COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-09935

BARNSTABLE COUNTY

COMMONWEALTH,
Appellee,

v.

CHRISTOPHER M. MCCOWEN,
Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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I. Reversible Error Occurred When A Lab Technician Testified to a DNA Analysis That She Did Not Perform

A Confrontation Clause violation resulted when a State Police Crime Lab analyst offered testimony about the findings and conclusions contained in a DNA analysis that she did not perform. Specifically, Christine Lemire testified as a witness for the Commonwealth that a sample of saliva collected from Christopher McCowen matched DNA found on the body of Christa Worthington. Another analyst named Stefana Petrina, however, actually performed the test.

It is now firmly established that the mere admission of a certificate of laboratory analysis without the testimony of the person who actually performed the test violates the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2537-2538 (2009); *Commonwealth v. DePina*, 456 Mass. 238, 248 (2010). *Melendez-Diaz* overruled *Commonwealth v. Verde*, 444 Mass. 279 (2005) where this Court had held that the admission of certificates of a chemical analysis did not implicate the Confrontation Clause because it did not involve the exercise of discretion and, hence, was not testimonial in nature. *Verde*, 444

Mass. at 283. A DNA analyses like "[c]ertificates of chemical analysis are neither discretionary nor based on opinion; rather, they merely state the result of a well-recognized scientific test." *Id.*

Melendez-Diaz abrogated *Verde* by holding that the admission of a drug certification analysis without testimony from the person who prepared the certificate offends the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Melendez-Diaz*, 129 S. Ct. at 2532, 2538, 2542. At the time of this trial in 2006, however, *Verde* was established and controlling precedent in this Commonwealth. Consequently, this Court has held that in cases prior to the granting of a writ of certiorari in *Melendez-Diaz*,[1] this Court will evaluate *Melendez-Diaz* laboratory certification and scientific test claims under a harmless error standard regardless whether the defendant raised an objection at trial. *Commonwealth v. Vasquez*, 456 Mass. 350, 356 (2010) ("objection to the admission in evidence of the drug certificates would have been futile because the judge was required to follow *Verde*").

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[1] The United States Supreme Court granted certiorari in *Melendez-Diaz* on March 17, 2008, which was more than a year and a half after the trial in this matter. *See Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008).

DNA analysis is akin to drug certification analysis and, hence, the introduction of failure to produce the person who performed the actual DNA analysis violates the Confrontation Clause. In a one-paragraph response to one of the most critical issues in this appeal, the Commonwealth attempts to deflect McCowen's *Melendez-Diaz* challenge by arguing "defense counsel stated during a sidebar said that he was not attacking the chain of custody or the authenticity of the defendant's swab. Because the lab analyst who actually tested the evidence at issue testified, there was no violation of the defendant's right to confrontation." Commonwealth's Brief at 20 (internal citations omitted). The Commonwealth's argument misses the mark and distorts the facts.

The question whether trial counsel – who again operated with *Verde* as controlling precedent - challenged the chain of custody or the authenticity of the DNA sample is irrelevant. The question is not whether the DNA at issue came from McCowen; the question is whether McCowen's DNA matched the DNA found on Worthington's body. The Confrontation Clause violation occurred when McCowen had no opportunity to cross-examine the person who actually performed the test. *See Melendez-Diaz*, 129 S. Ct. at 2536 ("Forensic evidence is

not uniquely immune from the risk of manipulation . . . And because forensic scientists are often driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in favor of the prosecution. Confrontation is one means of assuring accurate forensic analysis") (internal quotations and citations omitted).

Contrary to the assertion in the Commonwealth's brief, the Commonwealth's witness, Christine Lemire, did not perform the forensic test on McCowen's DNA sample. On cross-examination, she testified that Stefana Petrina actually performed the test that concluded that McCowen's DNA matched the DNA on Worthington's body. Tr. 2526-2527. Without an opportunity to cross-examine Petrina about how she performed the test, a Confrontation Clause violation ensued.

The Confrontation Clause violation requires a reversal of McCowen's conviction unless the Commonwealth demonstrates that the error was harmless beyond a reasonable doubt. *Vasquez*, 456 Mass. at 360 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In

assessing harmless error, an appellate court must consider "not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Vasquez*, 456 Mass. at 361 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993))(emphasis in original). "The standard of harmlessness beyond a reasonable doubt is a stringent one, for if loosely applied, the concept of harmless error can serve too readily as a bridge for a procession of mistakes and injustices." *Vasquez*, 456 Mass. at 361 (internal quotations omitted) (quoting *Commonwealth v. Sinnott*, 399 Mass. 863, 872 (1987)).

