



THE COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX DISTRICT ATTORNEY
15 COMMONWEALTH AVE WOBURN, MA 01801

Gerry Leone
District Attorney

Tel: 781-897-8325

For Immediate Release
March 9, 2011

Contact: Jessica Venezia Pastore/Cara O'Brien
781-897-8325

**Statement Of The Middlesex District Attorney's Office Regarding
The Police-Involved Fatality That Occurred On January 5 In
Framingham**

The Middlesex District Attorney's Office and the Massachusetts State Police assigned to the Middlesex District Attorney's Office have conducted an investigation into the facts and circumstances of a police-involved fatality that occurred on January 5, 2011, at 26 Fountain Street in Framingham. The Middlesex District Attorney's Office, per protocol and pursuant to statute, conducted an investigation in order to determine whether the discharge of Framingham Police Officer Paul Duncan's department issued firearm in this matter amounted to criminal conduct under our laws, and if so, whether the surrounding circumstances and evidence amounted to prosecutable criminal conduct.

The investigation included a thorough review of all interviews conducted (including witnesses at the scene, Framingham police officers, and emergency medical personnel), ballistics and crime scene forensic reports, radio transmissions and 911 calls, police reports, witness statements, photographs of the scene, and medical examiner information. Our investigation has revealed the following relevant facts on which we base our findings and conclusions.

In December of 2010 and early January of 2011, members of the Framingham Police Narcotics Unit obtained information regarding the illegal distribution of crack cocaine from and in the vicinity of 26 Fountain Street in Framingham. A confidential source informed members of the narcotics unit that a young male was distributing crack cocaine from that location. The informant also stated that the young man was frequently in the company of a male with a tattoo on his face. That male with the tattoo on his face was later identified as Joseph Bushfan, who has subsequently been charged with a drug distribution violation occurring in or near a school zone, possession of cocaine with intent to distribute, and conspiracy to violate the drug laws.

During the same time frame, Framingham narcotics officers also obtained information from a second confidential source. The second confidential informant informed the narcotics unit that it possessed information that the same young male was also involved in the illegal drug distribution activity from 26 Fountain Street in Framingham. Based on this information, narcotics officers obtained a search warrant for 26 Fountain Street.

In the two weeks leading up to the application for the search warrant, narcotics officers utilized a confidential informant in order to conduct three controlled buys from 26 Fountain Street, to support the existing information regarding illegal drug activity. During all three controlled buys, the confidential informant called one of two phone numbers provided by either Bushfan or the other young male suspect. During all three controlled buys, the informant ordered cocaine over the telephone from either Bushfan or the other young male suspect, travelled to the area of 26 Fountain Street, and then purchased cocaine directly from either Bushfan or the other young male suspect.

On January 4, 2011, in the hours before the search warrant was obtained and executed, Framingham Police detectives conducted surveillance of 26 Fountain Street, to further support and strengthen the existing evidence and probable cause, and observed what they believed to be at least five different hand to hand drug distribution transactions.

Prior to the execution of the search warrant, in the interests of the safety of all involved, the Framingham Police Department made the decision to request the assistance of the Framingham SWAT team in executing the search warrant. According to investigators, the decision to utilize the SWAT team was based on a number of factors including, but not limited to: the violent criminal histories of Bushfan and the other young male suspect; the information that one of their targets (the young male suspect) was a member of a gang involved with narcotics, weapons and violent crime; information that the young male was a known associate of an individual involved in the 2009 shooting of Framingham Officer Phil Hurton; the possible existence of additional suspects inside the target location; the numerous people seen coming and going from the target apartment in the hours leading up to the execution of the search warrant; and the numerous "hand to hand" drug transactions observed in front of the target apartment in the hours leading up to the execution of the search warrant.

Shortly after midnight, members of the Framingham Police Narcotics Unit and Framingham Police SWAT team proceeded to 26 Fountain Street. Immediately prior to their arrival, surveillance officers who had been stationed outside the address observed Joseph Bushfan and two females exit the front door of 26 Fountain Street and walk south towards Waverly Street. Detectives stopped and searched Bushfan and recovered eight individually wrapped packages of crack cocaine from Bushfan's pocket. Approximately \$397 dollars was also recovered from Bushfan, as well as a cell phone that utilized the same number that the informant had called when ordering cocaine from Bushfan during the first controlled drug buy. Bushfan was placed under arrest and charged with possession of cocaine with intent to distribute as well as conspiracy to violate the drug laws, and a related school zone drug violation.

As detectives were interacting with Bushfan, the SWAT team arrived at 26 Fountain Street and began carrying out the entry plan. As the team approached the house, they encountered Norma Bushfan-Stamps outside in front of the premises. While investigators interacted with Ms. Bushfan-Stamps, officers knocked and announced the presence of the Framingham Police and the existence of a search warrant. After knocking and announcing, the team was signaled to begin entry according to the pre-determined search warrant operational plan.

Two Framingham Police officers made entry and arrived inside the kitchen, then spread out and scanned the room. They both observed movement and people on the other side of the kitchen, in the area of the hallway and in the back bedroom. Upon seeing this, one officer yelled “Framingham Police, search warrant, put your hands up.” At that point, there was more movement behind the kitchen and at least one person moving in and out of the officers’ sight. Both officers then observed a large male come out of the back bedroom/bathroom area and stand on the hallway side of the threshold between the kitchen and the hallway/laundry area. The male, later identified as the decedent Eurie Stamps, was ordered to lie on the floor in the hallway/laundry area just before the threshold to the kitchen.

While Mr. Stamps was on the floor lying on his stomach with his hands up, an unidentified person was observed in the back bedroom area, not complying with the police orders to show hands. At that point, fearing the person in the back room may have a weapon or could be a threat to their safety, officers stepped over Mr. Stamps and made their way to the back hallway where the bathroom and rear bedroom were located. The person was later identified as Devon Talbert, who was subsequently charged with a drug violation occurring in or near a school zone, possession of cocaine with intent to distribute, and conspiracy to violate the drug laws. As officers made their way over Mr. Stamps and down the tight cluttered hallway, the officers had to move numerous containers out of the way. As the officers were making their way past Mr. Stamps and into the back hallway, Officer Paul Duncan, who was inside the kitchen, moved to position himself next to Mr. Stamps.

Officer Duncan had made entry into the home through a hallway door and helped clear two rooms before entering the kitchen area. As Officer Duncan approached the threshold between the hallway and the kitchen, Mr. Stamps was still lying on the floor on his stomach, with his head up and his hands moving. Officer Duncan then moved to within two feet of Mr. Stamps. Officer Duncan, knowing that Mr. Stamps had not been checked for weapons, with two hands on his rifle, decided to move to the side of Mr. Stamps, and secure Mr. Stamps’ hands behind his back, and check him for weapons.

As Officer Duncan moved to the right of Mr. Stamps, just past Mr. Stamps’ shoulders, he had to step to his left. As he stepped to his left, he lost his balance, and began to fall over backwards. Officer Duncan realized that his right foot was off the floor and that the tactical equipment that he was wearing was making his movements very awkward. While falling, Officer Duncan removed his left hand from his rifle, which was pointing down towards the ground, and put his left arm out to try and catch himself. As he did so, he heard a shot and then his body made impact with the wall. At that point, Officer Duncan, who was lying on the ground with his back against the wall, realized that he was practically on top of Mr. Stamps and that Mr. Stamps was bleeding. Officer Duncan immediately started yelling “man down, man down.” Numerous SWAT members began calling for medics and alerting team members that there was a person down that needed medical attention. Officer Duncan told another officer on scene within moments of the incident that he had stumbled and lost his balance while moving to get in a better position, and as he was falling, his gun fired.

The Framingham SWAT team includes a Tactical Emergency Medical Support group of emergency medical technicians and firemen that travels with the team. Upon word that someone

was injured, the medical support team entered the apartment and began rendering aid to Mr. Stamps. The medical team assessed Mr. Stamps and realized he was suffering from an apparent gunshot wound. Mr. Stamps was placed on a backboard and immediately transported by ambulance to Metrowest Medical Center, where he was later pronounced dead.

Dr. Henry Nields from the Office of the Chief Medical Examiner (“OCME”) performed the autopsy on Mr. Stamps. The cause and manner of death was determined to be homicide, resulting from a single fatal gun shot wound to the upper body area. The word homicide is defined by the OCME as “the death of one person caused by the act of another.”

Upon completion of this investigation and review of all available information and relevant evidence, the conclusion of this office is that the actions of Officer Duncan do not rise to the level of criminal conduct, and the shooting death of Eurie Stamps was an accident. This office applied all the relevant facts and evidence to the law of murder, voluntary manslaughter, involuntary manslaughter and reckless assault and battery by means of a dangerous weapon, as well as the law of accident. After review of both the law and the facts, it is clear from the evidence that Officer Duncan did not possess the requisite intent or the necessary mental state required under the law, to support a criminal charge of murder or voluntary manslaughter. Additionally, under the law, the facts do not support a criminal charge that Officer Duncan intended to commit a battery upon Mr. Stamps, nor do they establish that Officer Duncan acted in a criminally reckless manner. Therefore, the crimes of involuntary manslaughter by reckless conduct and reckless assault and battery by means of a dangerous weapon are also factually and legally unsupportable.

Furthermore, under the law of accident, if there is any evidence that the conduct at issue may have been the result of an accident, the Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. The legal term accident is defined as an unexpected happening that occurs without intention or design on the actor’s part. It means a sudden, unexpected event that takes place without the actor’s intending it. There is no evidence that Officer Duncan intended to pull the trigger of his rifle, no evidence that he possessed any desire or motivation to shoot Mr. Stamps, and no evidence that he was reckless or that he used excessive force to attempt to secure Mr. Stamps. It is the conclusion of this office, based on the law and the findings of fact that are based on the evidence in this matter, that the shooting death of Mr. Eurie Stamps was an accident as defined by the law applicable to criminal prosecutions. As such, the facts of this matter and the applicable law do not support a criminal prosecution.

Having made our determination under the law regarding accident, and the absence of criminal conduct on the part of Officer Duncan, we have, per the protocol of the Middlesex District Attorney’s Office, returned and referred this matter back to the Framingham Police Department so that they can perform whatever internal administrative review of the incident they deem appropriate.

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The Commonwealth of Massachusetts

Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 9, 2011

Woburn, Massachusetts

Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: Interview of: Norma F. Bushfan-Stamp

[REDACTED]
[REDACTED]
[REDACTED]

1. On Wednesday, January 5, 2011, at approximately 0345 hours, Trooper Jeffrey Saunders and I interviewed Norma Bushfan-Stamps at a Framingham Police Department interview room. It was during this meeting, when Norma was advised that her husband Eurie Stamp (DOB: [REDACTED]) was shot and killed by a Framingham Police Officer during the execution of a search warrant at her residence.

2. Detective Saunders and I asked Norma Bushfan-Stamp if she would be willing to provide a statement to us regarding the events that transpired during the execution of the search warrant from this past evening. Norma agreed and provided the following information: Norma said that she had just returned home from grocery shopping and was in the process of putting her groceries away. Norma said that her husband Eurie Stamp was in their bedroom, her son Joseph L. Bushfan (DOB: [REDACTED]), her nephew Devon Talbert and two young females were also at home and mostly in their son's bedroom. Norma said that at approximately 9:45 pm, she went to the front door to say something to her son Joseph whom was walking out the front door. Norma said that her son Joseph was exiting the house with his two female friends. Norma said that her nephew Devon was still in the house and believed to be in Joseph's room. Norma said that she was going to ask her son Joseph where he was going and where the dog was. Norma said while she was at the front door she noticed that the police were talking to her son Joseph and the two females down the street in front of the gas station. Norma also said that she was approached by armed police officers wearing fatigues at her front door and instructed to get down on the ground and then escorted to the gas station. Norma said that her husband Eurie and her nephew Devon were still in the house. Norma said moments later, she heard a loud bang

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

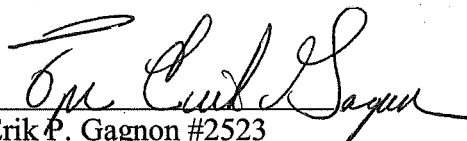
Supervisor [Signature]

Date 2/9/11

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from the inside of her residence. Norma then recalled her nephew Devon being escorted out of the house and transported away by a Framingham Police Cruiser. Norma also recalled someone being taken out of her house by stretcher and driven away by ambulance. Norma said that she was then transported to the Framingham Police Department with the other two females by a police cruiser and brought to this interview room.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Erik P. Gagnon", written over a horizontal line.

Erik P. Gagnon #2523

Trooper, Massachusetts State Police
Middlesex Detectives Unit



The Commonwealth of Massachusetts Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 16, 2011
Woburn, Massachusetts
Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: Interview of:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1. On Wednesday, January 5, 2011, at approximately 0430 hours, Detective Darren Crawford of the Framingham Police Department and I interviewed [REDACTED] at a Framingham Police Department interview room. [REDACTED] was advised that we wanted to take a statement from her regarding the events that she witnessed during the execution of a Framingham Police search warrant at 26 Fountain Street, 1st Floor in Framingham.

2. [REDACTED] advised Detective Crawford and I that she met Joe (identified as Joseph L. Bushfan - DOB: [REDACTED]) at some Framingham area parties, did not know him well, hung out with him on 2 prior occasions and was just friends with him. [REDACTED] said earlier this evening, her friend [REDACTED] (DOB: [REDACTED]) was at [REDACTED] house. During this time, [REDACTED] & Joe began texting each other on their cellular phones. [REDACTED] said that [REDACTED] was looking to get money from Joe for cigarettes and to put money toward her cellular phone bill. At approximately 11 pm, [REDACTED] went to Joe's house at 26 Fountain Street in Framingham. While at Joe's house, [REDACTED] met another black male who was she believed was Joe's cousin (identified as Devon Talbert - DOB: [REDACTED]). [REDACTED] said that they were all mostly in Joe's bedroom (1st floor right side) hanging out and were playing Joe's Xbox video game. [REDACTED] said that Joe's mom & dad were also home, in the kitchen and in the rear of the house.

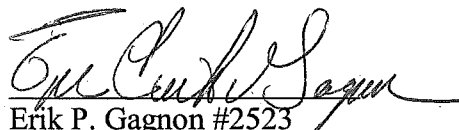
MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX
CASE # 2011-110-0005
Supervisor TSR Date 2/22/11

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3. [REDACTED] said that at approximately 12 am, she wanted to go home. [REDACTED] said that Joe began walking [REDACTED] down the street and part of the way home. [REDACTED] said that when they got to the gas station on Fountain Street the police approached & apprehended Joe. Joe was placed in handcuffs & searched. The police instructed for [REDACTED] & [REDACTED] to put their hands on a Framingham police cruiser where they were pat frisked. Joe was put into the rear seat of a police cruiser. [REDACTED] said that the police did a good job arresting Joseph. [REDACTED] said that it was during this time when the police entered Joe's residence. [REDACTED] said that they were outside for awhile. A short time later, Joe's mom was escorted down from the house to the gas station by police. [REDACTED] said that she then heard a loud boom and some glass breaking. A short time later, [REDACTED] said that a short time later, [REDACTED] Joe's mom and her were transported to the Framingham Police Department.

4. After the detailed events about the execution of the search warrant, [REDACTED] [REDACTED] was asked about some background information regarding weapons & narcotics relative to Joseph Bushfan and the 26 Fountain Street in Framingham address. [REDACTED] said that prior to the incident, she was aware that Joe would smoke marijuana, but has never known Joe to carry a weapon. As a result of what she witnessed during this incident, [REDACTED] said that she now knows that Joe sells drugs. [REDACTED] said that she witnessed Joe being pat frisked and that the police found drugs on him. [REDACTED] now believes that Joe sells crack cocaine, along with marijuana. [REDACTED] said that Joe is known to have a lot of money and that's why [REDACTED] was texting him earlier. [REDACTED] now says that prior to the incident, Joe's mom was putting away groceries in the kitchen and that she did not see Joe's dad. The interview was ended at approximately 0516 hours.

Respectfully Submitted,



Erik P. Gagnon #2523
Trooper, Massachusetts State Police
Middlesex Detectives Unit



The Commonwealth of Massachusetts Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 16, 2011
Woburn, Massachusetts
Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: Interview of:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

1. On Wednesday, January 5, 2011, at approximately 0545 hours, Detective Darren Crawford of the Framingham Police Department and I interviewed [REDACTED] [REDACTED] at a Framingham Police Department interview room. [REDACTED] [REDACTED] was advised that we wanted to take a statement from her regarding the events that she witnessed during the execution of a Framingham Police search warrant at 26 Fountain Street, 1st Floor in Framingham.

2. [REDACTED] [REDACTED] advised Detective Crawford and I that she met Joe (identified as Joseph L. Bushfan - DOB: [REDACTED]) at Los Compadres, exchanged cellular phone numbers and would text each other. [REDACTED] said that they hung out on 2 prior occasions and were just friends. [REDACTED] said earlier this evening she was at her friend [REDACTED] [REDACTED] house. During this time, she began texting Joe on her cellular phone. [REDACTED] said that she was looking to borrow money from Joe to buy cigarettes. Joe texted her back that he was not going to give [REDACTED] any money. At approximately 11 pm, [REDACTED] & [REDACTED] went to Joe's house at 26 Fountain Street in Framingham. When they got to Joe's house, [REDACTED] said that Joe's cousin (identified as Devon Talbert - DOB: [REDACTED]) and Joe's mom were also present. [REDACTED] said that they were all mostly in Joe's bedroom (1st floor right side) hanging out. While there, [REDACTED] said that they were listening to music, talking and that Joe gave her \$30. [REDACTED] said that she also overheard Joe on the phone saying, "I'm gonna meet up with you nigga". When Joe hung up, he said that he was "gonna meet up with one of his nigga's. Joe said that he was going to meet him at the YMCA.

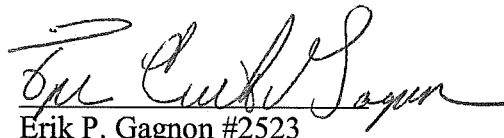
MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX
CASE # 2011-110-0005
Supervisor [Signature] Date 2/22/11

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3. At this time, [REDACTED] [REDACTED] [REDACTED] and Joseph Bushfan all left Joe's house. It was believed that Joe was headed to the YMCA to meet someone, but would walk [REDACTED] & [REDACTED] part of the way to [REDACTED] Pine Street home address. As they began to walk, Joe agreed to buy cigarettes for [REDACTED] at the Store 24. When they got to the gas station on Fountain Street, they were approached by numerous police officers. [REDACTED] said that the police instructed her & [REDACTED] to put their hands on a police cruiser. [REDACTED] observed the police to put Joe on the ground and placed under arrest. [REDACTED] observed a SWAT truck and police officers in fatigues pull up and enter Joe's residence. [REDACTED] said that Joe became worried and asked her and [REDACTED] to check on his mom. [REDACTED] said that a short time later a police officer escorted Joe's mom to the gas station. [REDACTED] said while she was in front of the gas station and the police were inside of Joe's house, she did not hear anything out of the ordinary. [REDACTED] said that after the police were in Joe's house for a while she observed an ambulance pull up to the front of Joe's house. A short time later, [REDACTED] and Joe's mom were transported to the Framingham Police Department.

4. After the detailed events about the execution of the search warrant, [REDACTED] [REDACTED] was asked about some background information regarding weapons & narcotics relative to Joseph Bushfan and the 26 Fountain Street in Framingham address. [REDACTED] said that prior to the incident, she was not completely aware that Joe was a drug dealer, but suspected that he was. [REDACTED] also said that she had never seen Joe carry a weapon. [REDACTED] said that several of Joe's friends said that Joe had a lot of money. [REDACTED] said when the police arrested Joe tonight, that he had a plastic bag containing smaller plastic bags containing cocaine on his person. [REDACTED] said she never saw Joe sell drugs and never saw any drugs at his house. [REDACTED] said that she was aware that Joe was friends with a guy that she knew as Country. Country had been arrested a year ago for shooting a Framingham Police Officer in the face. The interview ended at approximately 0640 hours.

Respectfully Submitted,



Erik P. Gagnon #2523

Trooper, Massachusetts State Police
Middlesex Detectives Unit



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February 16, 2011
Woburn, Massachusetts
Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

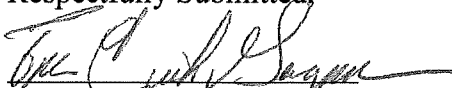
SUBJECT: Neighborhood Canvas of 26 Fountain Street in Framingham, MA

1. On Wednesday, January 5, 2011, at approximately 0800 hours, myself, Trooper Jeffrey Saunders and other detectives from the Framingham Police Department conducted a neighborhood canvas of the 26 Fountain Street area in Framingham. During the canvas I made contact with the following persons:

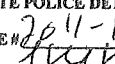
██████████ (DOB: ██████████) & ██████████ (DOB: ██████████) at ██████████ Street in Framingham. ██████████ was at work during the canvas. ██████████ said that she was asleep during the incident and did not see or hear anything. ██████████ said that she woke up around 4:45 am and saw Framingham Police cruisers with their emergency lights on out front.

██████████ (DOB: ██████████), ██████████ (DOB: ██████████) and ██████████ (DOB: ██████████) at ██████████ in Framingham. ██████████ said that he was the first to observe anything. ██████████ said that he was lying down when he heard a loud bang come from out front. ██████████ looked out a front window and noticed that numerous Framingham Police officers were in front of a house across the street. ██████████ said that he got his sister ██████████ in another room and told her that something was going on. They went to a front window and heard the police saying, "let us in" and "open the door". They also observed an ambulance pull up to the front of 26 Fountain Street and observe EMT's wheeling a person out of the house in a stretcher and into an ambulance.

Respectfully Submitted,


Erik P. Gagnon #2523

Trooper, Massachusetts State Police
Middlesex Detectives Unit

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX
CASE # 2011-110-0005
Supervisor 
Date 2/22/11

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COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 9, 2011
Woburn, Massachusetts
Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: Autopsy of: Eurie Stamp



1. On Thursday, January 6, 2011, at approximately 1000 hours, I attended that autopsy of Eurie Stamp at the Medical Examiners Office in Boston. Doctor Henry Nields performed the autopsy and determined that the victim's cause of death was a single gun shot wound to the head, neck and chest with injuries to the heart, lung and major blood vessels. Doctor Nields advised me that the projectile entered the victim's body through the left cheek, exited through the upper neck and re-entered the lower neck and clavicle area. The projectile fragmented in the clavicle, chest, heart, left lung, aorta and pulmonary artery. Doctor Nields also advised that there was evidence of stipling on the left side of the victim's face in the area of the entry wound.

2. Trooper Steve Walsh from the Massachusetts State Police Firearms Identification Section was also present to take custody of any recovered fragments from the victim's body. Trooper Karrol Setalsingh from the Massachusetts State Police Crime Scene Services was also present and took numerous autopsy photographs.

Respectfully Submitted,

Erik P. Gagnon #2523

Trooper, Massachusetts State Police
Middlesex Detectives Unit

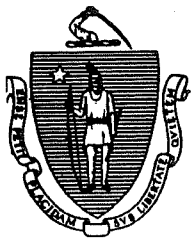
MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

Supervisor

Date 2/9/11

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The Commonwealth of Massachusetts Department of State Police

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MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 22, 2011

Woburn, Massachusetts

Case # 2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: ERIK P. GAGNON #2523, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: Supplemental Report: Eurie Stamp
of Autopsy: [REDACTED]
[REDACTED]
[REDACTED]

1. On Thursday, February 17, 2011, I spoke with Doctor Henry Nields of the Medical Examiners Office in Boston. Doctor Nields performed the autopsy of Eurie Stamp on January 6, 2011 and determined that the victim's cause of death was from single gun shot wound and also advised that there was evidence of stipling on the left side of the victim's face in the area of the entry wound. On February 17th, Doctor Nields was asked if he could determine an approximate distance between the shooter and Eurie Stamp. Doctor Nields advised that the determination on the distance cannot be definitive, but it is unlikely to be beyond 36 inches.

Respectfully Submitted,

Erik P. Gagnon #2523

Trooper, Massachusetts State Police
Middlesex Detectives Unit

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

Supervisor [Signature]

Date 2/22/11

Excellence In Service Through Quality Policing



The Commonwealth of Massachusetts Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

January 13, 2011
Woburn Massachusetts
2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: FORSTER, EDWARD L., LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: NEIGHBORHOOD CANVASS REGARDING THE FATAL SHOOTING OF
EURIE A. STAMPS IN FRAMINGHAM.

1. On 1/5/11 at approximately 0330 hrs this officer and Deputy Chief Kenneth Ferguson of the Framingham Police Department interviewed:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At his apartment. The following is a summary of the interview. [REDACTED] was home tonight and was in his room on his computer when he heard the police (Swat) say we have a warrant. He saw a flash from his window and heard a huge explosion. He also heard windows being smashed. [REDACTED] thinks this was around 12:30 pm. He is not exactly sure. The fire alarms were going off and there was smoke in the kitchen. [REDACTED] stayed were he was.

2. This officer also interviewed:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At his apartment. [REDACTED] was in his room sleeping when he heard a bang. He then heard a commotion with people yelling. [REDACTED] came out of his room and had conversation with [REDACTED]. Smoke started coming into apartment when he was in his room.

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX
CASE # 2011-110-0005

Excellence In Service Through Quality Policing

Date 2/8/11

3. This officer also interviewed:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At his residence. [REDACTED] called 911 sometime around 1230-1am. He remembers this being right before the television program "Law and Order". He heard huge banging and called 911. The Police were already there. When it quieted down he went downstairs. The police made [REDACTED] lay down at gunpoint. He stayed on the ground for 7-10 minutes before the police allowed him to get up.

4. This officer also interviewed:

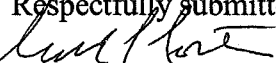
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

At her residence. [REDACTED] was home tonight and heard loud banging around 1am. She thought the noises were coming from downstairs on the second floor. [REDACTED] roommate [REDACTED] went downstairs. [REDACTED] heard the fire alarm then she also went downstairs. When she went downstairs the police ordered her to stay where she was and not move.

5. This officer interviewed:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

By telephone on 1/5/11. [REDACTED] was not home when the incident occurred. She left the house around 830pm and got home around 3am. She was unable to get in her apartment. She had been living there for one month. She knew a Joseph lived downstairs and didn't really talk to him. She would just say hi. She didn't see anything going on downstairs. She does remember the police cruisers coming there about 2-3 weeks ago.

Respectfully submitted,

Edward L. Forster, Lt
Massachusetts State Police



The Commonwealth of Massachusetts *Department of State Police*

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

February 14, 2011
Woburn Massachusetts
2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: JEFFREY SAUNDERS, TROOPER
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: INTERVIEW OF JOSEPH BUSHFAN; FRAMINGHAM POLICE SHOOTING
DEATH

1. On Wednesday, January 5th, 2011 I along with Tpr Erik Gagnon and Lt Ed Forster responded to 26 Fountain St, Framingham for a report of an officer involved shooting resulting in the death of Eurie Stamps. The Framingham Police SWAT Team was assisting the Framingham Police Drug Unit in the execution of a drug warrant at that address. The target of that warrant was identified as the stepson of the decedent;

Joseph Bushfan [REDACTED]
[REDACTED]

2. Bushfan was arrested by Framingham Police a short distance away from the premises for drug violations immediately prior to the execution of the warrant. After his arrest and during the execution of the warrant Stamps was shot and killed. At the Framingham Police Department Bushfan agreed to speak with Framingham Det. Darren Crawford and me. Bushfan was advised of Miranda rights at 0438 hours and after signing the Miranda form Bushfan agreed to have the conversation recorded.

3. At 0503 hours after being informed of the death of Mr. Stamp, Bushfan requested the recorder be turned off and agreed to continue speaking with us without being recorded. Bushfan appeared to be visibly upset upon hearing of Stamps' death and stated the following: "How am I going to explain this to his (Stamps') kids? It's on me." I asked Bushfan if he was referring to the warrant and he stated "I understand the reasons for why they did the search warrant. I'm not going to speak to that anymore."

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2010-110-0005

Supervisor *[Signature]*

Date 2-15-11

Excellence In Service Through Quality Policing

4. Bushfan stated earlier in the evening he was at his home, 26 Fountain St, with his cousin, Devon Talbert, mother, Norma Bushfan-Stamps, and Eurie Stamps. He stated at one point his mother and Stamps were arguing about the dog pooping in their room. Two girls showed up at his house a little while later asking for cigarettes. Bushfan stated he didn't know their names. At one point Bushfan stated he was in his cousin's bedroom with the girls and his mother was in the front bedroom while Stamps was in the kitchen. He eventually left with the girls out the front door to get some cigarettes for one of them at the Gulf Station

5. He walked up to the corner with the girls to the Gulf Gas Station and stated that was when he was arrested. Bushfan stated he was on the ground being handcuffed and heard over the police portable radios "Shots fired." He stated he was then put in the back of a cruiser. While in the back of the cruiser he stated he looked up the street to his house and saw his Stamps being taken out of the house on a stretcher and placed in to an ambulance. Bushfan stated he saw ambulance pull out of the parking lot of the Gulf Station. Bushfan stated he heard a uniformed officer nearby say "I think it was the two new guys."

6. I asked Bushfan if he had any drugs on him when he was arrested and he stated "I had crack on me. only about five pieces." He further stated he and his cousin "dabbled in it to take care of our kids." I asked him if he meant selling it and he stated "Yes." Bushfan stated his cousin had a one year old son and he had a three year old daughter.

7. Bushfan further stated he was worried about facing his stepfather's children. He stated he didn't want to go the funeral and face them.

Respectfully submitted,



Trooper Jeffrey A. Saunders #2924
Massachusetts State Police
Middlesex District Attorney's Office



The Commonwealth of Massachusetts

Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

January 21, 2011
Woburn Massachusetts
2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: PETER J. SENNOTT, SERGEANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: FRAMINGHAM POLICE DEPARTMENT INTERVIEWS

1. On 01-07-11, this officer and DLT Thomas Sullivan interviewed the following members of the Framingham Police Department:

Deputy Chief Craig Davis (OIC SWAT)
Lt. Kevin Slattery (OIC Detective Unit)
Sgt. Stuart (Team Leader SWAT)
Sgt. Jorge Ruiz (Eve Shift Patrol Supervisor)
Sgt. Robert Sibillo (SWAT member)

Also present at the interviews representing Stuart, Ruiz, and Sibillo were Attorney's Michael Akerson and John Vigliotti of Reardon, Joyce & Akerson PC. Deputy Davis was represented by the Departments Attorney, and Lt Slattery did not wish representation. All officers provided detailed statements without objection as to the events that took place at 26 Fountain Street, Framingham on 01-04-11.

2. The statements were recorded with the consent of all officers involved; a CD of the interviews is attached.

Respectfully submitted,

Peter J. Sennott

Sergeant

Massachusetts State Police

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

Supervisor ADN

Date 1/24/11

Excellence In Service Through Quality Policing



The Commonwealth of Massachusetts

Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

January 13, 2012
Woburn Massachusetts
2011-110-0005

TO: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

FROM: PETER J. SENNOTT, SERGEANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: RETURN OF WEAPONS

1. On 01-12-12, this officer was advised by ADA John Verner that all weapons and ammunition in the possession of the SPDU-Middlesex concerning the fatal shooting of Eurie Stamps in Framingham could be returned to the Framingham Police Department.
2. This officer returned two firearms (.40 Sig #UU635241 and Colt M-4 # A230821) and associated magazines and ammunition to Lt. Michael Hill at the Framingham Police Department.

Respectfully submitted,

Peter J. Sennott
Sergeant
Massachusetts State Police

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

Supervisor AB/H

Date 1-12-12

Excellence In Service Through Quality Policing

State Police Middlesex

Custody Receipt

On 01/12/2012 at 11:16 am the following items were transfered so that the current custody reads as follows;
"Returned To Owner". This custody update was processed by **Sergeant Peter Sennott**.

Case #: 2011-110-0005		Please initial below if the items are to be Transferred
Item #	Description	Transfer
01	.40 Sig w/ 3mags and 37 live. Serial #: UU635241 Item Notes: Dept #:	Initial
02	Item Notes: Dept #:	Initial
03	Item Notes: Dept #:	Initial
04	Item Notes: Dept #:	Initial
05	Item Notes: Dept #:	Initial
06	Item Notes: Dept #:	Initial
07	5.56 Colt M-4 with three magazines and 82 live cartridges. Serial #: A0230821 Item Notes: Dept #:	Initial

Total # of Items Transferred: 7

Comments: All items returned to Framingham Police Department per ADA Verner

Sergeant Peter Sennott

Released By

Released To

01/12/2012 - 11:16 am

Date/Time

When Transferring items please complete this Chain of Custody section below and return this form to your Property Officer.

Transferred By (Sign and Print)

Transferred To (Print Location Name)

Date/Time

Be sure to initial all of the items you are transferring above



The Commonwealth of Massachusetts Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

January 13, 2011
Woburn Massachusetts
2011-110-0005


TO: DETECTIVE CAPTAIN KEVIN J. BUTLER
DIVISION OF INVESTIGATIVE SERVICES
MASSACHUSETTS STATE POLICE

FROM: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: INVESTIGATION OF FATAL SHOOTING OF EURIE STAMP
[REDACTED]
[REDACTED]
[REDACTED]

1. On Wednesday, January 5, 2011, Lt. Kevin Slattery and I drove Norma Francine Bushfan-Stamp to her home at 26 Fountain Street, Framingham, MA. Mrs. Stamp needed her cell phone to obtain contact information for her relatives.
2. At approximately 5:50 AM, we arrived at 26 Fountain Street. In addition to her cell phone, Mrs. Stamp asked me to retrieve the following items: boots, socks, coat and cigarette pouch. I entered the home and met Framingham Police Officer Goncalves. Officer Goncalves was securing the home pending the issuance of a search warrant. I retrieved the above items and gave them to Mrs. Stamp. Lt. Slattery and I then returned to Framingham Police Station with Mrs. Stamp.

Respectfully submitted,


Thomas J. Sullivan
Detective Lieutenant
Massachusetts State Police

00005-1

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX
CASE # 2011-110-0005
Supervisor [Signature] Date 1-26-11

Excellence In Service Through Quality Policing



The Commonwealth of Massachusetts *Department of State Police*

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

January 13, 2011
Woburn Massachusetts
2011-110-0005

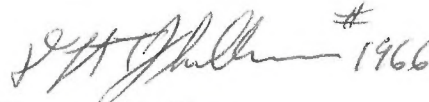
TO: DETECTIVE CAPTAIN KEVIN J. BUTLER
DIVISION OF INVESTIGATIVE SERVICES
MASSACHUSETTS STATE POLICE

FROM: THOMAS J. SULLIVAN, DETECTIVE LIEUTENANT
MIDDLESEX DISTRICT ATTORNEY'S OFFICE
MASSACHUSETTS STATE POLICE

SUBJECT: INVESTGATION OF FATAL SHOOTING OF EURIE STAMP
[REDACTED]
[REDACTED]
[REDACTED]

1. On Wednesday, January 5, 2011 at 0910 hours, Framingham Police Deputy Chief Craig Davis provided me with the attached paperwork. The paperwork was used by Deputy Chief Davis and Lt. Downing during the Operational Briefing prior to the entry at 26 Fountain Street, Framingham, MA.

Respectfully submitted,

 #1966

Thomas J. Sullivan
Detective Lieutenant
Massachusetts State Police

00005-2

MASSACHUSETTS STATE POLICE
DIVISION OF INVESTIGATIVE SERVICES
STATE POLICE DETECTIVE UNIT - MIDDLESEX

CASE # 2011-110-0005

Supervisor 

Date 1-26-11

Excellence In Service Through Quality Policing

1/4/11

830 - call from Martinez ref Search Warrant

910 - Met with Martinez, Avila, Derosin ref
Search warrant 26 Fountain St 1st
floor apt. Avila preparing search warrant

925 - Send all-call page to Tac and TEMS
for search warrant service at 11 PM.

SITUATION

Selling crack from 1st floor apt at 26
Fountain St.

SUSP -

Dwayne Barrett

B M

Joseph Bushfan

B M

Deandre Nwaford

B M

Bushfan's Aunt

40's

B F

Bushfan's uncle

40's

B M

Derosier in black infinity at Silver Glens
Gutwill in blue explorer at Columbus club

Mission

Secure 26 Fountain ST 1st floor
for detectives

1140 - warrant signed

1145 - Command briefing

1155 - Team briefing

Radio channel 16 R

969 Fountain / Dudley Station

949 Fountain / Waverly Gonzalez

1220 - leave station

1225 - arrive Fountain ST - Gutwill with
male and 2 females on sidewalk - Slattery,
Muntagh, Davis

1235 - Radio call shots fired call for
medics

1239 - AMR Transport

SWAT Training Roster

DATE: 1-4-11 into 1-5-11

Location: 26 Fountain St

Mission: warrant service.

Stand-by Time: 11pm

Call-Out Time: 9:25pm.

26 Fountain St.

TACTICAL

Name	Element
Blass	blue
✓ Casey	blue
✓ Curtis	gr
✓ Davis	com
✓ Downing	com
✓ Duncan	grn
✓ Eliadi	grn
✓ Murtagh	sup
✓ Langmeyer	grn
✓ Martinez	blue
✓ O'Toole	blue
✓ Reardon	gr
✓ Riley	blue
✓ Sebastian	grn
✓ Sheehan	blue
✓ Sibillo	grn
✓ Stuart	com

YES
NO

TEMS

✓ Hicks	
✓ Beckwith	
D. Harding	
✓ Ferri	
Zanella	
✓ Kaye	

NEGOTIATORS

McAulda			
---------	--	--	--

Canning, Thomas















COMMAND & SUPPORT

SERVICE & SIGNAL

C

HERKOW
CURTIS } SHIELDS

TWO
SEC (DETS)

b

1 (SEC) LAMGMEYER
BRAKE - ~~BRAT~~
CASRY

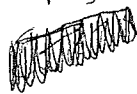
SHIELDS

= DOWNING
SHEEHAN (A)
G'TOOLE (A)

= ~~CHAI~~
ELIADI

= STUART
DUNCAN (A)
SEARST. (A)

RILEY - (SEC) (FIRE)
SIBILIO (BRAKE)



A

- ① MUZZLE DOWN
- ② TASERS

PATROL

PATROL

9-1-03

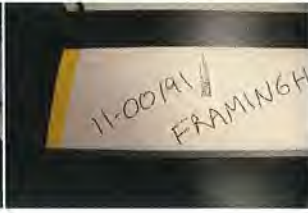
11-00197 JCR



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Framingham Search 001.jpg



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Framingham Search 003.jpg



Framingham Search 004.jpg



Framingham Search 005.jpg



Framingham Search 006.jpg



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11-0019W M1730



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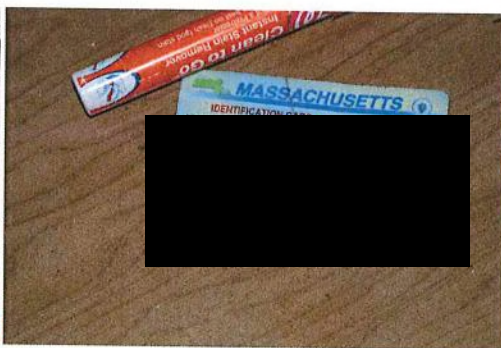
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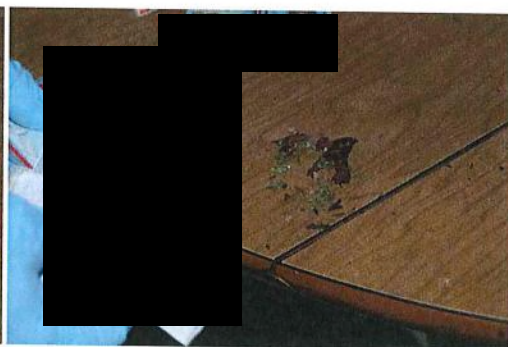
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11-00191 *new*



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11-00191 *mmg20*



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Forensic and Technology Center

124 Abolton Street

Waynard, MA 01754

Telephone 978-451-3300 Fax 978-451-3320

February 16, 2011

ADA Kyle Reed
Middlesex District Attorney's Office
P.A.C.T. Unit
15 Commonwealth Avenue, 2nd Floor
Woburn, MA 01801
(617) 679-6500

RE: Lab No. 11-00191 Framingham (Discovery Request)

Dear ADA Reed,

In response to your discovery request, we are providing the following items for Laboratory Number 11-00191 Framingham:
Criminalistics File Folder

Feel free to contact me if any additional information is needed.

Sincerely,

Gina M. Testa
Case Management Unit
State Police Crime Laboratory
(978) 451-3440

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF STATE POLICE
CRIME LABORATORY SYSTEM

I, Gina M. Testa, hereby certify that I am the custodian of the record attached and this document is a true and complete copy of the following case filed for **Case No. 11-00191**

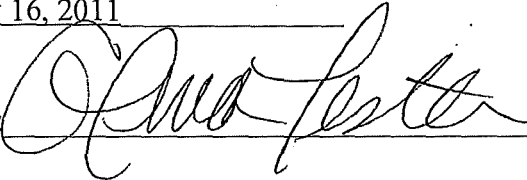
Framingham:

Criminalistics File Folder

I further state that this record is kept in the normal course of business; that this record is kept in good faith; that it is the regular course of the Department of State Police Crime Laboratory System to make such record.

Signed this date under the pains and penalties of perjury.

Date: February 16, 2011

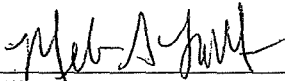
Signature: 

Title: Case Management Unit
State Police Crime Laboratory

Commonwealth of Massachusetts

Middlesex, ss.

On this 16 day of February 2011, before me, the undersigned notary public, personally appeared Gina M. Testa, proved to me through satisfactory evidence of identification, which was a Massachusetts State Police ID, to be the person whose name is signed on this document and acknowledged to me that they signed it voluntarily for its stated purpose as a custodian of records for the State Police Crime Laboratory System.


