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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12975

HAMPDEN COUNTY

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COMMONWEALTH OF MASSACHUSETTS

v.

KEVIN O. ORTIZ

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REPLY BRIEF FOR APPELLANT KEVIN ORTIZ

ON APPEAL FROM THE JUDGMENT OF THE HAMPDEN SUPERIOR COURT

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TABLE OF CONTENTS

TABLE OF CASES 3

I. REPLY TO THE COMMONWEALTH'S ARGUMENTS 5

1. In a Case Based on an Informant's Tip He Was Selling Drugs from an Apartment, and in Which Police Corroborated Nothing But the Simple Fact Mr. Ortiz Would Deliver Drugs to an End Purchaser, Defendant's Brief Stop at the Acura Before the Transaction Did Not Make Out Probable Cause to Search It 5

2. Mancinone's In-Court Identification Was Substantive Evidence of Guilt, Not 'Mere Confirmation' Defendant Was the Person Police Arrested. Treating Officer Participation in an Investigation as Good Reason Under *Commonwealth v. Crayton* Would Open the Door to Hearsay and Prior Bad Acts Evidence Masquerading as Percipient Testimony 12

3. Neither the Prosecutor's Closing Argument Nor the Trial Judge's Accurate Instructions on the Elements of the Offenses Can Assure the Court Defendant's Distribution and Possession with Intent Convictions Were Based on Separate and Distinct Acts 19

II. CONCLUSION 24

CERTIFICATES OF COMPLIANCE AND SERVICE 25

TABLE OF CASES

Commonwealth v. Beal
474 Mass. 341 (2016) 21

Commonwealth v. Cast
407 Mass. 891 (1990) 6

Commonwealth v. Crayton
470 Mass. 228 (2014) 12-17

Commonwealth v. Dew
478 Mass. 304 (2017) 18

Commonwealth v. Escalera
462 Mass. 636 (2012) 7-8

Commonwealth v. Gouse
461 Mass. 787 (2012) 20-21

Commonwealth v. Kelly
470 Mass. 682 (2015) 20-23

Commonwealth v. Kennedy
426 Mass. 703 (1998) 10-11

Commonwealth v. Long
482 Mass. 804 (2019) 11-12

Commonwealth v. Luthy
69 Mass. App. Ct. 102 (2007) 9

Commonwealth v. O'Day
440 Mass. 296 (2003) 9

Commonwealth v. Rosa-Roman
485 Mass. 617 (2020) 6

Commonwealth v. Santaliz
413 Mass. 238 (1992) 10

Commonwealth v. Sheridan
470 Mass. 752 (2015) 9

Commonwealth v. Sweezey
50 Mass. App. Ct. 48 (2000) 11 n.2

Commonwealth v. Wallace
22 Mass. App. Ct. 247 (1986) 11 n.2

Commonwealth v. Wilkerson
436 Mass. 137 (2002) 8

I. REPLY TO THE COMMONWEALTH'S ARGUMENTS

1. In a Case Based on an Informant's Tip He Was Selling Drugs from an Apartment, and in Which Police Corroborated Nothing But the Simple Fact Mr. Ortiz Would Deliver Drugs to an End Purchaser, Defendant's Brief Stop at the Acura Before the Transaction Did Not Make Out Probable Cause to Search It

The Commonwealth acknowledges significant errors in the motion judge's factual findings, but insists nevertheless probable cause to search Rey Ortiz's Acura was established by Defendant's 'unusual behavior' in stopping at the car and retrieving a traffic vest ahead of the transaction, which the motion judge was entitled to determine was actually a pickup of the drugs transferred to undercover officer Mancinone. Com.Br:29-38.[1] Neither this factual finding/legal conclusion hairsplitting nor case law treating 'unusual behavior' as a factor in assessing probable cause to arrest when police observe a street crime, however, can change the fact that officers' observation of Defendant's brief stop at the Acura did not establish probable cause to search it in a

[1] Citations to the Commonwealth's Brief are identified as Com.Br:Page; citations to Defendant's main brief are identified as Def.Br:Page; citations to transcripts of the pretrial hearings and trial are identified as Month/Day:Page; citations to Defendant's Record Appendix are identified as RA:Page; citations to Defendant's Addendum are identified as AD:Page.

case where all police's prior information was that the Ortiz brothers were running an apartment-based distribution operation with no mention of an outside stash spot. The Court should reverse the order denying Mr. Ortiz's motion to suppress.

