COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
NO. SUCR1993-1174

COMMONWEALTH

v.

SEAN ELLIS

DEFENDANT'S

MOTION FOR A NEW TRIAL

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DEFENDANT'S MOTION FOR A NEW TRIAL

The defendant, Sean Ellis, respectfully moves pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as Article XII of the Massachusetts Declaration of Rights and Mass. R. Crim. P. 30(b) & (c), that this Honorable Court grant him a new trial on the basis that justice was not done.

Mr. Ellis further requests a hearing on this motion and an evidentiary hearing, pursuant to Mass.R.Crim.P. 30(c)(3), in the event this Honorable Court declines to grant the motion solely on the attached memorandum and supporting documents.

As to the reasons that justice was not done:

After spending 19 years in prison, Ellis has discovered withheld exculpatory evidence detailing that the Boston Police Department was aware that multiple police officers believed that the victim in this case, Detective Mulligan, was actually killed by another identified police officer. The Boston Police Department was made aware - before the Ellis trials - that named officers reported that another named police officer was responsible for killing Mulligan. The Boston Police Department actually possessed the name of the police officer accused of killing Det. Mulligan, and yet that information was withheld from the jury, withheld from the public, and withheld from Ellis for over 19 years.

Additionally, more withheld exculpatory evidence finally links Mulligan to the criminal conspiracy involving Detectives Acerra, Robinson, and Brazil, whereby the group of police officers would allegedly rob drug dealers and other criminals. Withheld information generated by the Federal Bureau of Investigation and uncovered by Freedom of Information Act requests paints a true picture of Mulligan and his cohorts who were simultaneously acting as detectives, criminals and the men that "investigated" this crime. The new evidence suggests that Mulligan himself was involved in criminal activities and reveals a new motive for his murder.

The Boston Police Department was aware of this exculpatory evidence, and they were agents of the Commonwealth for discovery purposes. Kyles v. Whitley, 514 U.S. 419 (1993); Commonwealth v. Martin, 427 Mass. 816, 823 (1998)(S.J.C. reversed conviction because the prosecutor failed to turn over evidence from crime lab that prosecutor did not even know existed). The Commonwealth's failure to disclose all of this exculpatory evidence resulted in the trial jury not hearing the full truth, and a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

In addition to the withheld evidence and newly discovered evidence, the Commonwealth offered unreliable inadmissible fingerprint testimony and ballistics testimony in violation of Ellis' 5th, 6th, and 14th Amendment and Article XII rights. Notably, the same erroneous fingerprint testimony used against Ellis was held by the Supreme Judicial Court to be inadmissible during the co-defendant Patterson's retrial. Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

Further, a new trial is required based on a violation of Ellis' 6th Amendment and Article XII rights to confront witnesses, to a public trial, and to effective assistance of

counsel. Next, the Commonwealth failed to establish that the grand jury was properly instructed.

In addition, the cumulative impact of all of the errors and new exculpatory evidence violated Ellis' rights to due process and a fair trial pursuant to the 5th, 6th, and 14th Amendments and Article XII and warrants a new trial.

Finally, Sean Ellis is actually innocent.

For these reasons and the additional reasons detailed herein, it cannot be said with any confidence that justice was done. As such, Ellis respectfully requests that this Court grant him a new trial.

Ellis further requests an evidentiary hearing and relies on the attached memorandum of law and appendix.

Respectfully Submitted,
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By His Attorney

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party and upon any party appearing pro se by first class mail, postage prepaid or by hand delivery.

Dated: 2/1/13 Signed: _____

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
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COMMONWEALTH

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SEAN ELLIS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL

I. INTRODUCTION

It has often been said that the people with the power write history. In the present case, the trial evidence against Ellis was created by powerful but corrupt Boston police officers that were intent on covering up their own crimes and the crimes of the victim, thereby covering up other potential suspects as well as hiding the truth from the defense and the jury.

The Boston Police Department withheld exculpatory evidence from Ellis. Detectives Acerra, Robinson, and Brazil were members of the prosecution team for discovery purposes in the Ellis case, as was the Boston Police Department as a whole, and any evidence they withheld is imputed to the Commonwealth. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Most notably, after spending 19 years in prison, Ellis has discovered withheld exculpatory evidence detailing that the Boston Police Department was aware that multiple police officers believed that the victim in this case, Detective Mulligan, was actually killed by another identified police officer. The Boston Police Department was made aware - before the Ellis trials - that named officers reported that another named police officer was responsible for killing Mulligan. The Boston Police Department actually possessed the name of the police officer accused of killing Det. Mulligan, and yet that information was withheld from the jury, withheld from the public, and withheld from Ellis for over 19 years.

Additionally, more withheld exculpatory evidence finally links Mulligan to the criminal conspiracy involving Detectives Acerra, Robinson, and Brazil, whereby the group of police officers would allegedly rob drug dealers and other criminals. Withheld information generated by the Federal Bureau of Investigation and uncovered by Freedom of Information Act requests paints a true picture of Mulligan and his cohorts who were simultaneously acting as detectives, criminals and the men that "investigated" this crime. The new evidence suggests that Mulligan himself was involved in criminal activities and reveals a new motive for his murder.

The Boston Police Department was aware of this exculpatory evidence, and they were agents of the Commonwealth for discovery purposes. Kyles v. Whitley, 514 U.S. 419 (1993); Commonwealth v. Martin, 427 Mass. 816, 823 (1998)(S.J.C. reversed conviction because the prosecutor failed to turn over evidence from crime lab that prosecutor did not even know existed). The Commonwealth's failure to disclose all of this exculpatory evidence resulted in the trial jury not hearing the full truth, and a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

Ultimately, the claimed evidence that led to Ellis' conviction was a cover-up of distorted and misleading facts that omitted withheld exculpatory evidence regarding the investigating police detectives who were themselves criminals and who may have been involved in Mulligan's murder. Justice dictates that we discard that corrupted history to get at the truth.

And the truth is that Sean Ellis is innocent.

II. GROUNDS SUPPORTING A NEW TRIAL

Sean Ellis respectfully moves pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution as well as Article XII and Article XIV of the Massachusetts Declaration of Rights and Mass.R.Crim.P. 25 (b) and Mass.R.Crim.P. 30(b) & (c), that this Honorable Court grant him a new trial on the basis that justice was not done.

Ellis further requests a hearing on this motion and an evidentiary hearing, pursuant to Mass. R.Crim. P. 30(c)(3), in the event this Honorable Court declines to grant the motion solely on the memorandum and supporting documents.

As to the reason that justice was not done, Sean Ellis is actually innocent.

As to further reasons supporting Ellis' innocence and warranting a new trial, the Boston Police Department withheld exculpatory evidence that implicates another suspect and destroys the credibility of the police witnesses and the entire investigation.

Notably, the Boston Police Department withheld reports detailing that multiple police officers believed that Det. Mulligan was killed by another Boston police officer. (App. A, B)[1]. Even though the Boston Police Department was aware that another police officer was being accused of Mulligan's murder, that evidence was withheld throughout all three Ellis trials and throughout the first Motion for New Trial and direct appeal.[2]

In addition, the evidence withheld by the Boston Police Department regarding Mulligan's alleged criminality also reveals viable third-party culprits. In particular, new evidence suggests that three weeks before Mulligan's murder, Mulligan was allegedly involved in stealing thousands of dollars from a civilian named Robert Martin during a police robbery committed under the guise of a drug arrest. (App. C). Detectives Acerra and Robinson were also alleged to have been involved in that robbery. Based on Martin's allegations and other similar evidence, a federal grand jury indicted Acerra and Robinson after Mulligan's death. However, Martin's accusation that Mulligan was involved in the robbery was withheld from the defense until now. More new

[1] Citations to the supporting Appendix are (App. – Letter).

[2] This newly discovered evidence was uncovered through a public records request under the Freedom of Information Act and related statutes. Ellis requested records from both the F.B.I. and the Boston Police Department. The F.B.I. disclosed the exculpatory evidence. However, the Boston Police Department's response did not contain any of this exculpatory evidence regarding Mulligan or one officer being disciplined for accusing a fellow officer of Mulligan's murder. In fact, to date the Boston Police Department still has not turned over this exculpatory evidence.

evidence reveals that Martin and his lawyer John McBride met with Detective Walter Robinson – a detective in the police criminal conspiracy who later pled guilty to various crimes in federal court – several times before Mulligan's murder. (App. D). Further, the day after Mulligan was found murdered, new evidence reveals that Robert Martin paid his lawyer $15,000.00 for representation on an undisclosed crime.

Additional withheld evidence, not known by the defense at the time of trial, reveals that Mulligan himself was accused of being involved in criminal activity, including executing fake search warrants and stealing money. (App. E, F, G, H, I, J, K, L, M, N). Moreover, new evidence reveals that Mulligan was accused of engaging in inappropriate contact with young female prostitutes. Id. Notably, the prior evidence included an allegation that Mulligan was last seen in the company of a young woman and was arguing with her shortly before his death.

That new evidence, especially when combined with the withheld report that a police officer may have been involved in Mulligan's death, creates a strong reasonable doubt about whether Mulligan was killed not by Ellis but instead because of his alleged involvement in the criminal conspiracy with Acerra, Robinson, and Brazil. Ellis had a 5th, 6th, and 14th Amendment and Article XII due process right to have the jury hear all of this exculpatory evidence before it rendered a verdict. Smith v. Cain, 132 S.Ct. 627 (2012). Instead of disclosing the evidence, the Boston Police Department withheld the evidence, and the exculpatory nature of the evidence makes it impossible to say that justice was done.

This is a case where at trial the Commonwealth claimed that the motive for Detective Mulligan's murder was that Patterson and Ellis just happened to see Mulligan sleeping in his car and randomly decided to steal his gun and murder him. Even when Ellis filed his first Motion for New Trial and submitted withheld exculpatory evidence regarding the corruption of investigating detectives Acerra, Robinson, and Brazil, the Commonwealth claimed that evidence was unrelated

to Mulligan's death or the Ellis case. However, it is now clear that the Boston Police Department was aware that Mulligan is linked to the criminal conspiracy of Acerra, Robinson, and Brazil, and that link reveals a more likely motive for Mulligan's death than the "random robbery" theory, namely that Mulligan's criminal acts were drawing unwanted scrutiny.

The evidence withheld by the Boston Police Department shows that Mulligan was also accused of committing crimes, including alleged robberies and an alleged rape, and that Mulligan was also allegedly involved in the corruption and criminal conspiracy of Acerra, Robinson, and Brazil. Mulligan's criminality appears to be linked to the motive of Mulligan's real killer. Three groups of people had a motive to kill Mulligan – the drug dealers that Mulligan was accused of robbing, the prostitutes and young black girls with whom Mulligan was accused of having inappropriate contact with (one of whom he allegedly raped), and the other police detectives involved in the criminal conspiracy.

Importantly, all three of those groups – the other Boston police detectives in the criminal conspiracy, the drug dealers who were robbed by the detectives, and the prostitutes and young girls that Mulligan was accused of having inappropriate contact with - are linked together, and the pieces of withheld evidence regarding each of those groups actually corroborate each other. The fellow police detectives had the greatest motive to kill Mulligan, as his increased criminality put their criminal conspiracy at risk of being discovered. The most important pieces of withheld evidence – the withheld reports detailing that some police officers believed that Mulligan was killed by a fellow detective – increases the prejudice to Ellis by transforming the motive into an actual defense.

All of this withheld exculpatory evidence successfully rebuts the Commonwealth's relevance claims made on the prior Motion for New Trial, links Mulligan to various crimes, establishes the existence of multiple third-party culprits, and reveals that some members of the

Boston Police Department believed that Mulligan was actually killed by another police officer and not by a young innocent black teenager named Sean Ellis who happened to be out buying diapers. At a minimum, the Boston Police Department withheld exculpatory evidence that raises a reasonable doubt, and the Commonwealth failed to disclose the evidence to Ellis before his trials.[3] The exculpatory evidence has now been discovered by Ellis and a new trial is warranted.

In addition to the withheld evidence and newly discovered evidence, the Commonwealth offered unreliable inadmissible fingerprint testimony and ballistics testimony in violation of Ellis' 5th, 6th, and 14th Amendment and Article XII rights. New scientific studies, new evidence regarding corruption in the BPD fingerprint lab, and a decision from the SJC in co-defendant Patterson's case all combine to require a new trial. (App. O, P). Notably, the same erroneous fingerprint testimony used against Ellis was held by the Supreme Judicial Court to be inadmissible during the co-defendant Patterson's retrial. Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

This is a case where at trial and during the prior appeal, the only physical evidence linking Ellis to the crime scene was the alleged fingerprint of Patterson. Now, that unreliable evidence must be thrown out.

For these reasons and the additional reasons detailed herein, it cannot be said with any confidence that justice was done. As such, a new trial is required.

[3] Notably, the exculpatory evidence - that a Boston Police Officer told the Boston Police Department that another Boston Police officer murdered Detective Mulligan - has to date only been disclosed to Ellis by the F.B.I., and after 19 years that evidence has still not been disclosed by the Boston Police Department.

III. PROCEDURAL HISTORY

On October 27, 1993, Sean Ellis was indicted in Suffolk Superior Court on the charges of first-degree murder, armed robbery, and unlawful possession of a firearm without a license. A co-defendant named Terry Patterson was also indicted for the alleged murder.

On September 14, 1994, Ellis filed a Motion for Further Discovery. (App. Q). In that motion, Ellis specifically requested discovery regarding "the duration and nature of any personal relationship between Mulligan and either Robinson or Acerra; the duration and nature of any business or other financial relationship between Mulligan and either Robinson or Acerra, and in particular the nature of the joint purchase of four cellular telephones made by Mulligan and Acerra together; under what circumstances Acerra came to live in the same apartment complex as Mulligan and for how long they lived in proximity." (See attached). That same motion also requested any discovery regarding Acerra or Robinson having been untruthful in the past. (See attached). Although that motion was apparently denied on procedural grounds, it served to put the prosecution on notice that Ellis was specifically seeking exculpatory evidence regarding Mulligan, Acerra, and Robinson.

In addition to the discovery requirements imposed by the due process clauses of the 5th and 14th Amendments to the U.S. Constitution and Article XII and the discovery rules, as of September 14, 1994 the prosecution was on specific notice that Ellis was seeking exculpatory evidence regarding Mulligan, Robinson, and Acerra. Id.

On September 16, 1994, Ellis filed a Motion to Suppress the Alleged Identification. After a hearing conducted on December 6, 7, and 8th of 1994, this Court denied the Motion to Suppress on December 12, 2004. The cases of Ellis and Patterson were then severed by the trial court and both Ellis and Patterson proceeded to separate trials.

Ellis' trials and appeal

On January 4, 1995, the first trial of Sean Ellis began. On January 13 and again on January 17, the jury requested additional instructions on joint venture. On January 19, the jury asked the following question: "in considering the rule of joint venture, does conscious concealment of a known murder weapon constitute aiding and abetting?" The judge rejected Ellis's proposed answer and refused to provide an answer, telling the jury "I can't answer a question like that that is taken out of context in that fashion." See Ellis, 739 N.E.2d at 1111-12. The trial judge refused to answer. After 6 days of deliberations, the jury was unable to agree as to whether Ellis was guilty or innocent of the murder and armed robbery of Det. Mulligan. A mistrial was declared on these charges on January 21, 1995. Ellis was found guilty of two counts of unlawful possession of a firearm, but the Court continued sentencing for those charges until after the retrial on the remaining charges.

On March 21, 1995, the second trial began. On March 30, 1995, the judge instructed the jury on the elements of murder and on joint venture. On March 31, the jury requested additional instructions on joint venture and on murder in the first and second degrees. Later that day, the jury sent the judge a note stating, "Pursuant to the following concerns could you please reiterate *joint venture* only" (emphasis in original). The jury then included a second note identifying the jurors concerns: "Joint venture. Recognition of crime after the defendant fleeing with the perpetrator of the crime from scene of crime without prior knowledge of crime or participation of crime constitutes joint venture." The trial judge rejected Ellis's proposed response, which was the same response requested at the first trial when that jury asked a similar question. The judge repeated his initial joint venture charge in its entirety. On April 1, 1995, after the jury twice reported that they were hopelessly deadlocked, a mistrial was declared. Ellis, 739 N.E.2d at 1111-12.

On September 7, 1995, the third trial of Sean Ellis began before the Honorable James McDaniel, J. After two days of deliberations, on September 14, 1995 Sean Ellis was found guilty of armed robbery and first-degree murder by means of extreme atrocity and cruelty and also felony murder. The Court sentenced Ellis to a mandatory life sentence on the first-degree murder conviction, and to 30 to 40 years on the armed robbery conviction. The Court also sentenced Ellis to 4 and ½ to 5 years on the two firearm possession convictions from the first trial, to run concurrently with the life sentence.

On September 29, 1998, Ellis filed a Motion for New Trial and Motion to Reconsider the denial of the Motion to Suppress Identification, based on the fact that other police officers involved in the Ellis investigation had themselves been charged with crimes. Ellis based his Motion for a New Trial on the revelations, made after his trial in 1995, that Boston Police Detectives Walter Robinson, Kenneth Acerra and John Brazil, beginning in 1990 and continuing through 1996, had been involved in a criminal conspiracy and had also conducted their official police duties through an ongoing, pervasive pattern of deliberate perjury, inducing others to commit perjury, and theft. All three detectives were critically involved in conducting the police investigation that led to the prosecution of Sean Ellis. Robinson and Acerra were put in charge of the Commonwealth's single most important witness, Acerra's relative Rosa Sanchez, who was the only witness to ever identify Sean Ellis at the scene. Acerra was among the first officers to have contact with Rosa Sanchez and he was also a family relative. As such, the evidence that Acerra, Robinson, and Brazil were in a criminal conspiracy was clearly exculpatory.

However, when the first Motion for a New Trial was filed, Ellis was unable to demonstrate a link between Acerra, Robinson, and Brazil's misdeeds, and the Mulligan homicide. As such, on March 4, 1999, the trial court denied the Motion for New Trial without an evidentiary hearing.

On February 14, 2000, Ellis filed his direct appeal with the Supreme Judicial Court. On December 6, 2000, the SJC denied the direct appeal. Commonwealth v. Ellis, 432 Mass. 746 (2000).

To date, Sean Ellis has served 19 years in prison for a crime that he simply did not commit.

Terry Patterson trial and appeal

Co-defendant Terry Patterson, who was tried separately, was also convicted of murder in 1995. However, on December 6, 2000 the SJC reversed the conviction of Terry Patterson. Commonwealth v. Patterson, 432 Mass. 767 (2000)(conviction reversed where trial counsel had actual conflict of interest because counsel should have testified regarding false statement of police officer).

Prior to Patterson being re-tried, he filed a motion in limine to exclude unreliable testimony claiming that Patterson's fingerprints were on Mulligan's truck door. The trial judge denied this motion but reported the question to the appellate courts. On December 27, 2005, the SJC again reversed and remanded Patterson's case due to the unreliability of purported simultaneous fingerprint evidence. Commonwealth v. Terry Patterson, 445 Mass. 626 (2005). As discussed below, that same unreliable fingerprint testimony was used against Ellis at his trials. (V-118).

IV. STATEMENT OF FACTS

A. Background

On September 26, 1993, Boston Police Detective John Mulligan was found shot to death inside his car parked in the Walgreen's parking lot in Roslindale, Massachusetts. Det. Mulligan had been working a paid police detail at the Walgreen's on September 25, 1993.

There were no witnesses to the shooting of Mulligan. Within days of the Mulligan's murder, Sean Ellis and Terry Patterson were charged with the murder of Mulligan. Ellis is an

African-American male, and at the time of the arrest he was nineteen years old. Boston Police Detectives Kenneth Acerra, Walter Robinson, and John Brazil were part of the task force assigned to investigate the Mulligan homicide, even though Acerra and Robinson were not homicide detectives and were friends and business partners with Mulligan.

The Commonwealth's case against Ellis was based on a questionable identification from Detective Acerra's family relative named Rosa Sanchez, as well as fingerprint testimony claiming that Terry Patterson's simultaneous fingerprints were on the door of Mulligan's car. (IV-133; V-118). After two juries were hopelessly deadlocked, Ellis was convicted of first-degree murder at his third trial.

Since Ellis' trial, his alleged identification by Rosa Sanchez and Terry Patterson's alleged fingerprints on Mulligan's car have been called into question. Then in 2005, the SJC ruled that the testimony alleging that Patterson's prints were on Mulligan's car must be excluded from Patterson's retrial because the claimed "simultaneous" fingerprint testimony did not meet the Daubert/Lanigan test for reliability or admissibility. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005)(same fingerprint evidence held to be inadmissible in the case of Ellis' co-defendant).

At the time of the Ellis' three trials, the Commonwealth failed to disclose that the Boston Police Department was aware that Acerra, Robinson, Brazil, and Mulligan were engaged in a criminal joint venture to falsify search warrants and to steal drugs and money from unsuspecting residents of Massachusetts.

Since Ellis' conviction, Acerra and Robinson were indicted in federal court for their crimes and Brazil confessed his involvement, but the Commonwealth continued to withhold evidence detailing that the Boston Police Department knew that Mulligan was a joint venture in the criminal conduct of Acerra, Robinson, and Brazil..

Additionally, since Ellis' conviction, the Commonwealth (through its Boston Police Department agents) has continued to withhold evidence detailing that multiple police officers reported to BPD that Det. Mulligan was killed by another police officer. Even though the Boston Police Department was aware that another police officer was being accused of Mulligan's murder, that evidence was withheld throughout all three Ellis trials and throughout the first Motion for New Trial and direct appeal.

The Boston Police Department was aware of all of this exculpatory evidence, the Boston Police Department was an agent of the Commonwealth for discovery purposes in the Ellis case, and yet the Commonwealth failed to disclose any of this evidence before Ellis' three trials.

B. The New Exculpatory Evidence Withheld By the Boston Police Department That Was Never Disclosed By the Commonwealth And Instead Was Only Discovered By Ellis After His Trial, First Motion for New Trial And Direct Appeal

First, Det. Acerra's motive to enlist the assistance of his niece Rosa Sanchez to cover up his illegal activities surfaced when Acerra was indicted along with another BPD detective in a widespread conspiracy to falsify search warrants and steal money and drugs from citizens. U.S.D.Ct. (D. Mass.) Docket No. 1:97-cr-10059-DPW.

Despite that the Boston Police Department was aware that Mulligan was involved in the criminal conspiracy with Acerra, Robinson, and Brazil, the Commonwealth continued to withhold that exculpatory evidence. Instead of the Commonwealth disclosing the exculpatory evidence, after his trial and prior motion for new trial Ellis discovered that Mulligan was present during some of the drug robberies and that he was involved in the criminal conspiracy with Detectives Acerra, Robinson, and Brazil to rob drug dealers. (App. C). The Boston Police Department knew or should have known of Mulligan's criminality and the Commonwealth failed to disclose it.

Appellate counsel for Ellis has fought for years to force the Boston Police Department to disclose the contents of the I.A.D. files of Detectives Acerra, Robinson, Brazil, and Mulligan. To date, each request has been denied. Currently Ellis' attorney is pursuing a civil suit against the Boston Police Department to secure disclosure of the I.A.D. or corruption files of Robinson, Acerra, Brazil, and Mulligan. (App. EE).

Ellis has also discovered additional withheld evidence, including that viable third party suspects in Mulligan's murder are closely linked to the misconduct and crimes that Detectives Acerra, Robinson, Brazil and Mulligan were jointly involved in leading up to Detective Mulligan's death.

Notably, the information discovered from the F.B.I. - that a Boston Police Officer accused another officer of killing Det. Mulligan and was disciplined by the Boston Police Department for his accusation – was not within the documents disclosed by the Boston Police Department for the Mulligan homicide or within the Boston Police Department's own file on Mulligan. (App. A, B).

Ellis asserts that the withholding and subsequent discovery of this exculpatory evidence requires a new trial. The new evidence includes the following:

1. Evidence That Another Boston Police Officer Killed Mulligan And That the Boston Police Department Withheld This Evidence From Ellis For 19 Years

Ellis has uncovered a report dated November 1, 1993 – 35 days after Det. Mulligan's murder - that reveals the existence of withheld exculpatory evidence known to the Boston Police Department. The report states that "Source advised that **[redacted police officer] was recently disciplined for accusing [redacted police officer] of involvement in the murder of Detective John Mulligan.** Source stated that [redacted police officer] is corrupt and was involved in 'ripping off' and beating up hookers while assigned to the vice squad." (App. A)(emphasis added). As such, the Boston Police Department learned that another identified officer was

accused of killing Mulligan. Instead of disclosing that exculpatory evidence to Ellis, the Boston Police Department secretly disciplined the accusing officer and withheld the evidence from Ellis for 19 years. (App. A).

Ellis has also uncovered another redacted report dated December 3, 1993 – 67 days after Mulligan's murder - containing exculpatory evidence that corroborates the first report and states, "Boston Police Officer John **Mulligan (deceased) might have been killed to keep him from talking. A Boston Police Officer might have been involved in Mulligan's death**. Source has told the above [redacted]." (App. B)(emphasis added). As such, it appears that two officers believed that Mulligan was murdered by a fellow officer or detective. Again, the Boston Police Department withheld that exculpatory evidence from Ellis for 19 years.

2. The Boston Police Department Withheld Exculpatory Evidence Regarding Mulligan's Involvement In the Shakedown And Robbery of Robert Martin, Thereby Depriving Ellis of A Viable Third Party Suspect

Additional withheld evidence suggests that Mulligan was involved in stealing more than $20,000.00 dollars from a civilian named Robert Martin during a police robbery committed under the guise of a drug arrest. Additional new evidence reveals that Martin and his lawyer met with Detective Walter Robinson – who was involved in the criminal conspiracy with Mulligan and involved in the Mulligan murder investigation - several times after the detectives robbed Martin and before Mulligan's murder. The content of these communications and secret meetings between Robert Martin and Detective Robinson is not known. What is known is that Det. Robinson agreed to return five or six thousand dollars of the stolen money to Martin's attorney before Mulligan's murder. More new evidence reveals that the day after Mulligan was found murdered, Robert Martin paid his lawyer $15,000.00.