Here, the admission of the DNA test results performed by analyst clearly was not harmless. The Commonwealth's case rested on the DNA evidence. The fact that McCowen's DNA supposedly matched the DNA found on Worthington's breast and in her vagina formed the centerpiece of the Commonwealth's theory that McCowen raped and murdered Christa Worthington. The DNA evidence provided the only physical evidence linking McCowen to Worthington. The police officers relied upon the DNA match when they decided to arrest McCowen. They utilized the DNA match as their principle weapon to

induce alleged admissions from McCowen. Given the central role that DNA played in this case, the Court simply cannot conclude that the admission of the evidence of a DNA match through an analyst who did not perform the test was harmless beyond a reasonable doubt.

II. Reversible Error Occurred When A Substitute Medical Examiner Testified Regarding Findings and Conclusions He Did Not Make

A violation of McCowen's Confrontation Clause rights as enshrined in the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights occurred when a medical examiner testified to the findings and conclusions contained in an autopsy report that he did not author. It is well-established that a substitute medical examiner "is not permitted on direct examination to recite or otherwise testify about the underlying factual findings of the unavailable medical examiner as contained in the autopsy report." *Commonwealth v. Avila*, 454 Mass. 774, 782 (2009). Unless the defendant had a prior opportunity to cross-examine the unavailable medical examiner, the recitation or testimony about the underlying facts contained in the autopsy report constitutes a violation of the Confrontation Clause. *Commonwealth v. Nardi*, 452 *Mass. 379, 391-392 (2008); see also, Melendez-Diaz*, 129 S. Ct. at 2531-32 (Evidence rooted in testimonial

hearsay violates the Confrontation Clause); *Crawford v. Washington*, 541 U.S. 39, 51-53 (2004)(same).

Here, McCowen did not have a prior opportunity to cross-examine the medical examiner who performed the autopsy of Christa Worthington, and the Commonwealth has conceded that it was error for the trial court to permit pathologist Dr. Henry Nields to testify to the factual data contained in an autopsy report written by Dr. James Weiner. (Commonwealth's Brief at 18). The Commonwealth, however, argues that the error does not give rise to a substantial likelihood of a miscarriage of justice because defense counsel supposedly made extensive use of the autopsy report during cross-examination. The Commonwealth's argument misapprehends the law.

The Confrontation Clause violation occurs when a substitute medical examiner testifies on direct examination to the factual findings contained in a report that he did not author. *Avila*, 454 Mass. at 782. The fact that defense counsel had to utilize the autopsy report on cross-examination is irrelevant and does not alter the fact that a Confrontation Clause violation had already occurred when the Commonwealth elicited the factual findings during direct examination. Id. This is not a case like *Nardi* where the defendant referred to the autopsy report during his opening statement or where

the defendant's expert needed to utilize the autopsy report. See *Nardi*, 452 Mass. at 395. McCowen's defense did not depend upon getting at least some of Dr. Weiner's findings before a jury. The Commonwealth introduced Dr. Weiner's findings through Dr. Neilds. Absent the introduction of Dr. Weiner's findings, the Commonwealth would have no evidence regarding trauma or the time of death.

Contrary to the Commonwealth's contention, Dr. Neilds did not reach an independent conclusion regarding the time of death. Rather, he parroted Dr. Weiner's conclusions about the time of death as contained in Dr. Weiner's notes. Tr. 1234-35. Moreover, Dr. Neilds also relayed Dr. Weiner's findings regarding trauma, scalp abrasions, breast and hand contusions and a chest wound. Perhaps even more importantly, Dr. Neilds utilized Dr. Weiner's findings to postulate a rape theory despite the fact that no independent evidence of vaginal trauma existed. It stemmed only from Dr. Weiner's report. Unlike the situation in *Nardi* where the defendant himself utilized the findings contained in the autopsy report, the Commonwealth's case here depended upon those findings. The introduction of those findings in derogation of McCowen's constitutional rights created a

substantial likelihood of a miscarriage of justice warranting a reversal of his convictions.

