214R #1 - 3.05

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1993-1174

COMMONWEALTH

vs.

SEAN ELLIS

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

At approximately 3:45 a.m. on September 26, 1993, Boston Police Detective John Mulligan ("Mulligan"), of Area E-5, was found dead inside his motor vehicle, shot five times in the face. Mulligan's Ford Explorer was in the parking lot of the Roslindale Walgreens, where he worked overnight on a paid police detail. Just over a month later, the Commonwealth charged nineteen-year-old Sean Ellis ("Ellis") and co-defendant Terry Patterson ("Patterson") with Mulligan's murder. The two were tried separately. After two mistrials Ellis was found guilty on September 14, 1995 and sentenced to life in prison.

Now before the court is Ellis's second motion for a new trial, setting forth alleged newly discovered evidence which Ellis argues casts doubt on the justice of his conviction. According to Ellis, this evidence reveals Mulligan's involvement in a corruption scheme with detectives who were significantly involved in the homicide investigation. Ellis contends that these detectives had a motive to solve Mulligan's homicide as quickly as possible before others, investigating who might have killed Mulligan and why, uncovered the detectives' misdeeds. For this reason and because discovery produced during the litigation of this motion uncovered additional evidence of other possible culprits, Ellis's Second Motion for a New Trial is **ALLOWED**.

BACKGROUND

I. Procedural Summary

On October 27, 1993, Ellis was indicted on one count of first-degree murder; two counts of illegal possession of a firearm; and one count of armed robbery. On September 16, 1994, Ellis filed a motion to suppress identification that was denied on December 12, 1994 after an evidentiary hearing.

On January 4, 1995, Ellis's first trial began. On January 21, 1995, after eight days of deliberation, a jury found Ellis guilty on the firearm indictments. The jury was, however, deadlocked on the other two charges, and the court declared a mistrial. Ellis's retrial on the remaining indictments commenced on March 21, 1995. On April 1, 1995, the jury again reported a deadlock, and the court declared a second mistrial. On September 6, 1995, Ellis's third trial began. On September 14, 1995, a jury found Ellis guilty of first-degree murder and armed robbery. The court sentenced Ellis to life in prison on the murder conviction; thirty to forty years on the armed robbery conviction; and four and one-half to five years on the firearm convictions to run concurrent with the life sentence.

On September 29, 1998, Ellis filed a motion for a new trial and reconsideration of his motion to suppress the identification. The trial court denied the motion without a hearing on March 4, 1999. On December 6, 2000, the Supreme Judicial Court ("SJC") denied Ellis's consolidated direct appeal of his conviction and new trial motion. See *Commonwealth* v. *Ellis*, 432 Mass. 746 (2000).

On March 13, 2013, Ellis filed his second motion for a new trial which is now before the court and which relies upon newly discovered evidence obtained pursuant to Freedom of Information Act ("FOIA") requests. After reviewing this evidence, on June 5, 2014, the court

ordered the Commonwealth to turn over additional discovery, which revealed more evidence that supports Ellis's motion. The court held an evidentiary hearing on August 25, 26, 27, 2014; November 17, 18, 19, 2014 and December 10, 2014.

II. Summary of Evidence at Ellis's Trial

Where, as here, the trial judge is not the judge reviewing the new trial motion, the motion judge "must carefully scrutinize the trial record with a liberal attitude in order to determine fairly whether newly discovered evidence demonstrates that justice may not have been done." *Commonwealth* v. *Leaster*, 395 Mass. 96, 101 (1985). At the outset, the court notes that it credits the assertion of Ellis's trial counsel that they may have utilized a different defense strategy had the alleged newly discovered evidence been available at the time of Ellis's trial. Accordingly, the following summary not only outlines evidence presented at trial, but incorporates other facts relevant to this decision, including evidence in the record that is not newly discovered, but was not offered at trial. See *Commonwealth* v. *Wright*, 469 Mass. 447, 465 (2014).

A. Investigation

At approximately 3:30 a.m. on September 26, 1993, Walgreens employee Steven Bannister ("Bannister") took a break from his shift and headed to a nearby Dunkin' Donuts. On his way out, Bannister walked by Mulligan's vehicle and noted that Mulligan appeared to be sleeping. Fifteen minutes later, Bannister returned from his break and observed that Mulligan's face was covered in blood. Bannister's manager dialed 911 at approximately 3:49 a.m.

Officer Steven Kelly ("Officer Kelly") was the first to respond to the scene. Officer Kelly reported that he observed Mulligan in the driver's seat of the vehicle with blood and brain matter on his face. Officer Kelly also noted the passenger side door of Mulligan's vehicle was

locked, and when he opened the unlocked driver's side to administer first aid, he found that Mulligan did not have a pulse and observed that Mulligan's service weapon was missing.

Later that morning, Detective Richard Foilb ("Det. Foilb") examined Mulligan's vehicle for fingerprints and inventoried its contents. Det. Foilb's handwritten inventory of the vehicle was highly detailed, and listed the precise quantities of twenty-two unique items. Among the items Det. Foilb noted were taken from what he identified as the "glove compartment between the front seats" were "9 Dunkin Donuts napkins[;] 1 [unintelligible] blk rim sunglasses[;] 1 Boston Police Fleet Keychain (3316) w/1 key[;] 1 Panasonic Battery ser#063475[;] 1 unopened pkg. Lucky Strikes[;] 1 key ring w/whistle, 2 keys + cuff key[; and] 6 black plastic (small) triangular shape." [1] Det. Foilb's inventory did not list or otherwise account for a cell phone that Mulligan was known to carry. As a result, at approximately 1 p.m., Sergeant Detective Thomas O'Leary ("Sgt. O'Leary") asked Detective Walter Robinson ("Det. Robinson") and two other detectives to "coordinate the investigation regarding" Mulligan's cell phone, which Sgt. O'Leary believed had been stolen.

Hyde Park resident Victor Brown, who lived in a neighborhood behind Walgreens contacted police on September 26 after hearing about Mulligan's murder in the media. Detective Daniel Keeler ("Det. Keeler") and two other detectives responded to Victor Brown's home where he told them that he awoke at 3:20 a.m. to what sounded like a diesel car engine. When he looked out his window he observed a "chocolate brown colored 87 V.W. Rabbit." Victor Brown reported that he saw two men exit the vehicle and heard the men laughing as they walked down a

[1] Det. Foilb's detailed inventory also included "Black flashlight from under pass. seat;" from "between front seats . . . 1 Yellow Lighter[;] 1 Open pkg Lucky Strikes[;] 1 Pagenet Pager;" from the "Pass. Door Compartment . . . 3 Dapper O'Neil Bumper Stickers;" from "Under Front Seat . . . 1 Plastic cup (color-blue/green)[;] 1 roll duct tape;" from the "Ashtray . . . 1 Cig Butt-No Brand;" from "Under Back Seat—Drivers [sic] Side . . . 1 Purple Lighter;" from the "rear Section . . . 1 Manilla Envelope Containing: 1 Jar Blk Fingerprint Powder[;] 1 Jar White Fingerprint Powder[;] 1 Magnifying Glass[;] 1 Fingerprint Brush[;] 1 Package of Latent Print Lifts[;] 1 Folded Manilla Envelope."

footpath that went out to American Legion Highway where they took a right, toward the direction of Walgreens. The report of this incident indicates that the detectives entered Victor Brown's home, looked out the window he referred to in his statement, and realized that he would not have been able to see the end of the path due to "heavy vegetation."

Victor Brown also told the detectives that he thought the men were dropping off a stolen car, so he decided to go outside to check the car's registration. Once outside, Victor Brown observed that the car's windows were tinted. Victor Brown observed a black female in the car and asked if she was all right. The female responded that she was. Then, instead of looking at the vehicle's license plate, Victor Brown decided to go back inside his house in case the men returned. Once he was inside, Victor Brown heard what sounded like a vehicle door closing and an engine starting up. He looked back out of his window and saw the car take off at "a high rate of speed." Victor Brown reported that the whole episode lasted fifteen minutes.

Police asked for the public's help to locate the brown Volkswagen after speaking with Victor Brown and another witness, Adolph DeSalvo ("DeSalvo"). DeSalvo, a delivery person for the *Boston Globe*, also reported seeing a small brown car with tinted windows and three occupants coming off of American Legion Highway where the Walgreens was located, and onto Hyde Park Avenue, between 3:15 and 3:20 a.m. the night of the murder. DeSalvo observed that the driver was dark skinned, that the front passenger was a man, and that the rear passenger was a woman.

Another witness, Rosa Sanchez ("Rosa"), also contacted police on September 26.[2] Area E-5 Detective Kenneth Acerra ("Det. Acerra"), his supervisor Sergeant Leonard Marquadt ("Sgt.

[2] Accounts of how Rosa got in touch with police vary. Testimony from Ellis's suppression hearing and trial indicates that Rosa's mother-in-law contacted Rosa's brother-in-law, Officer Elvis Garcia ("Officer Garcia"), after learning that Rosa had been at Walgreens around the time of the murder. However, according to Officer Garcia's report, written over one year later, on November 19, 1994, Officer Garcia stated that he received a call from Rosa at

Marquadt") and Homicide Detective John Brazil ("Det. Brazil") responded to Rosa's home. Ten or fifteen minutes later, Det. Acerra, Sgt. Marquadt, and Det. Brazil drove back to Area E-5. Approximately one hour later, Det. Acerra and his partner, Det. Robinson, returned and drove Rosa to the police station to make a statement.[3]

Rosa would later testify that she visited Walgreens at 3:05 a.m. on the night of Mulligan's murder with her husband Ivan Sanchez ("Ivan"), and brother-in-law, Javier. Rosa went in to buy soap while Ivan and Javier waited in the car. Rosa stated that as she walked from the car to the Walgreens entrance, she saw Mulligan sleeping in his truck and observed a black male crouching next to the truck. According to Rosa, when the man looked up and made eye contact with her, she became nervous and went inside Walgreens for about twenty minutes. When she exited Walgreens at approximately 3:25 a.m., she saw the same man that she previously observed crouching by the truck, and another black male standing near some payphones.

On September 27, 1993, the *Boston Globe* published an article about Mulligan's death. The article stated that Mulligan had been investigated for misconduct on numerous occasions, including eight accusations of physically abusing citizens.[4]

At 11:20 p.m. that evening, Detective Richard Ross ("Det. Ross") and another detective interviewed Joanne Samuel ("Samuel"). Samuel told the detectives that she and her boyfriend went to Walgreens just before 3 a.m. the night of the murder to purchase socks. According to Samuel, when she arrived she noticed a vehicle parked in front of the store. Inside, Samuel

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approximately 4 p.m. on September 26, 1993. When Rosa indicated that she had "information" regarding the murder, Officer Garcia phoned Area E-5, which was Officer Garcia's own district, and spoke with an "unknown detective," whom he put in touch Rosa. Det. Acerra later testified at Ellis's suppression hearing that he believed Officer Garcia spoke with Det. Brazil, who at that time worked in the Homicide Unit.

[3] The record supports Ellis's assertion that no record of this statement exists.

[4] As discussed *infra*, some newspaper articles are relevant to Ellis's and the Commonwealth's positions on various aspects of the present motion.

stated that she observed an officer whom she recognized as the same officer who typically worked a detail at the Walgreens. Samuel stated that she also observed a white female around thirty years of age with blondish/brown hair in the officer's vehicle talking to him. According to Samuel, when she exited the store approximately ten minutes later, she observed the female inside the officer's vehicle open and shut the door of the vehicle without exiting. Samuel was not called to testify at Ellis's trial.

On September 28, 1993, *The Telegraph* printed an article about Mulligan titled, "Slain Officer Highly Decorated, Frequently Sued." In the article, Boston Police Commissioner William Bratton ("Commissioner Bratton") stated that of the twenty-four complaints filed against Mulligan during his twenty-seven year career, only one was still pending at the time of his death. The article also quoted an attorney who stated that Mulligan had "made a lot of arrests, and he's rubbed some people wrong—some of them legitimately and some of them for wearing his badge like a cowboy." The statement from the attorney continued that the police department gave Mulligan a significant amount of overtime and detail work, even though it knew Mulligan "was a bad actor."

That same day, Det. Foilb processed Mulligan's vehicle for latent fingerprints. Det. Foilb discovered seventeen latent prints, four of which he found on the driver's side of the vehicle. Det. Folib believed that these prints had been left at the same time by different fingers from the same hand. Det. Foilb would later identify these prints as Patterson's.

On September 29, 1993, Ellis's cousins Celine Kirk ("Kirk") and Tracy Brown were murdered in the apartment where Ellis lived with Tracy Brown. Officers were called to the scene around 9:15 p.m. While searching the residence, a detective found a package of disposable diapers and Ellis's photo identification. Det. Brazil met with David Murray ("Murray") while

conducting Kirk and Tracy Brown's homicide investigation. Murray is the uncle of Kirk, Tracy Brown, and Ellis. Murray told Det. Brazil that Ellis had told him that a man named "Craig Patterson" may be involved with Kirk and Tracy Brown's murder. Det. Brazil subsequently determined that "Craig Patterson" was actually two separate people, Craig Hood and Terry Patterson.[5]

The same day, police located a Volkswagen, purportedly matching Victor Brown's description, at 65 Stratton Street where the in-laws of Patterson's brother lived. A detective visited the address and observed one reddish brown, and one chocolate brown, Volkswagen in the driveway. The chocolate brown Volkswagen did not have a license plate and had scratches and residue that the detective believed were consistent with window tint having been removed. The detective determined the car was registered to Patterson's brother, Mark Evans.

On the evening of September 30, 1993, Det. Brazil brought Ellis to the Homicide Unit for questioning pursuant to an unrelated investigation. Ellis was not represented by an attorney and did not ask for one. During questioning, Ellis told Det. Brazil and Detective Dennis Harris ("Det. Harris") that on the night of September 26, 1993, he had ridden his bike to a friend's house, where he hung out with a group of people including Celine Kirk and Patterson. Before leaving his friend's house around 2:30 a.m., he spoke with Tracy Brown, who asked him if he could pick up some diapers on his way home. Patterson agreed to drive Ellis to the store.

Ellis also told the detectives that he used the payphone outside the Walgreens to call his friend, Harriet Griffith ("Griffith"), and volunteered Patterson's pager number so that Patterson could confirm his story. Ellis repeatedly denied having anything to do with Mulligan's murder. Ellis told detectives that a friend had driven him home the night his cousins were murdered. Upon arrival, Ellis saw police and media surrounding the building. When Ellis inquired as to

[5] Craig Hood confessed to murdering Kirk and Tracy Brown on October 3, 1993.

what had happened, he learned that two women had been murdered. Since Ellis had an outstanding warrant, the police presence caused him to be concerned, so Ellis had his friend take him to his girlfriend Letia Walker's house instead. Det. Brazil excused himself during the course of Ellis's interview, sometime around 11:30 p.m., and met with David Murray. Det. Brazil informed Murray that he was "presently questioning his nephew Sean Ellis" and was "able to determine that Sean Ellis was in fact at the scene on the night of Det. Mulligan[']s homicide."

