protected phone, however. "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the [text messages], taken together with all the circumstances" also provide authentication. Mass. G. Evid. §901(b)(4). See generally *Irving v. Goodimate Co*., 320 Mass. 454, 459-460 (1946)(content of letters, which spoke of prior dealings between the parties, was factor that authenticated the letters). See *Oppenheim*, 86 Mass. App. Ct. at 368 ("confirming circumstances" included familiar tone of exchanges on instant messaging and references to prior discussions on specific topics); *Commonwealth v. Foster F*., 86 Mass. App. Ct. 734, 737

(2014) (Facebook messages authenticated where juvenile appeared for dating game with victim and another girl on date and place he mentioned in Facebook message).

There was voluminous evidence of authentication coming from the texts themselves. Trooper Swan testified to the number of texts in which the victim refers to the receiver of the texts as “pumpkin tits” a term of endearment (9-19:33-34). The victim and defendant were engaged in very detailed back and forth conversations about their daily lives and struggles they were having with the defendant’s being fired from work and his arrest for operating under the influence. The arrest, in turn, caused him to lose his right to operate his motor vehicle and become dependent on the victim and severely limited his work options. Contrast *McMann*, *supra* at 560 (nothing about content or tone of Instagram message corroborated that defendant wrote it where message did not refer to any prior conversations between the parties or contain other distinctive characteristics). Here, it is inconceivable that someone other than the defendant could have authored these intimate texts. The preponderance of evidence standard was easily met.

V. Evidence of the Defendant's Arrest for Operating Under the Influence of Alcohol Six Days Before the Murder and of His Altercation with a Co-Worker and Antagonism Toward Other Co-Workers Was Properly Admitted to Show the Defendant's Hostile State of Mind Toward the Victim.

Evidence that the defendant had been arrested for Operating Under the Influence of Alcohol six days before he murdered the victim was properly admitted to show the defendant's state of mind about the deteriorating relationship between the victim and him and thus the defendant's motive for murder. The defendant raised the issue of the OUI in a motion in limine and objected to the evidence as it came in at trial (9-3:29-33; 9-17:10). The standard of review is therefore the prejudicial error standard and this court will need to be assured that any error did not influence the jury or had only very slight effect. *Commonwealth v. Flebotte*, 417 Mass. 348, 353 (1994), citing *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 434, 445 (1983).

There was also testimony from Steve Boelcskevy, an employee of Adamo's Restaurant, that the defendant told him he had had a physical altercation with a co-worker when the defendant stepped in to assist a female employee whom the co-worker had approached in a

threatening manner (9-12:164-165). The evidence was admitted over counsels' objection (9-12:158-161). The prejudicial error standard of review applies here. *Flebotte, supra*, citing *Peruzzi, supra*. The defendant, on appeal, also argues that text messages between the defendant and the victim show the defendant's prior bad acts (Defendant's Brief Def. Br./73). As the defendant offered no argument about the texts at the hearing on the motions in limine or objected when the texts came into evidence, the review standard is the substantial likelihood of miscarriage of justice standard. *Commonwealth v. Upton*, 484 Mass. 155, 159-160 (2020), citing *Commonwealth v Goitia*, 480 Mass. 763, 768 (2018).

The evidence was highly probative to show the defendant's state of mind and was not unfairly prejudicial. Evidence that a defendant or another has acted badly, indictably or not, is not admissible to show bad character or propensity to commit a crime. *Commonwealth v. Crayton*, 470 Mass. 228, 249 (2014), citing *Commonwealth v. Anestal*, 463 Mass. 655, 665 (2012) and *Commonwealth v. Butler*, 445 Mass. 568, 574 (2005); Mass. G. Evid. §404(b)(1). However, such evidence may be admissible for some other purpose, for

instance, “to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or pattern of operation.” *Crayton, supra*, quoting *Commonwealth v. Walker*, 460 Mass. 590, 613 (2013); Mass. G. Evid. §404(b)(2). The trial judge is further required to weigh the probative value of the evidence against the risk of unfair prejudice to the defendant. *Crayton, supra*. The evidence will not be admitted if the risk of prejudice outweighs its probative value. *Crayton, supra*, citing *Anestal, supra* and *Butler, supra*. “The determinations of relevance, probative value, and prejudice of such evidence are left to the sound discretion of the judge, whose decision to admit such evidence will be upheld absent clear error.” *Commonwealth v. Robidoux*, 450 Mass. 144, 158 (2007), citing *Commonwealth v. DelValle*, 443 Mass. 782, 791 (2005).

Through text messages between the defendant and victim in the days leading up to the murder, it was established that their relationship was very strained because the defendant had been fired from his job and obsessed about his bad fortune (9-19:40-56). Because the victim worked at the same restaurant and had a good relationship with the employees there, he

continually texted her about her co-workers and his intense frustration with them. On February 14, police encountered the defendant after he was involved in a one-car accident and told the officer that he had been driving to his home after having a fight with his girlfriend (9-17:9-13.) Daniel Baer, the bartender, recalled that the defendant was very angry with the victim for opting not to bail him out of jail that night (9-16:186-187). As he had given her an expensive bouquet of flowers for Valentine's Day, he was particularly incensed that she had not paid his forty-dollar bail fee (9-16:187). The arrest for OUI was also relevant to show the defendant's plight. The arrest caused an even bigger financial strain on the defendant, who was completely broke, and made him dependent on the victim for transportation (9-19:72-77). Without evidence of the defendant's arrest, for a misdemeanor that did not carry a strong stigma, the defendant's conduct would have seemed inexplicable to the jury. With the evidence, the jury could understand the defendant's frustration, hostility and motive to harm the victim. See *Commonwealth v. Mendes*, 441 Mass. 459, 464-465 (2004)(evidence of hostile relationship between defendant and his wife

properly offered as evidence of his motive to kill her). Besides being relevant to show intent or motive, the evidence was "inextricably intertwined with the description of events on the [week] of the killing." *Commonwealth v. Bradshaw*, 385 Mass. 244, 269 (1982), quoting *Commonwealth v. Hoffer*, 375 Mass. 369, 373 (1978). Similarly, testimony that the defendant had hard feelings about his former co-workers at Adamo's was probative of the deteriorating relationship with the victim. "Without the challenged evidence the killing could have appeared to the jury as an essentially inexplicable act of violence. The prosecution was entitled to present as full a picture as possible of the events surrounding the incident itself." *Id*. at 269-270, citing *Commonwealth v. Chalifoux*, 362 Mass. 811, 816 (1973). Moreover, the judge gave a contemporaneous limiting instruction as to how the testimony about his altercation at Adamo's could be used and an instruction regarding the OUI in the final charge, (9-19:54), thus limiting any potential prejudicial effect. *Commonwealth v. Almeida*, 479 Mass. 562, 569 (2018). The evidence was highly probative and not unfairly prejudicial.

VI. The Trial Judge Did Not Abuse His Discretion When Denying Without a Hearing the Motion for New Trial Where the Judge Properly Used His Knowledge Gained at Trial to Reject the Defendant's Claim that He Had Received Ineffective Assistance of Counsel Because He Could Not Communicate with Counsel.