III. The Court Did Not Conduct the Requisite Hearing Before Removing a Deliberating Juror After Returning That Juror to The Panel on the Day Before It Reported a Deadlock

Despite the Commonwealth's protestations, its claim that a sufficient hearing was conducted prior to the removal of Rachel Huffman, a deliberating juror during and after a deadlock had been reported, is the product of an imaginative argument. Commonwealth's Brief, 25. A trial court cannot discharge a deliberating juror absent unique, compelling circumstances, and ***only after a hearing in which there is an examination by the Court of all involved as to whether good cause exists for discharge.*** *Commonwealth v. Garrey*, 436 Mass. 422, 430-31 (2002); *Commonwealth v. Haywood*, 377 Mass. 755, 769-70 (1979). In *Commonwealth v. Connor*, 392 Mass. 838 (1984), like this trial court, the court examined each member of a reportedly deadlocked jury panel and ordered a "problem" juror returned to deliberations. Soon thereafter, the court received word the same juror remained uncooperative and then removed him without further hearing. This Court held that action constituted reversible error. The same has occurred here since trial courts "must hold a hearing adequate to determine whether there is good cause to

discharge a juror." *Connor*, 392 Mass. at 843-44 citing *Haywood*, 377 Mass. at 769-70. The court here ran afoul of this Court's admonition including that "…before a juror is excused from deliberations and replaced by an alternate … the judge should hold a hearing and be fully satisfied that there is a meritorious reason why a particular juror should not continue to serve … [T]he juror's presence may or may not be required, but all other personnel with relevant information should be heard … before the juror is … discharged. The judge then should consider whether, in view of all the circumstances, an alternate juror should be substituted." *Haywood*, 377 Mass. at 769-70.

Here the trial court discharged Huffman, without such a hearing, after a reported deadlock. Tr. 3755. On the day before, the trial court had questioned the eleven other deliberating jurors and Huffman. Tr. 3703. As part of that prior hearing, the court watched the tape of her police interview and the trial court found Huffman had done nothing wrong and returned her to the panel after Huffman said she could continue to serve as an impartial juror. Tr. 3740-41, 3751. Later that day, jurors reported a deadlock. Tr. 3755. After the Court sequestered the jury, in the presence of court officers and fellow jurors, Huffman took a call from the father of her child, whom she had not seen nor heard from since his arrest.

Tr. 3789. Huffman spoke of neither deliberations nor her feelings about the case in that conversation. Tr. 3795-97. Nonetheless, over defense counsel's objection, the trial judge summarily discharged her without a hearing after a night of sequestration. Tr. 3803. The defendant's mistrial motion was denied. Tr. 3826-29.

When the Commonwealth parrots the trial court's comments that Huffman had been dishonest about her relationship with her child's father, that she felt the police were lying in his case, that there was a palpable conflict and that she had a clear bias against the police, it does so with nothing in the record for support. Commonwealth's Brief, 25-27. There was no basis for the trial court's findings that that Huffman violated the court's order to avoid media coverage and that she'd not been truthful about her relationship with her child's father. Her discharge, with no sufficient record facts to show the necessary "good cause," was reversible error. *G.L. c. 234, §26B*; *Connor*, supra.

A trial court has at most limited discretion to determine a juror is unable to perform; that inability must appear in the record as a demonstrable reality. *People v. Compton*, 490 P.2d 537 (1976). On the day before, a proceeding was held and Huffman was returned to deliberations after the court found Huffman qualified

during the only hearing conducted. Tr. 3741. Her subsequent removal unnecessarily upset the jury's balance, causing a "substantial risk of a miscarriage of justice." *Commonwealth v Tennison*, 440 Mass. 553, 559 (2003).

IV. The Court's Conclusions After The Post-Trial Hearings Did Not Comport With The Record Evidence

The prosecution adopts without discussion the trial Court's post-trial hearing factual findings. It has been and is the argument of the defendant that the hearing court had no reasonable basis in the record, even allowing for its discretion and the deferential appellate review that goes with it, for several of its lynchpin findings. Without such factual pilings, the court's opinion collapses. In fact, the prosecution does not even mention the affidavit and testimony of Roshena Bohanna in its Brief, the juror whose complaint and stance started the post-trial events in the first place. Such an omission is telling. It is the contention of the defendant that the Court's post-hearing findings regarding Huffman, Juror Normand Audet, Julia Miranda and its wholesale disregard of Bohanna was not warranted by the record testimony. The affidavits and in-court testimony established "particularly egregious" juror misconduct. *United States v. Henley*, 238 F.3d 1111,1121

(9th Cir. 2001); *Tobias v. Smith*, 468 F. Supp. 1287 (W.D.N.Y. 1979); *State v. Johnson*, 2001 WL 694730 (S.D. June 20, 2001); *United States v. Heller*, 785 F.2d 1524, 1526-28 (11th Cir. 1986).