Police also interviewed Ellis's friend Robert Matthews ("Matthews") on October 1. Matthews was the friend who had driven Ellis home the night of Kirk's and Tracy Brown's murders, and corroborated Ellis's statement that Ellis left after he observed police surrounding the building.

The following day, Det. Ross directed Det. Harris and another detective to compose two photo arrays of eight men each. One array contained a picture of Ellis in the top left corner and the other had a picture of Patterson in the top left corner. Around 8:30 p.m. that evening, Detectives Ross and Acerra went to the garage holding Mulligan's vehicle after Det. Acerra told Det. Ross "that Mulligan always had a charger for his portable telephone in the car" and Det. Ross informed Det. Acerra that the charger had not been recovered. When Det. Acerra and Det. Ross reached the vehicle, Det. Acerra asked Det. Ross to open the center console. Det. Ross removed a tray inside the console and observed a cell phone along with a miniature flashlight attached to a pink key ring. Det. Ross's report of this incident states that the cell phone was a Panasonic, model number EB-3510 and serial number 042670. Det. Acerra then submitted a report to Det. Keeler disclosing that on May 1, 1992, Detectives Acerra, Brazil, and Mulligan had purchased four cellular phones together. Two of the phones went to Mulligan while Detectives Acerra and Brazil each received one of the other two. The report also listed the model

and serial numbers of these phones, which all differed from the model and serial number of the phone recovered by Det. Ross. None of the phones in Det. Acerra's report were ever located or examined by police pursuant to the investigation.

On October 2, 1993, Detectives John McCarthy ("Det. McCarthy"), Randall Halstead ("Det. Halstead"), and Harris interviewed Tina Erti ("Erti"), the roommate and friend of Mulligan's girlfriend, Mary Sharpov ("Sharpov"). Erti and Sharpov lived together in the unit upstairs from Mulligan in West Roxbury. Erti told the detectives that after Sharpov and Mulligan began dating, Mulligan bought Sharpov expensive jewelry and furs. According to Erti, Sharpov managed Mulligan's finances, including paying his bills and doing his taxes. Erti told the detectives that she stayed away from Mulligan because he "liked younger women."

Erti was not home the night of Mulligan's death. Sharpov told Erti that she had found out about the murder after "Kenny" [Det. Acerra] came to her home and told her what happened. Sharpov told Erti that she then went down to Mulligan's unit to look for "what she knew that he had for money." When she discovered the money was missing, Sharpov reportedly told Det. Robinson "just in case." Det. Robinson assured Sharpov that "the cops took it and had it at the station."

The detectives also asked Erti if she had ever seen Mulligan "with a small caliber gun with a pearl handle" or Sharpov with "a firearm of any type." Erti responded that she had not, and the detectives asked her if Sharpov had been talking to any of Mulligan's friends since the incident. Erti responded, "Eh, yes, she's talked to, I know, Kenny. I don't if [sic] his name is Acerra . . . . And then Walter . . . ." The detectives confirmed that "Walter" was Det. Robinson. Detectives McCarthy and Halstead interviewed Sharpov the following day. Sharpov confirmed that she contacted Det. Robinson about money missing from Mulligan's condominium and that

Det. Robinson told her that police had taken it. Sharpov also stated that she had never seen Mulligan with a small caliber pearl-handled gun. Neither Erti nor Sharpov testified at Ellis's trial.

On October 3, 1993, Patterson and his lawyer met with Detectives Harris and Brazil to answer questions about the Mulligan investigation. Patterson waived his *Miranda* rights and told the detectives that he owned a four-door maroon Volkswagen Rabbit with tinted windows, and at one time, a vinyl car bra. Patterson corroborated Ellis's version of events, and told the detectives that once he arrived at Walgreens, Ellis got out of his car and went over to a payphone that was near a red truck. Patterson stated that he was drowsy, and when Ellis came out of the store, he threw something in the back seat and woke Patterson up. When asked whether he and Ellis used the foot path by Victor Brown's residence, Patterson told the detectives that he and Ellis had pulled over in that area after leaving Walgreens so that Ellis could relieve himself and the men could smoke marijuana. When asked whether he and Ellis walked back to Walgreens, Patterson stated that while he and Ellis were in the woods by Victor Brown's residence, Ellis said, "Ain't that the store?" and suggested going back to the store to purchase a cigar to roll a marijuana "blunt." However, Patterson never stated that he or Ellis actually did return to the store.

The same day, Detective Joseph Mastrorilli ("Det. Mastrorilli") and another detective visited Rosa's husband, Ivan Sanchez, at his home, and showed him the Patterson and Ellis photo arrays. Ivan did not recognize anyone in the Patterson array. In the Ellis array, Ivan picked a photo that was not Ellis's and said it "looks like the man" he saw outside of Walgreens the night of Mulligan's murder. On a scale of one through ten, Ivan rated his certainty as a seven. The detectives did not ask Ivan to sign or initial this photograph.

Also on October 3, Det. Ross reported that around 12:30 p.m. Detective Donald Hayes ("Det. Hayes") of the Boston Police Crime Laboratory approached Det. Ross and asked him "the story" about Mulligan's cell phone. Det. Hayes responded that "he didn't understand the problem," because he had found it in the afternoon of September 26, 1993, and did not know that anyone was looking for it.

On October 5, 1993, Rosa Sanchez picked Ellis's photo from a photo array. The circumstances of the identification are discussed *infra*. The same day, Detectives Keeler and Brazil interviewed David Murray at the homicide unit in South Boston. Murray told Detectives Keeler and Brazil that Ellis had told him that Patterson drove Ellis to Walgreens to buy Pampers for Tracy Brown the night of Mulligan's murder. According to Murray, when Ellis exited Walgreens, he noticed that Patterson's car was no longer in the parking lot, but instead parked across from American Legion Highway near some bushes. Murray stated that Ellis told him that Patterson ran toward Ellis from across the parking lot and said, "Come on Sean. Come on Sean. Let's go. Let's go." Murray reported that when Ellis got to the car, Patterson said, "Hey man, I shot someone. I shot someone." According to Murray, Ellis then told him that Patterson handed him "[a] revolver, two guns." Det. Keeler asked if Murray was sure the guns were revolvers and Murray corrected himself, saying Ellis had just told him Patterson passed him "two guns." Murray also told detectives that he criticized Ellis for telling police that he was in Walgreens at the time of the murder and that Ellis responded, "Uncle David, but I didn't shoot him." Murray told the detectives that Ellis and Patterson buried the guns in separate plastic bags and in different places, but did not tell him where.

On October 7, 1993, Boston Police Cadets James Alfred ("Alfred") and John Mullan ("Mullan") found two guns two feet away from one another under some brush in a vacant lot

close to Ellis's house.[6] Alfred found a 9 mm Glock with the clip in it. Two feet away, Mullan found a Raven .25 caliber gun with a pearl grip. Det. Brazil wrote a report on the recovery of the weapons.[7] Sergeant Charles O'Hear ("Sgt. O'Hear") identified the Glock as Mulligan's service pistol and Detective Carl Washington ("Det. Washington"), a ballistician, identified the Raven as the gun that killed Mulligan.

On October 12, 1993, Det. Acerra, Det. Robinson, Sgt. Marquadt, and three other detectives visited Celine Kirk's boyfriend, Kurt Headen ("Headen"), to interview him about a page sent to Headen from Robert Matthews's cell phone.[8] According to Sgt. Marquadt's report, after some "brief conversation" with Headen at his home, Marquadt requested that Headen voluntarily go to the homicide unit for further interview. Headen agreed, and was transported by Detectives Acerra and Robinson in an unmarked vehicle.

Headen told detectives that on September 30, 1993, he was awoken around 1 a.m. by several pages from Ellis's father. Ellis's father told Headen that he could not find Ellis and Tracy Brown, and that "some girl" had been killed. Headen's friend Kevin Chisolm drove him to Tracy Brown and Ellis's apartment just after 2:15 a.m. Headen reported that he banged on the door, but no one answered. A neighbor came to the window and told Headen that Celine Kirk and Tracy Brown were dead. Headen spoke with Ellis outside of Headen's house later that morning around 7 or 8 a.m. Headen and Ellis subsequently went to Ellis's mother's house where Ellis's girlfriend, Letia Walker ("Walker"), was also present. When the detectives asked Headen if he

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[6] This refers to Ellis's mother's house, where he resumed living after Kirk and Tracy Brown's murders.

[7] This report is not before the court, but the list of police reports submitted at Ellis's evidentiary hearing as Exhibits 11 and 14 list an October 7, 1993 police report by Det. Brazil that is described as "recovering weapons."

[8] Aside from driving Ellis home the night of Kirk and Tracy Brown's murders, Robert Matthews's role in Mulligan's homicide investigation is unclear. The list of police reports, submitted at Ellis's evidentiary hearing, lists a two-page October 4, 1993 report about Robert Matthews's cellular phone and two October 12, 1993 reports by Lieutenant S. Murphy described as "Common arrests Robert Matthews and Patterson" and "ties between Rob Matthews and Ellis."

knew Patterson, Headen told them he did, but did not get along with him because Patterson had previously "jumped" him.

Sometime before trial, detectives also spoke with witnesses Joseph Saunders ("Saunders") and Evoney Chung ("Chung"). On the night of Mulligan's murder, Saunders and Chung observed two black males on a payphone outside Walgreens. Chung also observed Mulligan sleeping in his car that night and did not see anything wrong with his face. Neither Saunders nor Chung could identify anyone from the Patterson and Ellis photo arrays as the men they saw by the payphones.

On October 18, 1993, Rosa Sanchez picked Ellis out of a lineup and identified him as the man she saw crouching next to Mulligan's car on the night of the murder. Detectives Acerra and Robinson were present when Rosa made this identification. Ellis was the only person who appeared in both the photo array and the lineup. On October 27, 1993, the Commonwealth indicted Ellis for the murder of Mulligan.

B. Pretrial Developments and Proceedings

i. Det. Acerra's Integrity Questioned

On November 1, 1993, the *Boston Globe* printed two articles concerning an October 28, 1993 letter written by Boston Detectives Union President Tommy Montgomery ("Montgomery") demanding that District Attorney Ralph Martin ("DA Martin") remove Assistant District Attorney Phyllis Broker ("ADA Broker") as the chief prosecutor assigned to the Mulligan case. According to the *Boston Globe*, ADA Broker had removed Det. Acerra from the Mulligan Task Force[9] after accusing him of planting a portable cell phone in Mulligan's car several days after

[9] As discussed *infra*, after Mulligan was killed, Boston police formed a fifty-man task force to investigate the homicide.

the murder and accusing him and Det. Robinson of misconduct in their handling of Ivan and Rosa Sanchez. Det. Acerra was subsequently reinstated after Det. Hayes indicated that the phone had been in the car the entire time. In response to Montgomery's letter, DA Martin stated that Det. Robinson had previously assured him that the Detectives Union would not put ADA Broker's performance to a vote. DA Martin said that the fact the union conducted such a vote anyway, "calls into question the integrity of the detectives." The *Boston Globe* further reported that DA Martin supported ADA Broker and kept her on the case pursuant to his agreement with Commissioner Bratton that "there would be no further questioning of the detectives." The articles quoted DA Martin as stating that there was "a healthy sort of tension" between the Suffolk County district attorney's office and the Boston police department ("BPD").

ii. Wilkerson Notes

On January 12, 1994, former Massachusetts State Senator Dianne Wilkerson ("Senator Wilkerson") sent a letter to Ellis's trial attorneys, Norman Zalkind ("Attorney Zalkind") and David Duncan ("Attorney Duncan"). The letter contained notes that Senator Wilkerson took during a conversation with an anonymous caller who claimed to have information about Mulligan's murder ("Wilkerson Notes"). The handwritten notes were not sequential, but contained the following statements:[10] "I'm going to meet with FBI tomorrow"; "Girl Mulligan messin w/was in the car"; "Mulligan messing w/young black girls"; "His own gun was 25 automatic and has disappeared"; "Girlfriend found out, shot him"; "Saw him w/girl went home and got gun and went back and shot him"; "2 guys suddenly traded their guns in for another weapon"; "2 guys forced Armstead to retire early"; "Mulligan had black book"; "Shield Club, right behind there. I was wearing a wire. Not Irish, I'm Black they didn't open up."

[10] The relevant statements are reordered in a logical way for purposes of this decision.

iii. Discovery

On March 31, 1994, Ellis filed a motion for exculpatory evidence. Among Ellis's requests, he asked for "all information provided to the District Attorney's Office by Senator Dianne Wilkerson, a statement of what investigation based on that information was made, including police reports and witness statements, and any evidence developed and witnesses spoken to as a result of that information."

In its opposition to Ellis's motion, the Commonwealth argued in part that it was "not required to produce individual notes taken of a witness's statements unless they are verbatim or have been inspected and adopted" by that witness. The Commonwealth also argued that Ellis's request for "handwritten and any other notes of any police officer or investigator" were not within the "purview of exculpatory evidence where typed or formal reports have been and will continue to be disclosed." In ruling on the parties' motions, the court ultimately ordered the Commonwealth to turn over any handwritten notes of police officers that were exculpatory.

On September 14, 1994, Ellis's attorneys submitted a motion for further discovery requesting, in relevant part:

> Any information or evidence in the possession, custody or control of the Commonwealth, or which the Commonwealth could obtain with reasonable diligence regarding any personal or business relationship between Detective John Mulligan and either Detective Walter Robinson or Detective Kenneth Acerra. In particular:
>
> a) the duration and nature of any personal friendship between Mulligan and either Robinson or Acerra;
> b) 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;
> c) Under what circumstances Acerra came to live in the same apartment complex as Mulligan and for how long they lived in proximity. . . .

> Any information or evidence in the possession of the Commonwealth . . . regarding either Detective Robinson or Detective Acerra having been untruthful in any other investigation or prosecution of which the Commonwealth is aware, including but not limited to such information in Boston Police Department personnel or internal affairs records for either Detective Robinson or Detective Acerra.

The court denied this motion, citing the Commonwealth's brief in support, which argued that Ellis's request was "speculation, based on rumor and innuendo" and an "attempt to engage in a fishing expedition for information which is neither relevant nor material to the instant case."