The motion judge did not abuse his discretion in denying the defendant's motion for new trial without a hearing. The decision to hold an evidentiary hearing on a motion for new trial is within the judge's discretion and the judge may decide the motion on the basis of affidavits if "no substantial issue is raised by the motion or affidavits." *Commonwealth v. Riley*, 467 Mass. 799, 826 (2014), quoting *Commonwealth v. Morgan*, 453 Mass. 54, 64 (2009). Where, as here, the motion judge is also the trial judge, he may use his "knowledge and evaluation of the evidence at trial in determining whether to decide the motion for a new trial without an evidentiary hearing." *Riley*, *supra*, quoting *Commonwealth v. Wallis*, 440 Mass. 589, 596 (2003). The reviewing court will reverse the motion judge's decision solely if it determines that there has been a "significant error of law or other abuse of discretion." *Commonwealth v. Murray*, 461 Mass. 10, 21 (2011), quoting *Commonwealth v. Grace*, 397 Mass. 303, 307 (1986). When the motion is considered in

conjunction with a defendant's appeal from a conviction of murder in the first degree, it will be reviewed under the substantial likelihood of a miscarriage of justice standard pursuant to G. L. c. 278, § 33E. *Richards*, 485 Mass. at 905, citing *Commonwealth v. Alcequiecz*, 465 Mass. 557, 562 (2013).

The defendant failed to substantiate a claim of ineffective assistance of counsel. "Where a new trial is sought based on a claim of ineffective assistance of counsel, the burden of proving ineffectiveness rests with the defendant." *Commonwealth v. Kolenovic*, 471 Mass. 664, 673 (2015), quoting *Commonwealth v. Montez*, 450 Mass. 736, 755, 881 N.E.2d 753 (2008). Under G.L. c. 278, §33E, the claim must be reviewed to determine whether the performance caused a substantial likelihood of a miscarriage of justice. *Commonwealth v. Pena*, 455 Mass. 1, 22 (2009), citing *Commonwealth v. Williams*, 453 Mass. 203, 204 (2009). This court will "consider whether there was error during the course of the trial, and, if so, whether the error was 'likely to have influenced the jury's conclusion.'" *Pena*, *supra*, quoting *Williams*, *supra* at 205.

The sole ground for the defendant's ineffective assistance claim was that he could not communicate

with court-appointed counsel effectively (CA/32). However, the judge had been able to observe interactions between the defendant and counsel at the pretrial status hearing and throughout the trial. Using this knowledge, he could properly discredit the defendant's affidavit in which he claimed "constant anxiety and genuine fear" of his attorney (CA/35 n.3). *Commonwealth v. Fletcher*, 435 Mass. 558, 566 (2002), citing *Commonwealth v. Grace*, 370 Mass. 746, 752-753 (1978). Moreover, the defendant's failure to secure an affidavit from trial counsel about communications between counsel and the defendant permitted the motion judge to make an adverse inference against the defendant. *Commonwealth v. Lys*, 481 Mass. 1, 6 (2018). See *Commonwealth v. Goodreau*, 442 Mass. 341, 354 (2004)(trial counsel should have been obvious witness in support of defendant's claim that defendant and counsel had difficulty communicating due to defendant's mental problems or other problems).

In addition, the judge was aware of the defendant's previous motion to dismiss his first attorney (CA/36-37). And the judge noted that the defendant's pattern persisted during the motion for new trial as the defense was given additional time to

amend the motion so that counsel could add additional issues requested by the defendant yet the defendant would not tell counsel what any of these additional issues should be (CA/32-33). The defendant's pattern of claiming problems with communication with counsel and the subsequent delay that this caused in proceedings was well-established. In rejecting the defendant's claims, the trial judge did not abuse his discretion.

VII. The Defendant's Request for Relief Pursuant to G.L. c 278, §33E Should Be Denied Where the Evidence Showed Beyond a Reasonable Doubt that the Defendant Had a Motive to Kill the Victim and Acted with Premeditation and that the Murder Was Committed with Extreme Atrocity or Cruelty and There Were No Mitigating Factors.

The circumstances of this case do not warrant this court's use of its discretionary function under G.L. c. 278, §33E to reduce the verdict or order a new trial. The statute requires this court to examine the grounds of both premeditation and extreme atrocity or cruelty "to determine whether the exercise of [its] power is required to obtain a result "more consonant with justice." *Commonwealth v. Garabedian*, 399 Mass. 304, 316 (1987), quoting *Commonwealth v. Davis*, 380 Mass. 1, 15 n.20 (1980). Although the court is required to exercise serious deliberation, regard for

the public interest requires that the power be used sparingly. *Id*. The jury's verdict of first degree murder by premeditation and extreme atrocity or cruelty was consonant with justice. The verdict should be affirmed, not reduced or overturned.

The recording of the victim's frantic call to 911 established the defendant's premeditation to commit murder. With fear in her voice, the victim told the operator that the defendant was going to kill her and stayed on the line several seconds before the phone went dead. Those seconds established, in the victim's own voice, the defendant's premeditation. See *Commonwealth v. Robinson*, 482 Mass. 741, 746 (2019), citing *Commonwealth v. Chipman*, 418 Mass. 262, 269 (1994) (plan to murder may be formed within seconds). In addition, there was strong evidence of motive as the defendant placed his frustration and anger on the victim for the loss of his job and income and the victim had recently, unsuccessfully, tried to break off the relationship. See *Commonwealth v. Bianchi*, 435 Mass. 316, 322 and n.7 (2001)(motive relevant to theory that defendant committed murder with premeditation).

There was no evidence, including within the defendant's own statements to police, that the victim had assaulted or been aggressive toward him. Thus, heat of passion is not a ground for relief. *Id*. at 328. Contrast *Commonwealth v. Seit*, 373 Mass. 83, 92 (1977) (court exercised power to reduce verdict where there was evidence that victim had violent temper and might have started a struggle and used a gun).

With respect to extreme atrocity or cruelty, that question "is generally for the jury 'who, as the repository of the community's conscience, can best determine when the mode of inflicting death is so shocking as to amount to extreme atrocity or cruelty.'" *Id*. at 318, quoting *Commonwealth v. Lacy*, 37 Mass. 363, 367 (1976). Here, the jury heard testimony of the terrible wound inflicted on the victim that severed both jugular veins, her carotid artery, both vagus nerves, her trachea and esophagus (9-16:90-92). The evidence satisfied three of the *Cuneen* factors, applicable at the time of trial. The jury could find that the defendant took pleasure in the victim's suffering and that both the severe extent of the victim's injuries and the manner, degree and severity of the force used showed extreme atrocity or

cruelty. *Commonwealth v. Cuneen*, 389 Mass. 216, 227 (1983). [5]

This court may reduce the verdict if there are mitigating circumstances. *Garabedian*, *supra* at 318. The defendant's history of psychiatric problems including obsessive-compulsive disorder and substance abuse, should not be grounds for this court to reduce the verdict or order a new trial. The defense chose not to put on a defense of lack of criminal responsibility. Even in a case where mental illness has played a role in the crime, "[m]ental illness does not equate with the absence of criminal responsibility." *Commonwealth v. Loya*, 484 Mass. 98,

[5] The holding of *Commonwealth v. Castillo*, 485 Mass. 852 (2020) reducing the factors to consider for extreme atrocity or cruelty to three is prospective only and so applies to cases tried after Castillo was decided. *Id*. at 865-866. Even applying *Castillo*, however, the jury's verdict in the present case is consonant with justice given the extreme injuries to the victim and the manner, degree and severity of force used. *Id*. at 866, 872. The factors to be considered under *Castillo* are whether the defendant was indifferent to or took pleasure in the victim's suffering; whether the method or means of killing was reasonably likely to substantially increase or prolong the victim's suffering; and whether the means used were excessive and out of proportion to what would be needed to kill a person *Id*. at 865-866. For the third factor, the jury may consider extent of injuries; number of blows delivered; manner, degree and severity of forced used; and nature of the weapon, instrument or method used.