As the Commonwealth correctly points out, the motion judge "dr[e]w the inference that Kevin [Ortiz] retrieved drugs from the Acura" on the grounds "[t]here is no logical explanation for [Defendant] going to the Acura and having Rey remotely unlock it in order for [Defendant] to get a vest." Com.Br:32-33; RA:23; AD:64. The Commonwealth argues this Court is bound to accept that finding unless it is clearly erroneous, and probable cause is thus established by virtue of the motion judge's factual determination "the defendant used [the Acura] to store contraband." Com.Br:33-34 (citing *Commonwealth v. Cast*, 407 Mass. 891, 901-03 (1990)). By this neat trick of treating a factual finding as determinative of probable cause, the Commonwealth seeks to preclude this Court's independent review of the judge's ultimate findings and conclusions of law. See *Commonwealth v. Rosa-Roman*, 485 Mass. 617, 620 (2020). Two points are appropriate here.

First, the Commonwealth ignores the larger context. There is no dispute that, at the time they began their surveillance the morning of February 15, 2019, police believed, based on an informant's tip, the Ortiz brothers were "selling heroin from [Rey's] residence at 26 Niagara Street;" they had no information about an off-premises stash spot, whether in a car or anywhere else. RA:22; AD:63. Moreover, police made arrangements for the heroin purchase the preceding day; this was not a last-minute arrangement. 3/26:20; RA:22; AD:63. As the motion judge was well aware, "[b]efore a sale, the drug dealer either is in possession of drugs, or must proceed to a location to obtain the drugs." *Commonwealth v. Escalera*, 462 Mass. 636, 645 (2012).

The Commonwealth acknowledges, as it must, that the motion judge erred in finding Mr. Ortiz was at 26 Niagara Street the morning of February 15. Com.Br:14 n.6,30-31. In fact, there was no evidence about his whereabouts at any time between the February 14 phone call arranging the heroin purchase and his appearance at the Acura the next morning. But the only conceivable basis for the judge's finding Defendant obtained the drugs transferred to Mancinone at the Acura, however 'illogical' that stop may have appeared to him, was that Mr.

Ortiz went there and retrieved the vest *after* departing 26 Niagara Street—the base from which the brothers were selling drugs, according to police's purportedly reliable CI—and *before* meeting Mancinone, suggesting he was not in "possession of drugs [when he left 26 Niagara Street, and therefore had to] proceed to a location [the Acura] to obtain the[m]." *Escalera*, 462 Mass. at 645. Without his erroneous initial finding Mr. Ortiz was at 26 Niagara Street the morning of the transaction, the motion judge's own logic collapses, and the record does not support his dependent finding—made in contradiction to the CI's tip, other aspects of which police corroborated with their investigation—that Defendant had to obtain the drugs he passed to Mancinone somewhere else. The fact police did ultimately find drugs in the Acura cannot, of course, provide the missing support. *Commonwealth v. Wilkerson*, 436 Mass. 137, 140-41 (2002).

Second, even if the motion judge did properly find Defendant picked up the drugs transferred to Mancinone from the Acura, that factual finding does not answer the ultimate question of whether police's observations "establish[ed] probable cause to believe that a criminal amount of contraband was present in the car" after whatever

Defendant took from it was removed—i.e., that the Ortizes were storing the supply used in an ongoing operation there. *Commonwealth v. Sheridan*, 470 Mass. 752, 757 (2015). As Defendant points out in his brief, police relied solely on an informant who described apartment-based sales and forewent any sustained surveillance, and therefore were unable to observe any pattern to the brothers' purported operation that might have supported the inference they kept their supply at a particular location other than the one identified by the CI. See Def.Br:37-39. Moreover, as both this Court and the Appeals Court have observed, dealers operating ongoing, residence-based drug operations are unlikely to store their inventory in a vehicle. See Def.Br:39-41 (citing, *inter alia*, *Commonwealth v. O'Day*, 440 Mass. 296, 302-04 (2003) and *Commonwealth v. Luthy*, 69 Mass. App. Ct. 102, 107 (2007)). On this point, it is notable that police searched Rey's Acura without a warrant *before* they searched his apartment and did not find drugs. 3/36:27-35.

