COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. MIDDLESEX SUPERIOR COURT
NO. 82-2399-2407

COMMONWEALTH OF MASSACHUSETTS

v.

VICTOR ROSARIO

MOTION FOR NEW TRIAL

Now comes Mr. Rosario pursuant to Mass. R. Crim. P. 30(b), and moves this court for a new trial. As grounds therefore Mr. Rosario states as follows:

In 1983, Mr. Rosario was convicted of arson of a building and, as a consequence of the arson, eight counts of murder. Mr. Rosario seeks relief under Rule 30(b) on the following grounds: (1) newly discovered arson evidence have shown conclusively that the evidence relied upon by the Commonwealth to prove Mr. Rosario's guilt is false; (2) Mr. Rosario's statements signed after an all-night unrecorded interrogation are inconsistent with the evidence, were likely the product of improper police interrogation techniques now known to result in false confessions, and have been shown through new medical evaluations to be the product of an undiagnosed organic brain disorder that rendered him incapable of giving a voluntary statement; (3) Mr. Rosario received ineffective assistance of counsel where his trial attorney failed to adequately litigate the voluntariness of his confession and failed to retain an arson expert to advise him about the flaws in the Commonwealth's theory that the fire was started by means of Molotov cocktails.

7/7/14 After hearing, Allowed. See Memorandum of Decision and Order issued this date. KMJ Sullivan, J.

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
CRIMINAL ACTION
No. 82-2399-2407

COMMONWEALTH

vs.

VICTOR ROSARIO

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

Thirty-two years ago, on March 5, 1982, three adults and five children died tragically from carbon monoxide poisoning and smoke inhalation in a three-alarm fire in a multi-unit apartment building in Lowell. After the defendant confessed to setting the fire with two other men using Molotov cocktails, he was indicted and convicted for one count of arson and eight counts of second degree murder. His conviction and the trial judge's order denying his first motion for new trial were affirmed by the Appeals Court in 1985.[1] The defendant filed a second new trial motion and a supplement thereto which were denied by the trial judge in 1995 in a memorandum of decision and order. That order was affirmed by the Appeals Court in 1988.[2] Now before the court is the defendant's third motion for new trial where he contends that newly discovered fire science evidence and newly discovered evidence that his confession was false and involuntary, together with errors made by his trial counsel and by subsequent appellate counsel, demonstrate that justice was not done and that he is therefore entitled to a new trial.

After my determination that the defendant's motion raised substantial issues that were supported by an adequate showing, Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004);

[1] Commonwealth v. Rosario, 21 Mass. App. Ct. 286 (1985).
[2] Commonwealth v. Rosario, 45 Mass. App. Ct. 1105 (Memorandum and Order pursuant to Rule 1:28) (June 24, 1998).

Commonwealth v. Stewart, 383 Mass. 253, 260 (1981), a six-day evidentiary hearing was held on March 3, 4, 5, 6, 7 and 10, 2014. After hearing, I conclude that the defendant has met his burden to establish that justice was not done in this case based on evidence implicating the voluntariness of his confession as well as evidence regarding developments in fire science investigation. Accordingly, the defendant's motion for a new trial is **ALLOWED**.

Factual Background

The following facts are taken primarily from the transcripts of the proceedings. I have also considered the Appeals Court's review of the case in Commonwealth v. Rosario, 21 Mass. App. Ct. 286 (1985), and the exhibits the parties provided with their filings. See Commonwealth v. Grace, 397 Mass. 303, 306 (1986) (noting that "judicial analysis" applied in motion for new trial based on newly discovered evidence "requires a thorough knowledge of the . . . proceedings").

I. The Fire

Shortly after 1:00 A.M. on March 5, 1982, 911 received the first call regarding a fire located at 32-34-36 Decatur Street ("Building"), Lowell, Massachusetts. At the time that Lowell police officer Dennis Cormier arrived on the scene, "seconds" before the firefighters, he "observed the rear of the [B]uilding . . . was in flames" and he "could see fire coming from the second and third floors of the [B]uilding . . . ." Trial Transcript ("Tr."), VR000169-VR000170. Lowell police officer Ronald Potvin arrived just at the firefighters were arriving, and he "noticed a [Building] that was fully engulfed in flames." Tr., VR000167.

Deputy Chief Thomas O'Connell ("Deputy Chief O'Connell") was the first senior officer to arrive at the fire, and, upon his arrival, "[t]he fire enveloped the front of the [B]uilding. It was traveling up the front stairway and overlapping – it broke out the windows on both sides in the

front, and overlapping to the second and third floor." Tr., VR000207-VR000208. Captain Vernon Rockers arrived at the Building "[n]ot much more than a minute" after the first alarm had sounded, and by that time, "[t]he first floor was fully involved, overlapping fire, which was going up and into the second floor, stairway fully involved, three floors, and fire radiating heat impinging upon the building next door, to the left of the building." Tr., VR000194-VR000195.

As soon as Deputy Chief O'Connell arrived at the scene, he "immediately struck a second alarm." Tr., VR000207. This second alarm sounded within one to two minutes of the first alarm. Tr., VR000173. By the time the third alarm sounded, the "fire was down some" and the firefighters were able to enter the Building. Tr., VR000210-VR000211. It took the firefighters about an hour to get the fire "[u]nder control . . . ." Tr., VR000174; Tr., VR000196. Eight bodies were recovered from the Building, four on the back stairs, including Efrain Cortez, and four in the back bedroom on the first floor. The cause of death of each individual was carbon monoxide poisoning and smoke inhalation.[3]

Eyewitnesses who lived near the Building testified to their observations of the fire. Robert Arthur lived across the street from the Building in a first-floor apartment at 37 Decatur Street. At some point between 12:00 A.M. and 1:00 A.M. on March 5, 1982, he woke to "noise and the sound of breaking glass." Tr., VR000154, VR000156. He looked out his window and saw a "small fire starting" in the first floor at the front of the Building. Tr., VR000154. He walked to his kitchen to call the Fire Department and learned that the fire had already been reported. Id. When he returned to his bedroom minutes later to look out the window again, he "noticed that the [B]uilding was totally engulfed in fire[,]" id., with the flames "just up the front and up the side." Tr., VR000157.

[3] The parties stipulated that the individuals named as victims in the indictments are the same individuals named in the death certificates. Tr., VR000600-VR000601.

Marie Hinchee lived in a third-floor apartment at 24 Decatur Street, the first building to the left when facing the Building. She was in bed when she heard what sounded like rain drops, then she smelled smoke and heard someone yelling one word in Spanish. Tr., VR000164. She looked out the window and "could see a little fire, like right on the ground level" of the Building, so she called the Fire Department. Id. Once she was finished with her call, "the whole side of the [B]uilding had gone up. It was all the way to the top, and the flames were right outside [her] window." Id. She estimated that it took the Fire Department approximately five to ten minutes to arrive at the scene. Tr., VR000165.

Danelia "Tata" Martinez ("Martinez") lived at 44 Decatur Street, located to the right of the Building with an alley between them. Two to four minutes prior to her sister-in-law's alerting her to the presence of a fire at the Building, Martinez let Felix Garcia ("Felix") into her apartment after he knocked at her back door; she did not admit the defendant or Felix's brother, Elgardo Garcia ("Elgardo"). Upon learning of the fire, Martinez went outside and saw the defendant and Elgardo breaking windows of the Building; the defendant hurt his hand. The defendant was at Martinez's apartment for two to three hours after the fire. She testified that, during this period, the defendant was crying and nervous, but he appeared to understand what she said to him, and his responses made sense. Tr., VR000508.

Edward Evans ("Evans") testified to his observations of the fire as well as to having seen the defendant in front of the Building. Evans lived at 12 Decatur Avenue, Lowell, Massachusetts, located down a side street from the Building; his kitchen window faced the Building. He had spent the evening of March 4, 1982, at a men's club, and his friend dropped

him off at the corner of Salem Street and Decatur Street at approximately 1:05 A.M.[4] Evans walked up Decatur Street towards Decatur Avenue; he did not walk on the sidewalk but a couple of feet from the left-hand sidewalk. Tr., VR000564. As he walked up the street, he noticed a man standing with his back turned; the man was also in the street, but closer to the left-hand sidewalk, a location which brought him closer to the Building's bay window that extended a bit over the sidewalk. Tr., VR000564-VR000565. Evans heard a window crash, turned to his left, and looked at the bay window. He saw that the bay window "was smashed half way up and down . . . ." Tr., VR000552. By then, Evans was about three to four feet from the man, and Evans turned to face him, looking him straight in the face; the man's left arm was raised,[5] but Evans did not see him throw anything and did not see anything in his hand. Tr., VR000552, VR000554, VR000563, VR000565-VR000566. Evans also saw a second man a few feet away with his back turned, and a third man, also with his back turned, a few feet away from the second man. Tr., VR000552.

Evans continued home. Once inside, he looked out his kitchen window and saw "the whole first floor [of the Building] engulfed in flame[s], from top to bottom." Tr., VR000553. Evans' wife got up when he called her, and by the time she looked out the window, "the second floor was completely up. In a matter of not very long, the third floor was up." Id.

Evans spoke to arson investigators at various times between the evening of March 5, 1982, and March 8, 1982. Tr., VR000433-VR000434 (noting that Evans was "evasive" during March 6th conversation); Tr., VR000555-VR000558; Tr., VR000572-VR000575. Evans

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[4] At the probable cause hearing, Evans testified that his friend left him off "at approximately one o'clock or a few minutes either way." VR001233. At the motion to suppress hearing, Evans testified that he left the club "around five minutes of one. It was cold. [His friend] had to defrost his windows and scrape them." VR001188.

[5] On cross-examination, defense counsel pointed out that in his initial report to the police, dated March 8, 1982, Evans stated that the man's *right* arm was raised. Tr., VR00566-VR000567; see VR002116 (Evans' March 8, 1982, statement to police). Evans testified that whoever typed up his statement made a mistake. See Tr., VR00567-VR000571; see Rosario, 21 Mass. App. Ct. at 288 n.2 (noting that "[i]t was open to the jury to find that the defendant is left handed).

described the first man he had seen as Puerto Rican, about five feet, five or six inches with a thin mustache, but Evans was unable to pick him out of a photo array. Tr., VR000555-VR000556. After seeing the defendant's photograph on the front page of The Lowell Sun, and before reading the accompanying headlines and article, Evans was able to identify the defendant as the first man he had seen. Tr., VR000558; see Tr., VR000283 (noting that Evans spoke to police on evening of March 8, 1982, about recognizing defendant in Lowell Sun photograph); see also VR001383 (Trial Exhibit #47, photograph from The Lowell Sun).

II. The Investigation of the Fire

The fire "had reached such a stage" and had moved so rapidly by the time he arrived at the Building that Deputy Chief O'Connell immediately contacted the arson squad to investigate the fire. Tr., VR000209. Inspector Harold G. Waterhouse ("Inspector Waterhouse"), an arson investigator attached to the Lowell police department, Lieutenant William Gilligan ("Lieutenant Gilligan") of the Lowell fire department arson squad, and Sergeant David A. Coonan ("Sergeant Coonan") of the State Police, and assigned to the office of the State Fire Marshal, testified about their investigation of the fire. Inspector Waterhouse and Lieutenant Gilligan arrived at the Building after 2:00 A.M. on March 5, 1982, and Sergeant Coonan arrived at the Building at approximately 10:00 A.M. on March 5, 1982.

By 2:30 A.M. on March 5, 1982, the exterior of the Building had "heavy burning, heavy smoke" while other areas had "no burning whatsoever . . . ." Tr., VR000321. Later that morning, around 10:00 A.M., there was "heavy charring" on the exterior of the front of the Building, with the burn starting "from the top portion of the living room [i.e., the first-floor room facing Decatur Street] windows." Tr., VR000216. The charring on the front, right, and left sides of the building extended up to the second floor, then to a lesser degree to the third floor. Tr.,

VR000218-VR000219, VR000221. This exterior damage indicated that the fire had "com[e] from so many isolated locations at what appeared to be about the same time . . . ." Tr., VR000222. This occurrence was "unusual" and made one investigator "immediately suspicious . . . as to what the cause of the fire was . . . ." Id.

The investigators also examined the Building's interior, identifying three areas of significance.[6] The first area was the base of the stairway from the front hallway to the second floor where the lower step "was completely burned away" with "lesser burn along the riser . . . ." Tr., VR000226-VR000227. One investigator observed that "the fire had traveled up the stairway causing considerable charring and burning." Tr., VR000223. "[T]he low point of burning on the hallway and down burning in the stairs" suggested that flammable fluid had been used. Tr., VR000323.

The second area of significance was the front hallway and the threshold into the living room. The flooring was "a tongue and groove hardwood floor[,]" and there was "deep burning within the cracks" of the floor, as well as very low burning and charring of the baseboard and the threshold. Tr., VR000227. This low burning "was indicative of a flammable burning fluid flowing on the floor, and burning intensely, especially little crevices, the cracks in the floorboards, where if a flammable fluid were burning, it would flow down between these cracks and cause that type of charring and burning." Tr., VR000229.

The third area of significance was the kitchen. The common wall between the hallway and the kitchen was not intensely burned, Tr., VR000231, nor were the kitchen counters and ceilings, Tr., VR000233; Tr., VR000323 (observing "no communication" of fire through common wall between hallway and kitchen). Rather, the heaviest burning was in the back area

[6] During his direct examination, Sergeant Coonan drew the letters "H" and "L" on a floor plan of the Building's interior (Trial Exhibit #41) to indicate areas of "heavy" burning and "light" burning. Tr., VR000231-VR000232; VR001328 (Trial Exhibit #41).

of the kitchen. See Tr., VR000233. The interior walls at the back of the kitchen "were exposed. . . . [and] the studs were exposed and partially burnt," as was the area beneath the back side window and the cabinets closer to the rear door. Tr., VR000233, Tr., VR000240-VR000241; see Tr., VR000326, VR000328 (observing that fire "burnt the doors right off these kitchen cabinets"); see also Tr., VR000326 (noting that "heat and smoke damage [went] through" to back bedroom on first floor). There was also heavy burning between the tiles on the floor in the back area. Tr., VR000236. The door to the back hall had heavy burning at the bottom, with an area of about eighteen inches long and three-quarters of an inch high "burnt completely away[,]" and that the threshold between the kitchen and the back hall showed heavy charring. Tr., VR000236-VR000237. The area under a door "would normally be protected from fire within the room[;]" therefore, "the burning of the threshold and the bottom edge of the door had to be caused by a flowing, flammable liquid." Tr., VR000238-VR000239; see Tr., VR000324 (opining that flammable fluid had been used given burn pattern on the kitchen floor).

Based on these observations of "the extremely low burning, heavy charring, the patterns burnt into the floor, evidence of a flammable, flowing fluid, and the fact that . . . [the common wall between the hallway and the kitchen] wasn't penetrated by fire from one room to the next[,]" Tr., VR000242, Tr., VR000429, the investigators determined that there were at least two points of origin: "in the hallway just at the foot of the stairs leading to the second floor[;]" and "in the kitchen . . . along the wall to the outside and along the kitchen cabinets." Tr., VR000322; Tr., VR000242. Eliminating the possibility that electricity or human error had caused the fire in the front hallway,[7] Tr., VR000243-VR000244, the investigators concluded that it was an incendiary fire and that an accelerant had been used. Tr., VR000246-VR000247; Tr.,

[7] On cross-examination, Sergeant Coonan testified that he did not notice the heating unit that was located in the living room and that while he "observed" the stove in the kitchen, he did not know if it was a "gas, oil, electric or some other sort of stove[.]" Tr., VR000253.

VR000323, VR000325; Tr., VR000430.

Francis Hankard of the Massachusetts Department of Public Safety tested and detected no flammable fluids on a sample of wood from the first-floor living room, a sample of flooring from the front hallway, a sample of the threshold between the hallway and the kitchen, and a sample of liquid from a container in the kitchen. Tr., VR000390;[8] see Tr., VR000252-VR000253 (testifying that tests showed that "[t]here was no flammable fluids in those portions of the wood"); Tr., VR000329-VR000330 (testifying that debris was sent to state chemist for analysis "to see if he could find a flammable fluid from the debris").

III. The Investigation of the Defendant

Inspector Waterhouse became aware of the defendant's name on the morning of Saturday, March 6, 1982, after learning that the Red Cross had treated him at the scene of the fire and taken him by ambulance to St. Joseph's Hospital. Tr., VR000331-VR000332. Inspector Waterhouse spoke to Inspector Garrett Sheehan ("Inspector Sheehan") of the Lowell police department. Tr., VR000264; Tr., VR000333-VR000334. As a result of that conversation, Inspector Sheehan and Sergeant John Newell ("Sergeant Newall") also of the Lowell police department went to speak to the defendant at the defendant's third-floor apartment at 38 Branch Street, Lowell, where he lived with Carmen Garcia and her three children. Tr., VR000264-VR000265.

Inspector Sheehan and Sergeant Newall spoke to the defendant for approximately twenty to twenty-five minutes about events that had occurred during the early morning hours of March 5, 1982, with fourteen year old Luz Garcia acting as a translator. Tr., VR000266-VR000267; see

[8] The defendant submitted Francis Hankard's report with his new trial motion. VR002072-VR002073. The defendant also submitted documents concerning testing that the Federal Bureau of Investigation conducted on glass fragments and pieces of metal found in the debris from the fire, a gasoline can and a can of Red Devil paint varnish recovered from the defendant's basement, liquid from the gasoline can, and fingerprints from the defendant, Felix, and Elgardo. VR002075. This testing did not reveal anything significant. See VR002078-VR002080.

Tr., VR000301-VR000302. The defendant told them that he and Felix had been drinking at the Laconia Lounge on the evening of March 4, 1982, and when they left, they decided to take a short cut home via Decatur Street. Tr., VR000267-VR000268. He observed black smoke coming out of the Building and ran to the front door, but he could not enter because "the hallway was full of flame and smoke . . . ." Tr., VR000268. "He then said that he broke several windows to the right of the front door and tried to get the people out. He stated that he could hear the people [inside] screaming." Id. The defendant "appeared somewhat nervous . . . . [and] somewhat saddened" during his conversation with the police, Tr., VR000266-VR000267, Tr., VR000303, but he understood the questions and was responsive, and his answers made sense. Tr., VR000268-VR000269; Tr., VR000302-VR000303; Tr., VR000309.[9]

The defendant and Luz Garcia accompanied Inspector Sheehan and Sergeant Newall to the second-floor apartment of 38 Branch Street where Felix lived. Tr., VR000270; Tr., VR000310. Inspector Sheehan and Sergeant Newall spoke with Felix for approximately fifteen minutes and received the same information that the defendant had given them. Tr., VR000270-VR000271; Tr., VR000310-VR000311.

Later in the evening of March 6, 1982, in a Lowell parking lot, Inspector Sheehan and Sergeant Newall exchanged information with Inspector Waterhouse and Lieutenant Gilligan who, by that time, had spoken with Evans. Tr., VR000271-VR000273; Tr., VR000311; see Tr., VR000334-VR000339. Inspector Waterhouse and Lieutenant Gilligan relayed to Inspector Sheehan and Sergeant Newall Evans' description of the man he had seen in front of the Building. See Tr., VR000272-VR000274; Tr., VR000338-VR000339. As a result of this exchange of information, Inspector Sheehan and Sergeant Newall returned to the defendant's apartment at

[9] At the motion to suppress hearing, Luz Garcia testified that, for some questions, the defendant "would answer right; but in some parts, he was just, not screamed, just like, like, higher his voice in some parts, but not rudely." VR000978.

10:35 P.M. and asked him to accompany them to the police station to answer some questions about the fire; they brought him to the police station, then the defendant was taken to Inspector Waterhouse's office in the fire department. Tr., VR000274-VR000275; Tr., VR000311-VR000312.

While Inspector Sheehan and Sergeant Newall retrieved the defendant on the night of March 6th, Inspector Waterhouse and Lieutenant Gilligan picked up Ramon Nieves ("Nieves") who was to serve as a translator for their conversation with the defendant.[10] Tr., VR000339. But see Tr., VR000447 (stating that only Lieutenant Gilligan picked up Nieves); Tr., VR000458-VR000459 (same). When Nieves first saw the defendant, "[h]e appeared calm" and "wasn't nervous." Tr., VR000462, Tr., VR000473.

IV. The Defendant's Three Statements

The office in the arson unit in which the interrogation took place was about twelve feet wide, thirty-four feet long and contained Inspector Waterhouse's and Lieutenant Gilligan's desks, a desk with a typewriter, a small table, and three cabinets. Tr., VR000340-VR000341. There was also a telephone in the room, and Nieves testified that the defendant was not "informed of the right to make a phone call while" Nieves was in the room with him. Tr., VR000474. In that room, between approximately 11:00 P.M., March 6, 1982, and 5:00 A.M., March 7, 1982, the defendant made three statements to Inspector Waterhouse and Lieutenant Gilligan regarding his actions in connection with the fire. See Rosario, 21 Mass. App. Ct. at 287. Throughout that time period, the defendant visited the restroom unescorted, he was permitted to smoke, and there was food available. Tr., VR000350; Tr., VR000445.

[10] Nieves testified on cross-examination that he had previously served as a translator a couple of months earlier "[t]o interview some people on Decatur Street. . . . relative to a suspicious fire" that had also occurred in the Building. Tr., VR000476.

Before the defendant made the first and second statements,[11] Inspector Waterhouse read the Miranda warnings to the defendant using a form; also using a form, Nieves translated the warnings into Spanish; and the defendant agreed to speak and signed a waiver form. Tr., VR000342-VR000345, VR000351-VR000353; Tr., VR000460-VR000461, VR000465-VR000466; VR002118-VR002119 (Trial Exhibits #31 and #33). The questioning during that period followed a consistent format of Inspector Waterhouse's presenting the question to Nieves,[12] and Nieves' translating the question for the defendant and relaying the defendant's response to Inspector Waterhouse; then Inspector Waterhouse typed up his notes of each statement, Nieves read the typed statement in Spanish to the defendant, and the defendant signed the typed statement. See Tr., VR000345-VR000348, VR000354-VR000355; VR000362; Tr., VR000436, VR000439; Tr., VR000462, VR000474-VR000475, VR000483.