109 (2020). Contrast *Commonwealth v. Colleran*, 452 Mass. 417, 422 (2008)(court used power to reduce verdict where there was strong evidence that killing was driven by defendant's psychotic depression and defendant had presented unrebutted expert testimony that she "lacked substantial capacity to conform her conduct to the requirements of the law due to a serious mental illness").

According to the records the defendant has provided, much professional help was available to the defendant. As Dr. Fife noted in her June 3, 2013 evaluation of the defendant's criminal responsibility, the highly intelligent defendant "ha[d] a history of not taking responsibility for his behaviors… has immature defense mechanisms of dependency on others to have even his most basic needs met, and a passive-aggressive personality style." (Defendant's Impounded Appendix Volume II Def. Imp. App. II/69). The defendant had a long-term habit of using substances, particularly alcohol, to treat his obsessive-compulsive disorder despite the recommendations of numerous health care providers who opined that the disorder could be treated, but not while he continued to use alcohol (Def. Imp. App. II/5,23,35-37,

39,46,51,53-54,62-63,84,87-88,90). This opinion is exemplified in the defendant's actions in the last days of the victim's life. He refused to take responsibility for his situation and prior actions, took advantage of the victim's many kindnesses to him, and blamed her for his problems as shown by the horrific violence with which he ended her young life. The jury's verdict is most consonant with justice.

CONCLUSION

For the above-stated reasons, the Commonwealth respectfully requests this Court affirm the verdict of the jury finding the defendant guilty on Hampshire Superior Court Indictment 1280CR0051.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

David E. Sullivan
District Attorney
Northwestern District

/s/ Cynthia M. Von Flatern
Cynthia M. Von Flatern
Assistant District Attorney
One Gleason Plaza
Northampton, MA 01060
(413) 586-9225
cynthia.von.flatern@state.ma.us
BBO# 550493

ADDENDUM

TABLE OF CONTENTS

34.

COMMONWEALTH OF MASSACHUSETTS 12 051

HAMPSHIRE, ss.

SUPERIOR COURT
ACTION
NO. 12-051

COMMONWEALTH

v.

RYAN WELCH

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE

The defendant, Ryan Welch ("Welch") is charged with the murder of Jessica Pripstein ("Pripstein") on February 20, 2012. The case is before me on his Motion to Suppress Statements and Physical Evidence. Specifically, Welch contends that written statements made by him in the Baystate Medical Center and at the Hampshire County House of Corrections were: (1) obtained in violation of the Health Insurance Portability and Accountability Act; (2) obtained without a knowing and voluntary waiver of his rights pursuant to Miranda; (3) obtained after the police made an unlawful warrantless entry into his hospital room; (4) obtained after he had invoked his right to remain silent and to counsel; and (5) were not voluntary. For the reasons that follow, I conclude that the Motion to Suppress Statements must be **ALLOWED**, in part, and **DENIED**, in part. The motion is **ALLOWED** as to all statements made by Welch after the 6 minute and 34 second mark of the videotaped statement of February 22, 2012. In all other respects, the motion to suppress is **DENIED.**

FINDINGS OF FACT

After hearing and review of the exhibits, I find the relevant, credible facts as follows. Additional factual findings are reserved for my conclusions of law as may be necessary.

Just after midnight on February 20, 2012, Easthampton Police went to 27 Ward Avenue, Apartment C, in response to a 911 call from a woman who stated her husband was attempting to

kill her. After observing blood on the apartment floor through the front window police officers forced open the front door which had been barricaded by a futon. Police discovered Pripstein dead on the bathroom floor. Her throat had been cut. Welch was discovered alive on the bedroom floor with a cut on his throat. He was treated by emergency medical technicians and transported by ambulance to Baystate Medical Center ("BMC") in Springfield.

1. Statements at BMC

Easthampton Police Officer Timothy Rogers was directed to follow the ambulance to the hospital and monitor Welch's condition. Welch was taken into the trauma unit. Officer Rogers remained at the nurses' station. Baystate security personnel delivered Welch's personal belongings to Officer Rogers. Those items were later taken into custody by Massachusetts State Police Trooper John Riley. Welch underwent surgery on his neck. Officer Rogers remained with Welch in the intensive care unit ("ICU") following surgery, but had no contact or communication with him. Welch was bandaged and asleep.

Massachusetts State Trooper John Riley, the lead investigator, arrived at BMC at approximately 2:30 a.m. on February 20, 2012. After conferring with officers at the hospital and the EMTs, he asked the treating physicians not to remove the blood from Welch's hands unless it was medically necessary. He also conferred with an attending nurse, explaining the ongoing investigation and that he wished to speak with Welch when he was able to communicate. The nurse explained that Welch would be sedated as a potential suicide risk. At approximately 11:00 a.m. on February 20, 2012, law enforcement personnel sought and obtained a warrant to seize biological evidence from Welch's person.

Easthampton Police Officer Bruce Nichol relieved Officer Rogers at approximately 11:45 a.m. on February 20, 2012. He entered the ICU through an open door which remained open throughout his stay. He sat against a wall in the ICU, observing Welch. Welch was initially lethargic and drifted in and out of consciousness. Over the next twelve hours Welch began to

communicate with nurses, responding to their questions by gesture as he was unable to talk. At one point a nurse asked Welch a series of questions to assess his mental status: Do feathers float? Can you cut wood with a hammer? Do elephants live in the ocean? Do two pounds weigh more than one pound? Officer Nichol observed that Welch responded appropriately to each question by nodding or shaking his head. Officer Nichol had no contact or communication with Welch. In the ICU Welch was hooked up to a breathing tube, a feeding tube and an intravenous line.

Officer Nichol was relieved by Easthampton Police Officer Dennis Scribner who, for most of his shift, monitored Welch from a position in the hospital hallway. Officer Scribner had no communication with Welch, but observed that hospital staff entered and exited his room regularly through an open door. At approximately 5:30 a.m., a nurse exited Welch's room and handed Officer Scribner a note authored by Welch. It listed the following questions: *Will I recover? What happens when I leave? Will I speak? Why was the police officer here? Is my girlfriend ok?* Exhibit 4. He did not take custody of the note, but informed his replacement, Trooper William McMillan of the note upon his arrival. The note remained on a desk in the hallway. Trooper McMillan eventually gave the note to Trooper John Riley who took it into custody.

Trooper McMillan arrived at the BMC ICU at approximately 7:45 a.m. on February 21, 2012. At approximately 9:50 a.m. a nurse motioned Trooper McMillan to approach Welch's hospital bed. As Trooper McMillan was standing at his bedside, Welch wrote a note asking him if he would be evicted from his apartment. In the same note he asked Tooper McMillan to tell his landlord he had money even though he was 4 months behind in his rent. Trooper McMillan told Welch that he would look into the situation and gave Welch his business card. He had no more interaction with Welch during his shift.