The Commonwealth does not even address these issues, except to say that homes enjoy greater search and seizure protection than cars, a point that is both true and largely irrelevant to the question of whether

Mr. Ortiz's single stop at the Acura created probable cause to search it in the context of an informant-driven case focused on apartment-based distribution. Com.Br:35,38. Instead, it directs the Court to two cases discussing determinations of probable cause to *arrest* and search incident to arrest when police believe they witness a street crime.

Relying on *Commonwealth v. Santaliz*, the Commonwealth says "[o]ne of the factors that this Court has consistently relied upon in the context of narcotic transactions is unusual behavior by the participants." Com.Br:36 (citing 413 Mass. 238, 241 (1992)). Of course, *Santaliz* was discussing facts "tend[ing] to establish that the defendant was currently committing a crime when he was observed" by police on the street. See 413 Mass. at 241. Here, police already knew Mr. Ortiz was committing a crime—they solicited it—and the only question was where he kept his heroin supply. In an informant case alleging an apartment-based operation, *Santaliz* sheds no light on whether a single, unexpected stop at the Acura ahead of the transaction created probable cause to believe the brothers' stash was in the car. *Commonwealth v. Kennedy*, another probable cause to arrest for street crime case in which a relevant factor was "that one of the participants was a known drug

dealer," also sheds little light on whether police had probable cause to search the Acura: police already knew, from their informant and their own prior encounters with them, the Ortizes were involved with drug distribution and were actively responding to the undercover officer's request to purchase, but that fact says nothing about where they stored their inventory. Com.Br:37 (citing 426 Mass. 703, 709 (1998)).[2]

As Defendant demonstrates in his brief, police needed more than a single, enigmatic stop at a location other than the one their informant told them was the Ortizes' base of operations to make out probable cause to search that off-premises site—a 'plus factor' applicable precedent shows usually comes from observed patterns of behavior in ongoing investigation cases. Def.Br:37-42. Neither the motion judge's dubious finding Mr. Ortiz obtained the heroin transferred to Mancinone from the Acura nor the probable cause to arrest cases relied on by the Commonwealth provide the necessary justification in the particular facts of this case. See *Commonwealth v. Long*, 482 Mass. 804, 809 (2019) ("Probable cause is a fact-intensive inquiry, and must be resolved

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[2] *Commonwealth v. Sweezey*, 50 Mass. App. Ct. 48 (2000) and *Commonwealth v. Wallace*, 22 Mass. App. Ct. 247 (1986), also cited by the Commonwealth in support of its 'unusual behavior' argument, are probable cause to arrest street crime cases as well.

based on the particular facts of each case"). The fruits of police's warrantless search of the Acura should have been suppressed.

2. <u>Mancinone's In-Court Identification Was Substantive Evidence of Guilt, Not 'Mere Confirmation' Defendant Was the Person Police Arrested. Treating Officer Participation in an Investigation as Good Reason Under *Commonwealth v. Crayton* Would Open the Door to Hearsay and Prior Bad Acts Evidence Masquerading as Percipient Testimony</u>

The Commonwealth suggests Mancinone's in-court identification of Mr. Ortiz as the person who sold him heroin was "simply a formal confirmation that the person arrested for the crime [wa]s the same person sitting in the courtroom," not substantive evidence of guilt, and that even if the undercover officer was not testifying based on personal observation the concerns animating *Commonwealth v. Crayton*, 470 Mass. 228 (2014), are not implicated here because the Court can assume Mancinone 'knew,' based on his department's file and his conversations with other officers, Mr. Ortiz committed the crime. Com.Br:41-44. The first of these claims is incompatible with the trial record. The second serves only to underscore the importance of applying *Crayton* to non-arresting officer eyewitnesses.

In the Commonwealth's framing of the issue presented, "[t]he defendant asks this Court to revise *Crayton's*" rule about which

categories of witnesses are included in its 'good reason' exception permitting in-court identifications without a prior unequivocal identification made through a non-suggestive out-of-court procedure. Com.Br:40. This statement misrepresents Mr. Ortiz's argument and *Crayton's* rule: the decision expressly found good reason in the case of arresting officers and implicitly found good reason in the case of officers who have prior familiarity with a defendant, but left the question of in-court identifications by non-arresting officer witnesses open. 470 Mass. at 241-43.[3] Defendant's case simply raises this unresolved question; he is not seeking a revision of *Crayton* but rather application of its principles.