A. Defendant's First Statement

The defendant was already seated in the arson office when Nieves arrived, and at that time, the defendant "was calm. He wasn't nervous." Tr., VR000473. In his first statement, the defendant told Inspector Waterhouse and Lieutenant Gilligan that he, Felix, and Elgardo had gone to the Laconia Lounge on the evening of Thursday, March 4, 1982. Tr., VR000347; VR001416 (Trial Exhibit #32). When they left there at around 1:00 A.M. on Friday, March 5, 1982, they decided to take a short cut down Decatur Street. Id. The defendant saw smoke

[11] From their testimony, it appears that Inspector Waterhouse and Lieutenant Gilligan considered the defendant's third statement to be a continuation of his second statement, see Tr., VR000361, VR000413, VR000453-VR000454, and the second waiver form that the defendant signed indicates that the interview ran from 1:55 A.M. to 5:00 A.M., VR002119, covering the time period during which the defendant made the second and third statements. See, e.g., Tr., VR000408, VR000416, VR000439, VR000484.

[12] On cross-examination Nieves confirmed that he had previously stated that, at times during his questioning of the defendant, "Waterhouse got up, walked around the room, turned around and asked questions quick and in a rapid manner[.]" Tr., VR000478. Inspector Waterhouse denied on cross-examination that he walked around the room asking questions of the defendant; unless he got up to get food or coffee, Inspector Waterhouse remained seated while he questioned the defendant. Tr., VR000414-VR000415, VR000422. He also denied yelling at the defendant during the questioning. Tr., VR000421.

coming from the Building, so he broke first-floor windows at the front and the right side of the Building to help the people inside; he cut his hand while breaking the windows, and an ambulance brought him to St. Joseph's Hospital. Tr., VR000348-VR000349; VR001416 (Trial Exhibit #32); VR001282-VR001284 (Trial Exhibit #50).

The defendant completed making this first statement at approximately 12:15 A.M. Tr., VR000349, VR000407. Throughout this interrogation, the defendant was nervous, but he appeared to understand the questions, and he gave responsive and coherent answers. Tr., VR000345-VR000346, VR000350, VR000406; Tr., VR000437; Tr., VR000463.

After making his first statement, the defendant asked to speak to Nieves alone, so Inspector Waterhouse and Lieutenant Gilligan left the room. Tr., VR000350; Tr., VR000438; Tr., VR000464. Alone with Nieves, the defendant told him that Felix and Elgardo "were playing with his mind; that he wanted to get even. Then he . . . lifted his sleeve from his right arm and showed [Nieves] something that looked like a needle mark. And he said that Elgardo and Felix Garcia made him shoot up drugs. . . . [s]ometime the night before." Tr., VR000464. The defendant did not say anything to Nieves about his involvement with the fire, but, after they had spoken for "awhile, he said that he wanted to see Inspector Waterhouse and Lieutenant Gilligan. He wanted to say something about what had happened." Tr., VR000465. After approximately forty-five minutes to an hour, Nieves told Inspector Waterhouse and Lieutenant Gilligan that the defendant wanted to make another statement. Tr., VR000350-VR000351; Tr., VR000438; Tr., VR000465.

B. The Defendant's Second Statement

The defendant made this second statement approximately between 1:55 A.M. and 3:30 A.M. Tr., VR000353, VR000408; Tr., VR000439, VR000442; see Tr., VR000466 (stating that

defendant spoke for approximately forty-five minutes starting "[a]round one, one-thirty"). He told Inspector Waterhouse and Lieutenant Gilligan that after leaving the Laconia Lounge around 11:00 P.M. on March 4, 1982, he, Felix, and Elgardo went to another bar where Felix obtained a brown paper bag, then they walked to Decatur Street where Felix told the defendant and Elgardo to serve as his lookout while he burned the Building. Tr., VR000356-VR000357; VR001417 (Trial Exhibit #34). The defendant saw Felix break the first-floor kitchen window, take a Molotov cocktail out of the paper bag, and throw the lit Molotov cocktail into the kitchen.[13] Tr., VR000357; VR001417 (Trial Exhibit #34). The defendant saw smoke and fire and broke windows to try to help the people inside. Id. He also stated that Felix "was playing with his mind and had forced drugs onto him." Tr., VR000354.[14] At the time of making this second statement, the defendant still understood the questions and his answers made sense, but his condition changed in that he was more nervous and more upset, and he "was very concerned about being threatened by Felix Garcia; that Felix was playing games with his mind and that he had forced him into drugs." Tr., VR000351, VR000353-VR000354, VR000409-VR000410; Tr., VR000440; Tr., VR000467, VR000484.

Also during this time period, the defendant picked out Felix's and Elgardo's pictures from a mug shot book.[15] Tr., VR000358; Tr., VR000451-VR000452; VR001417 (Trial Exhibit #34). In addition, Inspector Waterhouse showed the defendant a photograph of the Building, and

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[13] Lieutenant Gilligan testified on cross-examination that he did not know if the defendant actually used the word "Molotov," but that Nieves had "said it somewhere along the line." Tr., VR000456-VR000457.

[14] The defendant's typed second statement does not include this information about drugs; rather, it states, "After the fire started Felix Garcia told me, you saw the beginning and your [sic] going to see the end. The next day Felix Garcia started talking to me trying to make me foreget [sic] about the fire." VR001417 (Trial Exhibit #34). Inspector Waterhouse explained during cross-examination that he did not include the information about drugs in the defendant's second statement because the defendant said it before Inspector Waterhouse had re-advised him of his Miranda rights. Tr., VR000410-VR000412.

[15] During cross-examination, Lieutenant Gilligan testified that he showed the defendant the mug shots of Felix and Elgardo during "[t]he second part of the second statement[,]" i.e., at the time the defendant made his third statement. Tr., VR000452. This testimony is inconsistent with the defendant's second statement in which he indicates that he identified Felix's and Elgardo's pictures. VR0001417.

the defendant identified the window on the Building's left-hand side through which Felix threw the Molotov cocktail. Tr., VR000358-VR000359; Tr., VR000441-VR000442; Tr., VR000469-VR000470; VR003267 (Trial Exhibit #35).

C. The Defendant's Breakdown

Shortly after making his second statement,[16] Inspector Waterhouse told the defendant that they had "certain information" and wanted "to know if he was part of it." Tr., VR000455. At this point, the defendant "broke down, went down on his knees and put his hands together and was praying on the floor, leaning on the chair. . . . [and] he said, 'God, oh, God.' . . . He was crying, sobbing." Tr., VR000360, VR000412-VR000413; Tr., VR000443; Tr., VR000467. The defendant held his hands "in a position like praying[,]" Tr., VR000483, and he was also "saying, 'Oh, God, those kids.'" Tr., VR000467.[17] The breakdown lasted ten to twenty minutes, then the defendant returned to his chair and asked for some water. Tr., VR000360; Tr., VR000443-VR000444; Tr., VR000467-VR000468. After having a cigarette, the defendant "settled down." Tr., VR000360; Tr., VR000444; Tr., VR000490. Through Nieves, the defendant told Inspector Waterhouse and Lieutenant Gilligan that "he wanted to make a further statement, or change his statement." Tr., VR000361; see Tr., VR000468 (testifying that defendant answered affirmatively to question whether "he wanted to add anything to his statement").

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[16] On cross-examination, the defense attorney presented Nieves with his statement to the defendant's investigator in which he stated that the defendant's breakdown occurred "'maybe a half hour after [the second statement] started.'" Tr., VR000479; see Tr., VR000481-VR000482 (testifying that breakdown occurred "after the second interrogation," that second interrogation lasted "about an hour[,]" and that breakdown started "approximately a half hour after the second interrogation started"); Tr., VR000490 (testifying that after defendant calmed down, he gave his third statement); Tr., VR000492 (testifying on redirect that defendant's breakdown occurred "after the second statement" for "maybe fifteen, twenty, twenty-five minutes"). Nieves' testimony at trial, that the defendant's breakdown occurred after he signed his second statement, is consistent with his testimony at the motion to suppress hearing. VR001078.

[17] At the motion to suppress hearing, Lieutenant Gilligan testified that, while the defendant was having his breakdown, he asked Nieves what the defendant was saying, and Nieves said, "'Devil' . . . and then Mr. Nieves said something about, 'The can. He's talking about a can.'" VR001054-VR001055. Lieutenant Gilligan tried "to put things together. Then it dawned on [him] that somewhere along the line that there was a petroleum product that [had] . . . a consumer warning with the skull and cross. I think Mr. Nieves said, 'That is what he's trying to tell you.'" VR001055.

D. The Defendant's Third Statement

The defendant stated that before leaving 38 Branch Street, he watched Felix and Elgardo make three Molotov cocktails in the basement, using twelve-ounce Miller beer bottles, rags, gasoline, and another liquid. Tr., VR000364; VR001418 (Trial Exhibit #36).[18] They carried the Molotov cocktails to the Laconia Lounge and left them in a brown paper bag in the trash while they went inside to drink. Id. At the Building, Felix threw one Molotov cocktail through the kitchen window, Elgardo threw one through a front window, and the defendant threw one into the front hall. Id. The defendant had left his house that evening "knowing [they] were going to burn the [B]uilding on Decatur Street because Felix Garcia wanted to get Efrain Cortez over drugs." Id.[19] At the time he made this statement, the defendant "was still very nervous and upset" and "kind of fidgety in the chair," but he appeared to understand the questions and his responses were coherent and made sense. Tr., VR000361; Tr., VR000445; Tr., VR000469; see Tr., VR000468 (testifying that this statement went on for "another hour, hour and a half, something like that").

E. The Defendant's Booking

After he had breakfast, coffee, and cigarettes with Inspector Waterhouse and Lieutenant Gilligan, the defendant went to the Criminal Investigation Bureau where Lowell police officer Charles Sadlier ("Officer Sadlier") of the Lowell police department processed him, and Lowell

[18] On cross-examination, Inspector Waterhouse testified that he did not enter the time on the defendant's third statement (Trial Exhibit #36) because that statement was a continuation of the second statement which had begun at 1:55 A.M. Tr., VR000417-VR000418; VR001418. The defendant's attorney asked Inspector Waterhouse who had typed the time "1:55 A.M." onto Trial Exhibit #36, and Inspector Waterhouse testified that he did not know. Tr., VR000418-VR000419; VR001418. The defendant's attorney also showed Inspector Waterhouse another copy of the defendant's third statement on which the time of 3:00 A.M. was typed in (Trial Exhibit #40); again, Inspector Waterhouse testified that he did not know who had entered that time. Tr., VR000420. During his testimony on cross-examination at the motion to suppress hearing, however, Waterhouse stated that *he* himself typed in 1:55 A.M. "with another typewriter because [he] forgot to put the time in." VR001038.

[19] During the Commonwealth's cross-examination of Felix, he denied that, before the fire, he knew where Efrain Cortez lived. Tr., VR000629-VR000630.

police officer Angus MacDonald fingerprinted and photographed him. Tr., VR000365; Tr., VR000494-VR000495; Tr., VR000498; see VR001923 (Trial Exhibit #43). The booking sheet indicates that the time of the defendant's arrest was 6:30 A.M. on March 7, 1982. VR0001923. During this process, the defendant was wide awake, aware of what was going on, and able to provide the requested information through Nieves who served as interpreter again, but he was very nervous. Tr., VR000494; Tr., VR000498; Tr., VR000470-VR000471.

After Officer Sadlier booked the defendant, he put him in a cell located near where Officer Sadlier sat. Tr., VR000495-VR000496. Officer Sadlier "never saw [the defendant] sit down. He paced his cell, and he mumbled." Tr., VR000496. When Officer Sadlier asked the defendant if he was talking to him, the defendant would "stop walking around and look at [him]; and he said, 'I'm dead. They are going to kill me.'" Id.

V. Evidence Recovered from Search Warrants

On March 7, 1983, Inspector Sheehan, Officer Joseph McGarry ("Officer McGarry") of the Lowell police department, and others executed a search warrant[20] at the defendant's 38 Branch Street residence. Thereafter, the investigators also executed a search warrant for the Building. Tr., VR000292. From the common cellar of the Branch Street building, they seized a gasoline can and a lidless paint can with a Miller beer bottle and other trash inside.[21] Tr., VR000284-VR000285, VR000287-VR000288; Tr., VR000500-VR000501.

Inspector Sheehan and others executed a search warrant at Felix's second-floor apartment at 38 Branch Street, and recovered a can of "Red Devil" paint remover. Tr., VR000288; Tr.,

[20] Officer McGarry testified that Inspector Angus MacDonald of the Lowell police department criminal investigation bureau prepared the affidavit in support of the search warrant. Tr., VR000502. Inspector Sheehan testified that Officer McGarry made the "application" for this search warrant. Tr., VR000292.

[21] Joseph Simao, the owner of 38 Branch Street, testified as part of the defendant's case, and he stated that he kept cans in the cellar, including a gas can like the one recovered pursuant to the search warrant. Tr., VR000707.

VR000549. The jury heard testimony from Russell Doyle, Jr. ("Doyle"), a security guard at a Lowell department store, who testified that he observed Felix in the store's Ladies' Department on March 1, 1982; Felix removed a blue can and an empty bottle from his carriage and poured liquid from the can into the bottle. Tr., VR000540-VR000541. Felix then walked down to the Infant's Department where he left the can, still half full, on the floor, and walked away with the bottle. Tr., VR000541. Doyle retrieved the can, which was a "Red Devil" can of paint remover, and he approached Felix when he left the store. Tr., VR000542. Rather than prosecute Felix, Doyle had him pay for the can because "he had already opened up the can, broken the seal on it . . ." Id. Doyle identified the blue can of Red Devil paint remover as the can that the investigators recovered from Felix's apartment.[22] Tr., VR000542-VR000543; Tr., VR000549; Trial Exhibit #46; see Tr., VR000544-VR000546 (testifying that Doyle contacted Lowell police about Felix and paint remover after seeing Felix's photograph in newspaper).

VI. The Defense and the Defendant's Testimony

A. The Fire

The defendant's theory with respect to the fire, as he tried to establish through his own testimony as well as that of other witnesses, was that he did not start the fire, but that he attempted to save the people inside. The defendant and Felix gave nearly identical accounts of their actions in the hours prior to, during, and after the fire. Prior to the fire, on the evening of March 4, 1982, the defendant and Felix went to Cynthia's house, then to the liquor store to purchase beer, then to the Laconia Lounge where they met Elgardo. Tr., VR000612-VR000613; Tr., VR000709-VR000710. Pedro drove the three men to Branch Street so the defendant could

[22] During his testimony as part of the defendant's case, Felix explained that he "tried to steal a little bit [of the paint remover] . . . , enough to remove the paint from [his] coat" but that the security guard caught him "and made [him] pay for the whole can" which he took home. Tr., VR000622. He "left the rest of the paint remover in [his] apartment in case [he] need[ed] it for some other time . . . ." Id.

get $100 from his apartment; he gave the money to Felix, then Pedro left the defendant, Felix, and Elgardo off near Decatur Street. Tr., VR000613-VR000614, VR000617; Tr., VR000711. They dropped off the beer at Cynthia's house, then they went to Martinez's house on Decatur Street to purchase drugs. Tr., VR000615; Tr., VR000712-VR000713. Martinez opened the door to them, but only Felix went in to make the purchase while the defendant and Elgardo waited outside. Tr., VR000616-VR000617; Tr., VR000713, VR000715.

While he and Elgardo were standing outside in the early morning of March 5, 1982, the defendant "smelled something was burning, and [he] ran towards the front [of the Building]. [He] started hearing children screaming, and [broke] a window with [his] hand." Tr., VR000715; see Tr., VR000618.[23] The defendant "lost [his] mind. [He] wanted to get inside" but he could not because there was "a lot of fire." Tr., VR000715; see Tr., VR000618-VR000619. Felix testified that he, too, heard people screaming inside the Building, and he "start[ed] crying, crying, crying . . . ." Tr., VR000637.

At some point after the fire, the defendant took cocaine and heroin at Martinez's house. Tr., VR000716, VR000723; see Tr., VR000619 (testifying that Felix, Elgardo, and defendant "[did] some dope. . . . [w]ith a needle"). The defendant remained at the scene "[u]ntil the early morning hours" and then went to the hospital to have his hand treated. Tr., VR000716, VR000723; see Tr., VR000619.

During the day on March 5, 1982, the defendant told Felix that "he was hearing some noise. . . . [and] was crying a lot because" he was unable to "save those people's lives." Tr., VR000619-VR000620.[24] He told Felix that he wanted to speak to Felix's mother-in-law, Ava

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[23] On cross-examination, the defendant stated that he did not remember seeing Evans in front of the Building at the time of the fire. Tr., VR000737.

[24] At the motion to suppress hearing, Luz Garcia testified that, while at home on March 5th, the defendant was crying and saying, "'I hear the kids; I hear the kids screaming in my mind[,]'" and "[h]e was wandering all around

Negron ("Negron") because he wanted her to pray for him. Tr., VR000620; see Tr., VR000742. Felix brought him to Negron's house, and Negron testified that when the defendant arrived, he was crying, and "[h]e was nervous, but [she] knew that he had something that his mind – that he was out of his mind." Tr., VR000608. The defendant "cried, and he said, 'I can't; I can't'; . . . . The only thing he said was, 'Pray for me. Pray for me.'" Tr., VR000609; see Tr., VR000742. Negron's minister came to see the defendant at Negron's request, and he prayed with the defendant. Tr., VR000609; Tr., VR000620. "Then [the defendant] fell down to the floor, flat . . . and he stayed like that for five minutes, then [he] [woke] up and [shook] hands with the minister, and [said], 'Thank you. I think I am going to go to the church.'" Tr., VR000620. The defendant testified that he felt guilty at that time because he had been unable to help the people in the Building. Tr., VR000742.

Felix saw the defendant on the morning of Saturday, March 6, 1982, and he told Felix "many times, 'My name is Victor Rosario, and I live at 38 Branch Street. I am the son of God. Jesus Christ.' That's all he told [Felix] that day." Tr., VR000621, VR000631. Later that same day, the police went to the defendant's house, and he spoke to them, then brought them downstairs to speak to Felix; the defendant accompanied the police to the police station when they returned to his house later that night. Tr., VR000718; see Tr., VR000736-000737. At that time, the defendant thought that he "was going to be arrested for the drugs. That [he] had used some drugs." Tr., VR000721.

B. The Interrogation and Arrest of the Defendant

At the police station, the defendant was alone with Inspector Waterhouse for about thirty minutes before Nieves arrived. Tr., VR000718-VR000719. The defendant testified that, before

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the house. He just couldn't stay still. He was . . . dying for [Carmen Garcia] to come. He needed [her] at the time." VR000982, VR000983.

Nieves arrived, Inspector Waterhouse asked him about the fire. Tr., VR000730. The defendant testified that he did not remember the conversations he had with the police, and he did not remember saying anything that appears in his three statements. Tr., VR000719, VR000734; see Tr., VR000740 (answering in affirmative to question, "it's your testimony that you don't remember anything that you told the police about the fire?").

The defendant did recall the conversation that he had with Nieves between his first and second statement. Tr., VR000720. He testified that the conversation involved a problem that Nieves' brother, who lived on the first floor of 38 Branch Street, had with the defendant. Id. Specifically, Nieves' brother refused to admit the defendant, Carmen Garcia, and Carmen Garcia's brother to the local dance club where he worked as a "doorman;" Nieves' brother "got mad. Then [the defendant] went outside, and he went outside with a gun[,]" but nothing further happened. Id. The defendant also testified that he told Nieves that he had used drugs the night of the fire. Tr., VR000741.

In three separate interviews with defense investigator James Mills in July and October 1982, Nieves stated that the defendant's breakdown occurred prior to his second statement, that the defendant was "incoherent" during booking, and that, while the defendant had made the statements contained within his second and third confessions, he kept saying in Spanish during the questioning that he had not set the fire. Tr., VR000692-VR000697.

Felix was arrested on March 7, 1982, and when the police accused him "of what happened in that fire, [Felix] was crying, crying, crying" and he was in "emotional shock . . . ." Tr., VR000624. After Felix's arrest, he was placed in a cell, and he spoke with the defendant who was also in a cell. Tr., VR000623. Felix had learned from the police that the defendant had implicated himself, Felix, and Elgardo in the fire, and Felix asked the defendant, "'[W]hy [did]

you say that? How can you say something that you didn't [do] . . . ?'" Tr., VR000624. The defendant replied, "'I don't know. I am crazy. I need a doctor.'" Id. Felix also spoke to Nieves who told him that he believed the defendant was crazy because he spoke to Nieves "about the bible and [told] him that he was God, Jesus Christ, the son of God[,]" and because the defendant "fell down on the floor and [woke] up again, like five minutes later, and talking about the bible." Tr., VR000624-VR000625.

The defendant was initially held at the house of correction in Lawrence ("Lawrence"); after a stint at the house of correction in Billerica ("Billerica"),[25] he was eventually transferred to Bridgewater State Hospital ("Bridgewater"). Carmen Garcia, with whom the defendant lived at the time of the fire, testified that she saw the defendant at Lawrence at the time he was being transferred to Billerica. Tr., VR000645-VR000643. The defendant "looked at [her] in a way like he didn't know [her,]" and he did not speak to her. Tr., VR000643. Carmen Garcia visited the defendant at Bridgewater about two weeks later, and he "was acting in a way that a person who was taking medication would [act]." Tr., VR000643-VR000644. She visited him a second time at Bridgewater, and he "seem[ed] to be getting better . . . ." Tr., VR000644.