Specifically, withheld evidence found within newly uncovered federal court transcripts in the public corruption case against Acerra and Robinson, Robert Martin stated "[Robinson and Acerra] used the keys to get into the back entrance at 208, and they left me and Mike in the car guarded by **John Mulligan**." (App. C) (emphasis added). Martin was describing being robbed by these officers when he disclosed that Mulligan was involved in this drug rip off. Id. Thus, Mulligan was involved with Acerra and Robinson when they robbed Robert Martin on September 10, 1993. (See id.) That robbery and the dispute about the money and the charges gave Robert Martin a strong motive to have Mulligan killed.

Further, appellate counsel has uncovered new evidence regarding former Attorney John McBride, who represented Robert Martin when Martin was arrested and robbed by Acerra, Robinson, and Mulligan. In particular, McBride testified before a federal grand jury that he represented Robert Martin. (App. D). McBride further testified that after Martin was arrested and money was stolen from him, Detective Robinson gave five or six thousand dollars of the stolen money back to McBride. Id. McBride then revealed that Robert Martin secretly met with Detective Robinson on several occasions after the robbery of Martin and before Mulligan's murder. Id. Finally, McBride received a cash payment of $15,000.00 from Robert Martin the day after Det. Mulligan was murdered. Id. This payment from Martin to McBride was not connected to the pending drug case and cannot be connected to any other pending matters against Martin. Notably, when Detective Robinson was ultimately charged with crimes, Attorney McBride represented Robinson. The Boston Police Department failed to disclose any of this exculpatory evidence regarding its detectives, including Mulligan's involvement in the robbery of Martin or Robinson's secret meetings with Martin.

3. Robert Martin's Assertion That Mulligan Was Killed by Another Police Officer

The withheld evidence regarding Mulligan's involvement in the robbery of Robert Martin is compounded by the fact that Robert Martin himself later asserted that a police officer killed Mulligan. In Martin's version of the facts, Martin was not involved in Mulligan's death and the motive for Mulligan's murder was Mulligan's alleged abuse of one of Acerra and Robinson's female informants. This additional evidence can be found in a letter written by Robert Martin. (See App. R - Attached Handwritten letter by Martin).

This letter reveals that Martin theorized that a fellow detective had committed the homicide of Mulligan, and Martin attributed the motive for this murder to Mulligan's act of victimizing an informant that Robinson and Acerra regularly used. At the time that the letter was apparently written, Martin had hired his own attorney, and had provided to her a description of what he believed occurred during the homicide of Mulligan. (App. R.). Martin stated that two people named "Laura" and "Mike" were informants for Walter Robinson. Mulligan had worked with these informants because he was Robinson's partner. Martin stated that Mulligan went to the informant Laura's house to shake her down for more information. Martin learned that Mulligan raped Laura. Laura called a Lt. "McCarthy", whom she knew and trusted, and told him she was raped by Mulligan. "McCarthy" then went to Mulligan at Walgreens on the night of the homicide, and sat in an Explorer besides Mulligan's vehicle. He confronted Mulligan about his raping Laura, and Mulligan allegedly confessed and laughed, saying she would not tell on him because she is an informant. "McCarthy" then put a firearm to Mulligan's forehead, and held it close to his face so that blood did not splatter. According to Martin, "McCarthy" fired the weapon five times into Mulligan's face in the shape of a cross, with one bullet in each eye. (App. R). As such, Robert Martin asserted that Mulligan was killed by another police detective for allegedly

assaulting a female informant named Laura, and that the detective may have used the name "McCarthy". Id.

Interestingly, years later Robert Martin saw a Boston Globe article relating to Acerra's misconduct, and informed the Boston Police Department that Acerra used the name "McCarthy" when ripping people off. In an April 18, 1996 interview with Sergeant Detective John Donovan, Robert Martin discussed the night where the Boston Police, including Detectives Acerra and Robinson robbed him of drugs and money. (App. S). Martin stated that Acerra used the name McCarthy during the incident. However, based upon viewing Acerra's photo in the Boston Globe, he learned that "McCarthy's" true name was Acerra. Id. As such, the evidence suggests that Acerra is "McCarthy." Id.; superseding federal indictments.

Additionally, in an April 25, 1996 Boston Police Department Anti-Corruption report that was made after Ellis' third trial, a Sergeant Greeley recounts that during the robbery of Robert Martin by police detectives, a woman named "Laura" and a man named "Mike" were present. (App. R). As referenced above, "Laura" and "Mike" were informants for Detective Robinson, and according to Martin, "Laura" was allegedly raped by Mulligan. (App. R). As such, there is additional corroboration for Martin's exculpatory statements. Id.

Further, the new evidence and Martin's theory are corroborated by the fact that a woman named Tina Erti gave a witness statement to police indicating that Mulligan's friend Mary went to Mulligan's apartment after his murder, Mary noticed that money was missing from Mulligan's apartment, she told Walter Robinson, and Robinson told her that the police had already seized the money and it was at the police station. (App. BB). From that evidence, it can be inferred that a police officer removed money from Mulligan's apartment as part of a cover-up.

4. Additional Exculpatory Evidence Known By the Boston Police Department Regarding Mulligan And His Own Criminality, Which Reveals Viable Third Party Suspects As Well As A Motive for His Murder

In addition to the withheld reports regarding the Boston Police Department being aware that another officer was accused of murdering Mulligan, Ellis has also uncovered additional withheld evidence known by the Boston Police Department. This exculpatory evidence includes evidence regarding Mulligan's own criminality, which reveals viable third party suspects and a motive for Mulligan's murder.

Ellis has uncovered a redacted FBI report dated November 12, 1993 stating that "Former Boston Police Officer, John Mulligan, aka 'Mulligan Stew', 'Mad Dog Mulligan', 'Plain View Mulligan', regularly, according to [redacted] 'associated'/ 'liked' young black girls and 'shook down' prostitutes. Mulligan regularly, according to [redacted] 'shook down' pimps, prostitutes, and drug dealers for money. Mulligan extorted from other police officers, and Mulligan used every means available to blackmail people. Mulligan was as 'dirty as they come'. Mulligan dealt drugs extensively. Mulligan was known as 'Plain View Mulligan' because all of his cases were cases where the evidence was found in plain view. Source has heard often that Mulligan committed murder as a cop." (App. E). The content of this report makes it clear that the Boston Police Department knew or should have known about Mulligan's criminality.

Ellis also uncovered a second report dated September 2, 1983 referencing that Detective Mulligan assists people in illegally disposing of tickets and that Mulligan is the on the "payroll" of a redacted enterprise. (App. F).

Ellis also uncovered a third report dated October 19, 1983, stating that a redacted criminal "has a bagman by the name of Detective John Mulligan." (App. G). That same report further stated that "Source advised Mulligan has always been identified in the department as a rogue

police officer. Source advised that one famous incident regarding Mulligan related to the fact that he had been bounced off the vice squad for misconduct...for Mulligan to have been bounced off the vice squad while the others remain is one indication of how corrupt Mulligan is." (App. G). The content of this report makes it clear that the Boston Police Department knew of Mulligan's criminality, which apparently got him "bounced off the vice squad for misconduct." Id.

A fourth report dated May 5, 1986, states in redacted form that Mulligan is the subject of an extortion investigation. (App. H). The content of this report makes it clear that the Boston Police Department knew about Mulligan's criminality.

A fifth undated redacted report states, "Source identified 4 police detectives who are among the worst in the Boston Police Department....[redacted]...District 4 detective John Mulligan...[redacted]...Source indicated that a group of detectives have formed a private security form, name unknown, that they are forcing upon various businesses in the city. Source stated that in fact this private security firm offers no services whatsoever, but that the businesses see this form as a subtle form of corruption." (App. I). This report corroborates the other evidence linking Mulligan to the conspiracy of Acerra, Robinson, and Brazil.

A sixth undated redacted report states that a redacted criminal "had several of his key detectives, including detective John Mulligan, collecting cash contributions from their regular shakedown victims, including bar owners and bookmakers, in order for [redacted] to collect money for [redacted] candidacy." (App. J).

A seventh undated redacted report stating, "Source advised that he knows a Boston police officer named John Mulligan. Mulligan has a reputation, according to one source, of hustling hookers and for being a shakedown man...Source feels the only reason Mulligan keeps his job is because he knows a lot of dirt on the department brass. He, in effect, blackmails the department brass with if I fall, you fall." (App. K). The content of this report suggests that the reason the

Boston Police Department withheld the exculpatory evidence regarding Mulligan and other suspects was because Mulligan was blackmailing top members of the Boston Police Department.

An eighth report dated December 6, 1983, implies that a top Boston Police Department official had an incident with a hooker, and states, "Source learned that Boston police detective John Mulligan approached this female and gave her an undisclosed amount of cash in order to have her drop the charges." (App. L). This report corroborates the prior report and confirms the reason why the Boston Police Department wanted to withhold the exculpatory evidence regarding Mulligan.

A ninth report dated December 19, 1983 states, "Mulligan frequents the area of Westland Ave. and Hemmingway and is said to know all the hookers there. Mulligan allegedly does favors for these hookers and they reciprocate. Mulligan is also known to have been a bagman for [redacted] and is currently a bagman for [redacted]." (App. M).

A tenth report dated February 26, 1985 states, "Boston Police Detectives [redacted] and John Mulligan of the Boston Police Department Burglary Squad shakedown the owner of Hudson Loan/ Jewelry Co. on Kneeland Street in Boston." (App. N).

Despite that all of this new exculpatory evidence - regarding Mulligan's criminality and his involvement in the conspiracy with Acerra, Robinson, and Brazil - was known to the Boston Police Department and directly related to Mulligan and the police officers investigating the Ellis case as agents of the Commonwealth, none of this evidence was ever disclosed before any of Ellis' three trials, or before the first Motion for New Trial, or before the direct appeal.

C. The Exculpatory Evidence Withheld By The Boston Police Department That Was Revealed During the First Motion for New Trial

As discussed above, Ellis has recently uncovered material and exculpatory evidence that was withheld by the Boston Police Department and never disclosed by the Commonwealth. The

latest batch of evidence withheld by the Boston Police Department is important not just for its content but for how it relates to Ellis' previous assertions of his innocence and attempts to reverse his conviction.

During Ellis' first Motion for New Trial, it was revealed that the Boston Police Department withheld exculpatory evidence regarding the involvement of Detectives Acerra, Robinson, and Brazil in the criminal conspiracy that involved executing fake search warrants and robbing citizens. Those crimes, which were occurring at the time of Mulligan's death, ultimately led to Acerra and Robinson being indicted and convicted in federal court. (App. T).

Thus, Ellis had established that police detectives who were involved in Mulligan's murder investigation were themselves committing crimes, evidence that went to the credibility of the entire investigation. However, at that time, the Commonwealth had still failed to disclose that Mulligan was involved in the criminal joint venture with Acerra, Robinson, and Brazil. As such, Ellis had not yet linked Acerra, Robinson, and Brazil's criminality to Mulligan or Ellis' prosecution.

In opposing Ellis' first Motion for New Trial and direct appeal, the Commonwealth specifically noted that Ellis had presented no evidence linking the detectives crimes to the Ellis/Patterson case and no evidence suggesting that Acerra, Robinson, or Brazil had any motivation to ensure that Ellis was convicted. See Commonwealth v. Ellis; Commonwealth's Principal Brief at 65 (June 2000). The Commonwealth further argued, despite Boston Police Department's knowledge of Mulligan's involvement, that the crimes of Acerra, Robinson, and Brazil were "completely unrelated" to the Ellis case. See Commonwealth v. Patterson; Commonwealth's Brief at 60 (arguing that the subsequent prosecution of the police detectives was "for criminal conduct arising out of an unlawful money-making scheme completely unrelated to this case..."). The prior motion judge agreed, and the motion for new trial was denied.

However, as discussed herein, the new evidence finally links Det. Mulligan and the Ellis case with the criminal conspiracy of Acerra, Robinson, Brazil, and Mulligan. (App. C, D, F-N). We now know that Mulligan was accused of robbing citizens and being involved in the criminal conspiracy with Acerra, Robinson, and Brazil. (App. C).

We also know that Mulligan was accused of even more misconduct, including allegedly engaging in sexual acts with prostitutes, and that this misconduct created a strong motive for Mulligan to be killed. (App. E-N).

When that evidence is combined with the additional withheld evidence proving that the Boston Police Department knew that Mulligan was involved in the criminal conspiracy with Acerra, Robinson, and Brazil, and that the Boston Police Department knew that another officer was accused of Mulligan's murder and hid that fact for 19 years, the result is that it cannot be said that justice was done.

D. The Relevant Evidence From Ellis' Third Trial That Is Implicated By The Withheld Exculpatory Evidence And Newly Discovered Evidence[4]

In order to put the withheld exculpatory evidence in context and to demonstrate the prejudice to Ellis, the following is a summary of relevant testimony at the third trial of Ellis that led to his conviction:

1. The Involvement of Detectives Acerra, Robinson, and Brazil in the Mulligan Murder Investigation And the Arrest of Ellis

Although Detectives Acerra and Robinson did not testify at Ellis' third trial, their extensive involvement in this case was revealed within the testimony of Detective Richard Ross. (IV-33).

[4] The following is a description of the trial testimony that is implicated by the withheld exculpatory evidence and the newly discovered evidence. By including citations to the transcribed testimony herein, Ellis seeks only to provide this Court with a relevant record to relate to the withheld exculpatory evidence. Ellis does not suggest that the police trial testimony was truthful. Additionally, Ellis has attached in the Appendix a more detailed summary of all of the trial testimony, much of which is not relevant to the present Motion for New Trial. (See App. U).

RICHARD ROSS, testified that he was a Boston Police Detective who was assigned to the Homicide Unit in September 1993. (III-217-18).

Notably, although it did not mean much at the time because evidence was being withheld by the Boston Police Department, Ross testified that both Det. Acerra and Det. Robinson were on the task force investigating Mulligan's murder. (IV-33). Ross stated that Acerra and Robinson were partners, and that Acerra was good friends with Mulligan. (IV-33). In fact, Acerra lived in the same condo complex as Mulligan. (IV-33). Further, Acerra was one of the first people to go inside Mulligan's apartment after his death. (IV-34).

Acerra was also one of the first persons to interview Rosa Sanchez. (IV-34). Acerra and Robinson also both attended briefings so they could monitor the progress of the investigation. (IV-34). Acerra and Robinson were also both present at the booking of Terry Patterson. (IV-35). Acerra was also present for Ellis' booking. (IV-37).

Both Acerra and Robinson were also present when Rosa Sanchez came to the homicide unit to identify Ellis. (IV-37). Acerra and Robinson were both present in the room where Rosa Sanchez and Det. Ross were sitting in the station. (IV-38).

Det. Ross further testified to the strong family ties between Acerra and Rosa Sanchez, who was Acerra's family relative and the only witness who made a questionable identification of Ellis after twice identifying other suspects. (IV-38). The family ties between Acerra and Rosa Sanchez went back to Puerto Rico. (IV-38).

Further, Rosa's aunt Lucie DelValle lived at the same condo complex with Acerra and Mulligan. (IV-39). Additionally, Acerra and Rosa's aunt DelValle had a child together. (IV-39). Rosa Sanchez and the child were cousins. (IV-39). Because of this relationship, Acerra often saw Rosa Sanchez at family functions. (IV-39). In addition, Ross testified that Rosa Sanchez visited with her aunt, Lucille DelValle, at the condo complex that the aunt shared with Acerra. (IV-40).

On October 5, 1993, Rosa Sanchez came to the Homicide Unit to look at photo arrays. (III-240, 265). Notably, Rosa Sanchez was transported to the station by Robinson and Acerra on her way to make an identification. (III-241).

Rosa Sanchez, Detective Ross, Acerra, Robinson and Sergeant O'Leary went into a room at the Homicide Unit. Detective Ross testified that Rosa appeared very apprehensive, and was shaking and nervous. (III-254-55).

When Rosa Sanchez examined the Ellis array, both Acerra and Robinson were in the same conference room with her. (III-254). She reviewed the array for five minutes and then allegedly began to get upset and shake. (III-258). She pointed to a photo in the lower right hand corner of the array (a photo that was not Sean Ellis) and then told the police that this person was a man that had been stalking her.[5] (III-258).

Detective Ross covered this photo and told Rosa Sanchez to try again to identify the person she saw at the Walgreens. (III-259). Rosa Sanchez looked at the photographs again, and selected a photograph on the upper right hand corner that was not Ellis' photo as the person she saw crouching down next to Mulligan's car on the night he was killed. (III-257, 260).

Detective Ross claimed that Rosa said, "I think that may be the person." (III-260). None of the four detectives in the room during this identification took any notes, nor was this alleged statement recorded in any way. (III-260). None of the four detectives asked Rosa Sanchez to sign the photograph that she selected as the man she saw crouching down next to Mulligan's car the night he was killed. (IV-46).

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[5] Sanchez later identified another man as the person who was following her, but the trial judge refused to allow Ellis to present Sanchez' misidentification to the jury. Further, there was inconsistent evidence and testimony regarding the seating arrangements during the identifications and whether Acerra was sitting right next to Sanchez. (IV).

The detectives then talked to Rosa for some time to calm her down, then showed her a photo array that contained Terry Patterson's photograph. III-261. When Rosa looked at Terry Patterson's photo array, Rosa Sanchez said, "I don't see anybody in there that I can identify." (III-262).

Rosa Sanchez then left the Homicide Unit together with Acerra and Robinson. (III-265). Notably, Rosa Sanchez then had a conversation outside of the police station with Detectives Acerra and Robinson. (III-265). After about three to five minutes, Detective Robinson returned to the homicide unit and was in Detective Ross' words was "very excited." (III-267).

Detective Robinson returned to the homicide unit together with Detective Acerra, Rosa Sanchez, and her husband Ivan Sanchez. (III-266).

Detective Ross took Rosa Sanchez to the conference room again, but this time, the identification was taped per the order of Captain McNelly. (III-266, IV-50). Sanchez was then shown the same photo array of Ellis again. (III- 268). According to Detective Ross, when shown the array with Ellis' photograph, Rosa Sanchez pointed to Ellis's photograph and said, "That's him right there. That's the man I saw." (III-269). Detective Ross testified that she selected Ellis's photograph almost immediately after returning from the car with Acerra and Robinson. (IV-51). This time, Ross asked Sanchez to sign the photograph and then he signed and dated it. (IV-52). As such, after speaking privately with Det. Acerra and Robinson, Rosa Sanchez ultimately identified Ellis as being near the scene, but Rosa Sanchez did not ever testify that Ellis had killed Mulligan. See id.

Notably, Detective Ross also testified that civilian witness Evoney Chung was shown photographs of Ellis and did not identify Ellis. Detective Ross acknowledged that civilian witness Joseph Saunders was also shown photographs of Ellis and did not identify Ellis. (IV-26).

JOHN BRAZIL, a detective with the Boston Police Department Homicide Unit, testified against Ellis at his trial. (III-136).

Both Brazil and the prosecution failed to disclose that at the time of Mulligan's murder, Brazil was involved in a criminal conspiracy with Detective Acerra, Det. Robinson, and the victim Det. Mulligan. (See attached).

Instead, Brazil testified that on September 30, 1993, he went with Sergeant Mahoney to Floyd Street and met with Sean Ellis and his mother; he arranged to bring Ellis to the homicide unit for questioning. (III-136-38). Detective Brazil noted that Ellis had a prominent stutter. (III-155).

Detective Brazil testified that after general conversation, he said to Ellis, "Sean, enough fooling around. You know why you're here and I know why you're here" to which Ellis responded, "No, I don't. I don't know why I'm here." (III-157).

Detective Brazil testified that Ellis truthfully admitted that he was at Walgreens on the night of Mulligan's murder. (III-157). Ellis told Detective Brazil that he needed to purchase Pampers diapers and that was why he was at Walgreens. (III-157-58). Ellis truthfully acknowledged to Detective Brazil that he used the phone outside of Walgreens to call a girl; and he told Detective Brazil where the girl that he called lived. (III-158). Ellis repeatedly denied knowing anything about the shooting of Mulligan. (III-157).

Ellis was not represented by an attorney at the time of this interrogation with Brazil, nor did he ask for an attorney. (III-174). At some point in time after Ellis asserted his innocence, Detective Brazil left the questioning, and Detective Harris entered and began questioning of Ellis. (III-168). Ellis consistently maintained his innocence throughout this interrogation.

2. Prosecutor's Closing Argument

In its closing argument, the Commonwealth theorized that Ellis and Patterson randomly decided to rob and murder Det. Mulligan. (VI-33).

There was no mention the prosecutor's closing argument that Mulligan, Acerra, Robinson, and Brazil were in a criminal conspiracy together, and no mention that other police officers believed that Mulligan was murdered by a fellow officer.

3. Jury Instructions

The trial judge, using an older version of model instructions, instructed the jury that the Commonwealth's burden of proving guilt beyond a reasonable doubt did not mean "proof beyond the possibility of innocence." (VI-63).

V. STANDARD OF REVIEW

The Massachusetts Rules of Criminal Procedure provide that "[t]he trial judge upon 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); Commonwealth v. Pike, 431 Mass. 212, 218 (2000); Commonwealth v. Stewart, 383 Mass. 253, 257 (1981).

When a defendant presents new evidence that casts doubt on the justice of the original conviction, the court must grant a new trial. Commonwealth v. Grace, 397 Mass. 303, 305 (1986).

While Rule 30(b) is framed in discretionary terms, a trial judge "has no discretion to deny a new trial" if "the original trial was infected with prejudicial constitutional error." Earl v. Commonwealth, 356 Mass. 181, 184 (1969); Commonwealth v. Nieves, 429 Mass. 763, 770 (1999). This is true when a defendant establishes that one of the Commonwealth's agents withheld exculpatory evidence from the defense despite a specific request. Smith v. Cain,132 S.Ct. 627 (2012); Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992).

This is also true where a defendant has newly discovered evidence that raises doubt as to whether justice was done at the trial. Commonwealth v. Grace, 397 Mass. 303, 305 (1986). This is also true where a defendant alleges that his confrontation rights were violated. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2531 (2009). This is also true where a defendant alleges that his public trial rights were violated. Presley v. Georgia, 130 S. Ct. 721, 724 (2010).

This is especially true where a defendant alleges that he was represented at trial by ineffective counsel. Commonwealth v. Cook, 380 Mass. 314, 320-321 (1980); United States v. Cronic, 466 U.S. 648, 656 (1984). "In a new trial motion asserting ineffective assistance of counsel, whether justice may not have been done equates with whether counsel was constitutionally ineffective." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001) (if counsel's ineffectiveness deprived the defendant of an otherwise available substantial ground of defense, "then there has been prejudicial constitutional error").

Further, a defendant does not have to prove his innocence in order to be successful on a Motion for A New Trial. Instead, a defendant must merely create doubt as to whether justice was done. Mass.R.Crim.P.30.

In addition, whenever it appears that a defendant's rights to due process, a fair trial, or to effective assistance of counsel have been violated, or that the jury verdict might have been different if additional evidence had been presented, then a new trial is required pursuant to the 5th, 6th, and 14th Amendments and Article XII of the Massachusetts Declaration of Rights. See Strickland v. Washington, 466 U.S. 668, 684-85 (1984). See also Mass.R.Crim.P. 30.

Finally, an evidentiary hearing is required if the motion and affidavits raise a substantial issue. Mass. R.Crim. P. 30(c)(3), 378 Mass. 900 (1979). In deciding whether a substantial issue is raised, the motion judge should assume that the allegations raised in the Motion for New Trial and supporting affidavits are true. Commonwealth v. Licata, 412 Mass. 654, 660-661 (1992)(if a

serious issue is raised by taking as true the allegations in any documents or affidavits supporting the motion, an evidentiary hearing should be held).

Claims regarding exculpatory evidence that was withheld, or newly discovered evidence, or that counsel provided constitutionally ineffective assistance raise a "serious issue" that requires an evidentiary hearing. Smith, 132 S.Ct. 627 (2012); Licata, 412 Mass. at 661.

VI. ARGUMENT

Ellis is innocent, and the Boston Police Department withheld exculpatory evidence that contradicts the Commonwealth's theory of the case, reveals new suspects, establishes that the victim Mulligan was himself committing crimes and ripping off other criminals, contains a withheld report that other police officers believed Mulligan was killed by another police officer, and suggests a motive for someone else to kill Mulligan and for Detectives Acerra, Robinson, and Brazil to divert the murder investigation and frame Ellis to hide their own crimes.

Notably, the withheld exculpatory evidence reveals that the Boston Police Department was made aware - before the Ellis trial - that named officers reported that another named police officer was responsible for killing Mulligan and that Mulligan was killed to keep him from talking. The Boston Police Department actually possessed the name of the police officer accused of killing Det. Mulligan, and yet that information was withheld from the defense and the jury. In fact, that information is still being withheld by the Boston Police Department to this day.

Additionally, the Boston Police Department withheld evidence that finally links the victim Det. Mulligan to the criminal conspiracy involving Det. Acerra, Robinson, and Brazil, and that in turn reveals a motive for other suspects to have killed Mulligan and for the detectives to sabotage and alter the investigation to hide their crimes.

Ellis had a 5th, 6th, and 14th Amendment and Article XII due process right to have the jury hear all of this exculpatory evidence before it rendered a verdict. Smith v. Cain, 132 S.Ct. 627

(2012). Instead, the Boston Police Department withheld the exculpatory evidence, and it cannot be said with any confidence that justice was done.

Further, new evidence establishes that the scientific "evidence" offered at the Ellis trial was unreliable and should not have been admitted. In particular, the opinion offered from BPD analyst Foilb – who was involved in the Stephan Cowans wrongful conviction – regarding his theory of simultaneous prints has now been held by the SJC in co-defendant Patterson's case to be unreliable and thus should not have reached the jury at Ellis' third trial. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005)(same fingerprint evidence used against Ellis held to be inadmissible in the case of Ellis' co-defendant Patterson).

For these reasons and the additional reasons detailed herein, it can no longer be said with any confidence that justice was done. As such, Ellis respectfully requests a new trial.

A. A NEW TRIAL IS REQUIRED BECAUSE SEAN ELLIS IS ACTUALLY INNOCENT.

Sean Ellis is actually innocent of the crimes charged. A new trial is required.