The Commonwealth fault[s] Mr. Ortiz for "not request[ing] a *voir dire* of Officer Mancinone" pretrial to assess his basis of knowledge, but the prosecutor's statements at sidebar show the only basis for the undercover officer's claimed ability to recognize Mr. Ortiz was their few

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[3] The Commonwealth goes so far as to argue that "[h]ad the Court adopted the defendant's proposed rule before the arrest in this case, the police would not have relied on the statement in *Crayton* that officers involved in the arrest of the defendant were not required to take part in an out-of court showup or lineup." Com.Br:42. The record contains no indication of reliance, and of course police—to the extent they conducted themselves mindful of applicable precedent—were well aware Mancinone was not "involved in the arrest."

minutes together a year and a half earlier. Com.Br:42 n.16; 9/18:78-83. Moreover, *Crayton* "place[s] the burden on the prosecutor to move *in limine* to admit the in-court identification of the defendant by a witness where there has been no out-of-court identification;" defendants need not try to ferret out the state of knowledge of witnesses who may not even be asked to make in-court identifications. 470 Mass. at 243.

Here, the prosecutor did move *in limine* shortly before trial to permit an in-court of Mr. Ortiz by Mancinone, and Defendant objected and attempted to make his case. RA:29; 9/16:74. Although the trial judge cut off motions for the day before addressing the question of Mancinone's proposed identification of Mr. Ortiz, his comments earlier in the session asking "[i]t's going to be an arresting officer testifying this is the person he arrested?" and responding to the prosecutor's assertion *Crayton* "goes to civilian witnesses, Your Honor…these are officer witnesses" by saying "I don't think there's necessarily that distinction," see 9/16:37,57, show he recognized investigating officers do not fall within *Crayton's* 'good reason' exception. Counsel then argued the issue at sidebar during trial, and as Defendant points out in his main brief, see Def.Br:20-21, the trial judge did not find good reason but

rather bypassed the question because he was convinced of Mr. Ortiz's guilt. See 9/18:79-83.

To treat the non-arresting officer in-court identification at issue here as "merely confirm[ing] that the defendant is the person who was arrested for the charged crime…rather than as identification evidence" on the question of guilt or innocence would defy the record. *Crayton*, 470 Mass. at 242; see Com.Br:41-42. Mancinone began his identification testimony before making any actual identification, first testifying over objection "a minute or two [after the lookout departed the spot where Mancinone expected to meet the dealer], Mr. Ortiz arrived." 9/18:57. After the prosecutor clarified "Mr. Ortiz, do you know his first name?" and Mancinone replied "Kevin," the undercover officer explained how he got in Mr. Ortiz's car, exchanged money for what he believed was heroin, and then got out. 9/18:58-62. After a sidebar to deal with *Crayton* issues, the prosecutor asked Mancinone "do you see the individual that you purchased what you believe to be heroin from…in the courtroom today?" and Mancinone, again over objection, identified Mr. Ortiz. 9/18:78-83.

To pretend this testimony was 'mere confirmation the defendant is the person arrested,' rather than substantive evidence of guilt on the charge of heroin distribution, is absurd. Any lingering question on this point is resolved by the prosecutor's closing argument that, whatever flaws jurors might perceive in the Commonwealth's case, they should convict Defendant based on evidence "Officer Mancinone gets into his vehicle. He sat there [on the stand] and he said, 'That's the guy I bought the heroin from.'" 9/23:47.

The Commonwealth urges this Court to look past the absence of either 'good reason' or a non-suggestive procedure ahead of trial in this case, and to read *Crayton's* 'good reason' standard to include investigating officers, based on "the way police conduct investigations," the fact identifying "officer[s] already believe[] in the[ir] department's identification of the defendant" regardless of the state of their personal knowledge or observations, and because an investigating officer "not only knows who the police suspect[] committed the crime but has likely seen the photograph the police have on file of the defendant." Com.Br:41-43. In-court identification of a criminal defendant from an eyewitness to a crime on the substantive question of guilt or innocence,

based not on firsthand observation but on hearsay and prior bad act evidence obtained from files and other police officers—this is what the Commonwealth proposes to use to deprive citizens of their liberty? Mr. Ortiz explains in his brief why such an approach to identification evidence is inconsistent with fundamental fairness and jury trial rights. Def.Br:48-50. The Commonwealth does not even respond to these points, and instead treats the vices Defendant identifies as virtues.