Signature



MELISSA S. LaMIER
Notary Public
Commonwealth of Massachusetts
My Commission Expires
May 24, 2013

Massachusetts State Police Crime Laboratory Criminalistics Unit

Case Pages Summary Form

Case Number & Town: **11-00191 Framingham**

	Date	Report (CS, Crim, Corr, DNAS, O)*	Last Page in Section														Initials **
			A	B	C	D	E	F	G	H	I	J	K	L	M	N	
1	2/8/11	CS	1	0	0	0	0	0	1	0	0	3	0	0	0	0	KLK
2																	
3																	
4																	
5																	
6																	
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15																	

*** Key**

- CS = Crime Scene Report
- Crim = Criminalistics Report
- CORR = Corrected Report
- DNAS = DNA Sendout
- O = Other

**** Assigned chemist or person placing page(s) in file**

Case-File Review Form

Case Number & Town: 11-00191 Framingham

Report Type (circle): Scene Crim Corrected DNA Send-out DNA Review Other

Assigned to: Kelley L. King

LIMS Assignment Approved/Closed ☒

Date Case Assigned: 1/5/11

Report Dated: 2/8/11

Section Left Jacket	Reviewed Page(s) Reviewer's Initials (Tech/Admin)	Section Right Jacket	Reviewed Page(s) Reviewer's Initials (Tech/Admin)
Case Pages Summary Form		Criminalistics and Crime Scene Report(s)	ER/ER
Case-File Review Form(s)		DNA Report(s)	
A. CL-1(s)	A1 ER/ER	I. RSA Worksheet(s)	N/A
B. LIMS Case Jacket(s) (if printed)	N/A	J. Hand-written Note(s) and worksheets	J1-J3 ER/ER
C. Examination Form(s)	N/A	K. Other Worksheet(s)	N/A
D. Paper Chain of Custody (In House Continuity, Return Receipts, Transfer Forms, etc)	N/A	L. Photocopies (Kit Box, Kit Form(s), Packaging, blood tube etc)	N/A
E. CIF(s)	N/A	M. Photograph(s)	N/A
F. Record of Conversation Log(s)	N/A	N. DNA Send-out Materials	N/A
G. Correspondence(s)	G1 ER/ER	Check LIMS: Statistics	N/A
H. Police Report(s), and other external reports	N/A	Case Info	<input checked="" type="checkbox"/>
		Supplements	<input checked="" type="checkbox"/>
		Items	<input checked="" type="checkbox"/>
		Chain of Custody	<input checked="" type="checkbox"/>

ER 2/9/11
Initials, Date of Technical Review

ER 2/9/11
Initials, Date of Administrative Review



Commonwealth of Massachusetts
Department of State Police
Forensic Services Group
Front Desk Sudbury: (508) 358-3110
Evidence Unit Phone: (508) 358-3155

ASCLT
Leg
Accredite

11-00191 - 4
Sub# 4 Received (1/5/2011)
Crime Laboratory Systems
Case# 2011-110-0005

Type of Case: Fatal Shooting		Scene Responder	
Date of incident: 01/05/2011		KLC / KLCJ	
Investigating Agency: MSP Middlesex County Detective Unit		FSG Case Number : 11-00191 - 4	
Incident Address: 26 Fountain Street		Investigating Agency Case #: 2011-110-0005	
Incident Town: Framingham		Special requests/comments: processed scene for biologicals	
Report to (Name): Trooper Erik P. Gagnon #2523			
Phone #: (617) 679-6600		CRIM: DNA: TRACE: ARSON: TOX	
Email:		CSSS: FIS: DEMS: (FOR FSG USE ONLY)	
County DA's Office: Middlesex County		ADA:	
Victim/Other's Name(s)		Suspect/Defendant's Name(s)	
DOB Sex Race		DOB Sex Race	
V Stamps, Eurle	03/02/1946 M		

RECORD OF EVIDENCE SUBMITTED: List item description and owner's name (or origin) of each item separately.

4-1 [Swab(s) of red-brown stain(s)] (2) Swabs - RB pool in laundry area (26 Fountain St)
4-2 [Pants] black pants (E. Stamps)
4-3 [Sock(s)] (2) white socks (E. Stamps)
4-4 [Boxer shorts] gray underpants (E. Stamps)
4-5 [Key(s)] set of keys from pants of E. Stamps

The items reported to be in the packages were inventoried and documented above by a representative from the submitting agency. At the time of analysis, the assigned analyst/examiner will unseal the package and verify the inventory. In the event of a discrepancy between the actual inventory and that reported on this form, reconciliation shall be conducted in accordance with the Massachusetts State Police Forensic Services Group (FSG) Evidence Handling and Submission Manual. The undersigned submits this evidence on behalf of the investigating agency, who acknowledges that the FSG is responsible for conducting all tests according to standard procedures, and who authorizes the FSG to make all decisions regarding scientifically necessary deviations from said procedures. All procedural deviations shall be documented in the laboratory notes according to laboratory procedure but notice of each such deviation need not be given to the agency.

I, (KLC) _____, acknowledge receipt of 3 packages from: Kelley L. King.

Evidence Technician (Signature)

Printed or Typed rank & name of Delivering Officer

01/05/2011

12:06 pm

Date

Time

Crime Laboratory Systems

Police Department / Agency (of Delivering Officer)

Signature of Delivering Officer

IF THE STATUS OF THIS CASE CHANGES, PLEASE NOTIFY THE CASE MANAGEMENT UNIT IMMEDIATELY AT 978-451-3440.
PLEASE RETAIN THIS RECEIPT FOR YOUR RECORDS.



The Commonwealth of Massachusetts
Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

Forensic and Technology Center

124 Acton Street

Weymouth, MA 01754

Telephone (978) 451-3400 Facsimile (978) 451-3401

Fax Transmittal Cover Sheet

Date: 1/5/11

To: Lt. Ed Forrester

From: Kelley King

Total Number of Pages (including Cover Sheet): 2

Any Additional Message: _____

Items collected / received @ scene
If you have any questions, call 978-451-3513

Thanks, kel

If you do not receive all of the pages as indicated, please call 978-451-3400. Thank you.

****CONFIDENTIALITY NOTE****

The documents accompanying this facsimile transmission contain information of the State Police Forensic and Technology Center, which may be CONFIDENTIAL AND/OR PRIVILEGED. The information is intended to be for the use of the individual or entity named on this transmittal sheet. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited. If you have received this facsimile in error, please notify us by phone immediately and return the original message to us at the above address by First Class Mail via the U.S. Postal Service. Thank you.

COPY

11-191
(kw)
e



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Crime Laboratory

124 Acorn Street

Raymond, Massachusetts 01754

Telephone (978) 451-3500 Facsimile (978) 451-3401

CRIME SCENE REPORT

Laboratory Case Number: 11-00191

Victim(s): Eurie Stamps

Suspect(s): N/A

Report To: Trooper Erik P. Gagnon, MSP Middlesex County Detective Unit

Report Cc: Susan Ledoux, Middlesex County District Attorney's Office

Report Date: February 08, 2011

Incident Number: 2011-110-0005

Offense Type: Fatal Shooting

Date of Incident: January 05, 2011

Town: Framingham

On January 5, 2011, Detective Lieutenant Thomas Sullivan of the Massachusetts State Police Middlesex County Detective Unit requested technical assistance in connection with the above subject. Chemist Kara Tremblay and I, Chemist Kelley L. King, responded, reporting to 26 Fountain Street in Framingham at approximately 8:30 a.m. where we met with the following personnel among others:

Lieutenant Edward Forster (Massachusetts State Police Middlesex County Detective Unit)
Trooper Erik Gagnon (Massachusetts State Police Middlesex County Detective Unit)
Trooper Jeffrey Saunders (Massachusetts State Police Middlesex County Detective Unit)
Detective Lieutenant Robin Fabry (Massachusetts State Police Crime Scene Services Section)
Trooper Michael Kerrigan (Massachusetts State Police Crime Scene Services Section)
Trooper Edward Kenney (Massachusetts State Police Crime Scene Services Section)
Trooper Steven Walsh (Massachusetts State Police Firearms Identification Section)
Officer David Studley (Framingham Police Department)

26 Fountain Street consisted of a first floor residence in a two-family dwelling. The apartment consisted of two bedrooms, a bathroom, kitchen and a dining room area. One of the bedrooms was located at the front of the residence, off the foyer which contained stairs ascending to the second floor. Damage was noted to this bedroom door. Damage was also noted to the front windows and the two kitchen windows of the residence. Glass was observed on the interior and exterior areas about the windows. The kitchen was also located off the front foyer. A pantry and a laundry area were noted at the rear of the kitchen. The other bedroom and the bathroom were located across from the laundry area. The apartment had a cluttered appearance with miscellaneous items on the floor.

Upon entry, we were directed to the kitchen area of the residence. A red-brown pool was observed in the in the laundry area, adjacent to the back of the washing machine. Red-brown stains, consistent with wipes, were observed extending from this red-brown pool. Red-brown footwear impressions were also noted about the red-brown pool. A screening test for the presence of blood was positive on these stains. A discharged

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cartridge casing was observed next to the red-brown pool in the laundry area. Several containers, clothing, a pair of eyeglasses, an over-turned ironing board and black bags were noted on the floor, about the red-brown pool.

We were then directed to the Framingham Police Department, arriving at approximately 11:15 a.m.

DEFINITIONS

The following terms relating to bloodstain pattern analysis were used throughout this report (SWGSTAIN Terminology 2009):

Bloodstain: A deposit of blood on a surface.

Pool: A bloodstain resulting from an accumulation of liquid blood on a surface.

Wipe Pattern: An altered bloodstain pattern resulting from an object moving through a preexisting wet bloodstain.

COMMENTS

The following items were collected from the scene and transported to the Crime Laboratory:

4-1 (2) Swabs – Red-brown pool in laundry area (26 Fountain St)

The following items were received at the Framingham Police Department from Officer David Studley of the Framingham Police Department at approximately 11:20 a.m. and transported to the Crime Laboratory:

4-2 Black pants (E. Stamps)

4-3 White socks (E. Stamps)

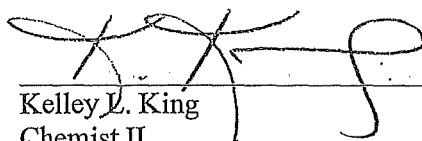
4-4 Gray underpants (E. Stamps)

4-5 Set of keys from pants of E. Stamps

Further analysis upon request.

Please direct all requests to: Erik Koester, Crime Scene Analyst (978) 538-6148/

Erik.Koester@pol.state.ma.us or complete a case activation form and fax it to 978-451-3459.



Kelley L. King

Chemist II

kelley.king@pol.state.ma.us

Massachusetts State Police Crime Laboratory



COPY

CRIME SCENE INVESTIGATION NOTES

Chemist(s): KL/KRT

DISPATCH INFORMATION: Det. Lt. Sullivan @ ~7:40AM on 1/5/11			LIMS NUMBER: 11-191
EXAMINATION DATE: 1/5/11 @ 1st	ARRIVAL TIME: ~8:30AM	DEPARTURE TIME: ~11:35AM	TYPE OF CASE: Fatal Shooting
INCIDENT LOCATION (Address, Town): 26 Fountain St Framingham	INCIDENT DATE: 1/5/11 @ 1st		INCIDENT NUMBER: 2011-110-0005
VICTIM(S): Eurie Stamps	SUSPECT(S): N/A	REPORT TO (Case Officer, Phone Number): Tpr. Erik Gagnon 617-438-3610	
INVESTIGATORS (i.e. CSSS, Firearms, MSP): <div style="display: flex; justify-content: space-between;"> <div> Tpr. Erik Gagnon Tpr. Jeff Saunders Lt. Ed Forrester </div> <div> Tpr. Mike Kerrigan Tpr. Edward Kenney Lt. Fabry </div> <div> CSSS Officer Studley - Framingham Tpr. Steven Walsh - Bull </div> </div>			

(v) Eurie A. Stamps DOB 3/2/46

- responded to 26 Fountain St: (2) family residence w/ 26 on 1st floor
- SWAT serving a warrant and (v) was shot outside rear bedroom in neck area.

Scene → Framingham Pd @ ~11:15AM

- received clothing of E. Stamps from Officer David Studley
 @ Framingham Pd @ ~11:20AM *David Studley*

Chemical	Lot Number	Expiration Date	Controls
OT Solutions	CC0120610	2/6/11	✓
AP Solutions			
Sodium Rhodizonate Solution			
15% Acetic Acid			NA
5% Hydrochloric Acid			NA
Dithiooxamide Solution			
10% Ammonium Hydroxide			NA
Saline			NA
DI Water		PRN	NA

Standards	Lot Number	Expiration Date
Blood	ACS011105	1/11/12
Semen		
Lead		PRN
Copper		PRN

COPY

11-0191
KL

EXAMINATION DATE

INCIDENT LOCATION

CHEMIST

KU / KRT



S
E ——— W

COPY

11-5

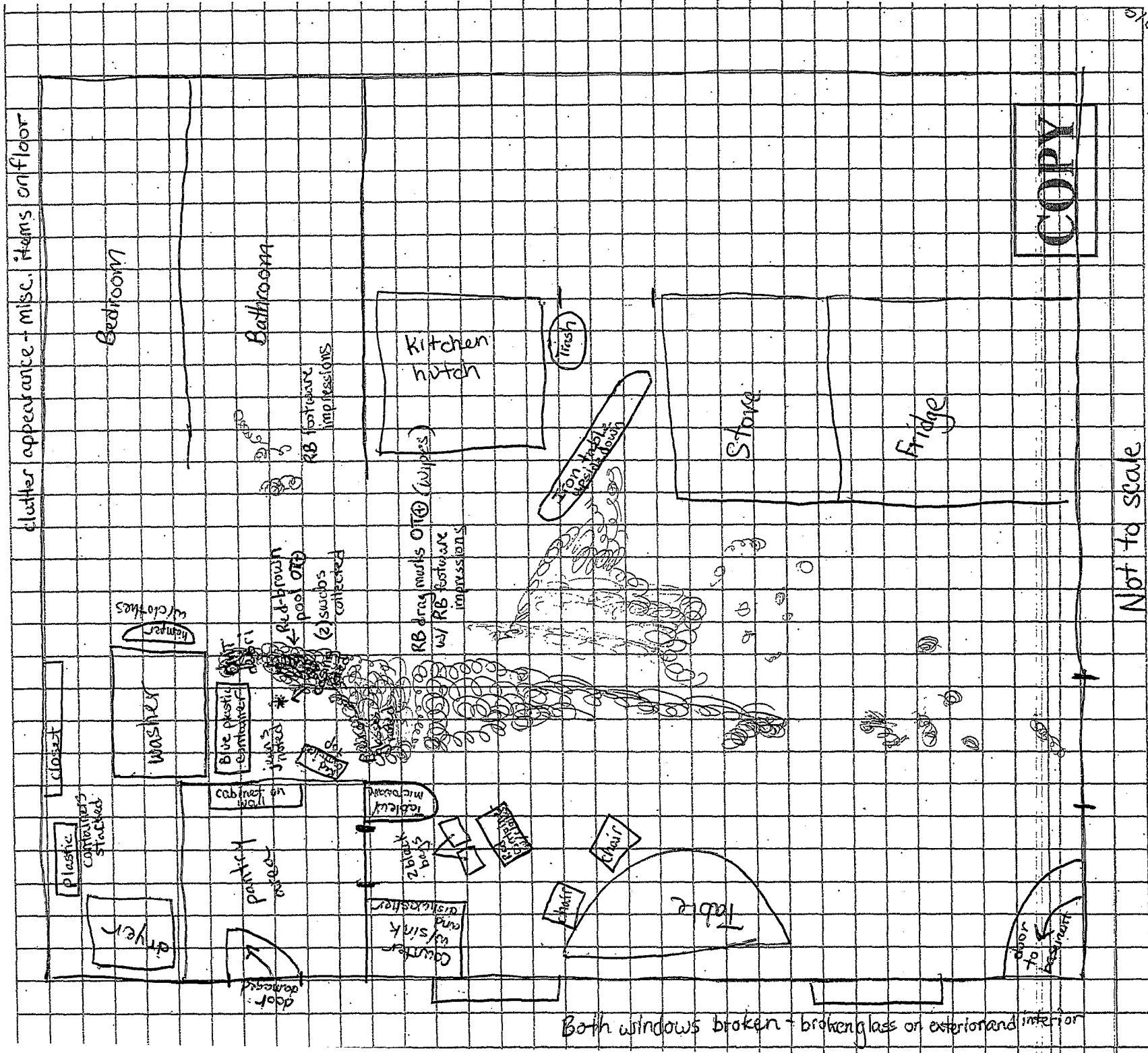
CRIME SCENE INVESTIGATION NOTES

EXAMINATION DATE

INCIDENT LOCATION

CHEMIST

26 Fountain St

 $kk/kR.T.$ 

SECRET

5/0-11



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts
Department of State Police
Forensic Services Group

59 Horse Pond Road

Fudbury, MA 01776

Voice: (508) 358-3100 Fax: (508) 358-3111

Returned to MSP Detective Unit

Lab Code / Case No.:	NOR 11-00191	Case Type:	Fatal
Department Name:	MSP Middlesex County Detective Unit	Offense Location:	Framingham
Department Case No.:	2011-110-0005	Offense Date:	01/05/2011
Case Officer:	Trooper Erik P. Gagnon #2523	Offense Type:	Fatal Shooting

Reference(s):

11-00191

2011-110-0005 AM

Officer Involved

Comment:

<u>Container Letter</u>	<u>Submission Number</u>	<u>Laboratory's Item Number</u>	<u>Department's Property Number</u>	<u>Packaging & Item Description(s)</u>
E	1	1-1.2		One paper envelope containing Compact Disk (CD-R-RW) Photo's of scene SPDU Copy
E	1	1-1.3		One tagged item of evidence Photo Contact / Index Sheet - Photo's of scene SPDU Copy
E	1	1-3.2		One paper envelope containing Compact Disk (CD-R-RW) Photo's of drug search Warrant SPDU Copy
E	1	1-3.3		One tagged item of evidence Photo Contact / Index Sheet - Photo's of drug search Warrant SPDU Copy
E	5	5-1.2		One paper envelope containing Digital Video Disk (DVD-R-RW) Middlesex SPDU Copy

Print Name (Released To)

Print Agency

Evidence Technician: Jennifer M. Bagley

Returned By:

Signature (Released To)




Date

Signature (Returned By)

The items and/or sub-items listed on this receipt were assigned by the laboratory and are returned in sealed packages. The accountability for the contents of these sealed packages is the responsibility of the submitting officer and/or laboratory examiner.

Massachusetts State Police Crime Scene Services Section

Crime Scene Report

1. Station CSSS - Boston		2. Case No. 11-00191 	
3. Department MSP Middlesex County Detective Unit	4. Department Case No. 2011-110-0005	5. Report No. 1	6. Page 1 of 1
7. Reporting Officer (Rank, First, MI, Last & ID#) Trooper Karrol G. Setalsingh, #1875	7a. Signature 	7b. Date Prepared 1/7/11	
8. Approved by (Rank, First, MI, Last & ID#) Sergeant David C. Mahan, #1416	8a. Signature 	8b. Date Approved 1-13-11	
9. Subject: Fatal Shooting			

Date of Offense: 1/5/2011
Offense Location: Framingham
Investigator: Trooper Erik P. Gagnon #2523
Victim(s): Eurie Stamps
Suspect(s):

1. On January 06, 2011, I attended and photographed the autopsy of OCME case # 11-0286 (Eurie Stamps), it was performed by Dr. Henry Niels. At the completion of the autopsy, I took major case prints of the decedent.



The Commonwealth of
Massachusetts
Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

Firearms Identification Section
124 Acton Street
Maynard, Massachusetts 01754

DATE: 2/11/11

FAX COVER SHEET

TO: Kyle

FAX: (781) 887-8862

FROM: Tr 5 Eve Walsh FIS

FAX: _____

NOTE: Kyle, could you pass this along to John V.,
this is a corrected version of a report I previously
sent. Thank you.

TOTAL NUMBER OF PAGES 3 INCLUDING THIS COVER SHEET

THE INFORMATION CONTAINED IN THIS FAX IS CONFIDENTIAL AND ANY ATTACHMENT IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, DISSEMINATION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US AT (508) 358-3180.

LIMS#11-00191

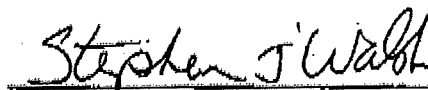
As a result of a physical and microscopic examination of the evidence discharged cartridge casing (item 3-1) and the discharged cartridge casing test fires (items 2-1.1) it is my opinion:

A/ They both share the same class characteristic of caliber and firing pin impression shape, however, they lack sufficient agreement of unique microscopic marks to determine the source weapon. My result is inconclusive.

B/ The item 6-1 spent jacket and lead fragments were too damaged for further identification.

C/ Item 2-2 was not examined.

COPY



Trooper Stephen Walsh
Massachusetts State Police
Firearms Identification Section
swalsh@pol.state.ma.us

cc: Trooper Eril, P. Gagnon #2523
MSP Middlesex County Detective Unit



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11-00191 *W03700*



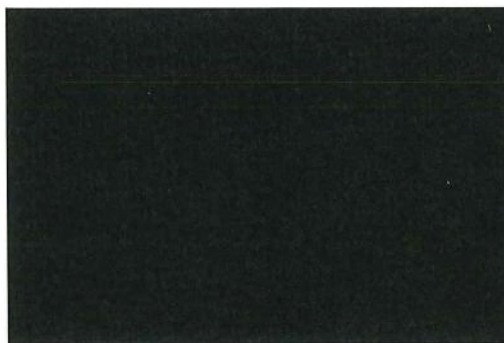
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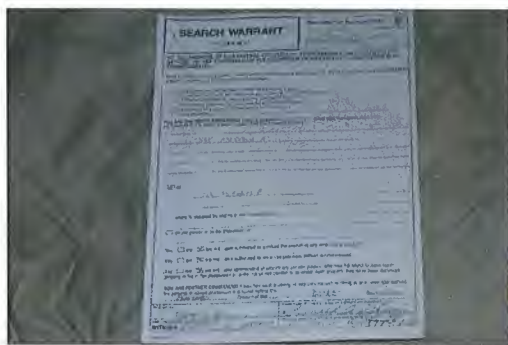
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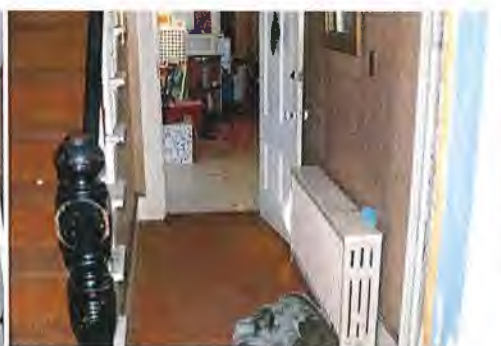
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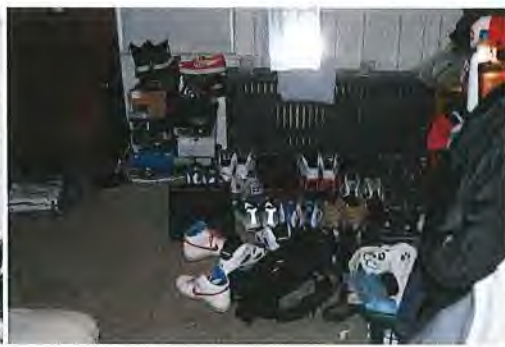


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11-00191 *11/11/98*



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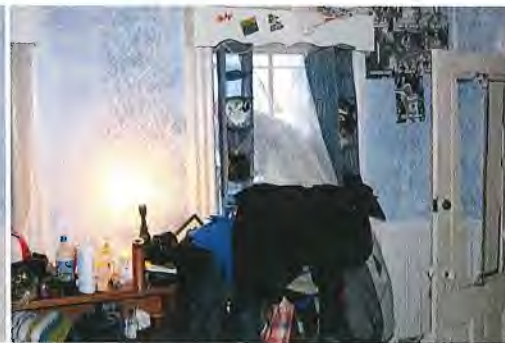
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11-00191 *mw 7/30*



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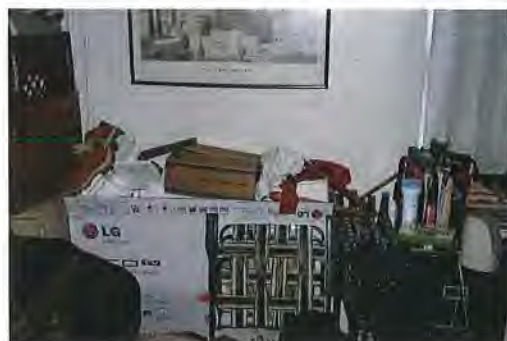
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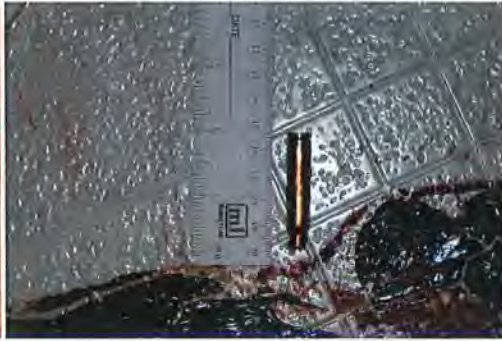
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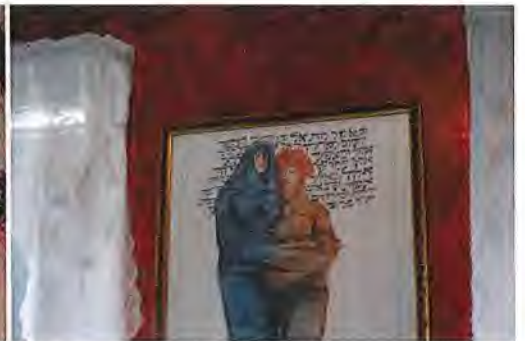
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Framingham 150.jpg



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
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COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Firearms Identification Section - Maynard

124 Acton Street

Maynard, Massachusetts 01754

Telephone (978) 451-3480 Facsimile (978) 451-3481

FIREARMS IDENTIFICATION SECTION REPORT

Case Number:	11-00191	Date:	January 15, 2011
Agency:	MS ³ Middlesex County Detective Unit	Agency Case Number:	2011-110-0005
Defendant or Suspect:		Case Type:	Fatal Shooting
Victim(s):	Eurie Stamps	Date of Incident:	1/5/2011

On January 05, 2011, Trooper Steve Walsh of the SP Ballistics - Maynard received item 2-1 at the Framingham Police Station Range and submitted it to this section for examination:

- 2-1 5.56mm caliber Colt M-4 Commando semi-automatic/automatic rifle serial number A0230821 and (1) magazine containing twenty-six (26) live cartridges from weapon. There was one live cartridge in the chamber when the weapon was cleared. Also submitted were two magazines and fifty-six (56) live cartridges.
- Barrel Length: 13 inches including flash suppressor.
Overall Length: 30 1/2 inches as submitted
Test Fire: Yes Malfunctions: None
Trigger Pull: Semi-automatic 6.22 - 6.95 lbs. Automatic 9.28 - 9.82 lbs

COPY

- 2-2 .40 S&W caliber Sig Sauer model P226 semi-automatic pistol, serial number UU635241 with three magazines and thirty-seven live cartridges.

Pursuant to a search warrant executed at 26 Fountain Street, Framingham, the following evidence was recovered:

- 3-1 One (1) 5.56 mm caliber discharged cartridge casing recovered from the laundry room adjacent to the rear bedroom. Headstamp: "LC 08".

On January 6, 2011 I received from Technician Nikia Hackett at the Office of the Chief Medical Examiner 720 Albany Street Boston:

- 6-1 Spent lead and jacket fragments weighing 15.1 grains, recovered during an autopsy of the above victim

LIMS#11-00191


As a result of a physical and microscopic examination of the evidence discharged cartridge casing (item 3-1) and the discharged cartridge casing test fires (items 2-2.1) it is my opinion:

A/ They both share the same class characteristic of caliber and firing pin impression shape, however, they lack sufficient agreement of unique microscopic marks to determine the source weapon. My result is inconclusive.

B/ The item 6-1 spent jacket and lead fragments were too damaged for further identification.

C/ Item 2-2 was not examined.

COPY



Trooper Stephen Walsh
Massachusetts State Police
Firearms Identification Section
swalsh@pol.state.ma.us

cc: Trooper Erik P. Cagnon #2523
MSP Middlesex County Detective Unit



The Commonwealth of
Massachusetts
Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

Firearms Identification Section
124 Acton Street
Maynard, Massachusetts 01754

DATE: 2-7-11

FAX COVER SHEET

TO: Kyle

781-897-8862

FAX: _____

FROM: Tpr Steve Walsh

FAX: _____

NOTE: Report

TOTAL NUMBER OF PAGES 3 INCLUDING THIS COVER SHEET

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THE COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX DISTRICT ATTORNEY
63 FOUNTAIN STREET FRAMINGHAM, MA 01702
WWW.MIDDLESEXDA.COM

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

Tel: (781) 897-8800
Fax: (781) 897-8801

March 9, 2011

Chief Steven Carl
Framingham Police Department
1 William Welch Way
Framingham, MA 01702

RE: Officer Involved Shooting on January 5, 2011, in Framingham

Dear Chief Carl:

The Middlesex District Attorney's Office and the Massachusetts State Police assigned to the Middlesex District Attorney's Office have conducted an investigation into the police involved fatality that occurred on January 5, 2011, at 26 Fountain Street in Framingham. The Middlesex District Attorney's Office, per protocol and pursuant to statute (See G.L. c. 38 § 4), conducted the investigation in order to determine whether the discharge of Framingham Police Officer Paul Duncan's department-issued firearm in this matter amounted to prosecutable criminal conduct under the law, and if so, whether the surrounding circumstances and evidence amounted to prosecutable criminal conduct.

The investigation included a thorough review of all interviews conducted (including witnesses at the scene, Framingham police officers, and emergency medical personnel), ballistics and crime scene forensic reports, radio transmissions and 911 calls, police reports, witness statements, photographs of the scene, and medical examiner information. Our investigation has revealed the following relevant facts on which we base our findings and conclusions:

In December of 2010 and early January of 2011, members of the Framingham Police Narcotics Unit obtained information regarding the illegal distribution of crack cocaine from and in the vicinity of 26 Fountain Street in Framingham. A confidential source informed members of the narcotics unit that a young male named Dwayne Barrett [LES/FOUO] was distributing crack cocaine from that location. The informant also stated that Barrett [LES/FOUO] was frequently in the company of a young black male with a tattoo on his face. That male with the tattoo on his face was later identified as Joseph Bushfan. [REDACTED]

[REDACTED]

During the same time frame, Framingham narcotics officers also obtained information from a second confidential source. The confidential informant informed the Narcotics Unit that it possessed information that the same young male named "D" or "Dwayne" [LES/FOUO] was also involved in the illegal drug distribution activity from 26 Fountain Street in Framingham. Based on this information, narcotics officers began working towards applying for and obtaining a search warrant for 26 Fountain Street.

In the two weeks leading up to the application for the search warrant, narcotics officers utilized a confidential informant in order to conduct three controlled buys from 26 Fountain Street. During all three controlled buys, the confidential informant called one of two phone numbers provided to it by either Bushfan or Barrett [LES/FOUO]. During all three controlled buys, the informant ordered cocaine over the telephone from either Bushfan or Barrett [LES/FOUO], travelled to the area of 26 Fountain Street and then purchased cocaine directly from either Bushfan or Barrett [LES/FOUO]. In addition, Framingham Police Detectives confirmed by way of physical surveillance and official police records that Joseph Bushfan lived at 26 Fountain Street, Apartment 1 in Framingham.

On January 4, 2011, in the hours before the search warrant was obtained¹ and executed, Framingham Police Detectives Matthew Gutwill and Jeffrey DeRosa conducted surveillance of 26 Fountain Street and observed what they believed to be, based on their training and experience, at least five different hand to hand drug transactions.

Prior to the execution of the search warrant, in the interests of the safety of all involved, Framingham Police Department Detective Phil Martinez, Detective Dinis Avila, Deputy Craig Davis, and other investigators made the decision to request the assistance of the Framingham SWAT team in executing the search warrant. According to investigators, the decision to utilize the SWAT team was based on a number of factors including: [REDACTED]; the information that Barrett was a member of gang involved with narcotics, [REDACTED]; information that Barrett [LES/FOUO] was a known associate of an individual involved in the 2009 shooting of Framingham Officer Phil Hurton; the possible existence of a third potential suspect, Deandre Nwaford [LES/FOUO], inside the target location; the numerous people seen coming and going from the target apartment in the hours leading up to the execution of the search warrant; and the numerous "hand to

¹ Detective Dinis Avila applied for and was granted a search warrant for the premises of 26 Fountain Street in Framingham. The warrant required law enforcement to knock and announce themselves prior to entering the premises. The warrant authorized law enforcement to execute the warrant at night.

hand” drug transactions observed in front of the target apartment in the hours leading up to the execution of the search warrant.

Once the decision to use the Framingham SWAT team was made, a pre-warrant execution meeting was conducted. During the meeting, members of the SWAT team, narcotics detectives and other Framingham Police members discussed the targets of the search warrant, the potential dangers involved in the execution of the warrant, the layout of the home at 26 Fountain Street, and the particular operational plan. It was decided that there would be two “rake and brake”² teams, two entry teams and other general support teams for the inside and outside of the apartment.

Shortly after midnight, members of the Framingham Police narcotics unit and Framingham Police SWAT team proceeded to 26 Fountain Street. Immediately prior to their arrival, surveillance officers who had been stationed outside the address observed Joseph Bushfan and two females exit the front door of 26 Fountain Street and walk south towards Waverly Street. Detectives Gutwell and DeRosa confronted Bushfan and detained him and the two females. Framingham Police Department Lieutenant Kevin Slattery arrived on scene and eventually recovered eight individually packaged corner baggies of crack cocaine from Bushfan’s pocket. Lt. Slattery also recovered approximately \$397 dollars from Bushfan, as well as a cell phone that utilized the same number that the informant had called when ordering cocaine from Bushfan during the first controlled drug buy. Bushfan was placed under arrest and charged with possession of cocaine with intent to distribute as well as conspiracy to violate the drug laws and a school zone drug violation.

As Detectives Gutwell and DeRosa were interacting with Bushfan, the SWAT team arrived at 26 Fountain Street and began carrying out the entry plan. As the team approached the house, they encountered Norma Bushfan-Stamps outside in front of the premises. For safety reasons, she was instructed to get on the ground, which she did, and then escorted to the parking lot of the gas station around the corner from 26 Fountain Street. While investigators interacted with Ms. Bushfan-Stamps, Sergeant Stewart knocked and announced the presence of the Framingham Police and the existence of a search warrant. After knocking and announcing, Sergeant Stewart signaled the team to begin entry according to the pre-determined search warrant operational plan. A “rake and break” team used a tool to break a window and pull back curtains so they could see inside the premises while the two entry teams breached and entered the apartment, one through a hallway door and one through the door leading to the kitchen.

Framingham Police Department Officers Timothy O’Toole and Michael Sheehan were assigned, along with Lt. Robert Downing, to enter through the

² A “rake and brake” team is a team of SWAT members that utilize a long tool (a “rake”) to break a window and pull any curtains or shades out of the way, allowing SWAT members to obtain an unobstructed view of the interior of the apartment.

outside door that opened directly into the kitchen. On the other side of the kitchen was a laundry area/pantry area that led into a hallway with a bathroom and a bedroom. The two officers made entry and arrived inside the kitchen, then spread out and scanned the room. They both observed movement and people on the other side of the kitchen, in the area of the hallway and in the back bedroom. Upon seeing this, Officer O'Toole yelled "Framingham Police, search warrant, put your hands up." At that point, there was more movement behind the kitchen and at least one person, maybe more, moving in and out of the officers' sight. Both officers then observed "a large male, approximately 6'5", 280 pounds" come out of the back bedroom/bathroom area and stand on the hallway side of the threshold between the kitchen and the hallway/laundry area. The male, later identified as Eurie Stamps, was ordered to lie on the floor in the hallway/laundry area just before the threshold to the kitchen.

While Mr. Stamps was on the floor lying on his stomach with his hands up, an unidentified person was observed in the back bedroom area "sneaking a peak" and not complying with the orders to show hands. At that point, fearing the person in the back room may have a weapon or could be a threat to their safety, Officers O'Toole and Sheehan stepped over Mr. Stamps and made their way to the back hallway where the bathroom and rear bedroom were located.³ As Officers O'Toole and Sheehan made their way over Mr. Stamps and down the tight, cluttered hallway, Officer O'Toole had to move numerous containers out of the way. As Officers O'Toole and Sheehan were making their way past Mr. Stamps and into the back hallway, Officer Paul Duncan, who was inside the kitchen behind O'Toole and Sheehan, moved to position himself next to Mr. Stamps.

Officer Duncan had previously made entry into the home through a hallway door along with Framingham Police Department Sergeant Vincent Stewart and Officer James Sebastian. After entering the home, Duncan traveled through and cleared two rooms and then entered the kitchen. After entering the kitchen, Officer Duncan scanned the room and stepped behind O'Toole and Sheehan in order to provide support for them. Officer Duncan then saw a man, later identified as Eurie Stamps, lying on the floor on his stomach in the hallway, two to three feet past the threshold of the hallway/kitchen. Mr. Stamps' hands were up and opened with his elbows on the floor. As Officer Duncan approached the threshold, Mr. Stamps' was lying on his stomach with his head up and his hands moving. As Officer Duncan moved to within two feet of Mr. Stamps, Stamps' hands were still moving. Officer Duncan, knowing that Mr. Stamps' had not been checked for weapons, decided to move to the side of Mr. Stamps, secure Stamps' hands behind his back, and check him for weapons.

³ The person was later identified as Devon Talbert, who was subsequently charged with a drug violation occurring in or near a school zone, possession with intent to distribute drugs, and conspiracy to violate the drug laws.

As Officer Duncan moved to the right of Mr. Stamps, just past Stamps' shoulders, Duncan ended up having to step left such that he "lost his balance" and began to fall over backwards. Duncan "very quickly" realized that "his right foot was off the floor" and that the tactical equipment that he was wearing was making his movements "very awkward." While falling, Duncan, who had both hands on his rifle, removed his left hand from his "long arm" (rifle), which was pointing down towards the ground, in an attempt to try and catch himself. As he did so, he "heard a shot" and then his body made impact with the wall. At that point, Officer Duncan, who was lying on ground with his back against the wall, realized that he was practically on top of Mr. Stamps and that Mr. Stamps was bleeding. Officer Duncan immediately started yelling "man down, man down."⁴ Numerous SWAT members began calling for medics and alerting team members that there was a person down that needed medical attention.

The Framingham SWAT team includes a Tactical Emergency Medical Support group of emergency medical technicians and firemen that travels with the team. In this case, the medical support team was stationed outside the apartment. Upon word that someone was injured, the medical support team entered the apartment and began rendering aid to Mr. Stamps. The team, led by Captain Hicks of the Framingham Fire Department, assessed Mr. Stamps and realized he was suffering from an apparent gunshot wound. Mr. Stamps was placed on a backboard and immediately transported by ambulance to Metrowest Medical Center where he was later pronounced dead.

Dr. Henry Nields from the Office of the Chief Medical Examiner performed the autopsy on Mr. Stamps. The cause and manner of death was determined to be homicide⁵ resulting from a single fatal gun shot wound to the upper body, with injuries to the heart, lung and major blood vessels. Dr. Nields found that the single projectile entered Mr. Stamps' body through the left cheek, exited through the upper neck and re-entered the lower neck and clavicle area. According to the doctor, the projectile fragmented as it passed through the clavicle, chest, heart, left lung, aorta and pulmonary artery. Dr. Nields also found there was stippling on the left side of the victim's face in the area of the initial entry wound. Based upon this, he concluded that the distance from the muzzle of the firearm to the deceased was not more than 36 inches.

Upon completion of this investigation and review of all available information and relevant evidence, the conclusion of this office is that the actions of Officer Duncan do not rise to the level of criminal conduct and the shooting death of Eurie Stamps was an accident. This office applied all the relevant facts and evidence to the law of murder, voluntary manslaughter, involuntary

⁴ Moments after the incident, Officer Duncan told Officer Chris Eliadi that he "was moving to get a better position" he "stumbled and fell and lost his balance" and as he was falling, his "gun fired and he "really didn't know what happened."

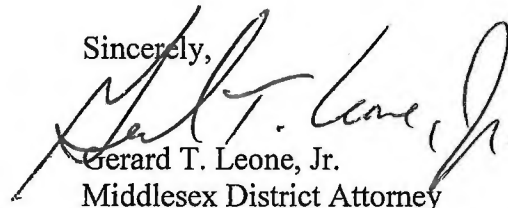
⁵ A homicide is the death of one person caused by the act of another. It can be unlawful, justified or excusable, e.g., accident.

manslaughter and reckless assault and battery by means of a dangerous weapon as well as the law of accident. After review of both the law and the facts, it is clear from the evidence that Officer Duncan did not possess the requisite intent or the necessary mental state required to support a charge of murder or voluntary manslaughter. Additionally, the facts do not support a charge that Officer Duncan intended to commit a battery upon Mr. Stamps, nor do they establish that Officer Duncan acted in a wanton or reckless manner. Therefore, the crimes of involuntary manslaughter by wanton or reckless conduct and reckless assault and battery by means of a dangerous weapon are also factually and legally unsupportable.

As with any investigation, in addition to analyzing the legal elements required to sustain a charge, we also considered all relevant defenses and the additional burdens of proof those defenses may place on the Commonwealth. The law of accident is a relevant defense in this case. Under the law of accident, if there is any evidence that the conduct at issue may have been the result of an accident, the Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. The legal term "accident" is defined as an unexpected happening that occurs without intention or design on the actor's part. It means a sudden, unexpected event that takes place without the actor's intending it. Here, there is no evidence that Officer Duncan intended to pull the trigger of his rifle, no evidence that he possessed any desire or motivation to shoot Mr. Stamps, and no evidence that he was reckless or that he used excessive force to attempt to lawfully control Mr. Stamps. It is the conclusion of this office, based on the law and the findings of fact that are based on the evidence in this matter, that the shooting death of Mr. Eurie Stamps was an accident as defined by the law applicable to criminal prosecutions. As such, a criminal prosecution would not be legally or factually supportable under the law.

Having made our determination under the law regarding accident, and the absence of criminal conduct on the part of Officer Duncan, we have, per the protocol of the Middlesex District Attorney's Office, returned and referred this matter back to your department so that you can perform whatever internal administrative review of the incident you deem appropriate.

Sincerely,



Gerard T. Leone, Jr.
Middlesex District Attorney



DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEPPERMAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Crime Laboratory Systems

50 Morris Bond Road

Randolph, Massachusetts 01906

Telephone (508) 368-3110 Facsimile (508) 368-3111

Laboratory Case Number: 11-00274
Defendant or Suspect: [REDACTED]
Agency: Framingham Police Department (FRA)
Case Officer: Lieutenant Kevin Shattary

Date: January 07, 2011
Agency Case Number: 1009574
Date of Incident: January 03, 2011
Date Submitted: January 06, 2011

I hereby certify that the following item(s):

Heat-sealed plastic bag containing the heat-sealed plastic bag containing

Item 1] 2.54 grams of white "rock" powder in the 8 plastic bags.

Has been examined by me with the following results:

The powder in Item 1 was found to contain Cocaine, a derivative of coca leaves, and a Class B Controlled Substance as defined under Chapter 94C, Section 31 of the General Laws. Note: The Cocaine was present in the free base form having the common name of "CRACK." Levamisole/Tetramisole was present as an adulterant.

Nancy W. Brooks
Chemist III



COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Nancy W. Brooks, whom I know to be a Chemist of the Massachusetts Department of State Police Crime Laboratory, appeared before me and affirmed the above to be the results made on Laboratory Number 11-00274.

Sworn and subscribed to before me this 10th day of January, 2011.



Notary Public

Chapter 22C, Section 39

A certificate by a chemist of the department of the result of an analysis made by him of a drug furnished him by a member of the state police, signed and sworn to by such chemist, shall be prima facie evidence of the composition, quality and when appropriate, net weight of any mixture containing such drug.

**Framingham Police Department
Booking Report**

COPY

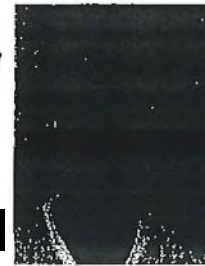
Incident #: 1100091

OBTN/Booking # TFRA00 0063606

PCF # 00002754181

Name: BUSHFAN, JOSEPH

DOB: [REDACTED]



Address: [REDACTED]

FRAMINGHAM MA 01701

File#: 102099

Sex: M Race: B HGT: 601 WGT: 190 Hair: BRO Eyes: BRO P.O.B.: BOSTON

Age: 20

SS#: [REDACTED] LN:

State:

Mother: NORMA

Father: CALVIN

Occupation: UNKNOWN

Employer: UNKNOWN

Phone #: [REDACTED]

Arrest Location: 26 FOUNTAIN ST

Booking Date & Time: 01/05/11 00:45

Arresting Officer: GUTWILL, MATTHEW J

Booking Officer: DIVITTORIO, FRANK

Physical Condition:

Assisting Officers:

Searched By: GUTWILL, MATTHEW J

Miranda Officer:

Miranda Time:

Miranda Location:

Offenses**Counts****Offenses****Counts**

DRUG-POS/INT/DIST CLASS

DRUG-SCH VIOL C94C S32A-F, I C94C S32J

DRUG-CONSPIRACY VIO C/S LAW C94C

NO ADDITIONAL

NO ADDITIONAL

NO ADDITIONAL

NO ADDITIONAL

NO ADDITIONAL

NO ADDITIONAL

Remarks:

I hereby acknowledge that the following property / money was taken from me and that I have been advised that I have the right to use the telephone within 1 hour of arrival:

Cash: \$0.00 Property: NO PROPERTY

BUSHFAN, JOSEPH

DIVITTORIO, FRANK

I hereby acknowledge that the money/property listed above was returned to me.

