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Version

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NORFOLK, SS.

SUPERIOR COURT DEPARTMENT
NORFOLK SUPERIOR COURT
DOCKET NO. 2282CR0117

COMMONWEALTH

v.

KAREN READ

COMMONWEALTH'S OPPOSITION TO "DEFENDANT'S MOTION TO
DISMISS FOR EXTRAORDINARY GOVERNMENTAL MISCONDUCT"

Now Comes the Commonwealth in the above-captioned matter and submits the following in opposition to the defendant's renewed claims that her indictments should be dismissed because of "egregious governmental misconduct". The Commonwealth disputes any ethical violations or misconduct let alone misconduct that taints the legal system or infringes upon the defendant's right to a fair trial. The defendant's motion should be denied.

Dismissal as a sanction is "very strong medicine, and it should be prescribed only when the government misconduct is so intentional and so egregious" and appropriate only upon "a showing of irremediable harm to the defendant's opportunity to obtain a fair trial." Bridgeman v. Dist. Attorney for Suffolk Dist. 476 Mass. at 298, 316, 322-323 (2017). To the extent the defendant has suggested that egregious circumstances might warrant dismissal, the Supreme Judicial Court has noted that "we have never dismissed charges in such circumstances in the absence of prejudice." Commonwealth v. Mason, 453 Mass. 873, 877 (2009). Judicial responses should be limited to "truly remedial, and not punitive, measures." Id. at 878, quoting Commonwealth v. Hines, 393 Mass. 564, 573 (1984).

The Commonwealth does not dispute its prosecutorial obligations and constitutional duty "to disclose in a timely manner material, exculpatory evidence over which it has possession, custody, or control." See Brady v. Maryland, 373 U.S. 83, 87 (1963); In the Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2002). Nor does the Commonwealth dispute its broad obligations to inquire and disclose any facts that would tend to exculpate the defendant or diminish her culpability and all statements of witnesses. Id.; see also Commonwealth v. Ellison, 376 Mass. 1, 22 (1978) ("The Brady obligation comprehends evidence which provides some significant aid to the defendant's case ...").

However, "[t]o prevail on a claim that the prosecution failed to disclose exculpatory evidence, the defendant must first prove that the evidence was, in fact, exculpatory." Commonwealth v. Healy, 438 Mass. 672, 679 (2003). Exculpatory evidence includes all evidence that tends to negate the guilt of the defendant or "provides some significant aid to the defendant's case" and while rightfully broad, the conception of exculpatory evidence "is not boundless." McFarlane, 493 Mass. at 390-391.

Canton Police Department Surveillance Video

In 2022 the Commonwealth provided the defense with approximately ninety crime scene services photographs depicting the condition of the defendant's vehicle in the Canton Police Department's sallyport. Further provided to the defense was Ring surveillance video of the defendant's broken rear right taillight at approximately 5:00am; statements of witnesses who observed the defendant's broken taillight around 5:30am; Canton Police cruiser video depicting the defendant's broken taillight at approximately 8:00 a.m.; observations of a damaged taillight by the Dighton police; and automated vehicle location

data from troopers' cruisers who were assigned to the SERT team, evidencing that the SERT team was on Fairview Road before the defendant's vehicle arrived at the Canton Police Station. Lieutenant Kevin O'Hara, of the Massachusetts State Police SERT Team testified at trial, and his Automated Vehicle Locator (AVL) records confirm, his arrival at 34 Fairview Road on January 29, 2022, at 4:56 p.m. Lt. O'Hara additionally testified that his arrival was preceded by one other trooper from his unit, Trooper Jason Beausoleil, at 4:54 p.m. (Tr. Day 25, June 3, 2024, p. 13-14). The defendant's vehicle arrived on the back of a flatbed tow truck at the Canton Police Station at 5:30 p.m. The defendant has also repeatedly represented in the media and postured at trial that her taillight was broken at 5:00 a.m. by striking the victim's parked vehicle in the driveway of the victim's home. The Commonwealth has provided substantial evidence, including accident reconstruction video from its expert, Jud Welcher, demonstrating otherwise. Beyond unsupported claims and vague innuendos, the defense struggles to establish how the condition of the defendant's broken taillight in the Canton Police Department sallyport is in fact exculpatory or "the most critical and highly-contested issue in this case". Def. Motion at 7. Despite claims to the contrary, the defense never filed a motion to preserve or in its perpetually evolving theory of the case, did the defendant specifically request prior to November 2024, surveillance video from the Canton Police station.¹

¹ The defense claims their February 2, 2022, request for "all physical evidence, including anything present on or near the decedent at the time his body was discovered, anything found at the alleged crime scene" was sufficient notice to the Commonwealth to preserve footage from the Canton Police Department's sallyport where the defendant's vehicle was stored for approximately two days. Def. Exhibit A. The Canton Police Department is not the alleged crime scene. The Commonwealth could not reasonably have anticipated the defense's ever-evolving third-party culprit claims, nor to this day, made the Canton Police Department video pertinent to their amorphous and fluid claims.