Ellis has submitted a number of fax machine cover letters that ADA Broker and her co-counsel in Ellis's prosecution, former Assistant District Attorney Jill Furman ("ADA Furman") sent to Attorneys Zalkind and Duncan before trial. Some, but not all of the cover letters, reference non-sequential numbers that were apparently assigned to the enclosed documents. Based on these fax cover letters, it is apparent that the Commonwealth disclosed discovery in this case by faxing or sending just a few or several documents at one time. For example, one fax cover letter, dated May 13, 1994 ("May 1994 cover letter"), stated that documents numbered 137, 196, 147-151, and 52, were enclosed in addition to a number of other documents without numbers. Another cover letter, dated November 21, 1994 ("November 1994 cover letter,") listed and described document numbers 141, 198, and 188.

iv. Motion to Suppress Identification

a. Disclosure of Det. Acerra's Ties to Rosa Sanchez

On September 16, 1994, Ellis filed a motion to suppress Rosa Sanchez's identification of Ellis from the photo array and lineup. Just before the December 1994 hearing on that motion, Sgt. O'Leary submitted a November 26, 1994 report indicating he had met with Rosa Sanchez's mother to discuss her concerns about Rosa's safety in connection with Rosa's involvement in the case. At the same meeting, Rosa's mother disclosed to Sgt. O'Leary that her family had a

personal relationship with Det. Acerra and his family dating back several decades. Following this report, Det. Acerra officially disclosed this relationship to the BPD for the first time on December 1, 1994.

b. Hearing

The court held a three-day evidentiary hearing on Ellis's motion to suppress during the first week of December 1994. Rosa and Ivan Sanchez, and Detectives Ross, Robinson, and Acerra were among the witnesses who testified to the following sequence of events.

On October 5, 1993, Detectives Robinson and Acerra drove Rosa and Ivan Sanchez to the homicide unit for Rosa to view the Patterson and Ellis photo arrays. When they arrived, Detectives Acerra, Robinson, Ross, and Sgt. O'Leary took Rosa into the room where they showed her the photo arrays. When she first viewed the Ellis photo array, Rosa became very upset and pointed to a man who she stated was her stalker.[11] The alleged stalker's photo was covered up, and Rosa was encouraged to try to identify the man she saw at Walgreens once again. Rosa viewed the Ellis photo array for a second time and pointed to the same man that Ivan Sanchez had identified at the couple's home a few days earlier. After making this identification, Rosa stepped outside to talk to Ivan and Detectives Robinson and Acerra. The parties to this conversation testified that Rosa was very upset and talked about how fearful she was to be involved with the case and to identify the man who she saw crouching next to Mulligan's vehicle.

Upon returning inside, Det. Ross took Rosa to a room where she explained that she had deliberately picked the wrong person because she was afraid. Rosa viewed the Ellis photo array a third time and identified Ellis as the man she saw crouching next to Mulligan's truck. Rosa

[11] In 1992, Rosa contacted Boston Police to report that a tall black male with a slim build and white scar on his hand was stalking her.

then signed her name to the back of Ellis's picture. At the suppression hearing, Rosa was asked to once again identify her stalker in the photo arrays. However, this time, she picked out a different man than the one she had identified the first time she viewed the arrays.

Det. Acerra testified that he had worked with Mulligan for over twenty years, and the two were very close friends. Det. Acerra also testified that he was a long-time friend of Rosa's family and had been living with Rosa's aunt, Lucy DeValle ("DeValle"), whom he had a child with, at the time of Mulligan's murder. Det. Acerra testified that he did not know Rosa well, but saw her at family events. Although he acknowledged that Rosa visited the home he shared with DeValle, Det. Acerra stated that "most of the time [he] wasn't there." When asked if Rosa would have seen Mulligan in the past when she visited with DeValle, Det. Acerra responded that Rosa would have because "John Mulligan was always outside his unit . . . [and] knew everyone that came in the place."[12]

Det. Acerra also stated that Mulligan had known DeValle since 1991. Det. Acerra referred to Rosa's mother as a "personal friend." He testified that he knew Officer Garcia, because like Det. Acerra, Officer Garcia was assigned to E-5. Det. Acerra also stated that he did not know that Officer Garcia was Ivan Sanchez's brother-in-law. According to Det. Acerra, he had known Ivan Sanchez for about five years "from being in Jamaica Plain" after Det. Acerra "inquired about him" when Det. Acerra "was doing certain investigations."

When asked about the events of September 26, 1993, Det. Acerra stated that Det. Brazil spoke with Officer Garcia the morning after Mulligan's murder. Det. Acerra testified that Det. Brazil then contacted him and said, "Come on Kenny, I think there's somebody named Rosa Sanchez, and . . . there might be a language barrier." Det. Acerra testified that he did not

[12] Det. Acerra and Mulligan lived in the same condominium complex. Ellis has presented evidence in conjunction with the present matter showing that Acerra actually purchased his condominium from Mulligan, discussed *infra*.

recognize the name "Rosa Sanchez" because he only knew Rosa's maiden name. Det. Acerra stated that prior to seeing the photo arrays on October 5, 1993, he had never seen Ellis and did not know which photo was his. Det. Acerra did not remember Rosa picking a second photograph after picking out her alleged stalker's photograph and before picking out Ellis's photo.

Det. Robinson testified that he knew Mulligan well as a colleague, but did not often socialize with him. Like Det. Acerra, Det. Robinson stated that he did not recall Rosa picking a second photograph, had never seen Ellis before October 5, 1993, and did not know in advance which photo was Ellis's.

Ellis argued at the hearing on the motion to suppress that Det. Acerra used his familial relationship with Rosa to exert influence over her. Ellis also asserted that Rosa's identification of Ellis on her third look at the photo array, after she returned from outside, warranted an inference that police either suggested or directed Rosa's attention to Ellis's photo.

On December 12, 1994, the court denied Ellis's motion to suppress Rosa's identification of Ellis from the photo array and a subsequent lineup. The court reasoned that Rosa's initial reluctance to identify Ellis was "a product of her underlying fear of identifying the defendant and possible reprisals," in combination with the fear generated from seeing a man who had been stalking her in one of the photo arrays. The court ruled that Ellis had not produced evidence of suggestion and stated that Ellis was merely "asking this court to speculate as to the events that took place in the interim" between Rosa's second and third identification from the photo arrays.

C. Trials

On January 4, 1995, Ellis's first trial began. On January 21, 1995, after eight days of deliberation, a jury found Ellis guilty on the firearm indictments. However, the jury was deadlocked on the other two charges, and the court declared a mistrial. Ellis's retrial on the

remaining indictments commenced on March 21, 1995. On April 1, 1995, the jury again reported a deadlock, and the court declared another mistrial. Ellis's third trial began on September 6, 1995.

At trial, the Commonwealth theorized that Patterson and Ellis decided to kill Mulligan for fun and steal his service weapon as a "trophy." Ellis's theory of defense was that he was not guilty and that Patterson killed Mulligan. Witnesses who testified at Ellis's trial included Victor Brown, Rosa Sanchez, Ivan Sanchez, Joseph Saunders, Evoney Chung, Harriet Griffith, Adolph DeSalvo, and Detectives Ross, Harris, Hayes, Foilb, Brazil, and Washington.[13]

Ellis's girlfriend, Letia Walker, also testified for the Commonwealth pursuant to an immunity agreement reached after Det. Foilb identified Walker's fingerprints on the clip of the Raven. Walker testified that the first time she spoke to Ellis after Mulligan's death was on September 29, 1993, when Ellis spent the night at her home. The following morning, September 30, 1993, the pair took a taxi to the apartment Ellis shared with Tracy Brown. Walker waited in the car while Ellis went inside and retrieved a bag. When Ellis and Walker returned to Walker's home, Ellis revealed that the bag contained two guns: one .25 caliber gun with a white handle and one 9 mm with a rubber handle marked "Boston Police." Walker testified that while she was dating Ellis, she had never previously seen a firearm at Ellis's home or those firearms in particular. According to Walker, on October 1, 1993, Kurt Headen came to Walker's home, retrieved the guns, and placed them in a field under some trees. Headen was killed before Ellis's first trial.

[13] Although David Murray testified for the Commonwealth at Ellis's first two trials, he was not asked to testify at the third. During the first two trials, the Commonwealth preempted any defense attempt to impeach Murray, by first asking him about his 1982 conviction for an armed home invasion for which Murray received a sentence of fifteen to twenty years in prison.

Harriet Griffith testified that on the night of Mulligan's murder she spoke to Ellis some time between midnight and 1 a.m. Contrary to her earlier testimony before the grand jury, Griffith also testified that Ellis had left a message on her answering machine around 3 a.m. the night Mulligan was killed. Griffith stated that after she realized this, she told Sgt. O'Leary and ADA Broker about the message on March 24, 1995, but that neither of them ever made an attempt to listen to it. The Commonwealth impeached Griffith with her contradictory grand jury testimony.

In addition to identifying the fingerprints on the Raven as Walker's, Det. Foilb testified that the fingerprints he found on the door of Mulligan's vehicle belonged to Patterson. The medical examiner who performed the autopsy of Mulligan's body, testified that Mulligan had received five gunshot wounds on his face in a cross pattern.

Det. Ross testified about Rosa Sanchez's lineup and photo array identifications of Ellis. He also testified that Detectives Acerra and Robinson were partners and that Det. Acerra was good friends with Mulligan, lived in the same condominium complex, and was one of the first people to go inside Mulligan's condominium after his death. Det. Ross also testified about the family ties between Rosa Sanchez and Det. Acerra.

On September 14, 1995, a jury found Ellis guilty of first-degree murder and armed robbery.

III. Post-trial Procedural and Factual Developments

A. Robinson and Acerra Indictments

In February 1996, *The Boston Globe* published at least two articles reporting that the Boston police anticorruption unit had started investigating a group of detectives from Area E-5. One of the articles also stated that the investigation concerned "allegations that two detectives in

separate incidents robbed two drug dealers of money, taking $4,000 from one of them at gunpoint . . . . The charges were lodged against Area E Detectives Walter F. Robinson Jr. and the late John J. Mulligan as part of an internal affairs complaint originally filed by a local business owner in 1993. . . . According to the source, the case was revived last week as part of a widening probe of police corruption. A small group of detectives at the West Roxbury station—fewer than five, according to Police Commissioner Paul Evans—are targets of the probe."

On October 2, 1997, a Federal grand jury returned indictments against Detectives Robinson and Acerra for violations of titles 18 and 26 of the United States Code. Relevant allegations against Detectives Robinson and Acerra are excerpted below:

> From a date uncertain but at least from in or about February of 1990, to in or about April 1996 . . . the defendants . . . did conspire and agree with each other, and with others . . . to commit offenses against the United States while acting under the color of laws of the Commonwealth of Massachusetts as follows:
>
> a. To embezzle, steal, obtain by fraud, and otherwise without authority knowingly convert to the use of any person other than the rightful owner, property that was valued at $5,000 or more and that was under the care, custody or control of the Boston Police Department . . . .
>
> b. To unlawfully obtain money and property from persons by extortion, that is, with their consent, under color of official right or induced by the wrongful use of actual or threatened force, violence or fear . . . .
>
> In order to obtain search warrants for private residences and businesses, the defendants would submit, and cause other detectives to submit . . . affidavits which contained knowingly and materially false information about informants and surveillance activities. . . . Using these . . . warrants, the defendants would take and seize money and property from the premises and persons searched and steal in excess of $200,000 for their own use. . . . The defendants would prepare and return, and cause other detectives to prepare and return, false search warrant inventories . . . which underreported, or omitted entirely, the total amount of money and property seized. . . . Even when the existence of seized money was known to the Suffolk County District Attorney's Office and ordered by the Court to be forfeited, the defendants from time to time ignored such orders and kept the money for themselves. . . . The defendants would intentionally not turn in to the BPD all of the firearms and illegal drugs seized in connection with the execution

> of search warrants. . . . In many instances, when arrests were made for drug offenses, the defendants would arrange with the arrestees for the dismissal of the charges, usually by the defendants deliberately failing to show up in court for trial, or for a lenient sentence recommendation, in order to induce them not to seek the return of their money and to provide information against others to give the defendants the opportunity to make more searches and steal additional money.

The indictments detail offenses committed by Detectives Robinson and Acerra during the course of obtaining warrants for and conducting thirty-three separate searches of residences and businesses from 1990 to 1994. Twenty-eight of those searches involved either another Boston detective "known to the grand jury" or "other area E detectives."

Pursuant to an immunity agreement, Det. Brazil testified to a Federal grand jury that he prepared dishonest search warrants both on his own initiative and pursuant to either Det. Robinson's or Det. Acerra's direction, that he would falsely indicate that he had performed surveillance on the target of his search warrant applications, and that he would falsify the existence or reliability of informants.

During Det. Robinson's Federal grand jury testimony, he repeatedly asserted that Sgt. Marquadt was aware that Det. Robinson did not account for money seized during search warrants and that "anyone that was working with us knew what we were doing and how—if money was given back to cooperating defendants, where it was kept. I'm sure they did."

Detectives Acerra and Robinson each pleaded guilty to conspiracy, civil rights, and tax violations in exchange for the dismissal of over forty related charges. In the transcript of Det. Acerra's plea hearing, the Federal prosecutor recounts the following incident concerning an attempt to locate $21,000.00 that Det. Acerra seized, but never turned in. According to the Federal prosecutor:

> When in 1996, there were some questions being raised about the money, the evidence would be that Detective Acerra, after being asked about it by his Captain, spent a week essentially stalling, that he would try to find it. He was

> looking everywhere for it. And at the end of that week, he arranged to have another detective miraculously find what appeared to be and what he said was the actual money seized from the Guzman case in its original heat-sealed plastic envelope. However, the evidence would show . . . that the majority of the bills, the currency, that was, in fact, in that heat-sealed envelope were not in circulation at the time of the Guzman search . . . .