Property taken at booking which is not claimed after thirty (30) days from today may be disposed of at public auction. Please promptly reclaim your property.

BUSHFAN, JOSEPH

Officer Releasing Prisoner

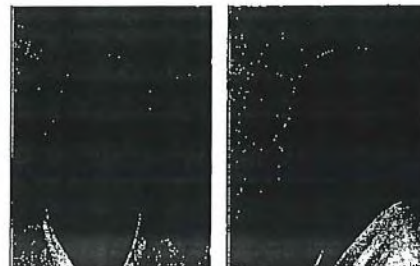
Release Date & Time:

Bail Commissioner:

Released to:

Cell:

WMS/Q1/BOP/Q5:

**Framingham Police Department
Telephone Rights Form****Incident #: 1100091****OBTN/Booking # TFRA00 0063606****PCF # 00002754181****Name: BUSHFAN, JOSEPH****DOB:** [REDACTED]**Address:** [REDACTED]**FRAMINGHAM MA 01701****File#: 102099****Sex: M Race: B HGT: 6'01 WGT: 190 Hair: BRO Eyes: BRO P.O.B.: BOSTON****Age: 20****SSN:** [REDACTED]**OLN:****State:****Mother: NORMA****Father: CALVIN****Occupation: UNKNOWN****Employer: UNKNOWN****Phone #:** [REDACTED]**Location: 26 FOUNTAIN ST****Date & Time:****01/05/11 00:45****Officer: GUTWILL, MATTHEW J****Booking Officer: DIVITTORIO, FRANK Physical Condition:****Assisting Officers:****Searched By: GUTWILL, MATTHEW J****Telephone Rights**

Section 33A. The police official in charge of the station or other place of detention having a telephone wherein a person is held in custody, shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter.

Bazilian/Portuguese

Direito A Um Telefone Leis Gerais Cap. 276, Sec. 33A: O oficial policial encarregado do distrito ou local de detenção onde haja um telefone, onde a pessoa está sob custódia, deve permitir o uso do telefone, às custas da pessoa detida, e permitir que a pessoa se comunique com sua família ou amigos, arranje sua soltura sob fiança ou contrate os serviços de um advogado. A pessoa deve ser informada, no momento de sua chegada ao distrito ou local de detenção, de seus direitos de uso do telefone, e esse uso deverá ser permitido no prazo de uma hora após sua chegada.

Spanish

Derecho A Usar El Teléfono Leyes generales, Capítulo 276, Sección 33A: El oficial de policía encargado de la estación u otro sitio de detención que dispone de un teléfono deberá permitir el uso del teléfono, a costo de la persona arrestada, para permitirle una comunicación con sus familiares o amigos, para arreglar su liberación bajo fianza, o para contratar los servicios de un abogado. Dicha persona debe ser informada de su derecho de usar el teléfono en el momento de su llegada en dicha estación u sitio de detención, y dicho uso deberá permitirse dentro de una hora a partir de su llegada.

Portuguese/European

Direito A Fazer Um Telefonema Cap. 276, Sec. 33A do Direito Geral: O agente da polícia responsável pela esquadra ou por outro lugar com telefone, no qual a pessoa se encontre detida, deve permitir o uso do telefone por conta do detido, para que o mesmo possa comunicar com a sua família ou amigos, ou providenciar a sua libertação sob caução, ou contratar os serviços de um advogado. A pessoa deve ser informada imediatamente após a sua chegada à esquadra, ou local de detenção, do seu direito de utilizar o telefone, e a sua utilização deve ser permitida na hora subsequente à sua chegada.


BUSHFAN, JOSEPH**Person in Custody**
1/5/11
DATE
147 AM
TIME
DIVITTORIO, FRANK**Booking Officer**

APPLICATION FOR CRIMINAL COMPLAINT		APPLICATION NO. (COURT USE ONLY)		PAGE 1 of 1		Trial Court of Massachusetts District Court Department	
I, the undersigned complainant, request that a criminal complaint issue against the accused charging the offense(s) listed below. If the accused HAS NOT BEEN ARRESTED and the charges involve: <input type="checkbox"/> ONLY MISDEMEANOR(S), I request a hearing <input type="checkbox"/> WITHOUT NOTICE because of an imminent threat of <input type="checkbox"/> BODILY INJURY <input type="checkbox"/> COMMISSION OF A CRIME <input type="checkbox"/> FLIGHT <input type="checkbox"/> WITH NOTICE to accused. <input type="checkbox"/> ONE OR MORE FELONIES, I request a hearing <input type="checkbox"/> WITHOUT NOTICE <input type="checkbox"/> WITH NOTICE to accused. <input type="checkbox"/> WARRANT is requested because prosecutor represents that accused may not appear unless arrested.						Framingham District Court 600 Concord Street P.O. Box 1969 Framingham, MA 01701-1969 ARREST STATUS OF ACCUSED <input checked="" type="checkbox"/> HAS <input type="checkbox"/> HAS NOT been arrested	
INFORMATION ABOUT ACCUSED							
NAME (FIRST MI LAST) AND ADDRESS <div style="border: 1px solid black; padding: 5px; width: fit-content;"> BUSHFAN, JOSEPH [REDACTED] [REDACTED] </div>				BIRTH DATE		SOCIAL SECURITY NUMBER	
				PCF NO.		MARITAL STATUS	
				00002754181			
				DRIVERS LICENSE NO.		STATE	
HAIR BRO		RACE B		COMPLEXION		SCARS/MARKS/TATTOOS	
		BIRTH STATE OR COUNTRY BOSTON		DAY PHONE			
EMPLOYER/SCHOOL UNKNOWN		MOTHER'S MAIDEN NAME (FIRST MI LAST) NORMA		FATHER'S NAME (FIRST MI LAST) CALVIN			
CASE INFORMATION							
COMPLAINANT NAME (FIRST MI LAST)				COMPLAINANT TYPE		PD	
ADDRESS Framingham Police Department 1 William Welch Way Framingham, MA 01702				<input checked="" type="checkbox"/> POLICE <input type="checkbox"/> CITIZEN <input type="checkbox"/> OTHER		FRA	
				PLACE OF OFFENSE Framingham			
				INCIDENT REPORT NO. 1100091		OBTN TFRA00 0063606	
				CITATION NO(S).			
OFFENSE CODE Ch. Sec.		DESCRIPTION		Cts.		OFFENSE DATE	
1		DRUG-POS/INT/DIST CLASS B C94C S32A				01/05/11	
VARIABLES (e.g. victim name, controlled substance, type and value of property, other variable information; see Complaint Language Manual)							
OFFENSE CODE Ch. Sec.		DESCRIPTION		Cts.		OFFENSE DATE	
2		DRUG-SCH VIOL C94C S32A-F, I C94C S32J				01/05/11	
VARIABLES							
OFFENSE CODE Ch. Sec.		DESCRIPTION		Cts.		OFFENSE DATE	
3		DRUG-CONSPIRACY VIO C/S LAW C94C S40				01/05/11	
VARIABLES							
REMARKS				COMPLAINANT'S SIGNATURE X		DATE FILED	
COURT USE ONLY		A HEARING UPON THIS COMPLAINT APPLICATION WILL BE HELD AT THE ABOVE COURT ADDRESS ON		DATE OF HEARING		TIME OF HEARING	
DATE		PROCESSING OF NON-ARREST APPLICATION (COURT USE ONLY)		AT		COURT USE ONLY	
		NOTICE SENT OF CLERK'S HEARING SCHEDULED ON:					
		NOTICE SENT OF JUDGE'S HEARING SCHEDULED ON:					
		HEARING CONTINUED TO:					
		APPLICATION DECIDED WITHOUT NOTICE TO ACCUSED BECAUSE:					
		<input type="checkbox"/> IMMINENT THREAT OF <input type="checkbox"/> BODILY INJURY <input type="checkbox"/> CRIME <input type="checkbox"/> FLIGHT BY ACCUSED <input type="checkbox"/> FELONY CHARGED AND POLICE DO NOT REQUEST NOTICE <input type="checkbox"/> FELONY CHARGED BY CIVILIAN; NO NOTICE AT CLERK'S DISCRETION					
DATE		COMPLAINT TO ISSUE		COMPLAINT DENIED		CLERK/JUDGE	
		<input type="checkbox"/> PROBABLE CAUSE FOUND FOR ABOVE OFFENSE(S) NO(S). <input type="checkbox"/> 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. BASED ON <input type="checkbox"/> FACTS SET FORTH IN ATTACHED STATEMENT(S) <input type="checkbox"/> TESTIMONY RECORDED: TAPE NO. _____ START NO. _____ END NO. _____ <input type="checkbox"/> WARRANT <input type="checkbox"/> SUMMONS TO ISSUE ARRAIGNMENT DATE: _____		<input type="checkbox"/> NO PROBABLE CAUSE FOUND <input type="checkbox"/> REQUEST OF COMPLAINANT <input type="checkbox"/> FAILURE TO PROSECUTE <input type="checkbox"/> AGREEMENT OF BOTH PARTIES <input type="checkbox"/> OTHER: COMMENT			

REQUIRED FORMS FOR ARRESTEE

BUSHFAN, JOSEPH

BOOKING # 0063606



Y SUICIDE FORM

N FORCE FORM

N CONSULAR FORM

N JUVENILE RELEASE FORM

Signature _____

DIVITTORIO, FRANK

ATTACH THIS SHEET TO THE BOOKING FORMS AND SUBMIT TO RECORDS

1100091**Arrest Report****Suspect:****Joseph Bushfan ([REDACTED])**
[REDACTED]**Framingham, MA 01702**
[REDACTED]**Suspect:****Devon Talbert (0 [REDACTED])**
[REDACTED]**Framingham, MA 01702**

Over the past several weeks member of the Framingham Police Narcotics Unit have been conducting an investigation into the illegal distribution of crack cocaine from 26 Fountain Street, Apartment 1 in Framingham, MA. See case 1009575. This investigation yielded two identified suspects, Joseph Bushfan ([REDACTED]) and Dwayne Barrett ([REDACTED]). During this investigation the Framingham Police Narcotics Unit, with the assistance of a reliable confidential informant, conducted several controlled purchases from 26 Fountain Street, Apartment 1. See warrant affidavit for details. The identity of the informant is known to me and is on record with the Framingham Police Narcotics Unit. On January 04, 2011, based on this investigation Detective Dinis Avila applied for and was granted a search warrant to search 26 Fountain Street, Apartment 1 (Docket #11-4-SW-02). Based on violent criminal records of the suspects involved in this particular case the decision was made to utilize the assistance of the Framingham Police SWAT team for the entry.

On January 05, 2011, at approximately 0020 hours, surveillance officers observed Joseph Bushfan and two females exit the front door of 26 Fountain Street and walked south toward Waverly Street. As this was occurring SWAT officers and Detectives were approaching the home and were forced to confront Bushfan. Bushfan, who was identified as one of the suspects who had previously provided our confidential informant with crack cocaine, was seized by Detectives Mathew Gutwill and Jeff DeRosa on the sidewalk in front of the Gulf Station located at the corner of Fountain and Waverly Streets. Lt. Kevin Slattery performed a pat frisk of Bushfan and while doing so felt several objects in the front left pocket of Bushfan's pants. At this time Bushfan was wearing a pair of thin red sweatpants. Upon feeling the objects Lt. Slattery immediately recognized them through his training and experience as corner baggies of crack cocaine. Lt. Slattery removed the items and observed them to be 8 individually packaged corner baggies of an off white rock like substance that appeared to be crack cocaine. These 8 corner baggies were all held in a larger knotted glassine sandwich bag. A sample of the substance was later selected at random by Detective DeRosa and did test positive for the presence of cocaine. A Nark 4 reagent test kit was used to conduct this test. Lt. Slattery also located a sum of money in Bushfan's front right pants pocket that was seized. In total \$299 was located in Bushfan's pocket and another \$98 was located in Bushfan's

wallet. I did later observe the crack cocaine and based on my training and experience recognized that the manner in which the crack cocaine was packaged in combination with the presence of the sum of money is consistent with crack cocaine distribution rather than simple possession. I also know that it is common for drug distributors to keep their spending money or "play" money separate from the earning derived from selling illegal narcotics so that they can more easily keep track of profits. In addition a black Metro PCS cell phone was located on the ground next to where Bushfan was taken into custody. This cell phone was registered with the phone number we dialed to purchase crack cocaine from Bushfan during a controlled purchase, 508-371-7497. The two females were also identified and were later interviewed by Detectives. See interview reports for details.

While Bushfan was being secured by the above mentioned officers, members of the SWAT team and perimeter team continued our approach on 26 Fountain Street, Apartment 1. Sgt. Vincent Stuart knocked and announced police presence and stated that we had a search warrant. After waiting for a reasonable period of time the SWAT team forced entry into the apartment. While in the apartment Devon Talbert was encountered in the rear bedroom. Talbert had been earlier observed by Detective DeRosa exiting 26 Fountain Street and engaging in what appeared to be a hand to hand transaction with an individual outside. Detective DeRosa then observed Talbert re-enter the house. This activity is consistent with drug distribution. I know through my training and experience that drug distributors frequently utilize the assistance of other individuals to aid them in the distribution of illegal narcotics. These individuals can assist drug distributors by delivering illegal narcotics in an attempt by the distributor to remain anonymous and avoid detection by police or may also work in a partnership with the drug distributor. Based on our investigation it is believed that Talbert engaged in a conspiracy with Bushfan to distribute crack cocaine from 26 Fountain Street, Apartment 1.

During the execution of the search warrant a firearm was discharged by a SWAT team member and a round struck a resident of 26 Fountain Street, Apartment 1. The resident received immediate medical attention by tactical medical personnel who were on scene. The resident was then transported to Metrowest Medical Center in Framingham, MA. Due to exigent circumstances which occurred while securing the residence a thorough search of the apartment did not occur; however, Detective DeRosa did observe a sock in plain view located in the top drawer of the front bedroom of the apartment. This sock contained individually wrapped corner baggies of an off white rock like substance that Detective DeRosa recognized through his training and experience as crack cocaine. The crack cocaine was not seized and was left in the drawer. Detective DeRosa did recognize the packaging of the crack cocaine to be consistent with distribution rather than simple possession.

Devon Talbert and Joseph Bushfan were ultimately placed under arrest for possession with intent to distribute a class B substance, to wit crack cocaine (94C-32A); drug school zone violation (94C-32J); and conspiracy to violate controlled substance laws (94C-40. Both men were transported to Framingham Police Headquarters where they were booked

and afforded all applicable rights. Both men were later interviewed by Detectives. See interview reports for details.

Due to the exigent circumstances, once the home was checked for other occupants a detailed search of the apartment was not conducted. At the time of the preparation of this report a Framingham Police Officer stood by the scene. A further investigation will be conducted by the Massachusetts State Police and Middlesex County District Attorney's Office.

As stated above the scene is 26 Fountain Street, Apartment 1. 26 Fountain Street is located within 1000 feet of the accredited SMOC daycare center located at 63 Fountain Street. Further reports to follow.

Respectfully submitted,

Felipe Martinez
Detective 299
Framingham Police Department

(NTR)

Date/Time Printed: 01-05-2011 12:02:45

Version 2.0 - 11/06

CRIMINAL COMPLAINT PROSECUTOR COPY		DOCKET NUMBER 1149CR000024	NO. OF COUNTS 3	Trial Court of Massachusetts District Court Department
DEFENDANT NAME & ADDRESS Devon Talbert [REDACTED] Framingham, MA 01702		COURT NAME & ADDRESS Framingham District Court 600 Concord Street Framingham, MA 01702 (508)875-7461		
DEFENDANT DOB [REDACTED]	COMPLAINT ISSUED 01/05/2011	DATE OF OFFENSE 01/05/2011	ARREST DATE 01/05/2011	
OFFENSE CITY / TOWN Framingham	OFFENSE ADDRESS Fountain Street		NEXT EVENT DATE & TIME 01/05/2011 9:00 AM	
POLICE DEPARTMENT Framingham PD	POLICE INCIDENT NUMBER 1100091		NEXT SCHEDULED EVENT Arraignment	
OBTN TFRA000063608			ROOM / SESSION Arraignment Session	
The undersigned complainant, on behalf of the Commonwealth, on oath complains that on the date(s) indicated below the defendant committed the offense(s) listed below and on any attached pages.				

COUNT	CODE	DESCRIPTION
1	94C/32J	DRUG VIOLATION NEAR SCHOOL/PARK c94C §32J

On 01/05/2011 did, as charged in the accompanying count(s), violate the provisions of G.L. c.94C, §§32, 32A, 32B, 32C, 32D, 32E, 32F or 32I while in or on, or within 1000 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, or elementary, vocational or secondary school, or within 100 feet of a public park or playground, in violation of G.L. c.94C, §32J.

(ADDITIONAL PENALTY FROM AND AFTER SENTENCE FOR VIOLATION OF §32, 32A, 32B, 32C, 32D, 32E, 32F or 32I: state prison not less than 2 1/2 years, not more than 15 years; or jail or house of correction not less than a mandatory minimum of 2 years, not more than 2 1/2 years; and optional fine not less than \$1000, not more than \$10,000. §32H: may not be filed or continued without a finding; no reduction or suspension of sentence until 2 years served. District Court has final jurisdiction under G.L. c.218, §26.)

2	94C/32A/G	DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a)
---	-----------	---

On 01/05/2011, not being authorized by law, did knowingly or intentionally possess with intent to manufacture, distribute or dispense a controlled substance in Class B of G.L. c.94C, §31, to wit: crack cocaine, in violation of G.L. c.94C, §32A(a).

PENALTY: state prison not more than 10 years; or jail or house of correction not more than 2½ years; or not less than \$1000, not more than \$10,000; or both; G.L. c.280, §6B: plus Drug Analysis Fee of not less than \$150, not more than \$500, with maximum fee of \$500 for multiple offenses from single incident. District Court has final jurisdiction under G.L. c.218, §26.

3	94C/40	CONSPIRACY TO VIOLATE DRUG LAW c94C §40
---	--------	---

On 01/05/2011 did conspire with Joseph Bushfan to violate a provision of G.L. c.94C, to wit: violation of controlled substance laws, in violation of G.L. c.94C, §40.

PENALTY: the sentence prescribed for the offense which was the object of the conspiracy.

req. \$1,000 cash bail

SIGNATURE OF COMPLAINANT X	SWORN TO BEFORE CLERK-MAGISTRATE/ASST. CLERK/DEP. ASST. CLERK X	DATE
NAME OF COMPLAINANT	A TRUE COPY ATTEST X	DATE

Notice to Defendant: 42 U.S.C. § 3796gg-4(e) requires this notice: If you are convicted of a misdemeanor crime of domestic violence you may be prohibited permanently from purchasing and/or possessing a firearm and/or ammunition pursuant to 18 U.S.C. § 922 (g) (9) and other applicable related Federal, State, or local laws.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

WOBURN DISTRICT COURT

DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DEVON TALBERT

MOTION FOR FUNDS FOR INVESTIGATOR

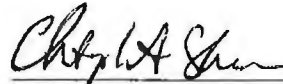
Now comes the Defendant in the above-entitled matter and moves this Honorable Court, pursuant to G.L. c. 261, § 27C, to authorize funds not to exceed \$1,000.00 dollars so that the Defendant can secure the services of an investigator. The Defendant states that the services of an investigator are necessary for trial preparation.

The Defendant states that the requested funds are "reasonably necessary to assure her as effective . . . a defense as she would have if she were financially able to pay." *Commonwealth v. Lockley*, 381 Mass. 156, 160, 408 N.E.2d 834, 838 (1980). See G.L. c. 261, § 27C.

RESPECTFULLY SUBMITTED

DEVON TALBERT

By his attorney,



Christopher A. Shannon

BBO # 631340

7 Harvard Street, Suite 220

Brookline, MA 02445

617-738-3246

Dated: January 25, 2011

allowed
by J. Guro
on 1/25/11

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

WOBURN DISTRICT COURT

DOCKET NO. 1149-CR-0024.

COMMONWEALTH

v.

DEVON TALBERT

AFFIDAVIT FOR FUNDS FOR INVESTIGATOR

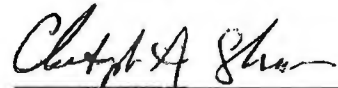
I, Christopher A. Shannon, do hereby depose and state:

1. Defendant, Devon Talbert, was found indigent by this Honorable Court on January 5, 2011. I was appointed as the attorney to represent the Defendant.
2. Devon Talbert does not have the financial ability or means to pay for the services of an investigator.
3. This case is complex. The Commonwealth is alleging distribution of drugs, and there appear to be different witnesses involved, which I need the assistance of a private investigator to interview.

Sworn to under the pains and penalties of perjury this 25th day of January, 2011.

RESPECTFULLY SUBMITTED

DEVON TALBERT
By his attorney,



Christopher A. Shannon
BBO # 631340
7 Harvard Street, Suite 220
Brookline, MA 02445

617-738-3246

Dated: January 25, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION

IN THE MATTER OF A SEARCH WARRANT
ISSUED ON JANUARY 4, 2011
ON THE APPLICATION AND AFFIDAVIT OF
FRAMINGHAM POLICE DETECTIVE DINIS AVILA

COMMONWEALTH'S MOTION TO LIFT THE IMPOUNDMENT ORDER
OF CERTAIN DOCUMENTS
RELATED TO THE ISSUANCE OF A SEARCH WARRANT

Now comes the Commonwealth and respectfully requests that this Court end further impoundment of the documents that relate to the above-entitled search warrant. As grounds therefor, the Commonwealth asserts that the need for impoundment, as stated in the Commonwealth's motion to impound, is no longer required. See Republican Co. v. Appeals Court, 442 Mass. 218, 226 (2004) ("the good cause that once supported impoundment has in some manner become less pressing"). However, the Commonwealth requests that the Court approve the redactions made to the attached search warrant materials in furtherance of privacy considerations. See Id. (impoundment found to be no longer necessary, especially in light of "the privacy protection available to individual witnesses through redaction of identifying names and addresses"). See also Globe Newspaper Co. v. Police Com'r of Boston, 419 Mass. 852, 860-861 (1995) ("With respect to undisclosed materials relating to the citizen witnesses, the judge applied the balancing test, and ordered limited disclosure with redaction of previously undisclosed names and addresses of citizen witnesses, references to incarceration, release dates, data concerning probation, references to grand jury testimony, and other information of a personal nature.").

Respectfully submitted
For the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

David Clayton
Assistant District Attorney
Framingham District Court

Dated: February 9, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION

IN THE MATTER OF A SEARCH WARRANT
ISSUED ON JANUARY 4, 2011
ON THE APPLICATION AND AFFIDAVIT OF
FRAMINGHAM POLICE DETECTIVE DINIS AVILA

ORDER TO LIFT IMPOUNDMENT

It is hereby ordered that further impoundment of the application, affidavit, any addenda, search warrant, and search warrant return for the above-entitled search warrant, as well as the motion in support of the previous impoundment Order related to those documents, shall be ended subject to approved redaction.

By the Court,

Justice

Dated: February 9, 2011

APPLICATION FOR SEARCH WARRANT

G.L. c. 276, §§ 1-7

TRIAL COURT OF MASSACHUSETTS



NAME OF APPLICANT

EDWARD FORSTER

DISTRICT

COURT DEPARTMENT

FRAMINGHAM

DIVISION

POSITION OF APPLICANT

LIEUTENANT - MASS. STATE POLICE

SEARCH WARRANT DOCKET NUMBER

I, the undersigned **APPLICANT**, being duly sworn, depose and say that:1. I have the following information based upon the attached affidavit(s), consisting of a total of 7 pages, which is (are) incorporated herein by reference.2. Based upon this information, there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☐ has been concealed to prevent a crime from being discovered.
☐ is unlawfully possessed or concealed for an unlawful purpose.
☒ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

3. I am seeking the issuance of a warrant to search for the following property (describe the property to be searched for as particularly as possible):

SEE ADDENDUM A

4. Based upon this information, there is also probable cause to believe that the property may be found (check as many as apply):
☒ at (identify the exact location or description of the place(s) to be searched):

SEE ADDENDUM B

which is occupied by and/or in the possession of: _____

☐ on the person or in the possession of (identify any specific person(s) to be searched): _____☐ on any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

THEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

- I ☐ have previously submitted the same application.
I ☒ have not previously submitted the same application.

PRINTED NAME OF APPLICANT

EDWARD FORSTER

SIGNED UNDER THE PENALTIES OF PERJURY

X

Signature of Applicant

SWORN AND SUBSCRIBED TO BEFORE

X

Signature of Justice, Clerk-Magistrate or Assistant Clerk

DATE

AFFIDAVIT OF LIEUTENANT EDWARD FORSTER

I, Edward Forster, hereby depose and state that the following is true to the best of my knowledge and belief:

1. I am a Lieutenant with the Massachusetts State Police. I am currently a detective assigned to the Middlesex District Attorney's Office. I have been a police officer for over twenty-eight years and assigned to my current post for the past twenty-two years. I have a bachelor's degree in criminal justice from Northeastern University and a Master's degree in criminal justice from U-Mass Lowell. I have received specialized training at the Massachusetts State Police Academy, and other seminars sponsored by the Middlesex District Attorney's Office. Over the course of my career, I have participated in the investigation of over one hundred serious crimes, including over one hundred homicides. I have participated in the execution of over fifty search warrants, and have been an affiant approximately thirty times.
2. All of the information contained in this affidavit is based on my personal knowledge and from information contained in reports and information that other police officers and witnesses have provided to me. Based on the information contained in the following paragraphs, I believe that I have probable cause to believe that a homicide has occurred in Framingham, Massachusetts, and that evidence related to that homicide will be found in or upon the premises located at 26 Fountain Street, Apartment #1 in Framingham, Massachusetts. 26 Fountain Street is a white, two-family structure with gray shutters, a red front door, a white storm door, and a small roof over the front entrance. There are two mailboxes - one on each side of the front door. Apartment #1 comprises the entire first floor of

the house. The driveway is on the left side of the house. It is the second house on the left-hand side of Fountain Street as one turns onto Fountain Street from Waverly Street. As of the time of this affidavit, this address has been secured from the outside by members of the Massachusetts State Police and Framingham police.

3. On January 4, 2011, Detective Dinis Avila of the Framingham Police Department applied for and obtained a warrant to search the premises located at 26 Fountain Street, Apartment #1 in Framingham. Detective Avila and other members of the Framingham Police Department Narcotics Unit had been conducting an investigation into the drug distribution activity of [REDACTED] and Joseph Bushfan at 26 Fountain Street, Apartment #1 in Framingham. (See Copies of Search Warrant #11-49-SW-02 and Affidavit of Detective Dinis Avila, attached and incorporated herein by reference).
4. During his investigation, Detective Avila learned that [REDACTED] and Bushfan had violent histories. Therefore, the Framingham police SWAT team accompanied the narcotics officers during the execution of the search warrant.
5. After the SWAT team gained entry to the apartment to execute the search warrant, a bullet was discharged. The bullet struck Eurie A. Stamps (DOB: [REDACTED]), of 26 Fountain Street in Framingham. Mr. Stamps, who was inside the apartment when the SWAT team entered, was taken via ambulance to Metrowest Medical Center in Framingham where he later passed away. Police officers remained at the premises and have kept the premises secured while they await the issuance of this homicide crime scene search warrant. Once I obtain this search warrant, other

officers from the State Police and a Framingham police officer will accompany me to 26 Fountain Street, Apartment #1, where we will execute this search warrant and finish the execution of the search warrant pertaining to the drug distribution.

6. I have personal knowledge, based on my training and experience, that crimes of violence often involve a struggle and/or the element of unpredictability. I have also learned that the person or persons participating in the commission of a violent crime are often in contact with the physical surroundings in a forceful or otherwise detectable manner. When they do so, those persons naturally transfer forensic evidence to and from other surfaces with which they have contact. In addition, crimes of violence often involve an attempt to alter, destroy, remove, clean up, or cover up evidence of a crime, but traces are often left in the form of blood, skin, physiological fluids and secretions, hair, fibers, fingerprints, palmprints, footprints, shoeprints, and items containing traces of any of the above-mentioned articles. Through forensic analysis, these fibers, materials, and other trace elements can be used as an aid to determine the identity of the perpetrator and the circumstances of the crime itself. Many of the above items are minute and/or microscopic, thus requiring additional specialized examination by forensic laboratory techniques.
7. I also have personal knowledge, based on my training and experience, that physical evidence will aid in establishing the identity of perpetrator(s), the circumstances under which the crime was committed, and/or which in general will assist in the discovery of the pertinent facts; and that such evidence requires a systematic search to locate, seize, record, photograph, and process.

8. Therefore, based on the information contained in this affidavit, and on my training and experience, I believe there is probable cause to believe that evidence of a homicide, to wit: bullets and empty shell casings; gunshot residue; blood, skin, physiological fluids and secretions, hair, fibers, fingerprints, palmprints, footprints, shoeprints, and items containing traces of any of the above-mentioned articles will be found at the premises located at 26 Fountain Street, Apartment #1 in Framingham, Massachusetts. I therefore seek permission to seize such evidence and to search it forensically for such evidence as described above. I also seek permission to search for documents showing possession, custody, and control of the target premises, and to take photographs and/or videotape of the target premises.
9. Because much of the evidence sought by this Search Warrant is forensic, minute, and/or microscopic, additional specialized examination by forensic laboratory techniques is required. Hence, the assistance of individuals with the proper equipment, technology, and expertise in searching for such material will be extremely valuable in accomplishing this task. Therefore, I believe that the assistance of members of the Massachusetts State Police Crime Laboratory and the Massachusetts State Police Crime Scene Services Section, located at 59 Horse Pond Road in Sudbury, Massachusetts, with expertise in executing such searches, will materially aid me in properly and adequately obtaining and analyzing such evidence. I therefore request authorization for members of the Massachusetts State Police Crime Laboratory and Crime Scene Services Section to participate in the search of the target premises identified and described above.

Signed under the pains and penalties of perjury this 5th day of January, 2011.

Lieutenant Edward Forster
Massachusetts State Police

Then personally appeared before me the above-named Edward Forster on this 5th day of January, 2011, and made oath that the foregoing subscribed by him is true.

Justice/Clerk/Assistant Clerk Magistrate

ADDENDUM A

Evidence related to a homicide crime scene, to wit: bullets and empty shell casings; gunshot residue; blood, skin, physiological fluids and secretions, hair, fibers, fingerprints, palmprints, footprints, shoeprints, and items containing traces of any of the above-mentioned articles. I also seek permission to search for documents showing possession, custody, and control of the target premises, and to take photographs and/or videotape of the target premises.

ADDENDUM B

26 Fountain Street, Apartment #1 in Framingham, Massachusetts. The residence at 26 Fountain Street is a white, two-family structure with gray shutters, a red front door, a white storm door, and a small roof over the front entrance. There are two mailboxes - one on each side of the front door. Apartment #1 comprises the entire first floor of the house. The driveway is on the left side of the house. It is the second house on the left-hand side of Fountain Street as one turns onto Fountain Street from Waverly Street.

SEARCH WARRANT

G.L. c. 276, §§ 1-7

TRIAL COURT OF MASSACHUSETTS



Discreet Trial

COURT DEPARTMENT

Framingham

DIVISION

SEARCH WARRANT DOCKET NUMBER

11-49-SW-02

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
- ☒ is intended for use or has been used as the means of committing a crime.
- ☒ has been concealed to prevent a crime from being discovered.
- ☒ is unlawfully possessed or concealed for an unlawful purpose.
- ☒ is evidence of a crime or is evidence of criminal activity.
- ☐ other (specify) _____

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

See Addendum A

☒ at:

See Addendum B

which is occupied by and/or in the possession of:

Joseph Bushlen

☐ on the person or in the possession of:

You ☒ are ☐ are not also authorized to conduct the search at any time during the night.

You ☐ are ☒ are not also authorized to enter the premises without announcement.

You ☐ are ☒ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the

FRAMINGHAM

Division of the

FRAMINGHAM

Court Department.

DATE ISSUED

1-4-2011

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

X

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

FIRST OR ADMINISTRATIVE JUSTICE

WITNESS: ROBERT V. GRECO

GEORGE R. MARINDSKY

ADDENDUM A

Cocaine, controlled substances as defined by Chapter 94C; all books, papers, records, documents, monies, implements and paraphernalia related to the illegal possession and distribution of controlled substances, including but not limited to, books, papers, records and other papers reflecting (A) the purchase and acquisition of Cocaine, (B) the identities of the sources of Cocaine, (C) the storage of Cocaine, (D) the distribution of Cocaine, (E) the identities of persons to whom Cocaine was distributed, (F) the sources of money or other property used to purchase or acquire Cocaine, and/or the manner in which financial proceeds of the distribution of Cocaine are stored, invested or spent; (G) amounts of money paid, collected or owed on account of the purchase or sale of Cocaine, (H) bank records, (I) investment account records, (J) safe deposit box rental agreements or keys, (K) property deeds, (L) bills of sale, (M) tax returns, (N) vehicle titles, (O) United States currency or coins; (P) Scales, packaging materials and paraphernalia; and/or (Q) Papers and possessions identifying the person(s) having custody and control over the premises to be searched and its contents.

GRM
Da
17

ADDENDUM B

26 Fountain Street Apartment 1:

The residence at 26 Fountain Street is a white two family structure and is the second house on the left hand side of Fountain Street as you turn onto Fountain Street from Waverly Street. The structure has a red front door and a white storm door with an overhang. There are two mailboxes one on each side of the front door. Apartment 1 occupies the entire first floor of the structure. The driveway is to the left of the structure. The numerical street number is not visible from the street. A Google Earth Query does depict 26 Fountain Street as being the same structure we identified in our investigation.

SRM
Da

AFFIDAVIT OF DETECTIVE DINIS AVILA

1. I, Dinis Avila, a police officer for the Framingham Police Department, being duly sworn depose and state that the following is true to the best of my knowledge and belief:

2. I have been a police officer for approximately 10 years. I am currently assigned to the Detective Bureau as an officer in the Framingham Police Narcotics Unit. Prior to being a narcotics detective, I was assigned as a detective responsible for investigating various violations of Massachusetts General Laws including but not limited to sexual assaults, robberies, homicides, and other violations of law. Prior to becoming a detective, I served as an officer in the street crimes unit for approximately 2 years and prior to that I was assigned to the patrol division. I am a graduate of the Boylston Municipal Police Academy. I have received training from the Municipal Police Training Committee in basic narcotics detection and investigation. In addition to this training and education and the annual in-service training which I attend, I have completed specialized training in criminal investigation, including an eighty hour course in narcotics investigation sponsored by the Drug Enforcement Administration. During this course I received training in various aspects of narcotics investigations, including but not limited to undercover operations, buy bust operations, surveillance, warrant service, and the handling of informants. In addition, I am a graduate of the Immigration and Customs Enforcement Academy delegation of authority training-287(g). During this course I received training on various aspects of narcotics investigations, including but not limited to trafficking in controlled substances, identifying the elements of Federal Criminal Law, becoming familiar with the Operational Enforcement Division of the Office of Investigation as it pertains to the smuggling of narcotics, identifying the requirements/procedures for obtaining a criminal search warrant, and identifying the procedures for the execution of a search warrant. I completed a twenty four hour course in gang investigation sponsored by Wicklander-Zulawski & Associates, a forty hour course in training specific to hostage rescue techniques sponsored by Law Enforcement

Advanced Development, and a twenty four hour course in conducting homicide investigations sponsored by SRR Training.

3. Throughout my career I have participated in the arrest of over two hundred narcotics offenders. I have also participated in multiple drug investigations which utilized such investigative techniques as undercover purchases by police officers, confidential informants used in controlled buys, the executions of search warrants, and street level patrol investigations. I have worked directly with the Drug Enforcement Administration (DEA) and the Massachusetts State Police conducting numerous drug investigations. I have also worked in an undercover capacity in which controlled purchases of illegal drugs and firearms were made. During my training and experience I have observed numerous types of controlled substances and I am familiar with the paraphernalia associated with the distribution and use of these substances and the ways in which they are packaged. I am also familiar with the prices charged for the controlled substances and with the jargon associated with these substances. On the basis of my training and experience I am familiar with the vernacular of illegal narcotics abusers and distributors. I am acquainted with the methods by which such persons seek to disguise the subject of their conversation and operations, and am familiar with the methods, practices and techniques by which members of organized conspiracies illicit transport and distribute controlled substances.

4. Based on the following, I believe that I have probable cause to establish that the crimes of distribution of crack cocaine, Class B, in violation of M.G.L. 94C-32A, and possession with intent to distribute cocaine, Class B, in violation of M.G.L. 94C-32A have occurred and that evidence of these crimes will be found in and upon the residence or person of [REDACTED] ([REDACTED]), Joseph Bushfan ([REDACTED]), 26 Fountain Street Apt 1, Framingham, MA. My conclusion is based on information obtained by me and other members of the Framingham Police Department, from confidential sources of information, and through our own investigation. This affidavit does not detail all of the facts known to me or other law enforcement officials regarding this matter, but instead relates only those facts which I believe are necessary to establish the requisite probable

cause in support of an application for a search warrant. The content of this information is contained in the following paragraphs.

5. In the past four weeks of this affidavit, a confidential source of information, which I will refer to as CS, contacted members of the narcotics unit. CS's identity is known to me and is on file with the Framingham Police Narcotics Unit. The content of CS's statement and its later corroboration are presented below. CS wishes to remain anonymous. The reason CS wishes to remain confidential is that it fears for its safety should its true identity be revealed in anyway. CS is a trustworthy individual due to the fact that it has provided information to the Framingham Police in the past that has led to the recovery of narcotics and a conviction in Framingham District Court. Within the past year the Framingham Police Narcotics Unit has also conducted controlled purchases with the assistance of CS that has led to the recovery of illegal marijuana and cocaine. Also within the past year, the Framingham Police Narcotics Unit was granted a search warrant based on CS's information in which we recovered an amount of cocaine and made an arrest. This particular case remains open in Framingham District Court. CS is also trustworthy because CS told me that in the past it has been a confidential informant for a local police agency in Massachusetts. The handling officer with that police department was contacted and verified that CS had provided information in the past that has led to arrests, seizures of narcotics, including a conviction in Superior Court. Under the handling officer's control, CS has made multiple controlled purchases of cocaine, powder cocaine, marijuana, and prescription medication. CS is also a trust worthy source because it has admitted to me that it is involved in criminal activity. Since I know where it lives, I am able to get in contact with it, and I have warned it about the possibility of it being prosecuted for its criminal conduct, I believe the CS had and still has a reasonable fear of prosecution.

6. CS told members of the narcotics unit that it had personal knowledge of drug activity in which crack cocaine is being illegally distributed. CS knows about crack cocaine distribution because CS has used crack cocaine in the past, knows what it looks like, how

it is packaged, the jargon associated with its use, and the prices typically charged for it. In particular CS told me the following. CS stated that it knows of a black male it knows as [REDACTED], who distributes crack cocaine from a house located on Fountain Street in Framingham MA. [REDACTED] is known to me to be a narcotics distributor. CS describes the house that [REDACTED] distributes crack cocaine from as being the second house on the left hand side of Fountain Street from Waverley Street. CS described the house as a white two story house and stated that [REDACTED] accesses this house through the front door. CS stated that [REDACTED] distributes crack cocaine from the first floor apartment which CS believes is occupied by two other black males whose true identities are unknown to CS. CS did describe one of the black males as being approximately twenty years of age and having a tattoo on his face. CS provided a phone number of 508 309 [REDACTED] for [REDACTED] CS stated that when it meets [REDACTED] it drives to the above described house and contacts [REDACTED] at the phone number provided above. [REDACTED] then meets CS on the street in front of the home. [REDACTED] then provides CS with a predetermined amount of crack cocaine in exchange for a predetermined amount of money. CS stated that [REDACTED] is frequently in the company of the young black male with the tattoo on his face as described above.

7. In the past four weeks of this affidavit, a second confidential and reliable informant, who I will refer as CI, contacted members of the narcotics unit. CI's identity is known to me and is on file with the Framingham Police Narcotics Unit. The content of CI's statement and its later corroboration are presented below. CI wishes to remain anonymous. The reason CI wishes to remain confidential is that it fears for its safety should its true identity be revealed in anyway. CI is a trustworthy source because it has provided the Framingham Police Narcotics unit with information in the recent past that has led to arrests, including one conviction in Framingham District Court, and seizures of narcotics, including cocaine, crack cocaine, and heroin. The additional cases are still pending. In addition, CI has provided information in regards to narcotics activity that was confirmed to be true by the Framingham Narcotics Unit. Within the past year the Framingham Police Narcotics Unit has conducted controlled purchases with the assistance of CI that has led to the recovery of illegal cocaine, crack cocaine, and heroin. Also within the past year, the Framingham Police Narcotics Unit was granted two search

warrants based on CI's information in which trafficking amounts of crack cocaine were recovered at each location and several arrests were made for trafficking a class B substance, to wit cocaine in violation of 94C-32. These particular cases remain open in Middlesex Superior Court and Framingham District Court. Furthermore, CI has provided detectives with information within the past seven months that led directly to the arrest of a person wanted on an outstanding warrant. The wanted person had taken steps to avoid capture and CI told detectives where the wanted person could be located. Based upon this information, fellow officers arrested this wanted person. CI is also a trust worthy source because it has admitted to me that it is involved in criminal activity. Since I know where it lives, I am able to get in contact with it, and I have warned it about the possibility of it being prosecuted for its criminal conduct, I believe the CI had and still has a reasonable fear of prosecution.

8. CI told detectives that it had personal knowledge of drug activity in which crack cocaine is being illegally distributed. CI knows about crack cocaine distribution because CI has used crack cocaine in the past, knows what it looks like, how it is packaged, the jargon associated with its use, and the prices typically charged for it. In particular CI told me the following. CI stated that it knows of a Black male it refers to as "[REDACTED]" or "[REDACTED]", and was later identified as [REDACTED], who distributes crack cocaine in forty dollar knotted corner baggies from 26 Fountain Street in Framingham MA. CI provided a phone number of 508 309 [REDACTED] for [REDACTED]. CI stated it meets [REDACTED] in the area of the intersection of Waverley Street and Fountain Street. Upon meeting, [REDACTED] provides CI with a predetermined amount of crack cocaine in exchange for a predetermined amount of money. CI described [REDACTED] as a short dark skinned black male approximately twenty years of age.

9. Based upon CI's and CS's information listed above, narcotics detectives performed the following independent police investigation. I performed a Framingham Police in house computer query on [REDACTED]. This query showed that we do have [REDACTED] in our in-house computer system which lists him as being a gang member associated with Folk Nation. Also through this in-house query I was able to

obtain a past booking photograph which Detective Martinez later showed to CI. CI immediately identified [REDACTED] as the male he knows both as "[REDACTED]" and "[REDACTED]". I also ran the phone number CI provided for [REDACTED] through a law enforcement subscription database that showed the number was registered to T-Mobile out of Framingham, MA; however, no personal information was attached to the account. I know through my training and experience that drug distributors frequently utilize the assistance of cellular telephone to aid them in the distribution of illegal narcotics. I also know that it is common for drug distributors to use pre-paid cellular telephones that do not require any biographical information upon purchase. This is specifically done because these phones are more difficult to trace back to the distributor and they are easily replaced, which allows the distributor to frequently change phone numbers with ease. I know through my training and experience the above is done in an attempt to remain anonymous and to avoid detection by police. I also know that drug distributors will also frequently use phones that are subscribed under other people's name for the same reason provided above.