Trooper Riley returned to BMC on February 21, 2012, at approximately 1:35 p.m. After discussing Welch's condition with Trooper McMillan and learning that Welch had been

communicating with hospital staff in writing, Trooper Riley entered Welch's hospital room. He had no physical contact with Welch. Trooper Riley called a nurse into the room when Welch began breathing heavily. Trooper Riley introduced himself to Welch and explained that he had been assigned to investigate the circumstances under which Welch had been injured. Welch, still unable to speak, responded by nodding his head. Trooper Riley told Welch that he believed Welch had information that would be helpful. Welch nodded again. Trooper Riley further stated that he wanted to be certain that Welch was in a position to understand. Welch pointed to his neck and shook his head. When asked if he was indicating that he was not yet ready to speak because of his neck injury, Welch nodded in the affirmative. Trooper Riley then left Welch's room.

At approximately 2:00 p.m. on February 21, 2012, Trooper Riley learned that the autopsy results showed Pripstein's death was a homicide. At 2:30 p.m. Nurse Duarte, Welch's primary nurse, told Trooper Riley that she would be reducing Welch's pain medication, fentanyl, and administering oxycodone to facilitate Welch's move out of the ICU. The nurse also explained that Welch had received a perfect score in cognitive testing. At 2:45 p.m. a nurse reported to Trooper Riley that Welch had given the nurse a note which, among other things, stated : *"Bleeding from neck then vaguely remember paramedics police? Before passing out. Girlfriend unconscious completely. Don't know why her or me." The note also said, "Keep getting paniced then caugh then more pain. Hard to breath slowly."* Exhibit 6.[1] The nurse gave the note to Trooper Riley and he took it into his custody.

At 3:25 p.m. Trooper Riley observed several notes on the table outside the ICU. The notes, apparently authored by Welch, related primarily to his condition and observations about his treatment. Exhibit 7. Eventually they were taken into custody when a nurse asked Trooper Darling if he wanted them.

---

[1] Spelling errors appear as they exist in the handwritten notes.

At 4:00 p.m. on February 21, 2012, Trooper Gary Darling arrived to take over a shift monitoring Welch. Trooper Riley introduced Trooper Darling to Welch and explained that if he wanted to talk, he should just let Trooper Darling know. Welch responded in writing, *"one more day in ICU before I can talk."* When the Troopers responded that he could do so in writing, but it was up to him, Welch nodded in the affirmative. Trooper Riley departed, but returned at approximately 6:00 p.m. Welch was sitting up in bed and appeared comfortable. Trooper Riley learned that the nurse would soon be performing another cognitive test. Trooper Riley told Welch that if he wanted to speak with the Troopers, this would be a good opportunity. Welch responded in writing *"We can talk briefly, but I am still terrified about the situation, I also know that you will most likel be considering me a suspect. Until I can speak, I can't have a reasonable conversation with anyone, but believe me, I an trying my best to get this moving. I Just lost someone very important to me, and I am not sure why."* Exhibit 8. Trooper Riley then asked if it was alright if they videotaped the cognitive test. Welch shrugged his shoulders and nodded his head.

The mental status examination followed and was videotaped by Trooper Darling. Exhibit 10. Welch told the nurse by gesture that he was nervous and in pain, but responded correctly to all of the questions. The result of the test was that he was not suffering from delirium. He knew the date and where he was. Following the mental status test Trooper Riley began an interview of Welch. At the time, Welch was unable to speak and had a breathing tube. As Trooper Riley was explaining the purpose of the interview, Welch wrote *"I was at her house. She was in the bathroom. Hygiene/makeup."* Exhibit 9. After reading the note, Trooper Riley asked Welch to stop and listen to him first. Trooper Riley then began to advise Welch of his Miranda rights. He told Welch that: (1) he was not obligated to communicate with them; (2) he was not under arrest and could end the interview at anytime; (3) anything he said could be used against him; and (4) that he had the right to have a lawyer present. The advisement was not read from a card, nor was

any written warning provided to Welch. Trooper Riley's advisement was incomplete in that it did not inform Welch that an attorney would be appointed for him if he was unable to afford one. When asked if he was familiar with Miranda warnings Welch nodded in the affirmative. [2]

Welch gestured that he wanted to write something and was given a pad of paper. He wrote "*What I will say for now is that when I opened the bathroom door, I found her in a pool of blood unconscious.*" Exhibit 9. Trooper Riley read the note and asked Welch to stop again, explaining that when he provides information he is waiving certain rights. Trooper Riley then asked if Welch still wanted to talk to them. Welch then wrote, "*I was in a total state of panick when I saw her and didn't know what to do. I think this would be better discussed when I am more capable. ASAP I want to talk to you all the same.*" Exhibit 9. Welch then wrote, "*It's too serious to discuss right now. I will accept a lawyer maybe.* He then crossed out the words "*I will accept a lawyer maybe*" and wrote "*I will do my best. I'm sorry.*" As the interview continued, Welch wrote the following notes, all of which are included in Exhibit 9.

- *Is she still alive? Prior injuries. Also longstanding psychiatric issues as well, and as I do to some extent.*
- *I injured myself only. I couldn't deal with having to be in this position for no fault of my own. Sorry.*
- *With the knife I picked up from next to her. There is much more to this story beyond that, but both wounds were self inflicted, as far as I can tell.*

After approximately 47 minutes, Welch wrote "*At this point I would like to see a lawyer. You kow were to look now.*" Exhibit 9. Trooper Riley then ended the interview.

Police personnel continued to monitor Welch through the night. The following day, February 22, 2012, law enforcement officers made a decision to arrest Welch. That arrest, which

---

[2] Miranda warnings had been administered to Welch seven days earlier in connection with an unrelated arrest for operating a motor vehicle under the influence of alcohol. The Miranda warnings were administered in writing and Welch signed the written form acknowledging he understood. An attorney was appointed to represent Welch in that case on February 15, 2012. Exhibits 1-3.

was videotaped, was made approximately 10:38 a.m. by Trooper Riley. Exhibit 10. By that time Welch had been moved from the ICU into Room C6144. Trooper Riley entered Room C6144 and told Welch that all of the rights he had explained the prior evening still applied, that he had invoked his right to an attorney and that he was not attempting to reinitiate questioning. Welch wrote *"it has been particularly bad today I was running a fever up to 102 last night."* He nodded in agreement when asked if he felt well enough to listen. Trooper Riley told Welch that if he communicated anything it could be interpreted as a waiver of his right to have an attorney present. Trooper Riley explained that there were inconsistencies between the facts revealed by their investigation and Welch's prior statements. Trooper Riley went on to state: (1) that there was overwhelming evidence; (2) that police were aware of a breakdown in his relationship with Pripstein; and (3) that he took actions that resulted in Pripstein's death. Trooper Riley then told Welch that they were taking him into custody for Pripstein's murder. Trooper Riley reiterated several times that he was not trying to interview Welch, that Welch did not have to speak with him and that any statements he made would be a waiver of his right to have an attorney present. Trooper Riley then stated:

- I appreciate your willingness to speak with us yesterday;
- everyone has their breaking point;
- some of us sometimes get dealt with cards in life that aren't so great;
- you are not a bad person. I don't believe that;
- I just hope you can find someone you trust here, to explain what happened.