VII. Psychiatric Testimony[26]

Through the testimony of psychiatrist Dr. Martin Kelly ("Dr. Kelly") and forensic psychiatrist Dr. Jorge Veliz ("Dr. Veliz") as well as witnesses who observed the defendant's demeanor, the Commonwealth met its burden of establishing that the defendant's confession was voluntary.[27] Although ultimately unsuccessful, the defendant attempted to show that the

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[25] According to Dr. Milton Schmidt, the defendant had been at Lawrence, but he was transferred to Billerica because there was no psychiatrist available in Lawrence. Tr., VR000702.

[26] While deliberating, the jury requested the testimony of the doctors. Tr., VR000814. The court was unable to provide the jury with the doctors' testimony because it had "not been transcribed. . . . [and would] not be transcribed for a substantial period of time." Tr., VR000814-VR000815. It does not appear from the trial transcript that the doctors' reports were admitted into evidence.

[27] The jury received an instruction as to the voluntariness of the defendant's statements. Tr., VR000802-VR000803.

Commonwealth could not meet its burden as to voluntariness through cross-examination of the Commonwealth's witnesses and through the testimony of psychiatrists Dr. Milton Schmidt ("Dr. Schmidt") and Dr. Robert Weiner ("Dr. Weiner"), and of forensic psychiatrist Dr. Robert Fein ("Dr. Fein"), in addition to other witnesses who observed the defendant's demeanor.[28] Of all of the psychiatrists who testified at the trial, only Dr. Kelly and Dr. Weiner rendered opinions as to the defendant's mental state on March 6th and March 7th when he made his three statements to Inspector Waterhouse and Lieutenant Gilligan.

A. Dr. Schmidt

On March 11, 1982, Dr. Schmidt examined the defendant at Billerica. Dr. Schmidt had been called there on an emergency basis, and the staff informed him that the defendant had "made some kind of suicide attempt. Tried to choke himself . . . [and] he was kicking and biting officers and was behaving in a very agitated way." Tr., VR000702, VR000703. Dr. Schmidt examined the defendant for a half hour, and the defendant told him "that he felt that he was the son of the devil, that Christ was coming, that he deserved to die." Tr., VR000703. Based on his examination, as well as from the information from the nurses, Dr. Schmidt concluded that the defendant was psychotic, which he testified meant that the defendant's "thinking was so disordered to make him out of touch with reality, unable to meet the demands of daily life; . . . it means basically, severely impaired." Tr., VR000703-VR000704.

[28] Also as part of the defendant's case, the jury watched two television reports of the defendant's arraignment, showing the defendant's behavior on March 8, 1982. Tr., VR000652-VR000653; Trial Exhibits #48 and #49. The court clarified at the time that "[t]he only part of the tape that was intended to be used as an exhibit, apart from the fire scene, were the scenes at the district court, and leaving the district court." Tr., VR000653. At the motion to suppress hearing, Nieves compared the defendant's behavior at the time of the television report with the defendant's behavior at the time of the interrogation and testified that, at the courthouse, "he was very different from the police station, ... [he] was really . . . out of his mind or something, when they brought him out of [the courthouse]." VR001084-VR001085.

B. Dr. Fein

The defendant was transferred to Bridgewater after Dr. Schmidt examined him. Dr. Fein examined the defendant at Bridgewater for ten to fifteen minutes on March 11, 1982. Tr., VR000651, VR000652. He was unable to take a detailed history from the defendant because he was confused, but he told Dr. Fein "that he was hearing voices telling him to kill himself." Tr., VR000651. Based on this information from the defendant, Dr. Fein opined that, at that time, the defendant "should be considered possibly suicidal," and that he was psychotic, meaning "he was out of touch with reality." Tr., VR000651-VR000652.

C. Dr. Veliz

Dr. Veliz examined the defendant at Bridgewater on April 8, 1982, pursuant to G.L. c. 123, § 18(a), to determine the defendant's "psychological ability to serve time in a penal environment." Tr., VR000586. Based on Dr. Schmidt's and Dr. Fein's descriptions of the defendant's symptoms at the time he was referred to and admitted at Bridgewater, Dr. Veliz concluded that, at that time, the defendant "was suffering from an acute psychotic episode," and "that the most probable diagnosis was schizophreniform reaction . . . ." Tr., VR000592-VR000593, VR000596. Dr. Veliz treated the defendant while he was at Bridgewater, Tr., VR000586, VR000594, and by April 29, 1982, when Dr. Veliz conducted his criminal responsibility and competency examinations pursuant to G.L. c. 123, § 15(a), the defendant was "[m]uch, much[] better," Tr., VR000593; he was no longer taking any medications; "he was no longer in any acute distress; "he did not have any hallucinations or delusions[;] [and] [h]e was clear in his mind. . . . [and] coherent . . . ." Tr., VR000586-VR000587.

With respect to the defendant's criminal responsibility to have committed the arson, Dr. Veliz testified to the defendant's account of his activities prior to, during, and after the fire. Tr.,

VR000588-VR590. The defendant told him that "he had a history of drinking and using drugs" and that he had been drinking heavily all day prior to the fire; at the time of the fire, he realized the Building was on fire after smelling something burning; he "tried to go inside because he heard voices of the children, crying; and he tried to open the door by breaking a window." Tr., VR000588. He became "very anxious" and "he remembers saying, 'God is coming. Give up your sins, because God is coming.'" Tr., VR000588-VR000589. After the fire, he "started hearing voices[,] and he was unable to sleep." Tr., VR000589. Dr. Veliz "found no evidence of major mental illness at the time of the alleged incident." Tr., VR000590.

As for the defendant's competency to stand trial, he concluded that the defendant was competent based on the fact that "he was aware of the charges . . . against him, and he knew about the process of the proceedings against him." Tr., VR000587. Additionally, the defendant "knew exactly the role of each person in the court, and . . . he was able to cooperate and consult with his defense lawyer" with whom he had been in contact once. Id.

D. Dr. Kelly

Dr. Kelly examined the defendant on February 21, 1983, solely to determine "if there was a psychiatric condition which might have a particular bearing on his being voluntarily able to make a statement or confession." Tr., VR000516. Dr. Kelly obtained a history from the defendant himself and reviewed police reports, the defendant's three statements, grand jury minutes, and Bridgewater records. Id. Dr. Kelly concluded, first, that there was no evidence that, prior to the fire, the defendant "suffered from a psychiatric condition of the type that would remove the capacity to . . . know what [he] [was] doing, be in control of [his] own conduct . . . ." Tr., VR000519. Second, with respect to the time period during the questioning, Dr. Kelly concluded that there was "no evidence that he was out of control of his behavior, that he didn't

understand what they were asking of him, that he was suffering from a mental disease or defect or psychiatric condition that would have a bearing on whether he could [have] made a voluntary and rational waiver at the time." Tr., VR000520.

Dr. Kelly interpreted the defendant's breakdown as being an "emotional outburst . . . having to do with the nature of the circumstances, but not a mental illness." Tr., VR000524. Even taking the breakdown into consideration, Dr. Kelly testified that the defendant "pulled himself together, and the interrogation resumed" with the defendant understanding the questions and not appearing "to be out of control . . . . [or] in the throes . . . of any emotional disturbance or psychiatric illness . . . ." Tr., VR000522-VR000523. Moreover, the timing of the breakdown "was not particularly crucial[,]" Tr., VR000532; rather, the crucial or "the key part [of the defendant's confessions] was that he knew what questions they were asking him. He knew why. He had initially denied all, the[n] [took] a little bit [of responsibility], then a little bit more." Id.; Tr., VR000524; see Tr., VR000525 (noting that, by third statement, defendant had "added new and verifiable information").

E. Dr. Weiner

The defendant retained Dr. Weiner to determine whether the defendant was "suffering from a serious mental illness at the time of the questioning in the police station; and because of that mental illness, . . . [whether he was able] to give a rational, informed and voluntary confession[.]" Tr., VR000656; see Tr., VR000665-VR000666 (testifying that he examined defendant to determine his mental condition "before, during and after the fire, ... with the specific question of the voluntariness of his statement"). To make that determination, he examined the defendant a number of times at Billerica,[29] and he interviewed Carmen Garcia, Luz

[29] Dr. Weiner testified at the motion to suppress hearing that part of his examination of the defendant involved eliciting from him information regarding his religious beliefs. VR000938. The defendant told him that, "not only

Garcia, Nieves, Felix, and Elgardo. Tr., VR000655-VR000656, VR000674. Dr. Weiner also read the defendant's three statements, but he did not speak with Inspector Waterhouse or Lieutenant Gilligan, nor did he review their reports. Tr., VR000682, VR000685.[30]

Dr. Weiner "had the impression" that, prior to the fire, the defendant had been drinking, but they "didn't go into how much he had to drink . . . ." Tr., VR000672.[31] The defendant told him that when he saw that the Building was on fire, he heard screams, and the screams of the children reminded him "of his youngster who[m] he had left in New York, and he tried to go in through the front door to rescue them, but the smoke and the fire was too great. . . . He was terribly upset, took his hand, went to a window, smashed the window to get in to see what he could do. He was unable to get in. He was crying inconsolably." Tr., VR000658. Dr. Weiner testified that "the time of the fire was the time of extreme stress and shock." Tr., VR000667.

The defendant admitted to having "shot up the drugs" with Felix and Elgardo, and Dr. Weiner noted that the emergency room record regarding the defendant's cut hand indicated that

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was there a strong belief in the Church and in God, but also a strong belief in the Devil and the anti-Christ, and a belief that a person could be taken over by the devil and could be controlled, overwhelmed; and . . . [Dr. Weiner] [thought] that [the defendant], in his religious beliefs and his mental illness, did, in fact, feel that he had been overcome; . . . . [and] at the time of the stressful incident, he felt himself very much in the power of Satan and believed totally in the existence of the devil, the demons." VR000938-VR000939.

[30] On cross-examination, Dr. Weiner testified that he assumed that the defendant was at the scene of the fire as a rescuer. Tr., VR000674. The Commonwealth pointed out that this testimony contradicted Dr. Weiner's testimony at the evidentiary hearing on the defendant's motion to suppress, specifically referring to the following exchange:

> "Q. So in arriving at your opinion [with respect to the voluntariness of defendant's statements], you did not make that assumption, that he was some way involved in some kind of a joint venture or individually as a perpetrator of the fire?
>
> "A. Well, as a psychiatrist, my particular focus was, first of all, was he involved in the fire? Was it something that he was there? That it severely affected him? But that is, in terms of whether he was a rescuer or a perpetrator, no, I didn't have any data to help me either way on that.
>
> "Q. So that you did not make an assumption either way?
>
> "A. Right, right."

VR000952; see Tr., VR000675-VR000676 (quoting motion to suppress testimony).

[31] On cross-examination, the Commonwealth pointed out to Dr. Weiner the defendant's conflicting reports of the amount of alcohol he had imbibed prior to the fire. Tr., VR000672.

the defendant "had an extremely fast pulse rate." Tr., VR000658-VR000659. The defendant informed Dr. Weiner that when he woke up later in the day on March 5th, he "could not get the smell of the smoke out of his nostrils and kept smelling the smoke and began to hear the voices of the victims screaming in the fire." Tr., VR000659. He heard the voices of "demons, or devils . . . saying to him, 'Death, death.' . . . And by . . . [the] morning [of March 6th], all that [the defendant] was saying [was], 'I am Victor Rosario. I am Victor Rosario, the son of God. Jesus Christ is in me.'" Tr., VR000659. The defendant described for Dr. Weiner his meeting with Negron's minister, and he stated that while he was praying with the minister, he "collapsed on the floor, sobbing, crying, saying that Christ was in him." Id.

Dr. Weiner learned from Luz Garcia that when the defendant spoke to the police at his apartment on March 6, 1982, he was responsive, understood the questions, and was able to provide the police with a detailed story of his actions. Tr., VR000674. By the time the police brought the defendant to the police station on the evening of March 6th, however, "he was already deluded and hallucinating, hearing the voices." Tr., VR000660.

The defendant "was more agitated, more upset" at the time of his second statement, "and the demons and devils were calling to him. He was experiencing what he called squares around his head, snakes choking him. He was frightened and asked [Inspector Waterhouse and Lieutenant Gilligan] what was happening, what was going to happen to him[,] and at one point he collapsed on the floor." Tr. VR000660-VR000661.[32] During this breakdown, the defendant "was sobbing and crying out" and "he just didn't have his wits about him, ... he had lost whatever control he had had." Tr., VR000664. The breakdown "lasted for a period of time. He was not responsive when he was in that situation." Tr., VR000665. After this breakdown, the

[32] Based on his conversation with Nieves, Dr. Weiner understood that the defendant's breakdown occurred around 2:00 A.M., before he signed the second statement. Tr., VR000663; see Tr., VR000685 (testifying that breakdown occurred "sometime after the police came back into the room").

defendant understood the questions asked of him and was able to respond coherently to those questions by providing details as to the cause of the fire, and he was able to point out a particular window through which Felix threw a Molotov cocktail. Tr., VR000686-VR000688; see Tr., VR000687-VR000687 (testifying that these factors would affect Dr. Weiner's opinion as to the voluntary nature of defendant's statements).

After the interrogation concluded and the defendant was placed in a cell, he "was uncommunicative except to talk about, 'I'm Victor Rosario, the son of God. Jesus Christ is in me. The devils. The demons,' and believing that the back of his head had been cut off." Tr., VR000661. He was transferred to Lawrence on Monday, March 8, 1982, where "he continued to be struggling, kicking, biting, biting himself, spitting and attempted to kill himself by self strangulation." Id. Thursday, March 11, 1982, was the first time a psychiatrist, Dr. Schmidt, examined the defendant, and on the basis of his report, the defendant was transferred to Bridgewater. Tr., VR000661-VR000662.

Dr. Weiner opined that the defendant was not able to make a rational, intelligent statement to the police on March 7th "because of the severity of his mental illness . . . ." Tr., VR000663-VR000664. During the period of the interrogation, even before the breakdown, the defendant "was psychotic; . . . he went to the police station with a very marginal amount of sanity and . . . he broke during the time in the police station." Tr., VR000664, VR000665; Tr., VR000681 (testifying that his opinion was that, during interrogation, defendant had "lost the ability to think rationally and to engage in the usual tasks of caring for himself and self-preservation");[33] see Tr., VR000665 (defining psychotic as an impaired sense of reality such

[33] Dr. Weiner conceded on cross-examination that the progression of the defendant's confessions – from denying all involvement, to stating he acted as a lookout, and finally to confessing that he had thrown a lit Molotov cocktail into the Building – "could" indicate "an awareness on his part of self-preservation and taking care of himself . . . ." Tr., VR000684.

"that they are believing or interacting with the unreal" and testifying that a psychotic person "can also do rational things and make rational statements" because "[i]t's not an all or none situation").

Prior Proceedings

I. Probable Cause Hearing

The Lowell District Court (Cyr, J.) held a probable cause hearing on May 27, 1982. At this hearing, the following witnesses testified for the Commonwealth: Captain Vernon Rockers of the Lowell fire department, VR001226-VR001232; Edward Evans, VR001232-VR001239; Ramon Nieves, VR001239-VR001260; and David Coonan of the State Lab Fire Marshal's office. VR001260-VR001278.[34] The defendant did not present any evidence. VR001280.

The Commonwealth sought a finding of probable cause based on its evidence. VR001278. The defendant argued that there was nothing linking the defendant to the scene of the fire except for the fact "that an incoherent man made a statement. No one saw him at the scene. No one knows the cause of the fire." VR001279. The court held that there was probable cause "[o]n each of these matters . . . [and] order[ed] that each of these matters be bound over to the Grand Jury at their next sitting . . . ." VR001280.

II. Motion to Suppress

On March 3, 1983, the defendant filed a motion to suppress his three statements "on the grounds that the defendant was suffering from a mental disease or defect during and throughout the time period in which he made said statements and that said statements were not the voluntary product of a rational intellect." VR002016; see VR002017 (defendant's affidavit in support of

[34] The testimony of these witnesses at the probable cause hearing was essentially consistent with their testimony at the defendant's trial. The only notable difference was that Captain Vernon Rockers testified at the probable cause hearing that the alarm came in at 1:03 A.M., VR001227; at trial, he testified that he arrived at the scene "[n]ot much more than a minute" after the first alarm, without giving a precise time. Tr., VR000194.

motion); VR002024-VR002026 (defendant's memorandum in support of motion). On March 8, 1983, the defendant filed a motion to suppress the identifications of him "made by persons who saw his photograph in newspapers after his arrest and subsequently identified the defendant as he who was the subject of the arrest story . . . ." VR002030;[35] see VR002033 (defendant's affidavit in support of motion); VR002031-VR002032 (defendant's memorandum in support of motion). Although it did not name him in particular, this latter motion concerned Edward Evans' identification of the defendant. See VR001200 (court's understanding of motion to suppress identification).

The court (Travers, J.) held an evidentiary hearing on these motions on March 10, 11, 14, and 15, 1983. In support of his motions, the defendant presented the testimony of Dr. Schmidt, Dr. Weiner, Dr. Fein, Dr. Veliz,[36] and Juan Pedrosa in support of his motions; in opposition, the Commonwealth presented the testimony of Luz Garcia, John Newell, Harold Waterhouse, William Gilligan, Ramon Nieves, Garrett Sheehan, Angus MacDonald, Dr. Kelly, Danelia Martinez, and Edward Evans. Other than Juan Pedrosa, who did not testify at the defendant's trial,[37] the testimony of the witnesses was essentially consistent with their trial testimony.[38] Both the Commonwealth and the defendant waived argument. VR001199.

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[35] The court (Travers, J.) allowed the defendant's motion for leave to file this motion late. VR002029.

[36] Dr. Veliz testified for the Commonwealth at the defendant's trial.

[37] Juan Pedrosa testified that, a few weeks after the fire, he spoke with Nieves, who had served as a Spanish interpreter for the defendant during his interrogation, and that Nieves said that when he first saw the defendant at the police station, he was "scared because [the defendant's] eyes were like out – he looked like out of his mind and he thought his eyes would probably pop out of his head at any time; that he was extremely nervous and that he kept saying, 'Those kids. Those kids. Oh, my God.' . . . [and] he said, 'I didn't do it. I didn't do it, and I'm going to get even. I'm going to get even.'" VR001099, VR001102. Nieves further told him that, "from the very beginning, he noticed that [the defendant] was out of his mind. He wasn't acting properly." VR001100.

Juan Pedrosa did not testify at the defendant's trial. During his cross-examination testimony at the defendant's trial, Nieves admitted that he had spoken with Juan Pedrosa about the defendant, but denied having stated his opinion of the defendant's "condition" at the time of the interrogation. Tr., VR000490-VR000491.

[38] The court notes any relevant differences in the witnesses' testimony above, in the context of the evidence at trial.

The motion judge dictated to the record his denial of both motions. VR001199-VR001200. He also dictated his findings of fact. VR001200-VR001211. In pertinent part, he found that:

- The defendant was at the scene of the fire and cut his hand as a result of breaking "windows on the first floor in an attempt to rescue persons trapped inside. The persons inside, including children, called for help and screamed." VR001201.

- "Evans, who lived near the fire scene, believed that he saw the defendant at the scene in a position from which it could be inferred that he had just thrown an object into the house through a window before the fire started." Id.

- Evans "heard a crash of glass and turned to see a man, that he had identified as the defendant, with . . . one arm . . . upraised, and the other arm in a low position. Both the man and Evans looked directly at each other from a distance of only about three to five feet." VR001201-VR001202.

- "Evans' perceptions of the man were particularly acute because he was quite apprehensive as to what action, if any, the man he was looking at was going to take." VR001202.

- "Evans' description of the man, when compared to the defendant, as one observes him, were quite accurate. . . . Evans felt quite confident that he could identify the man he saw." Id.

- The defendant's first statement to the police officers at his apartment on the afternoon of March 6, 1982, "is clearly admissible. It was non-custodial. There was no need for Miranda warnings, and it was entirely voluntary and the product of a rational mind." VR001203.

- The evening of March 6, 1982, Inspector Waterhouse and Lieutenant Gilligan spoke with Evans who had been identified as "a witness with whom [they] should speak. . . . [T]hey found that he was somewhat reluctant to become involved in the case, possibly because he feared retribution." VR001203.

- "When the police noted the similarity between Evans' description of the man that he had seen and the defendant, and also noted that the defendant's short cut home was actually substantially longer than the direct route, and also noted some differences between the defendant's story and that of other witnesses, they decided to question the defendant further." VR001204.

- At the time that the police officers asked the defendant "to come to the arson office for further questioning[,] [t]he defendant was not arrested and voluntarily came to the office." Id.

- Prior to the commencement of the interrogation, "the defendant appeared to be nervous, but entirely in control of himself." VR001205.

- At the time of his first statement, "the defendant's conduct was rational and reasonable[,] [and] [t]here was no indication whatsoever that he was hallucinating or experiencing voices or images in his mind." VR001206.

- After the first statement, the defendant spoke with Nieves alone; during this time, the defendant "had not discussed the fire or acknowledged any guilt in connection with it." Id.

- "[A]bout three quarters to an hour later, Nieves came out and said that the defendant wanted to tell them the whole story because Felix Garcia had forced him to take an injection of drugs, and he feared Felix Garcia, and Felix Garcia had some hold or control over him." Id.

- At the time of the defendant's second statement, "[t]he only change in his demeanor was increased nervousness and anxiety. . . . This [second] statement acknowledged some participation in the crime, that is, acting as a lookout while one of the Garcias threw a Molotov cocktail through a window." VR001207.