10. CI was asked if it would be able to purchase illegal drugs from [REDACTED]. CI stated that it would be able to contact [REDACTED] at phone number 508-309-[REDACTED] and arrange to purchase an amount of crack cocaine. Within the past two weeks of this affidavit, Framingham Police Narcotics Detectives with the cooperation of CI conducted a controlled narcotics buy from target "[REDACTED]". CI was instructed to contact [REDACTED] using CI's cell phone. While in Detective Martinez's presence, CI called the number it had for [REDACTED] (508) 309 2849. Detective Martinez heard a male voice on the line that CI recognized as [REDACTED]. CI then arranged with [REDACTED] to purchase an amount of crack cocaine and was instructed by [REDACTED] to meet him near the Gulf station located on the corner of Waverly Street and Fountain Street. Prior to this control buy, CI's person was searched and its property was noted. Detective Martinez performed this search and determined that CI did not have any money or illegal drugs in its possession. The vehicle CI was going to be riding in was also searched. No contraband was found. Detective Martinez then drove CI to the area of the buy location where other officers had previously established surveillance. I followed Detective Martinez and the CI to the

location and kept them under constant surveillance. While driving to the buy location Detective DeRosa informed us that he observed [REDACTED] and an unknown black male enter the residence of 26 Fountain Street as CI described. Detective Martinez provided CI with an amount of pre-recorded buy funds and instructed CI to purchase an amount of crack from [REDACTED]. CI exited Detective Martinez's undercover vehicle. Still under surveillance CI was observed walking north on Fountain St. Detectives then observed an unknown black male exit the front door of 26 Fountain Street and meet with CI. Detectives observed a hand to hand transaction and a short conversation. CI remained under constant surveillance throughout this entire investigation and did not stop or meet with anyone prior to and leaving the controlled buy with the exception of Narcotics Detectives. Upon completing the deal CI and target went their separate ways. Detective DeRosa then observed both black males enter the front door of 26 Fountain Street.

11. Detective Martinez then immediately met with CI who handed him 1 knotted corner baggie that contained a white rock like substance that he recognized through his training and experience as crack cocaine. I later observed the crack cocaine and recognized through my training and experience that the amount of crack CI provided to detectives was consistent in size and street value with the amount of money that CI paid for it. CI was then search again. No contraband was found. CI then informed Detective Martinez that [REDACTED] was not the individual that sold him the crack cocaine. CI stated that another black male who was, approximately 5'10, and approximately twenty years of age, sold him the crack cocaine. CI provided Detective Martinez with a physical description as well as a description of the clothing the unidentified male was wearing. This description did in fact match with Detective DeRosa's observations of the unidentified black male that he earlier observed entering the front door of 26 Fountain Street with [REDACTED]. This black male gave the CI a phone number (508) 371-7497 and stated it could call him in the future. CI continued and stated that the black male provided CI with the crack cocaine in exchange for the pre-recorded buy funds. The amount of crack was later field tested and did show a positive reaction for the presence of cocaine. Detective Martinez performed

this test using a Nark #4 cobalt thiocyanate reagent tube. Detective Martinez later entered the baggie into evidence at Framingham Police Headquarters.

12. Detectives later ran the phone number given to CI from the unidentified black male (508) [REDACTED] through law enforcement subscription database. The phone number came back to Joseph Bushfan out of Framingham to Metro PCS Wireless. Detectives then ran Bushfan in the in house computer and found a match for Joseph Bushfan [REDACTED] who lives at 26 Fountain Street Apt A. A Board of Probation query was conducted on Bushfan which shows a history of violent offences as well as a recent larceny case out of Natick with an arraignment date of August 24th 2010. Detective Martinez contacted Detective Kevin Delahantey of the Natick Police Department who informed Detective Martinez Bushfan had been arrested in Natick on December 06, 2010 on default warrants. Detective Delahantey provided Detective Martinez with the Natick Police arrest and booking report of Bushfan for the above mentioned offense. The documents provided indicated that Bushfan told Natick police at booking that he lives as 26 Fountain Street Apartment 1. Bushfan also provided Natick police with the phone number of (508) [REDACTED] which is the same number CI provided to detectives for the unidentified black male. Also Natick Police provided a color booking photograph of Bushfan that was later shown to CI. CI was not able to identify the male subject in the photograph at this time.

13. Within the past week of this affidavit, Framingham Police Narcotics Detectives with the cooperation of CI conducted a controlled narcotics buy from target [REDACTED]. CI was instructed to contact [REDACTED] using CI's cell phone. While in detective's presence, CI called (508) 309-[REDACTED], the number it had for [REDACTED]. Detectives heard a male voice on the line that CI recognized as [REDACTED]. CI then arrange with [REDACTED] to purchase an amount of crack cocaine. Prior to this control buy, CI's person was searched and its property was noted. Martinez performed this search and determined that CI did not have any money or illegal drugs in its possession. The vehicle CI was going to be riding in was also searched. No contraband was found. Detective Martinez provided CI with an amount of pre-recorded buy funds and instructed CI to purchase an amount of crack from

██████. Detective Martinez and I then followed the CI to the buy location where other officers had previously established surveillance. CI was kept under constant surveillance and did not stop and meet with anyone prior to reaching the buy location. At the buy location Detective Martinez observed two black males exit the front door of 26 Fountain Street. Detective Martinez observed one of the black males to be ██████. The second black male's identity was unknown to us at the time. Detective Martinez observed the two black males approach the passenger side window of CI's vehicle and have a brief encounter in which a hand to hand transaction was observed between CI and ██████. CI remained under constant surveillance throughout this entire investigation and did not stop or meet with anyone prior to and upon leaving the controlled buy with the exception of Narcotics Detectives. Upon completing the deal CI and target went their separate ways. Detective Martinez then observed both black males enter the front door of 26 Fountain Street.

14. Detective Martinez and I then immediately followed CI to a pre arranged meeting spot where CI handed me an amount of a white rock like substance that I recognized through my training and experience to be crack cocaine. I also recognized that the amount of crack cocaine CI provided to me is consistent in size and street value with the amount of money that CI paid for it. CI and CI's vehicle were then searched again. No contraband was found. CI then informed Martinez and I that ██████ was the individual who had provide CI with the knotted corner baggie of crack in exchange for the pre-recorded buy funds. CI stated that the unknown black male that was present with ██████ was the same male who had previously provided it with crack cocaine during the previous controlled purchase. The crack was later field tested and did show a positive reaction for the presence of cocaine. I performed this test using a Nark #4 cobalt thiocyanate reagent tube. I later entered the baggie into evidence at Framingham Police Headquarters.

15. Within the past 48 hours of this affidavit, Framingham Police Narcotics Detectives with the cooperation of CI conducted a controlled narcotics buy from target Joseph Bushfan. CI was instructed to dial the phone number given to it previously by the

unidentified black male using CI's cell phone. While in detective's presence, CI called (508) [REDACTED], the number it had been provided by the unidentified black male.

Detectives heard a male voice on the line. CI then arrange with the male to purchase an amount of crack cocaine. Prior to this control buy, CI's person was searched and its property was noted. Martinez performed this search and determined that CI did not have any money or illegal drugs in its possession. The vehicle CI was going to be riding in was also search. No contraband was found. Detective Martinez provided CI with an amount of pre-recorded buy funds and instructed CI to purchase an amount of crack cocaine. Detective Martinez and I then followed the CI to the buy location where other officers had previously established surveillance. CI was kept under constant surveillance and did not stop and meet with anyone prior to reaching the buy location. At the buy location Detective DeRosa observed two black males exit the front door of 26 Fountain Street. One of the males stayed on the front porch while the other one approached the driver side window of CI's vehicle and had a brief encounter in which a hand to hand transaction was observed between CI and the unidentified black male. CI remained under constant surveillance throughout this entire investigation and did not stop or meet with anyone prior to and upon leaving the controlled buy with the exception of Narcotics Detectives. Upon completing the deal CI and target went their separate ways. Detective DeRosa then observed both black males enter the front door of 26 Fountain Street.

16. Detective Martinez and I then immediately followed CI to a pre arranged meeting spot where CI handed Detective Martinez an amount of a white rock like substance that Detective Martinez recognized through his training and experience to be crack cocaine. I also recognized that the amount of crack cocaine CI provided to Detective Martinez as being consistent in size and street value with the amount of money that CI paid for it. CI and CI's vehicle were then searched again. No contraband was found. CI then informed Martinez and I that the male who provided it with the crack cocaine in exchange for the prerecorded buy funds was the same male depicted in the photograph that was previously displayed to it. This photograph that was displayed to CI was an image of Joseph Bushfan. CI indicated that it observed a tattoo on the left side of Bushfan's face which is consistent with the image CI was shown. The amount of crack was later field tested and

did show a positive reaction for the presence of cocaine. Detective Martinez performed this test using a Nark #4 cobalt thiocyanate reagent tube. Detective Martinez later entered the baggie into evidence at Framingham Police Headquarters.

17. Within the past 48 hours I spoke to Framingham Police Street Crimes Officer Timothy O'Toole. Officer O'Toole had explained to me that in December 2010 he had been to the residence of 26 Fountain Street to attempt to locate Joseph Bushfan. At the time Bushfan had outstanding warrants. Officer O'Toole was unable to locate Bushfan but was told by persons inside the apartment that he did indeed live there. Officer O'Toole explained that he entered the front door of the home where there is a common area; he stated that the entire first floor was one apartment.

18. Based on the above, I believe there is probable cause to establish that [REDACTED] and Joseph Bushfan distribute crack cocaine, and that said distribution is conducted from 26 Fountain Street, Apartment 1 in Framingham, MA, a building more specifically described in the attached application. Therefore I believe there is probable cause to believe that cocaine, drug paraphernalia, records of persons and items involved in the purchase and sale of cocaine, or those showing occupancy and money or evidence of money relating to the purchase or sale of cocaine will be found within 26 Fountain Street, Apartment 1 in Framingham, MA.

19. In my training and experience, I have also learned the following:

- A. Drug distribution is sometimes conducted as a cash and carry business, and at other times, drugs are bought and sold on credit. In either event, the distribution of drugs is a cash business, and distributors of drugs often deal in large sums of money. This necessitates that the distributor be in the possession of, or has ready access to large amounts of money.
- B. Because drugs are often bought and sold on credit, distributors frequently maintain written records of the drugs bought and sold, the identities of the

persons who have purchased or sold the drugs, and the moneys due to, or owed, by them.

- C. Distributors of drugs often maintain books, records, receipts, invoices, notes, ledgers, money orders, bank records and other papers relating to their transportation, ordering, sale, and distribution of controlled substances.
- D. Persons involved in the distribution of controlled substances often secrete their distribution records, controlled substances, and money, on their person, in their residences, in the residences of persons involved with them in the distribution of controlled substances, and in bank safe deposit boxes and other secure storage areas to which they have access. This is done for several reasons. First, safe deposit boxes, secure storage areas, and hidden areas of the residences and businesses are thought to provide a high degree of security for the records, drugs and proceeds of their drug distribution activities. Second, by secreting these items in secure areas, such a safe deposit boxes and hidden locations within their residences, drug distributors hope to minimize the likelihood that these items will be discovered by law enforcement officers who may execute search warrants at their offices, businesses or homes. Third, federal currency transaction reporting laws require financial institutions and businesses to report to the federal government cash transactions in excess of \$10,000. Because individuals participating in drug distribution activities often deal in cash transactions greater than \$10,000, they often store their monies in safe deposit boxes and other secure areas, such as hidden locations within their residences and businesses, to avoid transactions being reported to the federal government.
- E. Drug distributors may hide their monies, rather than investing in bank accounts or other investment vehicles, for other reasons as well. For

example, distributors of drugs often do not report their distribution income to the Internal Revenue Service and Department of Revenue, and by secreting their distribution monies in safe deposit boxes (or in other secure storage locations), they attempt to minimize the likelihood of detection by these agencies. Also, drug distributors often are familiar with the drug forfeiture laws, and attempt to conceal from law enforcement those assets, which are used to facilitate their drug distribution activities. As such, monies, as well as ownership records for other assets such as vehicles and real estate, are often secreted in secure storage areas such as safe deposit boxes.

- F. Drug distributors often employ stratagem to conceal the fact that their money, and assets acquired with their money, are traceable to the distribution of drugs. One common method of disguising the source of drug money is to "launder" it through what appears to be a legitimate business. Drug distributors often associate themselves with cash businesses, or persons involved in cash businesses, and falsely attribute their drug monies and income to the cash business. This tends to establish a lawful source for the money, thereby insulating the drug dealer and his money and asset, from detection by law enforcement officers.
- G. Whatever method of "laundering" money that a drug dealer employs, it allows him to invest his drug money in bank accounts, certificate of deposits, securities, business ventures, and other investment vehicles, with some degree of confidence that the true source of the money will not be detected.
- H. Persons involved in the distribution of controlled substances utilize various paraphernalia, such as scales, cutting agents (diluents) and packaging materials such as plastic sandwich baggies, to prepare and package these controlled substances for further distribution. Such

paraphernalia are often stored in close proximity to where the controlled substances are stored, such as in the cars and residences of distributors, and on their persons.

- I. Person's involved in the distribution of controlled substances utilize "hides" in there vehicle's and home's. These hide are built into different areas of the cars' and are built in such a way that there blend in with the cars original interior or exterior. These "hides" can be opened manually or electronically by manipulating several different electronic devices in the vehicle, some are also opened with the use of Magnets. In the homes the hides are built into the floor and walls of the homes and under the various cabinets.

20. Therefore, I am seeking the issuance of a search warrant to search 26 Fountain Street Apartment 1 in Framingham, MA for the following items:

- a) Books, papers, documents, ledgers, records, accounts, evidencing the possession and/or distribution of Cocaine including but not limited to, records and other papers reflecting (A) the purchase and acquisition of Cocaine, (B) the identities of the sources of Cocaine (C) the storage and transportation of Cocaine (D) the distribution of Cocaine (E) the identities of persons to whom Cocaine was distributed;
- b) Books, papers, documents, ledgers, records, accounts evidencing the sources of money or other property used to purchase or acquire Cocaine, and/or the manner in which financial proceeds of the distribution of Cocaine are stored, invested or spent, including, but not limited to (A) amounts of money paid, collected or owed on account of the purchase or sale of Cocaine, (B) bank records, (C) investment account records, (D) safe deposit box rental agreements or keys, (E) property deeds, (F) bills of sale, (G) tax returns, (H) vehicle titles;

- c) United States currency or coins used to purchase or sell Cocaine, or traceable to the purchase or sale of Cocaine;
- d) Scales, packaging materials and paraphernalia used in the possession and distribution of Cocaine;
- e) Papers and possessions identifying the person(s) having custody and control over the premises to be searched, and its contents;
- f) Cocaine, controlled substance as defined by M.G.L. 94C

I am also seeking permission to photograph and seize the above listed items, should the aforementioned items be located.

21. I also request the authority to search at any time of night because during my investigation, CI has told me [REDACTED] and Bushfan conduct many of their drug transactions at night. I also know that persons involved in the distribution of controlled substances from apartments, homes and other buildings frequently employ the use of counter-surveillance techniques for the purpose of detecting the approach of police officers. In my experience, these drug dealers often use lookouts posted inside and outside their premises, and the drug dealers choose the premises because they have a view of entry doors and/or the streets/alleys used by persons approaching the premises. During our investigation Detectives did observe counter surveillance activity conducted by multiple males that is consistent with what is described above. In addition, the Framingham Police Department Narcotics Unit is comprised of only several members and I have found that many of the persons involved in criminal activity in Framingham recognize me and the other detectives by sight. I fear that when the search warrant is executed 26 Fountain Street, the occupants will have the opportunity to observe our approach and may attempt to destroy drug evidence. Furthermore, 26 Fountain Street is a multi-family unit and is located in a thickly settled high crime environment which increases the likelihood

of police being detected while on approach. Because the cover of darkness maximizes the ability of police officers to approach premises without being detected, when search warrants are executed during the nighttime, drug dealers are less likely to have time to destroy their drugs before the police gain entry. Due to these facts and my wish to approach 26 Fountain Street, Apartment 1 without being detected, I am applying for permission to conduct my search at nighttime.

Signed under the pains and penalties of perjury this 4th day of January, 2011

Dinis Avila

Then personally appeared the above named Dinis Avila and made oath that the foregoing subscribed by him is true before me this 4th day of January, 2011.

Justice/Clerk/Assistant Clerk

ADDENDUM A

Cocaine, controlled substances as defined by Chapter 94C; all books, papers, records, documents, monies, implements and paraphernalia related to the illegal possession and distribution of controlled substances, including but not limited to, books, papers, records and other papers reflecting (A) the purchase and acquisition of Cocaine, (B) the identities of the sources of Cocaine, (C) the storage of Cocaine, (D) the distribution of Cocaine, (E) the identities of persons to whom Cocaine was distributed, (F) the sources of money or other property used to purchase or acquire Cocaine, and/or the manner in which financial proceeds of the distribution of Cocaine are stored, invested or spent; (G) amounts of money paid, collected or owed on account of the purchase or sale of Cocaine, (H) bank records, (I) investment account records, (J) safe deposit box rental agreements or keys, (K) property deeds, (L) bills of sale, (M) tax returns, (N) vehicle titles, (O) United States currency or coins; (P) Scales, packaging materials and paraphernalia; and/or (Q) Papers and possessions identifying the person(s) having custody and control over the premises to be searched and its contents.

ADDENDUM B

26 Fountain Street Apartment 1:

The residence at 26 Fountain Street is a white two family structure and is the second house on the left hand side of Fountain Street as you turn onto Fountain Street from Waverly Street. The structure has a red front door and a white storm door with an overhang. There are two mailboxes one on each side of the front door. Apartment 1 occupies the entire first floor of the structure. The driveway is to the left of the structure. The numerical street number is not visible from the street. A Google Earth Query does depict 26 Fountain Street as being the same structure we identified in our investigation.

Eddie/Kenny

Intern of

James Sebastian

- DRIVE SWAT vehicle to Fountain
- turn lights off on " St
- Park @ gas station over

His team

Duncan

Stewart

Sebastian

Duncan - job to breach door

Approach house

BF prone position on ground

Duncan was to breach hallway door (bedroom door)

- he did that
- Duncan + Stewart in
- he followed
- JS saw blanket
- he leaves + goes down hallway + into kitchen
- saw Downing

Sgt Stewart

Knock + announce FP SW

Lt Downing in kitchen
Sgt Ruiz

Lt Danny says "we need to clear cells
Riley there"

Heard a loud bomb, flinched
he + Riley went downstairs
3 MIN or so

- came back up, knew something happened in "this area"
[Challenger on other side of kitchen]

Came up, Dep Davis asked what happened
"I don't know"

- Medics

- stretch, Medics had problem b/c he was so large

Q Rest of Interview MISSING?

✓ Eddie / Ken
Officer Casey

assigned to Breck + Rach w/ Langmuir

Tol
 Flash Barry
 + Brock + Kade
 B side

- the head about Barry
 - the head "shits first"
 - then made a entry (had not intent of going till shd)
 - in kitchen, see Sgt Stewart
 - Stewart told him to help in basement

- dead basement
 - go up, told to go down/out of way
 - ~~of doors~~ talk to Oliver

Casey - "thought it was a pleasuring (it was a shit we km)"

(-2) Forth / Forger
 Mike Stuckler

- Primary Buckle & Kite the
 - was going to be first at
 - O'Toole was assisting him
 - as Black female, say "we are compromised"

- sh was about down, h + O'Toole by gas he
 - object is to hit the door holding

* got into comm hallway + waited for knock + announce for apartment door.

heard someone knock + announce (on door to right)

Sgt Stewart probably
heard flash bang

saw " " through crack in door

he opened door, flooded into kitch

* He + O'Toole spread into kitch
"flood room"

saw something in back ~~room~~ go into ~~kitchen~~
bathroom / "movement into bathroom"

Large black male come at back room / bathroom
+ was standing in hallway (hally)

* O'Toole "move forward" "get down on ground"
He just stared at us
just looked at us

* I was giving commands as well

* Kid in back bedroom kept sneaking a peak
Sheeh worried that kid may have weep
worried about threat from that room

he finally laid down
- ~~in~~ threshold of hallway but not in
kitchen

- O'Toole stepped in front
- "Go go go", over guy on ground, assumed
guys behind would take guy on ground
- ~~did~~ want to bend down w/ possible threat
in back / bathroom

HT bathroom

convinced someone in there

D-1

@ sink

- thinking going to taser

- Timmy "It's a cat It's a cat"

- heard bang

look @ each other (OK)

- what's guy on type thing

- step over fear of black male b/c need to go
to suspect in back bedroom

- Black male in back bedroom, Langmuir
has him standing there

→ black male + Langmuir in back room, back corner near closet

- can't see the "incident" from that room.
- he cuffs the suspect
- stay w/ him till time to move
- note TENS work on black male

~~later to back room~~

he + langmuir talk sp at

④ - noticed clutter in hallway, mentioned it a few times

"Head Dep Davis say it was accidental"

φ speak w/ Duncan @ all after

Lt Forster / ^{Ferry} ~~Ken~~ ~~Talbot~~
Devon Talbot

Boston

49

Q17. 296. 6446

Miranda Rights
Form

was in Boston earlier

- going to see friend Julian in Fram by Walpole
- then to go & see Aunt (Cousin wife) + Uncle (Cousin)
- 26 Fountain
- got there around 11 something

- got there, didn't know who was there in house
all ~~the~~ ^{he} knew was A+U there

- never went in front room

- In Aunts room talking she leaves
+ it is just him talking to Uncle watching
the basketball game

- then hears police

- " things go through window

- they told him to lay down, he did

- said "I don't know what's going on"

- Uncle left room after they went through door

- didn't hear of else

- heard boom go through window

- didn't know anyone was in front room @ all

- cuffed + brought out

- didn't see Joseph Bushfor (his cousin) @ all in the room

- again → never saw a spoke to J Bushfor

he would stay there a few days or, few days off

while visiting, no one, that he knows of, came to visit

- saw snake in kitchen, glances, sees snake

- heard Police! Police, he put hands up

- I know of any drug dealing
- I " of Joseph drug dealing

[I saw drugs
I " weapon
I been arrested ever ever

- only then for 20-25 minutes b/f police
- they knew I was coming
- was going to stay over

I know Dwight Barnett

Told him that uncle passed away
said he saw blood in kitchen

I hear gun shot
I know anyone was shot

Bach on tape

- went out + met car

person who dropped him off had X-Box
cable that belonged to him

Ben dropped him off, ^{he} called, said he had his
X box cable, he met Ben to get cable
outside

\$100 each

\$69 buck for GF

~~Johanna~~ "something like Emanuel"
Yohana

don't know where she lives

- near Blue Hill Ave

- cell 719-6076

Eddie / Ken

✓ Chris Eliade

10 year

SWAT 3 year

Briefly

Up to house

John

→ to left entry staircase to left
as entry house, he was to
hold staircase

- saw BM being arrested
- approached, saw female on porch
- O'Toole / Sheikh told her to get on ground
- heard / saw 1 flash bang
- O'Toole / Sheikh went in
he held staircase
- Person from upstairs apartment came at
"told him not to me, he didn't"

2nd bang

- he thought it was a flash bang
- then heard people ask "what's that?"

Medics

Then Downing / Sheikh grabbed Chade
told him to take Owen outside

-he did

~~Downing~~ Downing looked Sheikh up
what happened?

Duncan told Elade

- he fired weapon, it was an accident
- he was shaking
- cc told him to calm down

He said

"he went into room"

2 other operators male in room, they went past
they told him not to move

Duncan saw hands move, as he moved (Duncan)
to get a better position, he stumbled + fell on
lost his balance

as he was falling down his gun fired
he didn't really know what happened
he was
just trying to gain his balance + was trying
to move his weapon @ the same time
ble

he had it pointed @ the male party + when
he was falling he attempted to move it
+ in the process of falling down + trying to move
it, trying to regain balance, the gun
had discharged

- I told him to calm down
- Sgt Stewart, come, took the 2 of them to station (Chief's conference room)
- Stewart secured Duncan weapon
- then to hospital
- Cleese stayed w/ Duncan (left when Dr's came in)
- Signed at around 5
- back to PD
- Duncan drove home

not sure how long w/ b/f second bang
 maybe 30 seconds to a minute

⊗ Duncan didn't say to him where finger was &
 he didn't ask

~~Only time finger~~

F-2

F-1

- should have been 2 Flash Bangs
- was only 1 Flash bang

2/28/11

Meety w/ Gary + Mike

Language

2/m for both
lunch 2/28/11

M/GTL/TS/ME

Meety

W or
F

- our job
- Law

photo
of rifle

Fix ~~factor~~

SZ?

B w/ intr

2 yr in

B w/ intr

had

talent

8/10
GTL/MF

pls tal

2 gram (8 each) in sock
2 gram (8 each)

SZ

admits →

Memorandum

To: Chief Steven Carl
From: Lieutenant Michael Hill
Date: May 31, 2011
Subject: Internal Review of Narcotics Investigation and Officer Involved Shooting at 26 Fountain Street on January 5, 2011

On 03/31/11, I received a Compact Disc with the name "Stamps" handwritten on it. This CD was left in my office the previous evening by Assistant to the Chief, Brian Simoneau. After receiving it, I requested a meeting with you to discuss how I would proceed with my investigation. We subsequently met on 03/31/11. During that meeting, you instructed me to review all material relevant to the narcotics investigation at 21 Fountain Street, Apartment #1, including the controlled narcotics buys, the search warrant affidavit, the execution of the search warrant by members of the Framingham Police Department SWAT Team and Narcotics Unit and the officer involved shooting. You also instructed me to determine whether or not policies and procedures were followed by all members of the FPD involved in the above investigation and operation

I have reached the opinion that all involved members of the Framingham Police Department were in compliance with policies and procedures during the narcotics investigation and the execution of the search warrant at 21 Fountain Street Apartment #1.

I have reviewed the following relevant policies for compliance.

- Use of Confidential Informants #100-18 (See Exhibit I-1)
- Search and Seizure #100-1 (See Exhibit I -2)
- Swat Team #100-23 (See Exhibit I-3)
- Firearms and Weapons #50-4 (See Exhibit I-4)
- Use of Flash Sound/Diversionary Devices #100-29 (See Exhibit I-5)
- Evidence and Property Control #600-2 (See Exhibit I-6)

I also reviewed the CD that I received from Brian Simoneau, which contained written transcripts of interviews conducted by Lieutenant Edward Forster and Detective Lieutenant Thomas Sullivan from the Massachusetts State Police Detective Unit – Middlesex. Those transcripts included interviews of the members of the FPD SWAT Team involved in the service of the search warrant at 26 Fountain Street,

Apartment # 1 on 01/05/11. Also included were interviews of Tactical Emergency Medical Services (TEMS) personnel, FPD Narcotics Unit members, Deputy Chief Craig Davis, and Lieutenant Kevin Slattery (Bureau of Criminal Investigation Commander). Additionally included on the CD were the Affidavit in Support of the Search Warrant for 26 Fountain Street Apartment #1 authored by Detective Dinis Avila, the report on the arrests of Joseph Bushfan and Devon Talbert authored by Detective Felipe Martinez, and SWAT training records from 2003-2010.

In addition to reviewing the above mentioned material, I reviewed the following.

- Recorded Interview of Joseph Bushfan conducted by Trooper Jeffrey Saunders and Detective Darren Crawford
- Written Interview of Joseph Bushfan conducted by Trooper Jeffrey Saunders and Detective Darren Crawford
- Written Interview of [REDACTED] [REDACTED] conducted by Trooper Erik Gagnon and Detective Darren Crawford
- Written Interview of [REDACTED] [REDACTED] (Gagnon and Crawford)
- Written Interview of Norma Bushfan Stamps (Gagnon and Crawford)
- Crime Scene Photographs from 26 Fountain Street (taken by Massachusetts State Police)
- Narcotics Search Warrant Photographs (taken by Massachusetts State Police)
- Neighborhood Canvas Reports (by Lieutenant Forster & Trooper Gagnon MSP)
- Ballistics Report (MSP Firearms Identification Section)
- Crime Scene Affidavit and Search Warrant Application authored by Lieutenant Edward Forster
- Narcotics Search Warrant for 26 Fountain Street Apartment #1 obtained by Detective Avila
- Narcotics Search Warrant Return
- SWAT After Action Report authored by Deputy Chief Craig Davis
- Detective Bureau Reports, Logs, Ledgers, Informant Files, related to the Narcotics Investigation at 26 Fountain Street Apartment #1
- FPD Firearms Records (Range Master Pro)

Review

According to the Affidavit of Detective Dinis Avila, I learned the following. Within the past four weeks of 01/04/11, a reliable and confidential informant, whose identity is known to Avila, referred to as CS, provided information to Avila that a Black male known to CS as Dwayne Barrett was selling crack cocaine

from a house on Fountain Street in Framingham. CS described the house as a white, two story house, which is the second house on the left of Fountain Street from Waverly Street. CS said that Barrett accesses the house through the front door and distributes crack cocaine from the first floor apartment. CS described a second black male whom CS believes also resides in that apartment as approximately twenty years old and having a tattoo on his face. CS claimed to have purchased cocaine from Barrett by calling a cell phone number that he gave to CS, after which time CS meets Barrett in front of the house on Fountain Street . CS said that Barrett is frequently in the company of the young Black male with the tattoo on his face.

Within the past four weeks of 01/04/11, a reliable and confidential informant, whose identity is known to Avila, referred to as CI, provided information to members of the narcotics unit. The information was that a Black Male known as Dwayne was selling crack cocaine from 26 Fountain Street Framingham, MA. CI claimed to have purchased crack cocaine from Dwayne in the past by calling him at a cell phone number and then meeting him at Waverly and Fountain Streets (close to 21 Fountain Street). The detectives conducted an independent investigation on the information that they received from CI. They learned that the cell phone number that CI called Dwayne at was registered to T-Mobil out of Framingham, MA; however, no personal information was attached to that account. The detectives also obtained a FPD booking photograph of Dwayne Barrett, DOB [REDACTED]. CI identified Barrett from that photo as the person known to CI as Dwayne. Within the past two weeks of 01/04/11, CI agreed to contact Dwayne at the cell phone number and make arrangements to buy crack cocaine from him. In Detective Martinez' presence, CI called the cell phone number. Martinez heard a male voice on the line that CI claimed to recognize as Barrett. CI claimed that Barrett told CI to meet him at the Gulf Station at Fountain and Waverly Streets. CI was searched by Martinez and was found to have no money or contraband. Martinez drove CI to the area of the buy location, followed by Detective Avila. Detective DeRosa established a surveillance of 26 Fountain Street, where he observed Barrett and an unknown Black male enter that residence, prior to CI's and Martinez' arrival. Martinez gave CI an amount of prerecorded funds and instructed CI to purchase crack cocaine from Barrett. CI then exited the vehicle and was kept under constant surveillance by the detectives. The detectives observed an unknown Black male exit the front door of 26 Fountain Street and meet with CI. They observed a hand to hand transaction and a short conversation between CI and the Black male. CI then returned to meet with Martinez. The Black male entered 26 Fountain Street through the front door.

CI then provided Martinez with a knotted corner baggie with a substance that appeared to be crack cocaine. It was later field tested and reacted positive for cocaine. CI was again searched and found to have no money or contraband. CI told Martinez that Barrett was not the person who sold CI the crack cocaine. CI provided a description of the Black male who sold the crack. That description was consistent with that of the Black male observed entering 26 Fountain Street by Detective DeRosa. CI claimed that the Black male who sold the crack cocaine gave CI a phone number and stated that CI could call him in the future.

Detectives subsequently conducted a follow up investigation. They learned that the telephone number that the person gave to CI during the controlled buy of crack cocaine was listed to Joseph Bushfan of Framingham. They further learned that Bushfan had been arrested by the Natick PD on 08/24/10 at which time he provided Natick Officers with an address of 26 Fountain Street Apartment #1 Framingham, MA. He also provided his phone number to Natick officers. This was the same cell phone number that CI was given during the controlled buy. Detectives obtained a booking photo of Bushfan from Natick PD. CI was not able to identify Bushfan from that photo as the person who sold the crack cocaine.

Approximately two weeks after the first controlled buy, CI met with detectives and was instructed to contact Dwayne Barrett at the cell phone number that he had previously given to CI. CI called that number and claimed to have arranged a meeting to buy crack cocaine from Barrett. CI and the vehicle CI was driving were searched, before and after the controlled buy and CI was given pre recorded funds by Detective Martinez, as before. CI was followed to the buy location near 26 Fountain Street by Detectives Avila and Martinez and kept under constant surveillance. Martinez observed two Black males exit the front door of 26 Fountain Street and he recognized one of them as Dwayne Barrett. Martinez observed both Black males approach the driver's side of CI's vehicle and engage CI in what he described as a hand to hand transaction. When CI and the two males parted, Martinez observed the two males enter 26 Fountain Street through the front door.

Detectives Avila and Martinez then met with CI and CI provided Avila with an amount of white substance that appeared to be crack cocaine. It was later field tested and reacted positive for cocaine. CI told the Detectives that Barrett was the person who sold the crack cocaine. CI also claimed that the second male present was the one who had previously sold the crack cocaine during the controlled buy.

Approximately six days later, and within forty eight hours of applying for a search warrant, detectives again met with CI, who was instructed to contact the unidentified Black male, believed to be Joseph

Bushfan, at the cell phone number that he provided CI with. CI called that number in the presence of detectives and claimed to have arranged a meeting to buy crack cocaine. CI and the vehicle CI was driving were searched, before and after the controlled buy and CI was given pre recorded funds by Detective Martinez, as before. CI was followed to the buy location near 26 Fountain Street by Detectives Avila and Martinez and kept under constant surveillance. Detective DeRosa set up a surveillance of the buy area prior to CI's arrival. DeRosa saw two Black males exit the front door of 26 Fountain Street. One of the males remained on the front porch and the other went to the driver's side window of CI's vehicle. DeRosa observed the male and CI engage in a hand to hand transaction. After the buy was completed, DeRosa saw both Black males enter the front door at 26 Fountain Street.

Detectives Avila and Martinez then met with CI, who provided Martinez with an amount of white rock substance that appeared to be crack cocaine. It was later field tested and reacted positive for cocaine. CI told the two detectives that the male who sold the cocaine was the same male depicted in the photograph that was previously shown to CI. CI was referring to the photograph of Joseph Bushfan. CI told the detectives that the male who sold the crack cocaine on that date had a tattoo on the left side of his face. The detectives noted that in his photo, Bushfan had a tattoo on the left side of his face.

Detective Avila subsequently met with FPD Street Crimes Officer Timothy O'Toole, who told him the following. During December 2010, he went to 26 Fountain Street and attempted to locate Joseph Bushfan regarding outstanding warrants. Bushfan was not present; however, persons there verified that Bushfan did reside there in the first floor apartment. The entire first floor was one apartment.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Based primarily on the above information, Detective Avila applied for and obtained a search warrant to search 26 Fountain Street, Apartment #1, Framingham, MA. The warrant was issued by Framingham District Court Clerk Magistrate George Marinofsky on 01/04/11. It was a warrant to search for Cocaine and other items including money, records, and paraphernalia. The warrant authorized a nighttime search. The warrant did not authorize entering without announcing or searching any person present. The warrant named Dwayne Barrett and Joseph Bushfan as being occupants or people in possession of the premises.

Based primarily on the violent histories of Bushfan and Barrett, Lieutenant Kevin Slattery contacted or caused the contact of Deputy Chief Craig Davis, to request the assistance of the SWAT unit in serving the search warrant at 26 Fountain Street. A short time later, Deputy Chief Davis arrived at the FPD and he was briefed further by Detectives Avila, Martinez, and DeRosa. In addition to the information on the subjects' criminal backgrounds, D/C Davis learned from DeRosa that there was foot traffic to and from the apartment throughout the night. He also learned that much of that foot traffic was coming from Wings Over Framingham, a nearby restaurant. Davis then contacted Chief Steven Carl and obtained authorization to mobilize the SWAT Team to secure the first floor apartment at 26 Fountain Street and turn it over to the detectives to conduct their search.

Members of the SWAT were notified to report to the FPD. Specific Assignments were given to members of the SWAT Team including TEMS Medics. A very thorough briefing was also given, including a description of the premises, the narcotics history, and criminal histories of people believed to be at the residence. The briefing also included information that Eurie Stamps DOB 03/02/42 and an unidentified female in her forties, who was believed to have been Bushfan's or Barrett's aunt, may be present. (See Deputy Chief Craig Davis' After Action Report, Attached).

After the briefing, the SWAT Team left the FPD at approximately 12:20AM on 01/05/11 by way of Concord Street to Waverly Street to Fountain Street. They travelled in a convoy which included the armored vehicle in the lead, followed by the equipment truck, an AMR Ambulance, Deputy Davis' vehicle, and Lieutenant Slattery's vehicle. While the convoy was travelling, Detectives DeRosa and Gutwill, who had been on surveillance of the house, observed Joseph Bushfan and two young females (■■■■ and ■■■■) exit 26 Fountain Street and begin walking toward Waverly Street. Gutwill knew that the convoy was on the way and was concerned that when Bushfan and the others saw the vehicles that the mission would be compromised. Gutwill called over the radio to "Stand down." Several people in the vehicles heard Gutwill but they did not know where it was coming from nor apparently did

they have time to react. As the vehicles turned onto Fountain Street, Gutwill saw Bushfan looking at the trucks going toward his house and "like getting ready to make a move back toward the house." Gutwill approached and took Bushfan to the ground. Gutwill was joined by Deputy Chief Davis and Officer Murtagh. Bushfan told one of the females to go and get his mother and she started to run back to the house. Gutwill stopped her and placed her against a car. Lieutenant Slattery arrived at Bushfan's location and Gutwill left to go to the house. Slattery pat frisked Bushfan and found a plastic bag with 8 smaller bags of a substance which later field tested positive for the presence of cocaine. He also located approximately 397.00 on Bushfan. D/C Davis picked up a cell phone that was on the ground next to Bushfan. This cell phone had the same phone number that was given to CI by Bushfan during the first controlled buy.

While Bushfan and the two young females were being detained, the SWAT Team continued to 26 Fountain Street to execute the warrant. As they first approached, a female later identified as Norma Bushfan Stamps (Joseph's mother and Eurie's wife) was observed standing on the front porch. She was ordered to the ground and detained until Officer Gutwill arrived at the house. He then walked her to the location where her son and the two females were being detained.

When all of the SWAT members took their positions, entry was executed. It had been discussed during the planning stages that there was a common front door and hallway leading to the first and second floor apartments. There were two doors from that hallway leading into the first floor apartment. One of the doors, at the far end of the hallway lead into a kitchen and that door opened outward toward the hall. The other door, immediately on the right, lead into a living room or bedroom and that door opened inward to the apartment from the hallway. The entry team found that the common outer door was unlocked so they made easy access to the hallway. Once inside, Lieutenant Downing, Officer Sheehan, and Officer O'Toole went to the kitchen door. Sergeant Stuart, Officer Duncan and Officer Sebastian went to the living room/bedroom door. As planned during the briefing, Sergeant Stuart knocked three times and announced, "Framingham Police, search warrant, open the door." When there was no response, Stuart gave the command to the others to "execute." Officer Casey, who was with Officer Langmeyer (Rake and Break Team) at the B Side window (left side of house) broke a kitchen window with the bang pole and deployed a flash bag diversionary device.

Officer Sheehan found the kitchen door to be unlocked so he pulled the door open and he made entry, followed by Lieutenant Downing and Officer O'Toole.

Officer Duncan breached the bedroom/living room door with a battering ram. The door did not open as expected. According to Duncan's statement to Lieutenant Forster, "it felt like the middle of the door just disintegrated." Duncan then pushed his way through the door so that other people could get through causing him to be the first person through that door rather than the last as planned. He was then followed by Sergeant Stuart and Officer Sebastian.

Sergeant Sibilio and Officer Riley were the Rake and Break Team assigned to the front window of the room which Duncan, Stuart, and Sebastian entered. Sibilio and Riley decided not to deploy a flash bang device when they saw that those officers had entered the room.

Officers Sheehan and O'Toole made their way through the kitchen to a hallway leading to the rear of the apartment. They encountered Eurie Stamps in that hallway, coming out of a bathroom or a bedroom. Both officers started shouting commands for Stamps to get down on the ground. Both officers also observed another subject in a bedroom beyond where Stamps was standing. As Sheehan described it, that second subject was "sneaking a peek" toward them. "He would pop up, look, and then pop back down." Sheehan and O'Toole continued to command Stamps to get down on the ground and he eventually complied by lying face down in the hallway with his head facing toward the kitchen door. O'Toole followed by Sheehan then moved around Stamps and entered a bathroom on the right side of the hallway. Both officers described the hallway as being very cluttered. O'Toole had to move several bins that were on the right side of the hallway so that they would have a better entrance to the bathroom. Both Officers were aware that someone was in the rear bedroom, beyond the bathroom. They went into the bathroom first because O'Toole saw something go in there. As they went into the bathroom, O'Toole called out that there was someone in the bedroom. The officers discovered nobody other than a cat in the bathroom.

Officer Langmeyer arrived in the kitchen area and saw O'Toole and Sheehan standing in the rear hallway, near the door to the kitchen. He also observed that Stamps was lying on the floor. After Langmeyer watched O'Toole and Sheehan step over Stamps and enter the first door on the right, a bathroom, he either stepped on Stamps or got around him and went to the second door on the right, which was a bedroom. Langmeyer described Stamps as "totally taking up the hallway space." He also described the hallway space as being "very tight." Langmeyer found a male subject in the bedroom, identified as Devon Talbert.

When Officer Duncan entered the apartment, he brought his M-4 Long Rifle to the low ready position and placed it on Semi Auto (safety off). He then began scanning the room, which was a bedroom,

followed by Sergeant Stuart. Officer Sebastian entered this room briefly and then went back out into the common hallway through the door and reentered the apartment through the kitchen door. Duncan and Stuart came upon a blanket that was attached to a doorway leading into another room. Duncan could hear voices from somewhere beyond the blanket that he believed were saying, "Come out, come out." Duncan and Stuart then began yelling, "blue, blue" as a signal to officers on the other side of the blanket that they were police officers. Duncan claimed to have torn the blanket down and walked into another room that led to the kitchen. He could still hear voices yelling, "Come out, get down" but he couldn't see anyone. He had a line of sight into the kitchen from that room. It sounded to him like the voices were coming from the right side of the kitchen. He believed that Sergeant Stuart told him to "go with them" meaning the officers that were shouting. He saw two SWAT Operators (O'Toole and Sheehan) in a hallway and they made entry into a room on the right.

Duncan then described stepping onto the threshold from the kitchen into the hallway. He stated that it was dark and that there were obstacles in the hallway. He saw a man (Eurie Stamps) lying on his stomach in the hallway, approximately two or three feet beyond the threshold. The following are excerpts from the transcribed interview of Officer Duncan, which was conducted by MSP Lieutenant Edward Forster. For full transcript of Duncan's interview, (**See Exhibit H**).

As I approach, I can see that the hallway's dark. I can see that there's SWAT operators in front of me and I can see a light at the end of that hallway, on the right-hand side, a doorway that's lit, on the right-hand side.