Nothing in the record suggests Mancinone had any prior familiarity with Mr. Ortiz before the transaction at issue, let alone sufficient familiarity with him to recognize him during it. Nor does the record suggest Mancinone participated in any sort of confirmatory post-transaction identification procedure any time in the eighteen months between arrest and trial. The prosecutor did not make an offer of proof on either of these fronts when Defendant challenged the identification, instead relying exclusively on Mancinone's proximity to Mr. Ortiz for two or three minutes a year and a half earlier. See 9/16:74; 9/18:79-83. On this record, Mancinone's in-court identification violated *Crayton* and should not have been admitted.

The Commonwealth labors to denigrate its case against Jose Vargas so as to distract from the prejudice Mancinone's improper in-court identification caused Mr. Ortiz, but these efforts are unconvincing. See Com.Br:44-46. The trial record overflows with evidence of Vargas's involvement in the joint venture distribution: his departure from 26 Niagara Street to monitor Mancinone's arrival at the gas station; his 'all clear' call after observing the undercover officer for an extended period; his attempts to prevent police from accessing locations important to the operation; identifications of him by multiple other police officers; and expert testimony explaining Vargas's role in the distribution operation. 9/18:52-56,126-28,149-51; 9/19:20-25,42-49,96. The only thing missing, and which therefore plainly made the difference between conviction and acquittal, was an in-court identification by the undercover officer—something Mr. Ortiz alone was subject to. Contrast 9/18:83,85. At the very least, the Court cannot say otherwise with assurance. *Commonwealth v. Dew*, 478 Mass. 304, 322-23 (2017) (Gants, C.J., concurring). Defendant's distribution conviction must be reversed.

3. Neither the Prosecutor's Closing Argument Nor the Trial Judge's Accurate Instructions on the Elements of the Offenses Can Assure the Court Defendant's Distribution and Possession with Intent Convictions Were Based on Separate and Distinct Acts

The Commonwealth acknowledges, if only tacitly, that neither the indictments nor the verdict slips identified separate amounts or locations of heroin that were the subjects of the respective distribution and possession with intent charges, that the trial judge did not associate his instructions on these two charges with discrete amounts or locations of the drug, and that the judge did not tell jurors they could only convict Mr. Ortiz of both counts if their verdicts were based on separate and distinct acts. Nevertheless, it insists the trial judge's correct instructions on the elements of the two offenses, when considered alongside the prosecutor's attempt to associate separate amounts of heroin with the separate counts, eliminate any risk of duplicative convictions. This Court has previously rejected such specious arguments in analogous cases, and it should do so here as well.

The fact the trial judge "reminded the jury that there were two separate allegations: one for distribution and one for possession with the intent to distribute" is not at issue here; whether he told them these

separate allegations could not yield separate convictions based on the same amount of heroin is. Com.Br:51; see *Commonwealth v. Kelly*, 470 Mass. 682, 701 (2015) ("That the judge instructed the jury several times that they must consider each indictment separately did not equate to informing the jury that these two charged offenses must be factually based on separate and distinct acts"). Quoting *Commonwealth v. Gouse*, the Commonwealth asserts that "[a]lthough the judge did not use the exact words 'separate and distinct act,' he made perfectly clear that the two indictments were based on separate acts." Com.Br:52 (quoting 461 Mass. 787, 799 (2012)). In *Gouse*, which involved separate charges of assault and battery and assault and battery with a deadly weapon, the trial judge told jurors one charge "refer[red] to the alleged incident of…taking a closed fist and striking the area above the eye" and the other "referred to…kicking with a shod foot," differentiating the counts by reference to trial evidence. 461 Mass. at 799.

The judge here did nothing of the sort. In fact, he did not mention separate amounts of heroin, or the particulars of the case more generally, in the relevant instructions at all. This case is far more like *Kelly*, which distinguished *Gouse* and found an unacceptable risk of

duplicative convictions where “neither the indictments nor the verdict slips received by the jury identified the respective conduct for each charge. Not only did the judge not use the words ‘separate and distinct acts’…but, alternatively, he also did not describe with particularity which alleged acts supported which charges.” 470 Mass. at 701-02. Here, as in *Kelly*, “[o]n the basis of the instructions given, it is impossible for [this Court] to know on which facts each conviction rested.” *Id*. at 702.