B. Appeal and First New Trial Motion

On September 29, 1998, Ellis filed his first motion for a new trial and reconsideration of his motion to suppress his identification, based on "newly discovered evidence of the corrupt *modus operandi*" of Detectives Acerra, Brazil, and Robinson. The trial court denied Ellis's motion without a hearing on March 4, 1999. The SJC affirmed the Superior Court's denial of Ellis's motion on December 6, 2000, holding that Ellis did not meet his burden to suggest that Detectives Robinson, Brazil, and Acerra procured false evidence in their investigation of Ellis. *Commonwealth* v. *Ellis*, 432 Mass. 746, 765 (2000).[14]

C. Patterson's Conviction Vacated

On December 31, 1998, Patterson, who had been tried separately and convicted of first degree murder at his first and only trial, filed a motion for a new trial on grounds of ineffective assistance of counsel and newly discovered evidence. On December 6, 2000, the SJC set aside Patterson's verdict and remanded the case for a new trial. The SJC held that the evidence at Patterson's trial "was sufficient to support [his] convictions," but agreed with Patterson that due

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[14] Ellis's appeal also raised the following issues that are not relevant to the matter presently before the court: "Whether double jeopardy barred Ellis's retrial for a third time on charges of murder and armed robbery; Whether Ellis's constitutional rights were violated when he was prevented from impeaching [Evoney Chung] for bias; Whether Ellis's constitutional rights were violated by preventing him from impeaching [Rosa Sanchez] to show fabrication of a misidentification and flaws in her ability to perceive and remember; Whether Art. 12 requires the jury to be unanimous in its theory of culpability, as between principal and abettor, and whether the evidence was sufficient to establish Ellis's liability as an abettor; Whether the jury was left unconstitutionally at liberty to convict Ellis on a theory of extreme atrocity or cruelty without any limiting standards. . . . [and] [w]hether [the] Court should enter a lesser verdict pursuant to its obligations under G. L. c. 278, § 33E."

to a conflict of interest of his trial counsel, he was deprived "of the effective assistance of counsel." *Commonwealth* v. *Patterson*, 432 Mass. 767, 768 (2000).[15]

Subsequently, in *Commonwealth* v. *Patterson*, 445 Mass. 626 (2005), the SJC reviewed Patterson's pretrial motion to suppress fingerprint evidence at his retrial. The evidence was the same fingerprint evidence used at Ellis's trial. Patterson challenged the methodology employed by the Commonwealth's expert, who utilized simultaneous latent fingerprint impressions to match the fingerprints on Mulligan's truck to Patterson's fingerprints.[16] *Id.* at 627-628. The SJC found that the Commonwealth failed to demonstrate that the simultaneous print method is generally accepted or that *Daubert* favors admission of simultaneous print evidence. *Id.* at 654-655. Accordingly, the SJC vacated the trial court's denial of Patterson's motion to suppress the

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[15] The SJC described the conflict of interest as follows:

> In late October, 1993, shortly after [Patterson's] arraignment, his lawyer received a copy of an affidavit that had been submitted in support of a search warrant application. That affidavit recounted a version of [Patterson's] October 3 statement that included one additional question and answer. As set forth in the affidavit, the interview concluded with Harris asking the defendant whether Ellis had been 'the triggerman.' [Patterson] had allegedly nodded in response.
>
> When defense counsel received this version of the statement, she immediately informed the assistant district attorney, both orally and in writing (with a copy to Ellis's counsel), that that version was not accurate. Counsel stated that she had been present throughout the interview and that [Patterson] had never been asked whether Ellis had shot Mulligan. She further claimed that, if such a question had been asked of her client, she would have instructed him not to answer it. . . . .
>
> Counsel's continued representation of [Patterson] beyond the point when it became obvious that she should testify for the defense was a violation of DR 5-102(A). This particular ethical violation constitutes a form of conflict of interest. *Patterson*, 432 Mass. at 770, 780.

During the questioning of Ellis's former trial counsel at the evidentiary hearing on this matter, the Commonwealth suggested that Patterson "implicated" Ellis during his interview with Det. Harris in 1993. The *Patterson* holding calls Patterson's purported implication that Ellis was the "triggerman" into question. Moreover, any insinuation that Ellis was the shooter contradicts the Commonwealth's theory at Ellis's trial, which was that Patterson was the shooter. Indeed, viewing the trial record in the light most favorable to the Commonwealth, Patterson was the shooter.

[16] "Such testimony is 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 form the basis for a collective determination as to whether the entire group of latent impressions matches a corresponding group of full fingerprints." *Patterson II*, 445 Mass. at 645.

fingerprint evidence and remanded the case for further proceedings. *Id.* at 655. Patterson subsequently pleaded guilty to time served and is no longer in custody.

IV. Second New Trial Motion

A. New Federal Investigation Reports

On March 13, 2013, Ellis filed his second motion for a new trial ("present new trial motion"), arguing that newly discovered evidence revealed Mulligan's involvement in Detectives Acerra, Robinson, and Brazil's corruption scheme and that the Commonwealth failed to turn over exculpatory evidence. Attached to the first brief of Ellis's present new trial motion were a number of Federal Bureau of Investigation informant reports ("FBI Informant Reports"), obtained through FOIA requests, excerpted in relevant part below:

> December 19, 1983: Source thinks that the female was a hooker known by [D]etective John Mulligan. Mulligan is known to have given this female at least $150 and further convinced her to drop charges against [redacted]. 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].
>
> February 26, 1985: 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. [Redacted] pays [redacted] and MULLIGAN to avoid their examination of the statutorily required books and records regarding the purchase of second hand jewelry.
>
> November 1, 1993: Source advised that GEORGE FOLEY was recently disciplined for accusing RAY ARMSTEAD of involvement in the murder of Detective JOHN MULLIGAN. Source stated that Detective Foley is corrupt and was involved in

'ripping off' and beating up hookers while assigned to the vice-squad.[17]

November 12, 1993: Former BOSTON POLICE OFFICER, JOHN MULLIGAN, aka 'MULLIGAN STEW', [sic] 'MAD DOG MULLIGAN', [sic] 'PLAIN VIEW MULLIGAN', [sic] regularly . . . 'associated'/ 'liked,' young black girls and 'shook down' prostitutes. MULLIGAN regularly . . . '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'. [sic] 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. [Redacted], the author, had an intimate knowledge of MULLIGAN.

December 3, 1993: 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 was told the above by DAVID DUNKIN, an Attorney who is partners with NORMAN ZALKINE [sic].

Ellis's present new trial motion also offered a transcript of the October 3, 1996, Federal grand jury testimony of Robert Martin ("Martin Transcript"), who was a victim of one of the robberies for which Detectives Robinson and Acerra were federally indicted. Ellis offered this information in conjunction with an April 18, 1996 Boston police anti-corruption division ("ACD") report of an investigator's interview with Martin ("Martin ACD Report").

Robert Martin ("Martin") testified that on the evening of September 9, 1993, he was stopped by Detectives Kenneth Beers ("Det. Beers"), Robinson, Acerra, Mulligan, and Sgt. Marquadt while Martin was in his car with another individual conducting a marijuana sale. According to Martin, one of the officers identified himself as an "INS" officer as he ran to the

[17] Ellis's March 13, 2013 Motion for a New Trial submitted a version of this tip with Foley's and Armstead's names redacted.

car. Martin later learned that this was Det. Acerra after seeing his picture in the newspaper. According to the Martin ACD Report, Det. Acerra also used the name "McCarthy" during the raid.

Martin explained that the detectives confiscated his knapsack, which contained seven pounds of marijuana, and presented Martin with a search warrant for his apartment. Det. Acerra took Martin's keys from him and left Martin in the car "guarded by John Mulligan." Approximately twenty minutes later, Det. Robinson returned to Martin's vehicle and told him that he wanted Martin to come inside his apartment and open a safe. According to Martin, the safe contained twenty-two pounds of marijuana packaged in five-pound lots. Det. Acerra, Sgt. Marquadt, and Det. Robinson then took Martin to his second apartment to open another safe. Martin testified that when he asked if the detectives would release his friends, who had been detained at the first apartment, Sgt. Marquadt said he would release them only if there was more money in the safe since they had "only found $8000" up to that point.[18] After Martin opened the safe, Det. Robinson removed $18,000.00 and Martin directed him to another $8,000.00 that was in a filing cabinet. Martin stated that throughout the robbery the detectives intentionally kept their communications off of their police radios and used Martin's landline to communicate. Martin's friends were released the same evening.[19]

The September 12, 1996 Federal grand jury testimony of Dennis Simeson ("Simeson"), Martin's roommate, and one of the individuals who was detained at Martin's first apartment, indicates that Mulligan was inside Martin's apartment during the robbery. Simeson testified that

[18] The federal indictments state that Det. Robinson made this claim.

[19] The federal indictment against Detectives Robinson and Acerra states that they stole $26,000.00 from Martin, which was never turned into the BPD. The indictments also state that Det. Robinson further "prepared and returned a search warrant inventory, made under oath, that falsely reported that only $14,000 was seized . . . and a Form 1.1 that falsely omitted that any money was seized."

he arrived at home that evening to find Martin, his girlfriend, and the friend caught with Martin, detained by four detectives. Two detectives took Simeson to his room where they asked him to open a safe from which they confiscated marijuana. One of those detectives subsequently left with Martin and a third detective after asking Martin about the safe at his second apartment. Simeson and the others detained in the first apartment were left with a fourth detective and the other detective who had confiscated his marijuana. Sometime later, after a phone call from one of the detectives at Martin's second apartment, Simeson and the others were released. Viewed in light of Martin's testimony that Detectives Robinson, Acerra, and Sgt. Marquadt went with him to his second apartment, the only two detectives that Simeson could have been left with at Martin's first apartment were Detectives Mulligan and Beers.

The incident report filled out by Det. Robinson regarding this incident contains Mulligan's identification number and what appears to be his signature. The report also identifies Mulligan as Det. Robinson's partner. The report states that the raid was conducted by "Sgt. Marquadt and Dts[s] from E-5 and Lt. McCarthy et al from Area D-4," and that the detectives "seized several pounds of marijuana." However, during Det. Robinson's Federal grand jury testimony, he admitted that the statement on his report indicating that "Lt. McCarthy et al from Area D-4" were present during the raid was false.

B. Foley Report

In its opposition to Ellis's present new trial motion, the Commonwealth denied the veracity of Ellis's suggestion, initially supported only by the FBI Informant Reports, that another officer may have been responsible for Mulligan's death. The Commonwealth argued that no evidence of another police officer being involved in Mulligan's death was "ever in the custody or

control of the prosecution as there is no evidence that any of [the FBI] sources was a Boston Police Officer or reported his or her beliefs to the Boston Police before trial."

In Ellis's response to the Commonwealth's opposition, he provided a Boston police internal affairs division ("IAD") report indicating that Detective George Foley ("Det. Foley") had accused another officer of killing Mulligan ("Foley Report"). Ellis's counsel reportedly received this report in an unrelated case after making a FOIA request for information about Det. Foley.

One day before a June 5, 2014, status conference, the Commonwealth faxed Ellis's counsel the full report associated with Det. Foley's accusation. The report, which was authored by Det. Keeler, recalls that on September 30, 1993, Det. Foley spoke with Sgt. Mastrorilli, Homicide Unit Captain Edward McNelley ("Captain McNelley"), and Sgt. Marquadt in a homicide unit conference room. Det. Foley told them that in late August he was assigned to a case involving threats against Raymond Armstead, Jr. ("Armstead, Jr."), a corrections officer at "South Cove" and the son of BPD Officer Raymond Armstead ("Officer Armstead"). Det. Foley drove around with Armstead, Jr. in an attempt to locate the suspect and Det. Foley stated that in connection with this assignment he and Armstead, Jr. developed a rapport.

Det. Foley told the detectives that Armstead, Jr. told him, "[m]y Dad's got a beef with Mulligan, he (Mulligan) won't leave my fourteen year old sister alone. He's gonna kill him." According to Det. Foley, he told Armstead, Jr. that he would talk to Mulligan to see what he could do. Armstead, Jr. responded that it was too late and said that "they have checked on [Mulligan] at Walgreens. He sleeps in the car, they have shaken his car. You are gonna read about in [sic] the papers. Shot between the eyes at Wallgreens [sic]." Det. Foley stated that he

did not come forward with this information earlier because he did not think of it until the night before.

Det. Keeler and Sgt. O'Leary spoke with Armstead, Jr. the same day. Armstead, Jr. confirmed that Det. Foley was investigating threats against him and that he had driven around with Det. Foley to try to locate the suspect. However, Armstead, Jr. stated that he never knew Mulligan and that he did not have a sister. When asked whether Det. Foley may have been referring to one of Armstead, Jr.'s foster sisters, Armstead, Jr. said "no." Armstead, Jr. denied the conversation alleged by Det. Foley in its entirety.[20]

After speaking with Armstead Jr., detectives spoke with Det. Foley again. Det. Keeler's report described this incident as follows:

> [Foley] then stated 'maybe I was wrong, totally wrong. But I couldn't be, no.' . . . Sergeant Keeler[[21]] then informed Foley that [he] was lying and that his story would not withstand scrutiny. Foley insisted that he was telling the truth. . . . Detective Foley was adamant that [sic] about his story, but after confronted by Captain McNelley stated 'maybe I was wrong about on[e] thing, maybe it wasn't Armstead [Jr.] that told me.' Foley subsequently backed off the statement once again insisting that what he previously stated was in fact true. Detective Foley at the time appeared emotionally drained, dropping his head to his lap several times, and stating, 'I know you guys are mad at me.'

On October 2, 1993, two internal affairs officers met with Officer Armstead to discuss Det. Foley's allegations. Officer Armstead expressed that he felt Det. Keeler's and Sgt. O'Leary's questioning violated Armstead, Jr.'s rights. Officer Armstead continued that he had personally called Det. Foley, who was crying and admitted he made up his story. Officer Armstead stated that approximately six months earlier, he witnessed Det. Foley beating a

[20] The conversation between Det. Keeler, Sgt. O'Leary, and Armstead, Jr. is initially written as though it is a transcript despite Det. Keeler's testimony at Ellis's evidentiary hearing that he did not record this conversation. Later, the report continues in narrative form.

[21] Det. Keeler wrote the report from a third person perspective.

handcuffed black male and had to intercede. Officer Armstead threatened that "if nothing is done [to punish Det. Foley]," he would "go to the national news."

The Foley Report also includes a November 17, 1993, letter from Captain McNelley to Deputy Superintendent Joseph Dunforo. Captain McNelley wrote, "[a]t 11:30 p.m. September 30, 1993; I confronted Detective Foley and informed him that the information he had supplied was false. . . . Foley appeared to be suffering from severe emotional depression." Captain McNelley "concluded that Foley was unable to perform his duties" and "requested Detective Foley's gun and badge and relieved him of duty." Captain McNelley stated that sometime thereafter, Det. Foley told him that "he has been under a lot of stress resulting from both personal and financial problems and that he needed some help."

The Foley Report also contains a November 23, 1993, letter from Superintendent Joseph Saia, Jr. ("Superintendent Saia") to Commissioner Bratton. Superintendent Saia's letter stated that "Detective Foley had lost contact with reality and was in an adverse psychological condition." Superintendent Saia told Det. Foley it would be best to go to the hospital to seek treatment and Det. Foley admitted himself to the Pembroke Hospital immediately thereafter.