The court made a series of wild inferences from scant testimony. He improperly dismissed Huffman's testimony in finding she "misled the court," was cast in "a bad light in her community", had "a motive to wreak havoc on the judicial process" and that she'd been "meddlesome" while causing Bohanna to mistrust others. Where did this speculative reasoning come from? The judge went on to acknowledge that Audet's affidavit tracked Bohanna's, but found his testimony, "while sincere", faulty. After voiding Huffman and Audet without reason, the judge placed the racism charges squarely on Bohanna. The court rejected large portions of her testimony though saying "[t]he court accepts Juror Bohanna's ire as a warning flag that careful scrutiny must be given to Juror George's words … Juror Bohanna was appropriately vigilant in keeping racial bias from infecting the deliberations. Her calling was honorable." App. 224. Yet the court leapt to a failure of Bohanna's testimony failed because the affidavits of all "complaining affiants," had been "filtered through defense counsel's draftsmanship" although they testified

before him consistently. App. 219. The trial court went on to describe Miranda as "a pleasant woman known to this jurist from her frequenting the local courts … often enough that she leaves baked goods for the security staff." But her decision to approach an author, not a court officer, proved she was "seeking her 15 minutes of fame." Without warrant, the court noted two of her sons had priors, making it likely the 74-year-old harbored "resentment towards law enforcement." App. 227-229. These findings beg confirmation in the record, where there is none.

Since post-trial hearings proved racial prejudice affected at least half the panel, the defendant did not need not to prove that "prejudice pervaded the jury room … bias or prejudice of even a single juror" would have violated McCowen's right to a fair trial. *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977); *Dyer v. Calderon,* 151 F. 3rd 970, 973-4 (9th Cir. 1998); *Commonwealth v. Hunt*, 392 Mass. 28, 41 (1984); *Commonwealth v. Casey*, 442 Mass. 1, 5 (2004); *Commonwealth v. Tavares*, 385 Mass. 140,152 (1982). If even one affidavit, not four, in addition to the testimony at the post-trial hearings is found true only "in so far as it describes ethnically oriented statements attributed to jurors," the defendant is entitled to a new

trial. *Commonwealth v. Laguer*, 410 Mass. 89, 99 (1991). The *Laguer* Court was clear in stating that "…if the judge were to find … [an] affidavit essentially true, to the extent it purports to repeat ethnically oriented statements of jurors…the defendant shall be entitled to a new trial. *Id*. at 98-99.

In this case, the four affiants, all of whom testified, detailed racially derogatory statements/actions by three deliberating jurors, broader wrongdoing than that in other racial bias cases. *Commonwealth v. Fidler*, 377 Mass. 192 (1979). Miranda further underscored two additional instances of juror misconduct against Gomes, corroborating the affiant jurors and proving that he, not Huffman, lied during voir dire and post-trial hearings. *Commonwealth v. Amirault*, 399 Mass. 617, 625 (1987); *Commonwealth v. Kincaid*, 444 Mass. 381 (2005). McCowen proved by a preponderance of the evidence that racially biased statements were made after which prejudice is presumed. *Laguer*, supra at 99. Factually and legally flawed, the trial court's decision ignores that three deliberating jurors swore to grave misconduct on the part of three other deliberating jurors, involving half of McCowen's jury.

V. <u>The Prosecution's Withholding of Clearly Exculpatory Evidence Demands a New Trial</u>

The Commonwealth contends that the failure to turn over the evidence described was not exculpatory and not in its possession. Such an argument is legally preposterous. McCowen was not obligated to independently unearth material he requested because the State must disclose all data it possesses and all information possessed by persons "subject to the prosecutor's control." *Commonwealth v. Martin*, 427 Mass. 816, 824 (1998); *Commonwealth v. Tucceri*, 412 Mass. 401, 412 (1992); *Commonwealth v. Neal*, 392 Mass. 1, 8 (1984). A defendant must be granted a new trial when the Commonwealth doesn't disclose evidence favorable to the accused that may have altered the verdict. *Brady v. Maryland*, 373 U.S. 83, 87-8 (1963). Even in the absence of a discovery request by the defendant, the prosecution must disclose any and all obviously materially exculpatory information in its possession. *United States v. Agurs*, 427 U.S. 97, 108 (1976). Evidence is materially exculpatory if there is a reasonable probability that its disclosure to the defendant would have resulted in a different outcome. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In Massachusetts, these obligations extend to "all evidence which tends to

negate the guilt of the accused or, stated affirmatively, supporting the innocence of the defendant." *Commonwealth v. Healey*, 438 Mass. 672, 679 (2003).