Attempting to avoid the force of *Kelly* in light of a record that shows neither indictments, verdict slips, nor instructions associated the separate counts with discrete caches of heroin, the Commonwealth insists “[t]he prosecutor’s closing argument ameliorated any possible confusion.” Com.Br:53. This Court rejected the premise that prosecutorial argument, which of course is not evidence or instruction, could appropriately guide jurors and avoid the risk of duplicative convictions in both *Kelly*, 470 Mass. at 701-02, and *Commonwealth v. Beal*, 474 Mass. 341, 348 (2016). It should do so here as well, where the only *suggestion* of a separate and distinct acts requirement was the prosecutor’s “ask” that jurors associate different amounts of heroin with

the different counts, and even that request was confused by the prosecutor's reference to heroin accessible to "Kevin Ortiz, prior to the sale to Officer Mancinone" in the context of his possession with intent argument. 9/23:51. That vague statement cannot protect Defendant from the risk of duplicative convictions.

Finally, arguing against the theory it pursued when trying Rey Ortiz below, the Commonwealth assures the Court there is no risk of duplicative convictions here "because the jury acquitted Rey of distribution. Clearly, they were able to discern between the drugs that formed the basis of the possession with intent charge—those stored in Rey's car—and those that formed the basis of the distribution charge—the heroin the defendant sold to Officer Mancinone." Com.Br:53. This position makes no sense, as both charges were predicated on a joint venture between the brothers, and there was no reason for the jury to acquit Rey of distributing through Defendant's acts of pickup and sale heroin to which he controlled access while convicting Defendant of possessing the heroin to which the evidence showed Rey controlled access. Moreover, the Commonwealth conveniently omits the fact jurors acquitted Mr. Ortiz of possession of the cocaine also found in the Acura,

see 9/23:109; RA:32, a verdict that again makes no sense if they held him responsible for drugs stored there.

A far more likely reading of the verdicts is: the evidence never showed Mr. Vargas possessing or controlling any amount of drugs, and jurors acquitted him completely; the evidence showed Rey controlled access to the drugs police found in the Acura, and jurors convicted him on the two counts related to them while acquitting him of distribution, as he did not physically participate in the transaction with Mancinone; and the evidence showed Defendant physically possessed and controlled the heroin he passed to the undercover officer, and jurors (not having been instructed otherwise) convicted him of both greater and lesser offenses based on that act, while acquitting him of any act related to the drugs in the Acura, to which the evidence did not show he ever controlled access. As this recitation shows, "there is a[] significant possibility that the jury may have based convictions of greater and lesser included offenses on the same act." *Kelly*, 470 Mass. at 701. Defendant's conviction for possession with intent to distribute heroin must be reversed.

III. CONCLUSION

For the foregoing reasons, as well as those set forth in Defendant's main brief, the Court should reverse the order denying Defendant's motion to suppress, reverse Defendant's convictions, and remand his case to the Superior Court with an order directing suppression of the heroin and cocaine found in the Acura and a new trial on the distribution of heroin charge.

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By His Attorney,

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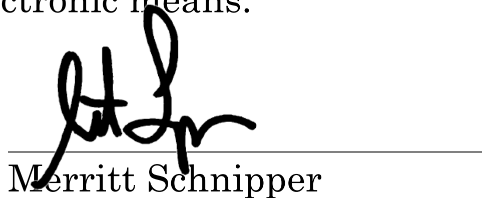
CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable provisions of Mass. R. A. P. 16, 20, and 21. This brief complies with the applicable length limitation set forth in Mass. R. A. P. 20 because it is in Century Schoolbook, a proportional font, 14 point, and contains fewer than 4,500 non-excluded words.

Merritt Schnipper

CERTIFICATE OF SERVICE

I certify that on January 20, 2021 I filed Appellant Kevin Ortiz's reply brief in *Commonwealth v. Kevin O. Ortiz*, SJC-12975, with the Massachusetts Supreme Judicial Court through the Court's electronic filing service, which will automatically serve the same on ADA David Sheppard-Brick (50 State Street, Springfield MA 01102, david.sheppard-brick@state.ma.us), counsel for the Commonwealth of Massachusetts, by electronic means.



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