- "After signing this statement at about 3:30 a.m., the defendant broke down[,]" making statements about failing to save the children and about "the face of a devil on a can. This appears to refer to a certain brand of paint thinner or remover that may have been obtained by one of the Garcias and possibly was used in some way in connection with the fire." Id.

- "This breakdown may have been precipitated by a statement of one of the officers that they intended to bring in persons who could identify him. However, since the defendant has always acknowledged his presence [at the fire] . . . it seems more likely that this breakdown was the result of his having reached the point of stating some guilt in connection with the fire and being swept over with the horror of recognizing his participation in a crime of such consequences. . . . As a result of this breakdown which was not in any way a mental deterioration, rather it was a sudden release of emotion, an emotional catharsis, the defendant achieved a temporary release from some of the guilt pressures which had been bearing down upon him. He was entirely sane and acting in a rational manner." VR001207-VR001208.

- By the time of his third statement, "the defendant had regained his composure . . . ." VR001208.

- The defendant "furnished all the required [booking] information without incident." VR001209.

- As a result of the "proceedings in the district court, . . . [which] apparently involved the arrests and later the release of the Garcia brothers, this defendant experienced a psychotic episode. . . . This defendant, previously, had no mental illness history of any kind. It appears that the illness from which he suffered was of a short-term character, lasting perhaps two to three weeks in all. . . . [T]he onset of the illness was precipitated sometime after the booking of the defendant and his appearance in court. . . . [I]t did not exist previously, and it was entirely absent during the time of his questioning." Id.

- Evans recognized the defendant from a newspaper photograph that "appears to have been one taken at the time of the defendant's arraignment in the district court." VR001210.

- "[A]ny identification that Evans should make in court is admissible. His recognition of the defendant's photo in the newspaper is also admissible. . . . [H]is identification of the photo was not suggestible in way. It is similar to a chance encounter on the street with other persons present. . . . [T]he recognition by Evans was based upon the clear perception and recollection of the appearance of the man that he had seen on the night of the fire in front of the subject building." VR001210-VR001211.

III. Trial, Verdict, and Sentencing

The defendant's trial took place between March 15 and March 28, 1983, and Attorney John Campbell represented the defendant. After deliberating on March 25 and March 28, 1983, the jury returned guilty verdicts on one count of arson in a dwelling house and eight counts on murder in the second degree.[39] Tr., VR000819-VR0008254. This court (Travers, J.) sentenced the defendant on April 4, 1983, to eight life sentences, to be served concurrently, on the murder indictments, and to eighteen-to-twenty years, to be served concurrently with the life sentences, on the arson indictment. Tr., VR000853-VR000854.

IV. Post-Trial Proceedings

The defendant filed his first motion for a new trial on June 18, 1985, arguing that certain rulings at trial "prevented the defendant from introducing relevant evidence that the owner of the building, his wife, his brother and some entity alleged to be in some way associated with them,

[39] It appears that the Commonwealth had indicted the defendant on murder in the first degree as to Efrain Cortez, and murder in the second degree as to the other seven individuals in the Building. See Tr., VR000789.

were engaged in an 'arson for profit scheme' and thus, the crimes were committed by a person or persons other than the defendant." VR002849; see VR002851; see also Rosario, 21 Mass. App. Ct. at 288-289 (describing rulings at issue). In support of his motion, the defendant relied "on various affidavits to the effect that during the period 1974-1978 there had been twenty-two buildings owned by [the Building's owner, James] Spanos in Lowell and fifty-five more fires in other buildings owned by members of the Spanos family or by a Spanos affiliate." Rosario, 21 Mass. App. Ct. at 290-291. On June 26, 1985, the court (Travers, J.) denied the motion without a hearing. VR002850; see VR002851.

The defendant appealed his conviction as well as the denial of his motion for a new trial. The Appeals Court affirmed his conviction and the court's denial of his first motion for a new trial. Rosario, 21 Mass. App. Ct. 292. The Supreme Judicial Court denied further appellate review. Commonwealth v. Rosario, 396 Mass. 1107 (1986). At the time of his direct appeal and his first motion for a new trial, Attorney Richard Zorza represented the defendant. VR002329.

The defendant filed his second motion for a new trial on November 7, 1994, and a supplemental motion for a new trial on March 7, 1995.[40] VR002851. At this time, Attorney Lisa Stephani represented the defendant. VR002328. The defendant argued that his trial counsel, Attorney John Campbell provided him with ineffective assistance as a result of a conflict of interest arising from his own vehicular homicide prosecutions, VR002855-VR002856, and as a result of his failure to make an offer of proof regarding other fires in the Building's owner's other buildings in Lowell, VR002856-VR002857. The court (Travers, J.) rejected these arguments. VR002855-VR002857.

[40] The Commonwealth refers to the supplemental motion as the defendant's third motion for a new trial. Opposition, at 33-34.

The defendant also argued that his appellate counsel, Attorney Richard Zorza provided him with ineffective assistance as a result of his failure to raise on appeal the trial judge's refusal to instruct the jury on insanity, VR002857-VR002858; the trial judge's identification instruction, VR002860-VR002862; the trial judge's failure to instruct the jury on involuntary manslaughter, VR002862-VR002863; the trial judge's error in denying the defendant's motion to suppress his three statements and Evans' identification of the defendant from a newspaper photo, VR002858-VR002860; and prosecutorial misconduct arising out of the Commonwealth's inclusion of facts not in evidence during closing argument. VR002863-VR002864. The court rejected these arguments as well. VR002857-VR002864. Finally, the court rejected the defendant's argument that the court gave an erroneous "reasonable doubt" instruction. VR002865-VR002867.

The Appeals Court affirmed this denial of the defendant's second motion for a new trial. Commonwealth v. Rosario, 45 Mass. App. Ct. 1105 (1998) (Rule 1:28 decision).

Findings of Fact

The findings that follow are based on a preponderance of the credible evidence adduced at the hearing and the reasonable inferences I draw therefrom. The evidence consisted of the testimony of nine witnesses called by the defendant and two called by the Commonwealth as well as numerous exhibits, which will be referenced by number where relevant. With respect to the expert witnesses in fire investigation and science, in interrogation techniques, and in mental health issues, I conclude that all are qualified to render opinions in their respective areas of expertise, and that all the opinions referenced in these findings are adequately supported by facts and data such that they would be admissible at a trial. See Commonwealth v. Roberio, 428 Mass. 278, 281-282 (1998) (holding that judge's denial of defendant's motion for new trial "based on his assessment of the expert's credibility" was erroneous because "[o]nce the expert's

qualifications were established and assuming the expert's testimony met the standard of Commonwealth v. Lanigan, 419 Mass. 15 (1994), the issue of credibility was for a jury, not the judge").

I. The Fire Science Evidence

A. John Lentini

John Lentini ("Lentini"), an expert in fire science investigation, testified for the defense. Since 2006, Lentini has been employed at Scientific Fire Analysis, a private independent consulting firm in Florida, as a consultant for fire investigations. He has conducted over two thousand fire investigations himself, but he now primarily reviews the work of others. Lentini has a bachelor's degree in natural sciences which he received in 1973, and he has taken courses in chemistry and criminal investigation at the university level. He has also attended numerous seminars and symposia sponsored by a variety of organizations including the International Association of Arson Investigators, the National Association of Fire Investigators, the Federal Bureau of Investigation and various law enforcement agencies and private corporations. Since 1986, he has held two professional certifications in fire scene inspection and since 1993, he has been certified in fire debris analysis. Lentini has previously testified on over two hundred occasions in both civil and criminal cases as an expert in chemistry, the standard of care for fire investigations, and the chemical analysis of fire debris.

Lentini serves on the National Fire Protection Association Technical Committee on Fire Investigations ("NFPA"), an internationally respected committee that maintains and promulgates NFPA 921, a guide for fire and explosion investigations (Exhibit 5). NFPA 921 is revised every three years. It is generally accepted as an authoritative guide in the field of fire science investigation. It was formally endorsed by the National Academy of Sciences in 2000.

Through the National Institute of Justice, Lentini participated on an editorial panel to prepare a document for public service fire investigators called "Fire and Arson Scene Evidence: A Guide for Public Safety Personnel," that was printed in 2000. He has published numerous papers and has contributed chapters to forensic science books regarding fire investigation. He also testified for the National Academy of Sciences in connection with a report published by that agency. His curriculum vitae was introduced into evidence (Exhibit 6).

Lentini first became involved in the defendant's case in 2006. He reviewed the trial transcripts, including the testimony of the fire investigators; the police reports and fire investigator's reports; results of laboratory analysis of the fire debris samples that were collected from the scene; color photographs of the fire in progress; black and white photographs of the fire scene investigation; and copies of the police statements that were attributed to the defendant. He also traveled to the neighborhood where the fire occurred, but the scene was not particularly instructive as the Building no longer exists.

Based on his training and experience and his review of the investigative materials generated in connection with the trial and the trial transcripts, Lentini determined that the opinion rendered by experts at trial – that the fire was intentionally set with flammable liquids and involved at least two points of origin – was incorrect, because the forensic evidence was equally susceptible to an interpretation that the fire was accidental, involved no flammable liquids, and had a single point of origin.

Lentini based his conclusion on the concept known as "flashover," a fire science phenomenon that represents a transition in the development of a fire from the point where a fire exists in a room to the point where the whole room is on fire. In flashover, the fire transitions from one controlled by fuel, where the fire grows by consuming more and more fuel, to a fire

controlled by the availability of oxygen provided by ventilation. Flashover occurs when all of the fuel in the room is burning, and the fire then consumes all the oxygen in the room. As flashover occurs, a fire may go out at the point of origin, and may burn much more intensely at the location or locations where oxygen is available. The point after flashover is called "full room involvement." Fire investigators and the NFPA 921 use the terms "post-flashover" and "full room involvement" interchangeably. Where there has been full room involvement, burn patterns within a room may be consistent and relatively even or they may be uneven, depending on the amount and areas of ventilation.

Lentini explained that he and others have conducted experiments which have led fire science experts to recognize that when flashover or full room involvement has occurred, the point of origin for a fire cannot be accurately identified based on the heaviest area of visible charring or damage. This is so because once a room is fully involved the fire will burn most hotly and cause most damage in the areas where most oxygen is available, such as near doors and windows. In fact, damages generated during a post-flashover compartment fire offer little insight as to where a fire originated. Such damages may only be accurately associated with the availability of ventilation openings that provide fresh air within the compartment.

Once a fire has burned for ten or fifteen minutes beyond the point of full room involvement, fire investigation experts now recognize that it is unlikely that small burn patterns, including patterns representing the use of flammable liquids, generated at the beginning of the fire, will still exist. Thus fire investigators must identify damages likely to have been generated due to post-flashover ventilation patterns and eliminate them as possible points of origin of the fire. Damages that cannot be accounted for in terms of ventilation must be examined very closely in order to determine if they represent surviving original patterns.

NFPA 921 states that irregular patterns are common in situations of post-flashover conditions, long extinguishing times, or building collapse. These patterns may result from the effects of hot gases, flaming and smoldering debris, melted plastics, or flammable liquids. Thus, where there are irregular curved or pool-shaped patterns, the presence of flammable liquids should be confirmed by laboratory analysis, and should not be made based on visual appearance alone. In the Decatur Street fire, floor samples from areas believed to be points of origin were collected and submitted for laboratory testing, but the testing did not confirm the presence of flammable liquids.

Lentini explained that, although fire scientists knew about the flashover phenomenon in the early 1980's, it was not until 1997 that tests were first conducted on the effect of ventilation generated patterns, and it is only since 2005 or later that fire scientists have generally understood that post-flashover ventilation patterns may make it difficult or impossible to identify the point or areas of origin of a fire.

The Decatur Street fire resulted in full room involvement, at least on the first floor. Lentini noted that the investigators who examined the scene interpreted two heaviest areas of fire damage in the front hall and the kitchen as being the points of origin, and as being consistent in appearance with the use of flammable liquids. They believed those fires had not communicated with one another because the wall between the front hall and the kitchen was not burned through. Thus, because there were two apparently separate areas of heavier damage, they concluded there were two points or areas of origin for the fire. This led to the determination that the fire was a set fire, or arson, because generally (with very rare exceptions), accidental fires begin in a single location.

However, because the living room, which connected the front hall and the kitchen, was a total burnout – nothing remained other than the steel parts of furniture and a vented space heater – Lentini opined that there was fire communication between the living room and the front hall and that the fire likely traveled from the living room both into the front hall (through a door that was consumed) and into the kitchen. Lentini opined that the stairwell would have acted as a chimney, drawing the fire gases from the living room into the hallway. Thus, he concluded, the investigators' observations of heavier charring in the hallway is consistent with a fire that moved from the living room (where there would have been less oxygen) into the front hall (where there was more available oxygen and a "chimney" effect occurred). Lentini opined that a single origin fire in a building of this nature would have taken less than five minutes to spread into multiple rooms.

Likewise, in Lentini's opinion, the investigators' conclusions that a burn pattern observed near the rear (exterior) kitchen door was consistent with flammable liquid flowing under the door represents a misconception about fire science common in 1983 and beyond. What fire scientists know now is that the hot gases in a room can cause burning on the other side of a closed door. Additionally, trial testimony that areas of so-called "alligatoring" (large, shiny areas of burned blistering resembling alligator skin) were consistent with the use of a flammable liquid was in line with generally accepted scientific principles at the time, but is now known to be untrue. NFPA 921 states that: "In the past, the appearance of the char and cracks had been given meaning by the fire investigation community beyond what had been substantiated by controlled testing. The presence of large shiny blisters (alligator char) is not evidence that a liquid accelerant was present during the fire, or that a fire spread rapidly or burned with greater intensity. These types of blisters can be found in many different types of fires. There is no

justification for the inference that the appearance of large, curved blisters is an indicator of an accelerated fire." (Exhibit 5, chapter 6.2.4.3).

Lentini explained that, in 1983, fire scientists and investigators generally accepted that because heat rises, fires burn up and out and floors should not burn. The investigators in this case were operating under that misconception in interpreting their observations of burn patterns on the hallway and kitchen floor as being consistent with the use of a liquid accelerant.

Lentini defined a "Molotov cocktail" or firebomb as a breakable container with a wick filled with a flammable liquid. It is used by lighting the wick and throwing the container against a hard surface so that it breaks, igniting the fluid inside the bottle and starting a fire. Molotov cocktails tend to leave evidence such as the neck or bottom of a broken bottle (both of which are fairly robust) or remnants of the wick. Once successfully ignited, a Molotov cocktail made of a twelve-ounce beer bottle or similar container would typically generate a brief fire that goes out in about ten seconds. In Lentini's opinion, this would not be long enough to ignite wood, such as the stairs and floor in the front hallway at Decatur Street. No physical evidence consistent with Molotov cocktails, other than some bits of broken glass, was found at the Decatur Street scene.

Lentini opined that, in determining the origin and cause of a fire, every potential ignition source in the compartment of origin should be considered. The Decatur Street investigators did not consider or examine the space heater in the living room, the use of candles,[41] or areas of the kitchen other than where the charring was observed as possible ignition sources. They only examined ignition sources in the front hall and the kitchen in the areas where they observed what they believed were heavy burning patterns consistent with the use of an ignitable liquid. In Lentini's opinion there was insufficient data to support the identification of any specific point of

[41] Lentini and Dr. Craig Beyler testified at the evidentiary hearing that there was evidence that the first floor resident regularly used candles. Evidentiary Hearing, 3/3/2014, at 161 (Lentini); Evidentiary Hearing, 3/4/2014, at 13 (Dr. Craig Beyler).

origin within the building, and the points of origin were determined based on incorrect interpretation of the meaning of the charring on the floor. Because an accidental fire and an intentionally set fire may look exactly alike in the aftermath where there has been full room involvement for more than a few minutes, Lentini opined that the evidence from the Decatur Street fire is consistent with an accidental fire emanating from the living room or another location and spreading into the balance of the building. Ultimately, given the limited amount of evidence available, he could only conclude that the cause of the fire was undetermined.

B. Dr. Craig Beyler

Dr. Craig Beyler ("Dr. Beyler"), a fire protection engineer, also testified for the defense. Dr. Beyler earned his Ph.D. in fire science from Harvard University in 1983 where he studied fire dynamics and under-ventilated compartment fires. He has studied and worked in the field of fire science since that time. He is currently employed as the technical director at Hughes Associates, a fire protection engineering consulting firm in Baltimore, Maryland. The firm examines fire hazards and analyzes how they can be mitigated and designs buildings and building systems, such as sprinkler and detection systems. It does forensic work as well, reviewing fire investigations after the fact.

Dr. Beyler's area of specialty is fire dynamics and fire chemistry. This includes understanding the science of ignition: how a fire develops and how it spreads throughout a building. Dr. Beyler has served on a number of governmental panels and committees in the area of fire science and protection. He has testified dozens of times as an expert in the areas of fire science and fire scene investigation, often in the area of cause and origin analysis. In determining cause and origin, he applies NFPA 921 and his knowledge of fire science to

determine whether findings as to cause and origin in a particular investigation can be supported. Dr. Beyler's curriculum vitae was introduced in evidence (Exhibit 11).

Dr. Beyler was asked to review the investigation in the Decatur Street fire and render an opinion as to whether the findings of the fire investigators were sound based on what is now known about fire investigation and fire science that was not necessarily known in 1982. He reviewed the entire trial transcript and the contemporaneous investigation reports.

Dr. Beyler disagreed with the investigators' conclusion that the area of deep charring in the front hall floor at the base of the stairs was a point of origin and indicated the use of an accelerant. Like Lentini, he explained that in fully developed room fires the place where there is the most damage is not necessarily where the fire started, because ventilation and the location of fuels (ignitable materials) play an important role in determining what the damage is.

Dr. Beyler explained that when an item is on fire, the object itself does not actually burn. What actually burns are flammable gases that are produced as the object thermally decomposes. Thus, when an item is heated, it creates flammable gases that are ignited, and a flame is visible above the item. The flame represents flammable gases that were originally in the solid or in the liquid that is burning. The process involves heating the material to evolve flammable gases, igniting those gases, and then burning. Studies have shown that when a flammable liquid is spilled onto a wooden floor and then ignited, the fire will last for about thirty seconds and then go out. The resulting damage to the floor will be entirely superficial. This is not consistent with the very deep char observed by the investigators at the Decatur Street fire.

Dr. Beyler explained the NFPA 921 protocol for conducting fire investigations. First, investigators should collect data at the scene, including interviewing witnesses, examining the scene, making drawings, taking photographs, and collecting physical evidence. Next is the

examination of every potential cause that exists within the area of origin to rule it in or out as to whether it is consistent with the damage that occurred. This requires a determination of the ignition source, the first material ignited, and the sequence of events that ensued. If the end result yields two hypotheses that are consistent with the damage, the cause must be ruled undetermined. The cause of a fire can only be determined where a single hypothesis survives scrutiny.

In Dr. Beyler's opinion, the Decatur Street fire investigators did not follow the NFPA protocol. They suspected that the fire might have been of incendiary origin before they even entered the Building because it had grown so quickly. Upon entering the Building, they immediately focused on two areas of heavy char in the front hall and the kitchen as the two points of origin and concluded that an accelerant had been used. The record shows no evidence that other possibilities were considered and ruled out.

Given the advanced state of the fire, including external flaming at the time that firefighters arrived and the high level of damage, as well as the statements of the eyewitnesses Marie Hinchee, Robert Arthur, and Edward Evans, Dr. Beyler opined that it was not appropriate to define the area of origin as any more circumscribed than the area of the kitchen, the living room, the front bedroom, and the front hallway, taken together. Because the evidence indicates that the fire started within this area, all potential causes within this area should have been examined, including electrical systems and appliances, as well as the space heater in the living room and the contents of every room. Additionally, all debris located within this area should have been examined.

In Dr. Beyler's opinion, a Molotov cocktail of the type purportedly used in this case – a twelve-ounce beer bottle containing flammable liquid – when ignited, would result in flames that

only last for ten seconds. Additional combustible materials would be required in order for the Molotov cocktail (which functions like a large match) to ignite items which could then lead to a fully developed fire. In other words, a Molotov cocktail could only be a competent ignition source for a fire of this magnitude if it was used to ignite some other significant fuel source. While diagrams prepared by the original investigators showed a detailed floor plan of the apartment, Dr. Beyler explained that the diagrams reveal nothing about combustible materials that may have been in the living room, foyer, kitchen, and front bedroom that could have been fuel sources affecting how the fire started or progressed. Furthermore, scant documentation was made regarding the contents of the apartment or how the various rooms were used by the occupants, and debris was only examined in the two areas the investigators believed to be points of origin. With such limited information, Dr. Beyler explained that it is not possible to understand or conclude anything about possible ignition sources or how the fire was able to grow and develop. Although the investigators determined what they believed to be areas of origin and determined that in their opinion an accelerant had been used, they had no understanding of what materials the accelerant might have ignited, and how the fire grew to involve other items and areas of the building.

In Dr. Beyler's opinion, Edward Evans' observations are consistent with a fire that was already burning before he approached the building but which was not visible from his vantage point due to a large volume of smoke. Once a window was broken, introducing oxygen into the building, the fire would have developed very rapidly. Taking the statements of all of the eyewitnesses together, Dr. Beyler opined that there likely was a fire inside the building that rapidly grew to be a fully developed fire once oxygen was introduced through an open window or an open door, providing additional ventilation.

Dr. Beyler also explained that the original investigators did not appear to consider the effects of ventilation in creating patterns in fully developed fires. At that time, in the early 1980's, scientists had some idea, though not as much as they do now, regarding the effects of ventilation on fully developed room fires. In the Decatur Street fire there were multiple ventilation sources, and Dr. Beyler concluded that the evidence demonstrates those areas of ventilation were all involved in this fire. This is consistent with the theory that the fire traveled from the living room into the front hallway, and explains the variations in the level of damage in different areas of the Building.