Q *Inside the hallway?*

A *Inside the hallway, toward the back of it. Just before I got to those operators, or as I got to those operators, I'm not sure. They take off and they make a-- they take off down that dark hallway and make entry into a room down there. I think it was the lit room. I'm not-- I'm not a hundred percent sure. But they take off and now they're entering a room and they're gone. I don't even see them. As I step in onto the threshold, I could see that it's dark. There seems to be obstacles in the hallway, disheveled, appeared disheveled to me. I see a man laying on his stomach somewhere in the hallway, probably, if I were to guess, a couple of feet passed the threshold, maybe two, three feet passed the threshold. I-- that's trying to recollect distance in darkness. So, as I-- now, the other two SWAT operators are gone. I look down. I see the individual laying there. At that time, his-- he's laying on his stomach. His hands are, I believe, above his-- I believe his elbows were resting on the floor. His hands and fingers were open, and they were not on his head. They were hovering by his head. So I see-- I see that. As I-- as I approach*

him at the threshold, I recall his-- I recall his head moving up towards me and his hands moving like in a motion of, you know, who's this, what's coming in here. So I see the hands move and the head go up, not a great distance, just enough where my attention automatically went to his hands and his head.

Q How far do you think you were from him then?

A Probably the-- probably the two feet.

Q Probably-- were you inside? You had just crossed the threshold?

A I probably just crossed-- crossed the threshold.

Q Alright.

A So I see the movement. So, at that time, I see the movement. I-- I have my long rifle in the low ready. I point it in his direction. At this time, I know-- I could-- I can hear-- I can still hearing yelling coming from that room down there. So I'm assuming, because I hear that yelling, that they have contact with something at that end of the room, out of my sight, in another room at the end of that hallway. He looks up to some degree. The hands move. My attention's focused on him. Long rifle pointed at him at that time, basically, because I didn't-- I don't know, at that point, you know, what's around him. The movement automatically draws my contact. So I have him. I know now-- I'm in this position. I know now the other SWAT operators move quickly. They went in for the other threat. I'm looking at the other room. It's disheveled in the area that he's in. I know that those SWAT operators had not checked him for any weapons. I know that there was no check of the area for any weapons, other than maybe a quick one with their eyes. And whether they saw something or-- I don't know. So I make a decision at that point. My options are focus on him like this and say, "Don't move. Don't move." But what happens if there's a gun or something hidden anywhere and he just reaches quick? What happens? Well, I'm still in a position where I got to make a decision. Do I fire? Do I not fire? And in my mind, as quickly as it was going, I made the decision, I'm going to take that out of this equation. I decided I'm going to go on the side of him, get his hands behind his back; not handcuff him, but just tighten up on his hands and kneel down on him so that I know he can't reach for anything at all, period. It takes-- in the back of my mind, it takes any threat that may be someplace I can't see, someplace I can't see, out of the equation, as far as any firearms or weapons. So, at that point, he's on the ground. I don't recall if he's-- I don't recall the way that he's laying; if he was directly straight, parallel with the wall, or if he was cockeyed. I can't remember. It seems to me that he was-- he may have been laying at an angle, where his head was towards me, but his body may have been coming towards the right side of the hallway. I-- it was dark.

At that time, I come around the right side of him. I take a couple of steps and I come around the right side of the-- of the-- of the man on the ground, on the floor. For some reason, I don't know if-- I think I was somewhere around his shoulders, or just passed his shoulders, I don't know if I stepped on something with my right foot, or whatnot, but, for some reason, I had to step backwards with my left foot, or not backwards, but to my left, which is essentially the spot-- the area I had come from. So I step with my right. I started to make that motion and, all of a sudden, I felt, for some reason, I had to step left. So, as I stepped to my left, I just-- I lose my-- for some-- some way, I lose my balance. I start to fall over. I'm-- I'm going backwards. I remember it was very quickly, but I start going backwards. This-- I think my right foot's coming off the floor. We-- with our tactical equipment and everything, it's just awkward. I start-- I start going backwards. I think that I lose, or let go of, my grip on my long gun because I'm falling over. And I don't know if, in the back of my mind, I'm trying to reach and trying to hit the wall, so I don't go all the way over. But I find myself falling back and to the left or-- and my arms out like this, or just out, trying to say, basically, "Oh, shit. Here I go," factor. So I'm going over. As I'm going over, at some point, my long rifle's pointing in the direction of the person on the floor. I'm trying to consciously, as I'm falling over, say to myself-- when I'm saying the oh shit factor, pull my gun, my long rifle, away, but I'm going over. At some point, I hear the discharge of a firearm. I don't know if it's-- I don't know if it's when I first start going over or when I impact, but I do impact with the wall, the corner of that-- somewhere between the wall and the corner of the threshold, I impact with the wall. I'm laying there. Now I'm laying on the ground. I'm laying on the ground in front of the person that I was trying to secure. I don't recall exactly where my entire make-up of my body was, but my-- my-- my ass is on the ground. My back is somewhere against the wall. The long rifle-- I want to-- I think the long rifle was resting somewhere on me. And I'm not sure if even a part of it landed anywhere on top of him or whatnot. For a second, the discharge-- I heard the discharge. It was almost like there was a shot fire. And it took a second for it to settle in that, you know, Jesus, was that my rifle? Now I'm resting on the ground on my rear-end. I look down at-- I'm literally almost on top of him, I think. I can see his head. I looked down at him and now I can see under his-- under his, what would essentially be his left shoulder, which was still-- now is like this. I can see-- now I start to see blood come out from somewhere under the-- somewhere under the left shoulder area. I hear a voice from out in the hall, or out-- not in the hall, from out in the kitchen area, or what I believe is a kitchen. I can't tell you that it is. I think it was, wherever that room is behind me. I hear a voice, you know, "What was that? What happened? What's going on" something to that affect. At that time, I yell, "Man down. Man down. Man down," two or three times. I don't remember if somebody-- I was trying to get up. I don't remember if somebody

helped me up. I know I was on the deck and I-- I don't remember if, when I was trying to get up, if somebody came in and helped lifted me. I know, at some point, somebody was right behind me, like, "Back up. Back up," like, "Let's get you out of this room. Let's get you out of this particular room." Then I heard somebody in that room-- I don't know who it was. I believe it was Lieutenant Downing, but I'm not a hundred percent-- yelling for the TEMS, to get the TEMS in there, which the tactical medics. Once I was in the kitchen, I think it was-- I think it was Lieutenant Downing, said, "What happened? What happened?" I told him, I said, "I fell or I tripped." I can't remember exactly what I said.

Q Sure. When you're confronting the individual when he's on the floor and he's got his hands up, like you said, moving them, and you're thinking about, you know, the area, I understand, if there's weapons underneath him, whatever. You don't know. As far as you know, he hasn't been secured. You're deciding what you're going to do with him.

A Yes.

Q Right? And you said that, you know-- you said, at one point, whether fire or not. I don't know what you meant by that.

A Did I say-- I guess, what I'm trying to--

Q I don't-- just give me your interpretation because I believe that's what I heard. I could be wrong.

Q (Unknown) What I think he said was he was trying to decide if the man reached for something, what would he do. Would he fire or--

Q (Forster) There you go. Okay. Sorry. What you-- yes-- okay. Alright. I just want to clear that.

A Yeah.

Q That's in your head at that time and you decide that you want to go and secure him, you know, from the rear, whatever you're going to do. When you're in the low ready before that-- before that-- while you're discussing that, your trigger finger on the outside?

A My trigger finger is on the outside of the trigger guard.

Q The trigger guard, okay. Did it ever, at that point when you were thinking that, go into the trigger guard at all?

A No.

Officers O'Toole, Sheehan, and Langmeyer heard the gun shot from Duncan's Weapon from the rooms that they were searching. They all continued with their business in those rooms. By the time they all exited those rooms, the first things they saw were the medics attending to Stamps.

Sergeant Stuart was apparently the first person to find Officer Duncan after the shot was fired. Stuart said in his interview with MSP Detective Lieutenant Thomas Sullivan that he was in the room that Duncan made entry to the kitchen from. Shortly after Duncan went in to the kitchen, Stuart heard a gunshot. Stuart went into the kitchen and looked into the hallway toward the rear bedroom. He saw Duncan sitting against the wall with his feet out crossing the hallway. He also saw Eurie Stamps lying face down. Stuart asked Duncan, "What do you got?" Duncan told him, "I have shots fired." Stuart asked, "Are you hit?" Duncan responded, "No, he is" as he pointed at Stamps. Stuart looked down and saw some blood. He pulled Duncan away and got on the radio and said, "We have shots fired; we need medics in here right now. He then moved Duncan to another room and went on to help other officers checking the basement.

There was an AMR Ambulance staged outside of 26 Fountain Street. Also staged there were the following members of the TEMS Unit.

- Framingham Fire Department Captain Joe Hicks, TEMS Team Leader
- AMR Paramedic Dave Kay
- FFD Firefighter EMT Jeff Beckwith
- FFD Firefighter EMT Nick Ferry
- AMR Paramedic Tom Canning

Immediately after Sergeant Stuart called for medics, Hicks and Kay went to Eurie Stamps. According to Hicks' statement they found Stamps face down on the floor in the hallway. Kay and he did a rapid trauma assessment. He saw a pool of blood near Stamps' head and neck area and the pool was growing. They rolled Stamps onto his back. Hicks saw a puncture wound on his left jaw. When Hicks cut Stamps' shirt, he saw a wound on the left side of his chest, which was bleeding profusely. They packed the wound and applied pressure. Hicks found Stamps to have a weak pulse. They moved him from the hallway into the kitchen by dragging him with webbing. Once in the kitchen, they placed him on a backboard and then onto a stretcher. They moved him to the ambulance where they placed a breathing tube in his airway and notified the Metro West Medical Center Emergency Room. Stamps had gone into cardiac arrest and while travelling to the hospital, Kay was at Stamps' head, Hicks was performing chest compressions, and Beckwith was performing airway ventilations. Ferry drove the ambulance to the

hospital. Also in the rear of the ambulance were AMR paramedic Tom Canning and Detective Martinez. According to Hicks, they continued performing CPR at the hospital until the attending doctor "called code."

Devon Talbert, DOB [REDACTED] and Eurie Stamps were the only people found inside of 26 Fountain Street, Apartment #1. Talbert identified himself as Norma Stamps' nephew and Joseph Bushfan's cousin. He claimed to have been watching the basketball game in the rear bedroom with Eurie Stamps when the flash bang device went off. He denied any knowledge that his cousin Joseph was selling drugs. He claimed that he resides in Boston and that he was staying at his aunt's house for a couple of days. Talbert had been observed exiting 26 Fountain Street and engaging in what appeared to be a hand to hand transaction with another person by Detective DeRosa, earlier in the evening on 01/04/11. Talbert was subsequently charged with Possession with the Intent to Distribute Class B Controlled Substance, Possession with the Intent to Distribute Class B Controlled Substance in a School Zone, and Conspiracy to Violate the Controlled Substance Laws.

Joseph Bushfan, DOB [REDACTED] was also charged with Possession with the Intent to Distribute Class B, Controlled Substance, Possession with the Intent to Distribute Class B Controlled Substance in a School Zone, and Conspiracy to Violate the Controlled Substance Laws. Bushfan told Trooper Jeffrey Saunders and Detective Darren Crawford that he had about five pieces of crack on him when he was arrested. He also said that he and his cousin (Talbert) sell crack to take care of their kids.

Norma Bushfan Stamps, [REDACTED] [REDACTED] and [REDACTED] [REDACTED] were all interviewed and released without being criminally charged.

The search warrant that was obtained on 01/04/11 by Detective Avila was served by members of the Massachusetts State Police. No members of the Framingham Police Department participated in the search pursuant to that warrant. The return of the search warrant was made on 01/05/11 at 12:35PM by Detective Dinis Avila. MSP Sergeant Brian Connors was listed as the person making the search. During the search, the items found included one knotted plastic bag with eight individually wrapped pieces of rock like substance, green vegetable matter, and a pill bottle with various pills. Also found were packaging materials, 3 cell phones and 3 knives.

The residence at 26 Fountain Street #1 was treated as a Crime Scene by the Massachusetts State Police Detective Unit – Middlesex. The State Police obtained a crime scene search warrant and subsequently processed and photographed the scene.

The firearms that Officer Duncan was carrying during the execution of the search warrant were taken from him and secured by Sergeant Stuart. They were subsequently given to the Trooper Stephen Walsh from the Massachusetts State Police Firearms Identification Section. Those weapons were as follows.

- Colt M-4 Commando Semiautomatic/Automatic Rifle Serial # A0230821
- 1 magazine with 26 live cartridges from the M-4 weapon
- 1 live cartridge from the M-4 weapon
- 2 magazines and 56 live cartridges for the M-4 weapon
- .40 S&W caliber Sig Sauer, Model P226, Semi automatic Pistol, Serial # UU635241

Dr. Henry Nields from the Office of the Chief Medical Examiner performed an autopsy on Eurie Stamps. He determined the cause and manner of death to be homicide resulting from a single fatal gunshot wound to the upper body, with injuries to the heart, lung, and major blood vessels. **(See Exhibit D)**

As you are aware, Middlesex County District Attorney Gerard Leone directed an investigation of the Eurie Stamps shooting. As you are also aware, District Attorney Leone concluded that the actions of Officer Duncan do not rise to the level of criminal conduct and that the shooting death of Eurie Stamps was an accident. Mr. Leone referred the matter back to the Framingham Police Department for whatever administrative review that was deemed appropriate. **(See Exhibit C)**

Analysis

Regarding the **Use of Confidential Informants Policy**, I found that members of the Detective Bureau, who were involved in the narcotics investigation at 26 Fountain Street, strictly adhered to this policy. I met with Lieutenant Kevin Slattery on 04/28/11 and 04/29/11 to review confidential informant records and other reports. I observed that the confidential informant files were kept in a secure location, within the Narcotics Unit Office in the Detective Bureau. The informant identified in Detective Avila's affidavit as CI, is well documented. Detective Slattery showed me the Informant Master File, listing the informants by names and assigned numbers. Other documentation that I observed showed this particular informant's name, assigned number and informant's history. That history included the three controlled buys of crack cocaine from 26 Fountain Street.

Lieutenant Slattery also showed me the Personal History Report and Conduct of Confidential Informant Form that was completed regarding the informant identified as CI. I also viewed the electronic ledger showing that proper accounting procedures were followed with the confidential investigations funds. The expenditure for each controlled buy was documented for the dates that they were made. Each of

the expenditures also documented the assigned CI number and the names of the targets, Barrett and Bushfan.

Additionally, Lieutenant Slattery produced copies of the police reports related to all three controlled buys. The information in those reports was consistent with the information outlined in Detective Avila's affidavit. I also observed photo copies of the currency that was provided to the CI for the controlled buys.

I believe that it is apparent from the information outlined in my summary and Detective Avila's affidavit that the detectives involved in this case established the credibility of the informant and conducted sufficient independent investigation regarding the informant's information.

I will discuss the **Search and Seizure and SWAT Team Policies** together. Detective Avila applied for and obtained the Search warrant for 26 Fountain Street from Clerk Magistrate George Marinofsky. It was Marinofsky's determination to make was to whether or not probable cause existed to issue the warrant. He apparently believed that there was probable cause to issue the warrant. I also agree that there was probable cause.

The search warrant required those serving it to knock and announce. The warrant also authorized a night time search. Sergeant Stuart stated during his interview that he knocked three times and announced, "Framingham Police, search warrant, open the door." There were at least eleven other officers or members of the SWAT and TEMS Teams who also heard Sergeant Stuart knock and announce. Those people consisted of Ruiz, Duncan, DeRosa, Reardon, Riley, Sheehan, Sebastian, O'Toole, Kay, Hicks, and Beckwith.

The search warrant did not authorize a search for all persons present. The officers were in compliance with the law and our policy to detain those present and keep them from moving about. Also, by case law and our Search and Seizure Policy, they were authorized to pat frisk people present for weapons for safety reasons. There was sufficient information documented that Bushfan and Barrett had committed numerous types of assaults with and without weapons. I believe that the analysis that should be applied is not whether or not there was reasonable suspicion that a specific person in the house may be carrying weapons, but rather it should apply to the whole situation. Certainly if Barrett or Bushfan had weapons in the house, anyone there could have access to them.

When it became apparent to Lieutenant Kevin Slattery that his detectives were obtaining a search warrant for a place where there were potentially armed and assaultive people, he made the request for activation of the SWAT Team as he should have. Deputy Chief Craig Davis (SWAT Commander) was first notified with the request. D/C Davis conducted a SWAT Threat Assessment, which included the following.

I. Suspect Assessment: Yes No Unknown Points

A. Known to use or propensity for violence:

1. Homicide _____
2. Armed Robbery _____
3. Assault _____
4. Resisting Arrest, (If Yes, 4 points) _____
5. Assault on Police Officer, (If Yes, 4 points) _____
6. Other: _____

B. Is suspect on Parole or Probation? _____

C. Is suspect a drug user? _____

If yes, what type (s)? _____

D. Is suspect an Alcohol abuser? _____

If yes, does suspect have a history of violence while intoxicated? _____

E. Is suspect mentally unstable? _____

If yes, describe condition _____

F. Does suspect have Law Enforcement/Military background? _____

(If Yes, 4 points)

If yes, describe agency, department/ branch of service, length of service, and any specialties, etc. _____

G. Is suspect currently/historically associated with an organization _____ which is known or suspected of violent criminal actions?

If yes, what group or organization? _____

Can the organization be classified as:

1. Paramilitary _____
2. Terrorist _____
3. Religious Extremist _____
4. Gang _____
5. Other: _____

Total from "SUSPECT ASSESSMENT" = _____

"Yes" = 2 points "No" = 0 points "Unknown" = 1 point

II. Offense Assessment: Yes No Unknown Points

A. Is the offense a felony? _____

If yes, list the offense: _____

B. Is the offense a violent felony? _____

C. Was a weapon used in the commission of the offense? _____

D. Were victims injured during the commission of the offense? _____

E. Were any Law Enforcement personnel injured during the _____
commission of the offense?

Total from "OFFENSE ASSESSMENT" = _____

"Yes" = 2 points "No" = 0 points "Unknown" = 1 point

III. Weapon Assessment: Yes No Unknown Points

A. Is suspect known or believed to possess:

1. Rifle – Semi-auto or bolt/lever action _____

2. Rifle – Full-Auto _____

If Yes, MANDATORY activation of SWAT

If "Unknown" 10 points

3. Shotgun _____

4. Handgun _____

5. Explosives _____

If Yes, MANDATORY activation of SWAT

If "Unknown" 10 points

6. Knives _____

7. Other: _____

Total from "WEAPON ASSESSMENT" = _____

"Yes" = 2 points "No" = 0 points "Unknown" = 1 point

IV. Site Assessment: Yes No Unknown Points

A. Are there geographic barriers or considerations? _____

If yes, describe: (may include upstairs apartments or rooms,
terrain features, etc.) _____

B. Is the site fortified? (If Yes, 4 points) _____

If yes, describe: (may include barricaded doors/windows, bars, etc.) _____

C. Does the site have counter surveillance personnel or
monitoring devices? _____

If yes, describe: _____

D. Are ARMED counter surveillance personnel present? _____

If Yes, MANDATORY activation of SWAT

If "Unknown" 10 points

E. Are there more than 4 adults present at the site? _____

F. Are there children, elderly persons, or handicapped persons
present at the site? _____

If yes, describe: _____

Total from "SITE ASSESSMENT" = _____

"Yes" = 2 points "No" = 0 points "Unknown" = 1 point

IV. Miscellaneous? Points

A. No Knock = 4 points _____

B. Force required to enter (door breaching, window break and raking, etc)= 2points _____

Total from "Miscellaneous Assessment" = _____

THREAT ASSESSMENT SCORE

Total from "Suspect Assessment" = _____

Total from "Offense Assessment" = _____
Total from "Weapon Assessment" = _____
Total from "Site Assessment" = _____
Total from "Miscellaneous Assessment" = _____
Overall Total = _____

ASSESSMENT KEY:

1-16 Points = SWAT Optional
17-24 Points = Consult SWAT Commander
25 + Points = *Mandatory SWAT Activation*

Using the above assessment, when D/C Davis learned that Dwayne Barrett was known to possess firearms, that factor alone called for a mandatory SWAT activation (See III Weapon Assessment). D/C Davis subsequently notified Chief Steven Carl and after providing all information that he had, regarding the situation, he received authorization to mobilize the SWAT Team.

D/C Davis made the arrangements for activation of the SWAT Team. He also conducted an extensive mission briefing with the SWAT and TEMS Team members. That briefing included interior/exterior photographs of the apartment to be searched, information about the drug investigation, and the criminal histories of the suspects. It also included aerial photographs of the area around 26 Fountain Street, and suspect photographs. Very specific assignments were given to SWAT and TEMS members. Very specific details of the approach to 26 Fountain Street were also given. Those details included bringing fire extinguishers and having an ambulance staged near the residence. D/C Davis also prepared a detailed after action report of the SWAT operation. **(See Exhibit B)**

Regarding the discharge of Officer Duncan's weapon and the death of Eurie Stamps, I concur with District Attorney Leone that this was accidental. I do not believe that the weapon was discharged as the result of non compliance with our policies. Duncan's explanation of the events preceding the discharge is credible. Numerous officers, who passed through the hallway and climbed over Eurie Stamps before Duncan, described how cluttered, tight, and difficult it was to do so. Crime Scene photographs that were taken by the Massachusetts State Police depict the situation as described. Duncan articulated valid reasons for him to consider Stamps to be a potential threat and for making the decision to secure his hands. Duncan, as well as all members of this Department who have been trained with the M-4 rifle, was taught to have his finger on the outside of the trigger guard unless he was prepared to fire. Room clearing training has consisted of teaching officers to have the safety in the off mode (semi auto) when they are the first to enter a room and when they perceive a possible threat. Other officers and I were

instructed in this manner during refresher training with the M-4 on 05/18/11 by Sergeant Vincent Stuart. Duncan claimed that his finger was on the outside of the trigger guard before he lost control of his weapon and tried to regain control of it. He also claimed that the weapon's safety was off (semi auto) mode.

The SWAT Team Policy mandates that newly assigned members complete at least 40 hours of tactical training. Officer Duncan successfully completed five days of training specific to Barricaded Gunmen & High Risk Warrant Service August 4-8, 2008. This training was sponsored by LEAD Consultants.

The SWAT Team Policy also mandates that members attend a minimum of eight hours per month training and that all training will be documented. I obtained copies of SWAT training records for 2003-2010. Officer Duncan first appeared on the training roster during August 2007. I was advised by D/C Davis that Duncan became a member of the SWAT Team during July or August of 2007. Upon reviewing the training records from 2007-2010, I found documentation that monthly trainings were conducted. The documentation indicated that Officer Duncan was present for all monthly training sessions with the exception of 12/17/09. Duncan's On-Duty Calendar shows that he was on his second of three days off, followed by two vacation days on 12/17/09.

Records that I obtained from Lieutenant Kevin Slattery and Deputy Chief Craig Davis have documented that the Framingham Police Department obtained and served at least 72 search warrants between 12/16/06 and 01/05/11. During that time period, the SWAT Team was mobilized to assist with only 12 of those warrants. SWAT was also activated on separate occasions during that time period to search a residence and neighborhood for a suicidal male with a knife, enter a residence with an arrest warrant, and assist Ashland PD with the service of a search warrant in Framingham.

Regarding the **Policy on Firearms and Weapons**, on 01/05/11, Officer Duncan was carrying two firearms. Those firearms were a Colt M-4 Commando Semiautomatic/Automatic Rifle Serial # A0230821 and a 40 S&W caliber Sig Sauer, Model P226, Semi automatic Pistol, Serial # UU635241. Framingham Police Department records indicate that both of those are Department weapons that were issued to Duncan.

The Massachusetts State Police Firearms Section Report indicates that the 5.56mm discharged cartridge casing recovered from the laundry room, adjacent to the bedroom, at 26 Fountain Street had a headstamp of "LC 08". On 05/13/11, at approximately 11:30AM, I met with Sergeant Peter Sennott from the Massachusetts State Police Detective Unit-Middlesex at his office in Woburn. Sergeant Sennott is the evidence control officer for his unit. The Firearms Identification Section turned the evidence from

this case over to Sennott after their examination was completed. During my visit with Sennott, I examined the Colt M-4 Commando and found that it was the same weapon that was issued to Duncan (Serial # A0230821). I also examined the discharged cartridge casing, the live round that was taken from the M-4's chamber, and 28 live rounds from one of the magazines. All of the casings had headstamps of "LC 08". I accompanied D/C Davis to the armory during the afternoon on 05/13/11. D/C Davis located the stored ammunition that is issued to the SWAT members for their M-4's. The boxes of ammunition were labeled Hornaday, TAP, Tactical Application Police, 5.56NA, 75gr, #8126N. This is the authorized ammunition for the M-4, which is articulated in the Firearms and Weapons Policy. I examined the ammunition in these boxes. The headstamps were "LC 08". My conclusion is that Duncan was carrying the authorized ammunition in his issued M-4 on 01/05/11.

The Firearms and Weapon policy requires yearly qualification with all issued weapons. Our training records indicated that Duncan qualified with the M-4 as follows.

- 10/17/07 Score 90
- 09/24/08 Score 85 & 90
- 06/11/09 Score 100
- 09/17/10 Score 95

Regarding the **Flash/ Sound Diversionary Devices Policy**, Sergeant Sibilio and Officer Casey, the officers assigned to deploy the flash bangs at 26 Fountain Street, completed training on proper use and deployment. Most recently prior to 01/05/11, both officers were instructed by Lieutenant Robert Downing (a certified instructor) on 02/18/10 (classroom segment) and 03/18/10 (practical segment). Sibilio and Casey were also present during a SWAT Training on 08/19/10, during which Lieutenant Downing reviewed the Flash Bang Policy and the team practiced deployment of flash bangs.

D/C Davis authorized the use of the flash bangs per our policy, which allows their use to facilitate entry, enable arrest, and potentially reduce the risk of injury during high-risk warrant service. As previously mentioned all available intelligence and information was considered in making the decision to use flash bangs, during the pre mission briefing. Considerable thought was also given during the mission, when Sergeant Sibilio decided not to deploy the second flash bang. Also as previously noted, the SWAT Team carried a fire extinguisher to the scene as required by this policy.

Regarding the **Evidence and Property Control Policy**, I found that the crack cocaine purchased during the three controlled buys was logged into evidence properly. I printed an inventory control sheet for all

evidence related to that case (1009574). The evidence was properly logged and placed in an evidence locker, prior to Detectives DeRosa, Avila, and Martinez ending their tours of duty on the dates of the controlled buys. Similarly, the evidence found on Bushfan when he was arrested on 01/05/11 and the evidence found during the execution of the search warrant were also properly logged and placed in evidence. **(See Exhibit E)**

It was noted in the State Police Firearms Identification Section report that Trooper Walsh examined and test fired Duncan's issued M-4. He found no malfunctions with that weapon. Trooper Walsh also took possession of the lead and jacket fragments recovered during the autopsy of Eurie Stamps and determined that they were "too damaged for further identification." Trooper Walsh also compared the discharged cartridge casing recovered at 26 Fountain Street with the test fired cartridge from Duncan's M-4. His conclusion was that "they both share the same class characteristic of caliber and firing pin impression shape; however, they lack sufficient agreement of unique microscopic marks to determine the source weapon." Trooper Walsh found that the result was inconclusive.

Although this was a review of the actions of many officers during the course of the narcotics investigation and execution of the search warrant at 26 Fountain Street, unfortunately, a great deal of the focus is on Officer Paul Duncan. As you are aware, Officer Duncan has been a member of the Framingham Police Department since 01/03/06, when he transferred from the Shrewsbury Police Department. He was employed by Shrewsbury PD since 07/2000. Previous to that he was a police officer with the Mendon Police Department from 01/99-07/2000. Prior to his employment in Mendon, he was a part time police officer with the New Braintree Police Department from 07/96-01/99. He was also a part time police officer with the Millville Police Department from 1997-1998.

In addition to his 40 hour training that was previously mentioned, Duncan successfully completed the U.S. Army Military Police School, Field Tactical Police Operations Course 11/15/09-11/19/09 (prior to his employment with the FPD). He also completed the CSX Police Rapid Response Team Tactical Rail Interdiction Class (24 hour class during July 2010). **(See Exhibit F)**

Officer Duncan also received the following awards from you.

- Police Commendation Award 10/14/06
- Letter of Merit 11/11/07
- Police Commendation Award 02/01/08

Officer Duncan has also received numerous letters of appreciation from citizens and the Natick Chief of Police. **(See Exhibit G)**

There has only been one citizen's complaint against Officer Duncan. That was a complaint made by a citizen that a group of five motorcycle officers, including Duncan, took a 34 minute coffee break at Dunkin Donuts on Cochituate Road. That incident occurred on 06/10/09. Duncan and the other officers received Letters of Counseling from you. Officer Duncan has not been the subject of any other disciplinary matters.

As you are aware, we are constantly reviewing and revising our policies. We have been an accredited police agency with the Massachusetts Police Accreditation Commission (MPAC) since our initial assessment during March 2005. We were reaccredited during September 2009 and we are presently preparing for a third assessment. We are one of thirty police agencies in Massachusetts that have attained accreditation with MPAC. In order to achieve accreditation, we were required to meet approximately 330 standards that are set by MPAC. Most of those standards require that our Department has written policies, that we adhere to those policies, and that we show documentation that we adhere to those policies. The six policies that I reviewed in this report have been scrutinized by the assessors from MPAC on two occasions. On both occasions, they found that those as well as all of our policies met MPAC standards.

As I stated on Page 1, I have concluded that Department policies were followed by all members of the FPD, who were involved in the narcotics investigation and search warrant service at 26 Fountain Street Framingham, MA. I believe that my conclusion is supported by the aforementioned facts.

Thank you.

To whom it may concern:

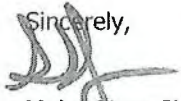
8-8-11

My name is Steve Ijames, and I am a retired deputy chief of police from Springfield, Missouri. I was contacted by Mr. Brian E. Simoneau following the death of Mr. Eurie Stamps. I did not have any prior relationship with Mr. Simoneau, and questions concerning his decision to contact me should be directed to him.

Mr. Simoneau asked that I review the circumstances presented in this case, and offer objective opinions in response to questions that he provided to, "address the concerns of non-experts". In addition, Mr. Simoneau asked that I not confine my opinions to the questions asked, but address any relevant issues that were noted during my review. Mr. Simoneau also offered to compensate me for the time committed to this effort, but consistent with similar reviews I have conducted (such as the Stern Commission investigating the death of Victoria Snelgrove by the Boston Police), I am respectfully declining payment. I will also not take a role on behalf of any party should this matter later result in civil litigation.

My opinions in this matter are offered in response to interviews with agency training and SWAT command staff, the material reviewed and listed on attachment A, and in consideration of the knowledge, training, and experience gained during my 32 year police experience-the qualifications of which are listed on attachment B. I have attempted to be responsive to the questions asked and issues raised, while keeping my opinions as brief as reasonably possible. Should additional information or expansion of a particular point be requested, I will respond accordingly. I am also willing to meet in person and discuss any of the issues addressed in my report.

Sincerely,



Major Steve Ijames
1020 East University Street
Springfield, Mo. 65807

417-838-4274
lesslethal@aol.com

Responses to the questions provided:

1. Was the use of the SWAT team on January 5, 2011 at 26 Fountain Street in Framingham an appropriate use of the team?

It is my opinion that the use of the Framingham Police SWAT team to execute the search warrant at 26 Fountain Street was an appropriate use of the team, and consistent with contemporary police practice considering the circumstances reasonably believed to exist. It is important to note that contemporary police practice is just that-what most reasonable and prudent law enforcement agencies would do-and such "practice" does not bind or compel a chief or sheriff into action or compliance. The ultimate responsibility for determining the "appropriate use" of any police resource-including the SWAT Team-rests with the chief or sheriff of the agency involved.

Considerations and basis for this opinion-The original SWAT team concept (late 1960's early 1970's) was for counter-sniper and extremely high-risk situations involving rioting, public disorder, and heavily armed/violent paramilitary groups. Beginning with the Drug Abuse Prevention and Control Act of 1970, SWAT has evolved into a more diverse operational element with roles that differ greatly from that of the original teams. This evolutionary process has not been without criticism or controversy. Some in the public and academic domains challenge what they describe as the inappropriate expansion of SWAT from its original "high-risk specialized" role, to more traditional police activity-most often involving drug law enforcement. One academic survey (involving 690 law enforcement agencies) reported that 75% of the SWAT activities were devoted to serving drug warrants, primarily due to the potential dangers if not handled by properly trained and equipped personnel. In the immediate case Framingham Police narcotics investigators received information from sources that cocaine base ("crack") was being sold in and around 26 Fountain Street. Two subjects were identified as the persons believed to be selling the cocaine, and eventually three controlled drug purchases were made from the suspect location. In addition, surveillance of 26 Fountain Street revealed what appeared to be multiple "hand to hand" drug [REDACTED] occurring independent of the three controlled purchases referenced above. In preparation of obtaining a search warrant the investigators conducted an inquiry into the background of the suspects involved. The information obtained caused them to reasonably conclude that the potential risks involved would likely meet the criteria for using the SWAT team to serve the warrant. The basis for their concern is outlined on page two of the district attorney's report as follows:

"the violent criminal histories of (the two named suspects), the information that (one of them) was a member of gang involved with narcotics, weapons and crimes of violent crime; information that (one of them) was a known associate of an individual involved in the 2009 shooting of Framingham Officer Phil Hurton; the possible existence of a third potential suspect (named) inside the target location; the numerous people seen coming and going from the target apartment

in the hours leading up to the execution of the search warrant; and the numerous hand to hand drug transaction observed in front of the target apartment in the hours leading up to the execution of the search warrant”

This information was provided to the SWAT command element, which agreed that the potential risks inherent in this operation met the criteria for using the tactical team and as mentioned in opinion #1 above, this decision was appropriate and consistent with contemporary practice in tactical policing today.

2. Was the screening tool used to determine whether or not SWAT is deployed consistent with “best practices” regarding how to evaluate whether or not to use SWAT?

It is my opinion that the SWAT Threat Assessment matrix used by the Framingham Police Department is consistent with and representative of contemporary police practice, as it relates to establishing an objective process for evaluating the appropriateness of using the SWAT team.

Considerations and basis for this opinion-The Framingham Police Department uses a written SWAT Threat Assessment Matrix, which according to SWAT command was designed and intended to provide objective criteria for assessing whether the use of the team would be appropriate. The matrix is broken down into four primary areas;

- suspect(s) assessment
- offense assessment
- weapons assessment
- site assessment

Each area is then broken down into sub-topics, which are assessed and weighted on a numerical basis. The total number of points are then used to provide guidance concerning whether the situation should be classified as optional SWAT use (1-16 points), SWAT command consultation (17-24 points), or mandatory SWAT activation. The Stamps file does not contain a completed SWAT Threat Assessment Matrix. SWAT command acknowledged that a matrix was not written out and completed in this case, but instead used as a mental “check off” when consulted by the narcotics investigators to determine whether SWAT use was appropriate-and in consideration of the circumstances involved command correctly determined that it was. The internal affairs report by Lt. Hill states that:

“using the above assessment, when D/C Davis learned that Dwayne Barrett was known to possess firearms, that factor alone called for a mandatory SWAT activation.”

In contrast, my understanding of the matrix is that mandatory SWAT activation only occurs when the weapon involved is believed to be “fully automatic”, which in this

case it was not (handgun). I completed the matrix conservatively using the information provided, and arrived at a total point count of 21. Based on the matrix, 21 points suggests the operation falls under the heading of "SWAT command consultation". SWAT command was consulted in this case, and the appropriate decision concerning the use of SWAT was made as a result. It is important to note that there is some debate in tactical police circles concerning whether:

- A. A matrix should be used at all, as opposed to the decision being made based only on what is reasonable considering the totality of circumstances presented.
- B. The matrix should have a defined numerical component that mandates SWAT not being used.
- C. The matrix should allow SWAT to be a potential option in practically any situation-as the Framingham Matrix does (where one point is sufficient for SWAT to be "optional")-and team use is decided based on what is reasonable considering the totality of circumstances presented, and the assessment of SWAT command.

The primary reason documents of this type have been created is to provide an objective basis for determining when SWAT should be used, and equally important in the minds of some, when SWAT should not. The material reviewed in the immediate case indicates that the Framingham Threat Assessment matrix and SWAT command response to it is doing just that. I examined the SWAT warrants history chart for the five years prior to the incident at 26 Fountain Street, and learned that the Framingham SWAT Team served one search warrant in 2006, three in 2007, five in 2008, one in 2009, and four in 2010. The "reason for SWAT" notes provided in each reflects the agency focus on elevated risk/weapons, and compliance with the letter and spirit of the SWAT Matrix. In addition, the minimal number of warrants served by SWAT in the five years (14) prior to the immediate case indicates that the Framingham Police Department is far more restrictive in its overall philosophy on authorizing the use of SWAT than most agencies today. This infrequent use should not be an indication of whether Framingham needs a SWAT team. It is an indication of how focused SWAT command is on using the team only when believed to be truly needed-which should be commended as it is a reflective of a level of caution and restraint that I rarely see in agencies today.

The SWAT command element created the matrix for the Framingham Police Department, has intimate knowledge of what it contains, and effectively used that knowledge to make the correct deployment decision in this case. Likewise, it is my opinion that the matrix should have been physically completed and made a part of the agency file.

3. Are the members of the Framingham Police Department SWAT team sufficiently trained for their SWAT mission?

It is my opinion that the Framingham Police Department SWAT Team is sufficiently trained for the SWAT mission they were tasked with in the immediate case-the service of an elevated risk search warrant.

Consideration and basis for this opinion-A review of the training records reveals that SWAT members receive a 40 hour foundational training course upon joining the team, which in Officer Duncan's case was provided by Los Angeles Police SWAT team leader Mike Odle in August, 2008. Mr. Odle is recognized as one of the most premier and sought after tactical trainers in America, and the 40 hour course he offered to Framingham SWAT (Barricaded Gunmen and High Risk Warrant Service) would have provided in depth information specific to resolving situations such as the warrant at 26 Fountain Street, and would have exceeded the level of training in this area most part time teams receive. In addition, each team member by policy must attend eight hours of in service SWAT training per month, and the records indicate that a variety of relevant topics were covered during the years preceding the search warrant in question. In addition, the records indicate that team members are also committing four additional hours to firearms training, for a total of 12 hours of in service SWAT related training per month.

In order to answer the more general question concerning whether the Framingham SWAT team is sufficiently trained for "their" SWAT mission, I would have to conduct an in depth team assessment beginning with clearly defining what their "SWAT mission" is. I would then compare that information to the specific time and course work committed to foundational skill achievement and maintenance, at the command, supervisory, and line operator levels. The records reviewed did not provide information concerning the training (foundational and in service) committed to those assuming the command and supervisory roles. The 12 hours per month committed to training is less than the 16 hours most part time teams attempt to maintain, but this may be adequate based on the tasks higher authority expects the line personnel to address.

4. Was Officer Duncan adequately trained and supervised?

It is my opinion that Officer Duncan was adequately trained and supervised as it relates generally to "basic SWAT", and specifically to the technical aspects of serving an elevated risk search warrant.

Considerations and basis for this opinion-As outlined in opinion three above, I believe that Officer Duncan received an adequate level of foundational and in service training to serve an elevated risk search warrant. In addition, my review of the file as it relates to the supervisory effort put forth during the pre-operational planning, briefing, operator assignments, and warrant service itself were consistent with

Based on the material reviewed it appears clear that Officer Duncan did not intentionally fire his weapon, and that the shooting was not the result of an intentional failure to comply with agency policy. Lt. Hill makes reference to the policy on "weapons and firearms" in his report, and then adds the technical description of Duncan's rifle and the magazines/ammunition involved. The policy under section 6 (a) requires officers to "handle all weapons in accordance to their training", and under (d), "keep their finger outside the trigger guard until ready to engage and fire on a target". The policy does not address the two issues that directly contributed to the unintended discharge by Officer Duncan;

- Threat definition and assessment
- Status of the safety/selector lever in response to #1

The agency lead M4 rifle instructor told me that officers are trained to keep the rifle safety/selector on safe until they perceive a "threat", and Lt. Hill noted in his internal affairs report that:

"Room clearing training has consisted of teaching officers to have the safety in the off mode (semi auto) when they are the first to enter a room and when they perceive a possible threat. Other officers and I were instructed in this manner during refresher training with the M-4 on 05/18/11"

As noted above this issue is not addressed in the weapons policy, so training would have provided the only guidance, direction, and agency influence concerning threat assessment and then in response, safety/selector manipulation at 26 Fountain Street. The training as described empowers the individual officer to decide when a threat is perceived or possible, and correspondingly decide when to remove the weapon from safe. The inherent problem with this is absent specific training on how a threat is defined and differentiated between perceived and possible, officers will self define and differentiate in their own unique and diverse ways. Correspondingly, they will vary in their decision when to go or remain "off" safe-and such variance in my opinion is problematic. Lt. Hill noted in his IA report that:

"Duncan articulated valid reasons for him to consider Stamps to be a potential threat"

Officer Duncan specifically addresses this issue in his statement, beginning on page 36 line 21, and ending on page 40 line 20:

"As I step in onto the threshold, I could see that it's dark. There seems to be obstacles in the hallway, disheveled, appeared disheveled to me. I see a man laying on his stomach somewhere in the hallway, probably, if I were to guess, a couple of feet passed the threshold, maybe two, three feet passed the threshold. I-- that's trying to recollect distance in darkness. So, as I-- now, the other two SWAT operators are gone. I look down. I see the individual laying

there. At that time, his-- he's laying on his stomach. His hands are, I believe, above his-- I believe his elbows were resting on the floor. His hands and fingers were open, and they were not on his head. They were hovering by his head. So I see-- I see that. As I-- as I approach him at the threshold, I recall his-- I recall his head moving up towards me and his hands moving like in a motion of, you know, who's this, what's coming in here. So I see the hands move and the head go up, not a great distance, just enough where my attention automatically went to his hands and his head. So I see the movement. So, at that time, I see the movement. I-- I have my long rifle in the low ready. I point it in his direction. At this time, I know-- I could-- I can hear-- I can still hearing yelling coming from that room down there. So I'm assuming, because I hear that yelling, that they have contact with something at that end of the room, out of my sight, in another room at the end of that hallway. He looks up to some degree. The hands move. My attention's focused on him. Long rifle pointed at him at that time, basically, because I didn't-- I don't know, at that point, you know, what's around him. The movement automatically draws my contact. So I have him. I know now-- I'm in this position. I know now the other SWAT operators move quickly. They went in for the other threat. I'm looking at the other room. It's disheveled in the area that he's in. I know that those SWAT operators had not checked him for any weapons. I know that there was no check of the area for any weapons, other than maybe a quick one with their eyes. And whether they saw something or—I don't know. So I make a decision at that point. My options are focus on him like this and say, "Don't move. Don't move." But what happens if there's a gun or something hidden anywhere and he just reaches quick? What happens? Well, I'm still in a position where I got to make a decision. Do I fire? Do I not fire? And in my mind, as quickly as it was going, I made the decision, I'm going to take that out of this equation. I decided I'm going to go on the side of him, get his hands behind his back; not handcuff him, but just tighten up on his hands and kneel down on him so that I know he can't reach for anything at all, period. It takes-- in the back of my mind, it takes any threat that may be someplace I can't see, someplace I can't see, out of the equation, as far as any firearms or weapons. So, at that point, he's on the ground. I don't recall if he's-- I don't recall the way that he's laying; if he was directly straight, parallel with the wall, or if he was cockeyed. I can't remember. It seems to me that he was-- he may have been laying at an angle, where his head was towards me, but his body may have been coming towards the right side of the hallway. I-- it was dark. At that time, I come around the right side of him. I take a couple of steps and I come around the right side of the-- of the-- of the man on the ground, on the floor. For some reason, I don't know if-- I think I was somewhere around his shoulders, or just passed his shoulders, I don't know if I stepped on something with my right foot, or whatnot, but, for some reason, I had to step backwards with my left foot, or not backwards, but to my left, which is essentially the spot-- the area I had come from. So I step with my right. I started to make that motion and, all of a sudden, I felt, for some reason, I had

to step left. So, as I stepped to my left, I just-- I lose my-- for some-- some way, I lose my balance. I start to fall over. I'm-- I'm going backwards. I remember it was very quickly, but I start going backwards."