Nevertheless, the trial prosecutor was not aware of the existence of surveillance video in the Canton Police Department's sallyport until receiving the federal grand jury transcript of Massachusetts State Trooper Michael Proctor. Prior to that, the prosecutor had not been alerted to its existence by investigating officers. Promptly, on April 4, 2024 the Commonwealth provided the defendant with nine surveillance videos in its possession, consisting of: video footage of the main driveway of the Canton Police Station and video files entitled: Okeefe Sallyport 1-28-22 12am-12am; Okeefe Sallyport 1-29-22 12a-530p; Okeefe Sallyport 1-29-22 5p-12am; Okeefe Sallyport 1-30-22; Okeefe Sallyport 1-31-22; Okeefe Sallyport 2-1-22 12a-noon; Okeefe Sallyport 2-1-22 noon-12a; and Okeefe Sallyport 2-2-22. Notably, the quality of the video is poor in certain portions, however that is the condition it was recorded in and the condition in which it was received by the prosecutor. The Commonwealth has produced evidence that since January 2022 the sallyport camera was replaced due to its defective condition and during the first trial, the Commonwealth called the technology director for the town of Canton to testify about surveillance video systems throughout the town and he was subject to cross-examination by the defense.

The Commonwealth filed its certificate of compliance on April 10, 2024 noting that "to the best of its knowledge and after reasonable inquiry" it had disclosed all information subject to Mass. R. Crim. P. 14 (a) (1) (A). See Def. Exhibit F. The parties were in court on Friday April 12, 2024, to argue motions in limine. During the defense's televised motion to admit third-party culprit evidence, Attorney Yannetti made representations about the Canton Police Department's surveillance videos. Following that hearing, on April 17, 2024, Lieutenant Brian Tully sent prosecution team members an email stating: "I spoke

with Chief Rafferty. She reviewed the video of the SUV arriving at CPD exists and we should have it, contrary to what defense represented on Friday. The video depicts the vehicle entering the sallyport and crime scene tape being put up. She is putting it on a thumb drive for us in the event we don't have it." See Def. Exhibit G. The prosecutor had not previously received this video or knew of its existence. Subsequently, the prosecutor requested that both the Massachusetts State Police and Canton Police Department produce all relevant and material surveillance video. On April 23, 2024, the Commonwealth provided the defense with surveillance video entitled "Interior Sally Port back wall _20220129_172900." Notably, what was produced to the Commonwealth and provided to the defense was "inverted" surveillance footage due to the camera's settings. The Commonwealth did not manipulate or alter any video, and entered as a trial exhibit the video in the condition it was received. Contrary to the defendant's representations that the Commonwealth's intention was to mislead or deceive the jury by introducing the "inverted" video, the defendant fails to mention that after the defense altered the evidence to "correct" the image to appear consistent with the human eye, the Commonwealth played the entirety of the "corrected" yet altered video which reveals that Trooper Proctor is standing feet away from the defendant's vehicle and never touched the rear right taillight. Further omitted from the defendant's filing is the fact that Trooper Proctor's DNA was not on the right rear taillight.

After the trial, a certified forensic video technician employed by the Norfolk District Attorney's Office reviewed the surveillance footage that had been previously produced to the defense. Recognizing that the video was extremely dark with minimal visible detail, the video technician clarified the video footage and on October 10, 2024, the

Commonwealth produced to the defense: clarified videos; reports detailing the forensic clarification process; associated hash values; and extracted still images from the Canton Police sallyport. Furthermore, the video technician clarified video images from the Canton Police cruiser camera footage on January 29, 2022 at 8:23 a.m.; the Canton Police Department Interior Sally Port front wall footage from January 29, 2022 at 6:13 p.m.; and the Massachusetts State Police Crime Scene Services Section photographs from February 1, 2022; each depicting the same damage to the right rear taillight and encapsulated those images in a substantive report provided to the defense.