This Honorable Court has the power to grant a new trial under Rule 30(b) of the Massachusetts Rules of Criminal Procedure "if it appears justice may not have been done." See Commonwealth v. Moore, 408 Mass. 117, 125 (1990).

In the present case, justice was not done because Sean Ellis was convicted of crimes for which he was innocent.

Ellis is actually innocent of murder. Quite simply, he did not kill Mulligan, and he was not in a joint venture that resulted in Mulligan's death. The newly discovered evidence and the withheld evidence detailed later herein suggest that another suspect killed Mulligan.

Because Ellis is actually innocent and for all the additional reasons detailed later in this memorandum, it cannot be said with any confidence that justice was done in this case. As such, this Honorable Court should grant a new trial.

B. A NEW TRIAL IS NECESSARY BECAUSE WITHELD EXCULPATORY EVIDENCE AND NEWLY DISCOVERED EVIDENCE SHOW THAT JUSTICE WAS NOT DONE, IN VIOLATION OF ELLIS' RIGHTS PURSUANT TO THE 5TH, 6TH, AND 14TH AMENDMENTS AND ARTICLE XII OF THE MASS. DECLARATION OF RIGHTS.

After his trials and previous appeals, Ellis has discovered newly discovered evidence and withheld exculpatory evidence that reveals other suspects, impacts the credibility of witnesses, and makes it impossible to say with any confidence that justice was done.

Ellis has discovered withheld exculpatory evidence detailing that the Boston Police Department was aware that multiple police officers believed that the victim in this case, Detective Mulligan, was actually killed by another identified police officer. The Boston Police Department was made aware - before the Ellis trial - that named officers reported that another named police officer was responsible for killing Mulligan. (App. A, B). The Boston Police Department actually possessed the name of the police officer accused of killing Det. Mulligan, and yet that information was withheld from the jury, withheld from the public, and withheld from Ellis for over 19 years. Not only was that evidence withheld from the defense, it appears to have been actively hidden and suppressed by the Boston Police Department. Appellate counsel for Ellis has fought for years to obtain exculpatory public records from the Boston Police Department and has now sued the Boston Police Department in civil court for their withholding of relevant I.A.D. files. To date, the Boston Police Department has continued to withhold exculpatory evidence. Much of the new evidence comes from the F.B.I. after a Freedom of Information Act request, and those documents reveal that the Boston Police Department and its detectives possessed and withheld exculpatory evidence.

Additional withheld evidence, not known by the defense at the time of trial, reveals that Mulligan himself was accused of being involved in criminal activity, including executing fake search warrants and stealing money. Moreover, new evidence reveals that Mulligan was accused of engaging in appropriate contact with young female prostitutes. Notably, the evidence at trial included an allegation that Mulligan was last seen in the company of a young woman and was arguing with her shortly before his death.

Further, new evidence suggests that three weeks before Mulligan's murder, Mulligan was allegedly involved in stealing more than $20,000.00 dollars from a civilian named Robert Martin during a police robbery committed under the guise of a drug arrest. Detectives Acerra and Robinson were also alleged to have been involved in that robbery. Based on Martin's allegations and other similar evidence, a federal grand jury indicted Acerra and Robinson after Mulligan's death. (App. T). However, Martin's accusation that Mulligan was involved in the robbery was withheld from the defense until now. More new evidence reveals that Martin and his lawyer John McBride met with Detective Walter Robinson – a detective in the police criminal conspiracy who later pled guilty to various crimes in federal court – several times after Acerra, Robinson, and Mulligan robbed Martin and before Mulligan's murder. Further, the day after Mulligan was found murdered, new evidence reveals that Robert Martin paid his lawyer $15,000.00. (App. D).

That new evidence, especially when combined with the withheld report that a police officer may have been involved in Mulligan's death, creates a strong reasonable doubt about whether Mulligan was killed not by Ellis but instead because of his alleged involvement in the criminal conspiracy with Acerra, Robinson, and Brazil.

The new evidence is also corroborated by old evidence that previously seemed inconsequential. The new evidence - about another officer killing Mulligan and Mulligan being accused of crimes himself - is corroborated by the evidence suggesting that Acerra may have

tampered with the crime scene by removing Mulligan's phone, and by the implausible coincidence whereby Acerra just happened to be related to the only witness who identified Ellis (after the witness previously identified another man). The new evidence about Mulligan making enemies - by allegedly engaging in sexual activities with prostitutes and being accused of robbing drug dealers and allegedly raping a young girl - is corroborated by a letter, by a report taken from Robert Martin, and by the evidence that Mulligan was seen arguing with a young girl in his car on the night of his murder. Thus, the withheld evidence that Ellis has finally uncovered fits together with what we already knew to reveal that corrupt police officers had a motive to kill Mulligan and that they were likely involved in his death.

Ultimately, the withheld evidence makes it impossible to say that justice was done. As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

1. The Law on Newly Discovered Evidence

Newly discovered evidence is evidence that was not known to the defendant at the time of trial. Commonwealth v. Grace, 397 Mass. 303, 306 (1986). The evidence should have been the type that was not discoverable by defense counsel at the time of trial. Id. Put simply, the evidence must now be new. Additionally, the new evidence must be material, credible, and support the defendant's position. Grace, 397 Mass. at 305.

Importantly, a defendant does not have to establish that the new evidence proves his innocence. Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011)(motion judge erroneously denied motion for new trial on new evidence grounds; reversed and remanded); Grace, 397 Mass. at 306.

Instead, if the new evidence casts doubt on the justice of the original conviction, the court must grant a new trial. Grace, 397 Mass. 303, 305 (1986).

Thus, the question before the motion judge is whether the new evidence offered creates a substantial risk that a jury exposed to that evidence might have reached a different verdict. DiBenedetto, 458 Mass. at 664.

Although the strength of the prosecution's case can in some instances weaken the value of new evidence, the new evidence must still be analyzed to determine whether it could have made a difference. However, this is not such a case. Here, two juries were declared deadlocked on the issue of whether Ellis was involved in the murder of Mulligan, and Ellis was convicted after a third jury deliberated after a trial that did not contain any of the withheld exculpatory evidence.

In determining if a new trial is warranted, it is enough that on a full and reasonable assessment of the trial record, the absent evidence would have played an important role in the jury's deliberations and conclusions, even if it is not certain that the evidence would have produced a verdict of not guilty. Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980); United States v. Montilla-Rivera, 115 F.3d 1060, 1065 (1st Cir. 1997).

2. The Law On Withheld Exculpatory Evidence

All defendants facing criminal charges have a 5th, 6th, and 14th Amendment due process right to be provided with exculpatory evidence prior to trial. See Smith v. Cain,132 S.Ct. 627 (2012); Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976). The prosecution is required in every case to disclose all exculpatory evidence to the defense, regardless of whether any request is made. Smith v. Cain, 132 S.Ct. 627 (2012); United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008).

Exculpatory evidence is not limited to evidence that would prove a defendant's innocence. Instead, it encompasses all evidence that might affect the credibility of any witness. It is crucial to our justice system that the defense is provided with the true evidence so that the government is

not allowed to distort the facts to make a case. Dennis v. United States, 384 U.S. 855 (1966) (discovery promotes the administration of justice and unlocks the doors to truth; the government should not have exclusive access to the facts).

The prosecutor's duty to disclose exculpatory evidence is a continuing duty, and it extends to evidence that is in the possession of all other local police, state police, or federal agents who were involved in the investigation of any aspects of the case. Kyles v. Whitley, 514 U.S. 419 (1993). In Kyles, the Court held that a prosecutor has a duty not just to turn over evidence that the prosecutor already possesses, but also a duty to learn of any additional favorable evidence to the defendant known "to the others acting on the government's behalf in the case, including the police." Id. at 437.

In cases prosecuted in Suffolk Superior Court, the Commonwealth is required to turn over all exculpatory evidence possessed by the Boston Police Department. Kyles, 514 U.S. at 438. Even when the Commonwealth is initially unaware of the existence of a joint investigation or any exculpatory evidence, the prosecutor has a continuing duty to inquire and to disclose. Kyles, 514 U.S. at 438; Commonwealth v. Martin, 427 Mass. 816, 823 (1998)(S.J.C. reversed conviction because the prosecutor failed to turn over evidence from crime lab that prosecutor did not even know existed); Commonwealth v. Monteiro, 396 Mass. 123 (1985)(prosecutor responsible for police withholding discovery).

When a defendant makes a specific discovery request and one of the Commonwealth's agents still withheld exculpatory evidence from the defense, a new trial is required if the withheld evidence might have affected the outcome or if the non-disclosure prejudiced the defendant. Smith v. Cain,132 S.Ct. 627 (2012); Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992). See also Commonwealth v. Gallarelli, 399 Mass. 17 (1987), citing U.S. v. Agurs, 427 U.S. 97 (1976) and declining to adopt the different federal standard of U.S. v. Bagley, 473 U.S. 667 (1985).

Even when a defendant has made no discovery requests or has made only a general request, a new trial is still required if any of the withheld evidence would have been a real factor in the jury's deliberations, or if there is a substantial risk that the jury might have reached a different result if the withheld evidence had been admitted at trial, or if the withholding of the evidence deprived the defendant of a substantial ground of defense. Tucceri, 412 Mass. 401, 412 (1992).

Ultimately, due process of law requires that the prosecution and its police agents disclose to all criminal defendants in every case all evidence favorable to the defendant. Id.; Brady v. Maryland, 373 U.S. 83 (1963). As such, a conviction must be reversed if it is revealed that the prosecution or police agents withheld material exculpatory evidence. Smith v. Cain, 132 S.Ct. 627 (2012)(Murder conviction reversed; where alleged surviving eyewitness's testimony was the only direct evidence linking defendant to a murder, the withheld discovery that could have impeached the eyewitness was material to the conviction). See also Norton v. Spencer, 351 F.3d 1 (1st Cir. 2003); Conley v. United States, 332 F.Supp.2d 302 (D.Mass. 2004), aff'd, 415 F.3d 183 (1st Cir. 2005) (Petitioner was entitled to habeas relief based on the prosecution's failure to disclose an FBI memorandum which contained significant data bearing on a key prosecution witness's inability to recall crucial events).

3. The Commonwealth's Continuing Duty to Disclose Exculpatory Evidence In the Present Case

As discussed above, here the prosecution team was required to turn over all exculpatory evidence to the defense before trial, including any and all evidence regarding other suspects or the credibility of police witnesses possessed by the Boston Police Department who were agents of the Commonwealth for discovery purposes. Brady v. Maryland, 373 U.S. 83 (1963); Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419 (1993); Commonwealth. v Martin, 427 Mass. 816, 823 (1998)(S.J.C. reversed conviction because the prosecutor failed to turn over

evidence from crime lab that prosecutor did not even know existed). Additionally, the Commonwealth's duty was a continuing duty, such that disclosure was also required before or during the first Motion for New Trial and direct appeal. Kyles v. Whitley, 514 U.S. 419 (1993).

Further, the prosecution was responsible for ensuring that the Boston Police Department turned over all exculpatory information within its possession, including but not limited to exculpatory information regarding the criminality and credibility of the victim and the police witnesses who investigated the case. Smith v. Cain, 132 S.Ct. 627 (2012); Brady v. Maryland, 373 U.S. 83 (1963). Here, since Acerra, Robinson, Brazil, and Mulligan were all involved in the Ellis case – in that they were investigators and the victim, respectively – the Commonwealth was required to turn over exculpatory information regarding these persons. Kyles v. Whitley, 514 U.S. 419 (1993). See also App. Q – specific discovery request.

Even if the police witnesses hid their misconduct from the prosecutor, the police officers were investigating this case and thus were members of the prosecution team for discovery purposes. Kyles, 514 U.S. at 438. Their knowledge is imputed to the prosecution and the exculpatory evidence should have been turned over to the defense. Id.

Likewise, the Commonwealth had a continuing duty to disclose information regarding third party culprits. Smith v. Cain, 132 S.Ct. 627 (2012); Kyles, 514 U.S. 419 (1993).

Ultimately, regardless of what the prosecutors actually knew, the Commonwealth had an obligation to ensure that the Boston Police Department disclosed all exculpatory evidence. This duty to disclose arises not solely from a Court's discovery order, but more fundamentally because of the prosecutorial due process duty to determine whether this exculpatory information existed and to disclose it. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); United States v.

Wright, 625 F.2d 1017 (1st Cir. 1980); Commonwealth v. Eric Murray, 461 Mass. 10 (2011)(motion judge correctly granted Motion for New Trial where police failed to turn over potentially exculpatory evidence regarding eyewitnesses to a homicide, and that evidence could have supported a charge of excessive force in self-defense); Commonwealth v. Daniels, 445 Mass. 392 (2005).

4. The New Evidence and Withheld Exculpatory Evidence In the Present Case Necessitates a New Trial

In this case, the withheld exculpatory evidence and newly discovered evidence casts real doubt on the justice of the original conviction.

As discussed in detail below, Ellis has discovered that the Boston Police Department withheld and suppressed evidence suggesting that a fellow police officer was the real killer of Det. Mulligan. The withheld evidence also states that Det. Mulligan was killed to keep him from talking.

Ellis has also discovered exculpatory evidence regarding other suspects who had the motive and opportunity to kill Mulligan. Ellis has also discovered exculpatory evidence regarding Mulligan's own criminality, as well as evidence linking Mulligan to the criminal conspiracy involving Detectives Acerra, Robinson, and Brazil. This new evidence provides the missing link for Ellis' claim that the detectives sabotaged the Ellis investigation from the very beginning to protect themselves.

All of this evidence was hidden and suppressed by members of the Boston Police Department. This evidence is also newly discovered. This newly discovered evidence is relevant because at worst, it raises reasonable doubt. At best, it shows that a third party may have killed Mulligan.

Each of these pieces of new evidence are relevant because they fit together to establish reasonable doubt as to the identity of the real killer.

The withheld evidence reveals three groups of people with a motive to kill Mulligan. This includes fellow corrupt police officers, drug dealers that Mulligan, Acerra, Robinson, and Brazil allegedly robbed, and people linked to the prostitutes and young black girls that Mulligan allegedly assaulted. Notably, the evidence relating to all three of these groups fits together and corroborates each other to reveal a true picture regarding Mulligan and his actions.

Of these three groups – the other Boston Police detectives in the criminal conspiracy, the drug dealers they robbed, and the prostitutes and young girls that Mulligan was accused of engaging in inappropriate activities with - it is important to note that the fellow corrupt officers are connected with each group, and the fellow police officers had the strongest motive to kill Mulligan. They had a motive to kill Mulligan for his volatile behavior and involvement in their own crimes. They also had a motive to kill Mulligan because he was failing to keep a low profile while the group was ripping off drug dealers, including Robert Martin. The fellow officers also had a motive to kill Mulligan because Mulligan's alleged actions with prostitutes and young black girls, including an alleged rape of Acerra's informant, were drawing too much attention.

Those motives, especially when combined with the new evidence that the Boston Police Department withheld evidence that a fellow police officer was the real killer of Det. Mulligan, makes it impossible to say that the verdict would be the same if this evidence had been presented.

Ellis had a 5th, 6th, and 14th Amendment and Article XII due process right to have the jury hear all of this exculpatory evidence before it rendered a verdict. Smith v. Cain, 132 S.Ct. 627 (2012). Acerra, Robinson, and Brazil were members of the prosecution team for discovery purposes in the Ellis case, and any evidence they withheld is imputed to the Commonwealth.

See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995). Likewise, the Boston Police Department was an agent of the Commonwealth for the Ellis prosecution. Id.

Instead of disclosing the withheld evidence, the Boston Police Department withheld the evidence, and the exculpatory nature of the evidence makes it impossible to say that justice was done. As such, a new trial is warranted. Id.

i. A New Trial Is Required Because The New Evidence Suggests That Ellis Did Not Commit The Crime

a. New Evidence From Multiple Independent Sources Suggesting That Mulligan Was Killed by Another Police Officer

First, Ellis has discovered withheld exculpatory evidence from four independent and separate sources – at least one of whom was a Boston Police Officer – all claiming that Mulligan was killed by another police officer. The Boston Police Department was aware of this exculpatory evidence and yet has failed to disclose it for 19 years and counting.

There are multiple new pieces of evidence that suggest Mulligan was actually killed by another police officer, an officer whose name is redacted from the newly discovered reports but who is known to the Boston Police Department.

First, the Boston Police Department withheld that it disciplined one police officer for accusing another police officer of the murder of Mulligan. After the prior Motion for New Trial was filed, new appellate counsel has discovered a report detailing that within a day of the murders of Detective Mulligan, the Boston Police Department disciplined a police officer (whose name was redacted but who is known to B.P.D.) for asserting that another Boston Police Officer (whose name was also redacted but who is known to B.P.D.) was involved in the murder of Mulligan. (App. A).

Specifically, a redacted report dated November 1, 1993 states that "Source advised that **[redacted police officer] was recently disciplined for accusing [redacted police officer] of**

involvement in the murder of Detective John Mulligan. Source stated that [redacted police officer] is corrupt and was involved in 'ripping off' and beating up hookers while assigned to the vice squad." (App. A)(emphasis added). This report, and the information in the report regarding the police officer who was accused of killing Mulligan, was never turned over to the defense prior to trial.[6] (See App. DD- affidavit of trial counsel).

Second, Ellis has discovered a December 3, 1993 report with exculpatory evidence from another police officer stating "Boston Police Officer John **Mulligan (deceased) might have been killed to keep him from talking. A Boston Police Officer might have been involved in Mulligan's death**. Source has told the above [redacted]." (App. B)(emphasis added). The information in this report was never turned over to the defense prior to trial. (See affidavit of trial counsel). This second report corroborates the first report and confirms that the Boston Police Department withheld evidence suggesting that another police officer was a suspect in Mulligan's murder.[7]

Third, the evidence withheld by the Boston Police Department is corroborated by an additional letter. Ellis has discovered a letter from a civilian named Robert Martin detailing his assertion that a Boston Police detective named "McCarthy" had committed the homicide of Mulligan, and that "McCarthy" was actually Detective Acerra, and that Martin attributed the motive for this murder to Mulligan's act of victimizing a female informant that Robinson and Acerra regularly used. (App. R).

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[6] In fact, this exculpatory evidence still has not been turned over by the Commonwealth or its agents at the Boston Police Department. Counsel for Ellis discovered this exculpatory evidence about the Boston Police Department only through a FOIA request to the F.B.I. Similar FOIA requests have been made to the Boston Police Department, but to date they have still refused to turn over any of the I.A.D. files or any evidence regarding the Boston Police Officer who accused another police officer of murdering Mulligan and was disciplined for the accusation.

[7] Similarly, this exculpatory evidence still has not been turned over by the Commonwealth or its agents at the Boston Police Department despite FOIA requests from Ellis and despite the Commonwealth's duty to disclose exculpatory evidence.

This evidence is newly discovered and warrants a new trial because it is evidence that fundamentally impacts the verdict and yet was not known or discoverable at the time of the Ellis trials. This evidence was also withheld because the Commonwealth had a duty to disclose that some police officers thought that Mulligan was murdered by another police officer. This evidence is clearly material and relevant because it suggests that Ellis is innocent and that another police officer killed Mulligan. This new evidence is also admissible as third-party culprit evidence and admissible pursuant to Ellis' 5th and 6th Amendment rights to present a complete defense. Holmes v. South Carolina, 547 U.S. 319 (2006).

The evidence is also uniquely reliable in that it shows that three independent sources, including at least one and perhaps two police officers, believed that Mulligan was killed by another Boston police officer. Evidence that one police officer believed that another police officer was killed by a third police officer falls clearly within the definition of exculpatory evidence that would impact a jury verdict. Brady v. Maryland, 373 U.S. 83 (1963). It cannot be said with any confidence that the jury verdict would have been the same if this newly discovered evidence had been presented at trial. As such, Ellis respectfully requests a new trial. United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980); Grace, 397 Mass. 303, 305 (1986).

More importantly, this new evidence is withheld exculpatory evidence that warrants a new trial. Smith v. Cain, 132 S.Ct. 627 (2012). Here, the Commonwealth withheld this exculpatory evidence from the defense. It is clear from the new evidence that Boston Police Department was aware that certain police officers accused another officer of the murder of Mulligan. (App. A-G, DD). It appears that the Boston Police Department disciplined one of the officers to keep him quiet. Id. As such, the Boston Police Department possessed information that another identified police officer was suspected of killing Mulligan, and yet that information was never turned over to the defense prior to trial. (App. DD).

The Boston Police Department was an agent of the Commonwealth for discovery purposes in the Ellis prosecution, and the sins of BPD are imputed to the prosecution. Kyles, 514 U.S. at 438.

By hiding this other suspect from the defense, the Boston Police Department substantially prejudiced Ellis and deprived him of an available third-party culprit defense and strong evidence to create a reasonable doubt. Tucceri, 412 Mass. 401, 412 (1992).

Importantly, the withheld evidence suggesting that another detective killed Det. Mulligan fits in with the other evidence regarding Detectives Acerra, Robinson, and Brazil.

As discussed above in the facts section, additional withheld evidence reveals that Mulligan was accused of being in the criminal conspiracy with Acerra, Robinson, and Brazil, whereby they all conspired to execute fake search warrants to rob citizens and steal from drug dealers. (App. C, D). Mulligan's alleged involvement in that conspiracy warrants a greater focus on the actions of Acerra, Robinson, and Brazil during the Ellis investigation, as they had a motive to frame Ellis. When the police needed a witness to identify Ellis, Acerra and Robinson spoke to Acerra's relative Rosa Sanchez. (III-265). At first Sanchez did not identify Ellis, but after Acerra talked to her outside the police station, suddenly her identification changed. (III-265).

Additionally, when crime scene technicians inventoried Mulligan's car after Acerra had responded to the murder scene, they did not find Mulligan's phone. Detective Walter Robinson and Detective Macdonald were then assigned to investigate whether Mulligan's phone had been stolen. (App. V). However, several days later Acerra amazingly found Mulligan's phone in the main console of Mulligan's car, a location where the crime scene technicians searched. (App. V).

Further, when police began interrogating Ellis – who maintained his innocence and did not deny he was at the Walgreen's – it was Det. Brazil who took the lead with the interrogation. (III-157).

These actions by Acerra, Robinson, and Brazil might seem innocuous or merely suspicious when viewed in the abstract. However, when that knowledge is combined with the evidence that Mulligan was allegedly in a criminal conspiracy with those same detectives (Acerra, Robinson and Brazil), and that Mulligan was allegedly blackmailing members of B.P.D., and the evidence that Mulligan was killed by a police officer, the combined new evidence at a minimum raises a reasonable doubt as to any alleged involvement of Ellis. This is a case where two prior juries were deadlocked, and where there was evidence of more than a dozen other fingerprints on Mulligan's car, including two other unidentified fingerprints in the drivers' side door column of Mulligan's car. (V-168). Where the withheld exculpatory evidence revealed another viable suspect, that evidence would have very likely changed the verdict.

Ultimately, Ellis had a due process right to have the jury hear all of this exculpatory evidence before deciding a verdict. Instead, the Boston Police Department hid this evidence for 19 years. The withholding of this exculpatory evidence deprived Ellis of access to third party culprits and violated his rights to due process and a fair trial pursuant to the 5th, 6th, and 14th Amendments and Article XII. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

It cannot be said with any confidence that the results of any of the three trials would have been the same if the defense had been provided with the exculpatory evidence that a police officer thought that someone else had killed Mulligan. Especially in such a close case, this new evidence regarding third party culprits is crucial to whether justice was done. As such, a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

b. The Boston Police Department Withheld Exculpatory Evidence Regarding Mulligan's Own Criminality, His Involvement in the Criminal Conspiracy With Acerra, Robinson, And Brazil, and Mulligan's Involvement In the Robbery of Third Party Culprit Robert Martin

The Boston Police Department withheld additional exculpatory evidence regarding Det. Mulligan and his involvement in the criminal conspiracy with Acerra, Robinson, and Brazil. Ellis has discovered reports alleging that Det. Mulligan was corrupt and was involved in the criminal conspiracy with Acerra, Brazil, and Robinson, three of the detectives that investigated Mulligan's murder.

The Boston Police Department also withheld evidence that Mulligan was involved in the robbery of a man named Robert Martin. (App. C, D, T).

The withheld evidence regarding Mulligan's criminality and his role in the Martin robbery also reveals additional third-party culprits. In particular, new evidence suggests that Mulligan was involved in stealing more than twenty thousand dollars from a civilian named Robert Martin during a police robbery committed under the guise of a drug arrest. Newly discovered documents reveal that Mulligan ripped off a man named Robert Martin on September 9, 1993, just two weeks before his death, with the assistance of Acerra and Robinson. (App. C, D, T). As such, Martin himself had a motive kill Mulligan. Mulligan's involvement in the Martin robbery also created a strong motive for Detectives Acerra and Robinson to steer the murder investigation away from their crimes and from Martin or other victims of Mulligan, Acerra, Brazil and Robinson, because Martin could have implicated the detectives in their public corruption scheme.

Further, Martin wrote a letter detailing that he believed Mulligan was killed by a police officer. (App. R).

Mulligan's Involvement In the Police Conspiracy And The Robbery of Robert Martin

Withheld exculpatory evidence reveals that Mulligan was a member of the criminal joint venture with Acerra, Robinson, and Brazil, and that all four detectives conspired to steal money and drugs from residents of Massachusetts. (App. C, D).

Additionally, the withheld evidence reveals that Mulligan was involved in the robbery of Robert Martin, and that Martin had a motive to kill Mulligan. Martin told police that when he was arrested on September 10, 1993 by Detectives Acerra and Robinson, that the police robbed him and then asked for further payment if Martin wanted the police to protect Martin's girlfriend from being charged with a crime. (App. C, D). Within newly uncovered federal court transcripts in the public corruption case against Acerra and Robinson, Martin stated ""[Robinson and Acerra] used the keys to get into the back entrance at 208, and they left me and Mike in the car guarded by **John Mulligan**." (App. C) (emphasis added). Martin was describing being robbed by these officers when he disclosed that Mulligan was involved in this drug rip off. Id. This is the first evidence that Ellis has uncovered that definitively links Mulligan to the criminal activity of Acerra, Robinson, and Brazil. Mulligan's involvement in the criminal conspiracy with Acerra, Robinson, and Brazil was known to members of the Boston Police Department prior to Ellis' third trial.