The undisclosed data at issue was in the District Attorney's own office, specifically Jeremy Frazier's 2003 arrest for assault and battery with a dangerous weapon, a knife. An instance of conduct substantially similar to the crime on trial has direct relevance to the identity of the true attacker. *Commonwealth v. Pring-Wilson,* 448 Mass. 718, 737 (2007). In its denial of this motion, the trial court wrongly found "a prosecutor cannot always know that…evidence is or might be exculpatory," and that the evidence of such a knife attack by Frazier would not have been admitted because "opening a pocket knife in defiance of two men in an innocuous argument is hardly congruent with the brutal stabbing of Christa Worthington." App. 557. This evidence was critical to McCowen's claims that Frazier alone killed Worthington and the fact that he had later wielded the same type of weapon used to kill Worthington was similar criminal conduct for impeachment.

VI. The DiGiambattista Standards Are Insufficient To Protect The Rights Of The Accused

The Defendant has not ignored the July 2006 hearings after which the trial court erred in finding McCowen's

April 14, 2005 statement voluntary beyond a reasonable doubt. App. 20. Despite that finding, the defense here argues that since the Commonwealth bears the heavy burden of proving a statement voluntary beyond a reasonable doubt the police should be required to record the interrogation **in all cases.** *Commonwealth v. DiGiambattista*, 442 Mass. 423, 441 (2004).

This *DiGiambattista* Court noted eight years had passed since it announced "[f]ailure to record … would not result in automatic suppression … [but] the lack of a recording was … relevant … on the issues of voluntariness and waiver." Id. citing *Commonwealth v. Diaz*, 422 Mass. 269, 273 (1996). Nearly fifteen years after *Diaz* and six years after *DiGiambattista*, it is contended that the time has come and that the fruits of an unrecorded interrogation should be inadmissible at trial. Since 1985, six states and the District of Columbia have required police to record interrogations in at least some criminal cases and local police departments, including some on Cape Cod, mandate it on a local level.

The current state of the law poses an inherent danger. If non-taped statements were inadmissible, interrogation tactics would be forced from the shadows. Taping is essential in a first-degree murder case, where the stakes are enormous. Police have incentive to obtain

a statement by any means; the suspect needs heightened protection. If this Court doesn't adopt an across-the-board rule, it should do so for homicides. This Court should mandate recording and reverse McCowen's convictions.

VII. <u>This Case Should Be Cumulatively Reversed Pursuant to G.L. c. 278 §33E</u>

Direct appeals from convictions of first-degree murder to the Supreme Judicial Court receive a substantially more expansive plenary review. *Justice John M. Greaney & James E. Comerford, The Law of Homicide in Massachusetts, 266 Flaschner Institute 2009, supra note 3 at 264.* In the end, the underlying question on such a review is whether the trial result is just. This type of evaluation allows for a two-part review: first, the Court reviews each case for unpreserved errors which give rise to a "substantial likelihood of a miscarriage of justice" and second, a review of the complete record for overall "fairness" in order to determine whether the conviction should be reversed or a new trial should be granted. *The Limits of 'Extraordinary Power'…", Stephanie Roberts Hartung, Legal Studies Research Paper 10-19, March 30, 2010.*

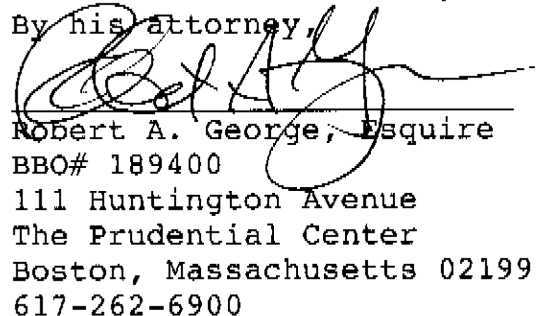
Another notable aspect of this appellate provision is that §33E allows the Court to review the record for

errors not objected to by trial counsel under a more relaxed standard of review (ie. "substantial likelihood of a miscarriage of justice") and gives this Court exclusive jurisdiction over all motions for new trial filed with the trial court as in this case. *Id.* It would be just on the basis of some, if not all, of the cumulative errors raised in the Defendant's Brief, to use this remedial power in this case.

CONCLUSION

For any, some, or all of the foregoing reasons, Defendant-Appellant McCowen asks this Court to **REVERSE** his convictions and remand his case to Superior Court for a new trial.

Respectfully submitted,
CHRISTOPHER M. McCOWEN,
By his attorney,



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