After trial, on August 21, 2024, the Canton Police Department provided the Commonwealth with two additional videos: video from the interior sallyport camera on January 1, 2022, depicting that the camera captured all video in an “inverted” fashion to rebut the defense’s suggestion that the video had been tampered with; and consistent with witnesses’ trial testimonies, video from the interior hallway and exterior of the Canton Police station that shows Brian Higgins at the Canton Police station during the early hours of January 29, 2022 and depicts Mr. Higgins moving his law enforcement vehicles due to the snowstorm. These videos were provided to the defense on October 10, 2024, along with a letter from the Canton Police Chief noting their August 21, 2024 production. Prior to their production, the prosecutor was unaware of the existence of these videos.

The defense boldly claims that the surveillance video of Mr. Brian Higgins in and outside the Canton Police Station proves that he “perjured” himself before a federal grand jury. This claim is extremely prejudicial and false. In support of this claim, the defense cites to a federal grand jury transcript [REDACTED]

[REDACTED]

[REDACTED]

Further the defense is unable to demonstrate any prejudice. [REDACTED]

[REDACTED]

[REDACTED]

Both Brian

Higgins and Brian Albert were thoroughly cross-examined at trial about their phone calls with one another. Additionally, the Commonwealth provided the defense with 167 pages of access "card swipe" records throughout the Canton Police Department on January 29, 2022. Mr. Higgins was cross-examined about his movements through the Canton Police Department on January 29, 2022.

On January 28, 2025, the Commonwealth provided the defense with surveillance video from the "main driveway side exterior sally port" that depicts a different camera angle of the defendant's vehicle arriving at the Canton Police station sallyport. Notably, consistent with other videos received from the Canton Police station sallyport, the quality of video is poor. There is absolutely nothing depicted in this video that is exculpatory or undermines the consistent evidence that the defendant's right rear taillight was broken and pieces were missing prior to the vehicle being towed from Dighton. Prior to late January 2025, the prosecutors had never seen this video. After directing a review of all physical and data files, this video was located within a paper case file of investigators.

After inquiry it was learned that an investigator obtained this video from the Canton Police Department in 2022 and it was placed in a physical case file and never provided to the prosecutor or multimedia assistant for download. Although the prosecutor was wholly unaware of this video until recently, the Commonwealth does not dispute that

the video was in its custody during the defendant's first trial. Had the prosecutor known about this video, it would have been produced; as every other video known to the prosecutor was.

Even in circumstances where the prosecutor fails to disclose evidence a defendant is entitled to receive, there must be a showing of irreparable harm to the defendant. This court must examine the extent to which the defendant was disadvantaged in defending herself when considering the prejudicial quality of exculpatory, material evidence. "In measuring prejudice, it is the consequences of the delay that matter, not the likely impact of the nondisclosed evidence, and we ask whether the prosecution's disclosure was sufficiently timely to allow the defendant to make effective use of the evidence in preparing and presenting his case." Commonwealth v. Rodriguez-Nieves, 487 Mass. 171, 176–77 (2021) (internal citations omitted). The defendant cannot show irreparable harm to her right to a fair trial as it relates to the Canton Police Department surveillance video. While the January 28, 2025, production was untimely, the poor quality of the video makes it difficult for either party to benefit from. Furthermore, this video depicts the same event that was contained on the surveillance videos produced on April 4, 2024, and April 23, 2024, simply just from a different camera angle. Further, while the Commonwealth would argue that the videos from the Canton Police station sallyport are inculpatory, the defendant benefitted during the first trial by suggesting, without any substantive evidence, that the poor quality of video and/or gaps in time due to an improperly functioning camera system were caused by an improper police investigation and systemic police misconduct.

In November 2024 the defense made an informal discovery request relative to Canton Police department videos. The Commonwealth and Canton Police department

facilitated the request and on December 12, 2024, in the presence of the defendant's expert, it was discovered, nearly three years after the incident, that the footage on the DVR was overwritten and the system no longer maintained the original surveillance footage to be forensically extracted. This also marked the first time that the defense had made any request for metadata or logs pertaining to these videos, as neither the defense's February 2, 2002 nor October 5, 2022, motions or corresponding orders make any reference to such materials.