Thus, it appears that Mulligan was involved with Acerra and Robinson when they robbed Robert Martin on September 10, 1993. (See id.) That robbery gave Robert Martin a strong motive to have Mulligan killed.

Further, appellate counsel has uncovered new evidence regarding former Attorney John McBride, who represented Robert Martin when Martin was arrested and robbed by Acerra, Robinson, and Mulligan. In particular, McBride testified before a federal grand jury that he represented Robert Martin. (App. D). McBride further testified that after Martin was arrested and money was stolen from him, Detective Robinson gave some of the stolen money back to McBride. Id. McBride then revealed that Robert Martin secretly met with Detective Robinson on several occasions to attempt to resolve the dispute about Martin's stolen money and the drug charges. Id. Finally, McBride received a cash payment of $15,000.00 from Robert Martin the day after Det.

Mulligan was murdered. Id. This payment from Martin to McBride was not connected to the pending drug case and cannot be connected to any other pending matters against Martin.[8]

That new evidence bears repeating. Here, the new evidence reveals that Mulligan robbed Martin. Then Martin and his lawyer met with Detective Robinson several times before Mulligan's murder. Then, the day after Mulligan was found murdered, new evidence reveals that Robert Martin paid his lawyer $15,000.00. That new evidence suggests that Martin may have been involved in Mulligan's murder, supports Ellis' innocence, and makes it impossible to say that justice was done.

Martin's Assertion That Mulligan Was Killed by A Police Officer

Additionally, Martin himself later asserted that a police officer killed Mulligan, although in Martin's version of the facts Martin is not involved and the motive for Mulligan's murder was his alleged abuse of one of Acerra's female informants. This additional evidence can be found in a letter dated October 4, 1994, written by Robert Martin. (App. R).

This letter reveals that Martin theorized that a Detective had committed the homicide of Mulligan, and Martin attributed the motive for this murder to Mulligan's act of victimizing an informant that Robinson and Acerra regularly used. At the time that the letter was apparently written, Martin had hired his own attorney, and had provided to his attorney a description of what he believed occurred during the homicide of Mulligan. (App. R). The contents of Martin's letter may have seemed unbelievable at the time, especially where the Boston Police Department

[8] Additional new evidence regarding Attorney McBride reveals that he was disbarred in 2007 after several ethical violations including misappropriation of funds. (App. W). Further, even more new evidence shows that McBride was arrested on October 11, 2011, and charged with misrepresentation, larceny, and forgery in the Edgartown District Court. (App. W). Finally, on information and belief, Attorney McBride represented Detective Walter Robinson when Robinson was charged with various crimes.

withheld evidence that one officer accused another Boston Police Officer of murdering Mulligan, but now Martin's letter corroborates the newly discovered evidence.

In this letter, Martin stated that two people named "Laura" and "Mike" were informants for Walter Robinson. Mulligan had worked with these informants because he was Robinson's partner. Martin stated that Mulligan went to the informant Laura's house to shake her down for more information. Martin learned that Mulligan allegedly raped Laura. Laura called a Lt. "McCarthy", whom she knew and trusted, and told him she was raped by Mulligan. "McCarthy" then went to Mulligan at Walgreens on the night of the homicide, and sat in an Explorer besides Mulligan's vehicle. He confronted Mulligan about his raping Laura, and Mulligan allegedly confessed and laughed, saying she would not tell on him because she is an informant. "McCarthy" then put a firearm to Mulligan's forehead, and held it close to Mulligan's face so that blood does not splatter. "McCarthy" fired the weapon five times into Mulligan's face in the shape of a cross, with one bullet in each eye. (App. R).

Interestingly, years later Martin saw a Boston Globe article relating to Acerra's misconduct, and informed the Boston Police Department that Acerra used the name "McCarthy" when ripping people off. In an April 18, 1996 interview with Sergeant Detective John Donovan, Robert Martin discussed the night where the Boston Police, including Detectives Acerra and Robinson robbed him of drugs and money. (App. S). Martin stated that Acerra used the name "McCarthy" during the incident. However, based upon viewing Acerra's photo in the Boston Globe, he learned of Acerra's true name. Moreover, the federal grand jury investigation while he was under investigation that a real Lt. McCarthy was not present during the searches of Robert Martin's properties. (App. S, T).

At the time of the Ellis trial, Martin gave this information to his own attorney, but not to Ellis's counsel. Robinson and Acerra also did not voluntarily disclose this information, and thus

the defense was deprived of this ground of defense. Clearly, Detectives Acerra and Robinson had a motive to steer the investigation away from Robert Martin, because Martin could have implicated numerous Boston Police officers in their public corruption scheme.

Even if they had disclosed the Martin evidence at the time of the Ellis trial, without knowledge that at least one other Boston Police Officer believed Mulligan was murdered by a fellow officer, and without knowledge of the vast corruption of Detectives Acerra, Robinson, Mulligan and Brazil, the Martin story likely lacked the ring of truth. It is not until it was uncovered that Mulligan was actually involved in acts victimizing the public, alongside Robison, Brazil and Acerra, that Martin's allegation becomes plausible. All of this new exculpatory evidence creates a reasonable doubt as to whether Ellis is innocent. As such, a new trial is warranted.

The Letter to Senator Wilkerson

Robert Martin's assertion - that Mulligan was killed by another officer in part because of Mulligan's alleged assault on Acerra and Robinson's female informant – is corroborated by a letter previously received by former Congresswoman Diane Wilkerson. (App. X).

Following the arrest of Sean Ellis, an unnamed source informed Massachusetts Congresswoman Diane Wilkerson that he believed Mulligan was killed because Mulligan was "messing with young black girls." (App. X). Notes of this conversation between Senator Wilkerson and this source were sent from Senator Wilkerson to Ellis's attorney on January 12, 1994. However, without the withheld evidence regarding Mulligan, the importance of that information was not cognizable. The necessary link to understand and use this information was not discovered until 18 years after trial, when documents from the federal government linked Mulligan to the conspiracy with Acerra, Robinson, and Brazil, and when the alleged crimes of Mulligan were clearly delineated in the withheld documents.

The females that Mulligan was allegedly victimizing had a clear motive to kill Mulligan or to have him killed. Moreover, Acerra, Robinson, and Brazil had a motive to kill Mulligan for allegedly raping their informant and for bringing too much attention to the group while they carried on their criminal conspiracy. Acerra, Robinson, and Brazil also had a motive to ensure that the "investigation" for Mulligan's killer did not lead back to Mulligan's crimes or to Martin. The newly discovered evidence hidden by the Boston Police department presents several alternate theories for the crime and creates a strong reasonable doubt.

The Withholding of The Martin Evidence Deprived Ellis of A Defense

The evidence relating to Robert Martin, which was known to the police detectives working on the Mulligan death investigation, was exculpatory evidence that should have been disclosed and that corroborates the other withheld exculpatory evidence.

Acerra, Robinson, and Brazil were members of the prosecution team for discovery purposes in the Ellis case, and any evidence they withheld is imputed to the Commonwealth. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995). Here, it is clear that Acerra, Robinson, and Brazil withheld exculpatory evidence from Ellis. It also appears that the Boston Police Department knew of Mulligan's criminality as well and also failed to disclose it to the defense.

If this exculpatory Martin evidence and the third-party culprit angle was fully disclosed to Ellis prior to trial, so too would have been the criminal enterprise of Detectives Brazil, Acerra, Robinson and Mulligan. Despite the fact that Ellis had a due process right to exculpatory evidence and third-party culprit evidence, that evidence was never disclosed by the Boston Police Department. Smith v. Cain, 132 S.Ct. 627 (2012); Commonwealth v. Silva-Santiago, 453 Mass. 782 (2009) (discussing the admissibility of third-party culprit evidence). It is apparent that more of this third-party culprit evidence is contained within the Boston Police Department's Anti-

Corruption Unit's files and should have already been turned over to the defense. Kyles v. Whitley, 514 U.S. 419 (1993).

Any additional internal affairs files regarding allegations against Mulligan should be immediately disclosed to Ellis now, including information regarding any young girls or prostitutes that Mulligan was "messing with". Smith v. Cain, 132 S.Ct. 627 (2012).

Just like with the new evidence of a police officer being involved in Mulligan's death, here it cannot be said with any confidence that the results of any of the three trials would have been the same if the Robert Martin evidence had been presented to the jury.

Ellis had a due process right to have the jury hear all of this exculpatory evidence before deciding a verdict. Instead, the Boston Police Department and Acerra, Robinson, and Brazil withheld this evidence and deprived Ellis of access to third party culprits and violated his rights to due process and a fair trial pursuant to the 5th, 6th, and 14th Amendments and Article XII. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

All of the newly discovered evidence hidden by the Boston Police department reveals several alternate theories for the crime and creates a strong reasonable doubt. It is not Ellis' burden to prove who actually killed Mulligan. Instead, it was the Commonwealth's duty to disclose exculpatory evidence prior to Ellis' trials.

If the jury had heard that Mulligan robbed Martin, and that Martin then met with Robinson, and that Martin's lawyer communicated with Robinson, and that Martin paid his lawyer $15,000.00 the day after Mulligan was killed, and that Martin believed a police officer killed Mulligan, and that the Boston Police withheld a report stating that a police officer also believed that Mulligan was killed by a fellow officer, and that the allegation that another officer killed Mulligan was corroborated by multiple independent sources, a reasonable juror would have had

serious doubts as to whether Ellis was innocent. As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

c. Additional Exculpatory Evidence Withheld By the Boston Police Department Confirms That Mulligan Was Actually A Criminal Working With Other Officers Who Purportedly "Investigated" His Murder

The Boston Police Department also withheld additional exculpatory evidence that suggests that Mulligan was blackmailing high-ranking members of the Boston Police Department, and that Mulligan was engaged in various other criminal activities. (App. K)("[t]he only reason Mulligan keeps his job is because he knows a lot of dirt on the department brass. He, in effect, blackmails the department brass with if I fall, you fall.").

The withheld evidence also corroborates Mulligan's involvement in the criminal conspiracy with Acerra, Robinson, and Brazil. (App. I)("... 4 police detectives who are among the worst in the Boston Police Department....[redacted]...District 4 detective John Mulligan...[redacted]...Source indicated that a group of detectives have formed a private security form, name unknown, that they are forcing upon various businesses in the city. Source stated that in fact this private security firm offers no services whatsoever, but that the businesses see this form as a subtle form of corruption.").

This withheld evidence explains why Mulligan may have been killed by another police officer, or by someone linked to one of the young girls or prostitutes Mulligan allegedly assaulted, or by Robert Martin (one of the drug dealers who was robbed by Mulligan, Acerra, Robinson, and Brazil). The withheld evidence reveals several alternate theories for the crime and creates a strong reasonable doubt. It is not Ellis' burden to prove who actually killed Mulligan. Instead, it was the Commonwealth's duty to disclose exculpatory evidence prior to Ellis' trials.

As referenced above, withheld evidence finally links the victim in this case, Boston Police Detective John Mulligan, to the group of dirty police officers that were robbing citizens, dealing

drugs and committing various other crimes. Additional withheld evidence corroborates Mulligan's involvement in this criminal conspiracy with the same detectives who were later assigned to investigate his murder.

In Ellis' first Motion for New Trial and direct appeal, Ellis had only uncovered exculpatory evidence regarding detectives Robinson, Acerra, and Brazil. See, e.g., Commonwealth v. Ellis, 432 Mass. 746, 764 (2000). This evidence detailed that Acerra and Robinson were indicted in federal court for filing false search warrant affidavit and stealing money from houses pursuant to the falsified warrants. Id. The prior motion judge and the SJC both implicitly held that this corruption evidence went only to the credibility of those officers and only to the motion to suppress the identification. See id. None of the crimes committed by Acerra, Robinson, or Brazil were successfully linked to Mulligan and thus that new evidence was never effectively linked to the Ellis case. Until now.

Ellis has now uncovered that the Boston Police Department withheld exculpatory evidence that establishes that Mulligan was involved in several different crimes. This withheld evidence links him into the Acerra, Robinson, and Brazil conspiracy, which therefore gives those detectives a strong motive to hide evidence in the Ellis case and to implicate an innocent 19-year-old black teenager in Mulligan's murder.

Additionally, this withheld evidence reveals several other third party culprits who could have killed Mulligan, including a criminal that Mulligan ripped off just two weeks before he was killed.

The Withheld Evidence Reveals Mulligan Was A Criminal

In addition to the withheld reports regarding the Boston Police Department being aware that another officer was accused of murdering Mulligan, Ellis has also uncovered additional withheld evidence known by the Boston Police Department. This exculpatory evidence includes

evidence regarding Mulligan's own criminality, which reveals viable third party suspects and a motive for Mulligan's murder.

Ellis has uncovered a redacted FBI report dated November 12, 1993 stating that "Former Boston Police Officer, John Mulligan, aka 'Mulligan Stew', 'Mad Dog Mulligan', 'Plain View Mulligan', regularly, according to [redacted] 'associated'/ 'liked' young black girls and 'shook down' prostitutes. Mulligan regularly, according to [redacted] 'shook down' pimps, prostitutes, and drug dealers for money. Mulligan extorted from other police officers, and Mulligan used every means available to blackmail people. Mulligan was as 'dirty as they come'. Mulligan dealt drugs extensively. Mulligan was known as 'Plain View Mulligan' because all of his cases were cases where the evidence was found in plain view. Source has heard often that Mulligan committed murder as a cop." (App. E). The content of this report makes it clear that the Boston Police Department knew or should have known about Mulligan's criminality.

Ellis also uncovered a second report dated September 2, 1983 referencing that Detective Mulligan assisted people in illegally disposing of tickets and that Mulligan is the on the "payroll" of a redacted enterprise. (App. F).

Ellis also uncovered a third report dated October 19, 1983, stating that a redacted criminal "has a bagman by the name of Detective John Mulligan." (App. G). That same report further stated, "Source advised Mulligan has always been identified in the department as a rogue police officer. Source advised that one famous incident regarding Mulligan related to the fact that he had been bounced off the vice squad for misconduct...for Mulligan to have been bounced off the vice squad while the others remain is one indication of how corrupt Mulligan is." (App. G). The content of this report makes it clear that the Boston Police Department knew of Mulligan's criminality, which apparently got him "bounced off the vice squad for misconduct." Id.

A fourth report dated May 5, 1986, states in redacted form that Mulligan is the subject of an extortion investigation. (App. H). The content of this report makes it clear that the Boston Police Department knew about Mulligan's criminality.

A fifth undated redacted report states, "Source identified 4 police detectives who are among the worst in the Boston Police Department....[redacted]...District 4 detective John Mulligan...[redacted]...Source indicated that a group of detectives have formed a private security form, name unknown, that they are forcing upon various businesses in the city. Source stated that in fact this private security firm offers no services whatsoever, but that the businesses see this form as a subtle form of corruption." (App. I). This report corroborates the other evidence linking Mulligan to the conspiracy of Acerra, Robinson, and Brazil.

A sixth undated redacted report states that a redacted criminal "had several of his key detectives, including detective John Mulligan, collecting cash contributions from their regular shakedown victims, including bar owners and bookmakers, in order for [redacted] to collect money for [redacted] candidacy." (App. J).

A seventh undated redacted report stating, "Source advised that he knows a Boston police officer named John Mulligan. Mulligan has a reputation, according to one source, of hustling hookers and for being a shakedown man...Source feels the only reason Mulligan keeps his job is because he knows a lot of dirt on the department brass. He, in effect, blackmails the department brass with if I fall, you fall." (App. K). The content of this report suggests that the reason the Boston Police Department withheld the exculpatory evidence regarding Mulligan and other suspects was because Mulligan was blackmailing top members of the Boston Police Department.

An eighth report dated December 6, 1983, implies that a top Boston Police Department official had an incident with a hooker, and states, "Source learned that Boston police detective John Mulligan approached this female and gave her an undisclosed amount of cash in order to

have her drop the charges." (App. L). This report corroborates the prior report and confirms the reason why the Boston Police Department wanted to withhold the exculpatory evidence regarding Mulligan.

A ninth report dated December 19, 1983 states, "Mulligan frequents the area of Westland Ave. and Hemmingway and is said to know all the hookers there. Mulligan allegedly does favors for these hookers and they reciprocate. Mulligan is also known to have been a bagman for [redacted] and is currently a bagman for [redacted]." (App. M).

A tenth report dated February 26, 1985 states, "Boston Police Detectives [redacted] and John Mulligan of the Boston Police Department Burglary Squad shakedown the owner of Hudson Loan/ Jewelry Co. on Kneeland Street in Boston." (App. N).

Despite that all of this new exculpatory evidence - regarding Mulligan's criminality and his involvement in the conspiracy with Acerra, Robinson, and Brazil - was known to the Boston Police Department and directly related to Mulligan and the police officers investigating the Ellis case as agents of the Commonwealth, none of this evidence was ever disclosed before any of Ellis' three trials, or before the first Motion for New Trial, or before the direct appeal.

All of this evidence regarding Mulligan's criminality is exculpatory evidence that was possessed by the Boston Police Department and yet was withheld from the defense prior to trial and for 19 years while Ellis sat in prison. Kyles v. Whitley, 514 U.S. 419 (1993); Smith v. Cain, 132 S.Ct. 627 (2012).

The prejudice to Ellis from the withholding of this evidence is increased because if the evidence had been disclosed, it would have led to additional suspects, motives, and substantial grounds of defense that could have been investigated and presented at trial. Instead, the Boston Police Department withheld this exculpatory evidence, and the jury did not get to hear the whole truth.

Based on this withheld evidence, it cannot be said with any confidence that the trial verdict would be the same if the evidence had been disclosed, investigated, and fruits presented to the jury. As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

The Withheld Evidence Finally Links The Acerra, Robinson, and Brazil Crimes to the Ellis Case And Reveals A Motive For Them To Sabotage And Falsify The Ellis Investigation To Ensure That It Did Not Lead Back to Their Own Crimes Or the Crimes of Mulligan

In opposing Ellis' first Motion for New Trial and direct appeal, the Commonwealth noted that Ellis had presented no evidence linking the crimes of Acerra, Robinson, and Brazil to the Ellis/Patterson case and no evidence suggesting that Acerra, Robinson, or Brazil had any motivation to ensure that Ellis was convicted. See Commonwealth v. Ellis; Commonwealth's Principal Brief at 65 (June 2000). The Commonwealth further argued that the crimes of Acerra, Robinson, and Brazil were "completely unrelated" to the Ellis case. See Commonwealth v. Patterson; Commonwealth's Brief at 60 (arguing that the subsequent prosecution of the police detectives was "for criminal conduct arising out of an unlawful money-making scheme completely unrelated to this case...").

However, the withheld exculpatory evidence finally links the crimes of Acerra, Robinson, and Brazil to Officer Mulligan and to the Ellis case. (App. C., D, E).

Specifically, appellate counsel for Ellis has discovered that in the October 3, 1996 transcript of the testimony of Robert Martin in federal court for the case against Acerra and Robinson, Martin stated ""[Robinson and Acerra] used the keys to get into the back entrance at 208, and they left me and Mike in the car guarded by **John Mulligan**." (App. C)(emphasis added). Martin was describing being robbed by these officers when he disclosed that Mulligan was involved. Id.

Additionally, all of the withheld evidence discussed above relating to Mulligan's own criminality fits into the conspiracy of Acerra, Robinson, and Brazil. (App. C-N)("Source identified 4 police detectives who are among the worst in the Boston Police Department ....[redacted]...District 4 detective John Mulligan...[redacted]...Source indicated that a group of detectives have formed a private security form, name unknown, that they are forcing upon various businesses in the city. Source stated that in fact this private security firm offers no services whatsoever, but that the businesses see this form as a subtle form of corruption.").

In light of this new evidence, the crimes of Acerra, Robinson, and Brazil are no longer unrelated to the Ellis case because Mulligan was committing crimes with those detectives and that criminality appears to have led to Mulligan's death.

Since Mulligan was committing crimes with Acerra, Robinson, and Brazil, the new evidence further reveals a motive for the detectives to sabotage or falsify the Ellis investigation in order to make sure that no parties ever uncovered the evidence of Mulligan's crimes, which would have led back to Acerra, Robinson, and Brazil. This in turn resulted in the suppression of other suspects who may have killed Mulligan.

While the existing motive for Acerra, Robinson, and Brazil - to steer the investigation away from Mulligan's own crimes and suspects angry with Mulligan – is enough on its own to create reasonable doubt, here it appears that Acerra actively compromised evidence to accomplish that motive. Specifically, an inventory of Mulligan's truck was taken the day after the murder, and Mulligan's cell phone was not in the truck and was not listed on the inventory sheet. (App. V).

Notably, Acerra was one of the officers to respond to the scene of the murder. (App. V). Despite Mulligan's phone not being found by the inventory officers, Mulligan's phone reappeared

more than a week later inside the car that had had already been searched, and it appears that the call history was deleted. (App. V).

It is unknown whether any of the other suspects – including Acerra (aka "McCarthy"), Robinson, Brazil, Robert Martin, or the female seen in Mulligan's car the night of his death – had called Mulligan's phone before his murder.

Because Acerra, Robinson, and Brazil were involved in the investigation that led to the conviction of Ellis, the evidence linking Mulligan to the crimes of Acerra, Robinson, and Brazil implicates the credibility of the entire police investigation of Mulligan's murder. Since those detectives were involved in a criminal conspiracy with Mulligan, and since the detectives therefore had an obvious motive to ensure that the Mulligan death investigation did not expose their own crimes, it cannot be said with any confidence that their investigation was trustworthy. At a minimum, there is a reasonable doubt as to whether the investigation was sabotaged or diverted towards Ellis and Patterson to ensure that the police crimes remained hidden.

If a jury had heard all this new evidence, the verdict likely would have been different. For these reasons, a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

The New Evidence Gives Rise to New Motives And Opportunities

As discussed above, all of this withheld evidence regarding Mulligan's own crimes, Mulligan finally being linked to the criminal conspiracy of Acerra, Robinson, and Brazil, and the robbery of Robert Martin gives rise to new motives for Mulligan's murder.

Acerra, Robinson, Brazil, and any other officers involved in the conspiracy had a motive to limit or divert Mulligan's murder investigation so that the investigation did not lead back to any suspects who might reveal Mulligan's own criminality or his involvement in the detective's criminal conspiracy. If the jury had heard that the detectives involved in the Mulligan murder

investigation had a motive to sabotage the investigation, the jury may have had a reasonable doubt as to whether Ellis was innocent.

These same detectives also had a motive to kill Mulligan or have him killed for his volatile behavior and his involvement in their own crimes. They also had a motive to kill Mulligan because he was failing to keep a low profile while the group was ripping off drug dealers, including Robert Martin. The fellow officers also had a motive to kill Mulligan because Mulligan's alleged actions with prostitutes and young black girls, including an alleged rape of Acerra's informant, were drawing too much attention. If the jury had heard that the detectives involved in the Mulligan murder investigation had a motive to kill Mulligan, and had heard that some police officers believed that Mulligan was killed by a fellow police officer, the jury may have had a reasonable doubt as to whether Ellis was innocent.

These motives, especially when combined with the new evidence that the Boston Police Department withheld suggesting that a fellow police officer was the real killer of Det. Mulligan, makes it impossible to say that the verdict would be the same if this evidence had been presented. As such, a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

d. A New Trial Is Required Because Withheld Evidence Reveals That Witness Evoney Chung Received $3,580.00 After She Testified Against Sean Ellis

The Commonwealth also withheld that civilian witness Evoney Chung, whose testimony did not identify Ellis but helped to corroborate the Commonwealth's claimed timeline at the Walgreen's, received more than $3580.00 in money returned to her from her own drug trafficking case after she testified against Ellis at his third trial. Specifically, Ellis has attached the docket sheet for Evoney Chung's drug case. (App. Y). This docket contains a new notation revealing that all monies seized during Chung's arrest, including the $3580.00, was returned to Chung after the Ellis trial. Id.

That money was originally seized by police during Chung's drug arrest. [9]

The fact that Chung was apparently paid more than three thousand dollars to testify against Ellis and help convict him was exculpatory evidence that should have been disclosed to the defense. Brady v. Maryland, 373 U.S. 83 (1963). The withholding of this exculpatory evidence deprived Ellis of his rights to due process and a fair trial pursuant to the 5th, 6th, and 14th Amendments and Article XII. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

This evidence is also newly discovered evidence because the new docket notation appears to have not previously existed.[10] Grace, 397 Mass. at 305.

Ellis was greatly prejudiced by the non-disclosure of this apparent reward for Chung's testimony, because the Commonwealth used Chung's testimony to buttress the timeline claims from the inconsistent identification made by Acerra's relative Rosa Sanchez, the only witness to ever identify Ellis. If the jury had heard that Chung was apparently getting help on a drug trafficking case and getting $3500 dollars back in exchange for testimony favorable to the prosecution, the jury likely would have had a reasonable doubt as to the veracity or accuracy of Chung's claims.

Ultimately, it cannot be said with any confidence that the results of any of the three trials would have been the same if this new Evoney Chung evidence had been presented to the jury. Chung was an important witness used by the Commonwealth, and her already inconsistent

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[9] Chung has previously claimed that she had received the $3580 from a civil settlement. However, when police arrested Chung, the police report indicates that police seized the money after they found it rolled up and hidden inside Chung's underpants. (App. Y). Ellis asserts that most individuals who lawfully obtain money from a civil lawsuit settlement do not roll up the money and hide it in their underpants.

[10] Prior to the first Motion for New Trial, the Commonwealth had not disclosed the $3580 returned to Chung, and the defense was under the impression that Chung received only $200.

testimony would likely have been discredited if this large financial deal had been revealed. As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

ii. All of This Evidence Is Withheld Exculpatory Evidence Warranting A New Trial, And The Commonwealth's Failure to Disclose It Violated Ellis' Rights Pursuant to the 5th, 6th, and 14th Amendments and Article XII

As referenced above, the prosecution was responsible for ensuring that the Boston Police Department turned over all exculpatory information within its possession, including but not limited to exculpatory information regarding the criminality and credibility of the victim and the police officers who investigated the case. Smith v. Cain, 132 S.Ct. 627 (2012); Brady v. Maryland, 373 U.S. 83 (1963).