Thereafter Welch continued to write information on a pad, Exhibit 11, including the following:

- *You have not spoken to anyone but Jessica so far, and took only a brief statement from me.*
- *Has Jessica invoked her right to an attorney?*
- *So how does this argument make sense?*

- *That is what I was told would happen that I would be evaluated by a psychiatrist.*
- *I am no murderer.*

Trooper Riley informed Welch that he would be seizing the legal pad he had been writing on and seeking a warrant to search the pad. Welch asked, *"am I somehow waiving my right to an attorney by doing this?"* Trooper Riley then explained that he would not yet be reading the content of the note pad, but only taking it into custody so that he could seek a search warrant. Welch responded *"at this point, I do reserve my right to remain silent, and the right to any private conversations with medical providers."* He further wrote, *"the further objection being noted that you have been dishonest and manipulative of my statements every step through this process."* Exhibit 12. A warrant authorizing the search of the legal pad was signed by District Judge W. Michael Goggins on March 12, 2012.

Despite his serious medical condition while hospitalized on February 21 and 22, 2011, I find that Welch's mental status was good and that he understood what was communicated to him by Trooper Riley and health care providers on those dates. His answers to delirium assessment questions asked by hospital staff were correct. He was able to communicate his needs in writing. He manipulated the suction tube to make himself more comfortable. He maintained eye contact. He was awake, alert, aware of his location and circumstance. His responses to questions were appropriate, whether written or by gesture. Based on my review of the videotaped statements and the uncontroverted testimony of psychiatrist Allison Fife, I conclude that Welch's responses were knowing, intelligent and voluntary. Dr. Fife testified that, despite Welch's physical condition, depression and pain medication, she saw no evidence of delirium in either the videotapes or the medical records.

2. Statements at the Hampshire County House of Correction

On May 22, 2012, Sergeant Popielarczyk interviewed Jennifer Martin, a nurse at the Hampshire County House of Correction about her treatment of Welch. The interview was audio

recorded. Exhibit 18. She stated she was focused on his basic needs and did not engage him in detailed conversation about the charges against him. Welch told her that he was the victim and felt that they weren't being compassionate enough in their treatment of him. He said the victim was his girlfriend. He also expressed concern that he needed to "get out," so he could take care of personal business.

CONCLUSIONS OF LAW

1. HIPPA Applicability

The Federal Health Insurance Portability and Accountability Act of 1996 ("HIPPA") prohibits an individual from knowingly obtaining individually identifiable health information relating to an individual. 42 U.S.C. § 1320d-6 (2006). Similarly, the Massachusetts Patient's Bill of Rights states that "[e]very patient or resident of a facility shall have the right . . . to confidentiality of all records and communications to the extent provided by law" and to "privacy during medical treatment or other rendering of care within the capacity of the facility." G.L. c. 111, § 70E. Welch argues that the seizure of his notes to hospital personnel and his statements to a nurse at the Hampshire County House of Correction without a warrant or other court order violates these statutes and the notes and statements should therefore be suppressed. I disagree. Even assuming that these statutes apply to law enforcement officers investigating a murder and that the notes qualify as "health information," questions which I do not reach, suppression is not a remedy. United States v. Streich, 560 F.3d 926, 935 (9th cir. 2009); Commonwealth v. Senior, 433 Mass. 453, 457 n. 5 (2001). Accordingly, the motion to suppress on the basis of violations of HIPPA and the Massachusetts Patients Bill of rights is **DENIED**.

2. Warrantless Entry into the Hospital Rooms and Seizure of the Notes

Welch asserts that the seizure of notes from both the ICU and Room C6144 was the result of an unlawful warrantless search and that the notes should therefore be suppressed. Again, I disagree. Welch bears the burden of establishing that a search in the constitutional sense occurred.

Commonwealth v. D'Onofrio, 396 Mass. 711, 714-15 (1986). To do so he must show that he had a reasonable expectation of privacy in the area searched. Commonwealth v. Berry, 420 Mass. 95, 105 (1995). "The measure of the defendant's expectation of privacy is (1) whether the defendant has manifested a subjective expectation of privacy in the object of the search, and (2) whether society is willing to recognize that expectation as reasonable." Id. The following factors are relevant in determining whether the expectation of privacy is reasonable: (1) the character of the location; (2) the nature of the place involved (did the defendant own, have a possessory interest in or control access to); (3) does the defendant have possessory interest in the item seized; (4) has the defendant taken normal precautions to protect his privacy; and (5) the nature of the intrusion. Commonwealth v. Pina, 406 Mass. 540, 545 (1990).

Welch never expressed a subjective expectation of privacy in the ICU or room C6144. He was aware of the presence of various police officers and that they were there to inquire into the circumstances surrounding his injury, but he never asked them to leave. Nor did he express any expectation of privacy in the notes themselves until the end of the second interview on February 22, 2012. Rather, he cooperatively responded to inquiries by gesture or writing and on one occasion even asked an officer for assistance with his delinquent rent. Considering all these facts, I conclude that he has failed to establish that he manifested a subjective expectation of privacy in his hospital room or his notes prior to communicating with Trooper Riley.

The objective factors also suggest that an expectation of privacy in the ICU and room C6144 would not have been reasonable. Welch had no ownership interest or control over the hospital rooms. He was there only temporarily. The doors of the rooms remained open and various hospital personnel entered and exited the room on a regular basis. The writings he claims were illegally seized are the notes he wrote to hospital personnel and the police as a means of communication. He made no effort to keep them private. Rather, he willingly shared their content. Under these circumstances, I conclude that Welch has failed to establish that he had a

reasonable expectation of privacy in either the BMC ICU or room C[redacted]. Therefore, the seizure of his notes was not the result of a search in the constitutional sense.

Whether a person has a reasonable expectation of privacy in an ICU and hospital room is apparently a question of first impression in Massachusetts. Welch argues that I adopt the reasoning of State v. Stott, 171 N.J. 343 (2002), a New Jersey case holding that a patient involuntarily committed to a state mental health facility has a reasonable expectation of privacy in the room where he is residing. The Commonwealth suggests that I adopt the reasoning of State v. Rheaume, 179 Vt. 39 (2005), a Vermont case holding that a patient in a hospital emergency room has no expectation of privacy. I conclude the facts of Rheaume are more closely aligned with the facts in this case and I find the reasoning of the Supreme Court of Vermont more persuasive.

For all these reasons, the motion to suppress the notes based on an unreasonable search and seizure is **DENIED**.

3. Suppression of Statements

Welch argues that his statements to police on February 21 and 22, 2012, should be suppressed because: (1) the Miranda warnings were incomplete; (2) he was unable to make a knowing, intelligent and voluntary waiver of those rights; and (3) police did not scrupulously honor his invocation of the right to remain silent and right to counsel. The threshold determination is whether Miranda warnings were even necessary. Miranda warnings are only necessary when someone is subject to custodial interrogation. Commonwealth v. Jung, 420 Mass. 675, 688 (1995). Welch bears the burden of proving custody. Commonwealth v. Hilton, 443 Mass. 597, 609 (2005). The Supreme Court has recognized four indicia of custody: (1) the place of interrogation; (2) whether the officers have conveyed to the person being questioned any opinion that he is a suspect; (3) the nature of the interrogation, that is, whether it was aggressive or informal; and (4) whether, at the time the statements were made, the suspect was free to end the interview. Commonwealth v. Groome, 435 Mass. 201, 212 & n. 13 (2001). The test is whether a reasonable

person in the defendant's position would experience the environment as coercive. Commonwealth v. Larkin, 429 Mass. 426, 432 (1999).