Another letter, dated December 2, 1993, from Captain Robert Dunford ("Captain Dunford") to Commissioner Bratton summarizes the BPD's findings regarding Det. Foley's behavior. The letter stated that there was "no question" Det. Foley's story was false and that Captain Dunford had known Det. Foley for over eighteen years and was "familiar with his personal and drinking problems."

The final document in the Foley Report is a letter dated May 10, 1996 stating that Foley admitted himself to the Pembroke Hospital on October 3, 1996, and a psychological evaluation

was performed on October 29, 1996, at which time the doctor felt Foley could return to work with a gun.[22]

On September 11, 2014, the Commonwealth arranged for a BPD investigator to contact Officer Armstead. The investigator reported that Officer Armstead told him that in 1992 and 1993 he had two biological daughters and two foster daughters. At the time, Officer Armstead's biological daughters were twenty-four and twenty-five years old, and his foster daughters were four and twelve or thirteen years old.

In recent affidavits submitted pursuant to the present motion, both ADA Broker and ADA Furman attested that they do not have any specific memories of turning over the Foley Report. ADA Furman's affidavit more specifically states that she has "no memory of a police officer accusing another police officer of killing Det. Mulligan."

C. Anti-Corruption Division Files

At the June 5, 2014 status conference, the court allowed Ellis's motion for discovery seeking the internal affairs and ACD files of Detectives Acerra, Robinson, Brazil, and Mulligan ("the ACD files"). The most significant document discovered in the files is a report dated November 17, 1993, stating that an anonymous tipster called to report that eighteen months prior "Detectives Mulligan and Robinson, E-5, robbed at gun point two mid-level drug dealers in a club parking lot at night in Brighton or Allston." The reliability of the tip is rated "good" and the "case activity log" reveals that Lieutenant Farrahar met with the informant the same day and learned that the robbery was for a large sum of money. The report also indicates that subsequent

[22] The court finds that these events actually occurred in October 1993. Although at Ellis's evidentiary hearing, Sgt. O'Leary could not recall when Foley returned to work, the Appeals Court's statement of facts in *Commonwealth* v. *Rise*, 50 Mass. App. Ct. 836, 837 (2001), reveals that Det. Foley responded to the scene of the homicide of Kurt Headen on October 7, 1994.

surveillance of Robinson was conducted on January 6, 1994.[23] This information is collectively referred to hereinafter as the "Mulligan Robbery Information."

The ACD files also contained the report of a 1996 ACD interview with Ronald Hansen ("Hansen") (the report is referred to hereinafter as the "Hansen Report"), a witness who testified before the Federal grand jury pursuant to the federal investigation of Detectives Acerra and Robinson.[24] Det. Robinson used Hansen and Hansen's ex-wife, Julie Peretti ("Peretti"), as paid informants, and also carried on a personal relationship with Peretti.[25] The Hansen Report states that Hansen said that Peretti had known Mulligan since she was sixteen years old and that Mulligan "used to take young girls for rides in his car." Concerning Mulligan's murder, the Hansen Report states, "Robinson asked [Hansen] if he knew anything about Mulligan's murder. Mulligan took drugs from the girlfriend of one of the killers and told her if her boyfriend wanted

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[23] In fact that report states that the investigator "observed target operate a 1986" red and black Chevrolet Corvette convertible. The court finds that this "target" was Det. Robinson not only because the ACD case name is "Det. Walter F. Robinson," but because both Det. Robinson's Federal grand jury testimony transcript and the Hansen Report, discussed *infra*, indicate that Det. Robinson owned and had a preference for driving Corvettes.

[24] In addition to the Mulligan Robbery Information and the Hansen Report, the ACD files contain certain documents purporting to analyze warrants executed by Detectives Robinson, Brazil, and Acerra in 1992 and 1993 ("warrant analysis"). The Commonwealth argues that the absence of Mulligan's name from the warrant analysis evidences his lack of involvement in Detectives Acerra, Brazil, and Robinson's corruption scheme. However, a comparison of this analysis with the warrant executions outlined in Detectives Robinson and Acerra's federal indictments, reveals that in many cases, the warrant analysis omits the names of any officers present other than Detectives Robinson, Accera, and Brazil. In some cases either Det. Robinson or Det. Acerra is omitted even though the federal indictments indicate that both participated in the subject search. At least five warrant executions listed in the federal indictments, including the warrant executed pursuant to the Martin robbery, are omitted from the warrant analysis entirely. As argued by Ellis, the ACD likely had no impetus to expend resources investigating Mulligan after his death.

The ACD files also contained a March 13, 1996, Federal grand jury subpoena to American Airlines requesting "any and all records relating to all travel by any individual in the names: Kenneth Acerra, Elizabeth Tejada [Rosa's mother], and Rosa Sanchez for the period January 1, 1990 to the present, including but not limited to trips in the name Kenneth Acerra from the Dominican Republic on 8/5/95 and 10/15/94." Ellis argues the subpoena constitutes evidence of the depth and extent of Acerra's relationship with Rosa. However, federal grand jury subpoenas may issue without even a threshold level of suspicion, such as probable cause. See *United States* v. *Williams*, 504 U.S. 36, 48 (1992) ("[T]he grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.").

[25] Det. Robinson corroborated his use of Peretti as an informant and their personal relationship in his own Federal grand jury testimony.

the drugs back he would have to come and see him or he'd arrest her. One of the girls killed in Mattapan was the girlfriend. [Detective Gene Hurley] said [Det. Robinson] wanted to know how much money Mulligan had on him when he was killed. Only found $11.00. . . . Hurley asked [Peretti] if Mulligan carried a .25 caliber gun on his ankle. [Peretti] said that he did."

D. Additional Evidence

i. Mulligan Condominium Information

Ellis has submitted evidence revealing that in the late 1980s, Mulligan purchased eight condominiums in West Roxbury for $1.8 million ("Mulligan Condominium Information"). Mulligan resided in one of these condominiums and sold a condominium that he originally purchased for $145,000.00 to Det. Acerra in March 1989 for $181,250.00, according to the deed. Det. Acerra obtained a mortgage for $145,000.00 and executed a promissory note in favor of Mulligan for 10% of the purchase price, $18,125.00.

ii. Hotline Tips

At the start of Ellis's evidentiary hearing, Ellis requested unredacted versions of some tips the BPD received during the Mulligan investigation that Ellis obtained pursuant to FOIA requests. The Commonwealth then provided several numbered indices purporting to list all of the hotline tips allegedly turned over to Ellis before trial. The Commonwealth's initial disclosure did not contain any of the hotline tips Ellis received pursuant to his FOIA request. On August 26, 2014, the Commonwealth agreed to search its files again and turned over the remaining hotline tips on September 28, 2014.

Among the hotline tip indices the Commonwealth turned over was an index of police reports ("Police Report Index") and two separate indices of hotline tips (collectively "Hotline Tip Indices"). One of the Hotline Tip Indices regards tips the BPD received regarding brown

Volkswagens, and the other encompasses tips regarding the circumstances of the murder. Both of the Hotline Tip Indices have the words "given to counsel" handwritten at the top. Some, but not all, of the tips on the Hotline Tip Indices correspond to individual tips that have circled, handwritten numbers at the top. Printed next to each number on the Hotline Tip Indices, are the date and a description of the corresponding tip. The Police Report Index is a numbered list of police reports, with the date, description, and reporting officer listed next to each number. Numbers 186 and 187 on the Police Report Index appear to refer to the Foley Report and describe these items as "Statement of Det. G. Foley" and "George Foley," respectively.

Unredacted tips received in the September 2014 disclosure relevant to the present matter include: a tip dated September 26, 1993 with the names Marquadt and Acerra handwritten on the top, stating that "Det. Cullinane called and stated that his brother, bobby Rowland [sic], who is a guard at South Bay, works 3:00p-11:00p, off Tues./Wed., told him that an inmate, William Bell, told him that a drug dealer, named Armstead, had a contract out on John Mulligan" ("Armstead Hotline Tip"); tip dated September 27, 1993 indicating that Councilman O'Neil came by the homicide unit and indicated that someone detained at "South Bay Cove" named "Blair" may be responsible for the murder; a tip stating that the caller saw Detective Mulligan giving a ticket to and arguing with a black male outside of the Bradlee's parking lot in Roslindale on September 25, 1993, at 5 p.m.; two tips stating that a man named Royce Hill was an accomplice to Mulligan's murder; a tip dated September 30, 1993, claiming to be from a cab driver who drove Mulligan's girlfriend to the parking lot the night of the murder where she shot him with a .25 caliber weapon Mulligan had given her for self-defense; and another tip dated September 30, 1993, stating that Mulligan kept a .25 caliber weapon in his closet that his girlfriend did not know about (hereinafter referred to collectively as the "Hotline Tips").

E. Evidentiary Hearing

The court held an evidentiary hearing over the course of seven days between August 25, 2014 and December 2014. Relevant testimony and findings are summarized below.

i. Michelle Hager

Ellis's first witness was a woman named Michelle Hager ("Hager"). Hager testified credibly that before Mulligan's death she had given him a sexual favor in exchange for Mulligan getting her "off of a case" in South Boston. Hager said that she remembered that days after she last spoke with Mulligan on the phone, she received a visit from two police officers or detectives. Hager could not remember any details of the visit other than the officers or detectives telling her that her number was either the last or among the last outgoing calls from Mulligan's phone before he was killed.

ii. Sergeant O'Leary

Sgt. O'Leary testified that he was the "shepherd" of Mulligan's homicide investigation, but that Commissioner Bratton and Superintendent Paul Evans were ultimately in charge of the investigation.[26] According to Sgt. O'Leary, shortly after Mulligan's murder, Commissioner Bratton instructed Captain McNelley, of the homicide unit, to put together a fifty-man task force to investigate Mulligan's death ("Mulligan Task Force"). Sgt. O'Leary testified that shortly thereafter, he sat down with Captain McNelley and Det. Keeler and picked fifty investigators from around the city. Sgt. O'Leary stated that half of the Mulligan Task Force was composed of detectives from the homicide unit and the rest were detectives "from around the city." Detectives from Area E-5 were included "because Mulligan was assigned to E-5."

Sgt. O'Leary noted that he had only been in the homicide unit for one month at that time and he "consider[ed] himself vastly inexperienced in the position [he] was in." Sgt. O'Leary

[26] Superintendent Paul Evans became the Boston Police Commissioner in 1994.

testified that although they had not been ordered to do so, Det. Acerra and Sgt. Marquadt were the first to enter Mulligan's condominium after he was killed.

Sgt. O'Leary also talked about the hotline that was set up to receive information about the murder. According to Sgt. O'Leary, as tips came in, "they were handed out" to sets of partners within the Mulligan Task Force to investigate. The partners assigned to the tips "were supposed to chronicle everything they did, and submit a report." Sgt. O'Leary verified that he assigned the Armstead Hotline Tip to Sgt. Marquadt and Det. Acerra. Sgt. O'Leary confirmed that he never personally followed up on the Armstead Hotline Tip and that Sgt. Marquadt and Det. Acerra never filed a follow-up report. After viewing a number of other Hotline Tips, Sgt. O'Leary admitted that no reports or record of follow-up was ever created in connection with any of the Hotline Tips.

At one point during his testimony, Ellis's counsel and Sgt. O'Leary had the following exchange regarding whether the Hotline Tips were turned over to the district attorney's office:

> Q: Okay. And what makes you say the tip, itself, was turned over?
>
> A: Because I numbered it, and everything I numbered was put into an index, and my indexes were all turned over to ADA Phyllis Broker.
>
> . . . .
>
> Q: Okay. And you said you'd indicated that [ADA Broker received a tip] by numbering it and circling it, is that right?[27]
>
> A: Right.
>
> . . . .

[27] The Commonwealth argues that the form of this question improperly led Sgt. O'Leary to indicate that he circled the numbers even though he did previously testify that he circled them. There is no evidence that Sgt. O'Leary was under any emotional stress or otherwise incapable of telling Ellis's counsel that he had not circled them. In fact, on several occasions throughout Sgt. O'Leary's testimony, he indicated that he either disagreed with Ellis's counsel's characterizations or could not otherwise answer her questions. Consequently, the court credits Sgt. O'Leary's confirmation that he circled the numbers. See *Commonwealth* v. *Aronson*, 330 Mass. 453, 460 (1953).

Q: How many indexes did you generate?

A: Oh, you know what, they change by the day, because if you got a new reported [sic] you added to it.

Ellis's counsel then showed Sgt. O'Leary the Police Report Index and pointed out an attached handwritten index of numbered items and descriptions that did not correspond to the numbered items and descriptions on the Hotline Tip Indices. Sgt. O'Leary testified that the handwriting was "definitely" his:

Q: It appears the numbers don't match. Is that right?

A: Correct.

Q: Okay. So there's at least one list out there somewhere that has different numbers for different documents in the same case, the Commonwealth v. Sean Ellis case. It that right? Is that your list? Right?

A: I'm looking. I'm looking. Yep.

When asked about the Foley Report, Sgt. O'Leary stated that he never believed Det. Foley's allegations, and that he did not send anyone to follow up and find out whether Officer Armstead had a daughter after Armstead, Jr. told him there were not any girls in the Armstead family.

Sgt. O'Leary also testified that he did not recall whether he found any cellular phones issued to Mulligan and stated that if he did, no one ever examined them.[28] He stated that even though the BPD did not issue cell phones in 1992 because officers already had car phones, he saw no reason to further investigate why Detectives Mulligan, Acerra, and Brazil had purchased the phones.

[28] The Commonwealth argues that this testimony is contradicted by a September 27, 1993 police report that states detectives asked Cellular One to "do a search for [Mulligan's] phone number." There is nothing in this report to suggest that detectives obtained records for more than one phone. As discussed *supra*, Mulligan owned at least two, and possibly three cellular phones.

Sgt. O'Leary was also asked about the "pearl-handled gun" that detectives asked Tina Erti and Mary Sharpov about. Sgt. O'Leary did not know why detectives asked Erti about a pearl-handled gun and stated that the BPD could never conclusively say where the pearl-handled Raven later identified as Mulligan's murder weapon, had originally come from.