Officer Duncan describes a tense and uncertain situation, but one that is encountered on practically every search warrant in America today. A subject is located, grounded, hands are visible and raised, he appears submissive, he has not yet been searched, handcuffed, or physically controlled, and there are a number of "unknowns" as it relates to potential danger. What should a reasonable, prudent, and properly trained officer do in this circumstance? Based on my knowledge, training, and experience, I suggest that one of the following courses of action would most likely be observed:

1. The officer holds position, advises the subject "police-search warrant-do not move", weapon on or off safe (depending on agency guidance, direction, policy/practice, and training), weapon pointed off the subject at low ready, and then he/she calls for cover/contact backup. If other team members are busy, verbal directions to the subject are repeated, and the officer holds his/her position until someone is available to cover for handcuffing and search.
2. The officer holds position, advises the subject "police-search warrant-do not move", weapon on or moved to safe (depending on agency guidance, direction, policy/practice, and training) and pointed off the subject at low ready. The officer repeats the verbal direction, advises the subject to slowly place their hands behind their back. Upon compliance the officer moves to a position of control, secures the subject in handcuffs, and then searches.

In the immediate case Officer Duncan explained the reasons why he felt compelled to act, and act in the manner that he did. Regretfully, when he made the decision to go "hands on" with the subject and began moving in that direction, his training did not result in him first placing the weapon on safe. Upon reacting to his loss of balance and attempting to counter, Duncan unconsciously pulled his rifles trigger which resulted in the death of Mr. Stamps.

In overly simplistic terms, the rifle safety is by design the most important aspect of controlling the potential for unintended discharge. In recognition of this and the potentially catastrophic consequences of such a discharge, it is my opinion that the decision to "go off/remain off safe" should generally be consistent from officer to officer, not based on officer discretion, and in response to clearly defined and specific direction from agency higher authority. This position must be communicated through training, with learning validated by test and practical exercise. Some in police training circles will strongly disagree with my position, and assert that trigger finger control is far more important than the position of the safety. This opinion was famously illustrated in the movie Blackhawk Down, in a scene at the chow hall where Captain Steele notices Delta Force operator "Hoot" with his rifle safety in the off (fire) position. Steele challenges "Hoot" and says, "hey soldier, your weapon should be on safety at all times". "Hoot" smiles, wiggles his trigger finger and says, "this is my

safety sir". The inference is clear; "my finger, which I control, is the safety and determining factor on when this gun will go off". I agree that trigger finger control is a critically important aspect of weapon safety-as is appropriately reflected in the agency weapons policy under 6(d)-but only when the officer has conscious control of the trigger finger. A search of the related literature reveals that there have been numerous cases in which individual control has been lost. Examples include when grasping with the non-gun hand resulting in a sympathetic squeeze with the gun hand, and in response to a sudden loss of balance. Officer Duncan is quoted on page 55 line 12 of his statement, in reference to his rifles discharge as he fell:

"I just know that it discharged. I don't know consciously that my finger was in there. I just know that the weapon discharged."

In addition, there are circumstances that can result in the trigger being exposed to pressure independent of the officers' finger, such as entanglement with equipment on the raid vest or a suspect grabbing the weapon during a struggle. In any case, the mechanical safety is what stands between good intentions and a potentially deadly outcome-but it can only do so when engaged. In the immediate case Officer Duncan explained his removal of the rifle from safe beginning on page 28 lines 12-17 of his interview:

"So, once I throw the ram down in that room, I reach over to my left side. I pull out my long rifle into the low ready, flick it on to semi-automatic, and I start scanning the room to make sure there's no people in there or anything that's threatening towards myself and anybody else coming in."

Officer Duncan removed his rifle from safe prior to identifying "anything threatening", and prior to interacting with Mr. Stamps he says an additional three times that he didn't see any threats as he moved through the house (page 28-9 line 25-1, page 29 lines 9-10, page 3 line 15). Upon interacting with Mr. Stamps Duncan says he was to planning to "whack (place) my gun on safe" (page 49 line 15) before laying hands on him. The key consideration here is that Officer Duncan removed his weapon from safe moments after entering 26 Fountain Street-in the absence of a specifically identified threat-and he left it in that status until discharging the gun. This would appear to be outside of training as described by the primary rifle instructor, but consistent with training received as described by Lt. Hill, i.e., going "off safe" when a threat is perceived vs. when a threat is possible. Officer Duncan appears to have removed his weapon from safe due to the unsecured premises representing a potential threat, which would be within his discretion as outlined in agency training, and consistent with many contemporary agencies in tactical policing today.

In March of this year I conducted a survey of 703 police officers/agencies, specifically asking; How does your agency policy/training address long gun safety status during building clearing?

The options and response breakdown are outlined as follows:

1. On safe until firing-277 (39.4%)
2. Off safe when clearing-59 (8.4%)
3. Off safe when clearing, then on safe when performing a task that requires removing a hand(s) from the weapon-260 (37%)
4. Officer preference-107 (15.2%)

Question one was specifically worded to avoid ambiguity concerning the definition of a threat-which in my opinion is an issue in the immediate case-as contemporary officers generally agree that in order to fire you must be facing a clearly defined and immediate deadly circumstance. This survey reveals that there is no clear consensus on the issue of rifle safety status during building clearing, as evidenced by the two primary positions being at opposite ends of the spectrum-one basically advocating on safe, the other off. This topic has been the subject of "point-counterpoint" articles, and remains a focus much debate, discussion, and heated argument. In recognition of this and the potential consequences involved, it is critically important that agency higher authority consider all of the relevant issues, and make a firm decision that is then clearly articulated to line personnel, and addressed in training, policy, and practice.

Summary of opinion #5 and considerations/basis: It is my opinion and belief that the training Officer Duncan received resulted in him removing his weapon from "safe" in the absence of a defined threat. His weapon remained in that condition until he interacted with Mr. Stamps, at which point Officer Duncan moved to take physical control, lost his balance, and unconsciously pulled the trigger resulting in the discharge that killed Mr. Stamps. It is also my opinion and belief that a significant percentage of contemporary police agencies in America today provide the same or similar training, would have approved going and remaining "off safe" in the same or similar fashion, and then interacted with Mr. Stamps in the same or similar way.

6. Are the members of the Framingham Police Department SWAT team sufficiently equipped for their SWAT mission?

Based on the material reviewed I found nothing to suggest that the Framingham Police SWAT Team is lacking in necessary equipment. Likewise, my focus was on the immediate case, and an accurate determination of equipment sufficiency could only be made following a formal, in-depth operational assessment.

7. Was lack of equipment a cause or contributing cause to the death of Mr. Stamps?

Please see my response to question 6.

8. Did the SWAT team engage in sufficient pre-raid planning for the operation in question?

It is my opinion and belief that the overall pre-raid and contingency planning process was sufficient, and addressed relevant issues in a manner consistent with contemporary police practice and training.

9. Was lack of planning a cause or contributing cause to the death of Mr. Stamps?

It is my opinion and belief that the overall operational plan was sound, and that it played no role in the cause of Mr. Stamps death. Some might question the service of a search warrant when persons other than the known suspects are believed to be present. The practical reality is "others" are present in almost every police/community interaction in general, and in particular adults who reside in an active drug house are legitimate persons of interest in the criminal enterprise-until an investigation (search warrant) suggests otherwise. As such, serving this warrant in the circumstances presented was consistent with contemporary police practice.

10. Was the SWAT team following sound law enforcement / SWAT practices?

It is my opinion and belief that the operational plan was reflective of sound law enforcement/SWAT practice, which I define as being within the standards of contemporary police practice, thinking, training, and consistent with the manner in which reasonable teams would have addressed the task at hand. As outlined previously above in depth, it is also my opinion and belief that the issues related to threat assessment and safety-selector manipulation should have been clearly defined, described, and then formalized via training that included validated learning.

11. Based on the information provided, can you make any recommendations regarding how to improve and enhance the Department's SWAT capabilities to minimize the likelihood of future similar tragedies?

My response to this question is made with benefit of 20-20 hindsight not only in this case, but numerous similar ones that have occurred across the United States. I recommend that the Framingham Police Department formalize the process of threat assessment, and then provide clear and direct guidance concerning when a rifle will be removed from safe-with emphasis placed on remaining "safe" until the decision to fire has been made. In addition, I suggest that this process include specific direction concerning muzzle control, and the provision of clear and direct guidance on when a firearm can be pointed at a person-with special consideration given to the use of force implications and inherent dangers involved. Some will suggest that removing officer discretion from things such as when they can go "off safe" or when they can point a gun will unreasonably place them in danger. I respectfully disagree. The same arguments were put forth in the late 1970's, when progressive firearms trainers advocated abandoning the long held tradition of "un-snapping" the holster when

facing a potential “threat”. Officers historically “un-snapped” their holsters because they believed if they waited until the gun was needed, they would never “un-snap” and get it out in time. What occurred far more often was the officers “un-snapped” in the absence of a legitimate threat, and ended up losing their guns in the struggle that followed due to it not being secured by the strap in its holster. In the end suspects shot officers far more often than officers with snapped holsters failed to get their guns out in time. Progressive trainers began recognizing that risks were actually being created by the officers’ misguided but well intentioned efforts at risk reduction. Officers were then taught effectively to stay “snapped” until drawing their gun, and guns lost to suspects and the related negative outcomes have dropped dramatically ever since. I believe a similar analogy can be made today when considering threat assessment, rifle safety status, and the gun pointing issues outlined above. In depth studies have been conducted that clearly indicate properly trained officers can assess a threat, remove the rifle from safe, raise the muzzle on target, and deliver an accurate shot in less than one second. It is important to note that similar tests have revealed that had the same officer been on target and off safe when the justification to shoot was presented, the lag/reaction time inherent in the perception of the deadly threat, mental formulation of the plan to pull the trigger, and then the trigger pull sequence itself generally requires approximately the same amount of time.

Conclusion and overall summary

Based on the information considered, it is my overall opinion and belief that the Framingham Police Department SWAT Team is generally well trained for a part time team, and led by caring and competent managers who demonstrate a remarkable level of restraint before deploying the team, as well as high degree of professionalism and pre-event competency when planning a deployment. The Framingham SWAT Team training and operational process related to threat assessment and rifle safety status is consistent with countless teams nationwide, who serve hundreds of thousands of search warrants each year-with a statistical probability of a negative outcome such as this occurring at just above zero. Likewise, it is my opinion and belief that we have an obligation to prevent every single negative outcome that we reasonably can-and that is my hope for the future following this case. If officers can be trained to take full advantage of the safety mechanisms built into their equipment, and then reasonably assess threats and react accordingly, I believe that necessary law enforcement and crime suppression operations can be conducted in the safest manner possible for persons on both sides of the badge.

Attachment "A"

- Interviews of the involved persons
- Photographs of the scene
- SWAT team training records
- 911 call record
- Crime scene report
- Raid plan and related records
- Search warrant and related records
- SWAT operational history
- Prosecutor report/records
- IA report

Attachment "B"

Stephen Bradford Ijames began his full time police career in 1979. He retired in 2007 as an assistant chief of police with the Springfield, Missouri Police Department, and is at present a commissioned deputy with the Greene County, Missouri Sheriff's Office. Ijames has a bachelor's degree in Criminal Justice, a master's degree in Public Administration, and is a graduate of the 186th FBI National Academy.

During his law enforcement tenure Ijames served in, supervised, and commanded a variety of assignments including uniformed patrol, criminal investigations, undercover narcotics, and Special Weapons and Tactics (SWAT). Ijames was the founder, first team leader and then commander of his agencies full time tactical team. In that role he participated in, supervised, or commanded the service of approximately 3,000 search warrants, and the resolution of over 150 barricaded subject incidents and seven hostage taking scenarios. He currently provides tactical training and operational command consultation for the Greene County Sheriff's SWAT Team.

Ijames is an original member of the National Tactical Officers Association (NTOA) board of directors, created their less lethal force instructor trainer program, and was their first less lethal force section chair. Ijames also created the less lethal force instructor trainer program for the International Association of Chiefs of Police (IACP), and is a member of their National Policy Center board of directors. Ijames is the author of the IACP model policies on TASER, less lethal force, chemical agents, noise flash diversionary devices, hostage rescue, barricaded subjects, and their Concept and Issues Papers on SWAT and police rifles. He also is a lead instructor for the IACP and California Association of Tactical Officers (CATO) SWAT Command and Supervision Training Programs.

Ijames has provided use of force training on behalf of the IACP and the U.S. Department of State across the United States, Canada, and in 33 foreign countries-including such places as Tanzania, Bosnia, Somalia, Haiti, El Salvador, Yemen, Pakistan, and East Timor. Ijames has served on a number of resistance control inquiry panels, and has reviewed approximately 2,000 police use of force cases for agencies across the United States, Canada, and overseas.



Commonwealth of Massachusetts
Department of State Police
Crime Laboratory
Main Desk Sudbury: (508) 358-3110
Evidence Unit Phone: (508) 358-3155
Evidence Unit Fax: (508) 358-3222

2011-286
Place LIMS Barcode Label here or write assigned number below.

Lab Case Number 11-0191

Scene Chemist	** SHADED AREAS FOR LABORATORY USE ONLY **		
	CONTAINER: ITEMS	PACKAGE TYPE	INCOMING LOCATION
SUBMISSION NUMBER:	A:		
	B:		
Police Report: Yes No (circle)	C:		
	D:		

Submitting agency: <u>Middlesex</u>	Type of Case: <u>Homicide - GSW</u>
Address: <u>20 Franklin St 10th fl</u>	Incident town: <u>Framingham</u>
Agency's case or incident number: <u>2011-110-0015</u>	Date of incident: <u>1-5-2011</u>
Report to (name):	Special requests/comments:
Phone #:	

ADA:		ADA Phone #:		County:			
Victim's Name	DOB	Sex	Race	Suspect's Name(s)	DOB	Sex	Race
<u>FURIE, James SR.</u>	<u>3-2-42</u>	<u>M</u>					

RECORD OF EVIDENCE SUBMITTED: List item description and owner's name (or origin) of <u>each</u> item separately.	
-01	<u>Black T-Shirt</u>
-02	<u>Black Long Sleeve Shirt</u>
-03	<u>Blood / Purple top white</u>
-04	<u>Hood Hair</u>
-05	<u>Pubic Hair</u>
-06	
-07	
-08	
-09	
-10	

The items reported to be in the packages were inventoried and documented above by a representative from the submitting agency. At the time of analysis, the assigned chemist will unseal the package and verify the inventory. In the event of a discrepancy between the actual inventory and that reported on this form, reconciliation shall be conducted in accordance with Section 8 of the Evidence Handling and Submission Manual.

I, 3-23-11, acknowledge receipt of 1 packages from Rife Scott H
Evidence Technician (Initials & signature) Printed or typed rank & name of Delivering Officer
3-23-11 9:30 MSP
Date Time Police Department / Agency (of Delivering Officer) Signature of Delivering Officer

IF THE STATUS OF THIS CASE CHANGES, PLEASE NOTIFY THE LABORATORY IMMEDIATELY.
PLEASE RETAIN THIS RECEIPT FOR YOUR RECORDS.





The Commonwealth of
Massachusetts
Department of State Police

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

Firearms Identification Section

124 Acton Street

Maynard, Massachusetts 01754

DATE: 2-7-11

FAX COVER SHEET

TO: Kyle

781-897 8862

FAX: _____

FROM: Tpr Steve Walsh

FAX: _____

NOTE: Report

TOTAL NUMBER OF PAGES 3 INCLUDING THIS COVER SHEET

THE INFORMATION CONTAINED IN THIS FAX IS CONFIDENTIAL AND ANY ATTACHMENT IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISCLOSURE, DISSEMINATION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US AT (508) 358-3180.

Crime Scene Sign-In

Date: 1/5/11

Case #: 11000 91

Incident: 26 fountain So

[illegible]



**Town of Framingham
Police Department**

A. Policy on Use of Force #100-4

Issue date: 11/06/06

Type of policy: New ()

Amendment (X)

Re-Issue (x)

Effective date: 10/16/08

Level: Public Safety ()

Police Division (X)

Town Wide ()

Policy Statement

Police officers are continually confronted with situations requiring or resulting in the use of various degrees of force to affect a lawful arrest, ensure public safety, or to protect persons from harm. The degree of force used, must be objectively reasonable and necessary, depending upon the facts and circumstances known to the officer at the time of the incident. The degree of force an officer is required, and therefore permitted, to use is dependent upon the amount of resistance or threat to safety the situation produces. All force used shall be held to the reasonable officer's standard as created in *Graham v. Connor*.

The objective of the use of force is to maintain and/or establish control over the situation. Control is achieved when a person complies with the officer's directions and/or the suspect is restrained or apprehended and no longer presents a threat to the officer or another.

Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no written directive can offer definitive answers to every situation in which the use of force might be appropriate. Rather this directive will

set certain guidelines and provide an officer with a basis on which to utilize his or her judgment in making reasonable and prudent decisions.

References

None

Special Terms

Deadly Force. Deadly Force as used in this policy is defined as that degree of force which a reasonable and prudent person would consider likely to cause death or serious physical injury.

Less Lethal Force. Force which is not intended to cause death or serious physical injury however has the potential to.

Non-Deadly Force. Any use of force other than that which is considered deadly or less-lethal. This includes any physical effort used to control or restrain another, or to overcome the resistance of another.

Serious Bodily Injury. Serious bodily injury is defined as any bodily injury which creates a substantial risk of death; causes serious, permanent disfigurement; or results in extended loss or impairment of the function of any bodily member or organ.

Circumstances. The officer's perspective of the severity of any crime, the existence of an immediate safety threat to the officer or others, and the degree of compliance / non-compliance from the subject.

Subject Action (s). The subject action (s) as perceived by the reasonable officer.

Officer Response (s). The "balanced" response (s) appropriate for the reasonable officer's selection from the Use of Force Model's response categories, in order to maintain or gain subject compliance and control.

I. Policy

Members of this Department shall only use that amount of force that is objectively reasonable and necessary, based on the facts and circumstances known to the officer at the time force is used, to affect lawful objectives and effectively bring an incident under control, or to protect his/her life and/or the lives of others. The amount and degree of force which may be employed will be determined by the facts and surrounding circumstances, and must be a "balanced" response appropriate for the reasonable officer's selection from the Use of Force

Model's response categories, in order to gain subject compliance and control.

The amount and degree of force which may be employed will be determined by the surrounding circumstances including, but not limited to:

- The nature of the offense/ perceived circumstances;
- The behavior of the subject against whom force is to be used/ perceived subject action(s);
- Actions by third parties who may be present;
- Physical odds against the officer; and
- The feasibility or availability of alternative actions.
- The facts known to the officer at the time of the incident;
- The need to make a decision in a tense, rapidly evolving situation.

II. USE OF FORCE MODEL

The Use of Force Model is described below displays the least to the most severe measures. Officers should employ a "balanced" response (s) appropriate for the reasonable officer's selection from the Use of Force Model's identified response categories, in order to maintain or gain subject compliance and control. Conversely, officers must never overlook the possibility of force de-escalation when possible.

Municipal Police Training Committee- Use of Force Model

The Use of Force Model was developed in 1991 by Dr. Franklin Graves, Federal Law Enforcement Training Center and Professor Gregory J. Connor, University of Illinois Police Training Institute. TM 1998, G. Connor. All rights reserved.

LEVEL 1

Subject Action (s).	Compliant. Represents the vast majority of officer / citizen confrontations in the form of cooperation and control. Such cooperation is generally established and maintained via, verbalization skills, etc.
Threat Perception.	Strategic. The broad "mind set" of the officer. The officer must maintain this functional foundation, centered upon strategies designed to enhance the status of safety.
Officer Response	Cooperative Controls Cooperative controls include contemporary controls developed to preserve officer safety and security, including: communication skills, restraint applications, etc. Remember the use of verbal persuasion can, in some cases, prevent and or minimize the need for physical force.

LEVEL 2

Subject Action (s).	Resistant (Passive). The preliminary level of citizen non-compliance. Here, the citizen, although non-compliant, offers no physical or mechanical energy enhancement toward the resistant effort.
Threat Perception.	Tactical. The officer perceives an increase in threat potential within the confrontational environment and tactical procedures are designated and deployed.
Officer Response	Contact Controls. Contact Controls include resistant countermeasures designed to guide or direct the non-compliant subject. These "hands on" tactics would include the elbow / wrist grasp, escort position, etc.

LEVEL 3

Subject Action (s).	Resistant (Active). The subject's non-compliance is increased in scope and / or intensity. The subject's non-compliance now includes energy enhanced physical or mechanical defiance.
Threat Perception.	Volatile The officer perceives an activated level of alertness and threat potential. Here the officer is confronted with the presence or potential of critical dynamics, including threat intensity and severity within the enforcement encounter
Officer Response	Compliance Techniques. Compliance techniques include resistant countermeasures designed to counter the subject's enhanced degree of resistance. These tactics could include the wrist locks, chemical agents (to include PepperBall) , distraction techniques, takedowns etc. The ASP expandable baton may also be used as a non-impact/restraining come-along tool. The use of the TASER in Drive Stun mode is also categorized as a compliance technique.

LEVEL 4

Subject Action (s).	Assaultive (Bodily Harm). The officer's attempt to gain lawful compliance has culminated in a perceived or actual attack on the officer or others. The officer makes the reasonable assessment that such actions by the subject would <u>not</u> result in the officer's or other's death or serious bodily harm.
Threat Perception.	Harmful . An accelerated perception of threat directed upon the officer or others. In this regard the officer must deploy initial defensive force in the effort toward eventual subject compliance and control.
Officer Response	Defensive Tactics. Defensive tactics includes assaultive countermeasures designed to cease the subject's non-lethal assault on the officer or others, regain control, and assure continued compliance. These tactics could include baton strikes, kicking techniques, striking techniques, Less Lethal Impact Weapons (beanbag), and the Taser (when probes are deployed).

LEVEL 5

<i>Subject Action (s).</i>	<i>Assaultive (Serious Bodily Harm / Death).</i> The officer's attempt to gain lawful compliance has culminated in the perception of an attack or the potential for such an attack on the officer or others. The officer makes the reasonable assessment that such actions by the subject <u>could</u> result in serious bodily harm or death to the officer or others.
<i>Threat Perception.</i>	<i>Lethal.</i> Although this potentially lethal degree of threat is most infrequent, it remains most crucial for the continuation of officer safety and security.
<i>Officer Response</i>	<i>Deadly Force.</i> Deadly force includes assaultive countermeasures designed to cease an assault which is lethal or could cause great bodily harm on the officer or others. These tactics could include the use of a firearm, lethal baton strikes, etc.(See Deadly Force Section Below)

III. PROCEDURES: USE OF NON-DEADLY FORCE

1. Only issued or approved equipment will be carried on duty and used when applying any level of force. In the event an officer is faced with a situation where there is a substantial risk of physical injury or death to themselves or another, and access to approved tools and weapons is not available or tactically feasible, he or she may resort to using a tool of immediate opportunity.
2. Use of restraining devices is mandatory on all prisoners, unless in the officer's judgment unusual circumstances exist which make the use of restraining devices impossible or unnecessary (e.g. prisoner is handicapped, etc.). The mere **placing of handcuffs** on a prisoner will **not** be construed to be a use of physical force.
3. After any level of force is used, the officer will evaluate the need for medical attention or treatment for that person upon whom the force was used and arrange for such treatment when:
 - a. That person has a visible injury; or,
 - b. In the case of use of pepper spray, immediately after spraying a suspect, officers shall be alert to any indications that the individual needs medical care. This includes , but not limited to, breathing difficulties, gagging, profuse sweating and loss of consciousness; or
 - c. That person complains of injury or discomfort and requests medical attention.

NOTE: Any person deemed in need of immediate medical attention shall be transported in accordance with departmental policy on **Transporting Prisoners** to the nearest available medical facility or hospital. All medical treatment received shall be noted in the officer's report.

4. The officer shall promptly notify his immediate supervisor of the incident.
5. The officer shall attempt to locate and identify all witnesses, documenting their statements.

V. DEADLY FORCE: GENERAL CONSIDERATIONS AND GUIDELINES

The purpose of the following section is to set forth guidelines for members of this Department in making decisions regarding the use of Deadly Force. The guidelines have been developed with serious consideration for the safety of both the police officers and the public, and with the knowledge that police officers are often called upon to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving. The value of human life is immeasurable in our society. This Department places its highest value on the life and safety of its officers and the public. The department's policies and procedures are designed to ensure that this value guides police officers in their use of deadly force.

VI. PROCEDURES FOR THE USE OF DEADLY FORCE

A member of this Department is authorized to use deadly force to:

1. Protect himself or others from what he reasonably believes to be an immediate threat of death or serious physical injury; or
2. An officer may use deadly force to prevent the escape and effect the arrest of a person only when:
 - a. The arrest is for a felony; **and**
 - b. The crime for which the arrest is made involves the use or attempted use, or threatened use of deadly force; **and**
 - c. The officer reasonably believes that the force employed creates no substantial risk of injury to innocent persons; **and**
 - d. there is a substantial risk that the person to be arrested will cause death or serious physical injury if his apprehension is delayed.
 - e. Where feasible, and where such action does not expose the officers to risk, officers shall identify themselves as police officers and give some warning before using deadly force.

VII. FIREARMS PROCEDURES

In addition to the above-mentioned situations, a police officer may also discharge a weapon under the following circumstances:

1. For authorized demonstrations, training, or competition, with weapons authorized by the Department.
2. To destroy a dangerous animal or an animal so badly injured that it should be destroyed to prevent further suffering. Children should not be present

3. Officers who find it necessary to discharge firearms shall exercise due care for the safety of persons and property in the area and shall fire only when reasonably certain that there is no substantial risk to bystanders.
4. Because of the danger of unintentional death or injury, warning shots are prohibited.
5. Firearms shall not be used as signaling devices or to summon assistance, except in extreme circumstances where there is no other means to communicate
6. Firing to **disable** a vehicle is **prohibited**.
7. Officers **shall not** discharge a firearm **from within** a moving vehicle.
8. Officers shall move out of the path of any oncoming vehicle (unless there is no ability to retreat) instead of discharging a firearm at it or any of its occupants. Moving to cover, repositioning and or waiting for additional responding units to arrive and maintain a tactically superior police advantage maximizes officer safety and minimizes the necessity for using deadly force. Firearms **shall not** be **fired at** a moving or fleeing vehicle unless;
 - a. the officer or another person is currently being threatened with deadly force by means other than solely the moving vehicle or
 - b. there is no reasonable ability to retreat.

NOTE: The prohibitions in section VII exists for the following reasons: Officers should be aware of the potential inability of a bullet to penetrate the metal or glass surfaces of an automobile and the likelihood of ricocheting bullets. If the bullet(s) disable the operator, the vehicle may crash and cause injury to officers or other innocent persons. **Officers must realize that it is highly unlikely that a bullet will stop a moving vehicle.**

9. Firearms shall not be utilized when there is substantial risk to the safety of other persons, including risks associated with vehicle accidents.
10. Care shall be taken to ensure the safety of the general public in the vicinity.
11. An officer shall avoid the unnecessary display of firearms. However, in responding to any potentially dangerous situation (e.g., searching

a building pursuant to a burglar alarm or approaching a business establishment on a report of a robbery in progress etc.) an officer may carry his/her firearm in a position that will facilitate its speedy, effective, and safe use.

VIII. USE OF FORCE REPORTING AND INVESTIGATION

1. Every employee who uses force (with or without a weapon) that results in injury or death, and/or who discharges a firearm (except for authorized demonstrations, training, or competition), or uses a non/less lethal weapon shall submit a report in a timely manner, subject to applicable law.
2. A separate Use Of Force Report shall be generated during the booking process (completed by the Booking Officer). The report will be filed separately by Records Personnel who will forward a copy to the Field Operations Commander for analysis.
 - If the subject is not processed during booking (i.e. bailed from hospital) or force was used during crowd control tactics, etc. a Use of Force (Ctrl +click to follow link) report will be generated manually from the FORMS folder in the "S" drive. The Use of Force report form will be completed by the officer applying the force who will submit the form along with his/her SOR report.
3. If injuries result from the use of force, every employee who witnessed the incident shall, subject to applicable law, submit a supplemental narrative to be included with the initial report,
4. Employees shall note all facts and circumstances involving any use of force and firearms/weapons discharge in the relevant incident report. This Report shall also contain:
 - a. The names and addresses of victims and witnesses;
 - b. The extent of treatment of injuries, if any;
 - c. The name of the treatment facility and physician administering treatment.
4. The **Patrol Supervisor** shall respond to the scene of an incident where an officer or other person is seriously injured. [S]he shall:
 - a. Ensure that all injured parties receive any necessary assistance, including medical treatment, and that any injuries are properly documented.

- b. If an injury or complaint of pain exists, supervisors shall obtain photographs.

NOTE: A photograph showing no injury may be as important as one which shows injury.

- c. Determine if an investigator should respond to the scene and the level of investigative services to be utilized (including photos, measurements and diagrams.)
- d. File a report on the incident with the Shift Commander.

5. The **Shift Commander** shall:

- a. Ensure photographs are taken of any injuries (or complaint of injury)
- b. Review the report(s) describing the use of force, and all other related reports;
- c. Notify the Deputy Chief-Operations.
- d. Ensure that all witnesses and injured parties have been interviewed.
- e. Assign sufficient officers to secure the scene to preserve physical evidence and request the assistance of investigators and/or crime scene technicians as appropriate.
- f. Make arrangements for counseling assistance for the officer (**see Critical Incident Stress policy**), or members of his family.
- g. Forward copies of all reports to the Deputy Chief-Operations

NOTE: In those incidents of the use of force where serious bodily injury or a death results, the District Attorney's Office will be notified forthwith.

6. The **Deputy Chief-Operations** shall be responsible for the following:

- a. Notify the Chief
- b. Ensure that a thorough investigation was conducted by a supervisor not involved with the incident and that all reports were properly prepared and submitted;
- c. Review all reports submitted;
- d. Maintain a separate file of all Use of Force incidents by officers for the purpose of conducting an annual analysis of all Use of Force for reports, recommending to the Chief further action if necessary (i.e. policy upgrades, training needs, equipment upgrades).

7. During the course of the investigation, information concerning the incident will be released to the public or news media only through the department's Public Information Officer (unless otherwise authorized by the Chief.)

IX. ADMINISTRATIVE RELIEF FROM DUTY DUE TO AN ACTION THAT RESULTS IN DEADLY FORCE

In every instance where the use of force or any action results in death or serious bodily injury to another person, the following steps shall be taken.

1. The supervisor shall impound the weapon involved immediately. In doing so, the investigating officer shall preserve the weapon in the condition in which [s]he finds it.
2. If necessary, the officer/employee involved shall be taken to Metro-West Medical Center for evaluation due to the abnormal stress placed on him/her in these circumstances.
3. The officer/employee involved will be placed on Administrative Duty Status pending administrative review. The involved officer's/employee's invocation of legal rights shall not affect the length of this status.
4. The involved officer/employee will be given the opportunity to call his/her family as soon as possible.
5. Assignment to Administrative Duty status shall be with no loss of pay or benefits.
6. Administrative duty is intended to serve two purposes:
 - a. To address the personal and emotional needs of an officer/employee involved in an action which results in injury or death; and
 - b. To assure the community that verification of all the facts surrounding such incidents are fully and professionally investigated.
8. Officers/employees on Administrative Duty shall, subject to applicable law, be reasonably available to investigators to assist, when necessary, in the investigation of the incident.
9. Whenever an officer/employee is involved in an incident that results in a serious injury or death, the officer/employee will be referred to the appropriate employee assistance program (see **Critical Incident Stress policy**).

X. POLICY TRAINING

This Use of Force policy will be issued and reviewed annually at Firearms In-Service training, whenever a new *type* of weapon is issued to them, and with any newly hired officers (during their field training orientation). The review and issuance of this policy will be documented.



**Town of Framingham
Police Department**

Policy on Officer Involved Shootings #200-16

Issue date: 03/11/08

Type of policy: New (x) Amendment ()

Effective date: 03/18/08

Level: Department (x) Division () Town Wide ()

Policy Statement

Fortunately, few officers become involved in hostile shooting situations, however all officers should have an understanding of steps that must be taken in such an event. The initial response of involved officers and the steps taken thereafter by first responders, supervisory and investigative personnel often determine whether an accurate and complete investigation can be conducted. The accuracy and professionalism of such investigations can have significant impact on involved officers. Other than in training exercises or similar agency-authorized actions, discharges of firearms by police officers, whether on or off duty, will be the subject of departmental investigation. The extent of the investigation should depend largely upon the real or potential impact of the shooting. Shootings that take place under hostile circumstances and, in particular, those in which injuries or fatalities have occurred, are situations that require more intensive investigation and involve a broader range of potential information requirements.

The seriousness of officer-involved shootings cannot be overstated. The reputation and often the career of involved officers depend upon whether a full and accurate determination can be made of the circumstances that precipitated the event and the manner in which it unfolded.

From a broader perspective, a law enforcement agency's reputation within the community and the credibility of its personnel are also largely dependent upon the degree of professionalism and impartiality that the agency can bring to such investigations. Superficial or cursory investigations of officer-involved shootings in general and particularly in instances where citizens are wounded or killed can have a devastating impact on the professional integrity and credibility of an entire law enforcement agency. It is the purpose of this policy to provide guidelines for the investigation of officer-involved shooting incidents

References

Special Terms

Policy Description

In incidents where the use of deadly force, by an employee of the Framingham Police Department, results in death, the Middlesex County District Attorney's Office will assume control of the investigation.

- The Commander of Investigative Services will coordinate with the District Attorney's Detectives and assign detectives to work with them as in any Homicide Investigation.
- The Commander of Professional Standards will coordinate with Investigative Services and the D.A.'s Office.
- The Commander of Professional Standards will conduct a parallel investigation.
- The District Attorney's Office will establish whether criminal conduct was involved.
- The Professional Standards Bureau will establish conformity with departmental policies, rules, and training.

In instances (excluding training, demonstration, or testing) where a Framingham Police Officer or Employee discharges a firearm, whether or not it results in an injury (not death) to another person, the District Attorney's Office will be notified. If the District Attorney's Office declines to assume control of the investigation, it will be investigated by the Bureau of Investigative Services.

- If the District Attorney's Office declines control, the BIS Commander will, if necessary, request the assistance of the Massachusetts State Police Ballistics Unit, Crime Scene Services, and Collision Analysis and Reconstruction Section.
- The Commander of Professional Standards will conduct a parallel investigation as outlined above.

It is not advisable to conduct in-depth investigative interviews with officers, immediately following their involvement in a shooting or use of any force that result in death. A variety of traumatic reactions caused by such incidents may interfere with an officer's ability to cope and react effectively and appropriately.

- Interviews will be conducted at a later time after the officer has had the opportunity to regain his/her composure may be more productive.
- The B.I.S. Commander and the State Police Detective Commander will coordinate with the officer and agree on an appropriate time and place to interview him/her.
- The subject officer will be encouraged to invite an attorney or union representative to be present.
- The Commander of Professional Standards will participate in the interview. This will not only give him/her the opportunity to ask the officer questions, it will also spare the subject officer the stress of multiple interviews.

I. Policy

A. It is the policy of the Framingham Police Department to:

- Investigate officer-involved shooting and deadly force incidents with the utmost thoroughness, professionalism and impartiality to determine if an officer's actions conform to the law and this agency's policy on use of force. (See Use of Force Policy # 100-4 and Firearms Policy #50-4)

II. Procedures

A. On-Scene Responsibilities

For officers involved in a hostile-shooting situation there are four general areas of concern that should be addressed after the initial confrontation has been stabilized: (1) the welfare of officers and others at the scene (2) apprehension of suspects (3) preservation of evidence and (4) the identification of witnesses. The safety and well-being of the officer(s) and any innocent bystanders is the first priority. The following actions will be undertaken in the order deemed appropriate.

1. Ensure that the threats to officer safety and the safety of others are over.
2. Secure and separate suspects.
3. Relay information on fleeing suspects to the dispatch center and other field units and work with them to establish a containment area.

4. Request a supervisor and additional back-up, emergency medical services, if necessary, and any other assistance required immediately.
5. If injured, administer emergency first aid to oneself first if possible. Then, administer basic first aid to suspects and others, as necessary, pending arrival of emergency medical assistance.
6. Decock and holster any involved handguns or secure them in place as evidence. Secure long guns in the prescribed manner or in place as evidence. Do not open, reload, remove shell casings or in any other manner tamper with involved firearms.
7. Take note of the time, survey the entire area for relevant facts, individuals who are present and who departed the scene, witnesses, potential suspects and suspect vehicles.
8. As time and capabilities permit, before supervisory and other assistance arrives:
 - a. Secure the area, establish a perimeter with crime scene tape and limit access to authorized persons necessary to investigate the shooting and assist the injured.
 - b. Protect evidence from loss, destruction or damage that is likely to occur before back-up can arrive. Ensure that evidentiary items are not moved or, if moved, note the original location and position of persons, weapons, and other relevant objects and evidence.
 - c. Record the names, addresses and phone numbers of all witnesses and other persons present at the shooting scene and request that they remain on hand in order to make a brief statement whether or not they say they saw the incident.

B. Supervisory Responsibilities at the Scene

The first supervisor to arrive at the scene of an officer-involved shooting should be designated as the officer-in-charge (OIC) until such time as he/she is relieved from this responsibility by an investigator or other appropriate senior officer. The OIC will:

1. Ensure the safety and determine the condition of the officer(s), suspect(s) and third parties. Summon emergency medical service providers if not yet summoned for officers, suspects and third parties.
2. If the officer has been shot or otherwise injured in the shooting:

- a. Ensure that an officer accompanies and remains with the officer at the hospital.
 - b. Ensure that the officer's family is notified on a priority basis and in person when possible. Ensure that they are assigned transportation to the hospital or other location where they are needed as soon as possible.
 - c. Do not release the officer's name to the media or unauthorized parties prior to the family being notified.
 - d. Assign an officer to the family for security, support, control of the press and visitors, establishment of communications and related matters.
 - e. Ensure that the clothing of officers and other injured persons is collected for potential evidentiary purposes and that related equipment of the officers is safeguarded.
3. If the officer is not injured, move him or her away from the center of activity accompanied by another officer. Ensure that all necessary steps are taken consistent with this agency's policy on Critical Incident Stress.
4. Confirm that the preliminary steps described in II-A have been adequately addressed and, if not, take appropriate action to ensure that necessary actions are taken.
5. Ensure that the immediate area is contained and detain any suspects therein.
6. Notify the Shift Commander who will make arrangements for notification of:
 - a. Chief of Police
 - b. Deputy Chief of Operations
 - c. Commander of Investigative Services
 - d. Commander of Professional Standards
 - e. District Attorney's Office
 - f. Medical Examiner's Office
 - g. Media Relations Officer
7. Establish a command post if necessary.

8. Appoint a recorder to make a chronological record of activities at the scene, to include: persons present, actions taken by police personnel and the identity of any personnel who entered the incident/crime scene, to include emergency medical and fire personnel.
9. Diagram the scene and photograph it if a camera is available.
10. Establish a media staging area as time permits unless a public information officer assumes this responsibility.
11. Begin doing the following:
 - a. Locate and secure or secure in place the officer's weapon(s) and ammunition casings. Check the weapons of all officers present for discharge.
 - b. Locate the suspect's weapon(s), ammunition and expended cartridges.
 - c. Collect information about the suspect, including name, physical description, domicile and other pertinent information.
 - d. Locate and secure as evidence any clothing that may have been removed from the suspect by emergency medical personnel or others.
 - e. Determine the original position of the officer(s) and the suspect at time of shooting.

C. Post-Shooting Trauma

1. Supervisory, investigative and other sworn and non-sworn employees shall be familiar with and follow the provisions established by this agency in its policy on dealing with Critical Incident Stress #50-2.
2. All personnel shall be familiar with the provisions of the Framingham Police Department's Critical Incident Stress Policy (#50-2) and should avail themselves of these services following officer-involved shooting incidents where appropriate.

D. Investigator's Responsibilities

Investigation of officer-involved shootings shall be the responsibility of the Framingham Police Department Bureau of Investigative Services (Detectives) or as may be alternatively designated by Chief. In the event that a death occurs, the

Middlesex County District Attorney's State Police Detective Unit will assume control of the investigation. In such cases, the FPD BIS will coordinate with the State Police Detective Unit. The BIS Commander shall be responsible for ensuring that the following tasks are adequately addressed in the order deemed necessary and appropriate.

1. Ensure that tasks itemized above in sections IIA and II-B of this policy have been appropriately and adequately completed. Take measures to ensure that any deficiencies in completing tasks are immediately remedied.
2. Receive a general briefing and walk-through by the supervisory officer regarding the circumstances surrounding the shooting.
3. Ensure that the overall scene and evidentiary items are photographed and videotaped. Videotape all persons present at the scene. Color photographs of the officer as he/she appears at the scene shall be taken, to include any injuries sustained.
4. Ensure thorough inspection of the scene and proper collection of all items and substances of evidentiary value.
5. Obtain taped statements from the suspects.
6. Ensure that notification is provided to next-of-kin of injured or deceased suspects.
7. Locate and identify witnesses and conduct initial tape-recorded interviews.
8. Tape record interviews with fire department personnel, emergency medical service providers and other first responders to the scene.
9. Conduct separate tape recorded interviews with each officer involved.
 - a. Conduct the interview in a private location away from sight and hearing of agency members and others who do not have a need and a right to the information.
 - b. Advise the officers not to discuss the incident with anyone except a personal or department attorney, union representative or departmental investigator until the conclusion of the preliminary investigation.
 - c. Be cognizant of symptoms of post-traumatic stress, to include time and space distortions, confusion, hearing and visual distortion and emotional impairment, including shock. (Defer tape-recorded interviews if these symptoms are evident.)

10. Ascertain that any weapons that were fired were secured by the patrol supervisor pursuant to Framingham Police Department Use of Force Policy, IX, 1&2. Also ascertain that the weapon(s) are submitted to State Police Ballistics Unit.
11. Where an officer has died, the BIS Commander shall ensure that policy and procedures established by this agency for **Death in the Line of Duty # 50-13** and **Death Notification # 50-15** are followed.
12. Obtain search warrants as necessary for searches of vehicles, containers and homes.