Ultimately, Dr. Beyler opined that the original investigators prematurely identified two areas of origin without properly considering other areas of the apartment and the hallway, and without properly considering all potential ignition sources that should have been examined.

C. Sergeant Paul Horgan

Paul Horgan ("Sergeant Horgan"), a sergeant with the Massachusetts State Police, testified for the Commonwealth. For twenty years, Sergeant Horgan has been assigned to the State Police Fire and Explosion Investigation Unit. His primary duties are to work with local police and fire departments to determine the origin and cause of fires and explosions; to document scenes where such incidents are the result of criminal activity; and to identify and prosecute those responsible. Sergeant Horgan has been involved in over sixteen hundred fire investigations during his career, including several hundred that involved the use of an accelerant. He is also a certified trainer for accelerant detection dogs. Sergeant Horgan holds a bachelor's of science degree and a master's degree in criminal justice. He also teaches and attends regular training seminars in the field. His curriculum vitae was admitted in evidence (Exhibit 20). Like Dr. Beyler and Lentini, Sergeant Horgan acknowledges that fire science has developed since the

1980's and that the scientific understanding of fire continues to develop even today, and he recognizes NFPA 921 as an authoritative source in the field.

Sergeant Horgan reviewed all of the materials relating to the investigation and trial of this case. He conceded that the investigators should have examined the space heater that was located in the living room on Decatur Street, but does not believe their failure to do so invalidates their ultimate opinions regarding the cause and origin of the fire. Sergeant Horgan explained that the investigators at the Decatur Street fire worked from the exterior to the interior of the building, examining fire patterns and collecting data to help them develop a hypothesis. They took photographs, excavated the scene, and collected evidence to submit to the crime laboratory. They also interviewed many witnesses. Their hypothesis regarding an incendiary fire was developed before they interviewed Edward Evans and learned about his observations outside of the Decatur Street building.

In Sergeant Horgan's opinion, when one examines the totality of the circumstances in this case, one is "led back to a solid conclusion of how this fire started and how it did what it did." Sergeant Horgan opined that the fire was incendiary, based on witness statements and the defendant's statements that corroborate the investigator's findings at the scene, as well as the fact that the fire spread so rapidly. Sergeant Horgan relied on the fact that Evans did not report seeing any fire, smelling any smoke, or hearing any screaming prior to or immediately after seeing the man (later identified as the defendant) with his arm raised and hearing the window break. Thus, he concluded that Evans' observations were made before the fire stated. Shortly thereafter Evans observed the Building engulfed in flames. On this basis, Sergeant Horgan concluded that there is no support for the defense theory that Evans may have seen the defendant breaking the window in response to a fire that had already started.

Sergeant Horgan placed significant weight on the fact that witnesses Robert Arthur, Marie Hinchee, and Daniela Martinez all saw small fires in the Building, apparently in three different locations, before the fire department was notified. He interpreted those observations as being made after Evans heard the window break and headed back to his home.

Sergeant Horgan opined that it would not comport with best practices to draw a conclusion about the cause and origin of the fire without considering the observations of witnesses. He pointed out that NFPA 921 discusses the issue of eyewitness statements in several places, and recognizes, in chapter 17.3.3.15, that eyewitness accounts are an important source of data in a fire investigation. He also acknowledged however, that NFPA 921, chapter 5.10.1.4 states: "The rate of fire growth as determined by witness statements is highly subjective," and that: "Eyewitnesses reporting a rapid rate of fire growth should not be construed as data supporting an incendiary fire cause."

In Sergeant Horgan's opinion, the burn pattern observed by investigators in the front hallway at the time of the fire could have been caused by an ignitable liquid, by combustible material on the floor, or by radiant heat coming out of the door from the living room. He acknowledged that NFPA chapter 6.3.3.2.4 states: "Full room involvement can also produce burning of floors or around door thresholds, sills, and baseboards due to radiation, the presence of hot combustible fire gases, or air sources (ventilation) provided by the gaps in construction." (Exhibit 5). He also acknowledged that NFPA 921 states that burning between seams or cracks or floorboards or around door thresholds, sills, and baseboards may or may not indicate the presence of an ignitable liquid. Ultimately however, Sergeant Horgan agreed with the scene investigators' conclusions that the irregular burn patterns both in the front hall and in the rear corner of the kitchen were consistent with the use of an ignitable liquid accelerant. Sergeant

Horgan pointed to a study, introduced into evidence at the hearing (Exhibit 24), indicating that fire patterns may persist, even after full room involvement or flashover, that can reliably support the determination of the origin of a fire, as he believes they do in this case.[42]

II. The Defendant's Social History

A. Carmen Garcia

Carmen Garcia ("Garcia") was the defendant's girlfriend at the time of the Decatur Street fire. She and the defendant met in New York in 1980. Later, they moved together to Lowell, Massachusetts with Garcia's three daughters, Carmen, Luz, and Nelita Garcia, and her son Andres Garcia ("Andres"). Eventually, they moved into the apartment at 38 Branch Street in Lowell where they lived at the time of the fire. Garcia and the defendant had been together for about two years at the time of his arrest in 1982. The defendant had a good relationship with all of Garcia's children, but was especially close to her son, Andres.

After they moved to Lowell, the defendant began working at a mattress factory. Daily, after he returned from work, the defendant would consume a six-pack of beer. On Fridays after work, he would also drink vodka or rum. On the weekends he would start drinking at about 9:00 A.M. when he awoke. He would consume hard liquor and a case of beer each weekend day, and would get drunk. When he was drunk he would at times hit himself in the face and say that he was hearing voices, and he would sometimes pass out or fall asleep from drinking.

About two weeks before the defendant was arrested he lost his job at the mattress factory. He applied for and began to receive unemployment insurance. He began drinking a case of beer a day during the week while he was unemployed.

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[42] Fire and Arson Investigator, Vol. 64, Issue 3, January 2014. The article also states, however, that: "the investigator should be cautioned that the origin is not necessarily located where the most fire damage is present, when considering a ventilation-controlled, post-flashover compartment fire. Instead, the most damage in these instances is located with the highest heat flux over time was present, which is most often in proximity to inflow vents."

About a week or so before the defendant was arrested, Garcia went to Puerto Rico to see her mother who was ill. While there, she saw a newspaper story about the fire in Lowell and the defendant's arrest. She called home and confirmed that the defendant had been arrested. She returned to Lowell and went to visit the defendant at the jail. When she called out to him, he did not look at her. He did not look well, and his eyes were "big and white." She was not able to speak with him because they were taking him to Bridgewater.

Sometime later, Garcia saw the defendant after he had been taken to Bridgewater. She described him as looking "like a dummy" and as not talking. He told her that they had given him medication. As of the date of her testimony, Garcia had not seen the defendant for fifteen years.

B. Andres Garcia

Garcia's son Andres first met the defendant in 1980 when he was ten years old. In August of that year, he moved to Lowell with his mother and the defendant. Andres had an excellent relationship with the defendant, who treated him like a father. After the defendant would come home from work he would spend his evenings drinking, watching television, and listening to music. On the weekends friends would come over, and the defendant would drink, listen to music, and play dominoes with his friends. Andres observed that the defendant drank a lot; he would usually have either a bottle or can or glass of beer in his hand.

At the time of the Decatur Street fire Andres was eleven years old. His mother was in Puerto Rico visiting her mother (his grandmother), who was ill. Andres recalls coming home from school one day and observing that the defendant was acting very strange. He was in the living room, his eyes were extremely big, and he was rocking back and forth on the couch. He seemed to be "far, far away," like he was "zoned out." The defendant had a bandage wrapped around his right arm, and he was mumbling. He seemed unable to keep still. He kept repeating,

"The children, the children. I tried to save the children." Andres had never seen the defendant like that before. Andres noted that it was unusual that the defendant did not have a beer in his hand. Andres recalls that the police came the next day and took the defendant out of the house.

Later, Andres turned on the color television and saw the defendant being lifted up and dragged into a police vehicle. The defendant appeared to be out of control and he was screaming. Andres had never seen the defendant behaving that way in the past. Andres has not seen the defendant since that time.

III. The Defendant's Mental Health History and his Confession

A. Dr. Judith Edersheim

Dr. Judith Edersheim ("Dr. Edersheim"), a forensic psychiatrist, testified for the defense. She is employed at the Massachusetts General Hospital where she is co-director of the Center for Law, Brain and Behavior. She also serves as a senior consultant to the Law in Psychiatry Service at the Massachusetts General Hospital, and she is a clinical associate professor of psychiatry at the Harvard Medical School. Dr. Edersheim explained that forensic psychiatry pertains to the relationship of psychiatry to legally relevant mental states. It addresses issues such as competency to confess, capacity to make certain decisions, the ability to consent to make a contract, and criminal responsibility.

Dr. Edersheim does research in the intersection of law, neuroscience, psychiatry, and neurology, involving issues about competency to make decisions, criminal responsibility, detecting truth from deception, and memory in the courtroom. She is board certified in psychiatry and in forensic psychiatry. She has published extensively in her field, and has testified as an expert in state and federal courts in Massachusetts and New Hampshire. Dr. Edersheim has performed evaluations and has lectured and testified on the issue of a defendant's

ability to validly waive his Miranda rights and voluntariness. Her curriculum vitae was introduced into evidence (Exhibit 27).

In preparation for testifying in this case Dr. Edersheim reviewed between twelve hundred and fifteen hundred pages of records. These included trial transcripts; medical record from the defendant's treatment at St. Joseph Hospital following the fire; booking records; Lawrence jail records; evaluations recommending the defendant for transfer from Lawrence and Billerica pursuant to G. L. c. 119, §18A; medical records following the defendant's transfer to Bridgewater State Hospital, including forensic evaluations by Dr. Veliz, a neurological consultation by Dr. Kearse, and admitting notes and observations of Dr. Fein. She also reviewed subsequent medical records from the defendant's detention facilities in Norfolk and Walpole; affidavits submitted in connection with this new trial motion; records from the defendant's current medical treatment in his detention facility and at the University of Massachusetts Memorial Medical Center; videotapes associated with the defendant's arraignment; independent mental health evaluations of the defendant by Drs. Kelly and Weiner; and two post-conviction mental health evaluations that were performed in connection with the defendant's parole proceedings in 1997 and 2002. Dr. Edersheim also met with the defendant in person.

Based on her review of records and her interview of the defendant, Dr. Edersheim formed the opinion that the defendant was suffering from delirium tremens, which is a global disturbance of cognition and orientation, at the time of his interrogation by police following the Decatur Street fire.

Dr. Edersheim explained that delirium generally is a very common medical condition. It has a characteristic presentation, a characteristic onset in terms of timing, and characteristic symptoms. It is a global disturbance in brain function that affects and acutely interrupts all of the

brain's functions. This includes orientation, awareness of the environment, cognitive processes, autonomic nervous system processes, perception, and the ability to orient oneself. In the medical literature, delirium is defined as a brain organ system failure and in layman's terms, it can be described as brain failure. It is a disruption of neurotransmitters so the chemical signaling in the brain is off and it results in an acute deterioration in mental processes. Delirium is very common in a medical setting because it is the final common pathway for many illnesses, including brain injuries, metabolic illnesses, liver failure, substance abuse, intoxication, and withdrawal. Delirium is a medical emergency and it has a fairly high mortality rate. Delirium may be seen post-operatively, when a person has been under anesthesia. It may also be caused by hemorrhage, stroke, metabolic derangements, substance abuse or withdrawal, toxic metabolic encephalopathy, and other kinds of insults.

Delirium tremens, otherwise known as alcohol withdrawal delirium, is a condition that represents a subset of general delirium that occurs as a result of someone who is a habitual user of alcohol decreasing or stopping use, which often precipitates a delirious state. There are characteristic signs that an individual is suffering from delirium tremens. The syndrome has an acute onset just like any other delirium, and it will coincide with the decrease or cessation of habitual alcohol use. If a person is a chronic alcohol user, he must maintain relatively the same amount of that substance in his system in order to have physiological equanimity. In other words, a person who is dependent on alcohol needs to use the same amount in order to prevent going into withdrawal.

Shortly after an alcohol-dependent person stops or reduces alcohol intake, he or she will descend into a very well-known progression of characteristic symptoms, which are pathognomonic (emblematic) of delirium tremens. The full timeline for the progression of

delirium tremens involves about a five-day evolution, peaking usually at about day three or day four. It then starts to resolve, and the tail end of symptoms may trail on for as much as several weeks afterwards. The abrupt onset starts between zero and twelve hours, and then over the next day there are characteristic symptom changes. There are also characteristic symptom changes when the disorder peaks, and finally, tail end symptoms when the disorder is beginning to subside.

Once a person begins to decrease or stops using alcohol, initial symptoms would include startling, tremor, and some confusion and agitation, but generally the person knows where he is and who he is. He may or may not have transient hallucinations, often transient auditory hallucinations. From day one to day two, things start getting significantly worse. Nightmares and insomnia may occur, as well as more profound disturbances including confusion, disorientation, and more extreme agitation. Following that, more significant perceptual disturbances occur such as hallucinations. Often, the early hallucinations are auditory. These may be of persecution, such as a feeling that people are out to get you or that there is evil around. Then the pathognomonic signs that identify the illness as delirium tremens develop. Around day two to day three, a person may experience unusual kinds of hallucinations including visual, tactile, and olfactory hallucinations as well as the more common auditory hallucinations. These peak between days three, four, and five. A person will engage in grossly disorganized behavior, extreme agitation, extreme disorientation, and confusion. Then other functions of the nervous system start to break down, so a person might exhibit fever, alterations in blood pressure and heart rate, pallor, flushing, and dilated pupils. At this point, delirium tremens is a medical emergency. The visual, olfactory, auditory, and tactile hallucinations become very vivid and very frightening and everything seems terrifying. There is disorientation and extreme agitation.

Typical hallucinations may include seeing fleeting faces, or seeing or feeling insects, rats, or snakes crawling on the person or on the walls or the ceiling.

Dr. Edersheim explained that the symptoms of delirium tremens can be distinguished from those of general psychosis such as schizophrenia or a delusional disorder. Psychosis includes loss of touch with reality, delusions, and hallucinations, but hallucinations associated with psychosis are more typically auditory. Visual hallucinations, tactile hallucinations, or olfactory hallucinations are not often seen in primary psychotic disorders. Those types of hallucinations implicate an organic brain syndrome, such as delirium.

Delirium is a neurologic neurocognitive disorder, and it is characterized by disorientation, disorganization, basic memory process disorders, language disorders, and autonomic nervous system dysfunction with some perceptual disturbances like hallucinations and delusions. In contrast, primary psychotic disorders like schizophrenia or delusional disorder are characterized by peculiar thoughts put forth in a peculiar way, not particularly by disorientation, or by lack of awareness or focus, or by disruption of basic mental processes, and certainly not by flushing, pallor or autonomic nervous system dysfunction. While delirium is an acute syndrome which comes on, becomes florid, and then subsides, psychotic disorders are typically chronic. They very rarely come on with an abrupt onset and no warning.

Because psychosis does not involve disorientation, people who are psychotic know who they are, know who others are, and know where they are. A person who is psychotic may be paranoid but is not confused about basic facts such as who their spouse is or in what country they are or even whether or not they are human. They might have very strange or paranoid ideas about a person's intentions or whom the person represents, but they are generally oriented to their environment and surrounding events. Psychosis does not involve the global derangement of

consciousness or orientation that is involved with delirium. Finally, unlike psychosis, delirium is characterized by fluctuating, or waxing and waning, behavior. In delirium there is a baseline level of impairment but behavioral symptoms tend to escalate when a patient loses the cues that are anchoring him to an awareness of the environment.

In her review of the records, Dr. Edersheim noted that the brevity of the defendant's symptoms and the onset of his symptoms were not consistent with the primary psychotic disorder – schizophreniform reaction – with which he was diagnosed. The Bridgewater State Hospital records (included in Exhibit 29) reveal that the defendant experienced a very time-limited illness; that he was only on medication for a brief period of time; and that his symptoms resolved completely and never recurred. Dr. Edersheim opined that this would be very unusual for a psychotic disorder. Dr. Edersheim also considered video clips of the defendant taken immediately following his arraignment in the Lowell District Court (Exhibits 30 and 31). The defendant appeared highly agitated, looked wild-eyed, and was bucking, thrashing, screaming, and engaging in highly disturbed behavior. Dr. Edersheim noted that this type of behavior would be uncharacteristic for someone who had a chronic psychotic disorder or even an acute psychotic disorder. Dr. Edersheim also reviewed records from the Cambridge Jail contemporaneous with the defendant's arraignment, which described him as acting similarly, in that he was completely agitated, pacing, thrashing, biting, kicking, screaming, and throwing his arms out against his cell. Such behavior, she opined, would also be completely out of keeping with a primary psychotic disorder. These behavioral characteristics led Dr. Edersheim to suspect that the defendant had been wrongly diagnosed. In addition, the medical records for each location where the defendant had been held revealed that he had elevated liver function tests. The liver function test results led Dr. Edersheim to consider the possibility that substance abuse, particularly alcohol, could be

an issue for the defendant. She also noted that the ambulance sheet reflecting transportation of the defendant to the hospital for treatment of his injured hand after the fire noted that he exhibited signs of alcohol intoxication (Exhibit 29). Many years later, in 2009, the defendant was tested again for liver function and he tested positive for Hepatitis C. This is an indicator for serious substance and alcohol abuse.[43]

Subsequently, Dr. Edersheim reconstructed a timeline of the defendant's symptoms and observed behaviors beginning with his normal daily life before the fire to put together a whole picture of the defendant's previous history and the onset, progression, and subsequent course of his illness in order to try to arrive at a diagnosis. The timeline shows that the defendant was an intravenous drug user in New York before moving to Lowell in 1980, that he had tried to stop his intravenous drug use but had continued using his drug of choice which was alcohol, and that he was a very heavy drinker and was alcohol-dependent. Immediately after the fire he dramatically reduced and eventually stopped his alcohol use and went into the early stages of alcohol withdrawal.

Additionally, Dr. Edersheim reconstructed the defendant's history of alcohol use based on her interviews with him, testimony from the trial, affidavits from the defendant's partner, Carmen Garcia and her children, and contemporaneous accounts of people who drank with him like Felix Garcia, Carmen Garcia's brother. Dr. Edersheim also considered behavioral observations of the defendant at the time which in her opinion reflect almost a textbook view of early withdrawal symptoms, as well as his liver disease. In addition, she concluded that the defendant was at a higher risk for development of delirium based on his medical history of suffering a very serious head injury in Puerto Rico as a young person, as well as information that

[43] Hepatitis C was not identified as a pathogen until approximately 1989, and the serology for a blood test for Hepatitis C was not available until 1992.

the defendant had been eating poorly while Carmen Garcia was away, just before the fire occurred.

Dr. Edersheim concluded, based on the materials she reviewed, that the defendant had been drinking more heavily than usual in the days prior to the fire, but then stopped drinking at about 1:00 A.M. on March 5, around the time the first fire alarm was called in. Shortly thereafter, he began to experience typical symptoms of early alcohol withdrawal. Andres Garcia observed that defendant was tearful, pacing, and disoriented. Others observed that the defendant was behaving in an extreme way they had never seen before, including staring wildly and undergoing an apparent religious conversion where he collapsed on the floor and called himself Jesus Christ. He reported to Dr. Weiner that he heard voices calling his name and he was having hallucinations of demons and devils.

Dr. Edersheim opined that the defendant began to experience full-blown symptoms of delirium tremens as a result of alcohol withdrawal during the police interrogation, which occurred on day three into day four. He appeared more agitated and more confused. He believed that someone was controlling his mind and that he had been forced to ingest drugs. His behavior reflected the typical waxing and waning of symptoms that is characteristic of delirium. Persons in a state of delirium are very suggestible, so they cannot make rational decisions or process information reliably. Towards the end of the interrogation, he was descending into the peak of delirium. He reported seeing demons, devils, and hell-fire. After the interrogation, he reported that he saw squares flying around his head and believed that the back of his head had been cut off. He remained in a peak state of delirium while he was at the Lawrence Jail, where he was fighting, assaultive, scratching, kicking officers, and was observed to be attempting to

strangle himself with his arms around his neck. These behaviors are consistent with delirium, but not with a schizophreniform reaction.

Dr. Edersheim explained that symptoms of delirium tremens typically start to subside around day five, six and seven. At the end of the cycle a person experiencing only residual symptoms of delirium might present as having a psychotic disorder. When the defendant was transferred to Billerica for an evaluation approximately on approximately day eight of the withdrawal timeline, Dr. Milton Schmidt noted that he presented as a "residual[ly] psychotic person who is acutely suicidal and who can't be maintained in the jail," and ordered a transfer to Bridgewater (Exhibit 29). Following his admission to Bridgewater, on March 11, a PCP level was ordered because the physician who admitted the defendant had a concern that he might be in a drug-induced psychosis, but the results were normal. The defendant was put on Mellaril, a sedating antipsychotic medication, which coincidentally is a good treatment for the psychosis aspect of delirium tremens. After three or four weeks, the defendant no longer needed medication and he was taken off of the Mellaril.

Dr. Edersheim opined that the diagnosis of delirium tremens was missed by clinicians who evaluated the defendant following his arrest for several reasons. Initially, he was seen for the limited purposes of an evaluation to address his ability to be maintained safely in a detention facility. Subsequently he was examined for competency to stand trial and criminal responsibility by Dr. Veliz. A full history was not taken at that time. Dr. Kearse also performed a neurological workup at Bridgewater on April 23. However, there was a lack of awareness of the defendant's substance abuse history,[44] his laboratory results concerning his abnormal liver function and Hepatitis C (which could not have been known at the time, see supra n.43), or other details

[44] During evaluations in connection with the defendant's parole applications in 1997 and 2002, evaluations revealed a past chronic history of alcohol abuse.

regarding his behavior during his interrogation and detention. Standard psychiatric screening tests which could have unearthed cognitive and reasoning deficits were not administered, either at the Lawrence Jail where the defendant was held after his arrest or at Bridgewater. In addition, although the defendant spoke some English, there was a significant language barrier that interfered with obtaining a full history.