Sgt. O'Leary testified that after Rosa Sanchez identified Ellis from the photo array, the Suffolk County district attorney's office asked Detectives Acerra and Robinson to record statements about their involvement with the identification within the hour.[29] Sgt. O'Leary does not remember any time before or since then that the district attorney's office made a similar request.

iii. David Duncan

Attorney Duncan testified that Ellis's case was "very important" and a "highly publicized and intense case." He indicated that if he had received the Hotline Tips and the Foley Report, he would have at least sent investigators to track people down, and "almost certainly would have filed discovery motions" and requested documentation of follow-up on the Hotline Tips. Attorney Duncan stated that while he knew investigators involved in the homicide investigation were corrupt, all he had to support that assertion before Ellis's trial and at the time of Ellis's first new trial motion were newspaper articles.

iv. Norman Zalkind

Attorney Zalkind, Attorney Duncan's partner and co-counsel in Ellis's case, testified that he and Attorney Duncan "were obsessed" and "total organized." He stated, "[i]f he had any information about someone else killing Mulligan, he absolutely would have followed up on it." Like Attorney Duncan, Attorney Zalkind testified that he knew Detectives Acerra, Robinson, and

[29] Sgt. O'Leary initially indicated that Detectives Robinson and Acerra were asked to record these statements under oath, but later conceded that they were not recorded under oath.

Mulligan were "bad cops," but they did not have anything they could present as evidence aside from newspaper articles. Attorney Zalkind repeatedly referred to the Hotline Tips that named third parties as Mulligan's murderer, the Foley Report, and the Mulligan Robbery Information as "spectacular" and "dynamite" stuff that he undoubtedly would have followed up on.

v. Robert Foilb

Det. Foilb testified that he started working in the Boston police identification unit in 1985. The morning of Mulligan's murder, he arrived at Walgreens at approximately 8:30 a.m. and was instructed to have Mulligan's vehicle towed to the evidence bay. Once the vehicle arrived at the evidence bay, Det. Foilb inventoried it by bagging and tagging one individual item at a time. During the evidentiary hearing, Det. Foilb reviewed his handwritten inventory of Mulligan's vehicle and acknowledged that it did not list a phone. According to Det. Foilb, to do his job correctly he was required to open all the closed containers in the vehicle and document everything. Det. Foilb stated that the phone's absence from his list meant that he had not found one when he inventoried Mulligan's car. Det. Foilb testified that when he eventually received the phone from Det. Ross, he did not find any fingerprints on it.

vi. Phyllis Broker

ADA Broker, now Judge Broker,[30] did not specifically remember any of the discovery she turned over in Ellis's case. Consequently, she testified only with regard to her standard discovery practices and how she typically handled her cases. According to Judge Broker, the way that she disseminated documents to counsel largely depended on what type of documents they were. Judge Broker testified that she would put handwritten numbers at the top of any police reports she received "and then . . . write a discovery letter saying, enclosed please find documents nine through ten which are whatever the items were." When asked whether there was

[30] Phyllis Broker is now a retired District Court Judge.

any significance to documents with a handwritten number at the top that was circled, Judge Broker responded that the circled number "would correspond to a number on a list, and that list represented all those reports that were turned over." Judge Broker identified the Police Report Index as a document that she had created and acknowledged that she updated it on a continual basis as documents came in.

Ellis's counsel then asked Judge Broker about the Foley Report, which has a handwritten, circled number 186 at the top:

> Q: Judge Broker, if you saw a document in your file like this, the George Foley, the statement of the George Foley Report with the number 186 that was circled, would that fact that it was circled, would that indicate to you whether or not you had turned over that report or not?
>
> A: Not necessarily by itself, but combined with the list, and I know that this 186 is on that list, that would indicate to me that it was turned over.

Judge Broker testified that she had a "vague recollection" of the Foley Report. She stated that her policy was to turn "anything over for a lot of reasons," unless she thought "it would contain something that would cause a safety issue or something like that." If that were the case, she would have a hearing on it. She testified that she did not remember specifically asking the BPD for information related to the hotline, but that her practice was to ask the BPD to give her everything they had. She stated that she did not recall assigning any investigators to investigate the Hotline Tips or asking any police officers to follow up on them. Judge Broker testified that she did not number the Hotline Tips and that "whoever was keeping track of the tips in the police department was numbering them." Nonetheless, Judge Broker stated that the words "given to counsel" at the top of the Hotline Tip Indices and the circled number at the top of Armstead Hotline Tip were her own handwriting and testified that the circle around that number signified she had turned the Armstead Hotline Tip over.

When asked why she opposed Ellis's 1994 discovery motion requesting the internal affairs files of Detectives Acerra, Robinson, and Mulligan, Judge Broker stated that she "was of the opinion that they weren't entitled to it." She stated that she did see any basis to assign anyone to investigate the cellular phones that the detectives shared or their personal relationship. Judge Broker testified that she "had a vague, somewhat distant relationship with all that was going on with Robinson and Acerra. I didn't want to know about it. It didn't affect me, so I didn't pay much attention to it."

Judge Broker acknowledged that the relationship between the Suffolk County district attorney's office and the BPD was strained during Mulligan's homicide investigation. She stated that prior to preparing for her November 19, 2014 testimony, she had never seen the Mulligan Robbery Information.

vii. Keeler, Acerra, Robinson, and Brazil

Det. Keeler also testified at Ellis's evidentiary hearing. Det. Keeler's testimony revealed that during Mulligan's homicide investigation, he did not make any serious efforts to investigate suspects other than Ellis and that he was unaware of the Wilkerson Notes that mentioned the name "Armstead" or the Armstead Hotline Tip.

Though Detectives Acerra, Robinson, and Brazil were subpoenaed, they invoked their 5th Amendment right against self-incrimination and did not provide testimony at the evidentiary hearing.

DISCUSSION

I. New Trial Standard

The decision to grant a new trial is within the discretion of the trial judge, who upon a written motion "may grant a new trial at any time if it appears that justice may not have been

done." Mass. R. Crim. P. 30(b). See *Commonwealth* v. *Figueroa*, 422 Mass. 72, 77 n.8 (1996). "New trials may not be granted without a substantial reason." *Commonwealth* v. *Jackson*, 468 Mass. 1009, 1010 (2014). If the trial judge decides that the defendant has raised a substantial issue, he is entitled to a hearing. *Figueroa*, 422 Mass. at 77-78. The judge must then examine the adequacy of the defendant's factual showing and the seriousness of the defendant's claim. *Id.* "Judges are to apply the standard set forth in rule 30(b) rigorously and should only grant such a motion if the defendant comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth." *Commonwealth* v. *Masonoff*, 70 Mass. App. Ct. 162, 166 (2007), quoting *Commonwealth* v. *Wheeler*, 52 Mass. App. Ct. 631, 635-636 (2001). See also *Commonwealth* v. *Fanelli*, 412 Mass. 497, 504 (1992).

Ellis asserts that he is entitled to a new trial on grounds of newly discovered evidence and because the Commonwealth failed to disclose exculpatory evidence.[31] These assertions fall under a number of analytical frameworks with differing standards. In ruling on Ellis's motion, the court will first address Ellis's newly discovered evidence argument, followed by a discussion of whether any of the newly discovered evidence also constitutes improperly withheld exculpatory evidence.

II. Newly Discovered Evidence

The newly discovered evidence at issue here falls into two categories: evidence which the Commonwealth concedes is new, including the FBI Informant Reports, the Martin Transcript, and the ACD files, and that which the Commonwealth contends was originally provided in discovery, including the Foley Report and Hotline Tips, or was readily accessible by defense counsel in the exercise of due diligence, specifically the Mulligan Condominium Information.

[31] Ellis also argues that he is factually innocent and that he received ineffective assistance of counsel. Because the court finds that Ellis is entitled to a new trial on other grounds, the court need not reach these issues.

When the present motion was originally filed, it relied entirely on the concededly new information within the FBI Informant Reports and the Martin Transcript, which allegedly support the argument that key investigators on the Mulligan Task Force, Detectives Acerra, Robinson, and Brazil, had a conflict of interest based on their criminal activities with Mulligan, which tainted the investigation.[32] Ellis's argument expanded based on documents received in discovery produced in connection with the present new trial motion, specifically the latter, contested information (the Foley Report and the Hotline Tips) which enhanced the argument that there were other potential perpetrators who were overlooked.

A. Standard

"To prevail on a new trial motion based on allegedly newly discovered evidence, a defendant must establish that the evidence is in fact newly discovered, is both credible and material, and that it casts real doubt on the justice of the conviction." *Commonwealth* v. *LaFaille*, 430 Mass. 44, 55 (1999). If the defendant knew of or reasonably should have known of the evidence before trial, or a previous new trial motion, the evidence is not newly discovered. See *Commonwealth* v. *Weichell*, 446 Mass. 785, 801 (2006). The defendant also bears the burden to demonstrate that the newly discovered evidence is admissible. *Id.* at 798-799.

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[32] While the Commonwealth does concede that the FBI Informant Reports, Martin Transcript, and ACD files are newly discovered, it does not concede that the inference to be drawn from them—that Mulligan was part and parcel of Detectives Acerra, Brazil, and Robinson's criminal enterprise—is new. The Commonwealth argues that the SJC considered this argument in Ellis's first new trial motion and determined that it is not a basis for granting a new trial. This is not so. Ellis's first new trial motion argued that if evidence of Detectives Acerra, Robinson, and Brazil's corrupt methods from *other* investigations had been introduced at his trial, it would have undermined the credibility of Mulligan's homicide investigation. Ellis's first new trial motion also argued that Detectives Robinson and Acerra "had a large personal stake in solving this crime" because "*Mulligan was their personal friend and partner, as well as . . . a fellow police officer.*" (Emphasis added).

The contention that what Detectives Acerra, Brazil, and Robinson had at stake in Mulligan's homicide investigation was to find personal closure, is distinguishable from Ellis's argument here, which is based on evidence suggesting that what was really at stake for Detectives Acerra, Robinson, and Brazil, was their own liberty, careers, and financial well-being. Additionally, rather than argue that evidence of the detectives' corrupt *modus operandi* in *other* investigations undermined the credibility of Mulligan's homicide investigation, Ellis's present new trial motion sets forth evidence that suggests there was corruption within the investigation of Mulligan's homicide itself.

B. Analysis

i. Newly Discovered

The court must first determine whether Ellis's alleged newly discovered evidence is, in fact, newly discovered. See *LaFaille*, 430 Mass. at 55. The Commonwealth contends, based on Judge Broker's evidentiary hearing testimony and the documentary evidence submitted, that the Hotline Tips and Foley Report were turned over before trial. Their argument is unpersuasive.

Judge Broker testified only with regard to her typical discovery practices. She was clear that she did not specifically remember any of the evidence turned over to Ellis's counsel. See *Commonwealth* v. *Zekirias*, 443 Mass. 27, 34 (2004) ("A good faith assumption that discovery had been timely provided falls far short of fulfilling [the Commonwealth's duty] and cannot be condoned."). Judge Broker also testified that standing alone, the circled number 186 on the Foley Report did not indicate that the report had been turned over to Ellis's counsel. Rather, Judge Broker stated that the fact the Foley Report is also listed on the Police Report Index suggests that she turned it over to Ellis's counsel.

There is, however, no documentary evidence to support Judge Broker's assertion that the Police Report Index is an index of evidence actually turned over to Ellis's counsel. In fact, the documentary evidence Ellis submitted challenges this assumption. The fax cover letters Judge Broker and ADA Furman sent Attorneys Zalkind and Duncan in 1994 show that discovery was turned over to Ellis piecemeal, and in an order that does not correspond to the chronology of the Police Report Index. For example, the November and May 1994 fax cover letters list only several non-sequentially numbered items each, and encompass unnumbered documents in addition to numbered documents appearing on the Police Report Index. ADA Furman attested that she had "no memory" of one police officer accusing another of Mulligan's murder.

Moreover, on November 17, 2014, the Commonwealth conceded at the evidentiary hearing that it does not have a cover letter referencing the Foley Report.

Additionally, the Hotline Tips do not appear on the Police Report Index and are not referenced in any fax cover sheets submitted in connection with the present motion. The Commonwealth argues that Judge Broker's testimony that the words "given to counsel" handwritten at the top of the Hotline Tip Indices were in her own handwriting shows that the Hotline Tips were turned over. However, ambiguities in the evidence with regard to a discovery production process which seems haphazard, together with the absence of cover letters confirming production of the Foley Report or the Hotline Tips, casts substantial doubt as to whether they were actually produced.

Attorneys Zalkind's and Duncan's testimony lends further support to this court's conclusion that the Foley Report and Hotline Tips were not turned over. Attorneys Zalkind and Duncan testified convincingly that if they had received this information they would have filed additional discovery motions requesting information about the potential third-party culprits named therein and any follow-up the BPD performed.

Ellis's March 31, 1994 motion for exculpatory evidence requesting "all information provided . . . by Senator Dianne Wilkerson" lends substantial support to Attorneys Duncan's and Zalkind's testimony in this regard. Attorneys Duncan and Zalkind made this detailed request based on vague, handwritten notes Senator Wilkerson generated while speaking with an anonymous caller who implicated a third-party suspect in Mulligan's homicide. Certainly they would have made similar requests with respect to the Hotline Tips and Foley Report in light of the detail within those documents as compared to the Wilkerson Notes. Unlike the Wilkerson Notes, several of the Hotline Tips included the name of the tipster, the name of a potential third-

party suspect, and in some cases, a possible motive for the murder. In at least one instance, the tipster was a detective. In another case, the tipster was a politician. Between the Wilkerson Notes, the Hotline Tips, and the Foley Report, both the name Armstead and a connection to South Bay[33] were referenced three times in connection with Mulligan's homicide, but not once in Ellis's discovery motions. Based on the foregoing, the court finds that the Foley Report and the Hotline Tips are newly discovered.

The Commonwealth also argues that the Mulligan Condominium Information is not newly discovered evidence because it is comprised of public real estate records that could have been obtained by Ellis at any time. The Commonwealth is correct. See *Nicholas* v. *Lewis Furniture Co.*, 292 Mass. 500, 505 (1935) (holding that reasonable prudence requires a defendant to conduct a thorough investigation before trial). Though Ellis's September 1994 discovery motion asked the Commonwealth for any information concerning the circumstances under which Detectives Acerra and Mulligan came to live in the same complex and for how long, this information was accessible through public records available to Ellis at that time. *Commonwealth* v. *Elangwe*, 85 Mass. App. Ct. 189, 195 (2014) (holding that "[t]imely investigation of the public record" would have uncovered the defendant's alleged newly discovered evidence). Accordingly, the court finds that the Mulligan Condominium Information is not newly discovered evidence. The court will therefore consider this evidence as it would any other evidence that was available, but not offered, at trial. See *Wright*, 469 Mass. at 465.

[33] The Foley Report says Armstead, Jr. was a corrections officer at "South Cove." This more than likely referred to the South *Bay* House of Correction, particularly in light of the Hotline Tip that describes an inmate housed at "South Bay Cove."

ii. Admissibility

a. Law

Ellis argues that the FBI Informant Reports, the Martin Transcript, the Foley Report, the Hotline Tips, the Mulligan Robbery Information, and the Hansen Report contain admissible evidence because they reveal viable third-party culprits and are evidence that the BPD conducted an inadequate police investigation.