Here, the Commonwealth has a continuing duty to disclose exculpatory evidence regarding third party culprits, Mulligan, and all of the police detectives involved in any aspect of the Mulligan death investigation, including Acerra, Robinson, and Brazil. Kyles, 514 U.S. at 438. See also United States v. Aviles-Colon, 536 F.3d 1 (1st Cir. 2008)(reversing the denial of a motion for new trial where the prosecution withheld exculpatory DEA reports).

Detectives Acerra, Robinson, and Brazil were members of the prosecution team for discovery purposes in the Ellis case, as was the Boston Police Department as a whole, and any evidence they withheld is imputed to the Commonwealth. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Ellis had a 5th, 6th, and 14th Amendment and Article XII due process right to have the jury hear all of this exculpatory evidence before it rendered a verdict. Smith v. Cain, 132 S.Ct. 627 (2012).

Instead of disclosing the evidence, the Boston Police Department withheld the evidence, and the exculpatory nature of the evidence makes it impossible to say that justice was done.

The Commonwealth and its police agents failed to disclose that Boston Police Officers believed Mulligan was killed by another police officer. The Boston Police Department actually possessed the name of the police officer accused of killing Det. Mulligan, and yet that information was withheld from the jury, withheld from the public, and withheld from Ellis for over 19 years.

The Commonwealth also failed to disclose that Mulligan was committing crimes while he was a police officer. The Commonwealth also failed to disclose Mulligan's involvement in the criminal conspiracy of Detectives Acerra, Robinson, and Brazil. The Commonwealth also failed to disclose the existence of several other suspects who had a motive to kill Mulligan because of the crimes Mulligan committed.

Even if Mulligan, Acerra, Robinson, and Brazil hid their misconduct from the prosecution, Mulligan was the victim and the other police officers were investigating this case and thus were members of the prosecution team for discovery purposes. Kyles, 514 U.S. at 438. Their knowledge is imputed to the prosecution and the exculpatory evidence should have been turned over to the defense. Id.

Moreover, the Commonwealth continued to withhold evidence even during the pendency of Ellis' first motion for new trial and direct appeal, when the prosecution was put on notice of the crimes of Acerra, Robinson, and Brazil, and of Ellis' attempt to link those crimes to his case.

Finally, trial counsel for Ellis filed a specific discovery motion for exculpatory evidence such that the Commonwealth could have and should have discovered and disclosed all of the new evidence discussed above. Brady v. Maryland, 373 U.S. 83 (1963).

Specifically, on September 14, 1994, Ellis filed a Motion for Further Discovery. (App. Q). In that motion, Ellis specifically requested discovery regarding "the duration and nature of any personal relationship between Mulligan and either Robinson or Acerra; the duration and nature of any business or other financial relationship between Mulligan and either Robinson or Acerra, and

in particular the nature of the joint purchase of four cellular telephones made by Mulligan and Acerra together; under what circumstances Acerra came to live in the same apartment complex as Mulligan and for how long they lived in proximity." (App. Q). That same motion also requested any discovery regarding Acerra or Robinson having been untruthful in the past. (App. Q).

Therefore, in addition to the discovery requirements imposed by the due process clause and the discovery rules, as of September 14, 1994 the prosecution was on specific notice that Ellis was seeking exculpatory evidence regarding Mulligan, Robinson, and Acerra. Id.

Despite the constitutional duties and the specific discovery request from Ellis, the Commonwealth failed to turn over this exculpatory evidence regarding Mulligan, Acerra, and Robinson before Ellis' trial, before his motion for new trial, and before his direct appeal. See App. DD (Affidavit of trial counsel: "Despite that I made a specific discovery request that called for the evidence that I have now seen for the first time, and despite that this new exculpatory evidence related to the victim and the police officers investigating the Ellis case as agents of the Commonwealth, none of this evidence was ever disclosed by the Commonwealth before any of Ellis' three trials.").

The timely disclosure of this evidence would have led to the discovery of Acerra, Robinson and Brazil's conspiracy and would have completely altered the theory of defense in that Acerra, Robinson and Brazil were involved in almost every aspect of the investigation of the murder of Detective Mulligan, including the identification of Ellis, the recovery of the murder weapon, and the interview of key witnesses placing the murder weapon in Ellis' possession. If the evidence had not been withheld, defense counsel could have conducted additional investigation and presented evidence to raise a reasonable doubt as to Ellis' innocence. See App. DD ("All of this withheld evidence was, in my view, exculpatory and material to the defense. If I had been provided this exculpatory evidence prior to trial, I would have filed additional discovery motions,

investigated additional suspects, investigated Mulligan, and used the exculpatory evidence to raise a reasonable doubt at trial. Mulligan's involvement in illegal activities meant that many people had motives to harm him.").

Even when the Commonwealth is initially unaware of the existence of a joint investigation or any exculpatory evidence, the prosecutor has a continuing duty to inquire and to disclose. Kyles, 514 U.S. at 438; Commonwealth v. Martin, 427 Mass. 816, 823 (1998)(S.J.C. reversed conviction because the prosecutor failed to turn over evidence from crime lab that prosecutor did not even know existed); Commonwealth v. Monteiro, 396 Mass. 123 (1985)(prosecutor responsible for police withholding discovery).

In this case, because Ellis made a specific discovery request and the Commonwealth's agents still withheld exculpatory evidence from the defense, a new trial is required if the withheld evidence might have affected the outcome or if it prejudiced Ellis. Smith v. Cain,132 S.Ct. 627 (2012); Commonwealth v. Tucceri, 412 Mass. 401, 412 (1992).

Here, this withheld evidence, including evidence about other police officers being suspected of Mulligan's murder, certainly might have affected the jury verdict. The withheld evidence in this case was highly exculpatory in that it revealed third party culprits, impacted the credibility of police witnesses, contained a new motive for Mulligan's murder, and deprived Ellis of a substantial ground of defense. The Commonwealth's failure to disclose this evidence greatly prejudiced Ellis, and violated Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII. Smith v. Cain, 132 S.Ct. 627 (2012); Brady v. Maryland, 373 U.S. 83 (1963). As such, a new trial is required.

iii. The New Evidence Is Also Newly Discovered Evidence That Warrants A New Trial

The above-referenced information constitutes newly discovered evidence because it was not known to Ellis at the time of his trial or his prior appeal. See Commonwealth v. Grace, 397 Mass. 303, 306 (1986). See also App. DD (Affidavit of trial counsel: "Despite that I made a specific discovery request that called for the evidence that I have now seen for the first time…none of this evidence was ever disclosed by the Commonwealth before any of Ellis' three trials.").

Additionally, the new evidence is material, credible, admissible, and raises a reasonable doubt as to whether Ellis is innocent. Grace, 397 Mass. at 305. See also App. DD (Trial Counsel: "All of this evidence was, in my view, exculpatory and material to the defense.").

A defendant is entitled to present evidence that another person committed the crime. Commonwealth v. Rosa, 422 Mass. 18, 22 (1996). A defendant may raise a reasonable doubt about his guilt by presenting evidence that the crime may have been committed by a third person. Commonwealth v. Silva-Santiago, 453 Mass. 782 (2009). Further, pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as Article XII of the Massachusetts Declaration of Rights, all defendants are afforded due process and given a full opportunity to prepare and present a complete defense. Holmes v. South Carolina, 547 U.S. 319 (2006).

Here, it cannot be said with any confidence that the results of any of the three trials would have been the same if the jury had heard the newly discovered evidence regarding Mulligan's criminality, the evidence of other viable suspects, the report that one police officer believed Mulligan was killed by another officer, and the evidence linking Mulligan to the crimes of Acerra,

Robinson, and Brazil. As such, a new trial is warranted. See Smith v. Cain, 132 S.Ct. 627 (2012); Grace, 397 Mass. at 305.

iv. The New Evidence As It Relates to Previously Claimed And Accepted Facts

All of this new evidence detailed above is relevant and exculpatory on its own and warrants a new trial. However, the importance of the new evidence is highlighted when it is compared to the previously claimed facts of the case. As such, even if this Court did not find that a new trial is warranted after considering the withheld evidence on its own, a review of the old evidence corroborates the new evidence and creates reasonable doubt.

a. The Evidence Regarding a Girl Seen In Mulligan's Car Right Before The Murder

In light of the withheld evidence about Mulligan committing crimes and ripping off hookers and young girls, the previously claimed evidence must be reexamined.

There was evidence that Mulligan was seen arguing with a girl in his car shortly before his murder. (App. AA). Specifically, a woman named Joanne Samuel told police that on the night of Mulligan's murder, she went to the Walgreen's and parked near Mulligan's car. (App. AA). Ms. Samuels saw a white girl with blondish and brownish hair inside Mulligan's car with him. (App. AA). At first the two appeared to be talking and then the woman's head was moving. (App. AA).

However, after Acerra got involved in the investigation and Ellis was arrested, the girl in Mulligan's car was largely forgotten. (See, e.g. trial transcripts).

Based on what we now know from the new evidence, the girl in the car is very relevant. As discussed above, the new evidence reveals that Mulligan was accused of harassing and assaulting prostitutes, and there was an allegation that he may have raped a young girl and messed with Acerra and Robinson's young female informant. (See attached). With that new evidence in

mind, it cannot be said with any confidence that the girl in Mulligan's car right before his death was not somehow involved in his death.

If the jury had heard all of the new evidence regarding Mulligan's criminality, the alleged assaults on women, the evidence that Mulligan messed with Acerra's young female informant, the report that one police officer believed Mulligan was killed by another officer, the evidence linking Mulligan to the crimes of Acerra, Robinson, and Brazil, and the evidence that Mulligan was seen fighting with a woman in his car right before his death, the jury likely would have had serious doubts as to whether Ellis was innocent. As such, a new trial is warranted. See Smith v. Cain, 132 S.Ct. 627 (2012); Grace, 397 Mass. at 305.

b. The Withheld Evidence Raises A Reasonable Doubt As To Whether Detective Acerra Tampered With the Crime Scene

When the withheld exculpatory evidence is analyzed in connection with what was learned about Detective Acerra during the first Motion for New Trial and with the evidence from the trial discovery, the result is a reasonable doubt as to whether Acerra tampered with the crime scene.

Specifically, there was evidence that Acerra was one of the officers who initially responded to the scene of the murder. (App V). There was also evidence that crime scene technicians came after the responding officers and did a complete search and inventory of all of the items in Mulligan's car. (App. V). Notably, this complete inventory of the car did not find Mulligan's cell phone. Id.

When police found that Mulligan's cell phone was missing, Detective Walter Robinson and Detective Macdonald were then assigned to investigate whether Mulligan's phone had been stolen. (App. V).

However, one week later on October 1, 1993 Detective Acerra returned to the location of Mulligan's car himself and coincidentally instructed Det. Ross to look inside the center console of

Mulligan's car. (App. V). Inside the center console, in an area already inventoried without a phone being located, was Mulligan's cell phone. (App. V).

That evidence is suspicious, but it takes on a whole new importance when combined with the new exculpatory evidence regarding Acerra. As discussed above, the withheld exculpatory evidence reveals that Acerra was committing crimes with Mulligan. (App. C, D).

Thus, Acerra had a strong motive to tamper with Mulligan's cell phone, including by removing any information as to who spoke to Mulligan on the phone right before his death. Acerra would not have wanted any of Mulligan's criminality brought to light as it would eventually come back to Acerra.

Further, if Acerra tampered with Mulligan's cell phone, that raises a reasonable doubt as to whether he tampered with other aspects of the investigation, including with the forensic evidence, the locations of shell casings, the guns, the alleged identification testimony of Rosa Sanchez, or the statement of Tia Walker.

This new evidence further calls into doubt the previously claimed facts and makes it impossible to say that justice was done. If the jury heard this new evidence, the claimed facts would have been questioned and the verdict would likely have been different. As such, a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

c. The Pearl-Handled Gun Issue

Police detectives claimed that they had located a pearl-handled gun that was involved in Mulligan's murder. The trial testimony asserted that the police found the gun on October 7, 1993. (V-218).

However, a closer look at the evidence reveals that police were already asking witnesses if they knew anything about a pearl-handled gun on October 2, 1993 – 5 days before the police found a pearl-handled gun and before other witnesses testified before the grand jury. (App.

BB)(October 2, 1993 Police Interview of Tina Erti asking her if she had ever see "a small caliber gun with pearl handles").

That timeline, along with the withheld evidence suggesting that another police officer might have killed Mulligan, begs the question that nobody thought to ask previously: How did the police already know they should be looking for a pearl-handled gun before any witnesses ever told them about a pearl-handled gun?

Since police cannot tell what type of handle a gun has merely by looking at wounds on a shooting victim, the answer to that question appears to lie in the newly uncovered documents.

First, the new documents reveal that Acerra, Robinson, Brazil, and Mulligan's criminal conspiracy also involved stealing drugs and guns from suspects. (App. C, T).

Second, the new documents reveal that Acerra, Robinson, and Brazil had multiple motives to have Mulligan killed, including because of his alleged involvement in ripping off drug dealers, as well as his alleged blackmailing of other B.P.D. officers, and his alleged habit of mistreating and possibly raping prostitutes and young black girls. (App. A-N).

Third, the withheld redacted documents reveal that multiple police officers believed that Mulligan was murdered by another named police officer. The Boston Police Department was made aware that named officers reported that another named officer was responsible for killing Mulligan. The Boston Police Department possessed the name of a fellow officer accused of killing Mulligan and yet that information was withheld from the defense for over 18 years.

Fourth, the previously overlooked evidence reveals that the officers somehow knew that they were looking for a gun with a pearl handle even before any witnesses mentioned such a gun handle.

All of this evidence combines to create a very real and probable conclusion: the police knew what type of gun to look for because Detective Mulligan was murdered by another police officer.

Even if this Court is not convinced of that conclusion, the existence of the withheld evidence supporting that conclusion makes it impossible to say that justice was done. In all likelihood, if the evidence had not been withheld and if the defense had presented it to the jury, the result of the trial would have been different. As such a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

d. The New Evidence Raises A Reasonable Doubt As to Whether Police Officers Orchestrated The Guns Being Linked to Ellis

The claims purporting to link Ellis to two guns must now be reexamined in light of the new exculpatory evidence.

As referenced above, the new documents reveal that Acerra, Robinson, Brazil, and Mulligan's criminal conspiracy also involved stealing items from suspects. (App. C, T).

As discussed above, the Boston Police Department somehow knew that they were looking for a gun with a pearl handle even before any witnesses mentioned such a gun handle and before ballistics had identified the pearl-handled gun as the weapon that killed Mulligan. (App. TT).

The guns were then coincidentally found by young people linked to Ellis. (See transcripts). Notably, each of the young men allegedly linked to those guns have been killed. Further, the sole female witness Letia Walker was vulnerable to police pressure and coercion because she had a young child, and a common police tactic was to threaten to get DSS to take a child if a witness did not say what the police wanted the witness to say. Finally, another Boston Police officer may have killed Mulligan. (App. A, B).

As such, we have corrupt officers who frequently stole drugs and contraband from suspects, and we have officers with a motive to kill Mulligan, and we have officers who knew what the gun looked like before they even found it or were told about it, and then guns coincidentally are linked to young men who can be connected to Ellis, and then those young men were all killed prior to Ellis' trial.

This new evidence calls into doubt the previously claimed facts and makes it impossible to say that justice was done. If the jury heard this new evidence, the claimed facts would have been questioned and the verdict would likely have been different. As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

e. The Letter from Senator Diane Wilkerson

As referenced earlier, prior to trial, former counsel for Ellis received a strange letter from former Senator Diane Wilkerson. (App. X).

At that time, and without all of the withheld evidence regarding Mulligan, Acerra, Robinson, and Robert Martin, the letter did not seem to make much sense. However, in light of the new evidence, that letter warrants another review.

As referenced above, an unnamed source informed Massachusetts Congresswoman Diane Wilkerson that he believed Mulligan was killed because Mulligan was "messing with young black girls." (App. X).

By asserting those facts, the Wilkerson letter unknowingly corroborates the assertions of Robert Martin and the withheld evidence regarding Mulligan. (App. C, E-N). Now there are three independent pieces of evidence that believe Mulligan was killed not by Ellis in some random and inexplicable robbery, but rather by someone else with a specific motive to kill Mulligan because he was messing with young girls. Thus, the new withheld exculpatory evidence is corroborated by the Wilkerson letter, such that it impossible to say that justice was done. If the jury heard this new

evidence, especially when combined with the withheld evidence that a police officer may have been involved in the murder, at least one juror would have had a reasonable doubt as to whether the Commonwealth and its police agents (including Acerra and Robinson) had proven their case beyond a reasonable doubt.

As such, a new trial is warranted. Smith v. Cain, 132 S.Ct. 627 (2012).

f. The Rosa Sanchez Claimed Identification of Ellis

As discussed previously, the Rosa Sanchez claimed identification was questionable from the start. Sanchez first did not identify Ellis and instead identified a different man as the person she saw near Mulligan's car. (III-257, 260).

In addition, Acerra was present and involved in the photo lineup. (IV-37).

Further, the Sanchez identification was suspicious because of her unusual relationship with Detective Acerra. Det. Ross testified to the strong family ties between Acerra and Rosa Sanchez, who was Acerra's family relative and the only witness who made a questionable identification of Ellis after twice identifying other suspects. (IV-38). The family ties between Acerra and Rosa Sanchez went back to Puerto Rico. (IV-38). Rosa Sanchez's aunt Lucie DelValle lived at the same condo complex with Acerra and Mulligan. (IV-39). Additionally, Acerra and Rosa's aunt DelValle had a child together. (IV-39). Rosa Sanchez and the child were cousins. (IV-39). Because of this relationship, Acerra often saw Rosa Sanchez at family functions. (IV-39).

Finally, Acerra was not just present on the identification day; he was actively involved in getting Rosa Sanchez to identify Sean Ellis. In fact, Acerra spoke with Rosa Sanchez in his car outside of the police station after she had identified another man, and only after that conversation with Acerra did Rosa ever identify Ellis. (III-265).

Despite the fact that the Rosa Sanchez identification was always questionable, the Court declined to suppress her identification and the jury ultimately convicted Ellis after Sanchez testified. (See docket sheet).

However, in light of the withheld exculpatory evidence uncovered by Ellis, the Rosa Sanchez claimed identification warrants a fresh evaluation. The new evidence corroborates the long-held belief that Acerra influenced Rosa Sanchez' testimony, and now we know why.

Specifically, the withheld exculpatory evidence includes information that Acerra and Mulligan were committing crimes together. (App. C). This created a strong motive for Acerra and Robinson to steer the investigation away from Mulligan's own crimes. Ellis provided the perfect scapegoat as a young black kid who went to buy diapers at Walgreen's the night Mulligan was murdered. In order to build a case against Ellis, the police needed a witness. Amazingly, Acerra's claimed identification witness was a personal family relative.

That family friend, Rosa Sanchez, claimed that she went to Walgreen's after 3 A.M. to buy soap. (See trial transcripts). Soap is not the type of toiletry that you buy in the middle of the night.

Based on the withheld evidence that Ellis has uncovered, the Rosa Sanchez' claimed identification testimony has become even more unreliable. In addition to the suspicious circumstances surrounding Acerra's involvement in the identification and Rosa's two mis-identifications, we now have new evidence about Acerra and Mulligan in a criminal conspiracy together, Acerra having a motive to divert the investigation onto Ellis, and Acerra allegedly tampering with the crime scene by removing Mulligan's cell phone from the car. All of these facts combine to create reasonable doubt as to the reliability of Rosa's claimed identification.

Thus, the withheld exculpatory evidence regarding Acerra and Mulligan is relevant to both the Motion to Suppress the identification and also to Ellis' conviction after the third trial. Both of

those proceedings would likely have ended with a different result if the Boston Police Department had not withheld the exculpatory evidence regarding their own officers.

As such, a new trial is required. Smith v. Cain, 132 S.Ct. 627 (2012).

g. The Theory that the Gun Was Fired From Inside Mulligan's Car, Likely From Someone He Knew, And Not Outside The Car As Claimed By The Commonwealth At Ellis' Trial

At the beginning of the Mulligan investigation, on information and belief, it was believed that Mulligan may have been killed by shots fired from inside his truck.

That theory changed when Ellis and Patterson were arrested, as the police theory would not have made sense if this were not a random robbery. However, in light of the withheld exculpatory evidence detailed above, it is necessary to review the ignored report that Mulligan was killed by someone sitting inside his vehicle with him.

If the shots were fired from inside the vehicle, that evidence creates a reasonable inference that Mulligan knew his killer. The Commonwealth's theory at trial and on the prior appeal was that Ellis and Patterson robbed Mulligan, not that they were sitting inside the car having a conversation with Mulligan. Thus, if the shots were fired from inside the car, it can be reasonably inferred that the shooter was not Ellis.

Instead, based on the new evidence, the person sitting in the car when shots were fired was someone close to Mulligan. The new evidence suggests third-party culprits that were close enough with Mulligan to be sitting in the car with him, including another police officer or Robert Martin. (App A, B, C).

If the Boston Police Department had not withheld the evidence that another police officer was suspected of killing Mulligan, Ellis could have presented a substantial defense based on the police officer suspect and the evidence that the shots were possibly fired from inside the car. Ellis could have challenged the alleged forensic evidence at length as well as the credibility of the entire

police investigation. Thus, by withholding the evidence of another suspect and by shifting its theory as to the crime, the Commonwealth prejudicially deprived Ellis of an available ground of defense. Brady v. Maryland, 373 U.S. 83 (1963). As such, a new trial is required.

Further, the withheld exculpatory evidence, combined with the prior report that the gunshots may have come from someone sitting inside Mulligan's car, creates a reasonable doubt as to whether Ellis is innocent. Thus, Ellis respectfully requests a new trial. Smith v. Cain, 132 S.Ct. 627 (2012).

5. Based on all this withheld exculpatory evidence, it cannot be said that justice was done

If the Boston Police Department had not withheld this evidence and it had been presented to the jury at the original trials, the result likely would have been different. Imagine if a jury was presented with evidence that the alleged victim was a dirty cop with many enemies, that the lead detective was a dirty cop who used to steal drugs and money with the alleged victim, that another Boston police officer believed that Mulligan was murdered by another Boston police officer, that detectives had coerced and threatened witnesses into telling their version of events, that a witness had recanted, and that other viable suspects existed. All of this withheld evidence presents several viable alternate theories that could have been presented to the jury at trial. See App. DD (Trial counsel: "If I had been provided this exculpatory evidence prior to trial, I would have filed additional discovery motions, investigated additional suspects, investigated Mulligan, and used the exculpatory evidence to raise a reasonable doubt at trial. Mulligan's involvement in illegal activities meant that many people had motives to harm him.").

If a jury had heard that evidence at trial, it is likely that at least one juror would have had a reasonable doubt. At a minimum, this evidence would have been a real factor in the jury

deliberations. Grace, 397 Mass. at 306. As such, it cannot be said with any confidence that justice was done in this case.

The withholding of this exculpatory evidence deprived Ellis of access to third party culprits and violated his rights to due process and a fair trial pursuant to the 5th, 6th, and 14th Amendments and Article XII. See Smith v. Cain, 132 S.Ct. 627 (2012); Kyles v. Whitley, 514 U.S. 419, 437 (1995).

Regardless of the standard of review, a motion judge should grant a new trial anytime it cannot be said with confidence that justice was done. Mass.R.Crim.P. 30. In this case, it does not matter whether the new evidence is considered withheld exculpatory evidence or newly discovered evidence or any other type of evidence. The important thing is that the evidence exists and it is exculpatory.

Here, for all the reasons discussed above, the existence of this new evidence means that the trials and conviction violated Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII. Smith v. Cain, 132 S.Ct. 627 (2012). This is a case where two different juries were hopelessly deadlocked before a third jury convicted Ellis. This is also a case where there were two other unidentified fingerprints in the drivers' side door column of Mulligan's car. (V-168).

The existence of the withheld exculpatory evidence, especially when reviewed in conjunction with the corroborating old evidence, creates a reasonable doubt as to whether Ellis is innocent. It cannot be said with any confidence that Ellis would still have been convicted if the jury heard all of this new exculpatory evidence. As such, Ellis respectfully requests that this Court order a new trial.

C. A NEW TRIAL IS REQUIRED BECAUSE ELLIS' CONVICTION WAS BASED ON UNRELIABLE AND INADMISSIBLE FINGERPRINT TESTIMONY IN VIOLATION OF HIS RIGHTS PURSUANT TO THE 5TH, 6TH, AND 14TH AMENDMENTS AND ARTICLE XII, AND THIS ERROR HAS ALREADY BEEN DECIDED BY THE S.J.C. IN THE CO-DEFENDANT'S CASE.

This is a case where at trial and during the prior appeal, the only physical evidence linking Ellis to the crime scene was an alleged fingerprint of Patterson, which the Commonwealth claimed was found on the door of Mulligan's truck. Now, that unreliable evidence has been invalidated by the SJC in co-defendant Patterson's case, and it must be thrown out here as well. See App. O - Commonwealth v. Patterson, 445 Mass. 626, 628 (2005)(same fingerprint evidence held to be inadmissible in the case of Ellis' co-defendant).

Newly discovered evidence, new scientific reports, and a decision from the SJC on co-defendant Patterson's fingerprint evidence all establish that the fingerprint testimony given at Ellis' trial - regarding the theory that individually inadequate "simultaneous" fingerprints can be aggregated to claim a match – was unconstitutional and unreliable. The unreliable fingerprint testimony was the key physical evidence that allegedly linked Patterson and Ellis to the scene. Additionally, the Commonwealth relied on the fingerprint claims in its opening statement and closing argument. As such, a new trial is required.

At trial, the Commonwealth claimed that Sean Ellis and co-defendant Terry Patterson were both guilty of the murder of Detective Mulligan. In attempting to prove this, the Commonwealth offered testimony from a fingerprint examiner. The fingerprint examiner told the jury that Terry Patterson's fingerprint had been found on the outside of the car in which Mulligan's body was found. However, in actuality no single latent impression, on its own, could reliably be matched to any corresponding finger on Patterson's hand. Instead, the examiner claimed that the four separate unmatched fingerprints could be analyzed collectively because he believed they were simultaneous impressions. Thus, the examiner was not just testifying about a routine fingerprint comparison; he was claiming an unreliable opinion based on an unproven method of trying to

combine simultaneous or overlapping prints – none of which can individually reveal a matching fingerprint – to create a combined result.