In Dr. Edersheim's opinion, the fact that the records reflected no evidence that the defendant had any later recurrence of a mental illness, ever required antipsychotic medication, or ever had any recurring psychotic thought processes is not consistent with the diagnosis of schizophreniform reaction, because an isolated psychosis that lasts for four weeks and does not require further treatment, with no history of mental illness before or after, is very unusual. In Dr. Edersheim's opinion the evidence is also inconsistent with the defendant experiencing a brief reactive psychosis, which is an encapsulated period of delusions and hallucinations that are in reaction to a particular stressor.

Ultimately Dr. Edersheim concluded that as a result of the defendant's condition at the time of his interrogation he was experiencing a significant derangement of his mental processes such that he was disoriented, lacked awareness, was confused, and was experiencing extreme behavioral and perceptual disturbances. In that condition a person would not be able to make decisions on his own behalf, and would lack the capacity for basic consensual functions. The fact that the defendant appeared to be coherent and able to answer questions at times during the interrogation is consistent with the characteristic hallmark of waxing and waning of symptoms and outward behavior seen in a person experiencing delirium tremens, but even when observable symptoms are not present, a person experiencing delirium will continue to suffer from the underlying cognitive deficits relating to orientation, language, and memory.

B. Dr. Robert Joseph

Dr. Robert Joseph ("Dr. Joseph"), a licensed psychiatrist in Massachusetts, also testified for the defense. Dr. Joseph is a staff psychiatrist at the Cambridge Health Alliance in Cambridge, Massachusetts. He is also the Director of Consultation Liaison Psychiatry and the Director of Primary Care and Behavioral Health at the Cambridge Hospital in Cambridge, Massachusetts, and an assistant professor at the Harvard Medical School. He is board certified in general adult psychiatry and has additional qualifications in addiction medicine, and psychosomatic medicine. Dr. Joseph is responsible for the psychiatric consultations for medical and surgical patients at the hospitals affiliated with Cambridge Health Alliance and with training other clinicians in the area of psychosomatic medicine. He is frequently called upon to do evaluations of patients with respect to their capacity to make medical decisions on their own behalf. He is also in charge of the resident training program at Cambridge Health Alliance for psychosomatic medicine and he is the training director of a fellowship program in psychosomatic medicine. In that capacity, he lectures annually on delirium and substance abuse intoxication withdrawal. He also sees such cases on a regular basis in a hospital setting. Dr. Joseph's curriculum vitae was introduced into evidence (Exhibit 41).

Psychosomatic medicine is a subspecialty within the field of psychiatry which focuses on disorders at the interface of medicine and psychiatry. It was not formally recognized as a subspecialty until 2006. Psychosomatic medicine addresses patients with serious mental illness who become medically ill, as well as the psychiatric manifestations of medical illnesses themselves such as confusion, dementia, delirium, and specific syndromes which may accompany certain medical illnesses. Addiction medicine is another area of subspecialty

accreditation within medicine, for physicians trained in a variety of areas such as internal medicine, family medicine, or psychiatry who have a subspecialty in addiction practice.

Dr. Joseph explained that delirium is generally described as comprising three categories: hypoactive, hyperactive, and mixed delirium. Each category represents about a third of the total number of delirium cases. In hypoactive delirium, a patient looks sedated, withdrawn, and possibly depressed. In hyperactive delirium, a patient is agitated, aroused, and hyper-alert. In mixed delirium, a patient will display a combination of both hypoactive and hyperactive symptoms.

Delirium has many different causes. Most systemic illnesses, including infections, metabolic disturbances, central nervous system disorders, and intoxication and withdrawal states can cause delirium. Head injuries, including acute injuries, as well as chronic injuries like dementia, make a person more vulnerable to the development of delirium. Unlike psychosis, delirium is marked by abrupt onset, acute manifestation, and relatively abrupt resolution (if the underlying causes of the delirium also resolve). Delirium is a frightening experience for a patient. People experiencing delirium feel as if they are losing their minds.

Alcohol withdrawal delirium tends to manifest itself as the hyperactive type of delirium, although it may also be of the mixed type. It is often characterized by behavioral disturbances, agitation, and active psychiatric symptomatology such as delusions, hallucinations, and illogical and disorganized thinking. Unlike other types of delirium, alcohol withdrawal delirium has a particular sequence and timeframe associated with it. It is generally considered an organic as opposed to a purely psychiatric disorder.

Dr. Joseph defined psychosis generally as a loss of reality testing: a removal of a person's general awareness of his surroundings and his interpretation of those surroundings. A

psychotic person may experience hallucinations, but these tend to be relatively steady and chronic and they tend to represent an organized pattern. For example, a psychotic person may believe he is being followed by the FBI, or that he is being investigated for being a terrorist. By contrast, in delirium, hallucinations tend to be much more fleeting, less organized, and bizarre in the sense that they lack any sort of logical internal coherence or consistency. Examples would be imagining people on the ceiling or organisms on the floor that come and go. Symptoms of delirium tend to come and go or wax and wane.

Dr. Joseph defined a schizophreniform reaction as a psychotic episode lasting more than one month and less than six months, with no other obvious cause such as depression. A person suffering from a schizophreniform reaction may exhibit symptoms of psychosis, as may a person experiencing delirium. When a patient experiences psychotic symptoms that occur abruptly, the physician will look at the cause or causes, including infections, metabolic disturbances, effects of medication, drug abuse, and substance withdrawal symptoms in order to make a diagnosis. Unlike delirium, cognitive impairment is not seen with schizophrenia or a schizophreniform reaction.

Dr. Joseph explained that, in order to diagnose delirium, there has to be a presumed underlying cause to which mental status changes can be attributed. An example of such an underlying cause would be withdrawal from alcohol. Obtaining a detailed history from the patient and from collateral sources is very important to making a diagnosis of delirium, but it may be difficult to diagnose because abnormalities in a person's mental status may be attributed to other causes.

In preparation for his testimony in this case, Dr. Joseph reviewed the defendant's medical and psychological records and relevant trial and other transcripts and affidavits. Based on his

review of the records, he opined that the defendant was suffering from alcohol withdrawal delirium rather than schizophreniform reaction at the time of his interrogation. Dr. Joseph based his opinion on the witness descriptions of the defendant's alcohol use prior to his arrest, from which he concluded that the defendant was alcohol dependent, and the defendant's cessation of alcohol use after the fire, as well as descriptions of the defendant's behavior during the interrogation and following his arrest, as detailed in the various medical records. Specifically, Dr. Joseph noted the defendant's agitation, his misperceptions, some relatively extreme behavior, and some bizarre auditory, visual, olfactory, and tactile hallucinations. He explained that such hallucinations are indicative of an organic rather than a functional psychosis. In particular, the defendant had visions or feelings of flying knives, of squares on his head, and of the back of his head being blown off. He made a disorganized suicide attempt while in custody; he reported being strangled by a snake; and he appeared not to recognize his partner, Carmen Garcia. Additionally, his symptoms appeared to be very fluid, in the sense that there would be one kind of bizarre hallucination one point, and a different bizarre hallucination at another point. The hallucinations were not connected or part of any unified schematic or thought process. Dr. Joseph explained that shifting delusions of this nature are more consistent with delirium than with other types of psychosis. Also relevant was the defendant's prior history of sustaining a head injury.

Dr. Joseph opined that the diagnosis of delirium tremens may have been missed by clinicians who examined the defendant after his arrest because no medical professionals saw the defendant when he would have been most symptomatic as a result of alcohol withdrawal delirium, and because the records did not reflect an awareness of his significant alcohol use at that time.

C. Dr. Martin Kelly

Dr. Martin Kelly, a psychiatrist, testified for the Commonwealth. He also testified for the Commonwealth at the defendant's trial (see supra at pp. 25-26). Dr. Kelly is board certified in general and forensic psychiatry and is also a certified forensic examiner/forensic psychologist by the Commonwealth of Massachusetts. Dr. Kelly explained that forensic psychiatry deals with the interface of the legal system and medical systems. In criminal matters it may involve assessments regarding competency to stand trial; criminal responsibility; evaluations in aid of sentencing; and assessments of dangerousness and sexual dangerousness. In civil matters, it may involve medical or psychiatric malpractice; assessments of individuals with head injuries or neuropsychiatric, cognitive or other problems; suicide assessments; and assessments of individuals for competency to accept or refuse medical treatment.

Dr. Kelly is currently an associate professor of psychiatry at the Harvard Medical School. Formerly, Dr. Kelly worked at the Peter Bent Brigham Hospital, now known as the Brigham and Women's Hospital, in Boston as the assistant director of psychiatry, associate director of psychiatry, and then acting director of psychiatry. Dr. Kelly has consulted with child welfare agencies and for District Attorney's offices and for defense attorneys. He has testified on hundreds of occasions in courts within and outside the Commonwealth both for prosecutors and for defendants. His curriculum vitae was introduced into evidence (Exhibit 43).

In preparation for testifying at this hearing, Dr. Kelly located and reviewed his original file on the case which included numerous police reports as well as probable cause hearing and grand jury transcripts. In addition he reviewed material submitted in connection with the defendant's new trial motion, including affidavits by Dr. Joseph, Dr. Edersheim, and Dr. Ofshe;

the trial and motion to suppress testimony; and various medical records, including records from Bridgewater State Hospital and the Massachusetts Department of Corrections.

As a result of his recent review of the materials generated since the time of trial, Dr. Kelly formed the opinion that the defendant was not suffering from delirium tremens or alcohol withdrawal syndrome at the time of his interrogation. Dr. Kelly based this opinion on his conclusions that: (1) the defendant was not disoriented at the time of the interrogation; (2) the defendant's behaviors, as described by witnesses, were not typical of alcohol withdrawal syndrome; (3) the defendant was not experiencing bizarre hallucinations;[45] and (4) the time frame did not fit for the development of delirium tremens. In this regard, Dr. Kelly assumed that the defendant had his last drink at 12:00 to 1:00 o'clock in the early morning on the day before the police interview. Thus, the interrogation would have ended about fifty-three hours after the last drink. In Dr. Kelly's opinion, the typical time course for delirium tremens is that symptoms peak at about seventy-two hours.

Dr. Kelly also concluded that the defendant was not alcohol dependent prior to the incident based on the fact that he worked, provided for his family, and was not dysfunctional. Additionally, Dr. Kelly noted that the defendant's 2010 liver biopsy, while consistent with Hepatitis C, did not show any evidence of alcoholic cirrhosis.[46] Although the defendant's liver function tests conducted in 1983 show elevated enzyme levels which could reflect liver injury secondary to hepatitis, alcoholism, or a variety of other causes, subsequent testing over the next several months showed levels that had decreased to closer to the normal range. This suggested to Dr. Kelly that the elevated levels reflected an acute rather than a chronic process.

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[45] However, Dr. Kelly acknowledged on cross-examination that the defendant had reported to him that during the interrogation he was increasingly seeing images of knives, demons, and squares or snakes, and that this was very frightening to him.

[46] Cirrhosis is a disease characterized by thick scar tissue in the liver. It is seen in people who have been heavy alcohol drinkers for a long time.

IV. The Interrogation

A. David James Prum

David James Prum ("Prum") is employed as a private investigator with Thorndike Investigations, his own investigation firm in Cambridge Massachusetts. Prum has been operating Thorndike Investigations since 1997. Prior to starting his own company, Prum was employed with another investigative service company in Boston. In 2002, Prum was retained by Attorney Veronica White, who previously represented the defendant. In April 2005, Prum located Ramon Nieves in Puerto Rico, and spoke with him about his involvement in the defendant's case. Subsequently, Prum prepared an affidavit for Nieves to sign (Exhibit M for identification). Prum interviewed Nieves again in 2009, at the request of Attorney Andrea Petersen, who was then representing the defendant. Subsequently, Attorney Petersen prepared another affidavit which Nieves signed in November 2009. That affidavit accurately reflects the substance of the conversation that Prum had with Nieves in 2009. Prum attempted to secure Nieves' voluntary attendance to testify at the hearing on the defendant's new trial motion. Initially, Nieves agreed to appear and testify, but subsequently, he refused to appear voluntarily.[47]

[47] Attorney Lisa Kavanaugh, counsel for the defendant, represented at the hearing that she had attempted to obtain an out-of-state subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings ("Uniform Act") in order to secure Nieves' appearance to testify, but was unsuccessful. Both Massachusetts and Puerto Rico have adopted the Uniform Act. Massachusetts law provides that if a person in another state "is a material witness in a criminal proceeding pending in a court of record of this commonwealth, or in a grand jury investigation or proceeding . . ., a justice . . . of such court may issue a certificate . . . stating such facts and specifying the number of days the witness will be required, which certificate may be presented in accordance with the laws of such other state to a magistrate or officer thereof for appropriate action to secure the attendance of such witness in this commonwealth." G.L. c. 233, § 13B; see G.L. c. 233, § 13A (similar language authorizing court of this state to direct person in this state to attend criminal or grand jury proceeding in another state where that other state has requested that person's presence as material witness). The Puerto Rican counterpart to this statute provides that "[i]f a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in criminal proceedings in Puerto Rico [as Massachusetts has, pursuant to G.L. c. 233, § 13A], certifies . . . that there is a criminal prosecution for a felony pending in such court, that a person being within this Commonwealth is a material witness in such prosecution, and that his presence will be required for a specified number of days," the court in Puerto Rico will hold a hearing and, thereafter, issue a

B. Ramon Nieves

A redacted version of Nieves' 2009 affidavit was introduced in evidence at the hearing (Exhibit 28).[48] The affidavit relates the following facts:

Nieves lives in Puerto Rico and is a United States citizen. At the time he signed the affidavit, he was employed as the Area Loss Prevention Manager for an international auto-parts company.

In the early 1980's, Nieves lived in Lowell, Massachusetts where he was an active leader of the Hispanic community. In early 1983 he became a Deputy Sheriff for Middlesex County at the Billerica House of Correction. He served as the interpreter for the Lowell police (Inspector Harold Waterhouse and Lieutenant Gilligan) when they interviewed the defendant in the aftermath of the Decatur Street fire. The interview took place at the Arson Unit in the Lowell fire department headquarters. During the interrogation, Nieves sat next to the defendant. He translated the questions to the defendant and translated the defendant's answers to the police.

The defendant stated that he had no involvement in setting the Decatur Street fire. He stated that he had come upon the fire already in progress in the apartment building and that he tried to break into the house to save the people inside. The defendant had injuries on his hand from this attempt to break into the house. At one point during the interrogation, Nieves and the

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summons after determining "that the witness is material and necessary, that it will not cause undue hardship to the said witness to be compelled to attend and testify in the prosecution of another state or territory, that the witness will not be compelled to travel more than two thousand (2,000) miles to reach the place of trial . . ., and that the laws of the state in which the prosecution is pending and those of any other state through which the witness may be required to pass . . . will give him protection from arrest and from the service of civil and criminal process . . . ." 34 L.P.R.A. § 1471 (2013), available at http://www.lexisnexis.com/hottopics/lawsofpuertorico/ (last viewed June 23, 2014). Because this statute limits application of the process to circumstances where there is pending "a criminal prosecution for a felony," Nieves could not be compelled to appear for purposes of this hearing.

[48] In the exercise of my discretion, as Nieves was unavailable to testify at the hearing but could be compelled to testify at a new trial (see supra n.47), I permitted a redacted version of his affidavit to be admitted in evidence, limited to information based on his personal knowledge. Commonwealth v. Pike, 431 Mass. 212, 220 n.8 (2000); Commonwealth v. Grace, 397 Mass. 303, 313 (1986).

defendant were left alone briefly, but the defendant did not make any statements to Nieves about being involved with the fire.

At some point the defendant stated that he had injected heroin before coming to the Arson Unit to be questioned and that he was having a reaction to coming down from the drug. Even while the defendant was denying his involvement with the fire, he referred constantly to "El Diablo" (the devil), to being possessed by the devil, and to being the son of God. At one point, several hours into the interrogation, the defendant collapsed on his knees sobbing. He repeated, "El Diablo, El Diablo" over and over again for fifteen to twenty minutes, and repeatedly said, "No, no, no." He denied his involvement in the fire, and he shouted, "Stop it, stop it." The defendant kept rubbing his arms as if something like ants were on him. He kept saying, "Get it off of me."

After this breakdown, the defendant signed two statements prepared by Inspector Waterhouse. The last statement said that he had thrown a Molotov cocktail into the front hall of the building on Decatur Street. Nieves did not translate the final statement to the defendant.

The defendant never stated that he acted as a lookout for the people who set the fire. He never stated that he threw a Molotov cocktail into the building to set the fire. Inspector Waterhouse made these allegations during interrogation and included them in the written statements prepared for the defendant to sign.

By the time the defendant signed the last two statements that Inspector Waterhouse prepared, he was incoherent. Often he did not respond to any of the officers' questions.

On the morning after the defendant signed the statements, Inspector Waterhouse and Lieutenant Gilligan brought him to a house on Bridge Street in Lowell. Nieves went along with them to continue translating. The defendant was in handcuffs and he was taken to the basement

of the building. There were people in police cars around the building. Inspector Waterhouse asked the defendant to reenact the preparation of the Molotov cocktails. The defendant appeared confused and was not able to do this. The defendant never said anything about making or watching the preparation of Molotov cocktails in the basement of the house on Bridge Street.

On the day of the trial, Nieves recalls telling the prosecuting attorney that he thought the defendant was out of his mind when defendant signed statements prepared by Inspector Waterhouse.

C. Notes of the Assistant District Attorney

Notes taken during two interviews of Nieves conducted prior to the defendant's trial by the assistant district attorney assigned to the case were introduced at the hearing (Exhibits 47A, B, and C). The notes reflect the following facts regarding the defendant's interrogation that are pertinent to his new trial motion:

Although the defendant understood some English, Nieves was asked to interpret because the officers wanted to make sure the defendant understood everything. Inspector Waterhouse read the defendant's Miranda rights in English, and Nieves interpreted the rights into Spanish. The defendant appeared nervous. His clothing was normal, he was not disheveled. Inspector Waterhouse told the defendant that they were going to question him about the Decatur Street fire and asked if he was willing to answer questions. The defendant answered, "Yes." The defendant was coherent, responsive, and calm.

Waterhouse began the interview by informing the defendant that they had reason to believe he was implicated in the Decatur Street fire. The defendant then gave his first statement which took ten to fifteen minutes. Inspector Waterhouse took notes on a pad and then typed up the statement. Nieves translated the statement to the defendant and asked him two or three times

if he understood. The defendant then signed the statement. It took about an hour from the time the statement began until the defendant finished signing it.

The police then told the defendant they had reason to believe that he was involved in the fire and urged him to tell the truth. The defendant denied that he was involved. The defendant pulled up his sleeve and stated that he had been forced to "do it" (shoot up drugs). He stated that he had been held down and "Elgardo" and "Felix" had stuck him in the arm with a needle. He stated that this had occurred before the fire and he did not know where he was or what he was doing after he had been shot up.

Inspector Waterhouse then told the defendant that he had a witness who had seen the defendant at the scene. The defendant kept saying he did not have anything to do with the fire. Inspector Waterhouse reiterated that they had a witness who saw the defendant at the scene and could identify him.

Nieves then met alone with the defendant for forty-five minutes to an hour. During this time the defendant continued to deny his involvement in the fire. He was speaking normally and Nieves could understand him. He was responsive and calm but nervous.

When police officers resumed questioning the defendant, he stated that he had "Just tried to save the kids." The officers told him again that if he was the only one who admitted being there he was going to be "left holding the bag," and told him to "remember the kids." There was a newspaper on Lieutenant Gilligan's desk showing a photograph of the children who had been killed in the fire. Inspector Waterhouse again told the defendant to "remember the kids," and stated that they had someone who could identify the defendant and put him at the scene of the fire. The defendant remained nervous, but was responsive and was answering questions willingly.

The defendant then "lost it," and started screaming and yelling, "Oh God, those kids." Nieves had never seen the defendant behaving this way before. The defendant stated that he had stitches in his head and had been involved in an accident. The defendant was wild-eyed, emotional, and crying. He made a reference to devils. He was on the floor holding onto a chair until he finished crying. The breakdown lasted for ten or fifteen minutes. Then the defendant sat on a chair and the police officers offered him a cigarette and coffee asked him if he wanted to stop being questioned. The defendant said, "No." The officers then continued to question the defendant about where he was before the fire and how he did it. The defendant kept saying that "Felix" always played with his mind, telling him what to do.

The interview continued for approximately an hour and a half and the defendant made a second statement where he admitted to being a lookout. The police asked him about why there were three points of origin for the fire. They questioned him about throwing something into the Building. The defendant denied, but then finally admitted throwing something into the Building. He remained nervous and his eyes were watering but he was responsive and seemed otherwise normal during this period. He stated that he was going to get even with "Elgardo" and "Felix" because of what they did to him, and stated that "Felix" is always forcing him to do things that he does not want to do.

D. Lisa Stephani

Attorney Lisa Stephani ("Stephani") represented the defendant in his first new trial motion and on appeal from denial of that motion. Her affidavit was introduced into evidence at the hearing (Exhibit 45). The affidavit sets forth the following facts:

Stephani brought a claim of ineffective assistance of counsel relating to Attorney John Campbell, who represented the defendant at trial. Attorney Campbell refused to give Stephani

access to his trial file. At the time she brought the new trial motion on the defendant's behalf, Stephani was not aware of the assistant district attorney's notes outlined in the preceding section of this memorandum. Had she been aware of the notes, she would have referenced them in her motion, as they would have bolstered the defendant's ineffective assistance claim by demonstrating that Nieves gave inconsistent statements regarding the defendant's interrogation and told the assistant district attorney about certain police tactics used during the interview.