A defendant may present evidence of a third-party culprit by showing that another individual had the motive, intent, and opportunity to commit a crime. *Commonwealth* v. *Holliday*, 450 Mass. 794, 811 (2008). The defendant's evidence must also have "a rational tendency to prove the issue" and must not be "too remote or speculative." *Id.* The defendant must demonstrate that the third-party's acts are "so closely connected in point of time and method of operation as to cast doubt upon the identification of [the] defendant as the person who committed the crime." *Id.*, citing *Commonwealth* v. *Conkey*, 443 Mass. 60, 66 (2004) (alteration in original).

Commonwealth v. *Bowden*, 379 Mass. 472 (1980), recognizes a defendant's ability to base his defense on the inadequacy of the police investigation in connection with the case. See *Commonwealth* v. *Silva-Santiago*, 453 Mass. 782, 801-802 (2009). "[T]he inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to . . . pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence." *Id.* at 801. This is commonly referred to as a *Bowden* defense. *Id.* at 802.

Information regarding a third-party culprit who was known to the police but never

investigated may be admissible under a *Bowden* defense even if it is not admissible as part of a third-party culprit defense. *Silva-Santiago*, 453 Mass. at 802. "[U]nder a *Bowden* defense, the information may be offered simply to prove that the police knew of the possible suspect and failed to take reasonable steps to investigate it." *Id.* Therefore, *Bowden* renders evidence that is otherwise inadmissible hearsay admissible, not for its truth, but "to show that the information was provided to the police." *Id.* Further, admission of evidence pursuant to *Bowden* presents less risk of prejudice to the Commonwealth "because the police are able to explain what they did to determine that the suspect was not guilty of the crime." *Id.* at 803.

Ellis also contends that his newly discovered evidence constitutes substantial impeachment evidence that could have been used against Detectives Acerra and Robinson at Ellis's suppression hearing and Det. Brazil during Ellis's trial. Newly discovered evidence that only serves to impeach a witness's trial testimony "does not ordinarily warrant a new trial." *Commonwealth* v. *Simmons*, 417 Mass. 60, 72 (1994). However, the court has "never adopted an inflexible rule that newly discovered evidence that merely . . . impeaches a witness's testimony is an insufficient basis for a motion for a new trial. In fact, we have found that, in rare cases, a new trial may be warranted '[w]here the Commonwealth's case depends so heavily on the testimony of a witness' and where the newly discovered evidence 'seriously undermines the credibility of that witness.'" *Commonwealth* v. *Cowels*, 470 Mass. 607, 621 (2015), quoting *Commonwealth* v. *Liebman*, 388 Mass. 483, 489 (1983).

b. Ellis's Evidence

In this case reasonable judicial minds might differ as to whether this newly discovered evidence of other possible perpetrators would be admissible as third-party culprit evidence. That is a question best left to the trial judge, if this case is retried. However, it is clear to this judge

that evidence that the investigators here failed to vigorously pursue other leads would be admissible under the rubric of a *Bowden* defense. Indeed, when coupled with evidence of Acerra, Robinson, and Brazil's conflict of interest, a potentially powerful *Bowden* defense exists here.

For example, the references to "Armstead" in the Foley Report, Hotline Tips, and Wilkerson Notes coupled with evidence that Mulligan liked "young black girls," provide fertile territory for counsel to explore at trial within the context of a *Bowden* defense. See *Commonwealth* v. *Reynolds*, 429 Mass. 388, 391 (1999) (permitting defendant to examine police witness about detectives' failure to investigate tips stating that other persons had reason and opportunity to kill the victim). In addition, Ellis argues that the statement in the Hansen Report that Peretti had known Mulligan to wear a .25 caliber weapon on his ankle casts detectives' questions to Erti and Sharpov about Mulligan's "pearl-handled" small caliber weapon in a new light. Ellis contends that this evidence suggests that the BPD knew Mulligan carried a .25 caliber weapon, but had not located it. Ellis posits that this means that the Mulligan Task Force may have initially focused on locating a suspect who, unlike Patterson or Ellis, was close enough to Mulligan to know that he carried a weapon on his ankle and steal it after killing him. Cf. *Conkey*, 443 Mass. at 69-70 (evidence of a third-party culprit who "had a relationship with the victim" is highly relevant where the defendant had no connection to the victim). The record reveals that the Mulligan Task Force abandoned their focus on what happened to Mulligan's .25 caliber gun just days after Mulligan's murder and before interviewing or otherwise investigating anyone who knew about it. Combined with Joanne Samuel's statement that she saw a woman in Mulligan's truck shortly before the murder, the two Hotline Tips stating that Mulligan owned a .25 caliber weapon, the statements in the Wilkerson Notes that Mulligan's girlfriend shot him

with his own .25 caliber weapon, and the Hansen Report, a *Bowden* defense focused on the possibility that someone who knew Mulligan killed him would be viable.

But it is not only evidence of other possible culprits that has newly come to light. The *Bowden*-based argument that the investigation was inadequate in that other leads were not fully pursued is greatly enhanced by the new evidence of an investigation impaired by a conflict of interest on the part of several key investigators.

Shortly after Mulligan was killed, the BPD began receiving tips, some of which indicated that Mulligan had rubbed people the wrong way. Rumors, perpetuated by reports in the media, began to circulate that Mulligan may have been a "dirty cop." For these reasons, Detectives Brazil, Acerra, and Robinson had a personal interest in solving Mulligan's homicide as quickly as possible before any members of the Mulligan Task Force, who were not part of the corruption scheme, or anyone else, could look further into *why* Mulligan may have rubbed people the wrong way or was rumored to be a "dirty cop." In other words, they needed to prevent others from finding out that they and Mulligan had been engaging in illegal activities.[34]

The Mulligan Robbery Information, which reveals that a credible tipster reported that Detectives Mulligan and Robinson robbed a drug dealer at gunpoint in 1992, provides ample support for the proposition that Mulligan was involved in the corruption scheme. At the heart of Detectives Robinson's and Acerra's federal indictments were allegations that they robbed drug dealers and conspired with additional unnamed detectives between 1990 and 1996. It is undisputed that Det. Brazil was one of them. The Mulligan Robbery Information, the Martin

[34] The court recognizes that Det. Brazil was transferred from Area E-5 where he worked with Detectives Robinson and Acerra to the homicide unit some time prior to Mulligan's death. However, this is of little consequence. As evidenced by the reports and testimony from the federal corruption investigation, discovery of any element of the corruption scheme would lead investigators to discover the extent of its reach. Det. Brazil was surely aware that an outsider's discovery of his involvement could lead to severe consequences.

Transcript, and the FBI Informant Reports, combined with Mulligan's apparent wealth and close friendship and business relationship with Det. Accera are strong evidence that Mulligan was also one of these unnamed co-conspirators.

The Commonwealth's argument that the Martin Transcript does not imply that Mulligan was involved in the corruption scheme is unconvincing. According to Martin, Det. Acerra identified himself as an INS officer named McCarthy as he approached Martin's car with the other detectives. Presumably, Det. Acerra wished to conceal his identity before robbing Martin. The Martin Transcript reveals that Det. Acerra made an effort to do so in front of Mulligan.

After entering Martin's first apartment, Det. Robinson returned to the vehicle where Martin was "guarded by Mulligan" to ask Martin to open a safe. Later, Det. Robinson, Det. Acerra, and Sgt. Marquadt went with Martin to his second apartment to open another safe. According to Simeson's testimony, the detectives openly discussed the second safe before leaving Martin's first apartment to open it. Simeson and Martin's other friends were left behind, and guarded by Detective Mulligan. The incident report subsequently completed by Det. Robinson, which is also signed by Mulligan, does not state that the detectives took any money or more than "several" pounds of marijuana from Martin's apartments. To conclude that Mulligan was unaware of the cash and drugs stolen from Martin, and did not benefit from participating in the robbery, strains credulity, especially in consideration of the Mulligan Robbery Information and close friendship between Mulligan and Detectives Acerra and Robinson.[35]

[35] Evidence of this friendship includes Det. Acerra's suppression hearing testimony that he and Mulligan were close friends and worked together for over twenty years; the fact that Sharpov knew Detectives Robinson and Acerra well enough to refer to them as "Walter" and "Kenny" and spend time with them after Mulligan's death; and the fact that Detectives Mulligan and Acerra lived in the same condominium complex where Det. Acerra had purchased a condominium from Mulligan, who had also lent Det. Acerra a portion of the down payment.

The Commonwealth argues that Ellis has failed to identify any case law that requires the court to grant a new trial where the officers investigating a crime did so despite having a personal conflict of interest. The court acknowledges that there appears to be no Massachusetts case law addressing a factual situation substantially similar to the circumstances here, but notes analogous case law addressing the consequences of a prosecutor's conflict of interest. See *Commonwealth* v. *Murray*, 461 Mass. 10, 19 (2011) ("A police officer is subject to the prosecutor's control when he acts as an agent of the government in the investigation and prosecution of the case."); *Commonwealth* v. *Sleeper*, 435 Mass. 581, 605 (2002) (identifying members of the "prosecution team" as anyone who has "participated in the investigation or evaluation of the case" who reports to the district attorney's office) (quotation omitted); *Commonwealth* v. *Redding*, 382 Mass. 154, 157 (1980) (holding "the taint on the trial is no less" where police "rather than the State's Attorney" engaged in misconduct), quoting *Commonwealth* v. *St. Germain*, 381 Mass. 256, 261 n.8 (1980).

Massachusetts courts have long recognized that defendants should receive a new trial where there is a danger that the district attorney who prosecuted them may have been influenced by private interests. See *Commonwealth* v. *Tabor*, 376 Mass. 811, 819, n.13 (1978), and cases cited. Underlying this principle is a legislative intent to "guard the district attorney's office from private interests and private influence" in order to "secure a fair and impartial trial for the public and for the defendant." *Id.* at 819. See *Commonwealth* v. *Ellis*, 429 Mass. 362, 371 (1999) (stating that Article VI of the Massachusetts Declaration of Rights "prohibits the improper use of State power for private interests"). Detectives Robinson's, Brazil's, and Acerra's private interests contravened this intent. By compromising the impartiality of Mulligan's homicide investigation,

these detectives compromised the impartiality of the resulting prosecution against Ellis. See *Tabor*, 376 Mass. at 820.

Detectives Brazil, Acerra, and Robinson's involvement in Mulligan's homicide investigation was hardly insignificant.[36] The corrupt detectives were involved in nearly every aspect of the homicide investigation that led to Ellis's prosecution. Cf. *Commonwealth* v. *Manning*, 373 Mass. 438, 444 (1977) (dismissing indictment where "officers' misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint"). According to Sgt. O'Leary, Det. Acerra, with Sgt. Marquadt, were the first to enter Mulligan's condominium after he was killed. Detectives Acerra and Robinson were among the first to respond to Rosa Sanchez's home the day of the murder, and drove her to the police station that day. They also drove Rosa to the homicide unit to view the Ellis photo array, and were present when she made her first two selections from the photo array, and when Rosa identified Ellis out of a line-up. Detectives Acerra and Robinson drove Kurt Headen, who allegedly hid the Glock and Raven for Ellis, to the police station.

Det. Brazil also met with Rosa Sanchez the day of the murder, and was involved in the investigation of the homicide of Ellis's cousins, Celine Kirk and Tracy Brown. The search of Kirk and Tracy Brown's home yielded Ellis's photo identification. The same investigation led Det. Brazil to meet and later interview David Murray in connection with Mulligan's homicide investigation. Although Murray could not identify where Ellis had buried the guns, when two cadets found the Raven and Glock in a vacant lot, Det. Brazil wrote the report on their recovery. Det. Brazil brought both Ellis and Patterson to the homicide unit and was one of the detectives

[36] The trial court's 1999 decision on Ellis's first new trial motion states that "Acerra and Robinson played only a peripheral role in the investigation." *Commonwealth* v. *Ellis*, CR1993-11743 at 12 n.8 (March 4, 1999) (McDaniels, J.). However, considering Det. Brazil's involvement in the investigation in addition to Detectives Acerra and Robinson's involvement reveals that one of the three corrupt detectives was involved with nearly every aspect of the investigation that led to Ellis's prosecution.

who questioned them. Detectives Acerra and Robinson testified at Ellis's suppression hearing and Det. Brazil testified at Ellis's third trial. Compare *Commonwealth* v. *Campiti*, 41 Mass. App. Ct. 43, 66 (1996) (newly discovered evidence that investigating officer engaged in unrelated wrongdoing did not warrant a new trial where officer had only a "secondary role in the . . . investigation and a very minor role in the trial").

In the view of this court, the newly discovered evidence of Mulligan's involvement in the corruption scheme of Detectives Acerra, Robinson, and Brazil is credible and material evidence admissible to prove the bias of all three investigators and supports a defense based on the inadequacy of the homicide investigation.

iii. Substantial Miscarriage of Justice

"A defendant seeking a new trial on the ground of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction." *Weichell*, 446 Mass. at 798, quoting *Commonwealth* v. *Grace*, 397 Mass. 303, 305-306 (1986). The motion judge must conduct a "full and reasonable assessment of the trial record" and determine whether "the absent evidence would have played an important role in the jury's deliberations and conclusions, even though it is not certain that the evidence would have produced a verdict of not guilty." *Jackson*, 468 Mass. at 1010 (quotation omitted).

Ellis's first two trials ended in mistrials because the jury could not agree on a verdict. There were no witnesses to Mulligan's murder, and the Commonwealth's theory as to Ellis's motive—that Ellis and Patterson randomly decided to shoot a police officer—is not particularly strong. See *Commonwealth* v. *Wilson*, 49 Mass. App. Ct. 429, 433 (2000) (citing a lack of witnesses to the crime as one reason for the court's finding that the case against the defendant was not "one in which the evidence pointed overwhelmingly to guilt"). Compare

Commonwealth v. *DaSilva*, 471 Mass. 71, 79 (2015) (finding evidence of motive was "very strong" where alleged motive for shooting was revenge, supported by evidence that the victim had shot at the defendant's friend and assaulted a family member earlier that day). Now that the SJC has invalidated Patterson's fingerprint evidence, there is no longer any physical evidence linking Ellis to the scene of the crime. See *Commonwealth* v. *Depace*, 433 Mass. 379, 387 (2001) (noting that lack of forensic corroboration detracted from the overall strength of the evidence identifying the defendant as the person who committed the crime); *Commonwealth* v. *Fancy*, 349 Mass. 196, 201 (1965) (holding case against defendant was weak where the only evidence linking him to the crime was that he was with his codefendants at a cafe the night of the crime, and at one point the defendants left and returned).