Here, there are several reasons why the fingerprint testimony requires a new trial. First, the fingerprint testimony was not scientifically reliable and should not have been admitted. Proof of this error is found in the SJC's ruling on this issue during co-defendant Patterson's retrial proceedings. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005). See also Daubert v. Merell Dow Pharmaceuticals, 509 U.S. 579 (1993).

Second, reports generated after the Stephan Cowans wrongful conviction detail that the BPD Fingerprint Unit, headed up by Foilb, made serious errors and fabricated evidence that led to Cowans's conviction. (See attached report). This newly discovered evidence about Foilb and the BPD Fingerprint Unit reveal rampant errors and possible corruption. Commonwealth v. Grace, 397 Mass. 303, 306 (1986); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980).

Third, the new NAS report further invalidates Foilb's testimony and fingerprint testimony in general. See NAS Report (2009).

Finally, there was a 6th Amendment confrontation violation because Foilb testified to the results of fingerprint examination and testing done by another non-testifying person. Williams v. Illinois, 567 U.S. __ (2012); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2531 (2009).

i. The Erroneous and Prejudicial Fingerprint Testimony

At Ellis' third trial, the prosecutor focused heavily on the unreliable claim that the fingerprints on Mulligan's car were simultaneously put on Mulligan's door when Terry Patterson allegedly opened the car door. Specifically, in her opening statement, the prosecutor stated:

> "But one of the things they did was they towed the Officer's car and they dusted it for fingerprints. And there was a set of fingerprints developed on the driver's side door. Again, if this is Officer Mulligan's car pointing to the bushes, on the driver's side window is a set of fingerprints, a little finger, a ring finger, a middle finger and a smudge of a left hand. You'll hear those are Terry Patterson's fingerprints."

(II-83).

Next, during the trial, the Commonwealth offered testimony from Robert Foilb of the Boston Police Department fingerprint unit. (V-96).

Based on the testimony at the last two trials, counsel for Ellis stipulated that Foilb was an expert in general fingerprint identification. (V-99). However, counsel did not stipulate that Foilb was an expert in analysis of simultaneous or overlapping impressions. Id. Counsel also did not stipulate to the validity of Foilb's theory that he could tell simultaneous fingerprint impressions by looking at them and that simultaneous prints could make up for a lack of individual points of comparison. Id.

On September 26, 1993, Foilb examined the Red Ford Explorer where Mulligan was found for fingerprints. (V-103). Two days later, on September 28, 1993, he processed the Ford Explorer for latent prints and discovered 17 latent prints on the Explorer. (V-111). Foilb told the jury that "he was examining the latent prints to find 'sufficient ridge detail' which means that there would be enough points of identification, ridge characteristic, that I would be able to say with out any doubt that it was the individual's fingerprint." (V-111). Foilb said that eight of the latent prints had "sufficient ridge detail." (V-111). On the driver's side of the truck, there were 4 fingerprints. (V-113). Foilb admitted that the fourth fingerprint bore no ridge detail. (V-118).

Foilb then testified that he deemed these prints to be simultaneous latent fingerprints – prints left at the same time from different fingers on the same hand. (V-118). He did not testify as to any science supporting that theory. Id. Foilb said simultaneous prints are left on an object by different fingers of the same hand at the same time. (V-118). Foilb claimed that even though there were not sufficient points of comparison for all the prints, under his simultaneous print

theory all the prints must be from the same hand. (V-119). Foilb did not explain any science behind his theory of simultaneous prints. Id.

Foilb then identified the fingerprint card of Terry Patterson, even though he did not conduct that testing or take those prints from Patterson. (V-121). Foilb visually looked at Patterson's ten print card and subjectively compared those prints to the latent prints from the truck. (V-131).

Notably, Foilb used his theory of simultaneous print impressions to make up for the lack of a sufficient number of points of comparison. Specifically, Foilb testified that one of the prints had only six points of comparison, and that the second print had only five points of comparison, and a third print had only two points of comparison. (V-129-132). The fourth print had zero points of comparison. (V-118). Despite the lack of individual points of comparison, based on a theory of combined simultaneous impressions Foilb stated that his conclusion was "[a] match to the left hand, the four simultaneous fingerprints of Terry. L. Patterson." (V-132).

Although Foilb's testimony was vague, he essentially stated that none of the latent impressions within the four prints had sufficient quality or quantity of sufficient detail to conclude individualization, but that he chose to aggregate the 13 points of similarity from different fingers to conclude individualization. See id.

Additionally, Foilb further stated his opinion that the alleged simultaneous prints were "left on the door in the action of closing the door." (V-132). There was no scientific testimony offered to support or explain this theory. Id.

Foilb told the jury that in his opinion, all four prints were Patterson's and were left on the car simultaneously when Patterson was closing the door. (V-132). Foilb told the jury that he could "absolutely, certainly say the four prints were Patterson's". (V-151).

Foilb also tested the clip from a Raven firearm recovered for fingerprints and then compared it to the ten print card of Tia Walker. (V-144). Foilb stated that the fingerprint on the clip was made by Tia Walker. (V-149).

Foilb stated that whenever he has an identifiable print and a print card, he can tell with absolute certainty if the print is a match. (V-151).

Trial counsel for Ellis cross-examined Foilb on his opinion regarding the simultaneous prints on the door of the truck allegedly being linked to Patterson. (V-160). There were other identifiable prints on Mulligan's truck, including near the door, but Foilb was not given any other print cards to match them to. (V-164).

Ellis was not a match to any of the latent prints found by police. (V-164). Notably, there were two other unidentified fingerprints in the drivers' side door column of Mulligan's car. (V-168).

However, the impression mistakenly left with the jury was that Foilb's simultaneous print theory was somehow reliable, and that Patterson's print was a "match", thereby erroneously telling the jury that Ellis was linked to the crime scene by association. (V-151).

Finally, after Foilb's testimony, the prosecutor again highlighted the fingerprint claims in her closing argument. Specifically, the prosecutor again focused on Foilb's testimony, argued that Ellis and Patterson committed the crime together, and said:

> But at this time they'd gotten it right. But what did they leave behind? Together they left behind a dead police officer and his empty holster. But they also left behind Terry Patterson's prints on the car and five bullets in the head of Officer Mulligan.

(VI-40).

As discussed in greater detail herein, after Ellis' conviction the SJC invalidated the exact same simultaneous fingerprint claims before the co-defendant Patterson's retrial. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

ii. **Here, the Commonwealth's fingerprint testimony did not meet the requirements of Daubert and Lanigan, because Foilb's theory was not reliable science, and thus Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII were violated**

In this case, Foilb's theory of simultaneous prints was unconstitutionally unreliable, was not based on a generally accepted scientific theory, failed to establish a known error rate, lacked any documented criteria, and the admission of that testimony was prejudicial error. Daubert, 509 U.S. at 592; Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

The same fingerprint claims have already been invalidated by the SJC in co-defendant Patterson's case, and its admission at Ellis' trial warrants a new trial. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005)(same fingerprint evidence held to be inadmissible in the case of Ellis' co-defendant).

Before a fingerprint examiner or "expert" can present opinion testimony to a trial jury, the Commonwealth must first satisfy its burden of proving that such "scientific" expert testimony meets the requirements of Daubert and Lanigan. See Daubert, 509 U.S. at 592 (a judge must conduct a preliminary assessment of proffered expert evidence, to ensure that it is both relevant and reliable); Commonwealth v. Lanigan, 419 Mass. 15 (1994)(If the process or theory underlying a scientific expert's opinion lacks reliability, that opinion should not reach the trier of fact). See also Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999); United States v. Two Bulls, 918 F.2d 56, 61 (8th Cir. 1990)("expert" opinion must not reach the jury until questions of reliability are determined by the judge); United States v. Velarde, 214 F.3d 1204 (10th Cir. 2000) (Court failed to make reliability determination about government's expert testimony).

Here, Foilb's testimony regarding his theory on simultaneous prints was unreliable and the admissibility of that testimony has been ruled on in co-defendant Patterson's case. See

Commonwealth v. Patterson, 445 Mass. 626, 628 (2005). Additionally, Foilb's claim of an absolute match was also a prejudicial error. Daubert, 509 U.S. at 592; NAS Report.

a. Erroneous Testimony of an Absolute "Match"

Here, Foilb testified to an absolute fingerprint match between the prints on the car (each of which individually were not a match) and the fingerprints taken from co-defendant Terry Patterson. (V-151).

Foilb's testimony claiming an exact match was erroneous and prejudicial, regardless of whether he was examining a single print or simultaneous impressions. Testimony as to an exact "match", or implying that the ACE-V methodology always produces objectively verifiable results, is erroneous and inadmissible. See Commonwealth v. Gambora, 457 Mass. 715 (2010); Id. at 736 (Spina, J. concurring)("While the science of fingerprint analysis may be valid, claims by practitioners that the process can establish identity with absolute certainty are not."). See also NAS Report, p. 142 (2009)(Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified...."); Daubert, 509 U.S. at 595.

Thus, it was error for Foilb to claim absolute certainty as to a match. This erroneous testimony violated Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII. Id.

Under any standard of review, the harm from this erroneous "match" testimony requires a new trial. Daubert, 509 U.S. at 595. The fingerprint testimony from Foilb was the only claimed physical evidence linking Ellis and Patterson to Mulligan's truck. Without the fingerprint testimony, it cannot be said with any confidence that the verdict would have been the same. As such, a new trial is warranted.

b. Foilb's Theory on Simultaneous Prints Was Inadmissible

In addition to his erroneous claim of a certain match, Foilb's underlying claim that Patterson's prints were on the door of the car, and that Patterson opened the door, was not supported by reliable science before it reached the jury. In fact, those same claims regarding simultaneous fingerprints were deemed unreliable by the SJC before the retrial of Ellis' co-defendant Terry Patterson. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

As discussed above, the Commonwealth called Foilb to identify Patterson as the person who left four latent simultaneous impressions on the victim's truck, despite the fact that analysis of the individual latent impressions did not produce sufficient points of comparison to result in a match.

Foilb's testimony was allegedly based on the theory that once a group of latent impressions are identified as simultaneous impressions, an otherwise unacceptably small number of similarities between each of the impressions and its allegedly corresponding fully inked fingerprint can be combined to form the basis for a collective determination as to whether the entire group of latent impressions matches a corresponding group of full fingerprints. Basically, Foilb's theory was that although none of the individual fingerprints could be reliably compared to Patterson's print card, he could aggregate points of comparison from four different latent prints to make a match.

However, that theory is constitutionally unreliable, and before that theory was presented to the jury the Commonwealth failed to establish that adding up similarity points of simultaneous impressions is a reliable way to use ACE-V to effectuate latent fingerprint identification.

1. Constitutional Law

The party introducing scientific opinion testimony bears the burden of establishing its reliability. Daubert, 509 U.S. 579 (1993).

The theory of simultaneous impressions – that a latent print, which individually has insufficient points of comparison to be reliable, can be aggregated with other insufficient prints to make a combined individualization – is not a sufficiently reliable, accepted, or controlled theory and should not be admitted. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

For simultaneous impression opinions or any other scientific opinions, both the United States Supreme Court, applying Fed. R. Evid. 702 and the United States Constitution, in Daubert, 509 U.S. 579 (1993), and the Massachusetts Supreme Judicial Court applying the common law and the Massachusetts Declaration of Rights in Lanigan, 419 Mass. 15 (1994), agree on the fundamental requirement that "[i]f the process or theory underlying [an] . . . expert's opinion lacks reliability, that opinion should not reach the trier of fact." Commonwealth v. Lanigan, 419 Mass. at 26. Both the United States Supreme Court and the Massachusetts Supreme Judicial Court require the trial judge to act as a gatekeeper to ensure that the expert witness testimony that is considered by the jury meets minimum standards of reliability.

Expert knowledge is the product of special knowledge applied to the particular facts of the case in dispute. Thus as foundation for the admissibility of expert opinion evidence, the proponent of the expert testimony must establish that (1) the scientific principles and methodology on which the expert's opinion is based are reliable; (2) the witness is qualified with special knowledge; and (3) the witness has specific knowledge of the particular facts to bring his expertise meaningfully to bear. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Commonwealth v. Lanigan, 419 Mass. 15 (1994).

In determining the reliability of the proffered expert testimony, the focus is on the principles and methodology, not on the conclusions they generate. Daubert, 509 U.S. at 595. In Daubert, the Court identified five factors that could be considered by the trial court in determining whether the proffered expert testimony was sufficiently reliable to

be put before the jury. The factors listed in Daubert include 1) whether a theory or technique can be and has been tested, 2) whether the theory or technique has been subject to peer review and publication, 3) whether a particular scientific technique has a known or potential rate of error, 4) whether standards controlling the technique's operation exist and are maintained and 5) whether the technique or theory is generally accepted in the relevant scientific community. Daubert, 509 U.S. at 593-94.

In other words, before proffered expert testimony may be admitted, the trial judge must "ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Id. at 597. The trial judge's gate-keeping obligation to ensure that any and all testimony "is not only relevant, but reliable" applies to "all expert testimony," regardless of whether the expert testifies or purports to testify on the basis of scientific, technical or other specialized knowledge. Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147 (1999).

The burden of proof is on the proponent of expert testimony to establish a prima facie case that the evidence satisfies the requirements. Commonwealth v. Lanigan, 419 Mass. 15, 26, 641 N.E.2d 1342, 1349 (1994). Where the court is presented "only the experts' qualifications, their conclusions and their assurances of reliability . . . [u]nder Daubert that is not enough."

2. Foilb's Testimony Was Unconstitutionally Unreliable

In the present case, the Commonwealth failed to establish a reliable foundation for Foilb's theory of simultaneous impressions somehow making up for no individual matches.

Even assuming for the sake of argument that latent fingerprint identification in general is generally accepted, the theory of simultaneity used in the Ellis case failed to satisfy any of the Daubert/Lanigan factors.

The Commonwealth, which had the burden of establishing the reliability of Foilb's scientific theory before it reaches the jury, failed to establish the reliability of the theory of

simultaneous prints. That failure is not surprising given the many problems with the theory of simultaneous prints, especially in light of the new case law and scientific findings made after the Ellis trial and direct appeal.

First, proof that the admission of the simultaneous print testimony was erroneous is found in the SJC's ruling on this issue in co-defendant Patterson's case. See Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

In Patterson, the SJC held that the underlying theory of ordinary fingerprint identification is reliable. Id. However, the SJC further held that the Commonwealth failed to establish that the theory, process, and method of ordinary fingerprint identification could be applied reliably to the police theory regarding simultaneous impressions that cannot be individually matched to any fingers. Patterson, 445 Mass. at 628.

In placing the theory of simultaneous prints through a Daubert/Lanigan analysis, the SJC found:

> The Commonwealth did not present evidence that any domestic agency or jurisdiction - save for the now disbanded Boston police fingerprint unit and the State police - relies on simultaneous impressions for identification purposes. Likewise, with the exception of Great Britain, there is no evidence in the record that any foreign jurisdiction applies ACE-V to simultaneous impressions. With regard to Great Britain, one of the Commonwealth's own experts, David Ashbaugh, a noted fingerprint examiner, described its use as a "weird doctrine." He further explained that the application of ACE-V to simultaneous impressions was one of several uses of ACE-V in England that "has resulted in a hodgepodge of doctrine that is far removed from the truth." Ashbaugh suggests that this application of ACE-V "require[s] a certain leap of faith" and has "no supporting rationale."
>
> Moreover, the Commonwealth did not present evidence that SWGFAST, IAI, or any other fingerprint examination society accepts or recommends the application of ACE-V to simultaneous impressions. At best, the record lacks evidence of widespread acceptance of the application of ACE-V to simultaneous impressions by the fingerprint examiner community. Because the Commonwealth has failed to carry its burden of proving general acceptance, we turn to the four remaining Daubert factors.
>
> ii. Testing. We judge this factor by inquiring whether this application of ACE-V can be or has been tested. The judge's supplemental order noted that no specific study or scientific article has validated the application of ACE-V to simultaneous impressions. Agent Meagher testified that

he was "not aware of any studies that have been performed to validate the application of ACE-V to simultaneous impressions to make an identification." Neither is this court...

iii. Peer review and publication. In her original order regarding latent fingerprint identification, the judge correctly concluded that the verification process of ACE-V was seriously flawed and did not constitute peer review under Daubert. We share the judge's consternation with the current verification process. Nevertheless, she found this factor to favor admission, though only slightly, because "limited" review exists on the reliability of ACE-V in forensic publications and because the SWGFAST guidelines outlining ACE-V underwent peer review. With respect to its application to simultaneous impressions, however, the Commonwealth has not introduced evidence of any scientific-technical publication discussing its reliability.

Further, the record contains no evidence that SWGFAST, IAI, or any other forensic identification society has promulgated peer-reviewed standards relating to the application of ACE-V to simultaneous impressions. This factor thus also favors exclusion.

iv. Known or potential error rate. We do not quarrel with the motion judge's conclusion that the ACE-V method of fingerprint individualization has a low error rate when used to match a latent fingerprint to a fully inked print of the same finger...

However, the Commonwealth has produced no evidence establishing a similarly low error rate when ACE-V is applied to simultaneous impressions. Neither the FBI survey nor the study involved simultaneous impressions. The record contains no studies regarding the ability of a fingerprint examiner to use simultaneous impressions to effectuate a positive identification and we have not been made aware of any. We recognize, as the motion judge explained, that "the absence of a specific study . . . does not preclude a finding of admissibility." Nonetheless, the absence of any experimentation here, without any other evidence of a low error rate, does not help the Commonwealth. See Canavan's Case, 432 Mass. 304 , 315 (2000) ("We cannot conclude that the . . . mere assertion that a methodology is reliable is sufficient to pass the Lanigan test absent any other evidence showing its reliability"). In the absence of evidence pertaining to the error rate, we conclude that this factor, at best, does not affect our ultimate decision concerning admissibility.

v. Standards controlling the technique. The judge concluded that there was no scientific basis for requiring a minimum number of matching points for an individualization. We agree...

The degree of subjectivity in a fingerprint examiner's ultimate conclusion that a latent print matches a fully inked print seems "of a substantially more restricted compass" than, say, "an electrical engineer's testimony that fire in a clothes [dryer] was caused by a thermostat malfunction." United States v. Llera Plaza, supra at 570, citing Maryland Cas. Co. v. Therm-O- Disc, 137 F.3d 780 (4th Cir. 1998). An examiner follows an objective method laid out in guidelines and standards adopted by SWGFAST...

It appears, however, that a fingerprint examiner's opinion regarding the individualization of simultaneous impressions is less bounded by objective factors. Most importantly, although Agent Meagher testified that the ACE-V process does not vary when applied to simultaneous impressions, the record does not establish that either SWGFAST or the IAI has adopted formal

guidelines regarding the individualization of simultaneous impressions. There is no standard procedure in place to which an examiner must conform his methods.

The judge also found that the "rigorous qualifications and training requirements for FBI fingerprint examiners . . . help control operation of the ACE-V methodology." Common sense dictates that higher academic and professional standards increase the chances that an expert will properly follow the objective criteria and properly employ his subjective consideration to the facts at hand. This consideration, however, is irrelevant here, where the Commonwealth does not propose to call an FBI examiner as its expert. The Commonwealth's proposed expert is a State trooper, and the original fingerprint examiner was a member of the now disbanded Boston police fingerprint unit. No showing has been made as to the qualifications required for employment and retention at either of these law enforcement agencies. We shall not simply assume that the requirements or expert's qualifications are as substantial as those of the FBI or its fingerprint examiners. See United States v. Llera Plaza, supra at 566 ("Whatever may be the case for other law enforcement agencies, the standards prescribed for qualification as an FBI fingerprint examiner are clear . . . . The uniformity and rigor of these FBI requirements provide substantial assurance that, with respect to certified FBI fingerprint examiners, properly controlling qualification standards are in place and are in force").

Moreover, the Commonwealth does not contend that FBI examiners have confirmed the result of the State examination. To the contrary, in response to a request for confirmation, the FBI issued a report indicating that the simultaneous impressions at issue here were not "of value," apparently concluding that a positive identification could not properly be made using those impressions.

In these circumstances, we conclude that the lack of accepted explicit universal standards controlling the application of ACE-V to simultaneous impressions counsels against admission of this evidence.

Patterson, 445 Mass. at 652-654.

Just like in Patterson's case, at Ellis' trial[11] the Commonwealth used the same simultaneous fingerprint testimony that the SJC held to be inadmissible and unreliable. See id. (See App. O- attached SJC findings and decision). As such, it was error to admit the same inadmissible simultaneous fingerprint testimony against Ellis at trial. Id.

[11] Patterson was initially convicted on February 1, 1995, and then his conviction was reversed in 2000. Before his retrial in 2002, Patterson litigated the admissibility and reliability of the "simultaneous impressions" fingerprint testimony proffered by the Commonwealth. That litigation reached the SJC in Commonwealth v. Patterson, 445 Mass. 626 (2005). By comparison, the juries for Ellis' first two trials were deadlocked and Ellis was convicted only after this third trial. However, the content of the fingerprint testimony from the Commonwealth's witnesses was the same at all of the trials.

Here, the Commonwealth did not establish that the simultaneous impression theory was generally accepted in the relevant scientific community. There was no minimum number of matching points required under the simultaneous impression theory, and no standards or controls for such analysis. Daubert, 509 U.S. at 595. There was no known error rate given, no peer review, no scientific studies offered, no testing or studies introduced to show that the witness' theory was reliable science.

Foilb's testimony here failed to satisfy the second prong for scientific opinion admissibility – an established error rate. Daubert, 509 U.S. at 595. There was simply no way of knowing whether errors were being made, and no known error rate. As such, the testimony was unconstitutionally unreliable. Id. See also Lanigan, 419 Mass. at 26.

Foilb's testimony here also failed to satisfy the third prong for scientific opinion admissibility – existence and maintenance of standards controlling the technique's operation. Daubert, 509 U.S. at 595. Here, it appears that there were no controlling standards or criteria. Foilb simply looked at prints and determined with no criteria that the prints must have been made simultaneously, and then he added up points of comparison from different prints to create a theoretical aggregate match. The Commonwealth failed to present any evidence regarding any standards or controls, and on information and belief none existed in the BPD lab.

Further, Foilb's testimony here also failed to satisfy the fourth prong for scientific opinion admissibility – general acceptance. Daubert, 509 U.S. at 595. The theory of simultaneous impressions – especially in cases where the individual prints are not sufficient themselves for an accurate comparison – is not generally accepted in the relevant scientific community. See id.

Finally, Foilb's testimony here also failed to satisfy the fifth prong for scientific opinion admissibility – subject to peer review and publication. Daubert, 509 U.S. at 595.

As such, it was error for the simultaneous impression fingerprint testimony to be presented to the jury. NAS Report, p. 142 (2009). This erroneous testimony violated Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII. Daubert, 509 U.S. at 595. See also Patterson exhibits, affidavits, and Transcript of testimony of Forensic Science Professor James Starrs (Attached).

Under any standard of review, the harm from this erroneous match testimony requires a new trial. Daubert, 509 U.S. at 595. The fingerprint testimony from Foilb was the only claimed physical evidence linking Ellis and Patterson to Mulligan's truck.

Importantly, the Commonwealth used the fingerprint evidence in its closing argument to convict Ellis of murder. Specifically, in her closing argument, the prosecutor focused on Foilb's testimony, argued that Ellis and Patterson committed the crime together, and said "...they also left behind Terry Patterson's prints on the car and five bullets in the head of Officer Mulligan." (VI-40).

That fingerprint, which Foilb claimed to be a certain "match", was the only allegedly reliable physical evidence presented at trial. Although there was witness testimony placing Ellis at the Walgreen's that night, the witness testimony was inconsistent, and in any event the fingerprint testimony was the only purportedly credible evidence linking Ellis to Mulligan's truck. Now we know that the fingerprint testimony was not credible, was not reliable, was not based on any accepted science, and should not have been admitted.

As many courts have repeatedly recognized, there is a grave risk that jurors are awed by an "aura of special reliability and trustworthiness" when it comes to the words that come out of the mouths of expert witnesses. See, e.g., United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973). Here, there is an unavoidable danger that the jury was "awed" by the unreliable and inadmissible fingerprint testimony of Foilb. Without the fingerprint testimony, it cannot be said

with any confidence that the verdict would have been the same. As such, a new trial is warranted. Daubert, 509 U.S. at 592 Commonwealth v. Patterson, 445 Mass. 626, 628 (2005).

iii. Foilb's Testimony Violated Ellis' 6th Amendment and Article XII Rights To Confront Witnesses

In addition to testifying about his own testing results, Foilb also testified to the findings of another non-testifying person who examined Patterson's fingerprints. (V-121). Because Foilb's testimony drifted into the results of testing done by another person, and because those results – a claimed accurate examination of Patterson's own prints – were offered for the truth of the matter asserted, the testimony violated Ellis' 6th Amendment and Article XII rights to confrontation. Williams v. Illinois, 567 U.S. __ (2012); Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2531 (2009); Crawford v. Washington, 541 U.S. 36 (2004).

Again, under any standard of review, the harm from this erroneous match testimony requires a new trial. Daubert, 509 U.S. at 595. The fingerprint testimony from Foilb was the only claimed physical evidence linking Ellis and Patterson to Mulligan's truck. The admission of this erroneous testimony created a substantial risk of a miscarriage of justice. Without the fingerprint testimony, it cannot be said with any confidence that the verdict would have been the same. As such, a new trial is warranted. Mass.R.Crim.P.30.

iv. Newly Discovered Evidence In The Form Of An FBI Lab Report Reveals That Foilb's Claim of Three Potential Prints Was Erroneous

As discussed above, BPD analyst Foilb claimed to have found three prints of value – prints with some identifiable characteristics that he used for his simultaneous impression theory. However, the FBI, which later reexamined these prints, found only one print of value. See FBI Latent Print Report (Feb. 17, 2005), Ltr. to Det. Lt. Kenneth F. Martin. See also Patterson, 445 Mass. at 652-654. This means that Foilb was erroneous not just as to his overall theory, but also as to his subjective observations of the alleged prints that he viewed. See id.