E. Dr. Richard Ofshe

Dr. Richard Ofshe ("Dr. Ofshe") is a tenured professor emeritus in the field of social psychology at the University of California at Berkeley. He holds a doctorate in sociology from Stanford University. His primary teaching has been in the field of influence and decision-making. Early in his career, he worked in the area of rational decision-making and explored mathematical models of decision-making and influence. Subsequently, he became interested in issues regarding how complex real-world environments influence individuals to engage in extraordinary conduct, and he began to study settings that have the ability to elicit extremes of conduct. For example, he studied how cult groups (also known as "high control groups") can lead individuals to engage in criminal conduct or to undergo high levels of exploitation in order to maintain their position in the group. Dr. Ofshe has also conducted research in the area of recovered memory. For the last twenty-five years, Dr. Ofshe's principal area of interest and work has involved police interrogation, and he has published in that field. Specifically, he has written about how the process of interrogation manipulates a person's perception of his or her current situation and expectations for the future; then manipulates the person's motivation to shift from denial of involvement in a crime to admission of having committed the crime; and

then how interrogation, if appropriately and competently conducted, leads to eliciting information from the suspect that corroborates his or her confession.

His paper, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U.L. Rev. 979, 1008-1013 (1997), has been cited frequently in academic literature, and has also been cited by courts, including by the Massachusetts Supreme Judicial Court in the case of Commonwealth v. DiGiambattista, 442 Mass. 423, 431-432, 434, 435, 439 n.15 (2004). He has lectured to defense attorneys, prosecuting attorneys, and judges on the subject of interrogation and influence. He has also been a consultant to numerous law enforcement agencies regarding interrogation and regarding the analysis, evaluation, and prosecution of high control/cult/domestic terrorist organizations. He has testified in excess of three hundred and fifty times in state, federal, and military courts regarding police interrogation tactics, including eight or nine times in Massachusetts. Dr. Ofshe's curriculum vitae was introduced into evidence (Exhibit 40).

Dr. Ofshe has extensively studied the methods by which police officers are trained to conduct interrogations. He explained that recently, traditional interrogation methods, such as those promoted by Reed Associates (a purveyor of the type of police interrogation training techniques that were generally in use in 1982, at the time the defendant was interrogated), have come under strong criticism as a result of the development of an understanding in the field of psychology that certain tactics may result in eliciting false confessions from criminal suspects. Specifically, techniques are employed to undermine a person's confidence and memory and supply the person with alleged evidence of his involvement in the crime. When there is purportedly reliable evidence linking a person to a crime, that person may confess falsely, even where he has no memory of having committed the crime. In such interrogations, information

regarding details about the crime that could only have been known to the perpetrator and to the police may also be transferred to the suspect during the interrogation.

During his career, Dr. Ofshe has analyzed over 1,500 police interrogations by reviewing the available information about the interrogation, including transcripts, and examining the tactics that are used by the police. He noted that typically, the interrogator begins by reducing the suspect's level of confidence about being able to get through the interrogation successfully. This is done by introducing what is known as an "evidence ploy" at a strategic moment. An evidence ploy is information that may be true or false, but if true would link the suspect to the crime. For example, an evidence ploy might be a statement informing the suspect that the police have an eyewitness who places him at the crime scene, or that they have recovered his fingerprints from the crime scene. An evidence ploy can reduce the confidence of a person who has committed the crime and knows he has committed the crime, and it can also do the same thing to a person who knows he did not commit the crime. Once a person perceives his situation as hopeless, it is easier for the interrogator to motivate him to abandon denial.

After the interrogator reduces the suspect's confidence successfully in this manner, he will typically introduce a motivational tactic, which will then become the interrogator's principal focus. Motivational tactics include things like telling a suspect "to be a man about it," reminding him that the police have not lied to him, suggesting that that he should admit to what the police know he did, telling him that "now is the time to show remorse," or stating that he should "show the police and the community that he has the integrity to admit his guilt." Motivational tactics in and of themselves do not lead to false confessions. They are designed to get the suspect to think about the future; to come to a realization that he will be better off if he confesses now, without the interrogator telling him that directly.

Police officers may also use psychological coercion by linking confessing to a lower level of punishment or leniency, and/or linking continuing denial to maximum or harsher punishment. This may be accomplished by, for example, suggesting that the defendant acted in self-defense, as opposed to committing a premeditated act. Another common form of psychological coercion is to suggest to the suspect that he was there, and that he was a witness to the crime, but that he did not do the offending act himself. The police may state that the suspect's testimony is necessary to make the case against the actual perpetrators.

Once a person confesses, a skilled interrogator will then seek to get him to reveal information about the crime that will corroborate his confession, and will link him to the crime in a way that can never be repudiated.

When a person has confessed falsely, studies show that corroborative details in the confession frequently have been supplied by the police, either deliberately or inadvertently. This process is known as contamination or formatting. It is especially difficult to prove that contamination or formatting has occurred when a confession has not been recorded.

In preparation for his testimony at the hearing, Dr. Ofshe reviewed the transcripts of the probable cause hearing, the grand jury hearing, the motion to suppress, and the trial. He examined the defendant's signed police statements, the prosecutor's notes describing his conversation with Nieves, Nieves' affidavits, the defendant's Bridgewater State Hospital records and mental health evaluations, the reports of the expert witnesses called at the trial, and the affidavits of Lentini, Dr. Beyler, Dr. Edersheim, and Dr. Joseph. He also reviewed the evaluation reports prepared in connection with the defendant's parole hearings.

In Dr. Ofshe's opinion, the police officers who interrogated the defendant used an evidence ploy by telling the defendant that they had a reason to believe he was present at the fire

scene before the fire began, and that it might be necessary to bring in witnesses who could identify him as being there, even though no affirmative identification had been made of the defendant at that time. The police did know that the defendant had been at the fire scene and had injured himself. They had also met with Evans who had reported seeing a young Hispanic male in front of the building with his hand raised prior to the start of the fire and hearing the sound of a window breaking in the area of the living room, but Evans had not yet identified the defendant as being the person he had seen. Dr. Ofshe opined that Evans' account provided the investigators with a hypothesis of a third point of origin for the fire, in addition to the two points they had identified based on their investigation at the scene.

Based on Nieves' affidavit and the prosecutor's notes of his conversation with Nieves, Dr. Ofshe also opined that the interrogators used a motivational tactic by threatening the defendant that he would be left "holding the bag." Dr. Ofshe additionally opined that the investigators engaged in contamination or formatting by introducing certain concepts to the defendant, including that he had acted as a "lookout" for Elgardo and Felix; that the fire had been started with "Molotov cocktails;" and that there were three points of origin for the fire. Dr. Ofshe noted that while the prosecutor's notes contain a description of how Nieves translated the defendant's first statement to him and obtained the defendant's acknowledgment that he understood it before having the defendant sign it, the notes do not contain a corresponding description of that process for the defendant's later statements.

Finally, Dr. Ofshe noted that witnesses gave different descriptions about the timing of the defendant's "breakdown" that occurred during the interrogation. He opined that the timing of the breakdown could be significant because a suspect's psychological status – whether normal, abnormal, or vulnerable – might be a factor in the overall evaluation of an interrogation.

F. Other Evidence

Michael N. Moore ("Moore") testified for the defense. Moore is a self-employed licensed private investigator who generally does investigative research for civil litigators. He has no training in chemistry, fire dynamics, or fire engineering. In 1982, Moore routinely did work for a retired Brookline police officer, James O. Mills ("Mills"), who was licensed as a private investigator. Mills had been hired by the defendant's trial counsel, Attorney Campbell, to work on the case, and Mills retained Moore to do research. Moore had previously conducted arson research for a government-funded program, but he had no expertise in fire scene investigation. Mills asked Moore to look for records that would tend to cast suspicion on other individuals, or would exonerate the defendant. Although Moore suggested that the defense should hire an arson expert to work on the case, Attorney Campbell did not do so.

Rulings of Law

I. Standards of Review

A. Mass. R. Crim. P. 30

"The trial judge upon a motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). Because the trial judge in this case retired, this motion is before a different judge. See Commonwealth v. Yancy, 440 Mass. 234, 235 (2003); Commonwealth v. Carter, 423 Mass. 506, 512 n.7 (1996) ("It is well settled that, although it is preferable that such motion be decided by the original trial judge, decision by a different judge of the same court is entirely proper."). While the granting of a new trial is within the discretion of the judge, "that discretion is not boundless and absolute." Commonwealth v. Genius, 402 Mass. 711, 714 (1988), citing Commonwealth v. Preston, 393 Mass. 318, 324-325 (1984). "Judges are to apply the standard set forth in rule 30(b) rigorously

and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635-636 (2001).

B. Newly Discovered Evidence

"The decision to deny or grant a motion for a new trial based on newly discovered evidence is committed to the sound discretion of the motion judge." Commonwealth v. Shuman, 445 Mass. 268, 272 (2005); Commonwealth v. Brown, 378 Mass. 165, 170-171 (1979). Where the defendant seeks a new trial on the basis of newly available or newly discovered evidence, the defendant "'must establish both [1] that the evidence is newly discovered and [2] that it casts real doubt on the justice of the conviction.'" Commonwealth v. Rosario, 460 Mass. 181, 195 (2011), quoting Grace, 397 Mass. at 307; Commonwealth v. Chiappini, 72 Mass. App. Ct. 188, 196 (2008) (setting forth "two principal elements" of motion for new trial based on newly discovered evidence). "If the motion judge concludes that the moving party has failed to establish one aspect of the burden, the judge need not, but may, consider the other." Grace, 397 Mass. at 307.

"Evidence not newly discovered, . . . and not offered at trial, may have a reasonable bearing on the weight and reliability of newly discovered evidence." Id. at 310. Thus, "[a] judge considering a new trial motion has the flexibility . . . to consider in the interest of justice all evidence that might bear on the issues presented." Id. at 312. That notwithstanding, "[t]he evidence said to be new . . . must be material and credible . . . [and] also must carry a measure of strength in support of the defendant's position." Id. at 305 (internal citation omitted); see id. at 306 (reiterating that defendant must "demonstrate . . . materiality, weight, and significance" of "the allegedly new evidence").

1. *Newly Discovered*

"A defendant seeking a new trial on the ground of newly discovered evidence must first establish that the evidence was not discoverable at the time of trial despite the due diligence of the defendant or defense counsel." Commonwealth v. Sena, 441 Mass. 822, 830 (2004); Commonwealth v. Kobrin, 72 Mass. App. Ct. 589, 612-613 (2008) ("'Evidence is considered 'newly discovered' . . . only if it was unknown and unavailable at the time of trial despite the diligence of the moving party.'" (internal quotations omitted) (quoting Wojcicki v. Caragher, 447 Mass. 200, 213 (2006))). "[T]he obligation to uncover evidence through reasonable diligence before trial (or before a motion for a new trial) lies not only with the defendant's counsel, but also with the defendant himself, when there is a reason to do so." Commonwealth v. Weichell, 446 Mass. 785, 802 (2006).

"A defendant need not jump quite so high a hurdle" as establishing that it would have been "impossible to have uncovered the new evidence before his trial." Kobrin, 72 Mass. App. Ct. at 613; see, e.g., Commonwealth v. Buck, 64 Mass. App. Ct. 760, 764 (2005) ("Defense counsel was not obliged to search for something he did not know existed."). Rather, this prong "requires a showing that reasonable diligence would not have uncovered the evidence by the time of trial[,]" Commonwealth v. Staines, 441 Mass. 521, 534 (2004), "or at the time of the presentation of an earlier motion for a new trial[]." Grace, 397 Mass. at 306; Kobrin, 72 Mass. App. Ct. at 613 ("[R]easonable diligence would not have led his trial counsel to the material."); see Shuman, 445 Mass. at 272 ("[E]vidence does not meet the test for 'newly discovered' evidence [if] it was available prior to the trial."); see, e.g., Commonwealth v. Wolinski, 431 Mass. 228, 237 (2000) ("[D]efense counsel's affidavit did not set forth what steps, if any, were taken at the time of trial to interview or to locate [witness alleged to be newly discovered]."); Commonwealth v. Whitlock, 74 Mass. App. Ct. 320, 324 (2009) (holding that evidence from

defendant's former girlfriend concerning alleged third-party suspect's presence at the time of crime was not newly discovered because, in part, "defendant had not shown why he could not have produced her testimony at trial"); Commonwealth v. DeLong, 60 Mass. App. Ct. 122, 137 (2003) (doubting "that at the time he represented the defendant in the Middlesex County [crimes] . . ., trial counsel would have been aware of the . . . surveillance tape made in Suffolk County [confirming defendant could not have been at crime scene] or could have discovered it through 'reasonable pretrial diligence' especially where the Middlesex County district attorney's office denie[d] that it had possession of the surveillance tape").

2. *Casts Real Doubt on the Justice of the Conviction*

Once the defendant has established that his evidence is newly discovered, he "must then show that the newly discovered evidence 'casts real doubt on the justice of the conviction.'" Sena, 441 Mass. at 830 (citation omitted). The defendant satisfies the second prong if he can demonstrate that there is "'a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial.'" Id. (citation omitted); Commonwealth v. Figueroa, 422 Mass. 72, 79 (1996); Grace, 397 Mass. at 306.

In determining whether the defendant has met his burden, the court does not decide "whether the verdict would have been different . . . ." Grace, 397 Mass. at 306. Rather, "[t]he task of the motion judge is to decide whether the new evidence probably would have been a real factor in the jury's deliberations, and in that regard the judge must consider the strength of the case against the defendant." Commonwealth v. Lykus, 451 Mass. 310, 326 (2008); Kobrin, 72 Mass. App. Ct. at 613; see, e.g., Commonwealth v. Morgan, 449 Mass. 343, 363-364 (2007) (concluding that "'newly discovered information . . . would [not] have influenced the jury anymore than was done at trial'" "'in light of [counsel's] work on cross examination'" and in

light of counsel's "attacking . . . credibility [of witness connecting defendant to murder weapon] in her closing argument" (final ellipses and alteration added)); Sena, 441 Mass. at 831 ("'It is well established that [n]ewly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial.'" (alteration in original) (citations and internal quotation omitted)). A strong case against the defendant "may weaken the effect of evidence which is admittedly newly" available, and new evidence "that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind." Grace, 397 Mass. at 305-306; see, e.g., Lykus, 451 Mass. at 329-330 (holding that newly discovered evidence "[did] not cast real doubt on the justice of the conviction" where it was cumulative and where circumstantial case against defendant was "overwhelming").

II. Fire Science Evidence

Through the testimony of John Lentini and Dr. Craig Beyler and the accompanying documentation, NFPA 921 specifically, the defendant attempts to cast doubt on the investigators' conclusion that the fire was intentionally set with flammable liquids and involved at least two points of origin, i.e., the front hall and the kitchen. Lentini and Dr. Beyler provided evidence that the investigators in 1982 operated under certain misconceptions that were generally accepted at that time. The defendant argues that this evidence is newly discovered evidence that entitles him to a new trial.

The first question for resolution is whether Lentini's and Dr. Beyler's testimony and NFPA 921 are, in fact, newly discovered. See Rosario, 460 Mass. at 195. "[E]xpert testimony may not be considered newly discovered for purposes of a new trial simply because recent studies may lend more credulity to expert testimony that was or could have been presented at trial." Commonwealth v. LeFave, 430 Mass. 169, 181 (1999). "To hold otherwise would

provide convicted defendants with a new trial whenever they could find a credible expert with new research results supporting claims that the defendant made or could have made at trial." Id. Analysis under this first prong therefore requires more than a determination of timing. The court must also consider the substance of the purportedly new evidence as compared to the evidence at trial. A close reading of LeFave provides guidance.

In LeFave, the defendant argued that "the testimony of [a posttrial expert] . . . constitute[d] newly discovered evidence that explain[ed] how children can speak of disturbing sexual acts that they did not experience." 430 Mass. at 176. During the pretrial proceedings, one expert testified "that it was obvious that the interviewing skill and comportment of the interviewer was 'a critical variable'" when interviewing child witnesses. Id. at 178. "At the defendant's trial, two [different] experts . . . testified on her behalf. They noted the importance of a neutral interviewer and the need to avoid adult influences to which children are particularly susceptible. . . . and criticized many of the same interview techniques described by [the defendant's posttrial expert] in the defendant's presentation in support of her . . . motion for a new trial." Id. at 178-179.

In presenting her posttrial expert, "the defendant acknowledge[d] that the same concepts regarding interviewing techniques were presented or available at the time of her trial." Id. at 179. She argued, however, that the posttrial expert's "ability to discuss the consequences of coercive interview techniques [made] her testimony new. . . . [and] that the expert testimony available at trial could not explain how suggestive interview techniques can lead a child to make false allegations of sexual abuse." Id. The defendant therefore asserted that the posttrial expert's testimony was "not simply 'better than' the testimony offered at trial because she would discuss

recent studies that answer the question unanswerable at trial, namely: 'How could children come to speak of disturbing sexual acts if they did not suffer them?'" Id.

The Supreme Judicial Court disagreed with the defendant, holding that the posttrial expert's testimony did not satisfy the first prong of the newly discovered evidence analysis because the testimony was not "new." Id. at 177. Although the posttrial expert's testimony was "new in the sense that she did not testify at the defendant's trial[,]" and although the studies to which she "referred were new in the sense that they were published after the trial[,]" the posttrial expert's testimony did not "differ in kind . . . from the evidence presented at trial[,]" id., and her opinion did "not differ significantly from the defense's theory before and after trial." Id. at 179. Importantly, the posttrial expert's "proposed testimony was corroborative of evidence available at the time of trial. Her evidence would have simply tended to support the opinion evidence, available at the time of the defendant's trial, that improper investigatory techniques could cause a child witness to state false facts." Id. at 181.

Conversely, in this case, NFPA 921 and Lentini's and Dr. Beyler's testimony with respect to developments in fire science suggest that the investigators did not arrive at their conclusions with respect to the cause and origin of the fire according to proper fire science principles. Relying on principles of fire science that were generally accepted at the time, the investigators concluded that ignitable liquid was the cause of the fire, and that the fire had originated in the front hallway and in the kitchen. The investigators did not examine any debris other than in the two areas they had identified, and they did not consider any other potential causes. Instead, they based their conclusions on the rapidity with which the fire had grown, and on the facts that these two areas were the heaviest areas of fire damage; that an area of less fire

damage separated the two areas; and that the blistering burn pattern was consistent with the use of a flammable liquid.

Lentini's and Dr. Beyler's testimony and NFPA 921 do not corroborate the evidence available at trial; rather, this evidence reflecting the current state of fire science demonstrates the misconceptions the investigators had at the time with respect to fire science. First, it is now generally accepted in the field of fire science that once flashover occurs, the point of origin cannot be accurately determined by looking solely at the heaviest visible charring or damage; it is unlikely that small burn patterns generated by a flammable liquid at the beginning of a fire will still exist upon flashover. Therefore, the deep char that the investigators noted in the front hallway and kitchen is not necessarily consistent with the presence of flammable liquid, and the investigators did not consider the sources of ventilation in the kitchen and living room as potentially enabling the fire to travel from the living room to the front hallway, and from the front hallway to the kitchen.

Second, hot gases in one room can cause burning in another room on the other side of a closed door, and irregular burn patterns on the floor can result from hot gases, smoldering debris, melted plastics, or ignitable liquids; investigators should confirm the presence of ignitable liquids through laboratory testing and should not attempt to identify the cause of the burn patterns by visual appearance alone. Here, laboratory testing of certain areas of the floor did not confirm the presence of flammable liquid; instead, the investigators relied on the visual appearance of the burn pattern to identify the cause and origin(s) of the fire.

Third, the presence of shiny blisters, or alligator char, is no longer considered to be indicative of the presence of a liquid accelerant during the fire; this type of char can result from

many different kinds of fire. The investigators' reliance on this "alligatoring" to support their theory of the presence of a flammable liquid was therefore erroneous.

Finally, when determining the cause of a fire, the investigators must consider every potential ignition source in the area. Here, the investigators did not take note of or seek evidence regarding the contents of the first-floor apartment in order to determine possible sources of the fire's origin and/or progression; instead, they focused their attention on the burn patterns in the floor in the two areas they identified as where the fire had originated.

Therefore, rather than corroborate the evidence available at trial, Lentini's and Dr. Beyler's testimony and NFPA 921 "differ significantly" from and contradict the principles that provided the bases for the fire science evidence at trial. Contra LeFave, 430 Mass. at 181 (holding defendant's "allegedly new evidence lack[ed] the characteristics necessary to qualify as newly discovered evidence . . . . [because it] was corroborative of evidence available at the time of trial"). These developments in fire science came about after the defendant's 1983 trial, therefore they were not discoverable at the time of trial. This evidence is accordingly "new," and the defendant has satisfied the first prong of the newly discovered evidence analysis. See Rosario, 460 Mass. at 195; Sena, 441 Mass. at 830; Kobrin, 72 Mass. App. Ct. at 612-613.

The defendant, however, is unable to satisfy the second prong of this analysis. This evidence does not cast real doubt on the justice of the defendant's conviction because the defendant's *confession* was consistent with and corroborated the fire science and eyewitness testimony at trial. See Rosario, 460 Mass. at 195; Grace, 397 Mass. at 306 ("The strength of the case against a criminal defendant . . . may weaken the effect of the evidence which is admittedly newly discovered."). The defendant has not demonstrated that, with the admission of his confession, there is a substantial risk that the jury would have reached a different conclusion if

the "new" fire science evidence had been admitted. See Sena, 441 Mass. at 830. Thus, on the basis of the newly discovered fire science evidence alone, the defendant is not entitled to a new trial.[49] But see infra n.54.