Applying these factors in this case, I conclude that Welch was not in custody on February 21, 2012. The interview took place in a semi-public area of a hospital where health care providers freely came and went through an open door. His stay in the ICU was temporary, lasting only two days. Trooper Riley never informed Welch that he was a suspect, but consistently told Welch that he was interested in his side of the story, so that investigators could try to determine what happened. The questioning was not aggressive or coercive in any way and, most importantly, Welch was told that he could ask the officers to leave at any time. Considering all of these facts, I conclude that Welch was not in custody on February 21, 2012. Therefore, the administration of Miranda warnings was not required at that time.

Welch also argues that his written statements on February 21st should be suppressed because he invoked his right to remain silent and Trooper Riley failed to scrupulously honor that right. The argument is based on his claim that by writing "*told me at least on mor day ICU depending. Not sure when I can talk,*" in response to Trooper Riley's question about whether he felt up to talking, he was invoking his right to remain silent. Exhibit 7. I conclude that this written statement was not sufficiently clear to invoke his constitutional right to remain silent, even under the greater protection afforded a defendant by Commonwealth v. Clarke, 461 Mass. 336, 341-53 (2012) (defendant's pre-waiver invocation of right to counsel need not meet the federal standard of utmost clarity, but must be made with sufficient clarity). Welch had communicated in writing with hospital and police personnel earlier in the day and continued to voluntarily write notes to Trooper Riley after making this statement. He was familiar with his right to remain silent, having been administered Miranda warnings in an unrelated case one week earlier, and chose to clearly and unequivocally exercise that right later in the interview when he stated, "*At this point I would like to see a lawyer. You kow were to look now.*" Exhibit 9. Under the totality of these

circumstances I conclude that Welch's statement "*told me at least one or day ICU depending. Not sure when I can talk,*" was intended to explain what he had been told by health care providers regarding when he might be physically able to speak. It was not intended to signal his intention to remain silent. Accordingly, the motion to suppress statements made by Welch on February 21, 2012, is **DENIED**.

Welch was first taken into custody at 10:38 a.m. on February 22, 2012, when Trooper Riley advised him in Room C6144 that he was under arrest. Any statements Welch made after his arrest in response to police questioning are admissible only if they were made after compliance with Miranda. Failure to administer all four of the Miranda warnings renders the warning incomplete. Commonwealth v. Dagraca, 447 Mass. 546, 551-552 (2006). Incomplete warnings are deficient, requiring that statements made by a defendant during custodial interrogation be suppressed. Commonwealth v. Duguay, 430 Mass. 397, 399-400 (1999). The Commonwealth concedes that the Miranda warnings were incomplete, but argues that Welch's post-arrest statements should not be suppressed because they were not the product of police interrogation. Rather, the Commonwealth asserts, Welch's statements were volunteered after being told that he did not have to say anything and that any statement would be interpreted as a waiver of the right to counsel he had invoked the prior evening. Interrogation in this context refers not just to express questioning, but also to its functional equivalent, that is, any words or conduct by police that they should know are reasonably likely to elicit an incriminating response. Commonwealth v. Dixon, 79 Mass. App. Ct. 701, 707 (2011), citing Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980). In determining whether or not police statements were the functional equivalent of interrogation, the focus is not on the subjective intent of the officer, but on whether a reasonable person in Welch's position would perceive the police conduct as interrogation. Id.

Trooper Riley's statements to Welch on February 22, 2012, went well beyond notice that he was in police custody. He used the formal arrest as an opportunity to spend an additional 36

minutes communicating with Welch, knowing that he had previously invoked his right to counsel. While he was careful to remind Welch that he only had to listen and that anything he said could be interpreted as a waiver of his right to have an attorney present, he also made statements that were calculated to elicit a response from Welch. For example, Trooper Riley stated: (1) that the investigation had revealed evidence that was inconsistent with Welch's earlier statements; (2) that they were aware of a breakdown in his relationship with Pripstein; and (3) that they believed he took action that resulted in Pripstein's death. Trooper Riley then explained that he was appreciative of Welch's courage and cooperation the prior evening and stated, "everyone has their breaking point. Some of us sometimes get dealt with cards in life that aren't so great. You are not a bad person. I don't believe that. I just hope you can find someone you can trust here to explain what happened." In my judgment, these statements were intended to elicit an incriminating response from Welch and were therefore the functional equivalent of interrogation. Thereafter, Welch made a series of written statements. Because Welch was subject to custodial interrogation on February 22, 2012, and the Miranda warnings previously administered by Trooper Riley were deficient, I conclude that statements made by him after the functional equivalent of interrogation must be suppressed. As to those statements the motion to suppress is **ALLOWED**.

Finally, I find beyond a reasonable doubt that Welch's statements were the product of his rational intellect and free will. Commonwealth v. Davis, 403 Mass. 575, 581 (1988). There was nothing about the nature of the interview or the manner in which it was conducted to suggest that his will was overborne. There were no improper promises or inducements. The questioning was not psychologically or physically coercive. For the reasons set forth in the last full paragraph on page 8, I find that Welch's physical and mental condition did not interfere with the voluntariness of his statements.

CONCLUSION AND ORDER

For all the foregoing reasons, the Defendant's Motion to Suppress Statements is **ALLOWED** only as to his statements to Trooper Riley after the 6 minute and 34 second mark of the videotaped statement of February 22, 2012. In all other respects, the motion to suppress is **DENIED.**

DATED: January 3 , 2012

C. Jeffrey Kinder
Associate Justice

217

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss. SUPERIOR COURT
INDICTMENT NO. 12-051

COMMONWEALTH

v.

RYAN D. WELCH

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

On September 22, 2014, after a trial by jury, the defendant was convicted of first degree murder based upon theories of deliberate premeditation and extreme atrocity or cruelty. He appealed his conviction to the Supreme Judicial Court, and eventually filed his motion for new trial in that court on March 20, 2019. On March 21, 2019, the Supreme Judicial Court remanded the motion to this court for disposition. On April 29, 2019, the parties appeared before me for a hearing on the motion, but at the request of defense counsel I continued the matter to May 20, 2019. On that date, I conducted a non-evidentiary hearing on the defendant's motion.