Ellis never denied that he was at Walgreens with Patterson the night of Mulligan's homicide. See *Wright*, 469 Mass. at 466 (finding it "doubtful" suspect would have admitted to police that he intended to go the crime scene the night the victim was murdered "if he perceived it to be incriminating"). This concession renders the information about the Volkswagen and sightings of two black males at Walgreens that evening less significant. See *Ellis*, 432 Mass. at 755 (holding that Evoney Chung's testimony was not critical to the Commonwealth's case against Ellis because Ellis had already conceded that he was at Walgreens on the night of the murder). There were no witnesses who reported seeing Ellis, or even two black males, at any time closer than twenty-five to forty minutes before Mulligan was killed. Victor Brown could not have seen Ellis and Patterson walk to Walgreens because as detectives reported the day after the murder, the end of the path to Walgreens was concealed by heavy vegetation. Though Victor Brown had been woken up at 3:20 a.m. by what he believed was the sound of a diesel car engine, he did not report hearing gunshots when he went outside to investigate, or hearing them before

he heard the men leave just fifteen minutes later. Patterson admitted that he and Ellis parked near Victor Brown's home to smoke marijuana and relieve themselves. Though the Commonwealth has argued that the removal of the window tint and racing bra from the Volkswagen evidences consciousness of guilt, "a jury may, but need not, consider consciousness of guilt evidence." *Commonwealth* v. *Henry*, 37 Mass. App. Ct. 429, 438-439 (1994). Rather, the jury could choose to infer that nineteen-year-old Patterson modified the car after seeing the police circular distributed shortly after Mulligan's murder because, as he told detectives at his October 3, 1993 interview, "he did not want to be harassed by the police." See *Commonwealth* v. *Irwin*, 72 Mass. App. Ct. 643, 649 (2008) ("[T]here are a number of reasons why a potential defendant may decide not to reach out to or otherwise interact with law enforcement."); *People* v. *Conyers* 52 N.Y.2d 454, 458 (1981) ("[I]t is a lamentable but undeniable fact of modern society that some of our citizens harbor a mistrust for law enforcement authority which leads them to shun contact with the police even when the avoidance of contact is not in their own best interest.").

The remaining evidence used to convict Ellis relies on Letia Walker's testimony and Rosa Sanchez's identification. While Walker's testimony and fingerprint evidence gave strong support to Ellis's conviction on the firearms charges, neither it nor the Rosa Sanchez identification is overwhelmingly persuasive as regards the murder and armed robbery convictions. Walker testified that she and Ellis went to Ellis's apartment to retrieve two guns the morning of October 1, 1993. October 1, 1993 was also the morning after Tracy Brown and Celine Kirk were killed inside of the very same apartment. In other words, Walker testified that she and Ellis entered the scene of a homicide the morning after the homicide, and presumably after police searched the house for evidence. Walker's testimony, combined with her fingerprint on the Raven, falls

considerably short of evidencing Ellis's intent to commit robbery and murder. See *Commonwealth* v. *Newson*, 471 Mass. 222, 234 (2015) (affirming propriety of jury instructions stating that "the defendant could not be found guilty of murder if his only participation consisted of aiding another person after the fact in escaping from the police and disposing of weapons"); *Commonwealth* v. *Laguer*, 448 Mass. 585, 598 (2007) ("For fingerprint evidence to be probative, it must be linked to the time of the crime, that is, there must be evidence to establish when the fingerprints were placed on the [item]."); *Fancy*, 349 Mass. at 201 (inference that defendant has requisite intent, without more, is "insufficient foundation for the erection of an entire case") (quotation omitted). David Murray's statement that Ellis's involvement was limited to hiding the guns for Patterson fails to strengthen the case against Ellis for the same reason, and is conceivably why the Commonwealth did not ask Murray to testify in Ellis's third trial.

The only person to identify Ellis and connect him to the scene of the homicide was Rosa Sanchez, who claimed to have seen Ellis crouching next to Mulligan's vehicle approximately forty-five minutes before Mulligan was killed. See *Commonwealth* v. *Gomes*, 470 Mass. 352, 365, 371 (2015) (recognizing that mistaken eyewitness identification is "the primary cause of erroneous convictions, outstripping all other causes combined") (quotation omitted). Detectives Acerra, Robinson, and Brazil's conflict of interest undermines Rosa's identification of Ellis much more than Rosa's familial ties to Det. Acerra, which Det. Acerra downplayed at Ellis's suppression hearing, ever did standing alone. Sgt. O'Leary's testimony that Detectives Robinson and Acerra were asked to record statements about the circumstances surrounding Rosa's photo array identification suggests that the prosecution team had doubts about the legitimacy of Rosa's identification of Ellis, specifically whether any improper influence had come into play.

If Ellis had possessed the newly discovered evidence of the detectives' conflict of interest, particularly the Martin robbery, which had occurred just two weeks before Mulligan was killed, Ellis could have argued to the jury that Det. Acerra's early entry into Mulligan's condominium and the belated discovery of Mulligan's missing phone suggests that Det. Acerra and his cohorts compromised potential evidence of the identity of Mulligan's killer while attempting to conceal evidence of their own wrongdoing. Apparently a sum of money was removed from Mulligan's condominium that night, as confirmed to Sharpov by Det. Robinson; the cash was never recovered nor, it would seem, ever resurfaced. An exhaustive search of Mulligan's automobile shortly after his murder, in particular of the compartment between the front seats, failed to produce Mulligan's cell phone. While it is true that the compartment had a removable upper tray which obscured the lower part of the compartment, the photographs of the compartment submitted at the hearing prove that the tray only covered half of the compartment below; it must have been obvious to Det. Foilb when he conducted the inventory on the morning of the murder that there was a searchable space below the tray. It is hard to believe that he overlooked a cell phone in those circumstances. The phone did not make its appearance until Det. Acerra suggested that a second search be undertaken days later and when it was found there was no evidence on it of at least Mulligan's call to Hager shortly before his death. Perhaps evidence of other calls was deleted as well. It would seem that even the prosecutor, Phyllis Broker, suspected that Det. Acerra had planted the phone in the car. See *Commonwealth* v. *Bennett*, 43 Mass. App. Ct. at 162 ("With the scale teetering in balance on the basic circumstances of the crime, it would be quite natural for the jury to pay attention to collateral factors and even to make them decisive.").

The newly discovered evidence would have further supported a powerful *Bowden* defense by revealing that the Commonwealth failed to investigate numerous other parties with reason to kill Mulligan. Such a defense could have raised a reasonable doubt as to whether, as the Commonwealth claimed at trial, Ellis decided to kill Mulligan simply because the opportunity presented itself. See *Commonwealth* v. *Hill*, 432 Mass. 704, 719 (2000) ("Evidence that contradicted the Commonwealth's entire theory of the case could have raised a reasonable doubt"). The newly discovered *Bowden* evidence is even stronger when combined with existing evidence not presented at trial, such as Samuel's sighting of a woman, whom police never identified, in the car with Mulligan shortly before he was killed. See *Commonwealth* v. *Smith*, 461 Mass. 438, 446 (2012) (stating that the court gives "wide latitude to the admission of relevant evidence that a person other than the defendant may have committed the crime charged").

The court concludes that the newly discovered evidence of Detectives Robinson, Brazil, and Acerra's conflict of interest and the BPD's failure to follow up on leads implicating third-party suspects is material, credible, and would have been a real factor in the jury's deliberations in the Commonwealth's case against Ellis. Indeed, even without the third-party culprit evidence, in this judge's opinion, the evidence of Detectives Robinson, Brazil, and Acerra's bias would have played an important role in the jury's deliberations. Accordingly, the court concludes that this is a case where justice has not been done. Therefore, Ellis's conviction must be reversed and he is entitled to receive a new trial.

III. Undisclosed Exculpatory Evidence

As discussed *supra*, the court finds that the Hotline Tips, Foley Report, and Mulligan Robbery Information constitute newly discovered exculpatory evidence. The court also finds

that the Commonwealth had a duty to disclose this evidence pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). See *Kyles* v. *Whitley*, 514 U.S. 419, 437-438 (1995).

"The *Brady* obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of events, or challenges the credibility of a key prosecution witness." *Laguer*, 448 Mass. at 594. The Hotline Tips, Foley Report, and Mulligan Robbery Information are *Brady* evidence because, as discussed above, Ellis has met his burden to establish that this evidence would have been "favorable to his cause." *Commonwealth* v. *Williams*, 455 Mass. 706, 720 (2010); *Commonwealth* v. *Neal*, 392 Mass. 1, 12 (1984).

When the defendant makes a specific and relevant request for information, a prosecutor's "failure to make any response is seldom, if ever, excusable." *Commonwealth* v. *Gallarelli*, 399 Mass. 17, 23 (1987), citing *Agurs*, 427 U.S. 97, 106 (1976). "[T]he reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but very slight effect.'" *Id.* This is because "defense counsel is more likely to treat the prosecutor's failure to disclose specifically requested material as an implied representation that the evidence does not exist and make legal and strategic decisions accordingly . . . ." *Commonwealth* v. *Daniels*, 445 Mass. 392, 404 (2005). Even where the court denies a defendant's specific pretrial discovery request, "[w]here the Commonwealth knows that a judge has not reviewed the specifically requested material, its obligation continues." *Id.* at 402. Due process requires a continuing duty of the Commonwealth to be vigilant in accessing and

disclosing evidence it "knows, or should know, the defendant seeks as material to his defense." *Id.* at 403-404.

At a hearing on April 9, 2015, the Commonwealth unequivocally stated that the district attorney's office possessed the Foley Report and the Hotline Tips before trial and contended that they were produced to defense counsel, a conclusion which this court has rejected. The Mulligan Robbery Information was not produced and is in a different category.

"Members of the prosecution team to whom the [*Brady* obligation] extends includes 'members of [the prosecutor's] staff and . . . any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to [the prosecutor's] office." *Sleeper*, 435 Mass. at 605 (quotation omitted). See also *Murray*, 461 Mass. at 19 ("A police officer is subject to the prosecutor's control when he acts as an agent of the government in the investigation and prosecution of the case."). Contra *Commonwealth* v. *Daye*, 411 Mass. 719, 733-734 (1992) (reports from police department outside of the prosecutor's jurisdiction were not in the prosecution's control in absence of a joint investigation between the two counties).

Commissioner Bratton and his successor, former Superintendent Evans[37] who became Commissioner Evans in 1994, had a duty to disclose the Mulligan Robbery Information. Rule 101 of the BPD Rule and Procedures, require the ACD to report directly to the police commissioner. Pursuant to BPD Rule 113, the ACD must "[i]mmediately notify the Police Commissioner . . . when a suspicion of significant corruption enters an investigation." The Mulligan Robbery Information plainly constituted "significant corruption" of which Commissioners Bratton and Evans should have been apprised. In fact, the 1996 *Boston Globe*

[37] Sgt. O'Leary testified that Commissioner Evans also headed Mulligan's homicide investigation in his former capacity as a Superintendent.

article reporting that the BPD had "revived" the robbery allegation against Detectives Mulligan and Robinson, contains a quote from Commissioner Evans that addresses this information. Therefore, at the very latest, Commissioner Evans was apprised of this information in 1996, at a time predating Ellis's first new trial motion.

Moreover, Judge Broker's lack of concern for the rumors surrounding the corrupt detectives because they did not "affect" her, based on the "assumption that [she] already [had] all of the items and information subject to discovery" in the Commonwealth's case against Ellis, "does not comport with [Mass. R. Crim. P.] rule 14(a)(3)." *Commonwealth* v. *Frith*, 458 Mass. 434, 440 (2010). "[I]t is incumbent on an ADA to ask a police prosecutor or other similar official, whether *all* discoverable materials relating to a particular case have been given to the Commonwealth." *Id.* at 441. See *Kyles*, 514 U.S. at 437-438 ("[I]ndividual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.") (internal citation omitted).

The Commonwealth's argument that Ellis has known all along that Mulligan was corrupt and possibly involved in corruption with other detectives is eyebrow-raising. Before trial, Ellis was denied discovery that would confirm these rumors after the trial court accepted the Commonwealth's argument that his request was merely a "fishing expedition." Where a defendant has requested evidence that the Commonwealth did not turn over, the defendant is entitled to an assumption that it does not exist. See *Gallarelli*, 399 Mass. at 23 n.7. In this case, Ellis made specific requests for the type of exculpatory information encompassed by the Hotline Tips, Foley Report, and Mulligan Robbery Information. The court finds that the Commonwealth's failure to disclose any of this information was a *Brady* violation and provides an additional basis upon which Ellis must receive a new trial. See *Commonwealth* v. *Light*, 394

Mass. 112, 114 (1985) (finding that essential fairness entitled the defendant to a new trial where the defendant was denied material exculpatory evidence that he requested and was known to the police).

CONCLUSION

Before the court is documentary evidence which would support, if not a third-party culprit defense, certainly a *Bowden* defense suggesting that the arrest of Sean Ellis was a rush to judgment based on an inadequate police investigation. The Commonwealth claims that these materials were provided to the defense, but the evidence does not bear that out. And even putting the third-party culprit evidence aside, the newly unearthed evidence of the bias of Detectives Acerra, Robinson, and Brazil, who played significant roles in the homicide investigation, demands that a new trial be ordered here. From the beginning of the investigation, the apparent criminal misconduct of Detectives Acerra, Robinson, Brazil and Mulligan gave the surviving partners a motive to cover up any evidence of their own crimes and to contribute to a quick arrest and conclusion to the investigation so that it did not turn in their direction. Defense counsel should have had the opportunity to make that argument to the jury.[38]

[38] Based on the information known to the Boston Police Department in 1993, Detectives Acerra and Robinson, at the very least, should never have been part of the investigative team. Phyllis Broker, while not fully cognizant of the obligation to produce to defense counsel all discovery regarding Mulligan's documented criminal involvement with Acerra et al., apparently realized this but no one else did—not the District Attorney, not two Police Commissioners, not the Detectives Union and not anyone else in the BPD. Having said that, the conclusions reached here should not be read as an indictment of the many honest and honorable Boston police officers who worked on the Mulligan murder investigation. Moreover, twenty years after these events, this judge is acutely aware of the strides made by the Boston Police Department in the professional handling of the investigation and prosecution of their cases. This is particularly true of the homicide department which is, deservedly, held in particularly high regard by this judge.

ORDER

The Defendant's (Second) Motion for a New Trial is **ALLOWED** as regards the Murder and Armed Robbery charges. It is, however, **DENIED** as to the firearm convictions as no real doubt as to the justice of those convictions has been established here.

By the Court,

Carol S. Ball JSC

Carol S. Ball
Justice of the Superior Court

Date: May 5, 2015