"A defendant who seeks relief from the loss or destruction of potentially exculpatory evidence has the initial burden . . . to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the [lost or destroyed evidence] would have produced evidence favorable to his cause If he meets his initial burden, a balancing test is employed to determine the appropriateness and extent of remedial action. The courts must weigh the culpability of the Commonwealth, the materiality of the evidence, and the potential prejudice to the defendant."

Commonwealth v. Williams, 455 Mass. 706, 716–17 (2010), quoting Commonwealth v. Cintron, 438 Mass. 779, 784 (2003) (internal quotations and citations omitted); see also Commonwealth v. Heath, 89 Mass. App. Ct. 328, 333–34 (2016). Here, the defendant fails to meet her initial burden. She has presented absolutely no evidence that a forensic copy of the sallyport surveillance video with metadata and logs would have been exculpatory, rather she relies upon innuendos and unsubstantiated allegations that are "speculative at best" and not the equivalent of concrete evidence. Commonwealth v. Kee, 449 Mass. at 550, 555 (2007); Commonwealth v. Dinkins, 440 Mass. 715, 717 (2004).

Even if this court were to engage in a balancing test, dismissal would be inappropriate as there is no evidence of egregious misconduct on the part of the

Commonwealth and any potential prejudice stemming from the overwritten videos could be remedied at trial. See Commonwealth v. Willie, 400 Mass. 427, 432 (1987) (court must consider “the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant”).

The defendant can point to no evidence of bad faith on behalf of the Commonwealth nor any of its agents, particularly where the Commonwealth is equally aggrieved by the poor video quality and inability to obtain a forensically extracted copy of the surveillance video to fully disprove the defense’s repeated and baseless allegations of evidence tampering.

Statement of Jennifer McCabe

In violation of the defense’s discovery order to produce all reciprocal discovery including impeachment evidence to the Commonwealth prior to the start of the trial, it was during the third week of trial, on May 7, 2024 that the defense produced reciprocal discovery to the Commonwealth regarding location information of Jennifer McCabe’s cellphone. Three days later, on May 10, 2024, in anticipation of her trial testimony, the Commonwealth met with Jennifer McCabe, as it does with all its witnesses. On May 29, 2024, Lieutenant Tully wrote a police report memorializing the meeting and explained when asked why her cell phone would have been in the area of the residence of Sergeant Michael Lank on January 30, 2022, “Jennifer stated she was with Kerry Roberts who was picking up her daughter at the residence. Jennifer did not speak with Michael Lank while at the residence.” See Def. Exhibit P. The Commonwealth produced Lieutenant Tully’s

report on Monday June 3, 2024.² On June 18, 2024, in response to the same claim raised by the defense, the prosecutor explained to the court that “Ms. McCabe met with Lieutenant Tully, looked at some video, and was asked a single question. That report wasn’t available. I didn’t have it until after Ms. McCabe testified, but it was given to counsel prior to Lieutenant Tully testifying.” See Def. Exhibit O.

On May 21, 2024, Attorney Jackson vigorously cross-examined Mrs. McCabe and she detailed her reasons for being in the driveway of Sergeant Lank’s home on January 30, 2022. During cross-examination, Attorney Jackson elicited testimony that it was Lieutenant Tully who asked Mrs. McCabe an open-ended question of: “Did you go to Michael Lank’s on January 30th?” Attorney Jackson then questioned Mrs. McCabe about whether there were any follow-up questions or whether the Commonwealth revealed the defense’s report. Mrs. McCabe testified that neither occurred. Def. Exhibit O.

Notably, the Commonwealth produced Lieutenant Tully’s report, once it was available, to the defense prior to Lieutenant Tully’s testimony. Lieutenant Tully was available to be cross-examined about his recent meeting with Jennifer McCabe and/or any perceived inadequacies in the investigation related to Mrs. McCabe’s phone’s whereabouts. The defense declined to do so.

Furthermore, on May 22, 2024, Kerry Roberts testified. Mrs. McCabe had testified, one day prior, that she had accompanied Kerry Roberts to Sergeant Lank’s driveway. The defense relinquished their opportunity to cross-examine Mrs. Roberts about the event at

² At the request of the defense, the trial was suspended on Wednesday May 29, 2024; Thursday May 30, 2024; and Friday May 31, 2024.

Sergeant Lank's house, let alone ask her, one of only a few percipient witnesses, a single question.