In his motion, the defendant claims that he was unable to communicate effectively with his trial counsel, Attorney John Morris. He also alleges that I "coerced" him to accept Attorney Morris as his trial counsel, and to withdraw a complaint he had filed against him with the Office of Bar Counsel. At the April 29 hearing, the defendant's new attorney, Alan Black, told me that the defendant was dissatisfied with his (Attorney Black's) efforts on his behalf and that the defendant felt that there were unspecified "things" that should have been included in the motion. He also stated that, if he had more time, he believed that he and the defendant could resolve their differences. I pointed out that I had examined the on-line docket of the Supreme Judicial Court

1

and had noticed that, beginning in the fall of 2018, Special Master Margot Botsford had granted several extensions for the defendant to file his motion for new trial. I also pointed out that I am facing mandatory retirement in the very near future, and that it is preferable for the trial judge, rather than a different judge, to act upon a motion for new trial. See Commonwealth v. Carter, 423 Mass. 506, 512 n.7 (1996). Finally, I suggested that any further delay could prejudice the Commonwealth, because if a new trial were eventually granted, an extensive delay would increase the possibility that witnesses would die, move out of the area, or forget important details of their testimony. However, in an attempt to mollify the defendant and to be sure that he received the most effective advocacy possible, I agreed to give Attorney Black more time. We agreed that he would file an amended motion by May 9, 2019, and that I would conduct the hearing on May 20, 2019.

On May 20, Attorney Black appeared and told me that he had given the defendant an opportunity to tell him what matters he wanted to be included in the motion, but that the defendant had failed to respond to him in a timely fashion. Therefore, no amended or supplemental motion was filed. The only explanation given for the defendant's inaction was that, for some reason, he had been unable to focus on the task at hand during the time between the April 29 hearing and May 20. Attorney Black told me that the defendant had verbally suggested some grounds to him that very morning in the court house lock-up, including the alleged failure of Attorney Morris to assert a third-party culprit defense (although when the defendant asked to address the court, he declined to tell me who the third party might be). Attorney Black then asked me for yet another extension so that he could file an amended motion incorporating the matters that the defendant had mentioned to him that morning. I refused, citing

the considerations that I had laid out during the April 29 hearing. Attorney Black then proceeded to present oral argument on the motion.[1]

Turning to the merits of the defendant's motion, as previously set forth herein the defendant claims that I pressured him into agreeing to be represented by Attorney Morris and into withdrawing the complaint that he filed with the Office of Bar Counsel. A review of the transcript of a status conference held on September 4, 2014 (four days before the commencement of trial) completely belies his contention. The hearing began with Attorney Morris telling me that the defendant had filed the complaint against him but never told him that he was about to do so, despite the fact that they had been in court together on two of the four previous days. When I asked the defendant if he wanted Attorney Morris to continue to represent him, he replied that he had concerns about Attorney Morris's level of commitment to his case in the past, but that he observed his performance in court on the last two days and concluded that he did an excellent job and was "certainly effective." Tr., Sept.4, p. 4.[2] When I asked if the defendant wanted to pursue his complaint against Attorney Morris, he said that he had a very recent change of heart and that

---

[1] Attorney Black did not file a written motion to withdraw, but he did suggest that it "might be better" if the defendant had new counsel. Even if a written motion had been filed, I would not have been inclined to allow it, for several reasons. First, a change of counsel would surely have resulted in a lengthy delay, well beyond the date of my retirement. Secondly, there was no indication that Attorney Black was unprepared or that he had failed to give the matter his full attention and best efforts. Indeed, Attorney Black obtained more time to file an amended motion, but he was thwarted by the defendant's inexplicable failure to communicate additional grounds to him. Thirdly, the defendant never asked, either verbally or in writing, that Attorney Black be discharged, even when he was allowed to address the court. Under these circumstances, I do not believe that the defendant was entitled to new counsel, particularly on the day when his motion was scheduled to be heard. See Commonwealth v. Rice, 441 Mass. 291, 297 (2004); Commonwealth v. Carsetti, 53 Mass. App. Ct. 558, 562-563 (2002).

[2] Attorney Morris argued a number of pre-trial motions before me on the previous day and achieved success on several of them.

it would be "in everyone's best interest" if he withdrew it. Id. He went on to say that he felt "like a fool" because he now realized that part of the problem he had with Attorney Morris in the beginning of his representation might have been a result of his own stubbornness, but that he learned from his personal observations in court that Attorney Morris was effective at making an argument against others. Id. at 5. Attorney Morris then assured me that he could represent the defendant zealously in spite of the complaint. I asked the defendant if he would be willing to withdraw the complaint in writing, and he asked to speak to Attorney Morris privately before he did so; of course, I acquiesced. After meeting for approximately forty minutes, both Attorney Morris and the defendant re-entered the courtroom, and Attorney Morris read the letter that the defendant wrote to bar counsel, withdrawing his complaint and stating that he wished to be represented by Attorney Morris at trial. Id. at 12. When I told the defendant that he was making a wise decision and that I believed that he would be well served by Attorney Morris, he replied, "Judge, I appreciate that." Id. at 13. The transcript very clearly shows that there was no arguing, no pressure, and no coercion, and that the defendant was treated with respect. His decision to continue with Attorney Morris was entirely voluntary, was not prompted by any comment that I made, and was not forced upon him by the Court or by anybody else. I believed then and I believe now that he made that choice of his own free will.

The defendant also claims that he was not able to communicate effectively with Attorney Morris either before or during trial because he was afraid of him.[3] I am highly skeptical of that assertion, because I was able to observe the interaction between Attorney Morris and the

[3] In his affidavit in support of this motion, the defendant states: "I was experiencing constant anxiety and genuine fear of my attorney, John Morris." However, he does not credibly explain the reasons why he was so afraid of Attorney Morris.

defendant during trial and I saw nothing that would tend to corroborate the defendant's outlandish claim. In fact, it appeared to me that they consulted frequently during trial and that they seemed to be working well together. Moreover, there is no affidavit from Attorney Morris addressing any of the defendant's allegations, and no explanation as to the absence of such an affidavit. "If mental illness, suicidal ideation, organic brain damage . . . or any other condition had resulted in the defendant's having problems communicating or cooperating with his lawyer, his lawyer would be the obvious witness to present evidence concerning the difficulties encountered. Yet that is the precise evidence that is missing from this record . . . ." Commonwealth v. Goodreau, 442 Mass. 341, 354 (2004). I attach considerable significance to that very telling omission. Id. I am not required to accept as true the assertions in the defendant's self-serving affidavit, see Commonwealth v. Marrero, 459 Mass. 235, 241 (2011), and in the circumstances of this case I reject the defendant's totally unsupported claim that he was unable to communicate effectively with his attorney.

Moreover, "the appropriate Sixth Amendment inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer." Commonwealth v. Britto, 433 Mass. 596, 607 (2001), quoting United States v. Cronic, 466 U.S. 648, 657 n.21 (1984). If there was any lapse in communication between the defendant and Attorney Morris, it was likely the result of the defendant's unfounded lack of trust and confidence in his attorney. It bears repeating that the defendant failed to communicate with Attorney Black when he had the opportunity to provide him with additional grounds for his motion for new trial. It is also worth noting that the defendant had been dissatisfied with and moved to discharge a previous attorney, Paul Rudof

(who is a well known and highly respected criminal defense attorney in western Massachusetts),[4] and that the defendant vacillated between wanting to represent himself (with or without a stand-by attorney) and wanting new counsel appointed. Simply put, he was never satisfied, and that pattern appears to have continued up to the present.