E. Check-list of individual's responsibilities

Involved Officers

- Control threats to safety
- Broadcast lookouts
- Request back-up and related support services
- Notify the dispatch center
- Request emergency medical assistance
- Secure your firearm
- Administer first aid to yourself and others
- Secure the perimeter and protect evidence
- Identify persons at or leaving the scene
- Identify witnesses and request cooperation

Supervisory Responsibilities

- Determine status of above actions
- Determine condition of officer and others
- Notify command/specialized units or personnel:
 - Station OIC and PIO
 - Shift Commander and Crime scene technicians
 - Mental health clinician, peer counselors and Victim Advocate
 - Legal Advisor and K-9
 - Hostage Negotiator and, if appropriate Air support
 - SWAT and Criminal Investigation Unit
- Ensure area is contained and perimeter established
- Protect evidence
- Move officers away from the area
- Separate officers and provide peer counselors
- If officer is shot, transport to hospital with supervisor
 - Don't release officer's name
 - Notify officer's family
 - Assign officer to family
- Collect officer's clothing and equipment as evidence
- Establish command post if required
- Appoint command post staff
- Appoint a recorder
- Brief personnel

- Maintain/establish perimeter security
- Press Relations
- Diagram and photograph overall scene
- Locate and secure officer's weapon as found
- Collect firearms of other officers present during shooting
- Begin gathering information on incident

Investigator's Responsibilities

- Identify all police and emergency services personnel who were or are at the scene
 - Name, rank, serial number and current assignment
 - Name of first supervisor at the scene
 - Other related persons, e.g. ambulance crew
- Ensure completion of foregoing tasks
- Conduct walk through
- Ensure location, photographing, collection of evidence
- Color photograph officer and injuries
- Interview witnesses (tape record)
- Conduct and tape record officer interviews in private
- Advise not to discuss incident with other officers
- Take involved officer weapon(s) into custody as found
- Formulate preliminary statement of facts
 - Establish chronology and conditions
 - Date and time call received
 - Names, serial number and rank of officers involved
 - Current assignment and detail
 - Uniform or plainclothes
 - Types of vehicles
 - Weather, lighting conditions
 - Describe and diagram scene including background
 - Position of officer(s)
 - Position of suspect(s)
 - Position of witnesses
 - Path of bullets fired

Evidence

- Photographs and videotape of scene and items of evidence
- Officer firearms and ammunition
 - Firearm: serial number, make, model, caliber, type holster
 - Ammunition: type, manufacturer, number of rounds fired
- Suspect firearms and ammunition
 - Firearm: serial number, make, model, caliber, type holster
 - Ammunition: type, manufacturer, number of rounds fired
- Collect expended bullets and cartridge casings
- Suspect information
 - Description
 - Prior record
 - Parole/probation and related information
 - Complaint taker and dispatcher voice and data transmissions
 - MDT logs
 - Officer's and suspect's clothing
 - Vehicles
 - Description
 - Evidence booked

- Disposition, e.g. impound
 - Autopsy results
 - Brief prosecutor's office
 - Debrief senior staff



**Town of Framingham
Police Department**

Policy on SWAT Team #100-23

Issue date: 07/01/03

Type of policy: New (X)

Amendment ()

Re-Issue ()

Effective date: 07/01/03

Level: Public Safety ()

Police Division (X)

Town Wide ()

Policy Statement

The presence of a highly skilled and trained police tactical unit has been shown to substantially reduce the risk of injury or death to citizens, police officers and suspects. A well-managed "team" response to critical incidents usually results in their successful resolution. It is the intent of the Special Weapons and Tactics team (SWAT) to provide a highly trained and skilled team and to support the Police Department with a tactical response to critical incidents.

References

None

Special Terms

The mission of the SWAT team is to support the police department with a tactical response to critical incidents. Critical incidents are defined as follows:

Hostage Situations: The holding of any person(s) against their will by armed or potentially armed suspect.

Barricade Solutions: The standoff created by an armed or potentially armed suspect in any location, whether fortified or not, who is refusing to comply with police demands for surrender.

Sniper Situation: The firing upon citizens and/or police by an armed suspect.

Apprehension: The arrest or apprehension of armed or potentially armed suspect (s) where there is a likelihood of armed resistance.

Warrant Service: The service of search or arrest warrants where there is a likelihood of armed or potentially armed suspects(s) and there is the potential for armed resistance.

Special Assignments: Any assignment, approved by the Chief, Executive Officer or Team Commander, based upon the level of threat or the need for a special expertise.

Policy

I. COMMAND AND CONTROL

A. **The SOU is a 24-hour a day on call special response unit.** It falls under the command of the SWAT Commander.

1. The SWAT Team Commander directs the:

- a. SWAT Tactical Commander,
- b. Crisis Negotiators
- c. Tactical Medics

2. The SWAT Tactical Commander directly oversees:

- a. SWAT Team Leaders
- b. SWAT Team Members
- c. Scout/Observers/Snipers

3. Team Leaders provide direct supervision and operational support for tactical team members during activation.
 4. When activated for operation, the SWAT Team Commander, or the Tactical Commander (when the Commander is absent, reports directly to the Incident Commander, where one has been designated.
 5. The SWAT commander is responsible for deployment of the SWAT, tactical decision-making, and tactical resolution of the incident.
 6. The SWAT commander is subordinate to the Incident Commander only in terms of **when and if** the tactical option will be initiated, not **how** it will be performed. Unless the SWAT Team Commander relinquished his control to another person outside the SWAT, no other person, who is not in a leadership position within the SWAT, will attempt to direct, supervise, or control any element or member of the SWAT during a tactical operation (when a SWAT ranking officer is present).
 7. **If no SWAT ranking officers are present**, team members fall under the supervision of the on-scene ranking officer. If and when a SWAT ranking officer arrives, he shall assume tactical command of the incident. The other ranking officer(s) present may then concentrate on other responsibilities i.e. logistic support, communications, and overall incident command.
 8. SWAT members become subordinate to the SWAT Team Commander until he/she determines that the activation is over.
- B. Responsibilities of On-Scene Patrol Supervisor-prior to a SWAT ranking officer arriving on-scene, the patrol supervisor will:
1. Establish Inner and Outer Perimeters
 2. Establish a Command Post
 3. Arrange for an ambulance(s) to be on scene
 4. Coordinate a staging area for arriving personnel, medical assistance, media, etc.
 5. Develop appropriate intelligence
 6. Begin evacuation (if necessary)
- C. When a SWAT ranking officer arrives on scene, the patrol supervisor will:
1. Brief the SWAT Coordinator/Supervisor of the situation outlining known factors.

2. Control of the Inner Perimeter will be released to the SWAT Commander/Supervisor who will be responsible for containment and apprehension of the suspect(s). Outer perimeter will remain the responsibility of the Patrol Supervisor until otherwise relieved.

II. ACTIVATION

- A. The following personnel have the authority to immediately activate the SWAT for any critical incident:

1. Chief of Police
2. Deputy Chiefs of Police
3. Patrol Operations Commander
4. Shift Commander
5. **NOTE:** The Chief, Deputy Chiefs and Patrol Commander must be notified immediately when any activation is initiated.

- B. Emergency

1. In exigent circumstances (i.e. active shooter, hostage taker), the Shift Commander may immediately call in the SWAT.
2. Immediate activation can be initiated by using the Inforad Paging System.

- C. Pre-Planned Event- (i.e. warrant service)

1. The SWAT Commander (or designee) will be notified first.
2. He/she will determine if any how many members of the team need to be called in, If the determination is made to call in team members, the SWAT Commander (or designee) will request the dispatcher to contact the appropriate SWAT personnel through the established protocol.

- D. Mission Planning

1. The SWAT will utilize a written planning process for all operations that are proactive or anticipatory in nature, such as warrant service.
2. The written process will include a format that will document how the operation is to be:
 - a. Conducted

- b. Commanded
- c. Controlled
- d. Communication
- e. Support Required

3. The SWAT Commander will cause a log of events to be recorded on all SWAT operations, and will also cause all planning or decision making documents to be recorded.

E. Media Relations

1. Critical Incidents by their nature attract greater than usual media attention. Whenever the SWAT is activated, the Public Information Officer will also be called in to respond to media inquiries.
2. He/she shall be accessible to the media in an area designated by the Incident Commander/

F. Post-Incident

1. Upon completion of the tactical aspect of the mission, command and control will revert back to the division that initiated the call-out for follow-up investigation.
2. Members of the SWAT may be reassigned as necessary.

G. Documentation of Activation

1. After the situation is resolved, the SWAT Commander/Supervisor will forward a written report to the Chief of Police.
2. The report will include only those actions taken by the SWAT to include:
 - a. Injuries to any persons
 - b. Use of weapons
 - c. Any property damage
3. The report will detail the tactical aspect of the operation, and will contain pertinent information required to follow-up investigators, prosecutors, etc.

H. After Action Critique

1. At the completion of all operations and significant training events, the SWAT Commander will conduct an after action review.
2. The purpose of this review will be to create a forum for team members to offer information for the improvement of the team.
3. The after action review will be formatted to develop the following information:
 - a. Positive factors
 - b. Areas that need improvement
 - c. Solutions for any areas that need correction

III. TEAM MEMBER SELECTION PROCESS

- A. The SWAT will select members based on certain criteria. The criteria for application will be based on the following:
 1. Satisfactory job performance in present and previous assignments
 2. Supervisor's recommendations (minimum of 2)
 3. Experience and training-minimum of 3 years prior municipal law enforcement
 4. Personnel file review
 5. Oral interview with SWAT Commander, Senior Team Leader, and at least one Team Member
 6. No physical limitations
 7. Ability to work as a team member
- B. Once accepted and assigned to the SWAT, all operational team members, regardless of rank or position, must maintain acceptable standards of conduct (both on and off duty).
 1. A team member may voluntary withdraw from the team at any time, for any reason.
 2. A team member may be removed from the team, without cause, when deemed necessary for the good of the team by the SWAT Commander.

IV. TRAINING

- A. Newly assigned SWAT members will complete at least 40 hours of tactical training.

- B. Existing SWAT members will attend training a minimum of 8 hours per month.
- C. The SWAT will train on appropriate subjects related to the mission of the SWAT Team.
- D. The training program will also include regular updates on legal issues facing SWAT operations, such as warrant service, deadly force, etc.
- E. All training will be documented and maintained by the team Commander in the SWAT training file.

V. EQUIPMENT STANDARDS

- A. The department will supply SWAT members with at least the following safety equipment:
 - 1. Kevlar Helmet
 - 2. Safety Goggles
 - 3. Tactical Vest (level 3 protection) with level 4 chest plate insert
 - 4. Duty belt and tactical holster (nylon)
 - 5. Special weapons as authorized by the SWAT Commander
 - 6. Appropriate amount of ammunition for weapons training and qualification
 - 7. Radio earpiece/microphone
 - 8. Gas Mask
 - 9. Utility Uniform
- B. SWAT members will utilize appropriate utility type uniforms, of an approved color/pattern, and footwear. Uniforms will utilize visible and identifiable placards; patches or lettering that identifies the wearer of the uniform as a law enforcement officer. The SWAT Commander must approve all other items of personal wear or equipment **in writing**.
- C. SWAT members, to whom any item of equipment is issued, are responsible for the care and maintenance of the equipment. Failure to appropriately care for or maintain the equipment in full mission readiness will be grounds for removal from the team. Any item that is in need of repair/replacement must be reported to a SWAT ranking officer immediately. Team leaders at the start of each monthly training program will inspect equipment. Deficiencies will be brought to the attention of the Senior Team Leader for appropriate action
- D. SWAT members will carry and or wear **all and only** the equipment issued/approved by the SWAT Commander. Failure to carry and or wear the required equipment or carrying and or wearing unauthorized equipment is grounds for removal from the team.

E. Equipment Storage

1. All team equipment i.e. ballistic shields, face shields, etc. will be stored in the SWAT vehicle or in the equipment room (never in an individual's locker or equipment bag)
2. All issued equipment will be stored under the following conditions:
 - a. Off Duty-in the SWAT equipment room.
 - b. On Duty- All issued equipment should be carried with the officer to include the M-4 rifle (MP-5 or shotgun). If not carried on-duty, the equipment will be stored in the above manner. If carried, the equipment will be secured in the vehicle of the officer's cruiser unless it's use is authorized. NOTE: Cruiser keys cannot be left in an unattended cruiser.

F. Special Equipment

1. The missions of the SWAT are often performed in hazardous environments.
2. Recognizing that the safety of innocent citizens, officers, and suspects is often jeopardized by these hazardous conditions, it shall be the intent of the SWAT to utilize special equipment, in an attempt to reduce the risk of injury or death to all involved.
3. The SWAT Commander will insure that only those Team members properly trained and certified in the use of the special equipment will utilize the equipment.
 - a. Primary Entry Weapons: A short-barreled weapon, which enables a team member to acquire rapid target acquisition, enhances high levels of accuracy, and provides maneuverability, reliability, stopping power, and sustained fire capacity.
 - b. High Caliber Rifles: These weapons allow the team member to place highly accurate rounds where needed to help resolve life-threatening incidents.
 - c. Less Lethal Weapons or Ammunition: Weapons or ammunition, which propel a round or device that is not normally lethal in nature. Designed to offer an alternative

to the use of deadly force when appropriate (see policies on less lethal weapons).

- d. Noise/Flash Diversionary Devices: Designed to save lives and reduce the potential for shooting situations by providing for a diversion for the entry of SWAT personnel into a hazardous area. Utilizes a bright flash of light followed immediately by a loud noise (see policy on Diversionary Devices).
- e. Breaching Tools and Ammunition: Items such as rams, pry bars, special frangible shotgun rounds, etc., which are designed to force entry into barricaded or secured areas.

VI. VEHICLES

1. All SWAT Vehicles will be inspected monthly for operational readiness. An officer will be assigned to each vehicle on a monthly basis by the Tactical Commander. The officer will notify the Tactical Commander and Fleet Maintenance immediately upon discovering a vehicle in need of repair. All inspections will be documented and forwarded to the Tactical Commander.
 - The equipment stored within the SWAT equipment vehicle includes:
 - Ballistic shields and blanket
 - Night vision equipment
 - Search light (portable)
 - Breaching tools
 - Fire Extinguisher
2. SWAT officers will be trained on vehicle operation before they are authorized to use such vehicle. Training will consist of:
 - backing the vehicle
 - Turning
 - Using mirrors
 - Familiarity with the controls and on board electronic equipment i.e radio, siren, lights, etc
3. The SWAT vehicles may be used by any SWAT officer during any SWAT mission or assignment.



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GOVERNOR

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SUPERINTENDENT

The Commonwealth of Massachusetts
Department of State Police
Forensic Services Group

124 Acton Street

Raynard, MA 01754

Telephone: (978) 451-3300 Facsimile: (978) 451-3320

Case Jacket for 11-00191

Lab Code / Case	11-00191	Department Name	MSP Middlesex County Detective Unit
Offense Location	Framingham	Department Case	2011-110-0005
Case Type	Fatal	Case Officer	Trooper Erik P. Gagnon #2523
Offense Date	1/5/2011	References	11-00191 2011-110-0005 AM Officer Involved

Case Names

<u>Name Type</u>	<u>Last Name</u>	<u>First Name</u>	<u>Middle Name</u>	<u>Sex</u>	<u>Race</u>	<u>SS#</u>	<u>DOB</u>
V	Stamps	Eurie		M			3/2/1946

Submissions

<u>Sub #</u>	<u>Date</u>	<u>Submitted By</u>	<u>Type</u>	<u>Comments</u>
1	1/5/2011	Trooper Michael Kerrigan #3300	Walk-in or Hand Delivered	Digital photo's of interior and exterior of scene
2	1/5/2011	Tpr SJ Walsh	Walk-in or Hand Delivered	Weapons submitted and inventoried at Framingham PD range.
3	1/5/2011	Trooper Steve Walsh	Walk-in or Hand Delivered	Evidence recovered at 26 Fountain St.
4	1/5/2011	Kelley L. King	Walk-in or Hand Delivered	processed scene for biologicals
5	1/6/2011	Trooper Edward Kenney #3299	Walk-in or Hand Delivered	
6	1/6/2011	Trooper Steve Walsh	Walk-in or Hand Delivered	Evidence recovered from autopsy.
7	1/6/2011	Tpr. Setalsingh	Walk-in or Hand Delivered	Photographed / Major case prints OCME case # 11-0286 (Eurie Stamps)
8	2/1/2011	Trooper Edward Kenney #3299	Walk-in or Hand Delivered	Photos of front rifle grip taken.

Items

<u>Sub #</u>	<u>Lab Item No.</u>	<u>Cont.</u>	<u>Description</u>	<u>Packaging</u>	<u>Custody Location on Date Printed</u>
1	1-1		Compact Disk (CD-R-RW) Photo's of scene Master Copy	PENV	301 CASEFILE
1	1-1.1		Compact Disk (CD-R-RW) Photo's of scene Working Copy	PENV	301 CASEFILE
1	1-1.2	E	Compact Disk (CD-R-RW) Photo's of scene SPDU Copy	PENV	ED RMSP
1	1-1.3	E	Photo Contact / Index Sheet -	ITMTAG	ED RMSP

This should not be considered an official report of the Forensic Services Group. This is a Case Jacket current as of 2/11/2011

Items (Continued)

<u>Sub #</u>	<u>Lab Item No.</u>	<u>Cont.</u>	<u>Description</u>	<u>Packaging</u>	<u>Custody Location on Date Printed</u>	
			Photo's of scene SPDU Copy			
1	1-1.4		Photo Contact / Index Sheet - Photo's of scene File Copy	ITMTAG	301	CASEFILE
1	1-2		Diagram / Sketch - Interior and Exterior	ITMTAG	301	CASEFILE
1	1-3		Compact Disk (CD-R-RW) Photo's of drug search Warrant Master Copy	PENV	301	CASEFILE
1	1-3.1		Compact Disk (CD-R-RW) Photo's of drug search Warrant Working Copy	PENV	301	CASEFILE
1	1-3.2	E	Compact Disk (CD-R-RW) Photo's of drug search Warrant SPDU Copy	PENV	ED	RMSP
1	1-3.3	E	Photo Contact / Index Sheet - Photo's of drug search Warrant SPDU Copy	ITMTAG	ED	RMSP
1	1-3.4		Photo Contact / Index Sheet - Photo's of drug search Warrant File Copy	ITMTAG	301	CASEFILE
2	2-1	D	Firearm with three magazines and 82 live cartridges.	RBOX	DRBM	DR15
2	2-1.1	H	Test Fire	RBOX	DRBM	DR17
2	2-1.2	H	Test Fire	RBOX	DRBM	DR17
2	2-1.3	H	Ballistics Other	RBOX	DRBM	DR17
2	2-2	I	Firearm w/ 3mags and 37 live.	HBOX	DRBM	DR17
3	3-1	F	Discharged Cartridge Casing(s)	COIN	DRBM	DR17
4	4-1	A	Swab(s) of red-brown stain(s) (2) Swabs - RB pool in laundry area (26 Fountain St)	SMPBAG	ESS	C18
4	4-2	B	Pants black pants (E. Stamps)	BOX	ESS	C11
4	4-3	B	Sock(s) (2) white socks (E. Stamps)	BOX	ESS	C11
4	4-4	B	Boxer shorts gray underpants (E. Stamps)	BOX	ESS	C11
4	4-5	C	Key(s) set of keys from pants of E. Stamps	SMPBAG	ESS	C18
5	5-1		Digital Video Disk (DVD-R-RW) Master Disc	PENV	301	CASEFILE
5	5-1.1		Digital Video Disk (DVD-R-RW) Working Copy	PENV	301	CASEFILE
5	5-1.2	E	Digital Video Disk (DVD-R-RW) Middlesex SPDU Copy	PENV	ED	RMSP
6	6-1	G	Spent Projectile(s)	ENV	DRBM	DR17
7	7-1		Compact Disk (CD-R-RW) Autopsy of OCME case # 11-0286 (Eurie Stamps)	PENV	306	CASEFILE
7	7-1.1		Compact Disk (CD-R-RW) Autopsy of OCME case # 11-0286 (Eurie Stamps)	PENV	ED	OCME
7	7-2		Major Case Prints - OCME case # 11-0286 / Eurie Stamps	PENV	306	MCP

This should not be considered an official report of the Forensic Services Group. This is a Case Jacket current as of

2/11/2011

Items (Continued)

<u>Sub #</u>	<u>Lab Item No.</u>	<u>Cont.</u>	<u>Description</u>	<u>Packaging</u>	<u>Custody Location on Date Printed</u>	
8	8-1		Compact Disk (CD-R-RW) Master Disc	PENV	301	CASEFILE
8	8-1.1		Compact Disk (CD-R-RW) Working Copy	PENV	301	CASEFILE
8	8-1.2	J	Compact Disk (CD-R-RW) Middlesex SPDU Copy	PENV	ED	RMSP
8	8-1.3	J	Photo Contact / Index Sheet - Middlesex SPDU Copy	ITMTAG	ED	RMSP
8	8-1.4		Photo Contact / Index Sheet - Casefile Copy	ITMTAG	301	CASEFILE
1	301-File		Case File of CSSS - Sudbury	FILE	301	ARCH
7	FILE-306		Case File of CSSS - Boston	FILE	306	LABCAB1
4	File-BLM		Case File of FIS-Maynard	FILE	DRBM	DR17
4	filecrim		Criminalistics File Folder	FILE	AN	EK

Open Assignments

Seq#	Rpt#	Section	Section Date	Analyst	Analyst Date	Priority	Status	Comments
------	------	---------	--------------	---------	--------------	----------	--------	----------

Approved Reports

Seq #	Rpt #	Section	Analyst Assigned	Date Assigned	Analyst Date	Date Completed	Turn Around	Priority	Comments
1	5	CSCE	KLK	01/05/2011	01/05/2011	02/09/2011	36	C	
	4-1	RBSSWAB							(2) Swabs - RB pool in laundry area (26
	4-2	PANTS							black pants (E. Stamps)
	4-3	SOCKS							(2) white socks (E. Stamps)
	4-4	BOXERS							gray underpants (E. Stamps)
	4-5	KEYS							set of keys from pants of E. Stamps
10	3	301	3300	01/24/2011	01/24/2011	02/07/2011	15	2	
	1-1	CFU-010							Photo's of scene Master Copy
	1-1.1	CFU-010							Photo's of scene Working Copy
	1-1.2	CFU-010							Photo's of scene SPDU Copy
	1-2	CSSS60							Interior and Exterior
	1-1.4	CSSS12							Photo's of scene File Copy
	1-1.3	CSSS12							Photo's of scene SPDU Copy
	301-File	CSSS81							
	1-3.1	CFU-010							Photo's of drug search Warrant Working
	1-3.3	CSSS12							Photo's of drug search Warrant SPDU C
	1-3.4	CSSS12							Photo's of drug search Warrant File Cop
	1-3.2	CFU-010							Photo's of drug search Warrant SPDU C
	1-3	CFU-010							Photo's of drug search Warrant Master C
2	0	BLM	SW	01/05/2011	01/05/2011	01/05/2011	1	2	
	3-1	BALL03							
4	1	306	1875	01/07/2011	01/07/2011	01/13/2011	7	2	
	7-1	CFU-010							Autopsy of OCME case # 11-0286
	7-1.1	CFU-010							Autopsy of OCME case # 11-0286
	7-2	CSSS07							OCME case # 11-0286 / Eurie Stamps
	FILE-306	CSSS86							
5	0	306	1875	01/07/2011	01/07/2011	01/13/2011	7	2	
	FILE-306	CSSS86							
	7-2	CSSS07							OCME case # 11-0286 / Eurie Stamps
6	0	BLM	SW	01/15/2011	01/15/2011	01/15/2011	1	2	
	2-1.1	BALL12							
7	2	BLM	SW	01/15/2011	01/15/2011	01/28/2011	14	2	
	3-1	BALL03							
	2-1	FIREARM							with three magazines and 82 live cartrid
	6-1	BALL04							
8	0	BLM	3390	01/24/2011	01/24/2011	01/24/2011	1	2	
	3-1	BALL03							
	2-1	FIREARM							with three magazines and 82 live cartrid
9	0	BLM	3390	01/24/2011	01/24/2011	01/24/2011	1	2	
	3-1	BALL03							
	2-1.1	BALL12							
	2-1	FIREARM							with three magazines and 82 live cartrid
	2-1.2	BALL12							
11	0	BLM	0697	01/28/2011	01/28/2011	01/28/2011	1	2	
	File-BLM	FILEBLM							
12	4	301	3299	02/01/2011	02/01/2011	02/07/2011	7	2	
	8-1	CFU-010							Master Disc
	8-1.3	CSSS12							Middlesex SPDU Copy
	301-File	CSSS81							
	8-1.4	CSSS12							Casefile Copy
	8-1.2	CFU-010							Middlesex SPDU Copy
	8-1.1	CFU-010							Working Copy
3	0	301	3299	01/06/2011	01/06/2011	01/24/2011	19	C	
	5-1	CFU-011							Master Disc
	5-1.1	CFU-011							Working Copy
	5-1.2	CFU-011							Middlesex SPDU Copy



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Forensic Services Group

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Returned to MSP Detective Unit

Lab Code / Case No.:	NOR 11-00191	Case Type:	Fatal
Department Name:	MSP Middlesex County Detective Unit	Offense Location:	Framingham
Department Case No.:	2011-110-0005	Offense Date:	01/05/2011
Case Officer:	Trooper Erik P. Gagnon #2523	Offense Type:	Fatal Shooting

Reference(s):

11-00191 2011-110-0005 AM Officer Involved

Comment:

<u>Container Letter</u>	<u>Submission Number</u>	<u>Laboratory's Item Number</u>	<u>Department's Property Number</u>	<u>Packaging & Item Description(s)</u>
E	1	1-1.2		One paper envelope containing Compact Disk (CD-R-RW) Photo's of scene SPDU Copy
E	1	1-1.3		One tagged item of evidence Photo Contact / Index Sheet - Photo's of scene SPDU Copy
E	1	1-3.2		One paper envelope containing Compact Disk (CD-R-RW) Photo's of drug search Warrant SPDU Copy
E	1	1-3.3		One tagged item of evidence Photo Contact / Index Sheet - Photo's of drug search Warrant SPDU Copy
E	5	5-1.2		One paper envelope containing Digital Video Disk (DVD-R-RW) Middlesex SPDU Copy

Print Name (Released To)

Print Agency

Evidence Technician: Jennifer M. Bagley

Returned By:

Signature (Released To)

Date

Signature (Returned By)

The items and/or sub-items listed on this receipt were assigned by the laboratory and are returned in sealed packages. The accountability for the contents of these sealed packages is the responsibility of the submitting officer and/or laboratory examiner.

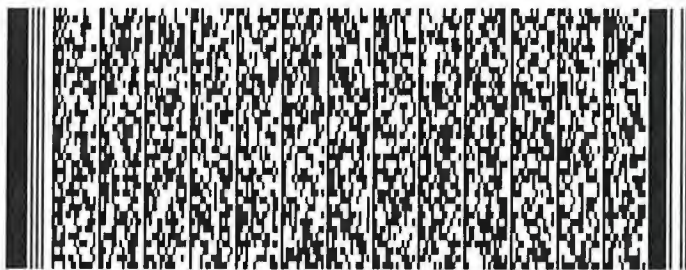
Submission Barcodes

Submission Barcode # 1

Crime Lab Case #: 2011-191

Department Case #: 2011-110-0005

PDF #: 002S1.



11/7/11

Stats, Lt Hill, Sgt Ruiz, ~~Tan Carol~~ asst to Chief
Chief Carl, Dept Fergyn, Davis

FRAMINGHAM CITIZEN'S COMMITTEE ON THE POLICE AND THE COMMUNITY:

REPORT AND RECOMMENDATIONS

October 5, 2011

INTRODUCTION

The death of Mr. Eurie Stamps was a tragic accident that occurred during the exercise of a search warrant by the Framingham Police Department's SWAT team on January 5, 2011. A tragedy such as this has an impact far beyond the victim and his family. It affects the larger community, including the police department, town government and the residents of Framingham. All want to be sure that an incident like this is an aberration, does not diminish residents' sense of safety in their homes nor diminish public confidence in police operations or in the men and women of local law enforcement, or tear at the fabric of the diverse community that is Framingham.

The **FRAMINGHAM CITIZEN'S COMMITTEE ON THE POLICE AND THE COMMUNITY** was charged by Chief of Police Steven B. Carl with reviewing the circumstances of this tragedy, and what, if anything could be learned from this incident. Our purpose is not to assign blame, but to seek improvement.

The Committee convened on May 10, 2011 and met six times through October 4, 2011. The Committee met face to face with the Chief of Police, Deputy Chief, other police officials, and the Town Manager on several occasions to discuss issues and questions that arose from Committee members' careful study of numerous reports and official documents. These materials included Police Department files and investigation reports, the investigation report of the Middlesex District Attorney's office, and a consultant's report by SWAT expert Steve Ijames commissioned by the Framingham Police Department. The Committee's deliberations were also informed by a comprehensive review of professional and scholarly research on police SWAT operations completed by Ms. Aleigh Jerome, a criminology student research assistant at Framingham State University under the direction of Dr. Timothy Flanagan.

OBSERVATIONS

Based on our review of the materials presented, including the report of the District Attorney, the Framingham Police Internal Affairs Report, the Steve Ijames independent consultant's report, police administrative policies and practices, depositions of those involved in the circumstances of January 5th, and interviews with leadership of the Framingham Police Department, we observe the following:

- The growing urban nature of Framingham, including the presence of major transportation and retail hubs, corporate headquarters, and educational and community institutions, as well as a national concern over drug use and trafficking, gang violence and a proliferation of weapons in society, requires that the police department be prepared and equipped for a variety of exigencies.
- Having a SWAT Team within the Framingham Police Department provides immediate access to resources and equipment that may be needed to significantly reduce the risk of injury and harm to officers and the general public.
- The Framingham Police Department has been judicious in the deployment of its SWAT team over its existence.
- The Framingham Police Department, by choice, does not deploy its SWAT team solely as a means for further in-service training.
- The Police Department's outreach to an independent expert on SWAT policy and practice for a review of the Stamps case and recommendations for improvement was a good decision; Major Ijames's report was helpful to the Committee and provides useful guidance to the Framingham Police Department.
- The training provided to SWAT officers appears comprehensive, although training could be expanded as recommended below.
- The decision to deploy the SWAT team on January 5th was appropriate given the associated risks and known criminal histories of the participants involved.
- The SWAT team followed existing police policies and procedures in planning for and conducting the operations of January 5th
- Following the January 5, 2011 Stamps incident, there was insufficient engagement and communication by the Town of Framingham with the Stamps family and the larger community, including the African American community. We understand that part of the difficulty was an order by the District Attorney not to release information prior to the

outcome of its investigation, and in part because of the potential of civil litigation. However, given the nature of the incident, we believe there should have been more proactive engagement and communication by Town leaders to address community questions and concerns surrounding the incident.

RECOMMENDATIONS

Police

- The Framingham Police Department should develop a written rationale for the presence of and deployment of a SWAT team in the Town of Framingham, should share this document and the operating philosophy with the community, and should issue an annual report to the community on SWAT unit activities, deployments, training, management and costs.
- The Police Department should maintain its SWAT team, but consider reducing the number of active members in order to increase the number of training hours per member per month.
- Training for SWAT team members should be increased from a minimum of 12 hours per month to 16 hours per month.
- The Police Department's SWAT Threat Assessment Matrix should be completed in writing for every incident in which mobilization of the SWAT is requested or contemplated. The completed written matrices should be maintained, included in an after-action report written following each SWAT deployment, and reviewed semi-annually by the Office of the Chief of Police.
- Police Department policies should be changed to require that tactical weapons to be "on safe" unless there is an immediate defined threat to the safety of the officer or others. (see IJames recommendations)
- Police Department training should be updated to reflect the above change in policy. (See IJames recommendations).
- The Committee recommends that all factors relevant to SWAT deployment be elaborated in the affidavit requesting a "No Knock" or "Knock and Announce" warrant, including:
 - (i) Whether evidence may be destroyed;
 - (ii) Whether the suspect(s) could possibly escape; and/or
 - (iii) Whether any of the target(s) are known to carry/possess weapons.

- (iv) Whether the suspect(s) is a known narcotics dealer.
 - (v) Specific facts and circumstances that indicate a strong possibility that announcing the presence and purpose of the police will result in violent resistance threatening the safety of the police or others - including the presence and description of weapons.
- The Town of Framingham and the Middlesex District Attorney's office should clarify for the community lines of authority, accountability, and communication between their offices and jurisdictions in homicide investigations, including who has statutory jurisdiction over the investigation, which office will and will not release information about the investigation, and an approximate timetable for conduct of the investigation.

Town of Framingham

- The Board of Selectmen and Town Manager should implement a plan and procedure for crisis management to ensure that timely information is communicated from designated officials to the community at large and identified community leaders. The Town needs a spokesperson who speaks on behalf of the Town.
- The Board of Selectmen and Town Manager should issue a written report regarding the Stamps investigation and hold community meetings to bring closure and give leadership for the town healing process.

Community:

- Residents should continue to view the Framingham Police Department as a highly professional, well managed and accredited force that is committed to working collaboratively with all segments of the community to ensure public safety.
- Residents should work in partnership with the police, the Framingham Public Schools, the Framingham Coalition for the Prevention of Alcohol and Drug Abuse, and other community groups to develop effective community resources to prevent substance abuse, and seek treatment services for those with substance use addictions.

- Residents should work with the police and the town's Violence Prevention Roundtable to develop plans and programs to reduce hate crime, domestic violence, youth violence with an emphasis on the contributing factor that alcohol and drugs have on acts of violence.

Respectfully Submitted,

Framingham Citizen's Committee on Police and the Community

Yvonne Brown, Liaison, NAACP – New England Area Conference

Martin Cohen, President, MetroWest Health Foundation

Beth Donnelly, Director of Community Relations, MetroWest Medical Center

Timothy Flanagan, President, Framingham State University

Brian Keyes, Chief of Police, City of Chelsea

Rev. J. Anthony Lloyd, Pastor, Greater Framingham Community Church

Paul Mina, President and Chief Professional Office, United Way of Tri-County

Michael Welch, Principal, Framingham High School



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February 14, 2011

*Via Facsimile 781-897-8301
and Overnight Mail*

Gerard T. Leone, Jr.
District Attorney
Office of the Middlesex District Attorney
15 Commonwealth Avenue
Woburn, MA 01801

Re: January 5, 2011 Shooting of Eurie Stamps at 46 Fountain Street, Framingham, MA

Dear District Attorney Leone:

This office represents the children of Eurie Stamps — Robin L. Stamps Jones, of Springfield, MA, Eurie A. Stamps Jr. of Woburn, MA, Marlon D. Stamps of Lynn, MA, and Kyon Stamps-Murrell of Missouri City, TX — in all matters concerning the January 5, 2011 shooting of their father, Eurie Stamps.

As you know, in the early morning hours of January 5th, Mr. Stamps was shot and killed in his home at 68 Fountain Street, Framingham, by an unidentified Framingham Police Officer who, according to reports, was a member of the department's SWAT team. Mr. Stamps was unarmed and in his own home when this unlawful and unjustifiable shooting occurred while the Framingham Police Department was reportedly serving a search warrant concerning Mr. Stamp's stepson.

According to published reports, your office has undertaken an investigation into the shooting and its circumstances, which reportedly would take 3 to 4 weeks. It is now

New York Office
250 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9452

California Office
207 Wilshire Boulevard, Los Angeles, CA 90017-3613
Tel: (213) 622-6469 Fax: (213) 622-6019

Gerard T. Leone, Jr., District Attorney
February 14, 2011
Page Two

nearly 6 weeks since the shooting, and, to my knowledge, you have not released a report or the identity of the officer or officers who shot Mr. Stamps or were otherwise involved in the incident.

I am writing at this time for several reasons:

1. To advise you that I, and my firm, represent Mr. Eurie's children in all matters concerning Mr. Stamps' shooting death, including civil claims for violation of Mr. Stamps' civil rights and for wrongful death.
2. To request that your office and all within its control preserve all evidence concerning this incident and your office's investigation of the incident and circumstances, without exception, including: all investigative reports and records; all photographs; all video recordings; all radio transmissions; all statements of police officers who participated in the serving of the search warrant or who were present at or in the vicinity of the shooting; all emails and electronic records of any kind or description concerning the service of the search warrant, the shooting death of Mr. Stamps, its investigation, or otherwise relating to the general subject of the incident and circumstances, including your office's computer system, individual computers, personal computers of any persons involved in the investigation, and all persons in your office whose computers may contain such information; all communications (paper, email, or otherwise) concerning the subject incident and resulting investigation, including, but not limited to, communications with any member or representative of the Framingham Police Department, communications with the Office of the Attorney General of the Commonwealth of Massachusetts, communications with the office of the United States Attorney for the Commonwealth of Massachusetts, communications with the United States Department of Justice, and communications with any person or agency concerning any aspect of the incident that resulted in Mr. Eurie's death or its investigation; and all other documents, materials, physical evidence, computer data and emails concerning any aspect of the subject incident or its aftermath.
3. To request that you release the name, address, rank, and position of: (a) the Framingham Police Officer or Officers who shot Mr. Eurie, (b) his/her superiors, (c) the officers who supervised the serving of the search warrant and raid on Mr. Eurie's home on January 5th, and (d) the supervisors/managers of the SWAT team;
4. To request that you allow me and my client to review your report before it is released publicly, and

Gerard T. Leone, Jr., District Attorney
February 14, 2011
Page Three

5. To advise you and any other representatives of the Office of the Middlesex District Attorney that all communications concerning this matter should be directed to me or others at my firm.

Please let me know if you are available to meet with me to discuss this matter.

Thank you for your anticipated cooperation.

Sincerely,



Anthony Taticoni

277 Dartmouth Street
Boston, MA 02116
Telephone: (617) 424-9100
Fax: (617) 424-9120

KREINDLER & KREINDLER

F

SENT BY: Anthony Tarricone

**SENT TO: Gerard T. Leone, Jr.
Middlesex District Attorney**

FAX NO.: 781-897-8301

A

DATE: 2/14/11

PAGES (including this page): 4

**MEMO: January 5, 2011 shooting of
Eurie Stamps at 46 Fountain Street,
Frammingham, MA**

X

This transmittal may be a confidential attorney-client communication or may otherwise be privileged and confidential. If the reader of this transmittal is not the intended recipient or any agent responsible for delivering it to the intended recipient, you are hereby notified that you have received this transmittal in error, and that any review, dissemination, distribution or copying of this transmittal is strictly prohibited. If you have received this in error, please notify us immediately by telephone and return the original transmittal to us by mail. Thank you.



The Commonwealth of Massachusetts

MIDDLESEX DISTRICT ATTORNEY
15 COMMONWEALTH AVENUE WOBURN, MA 01801
WWW.MIDDLESEXDA.COM

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

TEL: 781-897-8300
FAX: 781-897-8301

February 22, 2011

EXECUTIVE

- ADMINISTRATION
- COMMUNICATIONS
- INTERVENTION & PREVENTION PROGRAMS
- PUBLIC POLICY
- LEGISLATION
- VICTIM WITNESS BUREAU

TRIAL TEAMS

- CAMBRIDGE REGION SUPERIOR COURT
- MALDEN REGION SUPERIOR COURT
- WOBURN DISTRICT COURT

Anthony Tarricone, Esq
Kreindler and Kreindler LLP
277 Dartmouth Street
Boston, MA 02116

Anthony Fugate, Esq
22 Broad Street
Lynn, MA 01902

Re: Eurie Stamps

SPECIALTY UNITS

- APPEALS & TRAINING BUREAU
- CYBER PROTECTION PROGRAM
- FAMILY PROTECTION BUREAU
- CHILD ABUSE UNIT
- DOMESTIC VIOLENCE UNIT
- ELDER/DISABLED UNIT
- PUBLIC PROTECTION, ANTI-TERRORISM, CORRUPTION & TECHNOLOGY (PACT)

Dear Attorneys Tarricone and Fugate:

I am writing to acknowledge that this office has been informed that you and/or your law firms represent members of Eurie Stamps' family. Per your request, all communications regarding this matter will be directed to you or your designee. Please know that this office is working to conclude our investigation into the death of Mr. Stamps as soon as possible. When the investigation is complete, members of this office would like to meet with the family in order to notify them of our findings and conclusions. I will contact you at the appropriate time to discuss further the possibility of speaking to your clients about this matter. In the meantime, please do not hesitate to contact me if you have any questions or concerns.

STATE POLICE DETECTIVES

- COMPUTER FORENSICS
- HOMICIDE
- PACT

REGIONAL OFFICES

- CAMBRIDGE
- FRAMINGHAM
- LOWELL

DISTRICT COURT OFFICES

- AYER
- CAMBRIDGE
- CONCORD
- FRAMINGHAM
- LOWELL
- MALDEN
- MARLBOROUGH
- NATICK
- NEWTON
- SOMERVILLE
- WALTHAM
- WOBURN

Sincerely,

John Verner
Chief, PACT Unit
Assistant District Attorney
Middlesex District Attorney's Office

cc: Michael Fabbri, Chief of Homicide/Chief Trial Counsel





KREINDLER & KREINDLER LLP

TRADITION OF EXCELLENCE

277 Dartmouth Street
Boston, MA 02116-2805
(617) 424-9100
Fax: (617) 424-9120
www.kreindler.com

February 28, 2011

Via U.S. Mail

Gerard T. Leone, Jr.
District Attorney
Office of the Middlesex District Attorney
15 Commonwealth Avenue
Woburn, MA 01801

Re: January 5, 2011 Shooting of Eurie Stamps at 46 Fountain Street, Framingham, MA

Dear District Attorney Leone:

Enclosed are copies of requests to various government agencies under M.G.L. c.66, sec. 10 concerning the above incident.

I look forward to hearing from you concerning this matter in advance of the disclosure of your report findings so that we may schedule a meeting beforehand.

Please feel free to contact me at anytime either at my office at 617-424-9100 or my cell 617-423-5565.

Sincerely,

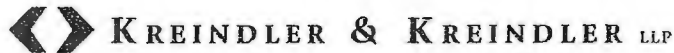
Anthony Tarricone

Enclosures

cc: John Verner, Chief, PACT Unit/Assistant District Attorney ✓
Michael Fabbri, Chief of Homicide/Chief Trial Counsel

New York Office
750 Third Avenue, New York, NY 10017-2703
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California Office
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February 28, 2011

Via Certified Mail RRR
#7006 2150 0000 7378 2989

Framingham Police Department
Attn: Steven B. Carl, Chief of Police
One William Welch Way
Framingham, MA 01702

Re: Request for Public Records

Dear Chief Carl:

As you know, this office represents the children of Eurie Stamps — Robin L. Stamps Jones, of Springfield, MA, Eurie A. Stamps Jr. of Woburn, MA, Marlon D. Stamps of Lynn, MA, and Kyon Stamps-Murrell of Missouri City, TX — in all matters concerning the January 5, 2011 shooting of their father, Eurie Stamps. In the early morning hours of January 5, 2011, Mr. Stamps was shot and killed in his home at 68 Fountain Street, Framingham, by an unidentified Framingham Police Officer who, according to reports, was a member of your department's SWAT team.

Pursuant to the Massachusetts Public Records Law (M.G.L. c. 66, sec. 10), I am writing to request copies of the following documents to be produced to this office within ten (10) days:

1. All investigative reports and records concerning the January 5, 2011 shooting of Eurie Stamps (hereafter the "Stamps Shooting").
2. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
3. All emails, cellular phone text messages, instant messages ("IMs") and electronic records of any other kind or description concerning the Stamps Shooting;
4. The personnel file(s) of each police officer who participated in or was present at or in the vicinity of the Stamps Shooting, including the complete training file and all documents concerning each officer's SWAT training;

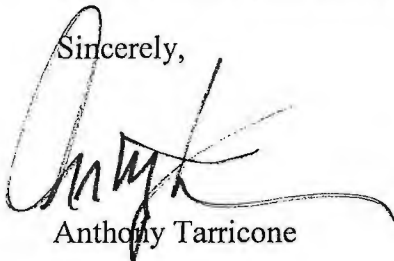
New York Office
750 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9432

California Office
707 Wilshire Boulevard, Los Angeles, CA 90017-3613
Tel: (213) 622-6469 Fax: (213) 622-6019

5. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department's SWAT team, and the Framingham Chief of Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members; and
 - b. lack of qualifications of Framingham Police SWAT members;
6. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the Massachusetts State Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members;
 - b. lack of qualifications of Framingham Police SWAT members;
7. All documents concerning the training of the Framingham Police SWAT team with regard to citizen home entry practices and protocols, including: documents concerning:
 - a. criteria, protocols and procedures for the deployment or use of the SWAT team and approvals or "sign-offs" relating thereto;
 - b. protocols and procedures for the Framingham Police SWAT team relating to home entry, execution of search warrants, and selection and assignment of SWAT team members for each aspect and role during home; and
8. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.