Based on this evidence, which has been discovered only after Ellis' first appeal was decided, it cannot be said with any confidence that justice was done. See Commonwealth v. Grace, 397 Mass. 303, 306 (1986); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980). As such, a new trial is warranted.

v. Newly Discovered Evidence Regarding The BPD Fingerprint Unit Warrants A New Trial

Newly discovered evidence, uncovered after Ellis' trial and his prior appeal, reveals that the fingerprint examiner in this case, Sgt. Foilb, was one of the heads of the BPD fingerprint unit responsible for the wrongful conviction of Stephan Cowans. (App. P).

After it was revealed that Stephan Cowans was wrongfully convicted based on an error relating to the ten-print card, and further errors within the BPD fingerprint unit were identified, Boston Police Commissioner O'Toole shut down the entire unit and hired Ron Smith & Associates to investigate the Cowans matter and then to write a report on the state of the fingerprint unit. (App. P).

As part of the investigation into the Cowans matter, Ron Smith's report concluded that a member of the fingerprint unit had discovered that a mistake was made but that even after the error was discovered, it was concealed all the way through the trial. See Ron Smith, Consultation Report (March 8, 2004). As such, the new evidence suggests that Foilb and his unit deliberately allowed false fingerprint evidence to go uncorrected even while an innocent man sat in prison. See id. That new evidence, especially when combined with SJC Patterson decision on the unreliability of simultaneous impressions and the new NAS report, creates a scenario where justice was not done.

Additionally, as part of the evaluation of the fingerprint unit, all of the members of the fingerprint unit were given written exams, and everyone scored very poorly. See Ron Smith,

Boston Police Department Latent Print Evaluation (Oct. 5, 2006). Ultimately, the BPD fingerprint unit was shut down.

Moreover, the independent audit and report of the BPD fingerprint unit – the same unit who did the fingerprint testing in this case - concluded that ACE-V "is a methodology that has become an industry standard and one that the Boston Police Department needs desperately to institute as soon as reasonably possible." Ron Smith & Associates, Inc. Letter to Capt. Thomas Dowd, Supervisor, Identification Division Boston Police Department (2004) at 35 (See Attached). Even accepting, for the sake of argument, the reliability of the ACE-V method, it was not the practice of Foilb or the BPD fingerprint unit to use that ACE-V method at the time of the Ellis case.

All of this new evidence was discovered after Ellis trial and after his prior appeal. This new evidence about the unreliability and apparent corruption in the fingerprint unit, which occurred during the time of Ellis' trial, makes it impossible to say that the fingerprint testimony was reliable. By extension, that makes it impossible to say that justice was done. Commonwealth v. Grace, 397 Mass. 303, 306 (1986); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980). As such, a new trial is warranted.

vi. Ellis' 6th Amendment Right to Effective Assistance of Counsel Was Violated

To the extent the standard of review for these errors are impacted by any failure of prior counsel for Ellis to raise the issue earlier, Ellis asserts that a new trial is still warranted as such a failure violated his rights to effective assistance of counsel pursuant to the 6th Amendment and Article XII. See Strickland v. Washington, 466 U.S. 668 (1984); Kimmelman v. Morrison, 477 U.S. 365, 382-383 (1986); Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991).

D. THE UNAVAILABILITY OF THE FBI ANALYST WHOSE RESULTS WERE PRESENTED TO THE JURY VIOLATED ELLIS'S RIGHT TO CONFRONT WITNESSES AGAINST HIM AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE XII OF THE MASSACHUSETTS DECLARATION OF RIGHTS

Ellis's constitutional right to confront witnesses against him was violated because a Commonwealth witness testified to the opinions of an unidentified FBI analyst who tested the materials taken from Patterson's vehicle and concluded that the materials were consistent with window tinting. This testimonial evidence was introduced against Ellis through a Boston Police Department employee, Hayes, who did not conduct the testing, observe the testing, nor did Hayes have expertise in the testing to formulate his own opinion about the results. Ellis was not afforded the opportunity to cross-examine the unknown FBI analyst who made these conclusions. This violated Ellis's constitutional right to confront witnesses against him. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009).

i. Ellis Had A 6th Amendment Constitutional Right to Confront Witnesses Who Offered Testimonial Evidence Against Him

In every criminal case, the Commonwealth bears the burden of proving every element of the offense beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 364 (1970). This is so regardless of whether an element is a live issue at trial or not. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009); Neder v. United States, 527 U.S. 1, 15-16 (1999); Commonwealth v. McDuffee, 397 Mass. 353, 363-64 (1979).

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to confront witnesses who offer testimony against him. See also Mass. Dec. Rts. XII. The United States Supreme Court has held that this foundational procedural guarantee applies to both federal and state prosecutions. Pointer v. Texas, 380 U.S. 400 (1965).

In Crawford v. Washington, the United States Supreme Court solidified the meaning of the Confrontation Clause, holding that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36 (2004).

In Melendez-Diaz v. Massachusetts 129 S.Ct. 2527 (2009), the Court held that forensic reports that certify incriminating test results are testimonial. In Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011), the Court reaffirmed Melendez-Diaz and made clear that when the prosecution wishes to introduce a certified forensic report, it does not suffice to call a supervisor or other "surrogate" witness to the stand in place of the actual author of the report. Id.

ii. The FBI Test Results Were Testimonial Evidence

The FBI testing results constituted testimonial evidence. The Crawford Court defined testimonial evidence as follows:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52.

In Williams v. Illinois, the Court held that the prosecution may not introduce testimonial statements in forensic reports through other expert witnesses. 567 U.S. ___, 132 S.Ct. 2221 (2012). However, the Court also determined that the forensic report at issue in the case – a DNA profile derived from a vaginal swab from a rape victim – was not testimonial. Williams v. Illinois, 132 S.Ct. 2221 (2012). Four justices joined in a strong opinion that would give prosecutors more leeway to use lab reports without having to put the analysts who prepared them on the witness stand. Four other justices said the Constitution does not permit the use of the lab analyst who

helped convict the defendant. Justice Clarence Thomas said the lab report used in the case could not be considered testimonial and so does not fall under the Constitution's cross-examination requirement.

The Williams plurality reaffirmed that the Confrontation Clause continues to deem formal scientific findings testimonial, and prohibit their admission without the analyst that made those findings. Williams, 132 S.Ct. 2221 (2012). That means that drug, blood alcohol, fingerprint, ballistics, autopsies, and related forensic reports that typically involve testing by one person and that are incriminating on their face will continue to be inadmissible without the testimony of their authors (or some other method of satisfying the Confrontation Clause). By contrast, statements made as part of a lab's internal work product or in a subsidiary report used to generate a final incriminating report will generally not be testimonial. Such statements are not typically formal, which was the line drawn by the Williams Court. Thus, in forensic testing involving multiple steps, it will often be enough for the prosecution to call to the stand the author of the final report or at least those who performed the key steps.

Here, the FBI testing results are testimonial.[12] An objective witness would reasonably believe the analyses conducted by the FBI on the substances taken from Patterson's window

[12] Here, in testifying Hayes did not claim to have conducted his own independent analysis of the findings, nor did he claim to have formed his own opinion, and so Commonwealth v. Greineder is not controlling. 458 Mass. 207 (2010). However, that the findings in the instant case are testimonial is reaffirmed by the United States Supreme Court's remand in Greineder v. Massachusetts, 2012 WL 2470055, remanding Greineder's case for reconsideration following in light of the Williams v. Illinois decision. The Supreme Judicial Court must reconsider its determination in Commonwealth v. Greineder, which held that a laboratory director who testified to DNA test results obtained by a staff analyst, and expressed her own independent statistical opinion based on those test results did not violate the confrontation clause because the witness had conducted her own independent evaluation and expressed her own opinion. 458 Mass. 207, 236-37 (2010).

would be available for use at a later trial, as they have no non evidentiary purpose. Crawford, 541 U.S. at 51-52.

Like the drug analysts affidavits in Melendez-Diaz, the FBI analyst's reported conclusions were "affirmation[s] made for the purpose of establishing or proving some fact." Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2532 (2009). Thus, FBI analysts who determined these facts, and made these reports, were "witnesses" for purposes of the Sixth Amendment. See Id. Absent a showing that the FBI analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial. See Melendez-Diaz, 129 S.Ct. 2527 (2009).

iii. The FBI Laboratory Technicians that Conducted the Testing were not Presented by the Commonwealth

A criminalist at the Boston Police Crime lab, Hayes, testified to the conclusions of FBI analysts. On October 3, 1993, Hayes scraped the blue green substances from the window and sent them to the FBI. (V-87). That was Hayes only role in the testing that ultimately occurred at an FBI lab. He then repeated the findings of the unknown FBI analyst from the stand.

Hayes testified that he received back analyses from the FBI, with ID markings from Q1 through Q4. (V-88). Mr. Hayes claimed that the FBI designation Q1 contained materials from the passenger vent window. (V-88) Hayes testified to the conclusion of an unknown FBI analyst that the report came back that the materials were consistent with a tinted adhesive. (V-88).

Hayes testified that the designation "Q2" referred to materials taken from the driver's vent window. (V-88). Hayes testified that the FBI analyzed those materials and the FBI determined that it was a piece of polyester film with tinted adhesive material coating it. (V-88).

Hayes testified that the FBI designation "Q3" referred to a substance he collected from the passenger window of the vehicle. (V-89). Hayes testified that an unknown FBI analyst determined that it was tinted adhesive material. (V-89).

Hayes claimed that the FBI made a comparison between the materials found in Q1, Q3 and Q4 and the adhesive in Q2, and the FBI's analysis revealed that they were all the same (V-90). Hayes testified to the conclusion of an non-testifying FBI analyst that the materials were consistent with the windows having been tinted at one time. (V-90).

Hayes never claimed to have done any independent analysis or testing. Hayes did not claim to have any expertise in this type of analysis.

iv. The Admission of the FBI's Test Results without the Technicians who Conducted the Testing was Error

Here, Hayes "merely acted as a conduit for the opinion of others." Cf. Commonwealth v. Greineder, 458 Mass. 207, 236 (2010), remanded by Grenedier v. Massachusetts, 2012 WL 2470055 (2012). As such, his testimony violated the Sixth Amendment and Article XII. Melendez-Diaz, 129 S.Ct. at 2533.

The Supreme Judicial Court has recognized that it is both evidentiary and constitutional error to permit an expert to testify to findings completed by another expert. "If a Commonwealth expert on direct examination were to testify to the conclusion or opinion of a second, nontestifying expert, that conclusion or opinion would be inadmissible hearsay." Commonwealth v. Barbosa, 457 Mass. 773 (2010); see also Crawford v. Washington, 541 U.S. 36 (2004).

v. The Erroneous Admission of this Testimony Violated Ellis's Constitutional Rights

The Sixth Amendment guarantees a defendant the right to be confronted with "the witnesses *against him*." Melendez-Diaz, 129 S.Ct. at 2533 (recognizing that the procedural requirement of cross-examination is the ensure the reliability of forensic testing). This Court, like

the Barbosa Court, should determine that the conclusions drawn by the analyst, which were repeated on the stand by a person that did not participate in nor observe the testing, violated the confrontation clause. 457 Mass. 773 (2010). Further, the admission of the testimony of Hayes, constituted inadmissible hearsay and was admitted in violation of Ellis's constitutional rights. Commonwealth v. Durand, 457 Mass. 574 (2010).

As the constitutional issues at stake are substantial, this Court should review the constitutional error as though preserved by proper objection at trial.[13] See Commonwealth v. Vasquez, 456 Mass. 350, 352 (2010). Because the Commonwealth used Ellis's alleged connection to Patterson, and Patterson's vehicle's connection to the crime scene, as evidence in its effort to convict Ellis, this Court cannot say with any confidence that the admission of the DNA profile testimony without the analysts who generated these profiles was harmless beyond a reasonable doubt. Id.; Melendez-Diaz, 129 S.Ct. 2527 (2009). Even under a lesser standard of review, the confrontation violation created a substantial risk of a miscarriage of justice. For these reasons, a new trial is required. Id.

E. A NEW TRIAL IS WARRANTED BECAUSE ELLIS' 6TH AMENDMENT AND ARTICLE XII RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED

i. Ineffective Assistance Of Counsel Standard

> In the search for truth that characterizes an American criminal trial, defense counsel plays an indispensable role. He must assure that the proceedings are fair to his client. He must test the state's assertions and he must challenge the inferences the state asks the factfinder to draw. Anything less destroys the reliability of the verdict; the state obtains a conviction without being held to its burden of proof beyond a reasonable doubt. Defense counsel has

[13] The admission of this testimony was constitutionally offensive error. Ellis's counsel should have objected to the admission of this inadmissible evidence. Trial counsel's performance fell below the objectively reasonable standard and caused actual prejudice, thus violating Ellis's Sixth Amendment right to effective assistance of counsel guaranteed by the United States Constitution, and Article XII of the Massachusetts Declaration of Rights. See Strickland v. Washington, 466 U.S. 668 (1988); Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974).

> a constitutional duty to subject the prosecutions case to meaningful adversarial testing.
>
> United States v. Cronic, 466 U.S. 648, 656 (1984).

Both Article Twelve of the Massachusetts Declaration of Rights and the Sixth Amendment to the United States Constitution each guarantee the right of a criminal defendant to effective assistance of counsel at each critical stage of the proceedings.[14] Strickland v. Washington, 466 U.S. 668 (1988). In Commonwealth v. Saferian, the Supreme Judicial Court established a two-part inquiry to determine the constitutional adequacy of the legal assistance provided by a defense counsel: (1) whether "there has been serious incompetence, inefficiency, or inattention of counsel – behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer," and (2) whether "it has likely deprived the defendant of an otherwise available, substantial ground of defense." Commonwealth v. Saferian, 366 Mass. 89, 96-97 (1974).

This standard requires "a discerning examination of and appraisal of the specific circumstances of the given case to see whether there has been a serious incompetence or inattention of counsel . . ." Id. With respect to the second prong of the Saferian test, the defendant must show that "better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).

Further, an ineffective assistance of counsel claim does not have to single-handedly prove a defendant's innocence. Commonwealth v. Aviles, 40 Mass.App.Ct. 440, 445-446 (1996)(judge misperceived the value of the omitted evidence, ineffective assistance of counsel issues do not have to "prove" that the defendant "could not have committed [the crime charged]."). The issue is

[14] If the state constitutional test enunciated in Saferian is met, the federal test is necessarily met as well. Commonwealth v. Callahan, 401 Mass. 627, 635 n. 10 (1988); Commonwealth v. Fuller, 394 Mass 251 n. 3 (1985).

simply whether trial counsel deprived a defendant of his or her 6th Amendment right to effective assistance of counsel.

Thus, analysis of the ineffective assistance issues raised in Ellis' motion for new trial should revolve around whether trial counsel's conduct fell below the Saferian standard, and whether counsel's failure deprived Ellis of an available and substantial ground of defense. See Saferian, 366 Mass. at 96. Employing both the Strickland and the Saferian standard to this case, trial counsel's inactions constitute ineffective assistance.

ii. In the Present Case, Prior Counsel's Numerous Failures Deprived Ellis Of His Constitutional Right to Effective Assistance, As Required by the 6th Amendment and Article XII, And It Cannot Be Said That Justice Was Done.

In the present case, to the extent that the Commonwealth argues that any of the previously-addressed issues could somehow have been raised by prior counsel for Ellis at some earlier date, then Ellis was deprived of effective assistance of counsel, as required by the 6th Amendment and Article XII. Strickland v. Washington, 466 U.S. 668 (1988).

The Massachusetts Appeals Court has held that, "In a new trial motion asserting ineffective assistance of counsel, whether justice may not have been done equates with whether counsel was constitutionally ineffective." Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 635 (2001). See also Commonwealth v. Medina, 430 Mass. 800, 802 (2000).

Here, as discussed above, if any of these issues raised herein could have somehow been raised earlier, then prior counsel was constitutionally ineffective and deprived Ellis of grounds of defense and grounds of appeal. As such, it cannot be said with any confidence that justice was done and a new trial is required. Strickland v. Washington, 466 U.S. 668 (1988).

F. A NEW TRIAL IS WARRANTED BECAUSE THE ALLEGED BALLISTICS EVIDENCE WAS UNRELIABLE AND VIOLATED ELLIS' RIGHTS PURSUANT TO THE 5th, 6th, AND 14th AMENDMENTS AND ARTICLE XII.

i. The Ballistics Evidence Is Unreliable

Based on all of the withheld exculpatory evidence and Mulligan's involvement in the criminal conspiracy with Acerra, Robinson, and Brazil who were in charge of investigating the Mulligan murder, Ellis asserts that the claimed ballistics testimony is unreliable and cannot be credited. Ellis further requests that the ballistics evidence be re-tested, or that he be provided with funds for independent testing.

ii. New Scientific Studies On the Unreliability of A Ballistics Match that Invalidate the Forensic Testimony and Call into Question Ellis's Conviction

At Ellis's trial, the Commonwealth presented testimony suggesting that bullets and shell casings definitely, and without doubt "matched" a specific firearm that the Commonwealth linked to Ellis. However, new studies commissioned by Congress, and completed in 2009 (after Ellis's conviction) by the National Academy of Sciences (NAS or The Committee) and the National Research Council (NRC) indicated that the practice of toolmark identification, whereby one matches a bullet to a particular gun or crime scene, needs more testing before it will be considered generally accepted in the scientific community. (available in their entirety at http://www.nap.edu/catalog/12162.html and http://www.nap.edu/catalog/12589.html).

This NAS report, especially when combined with the withheld exculpatory evidence suggesting that other police officers may have been involved in Mulligan's murder, requires a new trial.

The NAS Report and NRC Reports Have Invalidated the Ballistics Testimony that was Presented at Ellis's Trial

Ellis recently became aware of information that there are minimal, if any, toolmarks imparted by the finished firearm on the bullet or cartridge casings that are unique to the particular gun. In fact, the NAS Committee observed "the validity of the fundamental assumptions of

uniqueness and reproducibility of firearms-related toolmarks has not yet been fully demonstrated." There is no basis for the assumption, fundamental to classic tool mark identification theory and technique, that barrel rifling and breech face marks are in fact unique to a particular gun. See Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Toolmark Identification, Columbia Science and Technology L. Rev. Vol. VI (2005).

Accordingly, Detective Carl Washington's trial opinions that the bullets and shell casings recovered were fired from the "same weapon" was a subjective assessment, and not sufficient to meet the standards necessary for the admission of expert testimony; the testimony should not have been admitted, and its admission violated Ellis's rights to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution as well as Article XII of the Massachusetts Declaration of Rights. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). V-250.

A toolmark examiner attempts to identify the individual characteristics of microscopic toolmarks, as contrasted to class and subclass characteristics, and then determine the extent of agreement in individual characteristics in the two sets of toolmarks to determine a match. Leland V. Jones, Locating and Preserving Evidence in Criminal Cases, 1 Am.Jur. Trials 555, 616 (1964). Problems may arise in identification and a tool may be wrongly identified as the source of a tool mark that it did not produce because "(1) the individual characteristics of toolmarks are comprised of non-unique marks, (2) subclass characteristics shared by more than one tool may be confused with individual characteristics unique to one and only one tool, and (3) the individual characteristics of the marks made by a particular tool change over time." See Adina Schwartz, A Systemic Challenge to the Reliability and Admissibility of Firearms and Tool Mark Identification, 6 Colum. Sci & Tech L Rev 2, 11 (2005).

Toolmark examination lacks standards and protocols that typically accompany a scientific method. See Id.; Daubert, 509 U.S. 579 (1993). There is no peer review, no controls, no rate of error, and no statistics. The "science" consists only of observations made by lab technicians. This specific type of tool mark examination remains an unreliable subjective assessment of the particular lab examiner, whose practice continues unchecked by peers in the scientific community. As seen by the recent drug lab scandal, subjectivity and unchecked peer review can be disastrous to our system of justice.

Ellis was convicted based upon erroneous and unreliable "expert" testimony that all bullets and shell casings found at the scene were fired from the same matched weapon. The testimony was error as the "expert" testimony in Ellis's case relied only upon the exact type of analysis the NAS Report specifically cautions against. There is no basis for the assumption, fundamental to classic tool mark identification theory and technique, that barrel rifling and breech face marks are in fact unique to a particular gun.

Thus, Detective Washington's opinion that the bullets and casings recovered were fired from the same weapon based only upon his review of only the firing pin aperture mark was subjective, and not sufficient to meet the standards necessary for the admission of expert testimony; the testimony should not have been admitted, and its admission violated Ellis's rights to due process and a fair trial as guaranteed by the 5th and 14th Amends and Art. XII. Daubert, 509 U.S. 579 (1993). As such, these new reports could deem inadmissible the ballistics testimony and seriously undermine the case against Ellis. United States v. Monteiro, No.03-10329-PBS (D. Mass. 2005).

Based on all this new evidence, it cannot be said that justice was done. Since the outset of this case, Ellis has maintained that he was not involved in the homicides of Detective Mulligan. Based on this newly discovered scientific evidence, including the NAS report, it is clear that the

ballistics testimony offered at Ellis' third trial was erroneous and unreliable. Ellis was greatly prejudiced by this unreliable ballistics testimony, and if it had been properly restricted, the jury would have heard significantly less forceful scientific evidence. That in turn would have further severed the Commonwealth's claimed tie between Ellis and the charged crimes. At a minimum, this evidence would have been a real factor in the jury deliberations. Grace, 397 Mass. at 306; United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980).

As such, it cannot be said with any confidence that justice was done in this case. The ballistics evidence violated Ellis' rights pursuant to the 5th, 6th, and 14th Amendments and Article XII, and the new evidence highlighting the unreliability of that testimony warrants a new trial. Daubert, 509 U.S. 579 (1993).

G. ELLIS' CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL, PURSUANT TO THE SIXTH AMENDMENT AND ARTICLE XII OF THE MASSACHUSETTS DECLARATION OF RIGHTS, WERE VIOLATED BY THE CLOSING OF THE COURTROOM DURING TRIAL

1. The Constitutional Law Regarding The Right to A Public Trial.

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a ... public trial." U.S. Const. Amend. VI. Put simply, all defendants have the right to a public trial. In re Oliver, 333 U. S. 257, 273 (1948).

A defendant's constitutional right to a public trial includes the right to have the public present during the jury selection stage of the trial. Presley v. Georgia, 130 S. Ct. 721, 724 (2010), citing Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 505 (1984) ("the Sixth Amendment right to a public trial extends to the voir dire of prospective jurors"). See also Commonwealth v. Cohen, 455 Mass. 600, 612 (2010)("The public trial right applies to jury selection proceedings, . . . which are 'a crucial part of any criminal case.'").

It has been said that "The guarantee of a public trial is for the benefit of the defendant; a

trial is far more likely to be fair when the watchful eye of the public is present." Owens v. United States, 483 F.3d 48, 61 (1st Cir. 2007), citing In re Oliver, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."). The "sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." Press-Enterprise, 464 U.S. at 508.

The public trial guarantee has been considered so important that courts have reversed convictions or granted habeas relief where the courtroom was closed for the announcement of the verdict, United States v. Canady, 126 F.3d 352, 364 (2nd Cir. 1997), where a trial inadvertently ran so late one night that the public was unable to attend, Walton v. Briley, 361 F.3d 431, 433 (7th Cir. 2004), and where the trial was closed for the testimony of just one witness, United States v. Thunder, 438 F.3d 866, 868 (8th Cir. 2006). As discussed above, this important right clearly extends to the jury selection process. Presley v. Georgia, 130 S. Ct. 721, 724 (2010).

"Thus, courts recognize a strong presumption in favor of a public trial." Commonwealth v. Cohen (No. 1), 456 Mass. 94, 105 (2010), quoting Commonwealth v. Baran, 74 Mass. App. Ct. 256, 396 (2009). See Press-Enterprise I, 464 U.S. at 509 ("trial closures are to be 'rare and only for cause shown that outweighs the value of openness'").

Excluding spectators from the jury-selection portion of a criminal trial results in a closure of the courtroom, and implicates a defendant's constitutional right to a public trial. Presley v. Georgia, 130 S. Ct. 721, 724 (2010). A courtroom is closed in the constitutional sense regardless of who ordered the closure, and it simply does not matter whether a trial judge or a court officer closed the courtroom. See Cohen, 455 Mass. at 614 (noting that a "court room may be closed in the constitutional sense without an express judicial order"). A courtroom is also closed even if only some members of the public are excluded, resulting in a partial closure. Cohen, 456 Mass. at

107. The only issue is whether the courtroom was actually closed and whether any portion of the public was excluded from any portion of the trial.

A trial is also considered to be closed to the public if any portion of the trial is conducted outside the actual courtroom and outside of the watchful eye of the public, because such secrecy can cause proceedings to "descend into a sense of informality and intimacy that may not be conducive to the proper administration of justice." Commonwealth v. Patry, 48 Mass.App.Ct. 470, 475 (2000)(Conviction reversed on appeal for public trial violation, where instructions to jury were given in deliberation room). See also Levine v. United States, 362 U.S. 610, 616 (1960).

Unless certain mandatory steps are taken by the trial judge on the record before a courtroom is closed, such a closure of the courtroom results in a constitutional violation that requires reversal. Cohen, 456 Mass. at 107. See also Commonwealth v. Joseph Downey, 78 Mass.App.Ct. 224 (2010) (murder conviction reversed on appeal because of public trial violation, the record did not support a finding of a knowing waiver of the defendant's right to a public trial, and that the closure was broader than necessary because individual voir dire could have been done at sidebar in open court instead of being conducted in private); Commonwealth v. Donna Walcott, Mass.App.Ct. 08-P-1047 (August 25, 2010) (conviction reversed when courtroom closed without contemporaneous judicial findings to justify closure).

Specifically, the trial judge must make a determination on the record that satisfies four requirements articulated by the United States Supreme Court: 1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; 2) the closure must be no broader than necessary to protect that interest; 3) the trial court must consider reasonable alternatives to closing the proceeding; and 4) it must make findings adequate to support the closure. Cohen, 456 Mass. at 107, quoting Waller v. Georgia, 467 U.S. 39, 48 (1984).

Without these express judicial findings on the record, a courtroom closure violates a defendant's 6th Amendment right to a public trial. Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007). If a trial judge did not make these findings on the record to establish that closure of the courtroom was necessary before the courtroom was closed, then a defendant's conviction must be reversed. United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994)("Closure may not be retroactively validated.").