In addition, even if there was a breakdown in communication, "the defendant has failed to show how it likely deprived him of an otherwise available, substantial ground of defense." Commonwealth v. Britto, 433 Mass. at 608. His affidavit and other moving papers are completely silent on that issue, and Attorney Black rightfully conceded as much during his argument. I am not persuaded that the defendant was prevented from presenting an adequate defense. In fact, I thought that Attorney Morris was thoroughly prepared and well organized, and that he skillfully provided the defendant with a defense that was more than adequate, even though he was faced with the Mount Everest of uphill battles (after all, the killing was recorded on audio tape, which was played for the jury). The defendant has not convinced me that there was an irreconcilable breakdown of communication between him and Attorney Morris, that he did not receive a fair trial because of any breakdown, or that the verdict was unjust.

For the foregoing reasons, the defendant's Motion for New Trial is hereby **DENIED**.

Dated: June 3 , 2019

Daniel A. Ford
Justice of the Superior Court

[4] At the hearing, Attorney Black characterized the dispute between the defendant and Attorney Rudof as a mere disagreement about trial tactics. However, in an affidavit dated September 6, 2013, Attorney Rudof wrote that the defendant "does not trust me in any way."

United States Constitution

USCS Const. Amend. 4

Amendment 4 Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCS Const. Amend. 5

Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

ALM Constitution

Art. XIV. Right of Search and Seizure Regulated.

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Statutes

ALM GL ch. 265, § 1

§ 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is

murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

ALM GL ch. 276, § 1

§ 1. Search Warrants — Issuance.

A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the property or articles hereinafter named are concealed in a house, place, vessel or vehicle or in the possession of a person anywhere within the commonwealth and territorial waters thereof, if satisfied that there is probable cause for such belief, issue a warrant identifying the property and naming or describing the person or place to be searched and commanding the person seeking such warrant to search for the following property or articles:

First, property or articles stolen, embezzled or obtained by false pretenses, or otherwise obtained in the commission of a crime;

Second, property or articles which are intended for use, or which are or have been used, as a means or

instrumentality of committing a crime, including, but not in limitation of the foregoing, any property or article worn, carried or otherwise used, changed or marked in the preparation for or perpetration of or concealment of a crime;

Third, property or articles the possession or control of which is unlawful, or which are possessed or controlled for an unlawful purpose; except property subject to search and seizure under sections forty–two through fifty–six, inclusive, of chapter one hundred and thirty–eight;

Fourth, the dead body of a human being.

Fifth, the body of a living person for whom a current arrest warrant is outstanding.

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

The word “property”, as used in this section shall include books, papers, documents, records and any other tangible objects.

Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws or under the common law.

Notwithstanding the foregoing provisions of this section, no search and seizure without a warrant shall be conducted, and no search warrant shall issue for any documentary evidence in the possession of a lawyer, psychotherapist, or a clergyman, including an accredited Christian Science practitioner, who is known or may reasonably be assumed to have a relationship with any other person which relationship is the subject of a testimonial privilege, unless, in addition to the other requirements of this section, a justice is satisfied that there is probable cause to believe that the documentary evidence will be destroyed, secreted, or lost in the event a search warrant does not issue. Nothing in this paragraph shall impair or affect the ability, pursuant to otherwise applicable law, to search or seize without a warrant or to issue a warrant for the search or

seizure of any documentary evidence where there is probable cause to believe that the lawyer, psychotherapist, or clergyman in possession of such documentary evidence has committed, is committing, or is about to commit a crime. For purposes of this paragraph, “documentary evidence” includes, but is not limited to, writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X–rays, files, diagrams, ledgers, books, tapes, audio and video recordings, films or papers of any type or description.

ALM GL ch. 278, § 33E

§ 33E. Capital Cases — Appeals.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence. For the purpose of such

review a capital case shall mean: (i) a case in which the defendant was tried on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After the entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

Rules

ALM R. Crim. P. Rule 30

Rule 30. Post Conviction Relief

(Applicable to District Court and Superior Court)

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal

conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant’s allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless

such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the

preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial

Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney’s fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal under G. L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney’s fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

Article IV. Relevancy and its Limits

Section 404. Character evidence; crimes or other acts

(a) Character evidence

(1) Prohibited uses

Evidence of a person's character or a character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a defendant or victim in a criminal case

The following exceptions apply in a criminal case:

(A) a defendant may offer evidence, in reputation form only, of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) where the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant; and

(C) a defendant may offer evidence known to the defendant prior to the incident in question of the victim’s reputation for violence, of specific instances of the victim’s violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the defendant.

(3) Exceptions for a witness

Evidence of a witness’s character for truthfulness or untruthfulness may be admitted under Sections 607, 608, and 609.

(b) Crimes, wrongs, or other acts

(1) Prohibited uses

Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted uses

This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. However, evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to

the defendant, even if not substantially outweighed by that risk. Evidence of such an act is not admissible in a criminal case against a defendant who was prosecuted for that act and acquitted.

Article IX: Authentication and identification

Section 901. Authenticating or identifying evidence

(a) In general

To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples

The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) Testimony of a witness with knowledge

Testimony that an item is what it is claimed to be.

(2) Nonexpert opinion about handwriting

A nonexpert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an expert witness or the trier of fact

A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive characteristics and the like

The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion about a voice

An opinion identifying a person’s voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence about a telephone conversation

For a telephone conversation, evidence that a call was made to the number assigned at the time to

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called, or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence about public records

(A) Originals. Evidence that a document was recorded or filed in a public office as authorized by law, or that a purported public record or statement is from the office where items of this kind are kept.

(B) Copies. A copy of any of the items described in Subsection (7)(A), if authenticated by the attestation of the officer who has charge of the item, is admissible on the same terms as the original.

(8) Evidence about ancient documents

For a document, evidence that it

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least thirty years old when offered.

(9) Evidence about a process or system

Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods provided by a statute or rule

Any method of authentication or identification allowed by a rule of the Supreme Judicial Court, by statute, or by the Massachusetts Constitution.

(11) Electronic or digital communication

Electronic or digital communication, by confirming circumstances that would allow a reasonable fact finder to conclude that this evidence is what its proponent claims it to be. Neither expert testimony

nor exclusive access is necessary to authenticate the source.

CERTIFICATE OF COMPLIANCE

I hereby certify, as required by Mass.R.A.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.A.P. 16(a)(6); Mass.R.A.P. 16(e); Mass.R.A.P. 16(f); Mass.R.A.P. 16(h); Mass.R.A.P. 18; and Mass.R.A.P. 20.

/s/ Cynthia M. Von Flatern__
Cynthia M. Von Flatern

Date: 12/11/2020

CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this date, I served the Commonwealth's Brief and Appendix through the Massachusetts Appeals Court's electronic filing system on the defendant though his attorney – Alan Black, Law Offices of Alan J. Black, 48 Round Hill Road, Suite 1, Northampton, Massachusetts 01060, alan.black@comcast.net.

Date: 12/11/2020

/s/ Cynthia M. Von Flatern__
Cynthia M. Von Flatern
Assistant District Attorney
Northwestern District
One Gleason Plaza
Northampton, MA 01060
(413) 586-9225
BBO# 550493

No. SJC-11839

COMMONWEALTH of MASSACHUSETTS,
Appellee,
v.
RYAN DANIEL WELCH,
Appellant.

On Appeal from a Judgment of the Superior Court

BRIEF FOR THE COMMONWEALTH

HAMPSHIRE COUNTY