III. The Defendant's Confession

The voluntariness of the defendant's confession was at issue at his trial. See DiGiambattista, 442 Mass. at 446 ("[T]he evidence of a defendant's alleged statement or confession is one of the most significant pieces of evidence in any criminal trial."). Humane practice requires that, where "the Commonwealth intends to rely on a defendant's confession to a crime," Commonwealth v. Baye, 462 Mass. 246, 256 (2012), or where a defendant objects to the voluntariness of his confession, "the Commonwealth must prove beyond a reasonable doubt that the statements were voluntarily made." Commonwealth v. Santana, 465 Mass. 270, 281 (2013); see Commonwealth v. Watkins, 425 Mass. 830, 834-835 (1997).

"[T]he question whether the statements were voluntarily given is to be decided by the judge following an evidentiary hearing in the absence of a jury." Commonwealth v. Miller, 68 Mass. App. Ct. 835, 842 (2007); see, e.g., Commonwealth v. Girouard, 436 Mass. 657, 658 n.1 (2002) (holding that, "[i]n the absence of any evidence of involuntariness, . . . the judge was under no obligation to conduct a pretrial evidentiary hearing"). If "the judge determines as a

[49] With respect to the defendant's contentions that his trial counsel was ineffective for failing to engage an arson expert to challenge the Commonwealth's theory and that his appellate counsel was ineffective for not raising that failure, those arguments do not succeed for these same reasons. The failure to engage an arson expert is not conduct that "[1] falls 'measurably below that which might be expected from an ordinary fallible lawyer,' [or] [2] 'likely deprived the defendant of an otherwise available, substantial ground of defence.'" Commonwealth v. Butler, 464 Mass. 706, 709 (2013), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). First, given the state of fire science at the time of the defendant's trial, an arson expert would not necessarily have provided the defendant with a different theory. See Commonwealth v. Drew, 447 Mass. 635, 641 (2006) ("Counsel's performance must be measured against that of an 'ordinary fallible lawyer[]' . . . at the time of the alleged professional negligence, and not with the advantage of hindsight." (quoting Saferian, 366 Mass. at 96)). Second, even if an arson expert at the time of the defendant's trial were able to controvert the Commonwealth's theory in some way, the defendant's confession would still serve as strong corroboration for that theory. See Commonwealth v. Leng, 463 Mass. 779, 781 (2012) (holding that second prong of Saferian test requires "'some showing that better work might have accomplished something material for the defense'" (quoting Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977))).

preliminary matter that the statement is voluntary[,] . . . such statement may come into evidence. . . . [and] the judge is then obliged to instruct the jury to make an independent determination of the issue and to 'instruct the jury not to consider the confession if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant.'" Miller, 68 Mass. App. Ct. at 842, quoting Commonwealth v. Tavares, 385 Mass. 140, 150 (1982).

The determination of whether the Commonwealth has met its burden "involves an examination of the totality of the circumstances surrounding the making of the statement to make sure that the defendant's statement was a free and voluntary act and was not the result of inquisitorial activity that had overborne his will." Commonwealth v. Walker, 466 Mass. 268, 277 (2013); see Commonwealth v. Tremblay, 460 Mass. 199, 208 (2011) ("[C]oercion . . . is the hallmark of an involuntary statement."). "'Relevant factors include, but are not limited to, promises or other inducements, conduct of the defendant, the defendant's age, education, intelligence and emotional stability, experience with and in the criminal justice system, physical and mental condition, the initiator of the discussion of a deal or leniency (whether the defendant or the police), and the details of the interrogation, including the recitation of Miranda warnings.'" Walker, 466 Mass. at 277 (internal quotations omitted), quoting Commonwealth v. Selby, 420 Mass. 656, 663 (1995).

After a four-day motion to suppress hearing during which the defendant and the Commonwealth presented evidence relating to the defendant's confession, the trial judge deemed the defendant's confession voluntary. At trial, the jury heard testimony from witnesses who observed the defendant's demeanor, heard testimony from Dr. Kelly and Dr. Weiner about the defendant's mental state at the time he made his three statements, and watched video footage[50] of

[50] The defendant has not demonstrated that his trial counsel was ineffective for failing to "sanitize" this video footage that contains a comment from the police chief that he was satisfied the defendant was guilty and an

the defendant's behavior after his arraignment. The jury also heard testimony from Inspector Waterhouse and Lieutenant Gilligan, who conducted the interrogation, and Ramon Nieves, who served as the interpreter during the interrogation. The jury received the human practice instruction and, by convicting the defendant, the jury concluded that the defendant's confession was voluntary.

The defendant now argues that newly discovered evidence casts doubt on the voluntariness of his confession.

A. Psychological Diagnosis

First, the defendant argues that he was misdiagnosed as psychotic; in actuality, he contends, he was suffering from delirium tremens at the time of his confession and was therefore incapable of making a voluntary statement to the police. See Walker, 466 Mass. at 277 (noting that emotional stability and mental condition are among factors to consider when determining voluntariness of statement). Mental illness, "while relevant, do[es] not preclude the making of voluntary statements or waivers. . . . Evidence of such impairments requires suppression only where the defendant is rendered incapable of giving a voluntary statement . . . ." Commonwealth v. McCray, 457 Mass. 544, 554 (2010); e.g., Commonwealth v. Boyarsky, 452 Mass. 700, 714-715 (2008) (holding that defendant's diagnosed panic disorder did not render his statement inadmissible given, in part, "the defendant's calm, sober, and responsive demeanor; the defendant's detailed, coherent answers to questions; [and] the lack of any manifestation of panic attacks, physical discomfort, or desire to leave"). In other words, "a statement is inadmissible as

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anonymous comment that the fire had three points of origin. Even if this failure constitutes conduct that falls "measurably below that which might be expected from an ordinary fallible lawyer[,]" Saferian, 366 Mass. at 96, it is too speculative to conclude that the redaction of portions of the footage "'might have accomplished something material for the defense.'" Leng, 463 Mass. at 781, quoting Satterfield, 373 Mass. at 115. Moreover, not only it is unclear from the record whether the jury heard the audio portion of this footage, but also the visual representation of the defendant's behavior is consistent with and cumulative of the testimony that the defendant was psychotic at various times after the fire.

a matter of law only if it would not have been obtained but for the effects of the confessor's mental impairment." Boyarsky, 452 Mass. at 715; see Commonwealth v. Brown, 449 Mass. 747, 765 (2007) ("'Statements that are attributable in large measure to a defendant's debilitated condition, such as insanity . . . are not the product of a rational intellect or free will and are involuntary.'" (ellipses in original) (citation omitted)).

1. *Newly Discovered*

As above, the first question is whether the evidence that the defendant was experiencing delirium tremens at the time of his interrogation is newly discovered. While it would not have been impossible to have diagnosed the defendant with delirium tremens, that is not the standard the defendant must satisfy. See Kobrin, 72 Mass. App. Ct. at 613. Instead, the defendant must show "that reasonable diligence would not have uncovered the evidence by the time of trial." Staines, 441 Mass. at 534.

I conclude that no reasonable defense counsel would have considered or investigated other possible diagnoses given the consensus that the defendant was psychotic during the relevant time period.[51] See Kobrin, 72 Mass. App. Ct. at 613; Buck, 64 Mass. App. Ct. at 764. No medical professionals examined the defendant at the time he would have been experiencing the most obvious symptoms of delirium tremens. Additionally, the psychiatric evaluations that the defendant underwent were focused on the limited purposes of the defendant's ability to serve time in a penal environment, his competency to stand trial, and his criminal responsibility. Dr.

[51] For this same reason, the defendant's contention that failure to raise the delirium tremens argument sooner constitutes ineffective assistance of his trial and/or appellate counsel does not succeed. Not investigating *alternative* diagnoses does not constitute conduct that falls measurably below that which might be expected from an ordinary fallible lawyer where the consensus of the psychiatrists who testified – including the defendant's witnesses – was that the defendant was psychotic. See Saferian, 366 Mass. at 96. Contra Roberio, 428 Mass. at 280 (holding that motion judge "correctly concluded that defense counsel's decision not to investigate the possibility of presenting expert testimony [addressing an insanity defense] was unreasonable and that 'the "ordinary fallible lawyer" would have at least undertaken an investigation [of] the viability of presenting expert psychiatric testimony' in defense of a client" (final alteration in original)).

Kelly testified that the defendant was not suffering from a mental disease or psychiatric condition that would affect his ability to make a voluntary statement. Dr. Weiner's conclusion that the defendant was psychotic at the time of his confession was consistent with Dr. Schmidt's, Dr. Fein's, and Dr. Veliz's conclusions that the defendant was psychotic at various times between March 11, 1982, and April 8, 1982. As they had conducted their exams for limited purposes, these doctors did not administer the types of psychiatric screening tests that could have revealed any cognitive and reasoning deficits the defendant might have been experiencing at the time of his confession, and, more significantly, the doctors did not compile the type of information about the defendant that would have made them aware of his substance and alcohol abuse history. Because evidence supporting a delirium tremens diagnosis would not corroborate the evidence available at the time of trial, the defendant has satisfied the first prong of the newly discovered evidence standard. See LeFave, 430 Mass. at 181.

The second question is whether this newly discovered evidence that the defendant was suffering from delirium tremens at the time of his confession casts real doubt on the justice of the conviction. See Rosario, 460 Mass. at 195; Grace, 397 Mass. at 307; Chiappini, 72 Mass. App. Ct. at 196. Essentially, delirium tremens precludes an individual from making a voluntary statement. See McCray, 457 Mass. at 554; Boyarsky, 452 Mass. at 714-715; Brown, 449 Mass. at 765. This condition is marked by derangement of mental processes resulting in disorientation, a lack of awareness, confusion, and extreme behavioral and perceptual disturbances. These symptoms of delirium tremens leave the individual experiencing them susceptible to suggestion and unable to process information reliably, and they prevent the individual from making rational decisions on his own behalf. By contrast, the symptoms of schizophreniform reaction do not include cognitive impairment. With this evidence, then, a reasonable fact-finder could conclude

that the defendant's confession was involuntary. See id. As such, the confession would be inadmissible. Commonwealth v. Sheriff, 425 Mass. 186, 192 (1997) ("It is . . . fundamental that a confession, or . . . an admission, whether made to the police or to a civilian, is admissible only if it is voluntarily made.").

Without the defendant's confession, the strength of the case against him would be significantly weakened. It would rest on the evidence of arson, together with Evans' testimony that he heard a window break, saw that the living room window was smashed, and saw that the defendant was close to the window with his arm was raised. See Lykus, 451 Mass. at 326 (holding that "judge must consider the strength of the case against the defendant" when deciding "whether the new evidence would have been a real factor in the jury's deliberations"). Additionally, Evans' testimony could be viewed as consistent with the defense theory that the defendant did not start the fire but that he injured his hand while breaking windows in an attempt to save the people inside the Building. Therefore, a finding that the defendant's confession was involuntary would probably have been a real factor in the jury's deliberations.[52] See id. The defendant has therefore satisfied both prongs of his newly discovered evidence claim, and he is entitled to a new trial on this basis.[53]

2. *Substantial risk of a miscarriage of justice*

Even if the evidence that the defendant was suffering from delirium tremens does not qualify as newly discovered, see Shuman, 445 Mass. at 272 (holding that evidence that "was available prior to trial" is not newly discovered), the defendant is still entitled to a new trial

[52] Envisioning a trial that involves the exclusion of the defendant's confession in combination with the admission of the newly discovered fire science evidence casts even greater doubt on the justice of the defendant's conviction.

[53] Given this conclusion, it is not necessary to address the defendant's arguments that his trial counsel was ineffective for failing to elicit from Dr. Veliz at the motion to suppress hearing his opinion that the defendant was suffering from a schizophreniform reaction during the interrogation; for waiving his closing argument at the motion to suppress hearing instead of marshaling the evidence supporting his claim of involuntariness; and for creating a situation that enabled the Commonwealth to attempt to discredit Dr. Weiner at trial by revealing that he did not review all of the defendant's Bridgewater records.

under a substantial risk of a miscarriage of justice analysis. Generally, "[a] motion for a new trial may not be used to compel the review of . . . issues on which the defendant has forgone the opportunity." Commonwealth v. Balliro, 437 Mass. 163, 166 (2002); see Mass. R. Crim. P. 30(c)(2) (providing that all grounds for relief that defendant claims in motion for new trial "shall be raised by the defendant in the original or amended motion. . . . [or] 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"). However, an exception to this general rule applies where the failure to raise or preserve an issue creates a substantial risk of a miscarriage of justice. Commonwealth v. Randolph, 438 Mass. 290, 294 (2002). More accurately, this exception "is actually not an exception, but a default standard of review. In all cases where a defendant fails to preserve his claim for review [courts] must still grant relief when '[they] are left with uncertainty that the defendant's guilt has been fairly adjudicated.'" Id. at 294-295; see, e.g., Commonwealth v. Proulx, 61 Mass. App. Ct. 454, 461 (2004) (reviewing defendant's motion for a new trial "'solely to determine whether the error gives rise to a substantial risk of a miscarriage of justice'" where "defendant did not object at trial and did not raise this issue until his third motion for a new trial").

"A substantial risk of a miscarriage exists 'if [the court] [has] a serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. Acevedo, 446 Mass. 435, 450 (2006) (citations omitted). "[O]nly rarely will an error exert an influence of this magnitude." Commonwealth v. Simmons, 448 Mass. 687, 691 (2007); see Balliro, 437 Mass. at 166 (recommending that courts restrict "exercise of that [discretion] to the extraordinary situations when 'upon sober reflection, it appears that a miscarriage of justice might otherwise result'" (citation omitted)). To make this determination, the court asks four

questions: "(1) Was there error? . . . (2) Was the defendant prejudiced by the error? . . . (3) Considering the error in the context of the entire trial, would it be reasonable to conclude that the error materially influenced the verdict? . . . (4) May [the court] infer from the record that counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision?" Randolph, 438 Mass. at 297-298 (internal citations omitted). The court will only grant relief if the answer to all four questions is "yes." Id. at 298; see, e.g., Proulx, 61 Mass. App. Ct. at 462-463 (2004) (finding no substantial risk of miscarriage of justice after answering three out of four questions affirmatively).

First, with Dr. Edersheim's and Dr. Joseph's testimony that the defendant was experiencing delirium tremens and that he was erroneously diagnosed with having suffered from a psychosis, the defendant has provided evidence that there was an error. Second, the defendant has also demonstrated that this error prejudiced him because, as noted above, evidence that the defendant was suffering from delirium tremens at the time of his confession supports a finding that he was incapable of giving a voluntary statement. See McCray, 457 Mass. at 554; Boyarsky, 452 Mass. at 714-715; Brown, 449 Mass. at 765. Third, for the same reasons discussed above in the context of the second prong of the defendant's newly discovered evidence argument, it is reasonable to conclude that the absence of evidence of delirium tremens calling into question the voluntariness of the defendant's confession materially influenced the verdict.[54] See Randolph, 438 Mass. at 298. Finally, defense counsel's theory was that the defendant's confession was involuntary because he was psychotic at the time of his interrogation, and the experts at trial

[54] Moreover, without the defendant's confession, the newly discovered fire science evidence casts real doubt on the justice of the conviction because there is a substantial risk that the jury would have reached a different conclusion. See Sena, 441 Mass. at 830; Figueroa, 422 Mass. at 79; Grace, 397 Mass. at 306; see, e.g., DiGiambattista, 442 Mass. at 439 n.15 ("[I]t is . . . troublesome that this particular confession has been shown to be inaccurate in so many important respects. Significant discrepancy between the known facts of the crime and the details of a confession is recognized as an indicator that a confession may be false.").

testified to that effect. It is therefore reasonable to infer from the record that the failure of any of the defendant's attorneys to raise the possibility at any point that the defendant was suffering from delirium tremens was not a tactical decision. See Randolph, 438 Mass. at 298. Accordingly, even if the evidence that the defendant was suffering from delirium tremens at the time of his confession is not newly discovered, the defendant is nevertheless entitled to a new trial because his failure to raise the evidence sooner created a substantial risk of a miscarriage of justice.

B. Interrogation Techniques

Second, the defendant argues that Inspector Waterhouse and Lieutenant Gilligan used interrogation techniques that are now understood to produce false confessions. See, e.g., Commonwealth v. Feeney, 84 Mass. App. Ct. 124, 132 (2013) ("Most cases involving police ruses or trickery concern attempts by the police to secure a confession from a defendant by presenting the defendant with false evidence implicating the defendant's guilt."). This newly discovered evidence, he asserts, is also relevant to the issue of the voluntariness of his confession. See Walker, 466 Mass. at 277 (holding that "details of the interrogation" are among circumstances to consider when ascertaining that "defendant's statement was a free and voluntary act and was not the result of inquisitorial activity that had overborne his will").

At the time of the defendant's interrogation, police officers routinely used certain interrogation techniques that had the effect of undermining the suspect's confidence and memory. These methods have recently come under scrutiny, and the Supreme Judicial Court has, "over the years, expressed [its] disapproval of police tactics that employ the use of false statements during an interrogation because such tactics cast doubt on the voluntariness of any subsequent confession or admission." Tremblay, 460 Mass. at 208, citing DiGiambattista, 442

Mass. at 432; Feeney, 84 Mass. App. Ct. at 132; see Tremblay, 460 Mass. at 209 (noting that "assurances made by the police to a suspect for the purpose of securing a confession or admission may [also] render the suspect's statements involuntary"). "[W]here the use of a false statement is the *only* factor pointing in the direction of involuntariness, it will not ordinarily result in suppression, but if the circumstances contain additional indicia suggesting involuntariness, suppression will be required." DiGiambattista, 442 Mass. at 433 (emphasis in original). Therefore, "such deception or trickery does not necessarily compel suppression of the confession or admission but, instead, is one factor to be considered in a totality of the circumstances analysis." Tremblay, 460 Mass. at 208.

Dr. Ofshe opined that Inspector Waterhouse and Lieutenant Gilligan used the "evidence ploy" of telling the defendant they had an eyewitness who placed the defendant at the scene *before* the fire, even though Evans had not yet identified the defendant as the man he had seen; that they used the "motivational tactic" of threatening the defendant that he would be left "holding the bag;" and that they engaged in formatting by telling the defendant that he had acted as a lookout for Felix and Elgardo, that Molotov cocktails had started the fire, and that there were three points of origin.[55] See, e.g., DiGiambattista, 442 Mass. at 434, 436 (acknowledging research that identifies "use of false statements" and "minimization" as interrogation techniques that may result in false confessions).

Inspector Waterhouse and Lieutenant Gilligan engaged in interrogation techniques that are now considered conducive to eliciting a false confession from a criminal suspect, but, at the

[55] Dr. Ofshe's testimony that the timing of the defendant's breakdown is also relevant to the defendant's psychological status, and, as a consequence, his vulnerability to coercion, is persuasive. See Walker, 466 Mass. at 277 (noting that defendant's "emotional stability" is among factors to consider when determining voluntariness of defendant's confession). Given the ultimate conclusion in this case, however, it is not necessary to address the defendant's argument that his trial counsel was ineffective for failing to impeach Nieves at the motion to suppress hearing with his prior inconsistent testimony with respect to the timing of the defendant's breakdown.

time of the interrogation, were generally used. Dr. Ofshe's testimony with respect to interrogation techniques does not corroborate the evidence at trial and is therefore newly discovered. See LeFave, 430 Mass. at 181; Kobrin, 72 Mass. App. Ct. at 613; Buck, 64 Mass. App. Ct. at 764. The fact that Inspector Waterhouse and Lieutenant Gilligan engaged in these interrogation techniques is insufficient, alone, to cast real doubt on the justice of the conviction in satisfaction of the second prong of the newly discovered evidence analysis. See Tremblay, 460 Mass. at 208; Sena, 441 Mass. at 830; see, e.g., Feeney, 84 Mass. App. Ct. at 134-135 (affirming denial of motion to suppress statement where "the only factor weighing on the voluntariness of the defendant's incriminatory statement" was police ruse). At the time of the defendant's confession, however, he was in a state of vulnerability, whether in the throes of an emotional outburst or catharsis, as Dr. Kelly testified at trial and as the trial judge found when denying the defendant's motion to suppress; or suffering from a psychosis, as Dr. Weiner testified at the defendant's trial; or experiencing delirium tremens, as Dr. Edersheim and Dr. Joseph now contend.

A reasonable fact-finder could therefore conclude that the defendant's confession was involuntary based on the evidence regarding coercive interrogation techniques, taken in combination with the totality of the circumstances.[56] See Walker, 466 Mass. at 277; see, e.g., Feeney, 84 Mass. App. Ct. at 132-133 (collecting "ruse cases" where "Supreme Judicial Court has suppressed confessions[] [because] there have been generally additional circumstances, apart from the ruse itself, that rendered the confession involuntary"). A fact-finder's conclusion that the defendant's confession was involuntary would have been a real factor in the jury's deliberations, especially in combination with the newly discovered fire science evidence. See

[56] For that matter, even if the evidence that the defendant was experiencing delirium tremens at the time of his confession is insufficient, alone, to entitle the defendant to a new trial, that evidence, in combination with the evidence concerning interrogation techniques, satisfies the defendant's burden.

Lykus, 451 Mass. at 326; Kobrin, 72 Mass. App. Ct. at 613. Accordingly, this evidence casts real doubt on the justice of the conviction. See Sena, 441 Mass. at 830. For this reason, too, the defendant is entitled to a new trial.

Order

For the foregoing reasons, the defendant's motion for a new trial is **ALLOWED**.

Dated: July 7, 2014

Kathe M. Tuttman
Justice of the Superior Court