However, most enlightening on the defendant's lack of prejudice is that on June 18, 2024, Attorney Jackson stated: "during trial, they [the Commonwealth] interviewed Jen McCabe, apparently, had a full interview with her. Lieutenant Tully took a report, dated the report, and then they [the Commonwealth] held on that report until after she testified. The interview, the report, and the completion of the report were all done before her testimony." See Def. Exhibit O. Immediately the court offered: "Do you need – do you need to call her again?" Attorney Jackson responded: "No, Your Honor. I'm not – that's not – and I think the Court understands. That's not my point. My point is not [that] I need to call Jennifer McCabe back. I've done the damage that needs to be done on Jennifer McCabe." The court: "I'm sorry. I missed that. You've what?" Attorney Jackson: "I've done the damage that needed to be done on Jennifer McCabe. I don't need to call her back." See Def. Exhibit O

When given the opportunity to remedy any perceived prejudice, the defense declined to do so.

Trial Court Security / Juror Dismissal

The defendant's claim that a Lieutenant of the Massachusetts State Police was "in charge of jury security" is patently false. At no time did Lieutenant John Fanning have contact with nor control or influence over the trial jury nor was there "jury tampering that deprived Ms. Read of her constitutional right to a fair trial." Def. Motion at 3-4. The defense's brazen misrepresentation, previously proffered in media interviews, in direct violation of the impoundment order of juror discussions and sidebars, solely to mislead the

public and jeopardize the integrity of the judicial proceedings, are false and dishonest misrepresentation.³

The executive branch of government is separate and distinct from the judiciary. The governance of the jury is solely within the power of the trial court and sworn court officers. The defendant's first trial raised significant safety concerns for both parties; members of the victim's family; witnesses; court staff; media; and the public. To effectuate both the defendant and Commonwealth's rights to a fair trial, this court ordered a buffer-zone around the courthouse. To enforce the buffer-zone and maintain order, approximately 50 uniformed officers from the Massachusetts State Police and other local departments were deployed each day on foot, motorcycle, and bike in the area directly surrounding the courthouse. Additional law enforcement resources were available in proximity to the courthouse at the Dedham Police station. As a superior officer, assigned to the Norfolk District Attorney's Detective Unit and the only supervisor who was not a trial witness, Lieutenant Fanning was one of the commanding officers who was involved in the safety and peace-keeping efforts occurring outside the courthouse.

Yet somehow, the defense conflates that fact to misrepresent that Lieutenant Fanning therefore, improperly influenced and tampered with the jury. To do so, the defense omits the remainder of Assistant District Attorney McLaughlin's statement to the court.

ADA McLaughlin stated: "[REDACTED]"

³ On February 17, 2025, Boston25 News aired an interview with the defendant and Attorney Jackson where Attorney Jackson stated that Lieutenant Fanning was the "very person governing the jury". Attorney Jackson also stated, despite representations in this court filing, that he had "no specific evidence of jury tampering." Audio and Video of interview available at: https://www.youtube.com/watch?v=d19v1Tx_224 (beginning at 14:00 – 17:00).

[REDACTED], however conveniently omitted from the defense's filing and extrajudicial statements is the following, from ADA McLaughlin,

[REDACTED]

Def. Exhibit S.

At no time did Lieutenant Fanning enter the Norfolk Superior Courthouse during the defendant's trial. Moreover, he never saw, let alone spoke to any member of the jury. Furthermore, there is absolutely no evidence that the dismissal of the juror was improper.

[REDACTED]

The defendant's preposterous claim, one that Attorney Jackson has stated he had "no specific evidence of" should be rejected outright.

CONCLUSION

In sum, the defendant's motion should be **DENIED**. The defendant can show no irreparable prejudice to her right to a fair trial nor has the evidence in good faith shown that the Commonwealth engaged in prosecutorial misconduct. See cf. Comm. for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 724 (2018) (presumptive prejudice warrants dismissal to prevent repetition of misconduct). Dismissal of the case is accordingly not appropriate. Further, where the defense's claims do not raise any substantial issues, the request for an evidentiary hearing should be denied.

Respectfully submitted

For the Commonwealth,

MICHAEL W. MORRISSEY
DISTRICT ATTORNEY

Date: February 27, 2025

By:

/s/ Hank Brennan

Hank Brennan

Specially Appointed Assistant District Attorney

/s/ Adam C. Lally

Adam C. Lally

Assistant District Attorney

/s/ Laura McLaughlin

Laura A. McLaughlin

Assistant District Attorney