Violation of the public trial right "is a structural error and not susceptible to harmless error analysis." Cohen, 456 Mass. at 105, quoting Baran, 74 Mass. App. Ct. at 296. The burden is on the defendant to show that the public was excluded. Cohen, 456 Mass. At 105. If in fact a defendant's public trial rights were violated by a closure of the courtroom to the public during jury selection, a new trial is constitutionally required. Presley v. Georgia, 130 S. Ct. 721, 724 (2010). See also United States v. Agosto-Vega, 09-1158 (1st Cir. August 18, 2010)(reversal where excluding public from jury selection resulted in structural error).

2. The Constitutional Law Regarding Waiver of Constitutional Rights

The failure of a defendant to expressly demand that a constitutional right be enforced is not to be construed as a waiver of the right. Barker v. Wingo, 407 U.S. 514, 528 (1972).

Instead, waiver is found only where the defendant personally makes "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Cf. Commonwealth v. Lavoie, 464 Mass. 83 (2013)(in limited circumstances a defense attorney who knows that the public is being excluded from the courtroom can waive a public trial right if the attorney testifies that there was a strategic reason for doing so).

However, under federal constitutional law, a constitutional right can only be waived when a defendant affirmatively, knowingly, and intelligently waives the right. Carnley v. Cochran, 369 U.S. 506, 516 (1962)(Waiver of constitutional right must never be presumed, and to be found must

appear from the record to have been intelligently and understandingly made). See also Johnson v. Sherry, 586 F.3d 439 (6th Cir. 2009).

Absent a clear record that reflects an affirmative, knowing, and intelligent waiver of a constitutional right made personally by a defendant, it is the duty of any reviewing Court to honor the constitutional right and find that there has been no waiver. See Johnson v. Zerbst, 304 U.S. 458 (1938)(courts indulge every reasonable presumption against waiver of constitutional rights, and any doubts must be resolved in favor of the defendant).

3. The Commonwealth Should Bear the Burden of Proving That the Courtroom Was Open

Ellis objects to any ruling that places the burden of establishing a closed courtroom on a defendant, where defendants have the least access to information needed to establish that public exclusion occurred. The due process rights of all defendants pursuant to the 5th and 14th Amendments and Article XII demand that the burden be placed on the Commonwealth to establish that a defendant's 6th Amendment right to a public trial was not violated and that the courtroom was open to the public. See Presley v. Georgia, 130 S. Ct. 721, 724 (2010)(the party seeking to close the courtroom bears the burden of justifying a closure); Mullaney v. Wilbur, 421 U.S. 684 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971)(the prosecution bears the burden of proving that warrantless police actions were constitutional and did not violate defendant's rights); Brady v. United States, 397 U.S. 742, 748-49 (1970)(guilty pleas); In re Winship, 397 U.S. 358 (1970)(due process requires prosecution bear the burden of proof).

4. Ellis' 6th Amendment Rights to A Public Trial Were Violated, Where The Public Was Excluded From the Jury Selection Without Express Findings From the Court To Justify Such A Courtroom Closure

Regardless of which party bears the burden of proof, here the courtroom was closed to the public during the jury selection process. Members of the public were excluded from the main courtroom while the potential jury was being questioned.

In support of this assertion, Ellis cites to the trial transcripts. See I-4 (beginning in the judge's lobby); I-55 (court conducts a "colloquy held voir dire"); I-55, 63 (where everyone except one potential juror is removed from the courtroom, and the individual juror questioning takes place in the courtroom and then attorney objections are made at sidebar).

Additionally, Ellis has also attached a supporting affidavit regarding members of the public being excluded from the courtroom during the jury voir dire. (App. Z, CC).

Further, the record reflects that the Court failed to adequately and contemporaneously explain or justify this closing of the courtroom. (See entire transcripts).

The closure of a courtroom is a structural error and prejudice is not required. Presley v. Georgia, 130 S. Ct. 721, 724 (2010). Here, the exclusion of the public from jury selection violated Ellis' 6th Amendment right and this structural error requires reversal. See In Re Oliver, 333 U.S. 257, 272 (1948)(Supreme Court explained that a defendant has a particularly compelling interest in having his family present at his trial). See also Waller v. Georgia, 467 U.S. 39, 46 (1984)("the presence of interested spectators may keep [defendant's] triers keenly alive to a sense of their responsibility and to the importance of their functions.").

Ultimately, the courtroom was closed to the public, and the record does not reflect any express findings by the Court to justify closing the courtroom to the public during the jury selection process. As such, there was structural error and a new trial is constitutionally required. Cohen, 456 Mass. at 107. See also Presley v. Georgia, 130 S. Ct. 721, 724 (2010); Owens v. United States, 483 F.3d 48, 63 (1st Cir. 2007); Commonwealth v. Joseph Downey, 78 Mass.App.Ct. 224 (2010).

5. Ellis Never Waived His Rights to A Public Trial And to Be Present

Ellis anticipates that the Commonwealth will attempt to argue some form of waiver to avoid a new trial. The Commonwealth bears the burden of proving waiver.

Here, the Commonwealth has presented no evidence that Ellis knew about his 6th Amendment right to a public trial or that Ellis ever discussed waiving these rights with his prior attorneys. The Commonwealth has also failed to establish any conceivable duty to object.

There is no evidence that trial counsel for Ellis knew about the public being excluded, there is no evidence that counsel ever waived Ellis' rights, and there is no evidence that trial counsel had any strategic reason for waiving Ellis' rights. (See transcripts). As such, the Lavoie case is inapplicable to the present case. See Lavoie, 464 Mass. 83 (2013)(in limited circumstances a defense attorney who knows that the public is being excluded from the courtroom can waive a public trial right if the attorney testifies that there was a strategic reason for doing so).

Additionally, Ellis asserts that this Court should find that he never knowingly or intelligently waived his 6th Amendment public trial rights, and that his trial attorney never waived the right on his behalf. (See App. CC – Affidavit of Sean Ellis).

The evidence before this Court establishes that Ellis did not ever knowingly or intelligently waive his right to a public trial, a right that included the jury selection portion of the trial. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Grant, 78 Mass.App.Ct. 450 (2010). (See also entire transcripts; App CC).

Under these circumstances, any claimed inferences of waiver must fail. Johnson v. Zerbst, 304 U.S. 458 (1938). Compare Martineau v. Perrin, 601 F.2d 1196, 1200 (1st Cir. 1979) (emphasis supplied)(finding waiver where "petitioner's attorney was caught on the horns of a [strategy] dilemma... Counsel fully explained the situation to petitioner, told him what (counsel's)

decision was and then informed his client that 'at any time he wanted to' he could get up and object himself, which petitioner did not do.").

Ellis asserts that federal constitutional law requires a waiver of 6th Amendment rights to be made only after a defendant is informed of the right, understands the right, and then personally, knowingly, and intelligently elects to waive a right. See Carnley v. Cochran, 369 U.S. 506, 516 (1962)(Waiver of constitutional right must never be presumed, and to be found must appear from the record to have been intelligently and understandingly made).

The absence of any evidence of an express waiver of public trial rights, combined with undisputed evidence that Ellis was never informed of his public trial rights or asked whether he wanted to waive the right, creates a record establishing that there was no waiver of Ellis' 6th Amendment public trial rights in the constitutional sense. See Johnson v. Zerbst, 304 U.S. 458 (1938)(courts indulge every reasonable presumption against waiver of constitutional rights, and any doubts must be resolved in favor of the defendant). As such, this Court should find that no waiver occurred here. Since no waiver occurred, a new trial is required. Owens v. United States, 483 F.3d 48, 64 (1st Cir. 2007).

6. Any Claims of De Minimis Must Fail

The Commonwealth may also argue de minimis. Ellis objects to any assertion that the closure of the courtroom here was de minimis, where the courtroom was closed to the public for the entire individual jury selection. See Presley v. Georgia, 130 S. Ct. 721, 724 (2010)(conviction automatically reversed where one single spectator was excluded from part of jury selection); Owens v. United States, 483 F.3d 48, 61 (1st Cir. 2007); Commonwealth v. Cohen, 456 Mass. 94, 109 (2010) (where, "pursuant to an established policy, court officers told a number of individuals that they would not be permitted in the court room during the jury selection process.... [That

closure] cannot qualify as inadvertent. Nor can it be characterized as so trivial or de minimis that it falls entirely outside the range of 'closure' in the constitutional sense").

In fact, the United States Supreme Court has held that excluding the public from the courtroom during the questioning of jurors is structural error, not subject to any analysis for triviality or prejudice. Presley v. Georgia, 130 S. Ct. 721, 724 (2010). Here, Ellis has established structural error. Id.

Therefore, this Court should find based on the undisputed evidence, transcripts, and affidavits, that the closure of the courtroom in this case was not de minimis. Id.

7. The Related Ineffective Assistance of Counsel Claim

Ellis finally notes that he is also raising an ineffective assistance claim in connection with the public trial violation, arguing that any failure of trial counsel to advise Ellis of his public trial rights and protect Ellis' 6th Amendment public trial rights constituted ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1988); Johnson v. Sherry, 586 F.3d 439 (6th Cir. 2009)(Murder conviction remanded, Defense counsel's failure to object to closure denied defendant substantial trial right). See also Owens v. United States, 483 F.3d 48, 64 (1st Cir. 2007) (holding that failure to object to the courtroom closure for a day of jury selection deprived the defendant of a substantial fair trial right).

Here, if the Commonwealth were to claim that trial counsel somehow waived Ellis' 6th Amendment public trial right by failing to object, that would be ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1988). Additionally, the evidence before this Court is that Ellis never had any discussion with his trial counsel about Ellis' 6th Amendment right to a public trial. (App. CC).

As such, if this Court were to find that trial counsel waived Ellis' public trial rights without discussing such a waiver with Ellis, then trial counsel provided ineffective assistance of counsel. Id.

The Commonwealth cannot have it both ways. Either trial counsel did not waive Ellis' rights and thus there was structural error requiring a new trial, or trial counsel somehow waived Ellis' rights without knowing about the public trial violation and without telling Ellis and thereby deprived him of an available ground of defense, requiring a new trial. Under either scenario, a new trial is constitutionally required. Strickland v. Washington, 466 U.S. 668 (1988).

For all the foregoing reasons, and in accordance with his rights pursuant to the 5th, 6th, and 14th Amendments and Article XII of the Massachusetts Declaration of Rights, Ellis respectfully requests that this Honorable Court grant him a new trial. Presley v. Georgia, 130 S. Ct. 721, 724 (2010). Alternatively, Ellis requests an evidentiary hearing.

H. ELLIS WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL PURSUANT TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE XII OF THE MASSACHUSETTS DECLARATION OF RIGHTS BY THE CUMULATIVE IMPACT OF ALL THE ERRORS, WITHHELD EVIDENCE, NEWLY DISCOVERED EVIDENCE, AND THE FAILURES AT TRIAL

It is clear that "[a] defendant in a criminal case has a right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment." Rogers v. Richmond, 365 U.S. 532 (1961); Newhall v. Boyle, 366 F. Supp. 871, 872 (D. Mass. 1973).

"The Constitution guarantees a fair trial through Due Process Clauses. " United States v. Olano, 507 U.S. 25, 28 (1993); Strickland v. Washington, 466 U.S. 668, 684-85 (1984). The guarantees of due process and a fair trial are also contained in Article I, X, XI, XII of the Massachusetts Declaration of rights. Moe v. Secretary of Administration and Finance, 382 Mass. 629, 633 n.4 (1981); Commonwealth v. Geagan, 339 Mass. 487 (1959).

In this case, the nature and extent of the errors and the new evidence, evaluated either individually or cumulatively, necessitates a new trial. See Strickland v. Washington, 466 U.S. 688 (1984); United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967). "Where there are numerous errors at trial, the reviewing courts must weigh the cumulative impact" of the errors to determine if the defendant received a fair trial. United States v. Jones, 482 F.2d 747 (D.C.Cir. 1973); Commonwealth v. Cancel, 394 Mass. 567, 568 (1985); Commonwealth v. LaFaille, 46 Mass.App.Ct. 144, 145 (1999).

Here, the combined effect of all of the new evidence and errors makes it impossible to say that justice was done. Instead, it appears that an innocent man is sitting in prison.

Whether justice was done can best be viewed by considering what would happen if all of the withheld and newly discovered evidence was presented to the jury at the time of trial. In that scenario, it cannot be said with any confidence that the jury would have come back with a unanimous guilty verdict. In all likelihood, at least some of the jurors would have had serious doubts as to whether someone else killed Mulligan. As such, it cannot be said that justice was done, and a new trial is required.

I. A NEW TRIAL SHOULD BE GRANTED IN THE INTERESTS OF JUSTICE BECAUSE THE VERDICT IS NOT BASED ON THE WHOLE TRUTH AND THUS IS NOT FREE FROM REASONABLE DOUBT

A new trial should be granted in the interests of justice because the verdict is not based on the truth and thus is in doubt.

Here, the Commonwealth may be tempted to unconstitutionally and instinctively protect its conviction by claiming that certain issues were waived or that certain withheld evidence could somehow have been uncovered earlier.

However, Ellis respectfully reiterates that this Motion for New Trial does not depend on any rules of procedure. The only issue is whether it can still be said with confidence that the verdict was just and that the verdict would remain the same if the jury knew what we now know.

In support thereof, several Massachusetts appellate decisions assert that Rule 30 Motions must be decided in the interests of justice and not in the interests of rules of evidence or procedure. See Commonwealth v. Gordon, 13 Mass. App. Ct. 1085, 1085 (1982)(new trial granted due to doubts about correctness of verdict alone); Commonwealth v. Grace, 397 Mass. 303, 312 (1986) ("The Commonwealth objects generally that the motion judge relied on evidence that was not new. A judge considering a new trial motion has the flexibility, however, to consider in the interest of justice all evidence that might bear on the issues presented."); Commonwealth v. McCarthy, 375 Mass. 409, 415 (1978).

Here, in light of the evidence presented herein, it is clear that the verdict can no longer be given a rubber-stamped vote of confidence. The version of the facts presented to the third trial jury was incomplete and appears to have been manipulated by corrupt police officers involved in a criminal conspiracy with the victim Mulligan. In a case where the victim is a police officer, there is often pressure to obtain swift justice. However, justice is not always swift, and here both the victim and Ellis deserve a trial where the jury hears the full truth. Berger v. United States, 295 U.S. 78 (1935); Commonwealth v. Pring-Wilson, 448 Mass. 718 (2007).

Whether justice was done can best be viewed by considering what would happen if all of the withheld and newly discovered evidence was presented to the jury at the time of trial. In that scenario, it cannot be said with any confidence that the jury would have come back with a unanimous guilty verdict. Ellis had a due process right to be provided with the exculpatory evidence and then to use it at trial to create reasonable doubt, to establish third party culprits, and to support a Bowden defense. In all likelihood, if the jury had heard all of the withheld

exculpatory evidence, at least some of the jurors would have had serious doubts as to whether someone else killed Mulligan and doubts as to whether Ellis is innocent.

In light of the withheld evidence, it cannot be said with any confidence that justice was done. As such, this Court should order a new trial. Smith v. Cain, 132 S.Ct. 627 (2012); Commonwealth v. Merry, 453 Mass. 653 (2009) (exculpatory information discovered after conviction warranted the allowance of a motion for new trial); Commonwealth v. Grace, 397 Mass. 303, 305 (1986).

J. THE COMMONWEATLH'S FAILURE TO ESTABLISH THAT THE GRAND JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF THE LAW AS WELL AS THE APPLICABLE JUSTIFICATIONS AND DEFENSES VIOLATED ELLIS' RIGHTS TO DUE PROCESS, INDICTMENT BY GRAND JURY, AND TO A FAIR TRIAL PURSUANT TO THE 5TH, 6TH, AND 14TH AMENDMENTS AND ARTICLE XII.

In this case, the integrity of the grand jury was irreparably impaired where the Commonwealth did not provide the grand jurors with proper instructions regarding the elements of murder, joint venture, and defenses, and did not preserve or record any instructions given. Commonwealth v. Javon Walczak, 463 Mass. 808 (December 12, 2012)(juvenile murder case properly dismissed where grand jurors were not properly instructed on the legal significance of mitigating circumstances or defenses).

Here, there is no evidence that the grand jury which indicted Ellis were ever instructed on the elements of the charged crimes, the applicable defenses based on the evidence, or lesser-included offenses. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Walczak, 463 Mass. 808 (2012).

It is true that the Walczak majority distinguished between juveniles and adults. However, since Massachusetts utilizes a grand jury to charge citizens with serious crimes and to commence a process that deprives them of their liberty, the grand jury "must comport with the demands of the

Due Process and Equal Protection Clauses of the Constitution." Evitts v. Lucey, 469 U.S. 387, 393 (1985), quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956). Here, Ellis' federal constitutional rights to due process and equal protection require that the grand jury be correctly instructed on the elements of the charged crimes as well as mitigating circumstances and defenses. Evitts v. Lucey, 469 U.S. 387, 393 (1985); Walczak, 463 Mass. at 836 (Gants, J., concurring)(grand jury must be instructed on the elements of murder and on mitigating circumstances and defenses, regardless of whether the defendant is a juvenile or an adult.).

In Walczak, the concurrence stated:

> Evidence of mitigating circumstances, however, is meaningless to a grand jury that have not been provided with the guidance necessary to understand its legal significance. It makes no sense to require a prosecutor to provide the grand jury with evidence of reasonable provocation and sudden combat in a case such as this, where there is strong evidence of both reasonable provocation and sudden combat, but not also to require a prosecutor to instruct the grand jury that malice is an element of murder in the second degree, and that reasonable provocation and sudden combat negate malice, so that grand jurors know of the relevance of such evidence in deciding whether to indict the defendant for murder or voluntary manslaughter.
>
> It also makes no sense for a prosecutor to owe a duty to provide such a legal instruction only where the grand jury know enough about the law of homicide to ask for such an instruction. The law of homicide is too complex reasonably to expect a grand jury to know the legal significance of reasonable provocation or sudden combat without instruction by a prosecutor, or even to recognize that it may be an issue for which they should seek legal guidance. In contrast with indictments for some other crimes, an indictment charging murder does not even list the elements of the crime, alleging only that the defendant "did assault and beat" the victim "with intent to murder him ... and by such assault and beating did ... murder" the victim. G.L. c. 277, § 79. Therefore, reading the proposed murder indictment would not alert a reasonable juror to the legal significance of a defendant committing the killing in a heat of passion arising from reasonable provocation or sudden combat. Contrast *Hamling v. United States,* 418 U.S. 87, 117 (1974) ("an indictment is sufficient if it, first, contains the elements of the offense charged"); *United States v. Superior Growers Supply, Inc.,* 982 F.2d 173, 176 (6th Cir.1992) ("indictment will usually be sufficient if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense").
>
> Under our holding in *Attorney Gen.* v. *Pelletier,* 240 Mass. 264, 307 (1922), a prosecutor owes a duty to instruct a grand jury as to the law "in appropriate instances." This duty is consistent with our recognition that "[a] prosecutor has the responsibility of a minister of

> justice and not simply that of an advocate," including the responsibility "to see that the defendant is accorded procedural justice." Comment [1] to Mass. R. Prof. C. 3.8, as amended, 428 Mass. 1305 (1999). It is also consistent with the United States Department of Justice's understanding of the role of a prosecutor in a Federal grand jury: "The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration." United States Department of Justice, United States Attorneys' Manual § 9-11.010 (1997). See N.Y.Crim. Proc. § 190.25(6) (McKinney 2007) ("The legal advisors of the grand jury are the court and the district attorney, and the grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duties or any matter before it, and such instructions must be recorded in the minutes"). See also *State v. Edmonson,* 113 Idaho 230, 238 (1987) ("prosecutor is expected to act as the grand jury's legal advisor"). See generally LaFave, *supra* at § 15.2(e), at 476 ("The prosecutor serves not only as the state's advocate in presenting its case to the grand jury, but also as the primary legal advisor to the grand jury").
>
> I do not believe that a prosecutor should only provide this legal instruction where the grand jury know enough about the law of homicide to ask for such an instruction or where the defendant is a juvenile facing a possible murder indictment. I believe that where, as here, it would impair the integrity of the grand jury if evidence were withheld regarding the circumstances suggesting that the defendant killed in a heat of passion arising from reasonable provocation or sudden combat, it equally impairs the integrity of the grand jury if *legal instructions* are withheld that would enable them to understand the legal significance of such evidence.

Walczak, 463 Mass. at 836-839 (December 12, 2012)(Gants, J., concurring).

Here, especially given the facts of this case, the Commonwealth's claim that two persons played differing roles in the crime, and the evidence suggesting that Ellis was not the shooter, it was constitutionally imperative that the grand jury be given correct instructions regarding the elements of the crime, joint venture, instructions on lesser-included offenses, and instructions on defenses, including accessory after the fact and mere association. Because the Commonwealth has failed to establish that the grand jurors were properly instructed, the integrity of the grand jury was irreparably impaired such that the subsequent trial was unconstitutional. Walczak, 463 Mass. 808 (2012). See also United States v. Olano, 507 U.S. 25, 28 (1993); Evitts v. Lucey, 469 U.S. 387, 393 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Attorney General v. Pelletier, 240 Mass. 264 (1922); Commonwealth v. O'Dell, 392 Mass. 445 (1984).

Additionally, implicit in the Walczak holding regarding the content of instructions to the grand jury is a requirement that the Commonwealth actually record and preserve instructions given to the grand jurors so that the instructions may be reviewed by appellate courts. Walczak, 463 Mass. at 836. At a minimum, based on Walczak the Commonwealth was required to record legal instructions given to the grand jury and to provide them to Ellis and his trial attorney. Id. Here, the Commonwealth's failure to record or preserve any grand jury instructions deprived Ellis of his right to present a complete defense or a complete appeal (including challenging the content of the grand jury instructions and filing a motion to dismiss), impaired the integrity of the grand jury, and deprived Ellis of effective assistance of counsel pursuant to the 5th and 6th Amendments. Strickland v. Washington, 466 U.S. 668 (1984); United States v. Dionisio, 410 U.S. 1, 16 (1972).

Further, to the extent there is any argument that Walczak should not apply to Ellis or that Ellis somehow has less constitutional rights than juveniles with respect to a grand jury indictment, he asserts that his federal constitutional rights to equal protection and due process require dismissal because "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule is in contrast to the principles of equity and fairness required by the United States Constitution. United States v. Johnson, 457 U.S. 537, 556 n.16 (1981) (emphasis in original); Griffith v. Kentucky, 479 U.S. 314 323 (1986).

Next, because Courts are now analyzing the legality of instructions given to the grand jury, constitutional due process and the right to indictment by grand jury require that the grand jury instructions be recorded and that Ellis be provided with the instructions prior to trial and appeal so that he may adequately challenge the indictments and convictions against him. Holmes v. South Carolina, 547 U.S. 319 (2006); Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1993); United States v. Olano, 507 U.S. 25, 28 (1993); Strickland v. Washington, 466

U.S. 668 (1984). Although grand jury proceedings are kept secret while they are being conducted, once they are completed due process requires that a defendant be entitled to learn everything that occurred in the grand jury. Smith v. Cain, 132 S.Ct. 627 (2012); Brady, 373 U.S. 83 (1963).

Here, the Commonwealth's failure to establish that the grand jury was properly instructed violated Ellis' rights to due process, to indictment by a grand jury, and to a fair trial, and withheld favorable evidence from Ellis, pursuant to the 5th, 6th, and 14th Amendments and Article XII. United States v. Olano, 507 U.S. 25, 28 (1993); Evitts v. Lucey, 469 U.S. 387, 393 (1985); Strickland v. Washington, 466 U.S. 668 (1984); Attorney General v. Pelletier, 240 Mass. 264 (1922); Commonwealth v. O'Dell, 392 Mass. 445 (1984); Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857); and Commonwealth Walczak, SJC-11155 (2012)(juvenile murder case y dismissed because Commonwealth failed to instruct grand jury on murder, mitigating circumstances or defenses).

In light of the nature of the grand jury impairment and the lack of evidence presented and the new exculpatory evidence that was withheld, the Commonwealth's failure to establish that correct legal instructions were given to the grand jury and the absence of a recording of the legal instructions given to the grand jurors deprived Ellis of his rights to due process and to a fair presentation to the grand jury, such that his subsequent trial was also unconstitutional. See Evitts v. Lucey, 469 U.S. 387, 393 (1985); Francis v. Franklin, 471 U.S. 307, 313 (1985); Walczak, 463 Mass. at 836 See also United States v. Dionisio, 410 U.S. 1, 16 (1972)("[t]he Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' "[quoting U.S. CONST. amend. V].). As such, the convictions must be reversed.

Further, to the extent that trial counsel and prior appellate counsel could have raised this issue earlier without any supporting case law, Ellis asserts that he was deprived of an available

ground of defense such that his 6th Amendment and Article XII rights to effective assistance of counsel were violated. Strickland v. Washington, 466 U.S. 668 (1984). As such, the convictions must be reversed.

VII. CONCLUSION

As Justice Harlan stated in his concurrence in In Re Winship, 397 U.S. 358 (1970), "the truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief."

In this case, while it is impossible to measure the beliefs of the jury that convicted Ellis at his third trial, it is important to note that two prior juries were hopelessly deadlocked with the same evidence. It is also important to note that the alleged fingerprint evidence has now been invalidated by the SJC, and that the only alleged eyewitness was the niece of Detective Acerra.

When the withheld exculpatory evidence is examined with that background, it cannot be said with any confidence that the jury verdict would be the same if the jury heard all of the withheld evidence. At a minimum, the withheld evidence creates a reasonable doubt as to whether Sean Ellis is actually innocent.

For all the foregoing reasons, Sean Ellis respectfully requests that this Honorable Court grant him a new trial. Ellis further relies on the attached documents within the Appendix.

Alternatively, if this Court is not inclined to grant the motion solely on the papers, Ellis requests an evidentiary hearing. Commonwealth v. Licata, 412 Mass. 654, 660-661 (1992)(evidentiary hearing is required if a serious issue is raised by taking as true the allegations in any documents or affidavits supporting the Motion for New Trial).

Respectfully Submitted,
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BBO # 679716

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party and upon any party appearing pro se by first class mail, postage prepaid or by hand delivery.

Dated: 3/1/13 Signed: _____