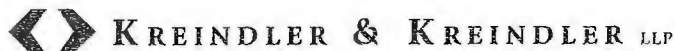
Thank you for your anticipated cooperation.

Sincerely,



Anthony Tarricone

Copy To: File
 Gerard T. Leone, Jr., Esq., Middlesex County District Attorney ✓



KREINDLER & KREINDLER LLP

TRADITION OF EXCELLENCE

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Boston, MA 02116-2805
(617) 424-9100
Fax: (617) 424-9120
www.kreindler.com

February 28, 2011

Via Certified Mail RRR
#7006 2150 0000 7378 2972

Beth McLaughlin, Esq.
General Counsel's Office
Massachusetts Department of Public Safety
One Ashburton Place
Room 1301
Boston, MA 02108

Re: Request for Public Records

Dear Ms. McLaughlin:

This office represents the children of Eurie Stamps — Robin L. Stamps Jones, of Springfield, MA, Eurie A. Stamps Jr. of Woburn, MA, Marlon D. Stamps of Lynn, MA, and Kyon Stamps-Murrell of Missouri City, TX — in all matters concerning the January 5, 2011 shooting of their father, Eurie Stamps. In the early morning hours of January 5, 2011, Mr. Stamps was shot and killed in his home at 68 Fountain Street, Framingham, by an unidentified Framingham Police Officer who, according to reports, was a member of that department's SWAT team.

Pursuant to the Massachusetts Public Records Law (M.G.L. c. 66, sec. 10), I am writing to request copies of the following documents in the possession of the Department of Public Safety, to be produced to this office within ten (10) days:

1. All investigative reports and records concerning the January 5, 2011 shooting of Eurie Stamps (hereafter the "Stamps Shooting").
2. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
3. All emails, cellular phone text messages, instant messages ("IMs") and electronic records of any other kind or description concerning the Stamps Shooting;
4. The personnel file(s) of each police officer who participated in or was present at or in the vicinity of the Stamps Shooting, including the complete training file and all documents concerning each officer's SWAT training;

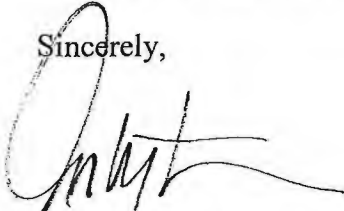
New York Office
750 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9432

California Office
707 Wilshire Boulevard, Los Angeles, CA 90017-3613
Tel: (213) 622-6469 Fax: (213) 622-6019

5. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department's SWAT team, and the Framingham Chief of Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members; and
 - b. lack of qualifications of Framingham Police SWAT members;
6. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the Massachusetts State Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members;
 - b. lack of qualifications of Framingham Police SWAT members;
7. All documents concerning the training of the Framingham Police SWAT team with regard to citizen home entry practices and protocols, including: documents concerning:
 - a. criteria, protocols and procedures for the deployment or use of the SWAT team and approvals or "sign-offs" relating thereto;
 - b. protocols and procedures for the Framingham Police SWAT team relating to home entry, execution of search warrants, and selection and assignment of SWAT team members for each aspect and role during home; and
8. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.

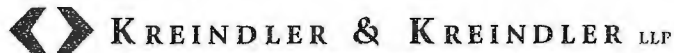
Thank you for your anticipated cooperation.

Sincerely,



Anthony Tarricone

Copy To: File
 Gerard T. Leone, Jr., Esq., Middlesex County District Attorney ✓



KREINDLER & KREINDLER LLP

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Boston, MA 02116-2805
(617) 424-9100
Fax: (617) 424-9120
www.kreindler.com

February 28, 2011

Via Certified Mail RRR
#7006 2150 0000 7378 2965

Massachusetts State Police
Records Department
470 Worcester Road
Framingham, MA 01702

Re: Request for Public Records

Dear Sir/Madam:

This office represents the children of Eurie Stamps — Robin L. Stamps Jones, of Springfield, MA, Eurie A. Stamps Jr. of Woburn, MA, Marlon D. Stamps of Lynn, MA, and Kyon Stamps-Murrell of Missouri City, TX — in all matters concerning the January 5, 2011 shooting of their father, Eurie Stamps. In the early morning hours of January 5, 2011, Mr. Stamps was shot and killed in his home at 68 Fountain Street, Framingham, by an unidentified Framingham Police Officer who, according to reports, was a member of that department's SWAT team.

Pursuant to the Massachusetts Public Records Law (M.G.L. c. 66, sec. 10), I am writing to request copies of the following documents in the possession of the Massachusetts State Police ("MSP"), to be produced to this office within ten (10) days:

1. All investigative reports and records concerning the January 5, 2011 shooting of Eurie Stamps (hereafter the "Stamps Shooting").
2. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
3. All emails, cellular phone text messages, instant messages ("IMs") and electronic records of any other kind or description concerning the Stamps Shooting;
4. The personnel file(s) of each police officer who participated in or was present at or in the vicinity of the Stamps Shooting, including the complete training file and all documents concerning each officer's SWAT training;

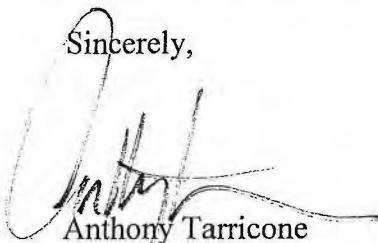
New York Office
750 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9432

California Office
707 Wilshire Boulevard, Los Angeles, CA 90017-3613
Tel: (213) 622-6469 Fax: (213) 622-6019

5. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department's SWAT team, and the Framingham Chief of Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members; and
 - b. lack of qualifications of Framingham Police SWAT members;
6. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the MSP concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members;
 - b. lack of qualifications of Framingham Police SWAT members;
7. All documents concerning the training of the Framingham Police SWAT team with regard to citizen home entry practices and protocols, including: documents concerning:
 - a. criteria, protocols and procedures for the deployment or use of the SWAT team and approvals or "sign-offs" relating thereto;
 - b. protocols and procedures for the Framingham Police SWAT team relating to home entry, execution of search warrants, and selection and assignment of SWAT team members for each aspect and role during home; and
8. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.

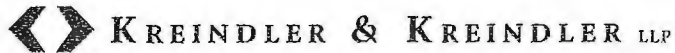
Thank you for your anticipated cooperation.

Sincerely,



Anthony Tarricone

Copy To: File
Gerard T. Leone, Jr., Esq., Middlesex County District Attorney ✓



KREINDLER & KREINDLER LLP

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www.kreindler.com

February 28, 2011

Via Certified Mail RRR
#7006 2150 0000 7378 3009

Massachusetts Municipal Police Training Committee
Records Department
6 Adams Street
Randolph, MA 02368

Re: Request for Public Records

Dear Sir/Madam:

This office represents the children of Eurie Stamps — Robin L. Stamps Jones, of Springfield, MA, Eurie A. Stamps Jr. of Woburn, MA, Marlon D. Stamps of Lynn, MA, and Kyon Stamps-Murrell of Missouri City, TX — in all matters concerning the January 5, 2011 shooting of their father, Eurie Stamps. In the early morning hours of January 5, 2011, Mr. Stamps was shot and killed in his home at 68 Fountain Street, Framingham, by an unidentified Framingham Police Officer who, according to reports, was a member of that department's SWAT team.

Pursuant to the Massachusetts Public Records Law (M.G.L. c. 66, sec. 10), I am writing to request copies of the following documents in the possession of your agency, to be produced to this office within ten (10) days:

1. All investigative reports and records concerning the January 5, 2011 shooting of Eurie Stamps (hereafter the "Stamps Shooting").
2. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
3. All emails, cellular phone text messages, instant messages ("IMs") and electronic records of any other kind or description concerning the Stamps Shooting;
4. The personnel file(s) of each police officer who participated in or was present at or in the vicinity of the Stamps Shooting, including the complete training file and all documents concerning each officer's SWAT training;

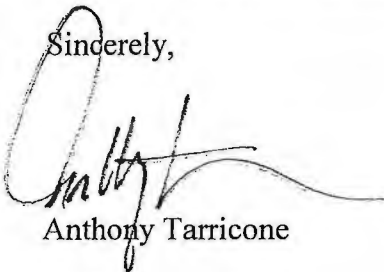
New York Office
750 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9432

California Office
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5. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department's SWAT team, and the Framingham Chief of Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members; and
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6. All correspondence from the past ten (10) years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the Massachusetts State Police concerning:
 - a. deficiencies or problems in the training of Framingham Police SWAT members;
 - b. lack of qualifications of Framingham Police SWAT members;
7. All documents concerning the training of the Framingham Police SWAT team with regard to citizen home entry practices and protocols, including: documents concerning:
 - a. criteria, protocols and procedures for the deployment or use of the SWAT team and approvals or "sign-offs" relating thereto;
 - b. protocols and procedures for the Framingham Police SWAT team relating to home entry, execution of search warrants, and selection and assignment of SWAT team members for each aspect and role during home; and
8. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.

Thank you for your anticipated cooperation.

Sincerely,



Anthony Tarricone

Copy To: File
Gerard T. Leone, Jr., Esq., Middlesex County District Attorney ✓



REARDON, JOYCE & AKERSON, P.C.
ATTORNEYS AT LAW

Michael J. Akerson

Attorney

4 Lancaster Terrace, Worcester, Massachusetts 01609
508-754-7285 fax: 508-754-7220 website: rja-law.com
E-mail: akerson@rja-law.com

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT

DOCKET NO. ~~2010-~~

1149CR0024
1149CR0023

COMMONWEALTH

v.

Joseph Bushfan
Devon Talbert

COMMONWEALTH'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF THE NAME, DATE OF
BIRTH AND LAST-KNOWN ADDRESS OF CONFIDENTIAL INFORMANT

The Commonwealth opposes Defendant's Motions for the Disclosure of the Identity of the Commonwealth Informant pursuant to Rovario v. United States, 353 U.S. 53, 60-61 (1957). The Commonwealth is not required to disclose the informant's identity to the defendant because the informant was not a percipient witness to the events charged in this indictment.

FACTS

In December of 2010 and early January of 2011, members of the Framingham Police Narcotics Unit (herein referred to as FPNU) obtained information regarding the illegal distribution of crack cocaine from 26 Fountain Street in Framingham. A confidential source (herein referred to as CS) informed members of the FPNU that it knew a black male named Dwayne Barrett who

was distributing crack cocaine from a house on Fountain Street. The CS gave an exact location and description of the house which was later determined to be 26 Fountain Street. The CS went on to state that Barrett sells cocaine from the first floor of 26 Fountain and that the apartment is also occupied by two other unknown black males. The CS went on to state that it drives to the described house, calls a phone number for Barrett and "orders up." Barrett then meets the CS on the street in front of the house and purchases cocaine. The CS also stated that Barrett is frequently in the company of a young black male with a tattoo on his face.

During the same time frame, members of the FPNU also obtained information from a second confidential reliable informant (herein referred to as CI). CI informed the FPNU that it had information about a black male named "D" or "Dwayne" that was selling crack cocaine from 26 Fountain Street in Framingham. "D" / "Dwayne" was later identified as Dwayne Barrett. According to the CI, it would meet Barrett in the area of the intersection of Waverley and Fountain Street and purchases crack cocaine from Barrett.

In the two weeks leading up to the application for the search warrant, the FPNU conducted three controlled buys with the CI from 26 Fountain Street. During the first buy, the CI called Barrett's cell phone, ordered cocaine and proceeded to

the area of 26 Fountain Street. Detectives observed a black male, later identified as Joseph Bushfan, leave 26 Fountain Street and conduct a hand to hand drug transaction with the CI. During that controlled buy, Bushfan gave the CI a phone number that could be used for future purchases. During the second controlled buy, the CI called Barrett, ordered cocaine, traveled to 26 Fountain Street and met with Barrett and Bushfan outside 26 Fountain Street. The CI proceeded to purchase cocaine from Barrett. Police surveillance teams watched Barrett and Bushfan leave 26 Fountain Street, meet with the CI and proceed back to 26 Fountain Street. The third controlled buy occurred within 48 hours of the application for the search warrant. For the third controlled buy, the CI called a phone number given to it by Bushfan during the first controlled buy. After calling and ordering cocaine, the CI traveled to 26 Fountain Street. Surveillance officers observed two black males exit 26 Fountain Street. One male stayed on the front porch while the other, later identified as Joseph Bushfan, met with the CI and sold it cocaine. Based on the above, Detective Dinis Avila applied for and was granted a search warrant for 26 Fountain Street.

In the hours leading up to obtaining and executing the search warrant, Detectives Gutwill and DeRosa conducted surveillance of 26 Fountain Street. During the surveillance, Gutwill and DeRosa observed what they believed to be, based on

their training and experience, hand to hand drug transactions in the area around 26 Fountain Street. At least one of the suspected hand to hand transactions was conducted by Devon Talbert.

ARGUMENT

I. Defendant Is Not Entitled to the Identity of the Confidential Informant.

"The government's privilege not to disclose the identity of an informant has long been recognized in this Commonwealth." Commonwealth v. Douzanis, 384 Mass. 434, 441 (1981). Based on the policies behind that privilege, i.e., encouragement of tips by citizens, "the government is not required to disclose the identity of an informant who is . . . not an active participant in the offense charged." Commonwealth v. Brzeninski, 405 Mass. 401, 408 (1989) (refusing to disclose the identity of "an informant who is a mere tipster and not an active participant in the offence charged") (citation omitted). See also Commonwealth v. Clarke, 44 Mass. App. Ct. 502, 511 (1998) (informant's identity did not have to be disclosed, and no prejudice was caused by the nondisclosure, when defendant was not charged with the sale of cocaine, the only crime in which the informant allegedly participated); Commonwealth v. Russo, 49 Mass. App. Ct. 1118 (2000) (no disclosure when (1) informant provided police with information supporting a search warrant for

defendant's house where drugs were found; (2) defendant was charged with trafficking the cocaine found at the apartment; and (3) informant was not present at the search and could not therefore provide material testimony on the charged crimes).

In this case, the informant was not a percipient witness to any crime that is charged nor was s/he a percipient witness to the activity in front of 26 Fountain Street prior to the search warrant being executed. The informant's only role in this investigation was to provide the FPNU with information about the activities at 26 Fountain Street and to conduct controlled buys in the weeks and days prior to the execution of the search warrant. Therefore, the informant is not a percipient witness to any of the crimes charged and the Commonwealth is not obligated to reveal its identity to the defendant.

The defendant relies on Rovario v. United States, 353 U.S. 53 (1957) to support his request to obtain the identity of the informant. The facts of that case are distinguishable from the facts in the case before this court. In Rovario, the informant, after meeting with police officers, picked up the defendant in the informant's car. Id. at 56. The informant was the driver and the defendant was the passenger. Unbeknownst to the defendant, an officer was in the trunk of the informant's car. Id. at 57. Additionally, two police cars were following behind the defendant and the informant. Id. At some point during the

drive, the defendant got out of the informant's car, picked up a package that was near a tree, put the package into the car, waved at the informant and then walked away without getting back into the informant's car. Id. Meanwhile, the officer who was traveling in the trunk of the informant's car overheard a conversation between the informant and the defendant where at one point the defendant directed the informant to drive in a certain manner so they could lose a "tail." Id. The officer also heard the defendant advise the informant that he bought him "three pieces this time." Id. When the defendant got out of the informant's car to get the package, the officer opened the trunk and watched him pick up the package, put it in the car and say, "here it is. I'll see you in a couple of days." Id. The officers recovered that package from the floor of the informant's car and saw that it contained heroin. Id. 57-58.

The facts of Rovario, which necessitated the disclosure of the informant, differ from the facts of this case. In Rovario, the defendant was not carrying the heroin on his person. Instead, he got out of the car, picked up a package from near a tree and put it in the informant's car. The court held that the informant's testimony was material because the government would have to prove, among other things, that the defendant *knowingly* possessed the heroin. Id. at 63. That is not the situation facing the court in this case. In this case, the informant is

not a percipient witness to the facts and circumstances supporting the charged conduct. Therefore, its identity is not relevant or discoverable.

II. The defendant has not shown that the informant's identity is material to his defense.

The standard for determining whether an informant's identity should be disclosed is predicated on a showing of materiality. Commonwealth v. Youngworth, 55 Mass. App. Ct. 30, 33 (2002). It is a general principle that materiality may exist "where the informer is an active participant in the alleged crime or the only non-government witness, [and] disclosure usually has been ordered in such circumstances." Commonwealth v. Lugo, 406 Mass. 565, 572 (1990). The proper inquiry [at trial] concerns whether disclosure would have provided material evidence needed by the defendant for a fair presentation of his case to the jury. Id. at 574. In determining whether an informant's identity is to be disclosed, a court engaged in "balancing the public interest in protecting the flow of information against the individuals' right to prepare his defense." Rovario, 353 U.S. at 62. Part of that balance involves weighing the potential danger to the informant. See Commonwealth v. John, 36 Mass. App. Ct. 702, 706 (1994).

In the current case, the informant is not a percipient witness to any activity that is 1) charged conduct or 2) conduct that the Commonwealth intends to introduced at trial. The defendant has not shown that the informant was an active participant in the crimes charged or a percipient witness to any fact that will be introduced at trial. As a result, the informant is not a material witness and the Commonwealth is not required to disclose its identity to the defendant.

For these reasons, the Commonwealth respectfully requests that this Court deny Defendant's Motion to Compel Disclosure of the Name, Date of Birth and Last-Known Address of Confidential Informant.

Respectfully submitted
For the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

By: _____
John C. Verner
Assistant District Attorney
Middlesex District Court
15 Commonwealth Avenue
Woburn, MA 01801

Dated: August 8, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

FRAMINGHAM DISTRICT COURT

DOCKET NO. 1149CR0023

1149CR0024

COMMONWEALTH

v.

JOSEPH BUSHFAN

Devon Talbert

PROTECTIVE ORDER

IT IS HEREBY ORDERED THAT counsel for the defendant not disclose the contents of discovery to anyone but the defendant except with the consent of the District Attorney's Office or by leave of this Court; that counsel for the defendant not disclose the contents of discovery to any attorney who is not counsel of record in the instant criminal action except with the consent of the District Attorney's Office or by leave of this Court; and that counsel for the defendant not use the information or materials provided for any purpose other than in the instant criminal action.

SO ORDERED this ____ day of April 2011.

Associate Justice
Framingham District Court
Commonwealth of Massachusetts

My copy

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

DISTRICT COURT
DOCKET NO.1149CR0024

COMMONWEALTH

v.

DEVON TALBERT

COMMONWEALTH'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

The Commonwealth opposes the defendant's motion to dismiss. There was ample evidence presented to the Clerk Magistrate to establish probable cause to support the charges of possession of cocaine with intent to distribute, school zone violation and conspiracy to violate the controlled substance act. Therefore, the motion to dismiss should be denied.

STATEMENT OF THE FACTS

Attached to this filing is the police report of Detective Felipe Martinez filed in support of the application for complaint.

ARGUMENT

"It is a well-established principle that the adequacy of the evidence presented to the grand jury cannot be tested by a motion to dismiss."

Commonwealth v. Robinson, 373 Mass. 591, 592 (1977).

Judicial review of the sufficiency of evidence in grand jury proceedings is sharply limited.

Commonwealth v. O'Dell, 392 Mass. 445, 452 (1984).

The long-standing rule is that a court will not inquire into the competency or sufficiency of evidence before a grand jury except where the integrity of the grand jury proceedings has been impaired or where the evidence failed to establish probable cause.

Commonwealth v. Lawrence, 404 Mass. 378, 384-5 (1989).

See Commonwealth v. Galvin, 323 Mass. 205, 211-212

(1948). This general rule, along with its two exceptions, reflects the "proper concern for the integrity of the grand jury proceedings without substantially affecting the grand jury's historic function as an investigative and accusatory body.

O'Dell, 392 Mass at 450.

Accordingly, grand jury indictments should stand as long as the evidence presented establishes both the identity of the defendant and probable cause to arrest

the defendant for the crime in question. Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

When ascertaining the presence of probable cause the Court looks to the facts and circumstances within the police's knowledge at the moment of arrest, and determines whether the police possessed reasonably trustworthy information sufficient to warrant a prudent man to believe that the defendant had committed or was committing an offense. Commonwealth v. Stevens, 362 Mass. 24, 27 (1972); Beck v. Ohio, 379 U.S. 89 (1964). Probable cause can be based on personal observations or credible hearsay.

Commonwealth v. White, 422 Mass. 487, 497 (1996);

Commonwealth v. Mitchell, 353 Mass. 426, 428-29

(1967). Probable cause has been said to be a "considerably less exacting [standard] than a requirement of sufficient evidence to warrant a finding of guilty" (emphasis added). O'Dell, 392 Mass. at 451. In considering the defendant's motion to dismiss in this matter, the Court should apply the same probable cause analysis. Commonwealth v. Valchuis, 40 Mass. App. Ct. 556.

In this instance, Detective Martinez filed a three page arrest report in support of the application

for complaint. The report, read in its entirety, along with the reasonable inferences inferred from the facts alleged, contains ample probable cause to support the issuance of the complaint against Mr. Talbert.

According to Martinez, in the weeks leading up to the arrest of this defendant, the Framingham Police Narcotics Unit, with the help of a confidential informant, conducted several controlled purchases of crack cocaine from 26 Fountain Street, Apartment #1. Based on the controlled purchases, Framingham Police Narcotics Unit applied for and were granted a search warrant for the above listed apartment. These facts support the allegation that 26 Fountain Street was an apartment that contained illegal narcotics and from which illegal narcotics [REDACTED] were taking place.

Martinez further states that immediately prior to the execution of the search warrant, Mr. Bushfan was stopped on the sidewalk near his home and searched. During the search, Framingham Police found 8 individually packaged corner baggies inside a larger plastic bag. Of the 8 items, one was randomly selected, tested and determined to be cocaine. Also found by police during the search was two amounts of money, \$299 dollars and \$98 dollars and a cell phone

with a number that the confidential informant called to arrange the previous controlled buys. Inside the front bedroom of the home, additional crack cocaine was found. These facts are further evidence of the fact that a crack cocaine business was being run from 26 Fountain Street.

Martinez further states in his police report that prior to the execution of the search warrant, Detective DeRosa observed defendant Talbert exit 26 Fountain Street and engage in what appeared to be a hand to hand drug transaction with an individual outside of the home. DeRosa then observed Talbert re-enter 26 Fountain Street. Martinez further describes, in his training and experience, how drug distributors, in this case Bushfan, often utilize the assistance of other individuals, in this case Talbert, to aid them in the sale of narcotics. Martinez states in his report that in his opinion, based on his training and experience, Mr. Talbert was engaged in a conspiracy with Mr. Bushfan to distribute crack cocaine from 26 Fountain Street. During the search warrant execution, Mr. Talbert was located in a back room inside 26 Fountain Street.

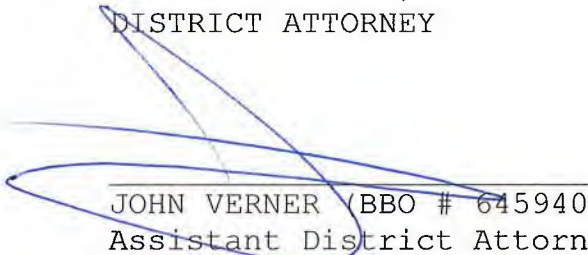
At this stage of the proceedings, the Commonwealth has shown that probable cause exists to believe that this defendant committed the crime of possession with intent to distribute cocaine in a school zone and conspiracy to commit same.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss the complaint should be denied.

Respectfully Submitted
For the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY



JOHN VERNER (BBO # 645940)
Assistant District Attorney
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801
Tel: (781) 897-8300

DATED: October 11, 2011

1100091

Arrest Report

Suspect:

Joseph Bushfan [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Suspect:

Devon Talbert [REDACTED]
[REDACTED]
[REDACTED]

Over the past several weeks member of the Framingham Police Narcotics Unit have been conducting an investigation into the illegal distribution of crack cocaine from 26 Fountain Street, Apartment 1 in Framingham, MA. See case 1009575. This investigation yielded two identified suspects, Joseph Bushfan ([REDACTED]) and Dwayne Barrett ([REDACTED]). During this investigation the Framingham Police Narcotics Unit, with the assistance of a reliable confidential informant, conducted several controlled purchases from 26 Fountain Street, Apartment 1. See warrant affidavit for details. The identity of the informant is known to me and is on record with the Framingham Police Narcotics Unit. On January 04, 2011, based on this investigation Detective Dinis Avila applied for and was granted a search warrant to search 26 Fountain Street, Apartment 1 (Docket #11-4-SW-02). Based on violent criminal records of the suspects involved in this particular case the decision was made to utilize the assistance of the Framingham Police SWAT team for the entry.

On January 05, 2011, at approximately 0020 hours, surveillance officers observed Joseph Bushfan and two females exit the front door of 26 Fountain Street and walked south toward Waverly Street. As this was occurring SWAT officers and Detectives were approaching the home and were forced to confront Bushfan. Bushfan, who was identified as one of the suspects who had previously provided our confidential informant with crack cocaine, was seized by Detectives Mathew Gutwill and Jeff DeRosa on the sidewalk in front of the Gulf Station located at the corner of Fountain and Waverly Streets. Lt. Kevin Slattery performed a pat frisk of Bushfan and while doing so felt several objects in the front left pocket of Bushfan's pants. At this time Bushfan was wearing a pair of thin red sweatpants. Upon feeling the objects Lt. Slattery immediately recognized them through his training and experience as corner baggies of crack cocaine. Lt. Slattery removed the items and observed them to be 8 individually packaged corner baggies of an off white rock like substance that appeared to be crack cocaine. These 8 corner baggies were all held in a larger knotted glassine sandwich bag. A sample of the substance was later selected at random by Detective DeRosa and did test positive for the presence of cocaine. A Nark 4 reagent test kit was used to conduct this test. Lt. Slattery also located a sum of money in Bushfan's front right pants pocket that was seized. In total \$299 was located in Bushfan's pocket and another \$98 was located in Bushfan's

wallet. I did later observe the crack cocaine and based on my training and experience recognized that the manner in which the crack cocaine was packaged in combination with the presence of the sum of money is consistent with crack cocaine distribution rather than simple possession. I also know that it is common for drug distributors to keep their spending money or "play" money separate from the earning derived from selling illegal narcotics so that they can more easily keep track of profits. In addition a black Metro PCS cell phone was located on the ground next to where Bushfan was taken into custody. This cell phone was registered with the phone number we dialed to purchase crack cocaine from Bushfan during a controlled purchase, 508-371-7497. The two females were also identified and were later interviewed by Detectives. See interview reports for details.

While Bushfan was being secured by the above mentioned officers, members of the SWAT team and perimeter team continued our approach on 26 Fountain Street, Apartment 1. Sgt. Vincent Stuart knocked and announced police presence and stated that we had a search warrant. After waiting for a reasonable period of time the SWAT team forced entry into the apartment. While in the apartment Devon Talbert was encountered in the rear bedroom. Talbert had been earlier observed by Detective DeRosa exiting 26 Fountain Street and engaging in what appeared to be a hand to hand transaction with an individual outside. Detective DeRosa then observed Talbert re-enter the house. This activity is consistent with drug distribution. I know through my training and experience that drug distributors frequently utilize the assistance of other individuals to aid them in the distribution of illegal narcotics. These individuals can assist drug distributors by delivering illegal narcotics in an attempt by the distributor to remain anonymous and avoid detection by police or may also work in a partnership with the drug distributor. Based on our investigation it is believed that Talbert engaged in a conspiracy with Bushfan to distribute crack cocaine from 26 Fountain Street, Apartment 1.

During the execution of the search warrant a firearm was discharged by a SWAT team member and a round struck a resident of 26 Fountain Street, Apartment 1. The resident received immediate medical attention by tactical medical personnel who were on scene. The resident was then transported to Metrowest Medical Center in Framingham, MA. Due to exigent circumstances which occurred while securing the residence a thorough search of the apartment did not occur; however, Detective DeRosa did observe a sock in plain view located in the top drawer of the front bedroom of the apartment. This sock contained individually wrapped corner baggies of an off white rock like substance that Detective DeRosa recognized through his training and experience as crack cocaine. The crack cocaine was not seized and was left in the drawer. Detective DeRosa did recognize the packaging of the crack cocaine to be consistent with distribution rather than simple possession.

Devon Talbert and Joseph Bushfan were ultimately placed under arrest for possession with intent to distribute a class B substance, to wit crack cocaine (94C-32A); drug school zone violation (94C-32J); and conspiracy to violate controlled substance laws (94C-40). Both men were transported to Framingham Police Headquarters where they were booked

and afforded all applicable rights. Both men were later interviewed by Detectives. See interview reports for details.

Due to the exigent circumstances, once the home was checked for other occupants a detailed search of the apartment was not conducted. At the time of the preparation of this report a Framingham Police Officer stood by the scene. A further investigation will be conducted by the Massachusetts State Police and Middlesex County District Attorney's Office.

As stated above the scene is 26 Fountain Street, Apartment 1. 26 Fountain Street is located within 1000 feet of the accredited SMOC daycare center located at 63 Fountain Street. Further reports to follow.

Respectfully submitted,

Felipe Martinez
Detective 299
Framingham Police Department

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149CR000023
1149CR000024

COMMONWEALTH

v.

JOSEPH BUSHFAN & DEVON TALBERT

COMMONWEALTH'S BILL OF PARTICULARS

The following constitutes a bill of particulars, providing the defendants and the Court reasonable notice of the crime charged, including the time, place, manner, or means. Mass. R. Crim. P., 13(b)(1); Commonwealth v. King, 464, 441, N.E.2d 248 (1982). The purpose of this document is to fully inform the defendant, by giving them reasonable knowledge of the nature and character of the crime charged, and adding substance to the factual information supplied by the complaint, thereby enabling them to prepare an adequate defense.

Commonwealth v. Daughtry, 417 Mass. 136, 142 (1994); Rogan v. Commonwealth, 415 Mass. 376, 378 (1993); Commonwealth v. Amirault, 404 Mass. 221, 233 (1989); Commonwealth v. Cantres, 405 Mass. 238, 242 (1989); Commonwealth v. Conceicao, 10 Mass. App. Ct. 899 (1980); Commonwealth v. Whitehead, 379 Mass. 640 (1980).

Additionally, this bill of particulars is not intended to be, nor can it reasonably be taken as, a complete statement of the Commonwealth's evidence. Commonwealth v. Kirpatrick, 26 Mass. App. Ct. 595, 598 (1988). See Commonwealth v. Hare, 361 Mass. 263, 270 (1972). The effect of this bill of particulars when filed with the Court is to bind and restrict the Commonwealth as to the scope of the complaint and to the proof to be offered in support of it. Rogan v. Commonwealth, 415 Mass. 376, 378 (1993); Commonwealth v. Hare, 361 Mass. 263, 267-268 (1972), quoting Commonwealth v. Ianello, 344 Mass. 723, 726 (1962). Yet, if at trial, there exists a material variance between the evidence and the bill of

particulars, the Judge may order the bill of particulars amended or may grant such other relief, as justice requires. The amendment may be done during the trial, after the evidence is completed, or after the final argument, provided there is no change in the substantive offenses that have been charged, and the defendants are not prejudiced. M.R. Crim. P. 13(b)(2); Commonwealth v. Tavares, 385 Mass. 140 (1985); Commonwealth v. Iacovelli, 9 Mass. App. Ct. 694 (1980).

Count One: School Zone

DATE: January 5, 2011

PLACE: 26 Fountain Street, Apartment 1, Framingham, MA 01702

MANNER & MEANS:

The site of the drug investigation that resulted in charges of Possession with Intent to Distribute a Class B substance, to wit: crack cocaine, pursuant to M.G.L. c. 94C, § 32A(a) against both defendants occurred at 26 Fountain Street, Apartment 1, Framingham, Massachusetts 01702. That location is within 1000 feet of the accredited Metro Child Care Center located at 63 Fountain Street, Framingham, Massachusetts 01702, which serves children ranging from infants to school age children.

Count Two: Possession with Intent to Distribute Class B Substance (to wit: crack cocaine)

Defendant Bushfan

DATE: January 5, 2011

TIME: Approximately 12:20am

PLACE: Fountain Street, on corner of Waverly Street, Framingham, MA

MANNER & MEANS:

On this date, the Framingham Police Narcotics Unit, with the assistance of the Framingham Police SWAT team, were executing a search warrant that was granted on

January 4, 2011 (Docket #11-49-SW-02) for 26 Fountain Street, Apt. 1, Framingham, MA. While preparing to execute the search warrant, defendant Bushfan was seen exiting 26 Fountain Street with two females and walk down Fountain Street, towards Waverly Street. Due to the preparations to execute the search warrant, Detectives were forced to confront defendant Bushfan on the sidewalk in front of the Gulf Station on the corner of Fountain and Waverly Streets. While conducting a pat frisk, several objects were felt by Lt. Slattery which he immediately recognized to be corner baggies of crack cocaine. There were eight (8) individually packaged corner baggies of an off-white rock-like substance later confirmed by the Massachusetts State Police Crime Laboratory to be crack-cocaine. The eight baggies were held in a larger knotted glassine sandwich bag. Two sums of money were recovered from defendant Bushfan's person. The first sum of \$299 in US Currency was recovered from his pocket and another \$98 in US Currency was recovered from his wallet. A black Metro PCS cell phone was located on the ground near where defendant Bushfan was placed into custody. In the residence, a sock was seen in plain view in a top drawer in the front bedroom of the apartment containing individually wrapped corner baggies of a substance later confirmed by the Massachusetts State Police Crime Laboratory to be crack-cocaine. The officers noted that based on their training and experience, the packaging of the crack-cocaine in this case and the separated monies were factors that were more consistent with distribution of crack-cocaine rather than simple possession. In a subsequent interview, defendant Bushfan admitted that he and defendant Talbert sold crack to take care of their young children.

Defendant Talbert

DATE: January 4 and 5, 2011

TIME: Approximately 12:30am

PLACE: 26 Fountain Street, Apartment 1, Framingham, MA 01702

MANNER & MEANS:

On this date, the Framingham Police Narcotics Unit, with the assistance of the Framingham Police SWAT team, were executing a search warrant that was granted on January 4, 2011 (Docket #11-49-SW-02) for 26 Fountain Street, Apt. 1, Framingham, MA. During the execution of the search warrant, defendant Talbert was encountered in the rear

bedroom. In the home a sock was located in plain view in a top drawer in the front bedroom of the apartment containing individually wrapped corner baggies of a substance later confirmed by the Massachusetts State Police Crime Laboratory to be crack-cocaine. The officers noted that based on their training and experience, the packaging of the crack-cocaine in this case indicated that the crack-cocaine was for distribution and not for simple possession. Prior to the execution of the search warrant, investigators observed this defendant exit 26 Fountain Street, approach a motor vehicle and conduct what is believed to be a hand to hand drug transaction.

The Commonwealth is alleging that this defendant possessed, individually or in joint venture, both the cocaine found on defendant Bushfan and the cocaine found in the sock in the bedroom. The Commonwealth is alleging and intends to introduce at trial that Talbert conducted what is believed to be a hand to hand drug transaction in the hours before the execution of the search warrant, the facts of which are detailed in the above paragraph and in discovery previously provided.

Count Three: Conspiracy to Violate the Drug Laws

DATE: January 4 and 5, 2011

TIME: January 4 and 5, 2011

PLACE: 26 Fountain Street, Apartment 1, Framingham, MA 01702

MANNER & MEANS:

On January 5, 2011, Defendant Bushfan and Defendant Talbert conspired together to violate the controlled substance laws by possessing crack-cocaine with the intent to sell it.

The Commonwealth reserves the right to add to, supplement or amend this Bill of Particulars at any time.

Respectfully Submitted
For the Commonwealth,

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

By:

John C. Verner
Assistant District Attorney
Middlesex District Attorney's Office
15 Commonwealth Ave
Woburn MA

Dated: October 11, 2011

WALTERS, SHANNON & JENSEN LLC
Attorneys at Law

27 Harvard Street, Brookline, MA 02445 Tel (617) 566-2300 Fax (617) 566-9350

Christopher A. Shannon
Direct Tel (617) 738-3246
Direct Fax (617) 738-3248
cshannon@wsjlawoffice.com

September 26, 2011

ADA John C. Verner
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801

Re: Commonwealth v. Davaughn E. Talbert
Framingham District Court
Complaint No.: 1149 CR 0024

Dear ADA Verner:

Please see the attached copies of the Defendant's Motion to Dismiss, with Affidavits and Memorandum of Law, and if said motion is not allowed, Defendant's Motion for a Bill of Particulars.

These matters are scheduled for hearing on Wednesday, October 12, 2011 in the Framingham District Court.

Also, please note for your records my new office, location and contact information.

Very truly yours,



Christopher A. Shannon
Walters, Shannon & Jensen, LLC
27 Harvard Street
Brookline, MA 02445
P: (617) 566-2300
F: (617) 566-9350
cshannon@wsjlawoffice.com

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, ss

FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DAVAUGHN E. TALBERT

MOTION TO DISMISS BASED UPON LACK OF PROBABLE CAUSE

NOW COMES DEFENDANT, DAVAUGHN E. TALBERT, (hereinafter "Defendant"), in the above-captioned matter and, pursuant to Mass. R. Crim. P. 13 and *Commonwealth v. McCarthy* 385 Mass. 160 (1982), respectfully moves this Honorable Court to dismiss said complaint against Defendant for the reasons hereinafter set forth.

As grounds therefore, Defendant submits as follows:

1. The Framingham Police Department and the Commonwealth did not submit sufficient evidence to establish probable cause in the police reports and Application for Complaint so as to go forward with Complaint No. 1049-CR-0024 against Defendant Davaughn E. Talbert.
2. There is no mention of the Defendant, Mr. Talbert in the Search Warrant Affidavit filed by the Framingham Police Department, which summarized an investigation of several weeks into alleged drug-dealing by two other individuals, and which requested authorization to search the home at 26

Fountain Street, #1, Framingham, MA, in which the Defendant was a visitor at the time the search warrant was executed.

3. The Defendant does not reside at 26 Fountain Street #1, as erroneously written on the Application for Complaint. The Defendant Davaughn E. Talbert is a relative of the residents but he resides in Boston, MA. He is not on the lease of the apartment, he does not receive mail there, or keep clothes or personal effects there, and Mr. Talbert had only been a visitor in the apartment for a short time before the police raided the apartment.
4. The Defendant did not have any illegal substances on his person when he was arrested by the Framingham Police, and he was found by the police in a different room in 26 Fountain Street than where the alleged Class B was found, such that it was not in his possession, either actual or constructive.
5. There was no evidence, either real or circumstantial, that Mr. Talbert had engaged in a conspiracy with the other Defendant arrested that night, Joseph Bushfan, to Possess Class B with the Intent to Distribute it, or to Possess Class B with the Intent to Distribute it within 1,000 feet of a school, park or licensed day care facility.

WHEREFORE, based upon the foregoing arguments, authorities and accompanying Affidavit and Memorandum of Law, Defendant hereby requests that this Honorable Court allow Defendant's Motion to Dismiss for Lack of Probable Cause and dismiss said matter with prejudice.

Respectfully submitted,
DAVAUGHN E. TALBERT,
Defendant,
By his Attorney,



Christopher A. Shannon
Walters, Shannon & Jensen, LLC
27 Harvard Street
Brookline, MA 02445
P: (617) 566-2300
F: (617) 566-9350
BBO # 631340
cshannon@wsjlawoffice.com

Dated: September 26, 2011

CERTIFICATE OF SERVICE

I, Christopher A. Shannon, Attorney for the within named Defendant certify that I gave notice of the foregoing Defendant's Motion to Dismiss For Lack of Probable Cause, by delivering a copy of said Motion, and Attached Affidavit and Memorandum of Law, with this Certificate, on this 27th day of September, 2011, to: the Office of the Middlesex District Attorney, 15 Commonwealth Avenue, Woburn, MA 01801.

Signed under the pains and penalties of perjury.



Christopher A. Shannon

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, ss

FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DAVAUGHN E. TALBERT

AFFIDAVIT OF DEFENSE COUNSEL IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS BASED UPON LACK OF PROBABLE CAUSE

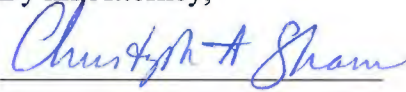
In support of the within Defendant's Motion to Dismiss for Lack of Probable Cause, I, Christopher A. Shannon, Attorney for Defendant in the above-captioned matter, under oath and upon information and belief, do hereby state and depose as follows:

1. I am the Attorney of Record for the Defendant in said matter:
2. Defendant states that he was arrested in the Town of Framingham on January 5, 2011.
3. Defendant states that he was charged in Framingham District Court Complaint No. 1149-CR-0024, with one count each of:
 - a) Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J
 - b) Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A;
 - c) Conspiracy to Violate Drug Law, in violation of M.G.L. c.94C, §40.
4. I was court appointed to represent Mr. Talbert on January 5, 2011 in the Framingham District Court.

WHEREFORE, Defendant, through his attorney, does hereby request that this Honorable Court allow Defendant's Motion as aforesaid.

Signed this date under the pains and penalties of perjury.

Respectfully submitted,
DAVAUGHN E. TALBERT,
Defendant,
By his Attorney,



Christopher A. Shannon
Walters, Shannon & Jensen, LLC
27 Harvard Street
Brookline, MA 02445
P: (617) 566-2300
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cshannon@wsjlawoffice.com

Dated: September 26, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, ss

FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DAVAUGHN E. TALBERT

AFFIDAVIT OF DEFENDANT IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS BASED UPON LACK OF PROBABLE CAUSE

In support of the within Defendant's Motion to Dismiss for Lack of Probable Cause, I, Davaughn E. Talbert, Defendant in the above-captioned matter, under oath and upon information and belief, do hereby state and depose as follows:

1. My name is Davaughn E. Talbert.
2. I reside at 49 Maryknoll Street, Boston, MA 02126. I am a 2009 graduate of Charlestown High School, Charlestown, MA. I have visited relatives at 26 Fountain Street, Apt, 1, Framingham, but I do not live there. I am not on the lease or any utility bills sent to 26 Fountain Street. I do not receive mail at 26 Fountain Street and my name is not on any mailbox there. I do not store clothes or personal belongings or toiletries at 26 Fountain Street, nor do I have my own room there.
3. In December 2010 and early January 2011, I visited my relatives at 26 Fountain Street, Framingham, specifically my late uncle Eurie Stamps, my aunt Norma Bushfan, and my cousin Joseph Bushfan, because I was job

hunting in the Framingham / MetroWest area. On a few occasions, perhaps four to five nights over the previous twenty (20) days before January 5, 2011, I had spent the night in their apartment so that I could job hunt and drop off my resume the next day. My uncle Mr. Stamps was retired and he was helping me find a job by driving me to appointments and different store locations, and then he would drop me off at the commuter rail station at the end of the day to take the train back to Boston.

4. On the night of January 4, 2011, I arrived at 26 Fountain Street late in the evening, at approximately 11:00 p.m.. An acquaintance gave me a ride and dropped me off. About ten minutes later my friend called me. He circled back in his car and gave me the power cable for my X-Box video game console, which I had left in his car. My uncle and cousin and I often play video games together.
5. When I arrived my cousin Joseph was in his bedroom at the front right of the apartment, talking with two teenaged girls I did not know. I said hello and chatted with Joseph and the girls for a little while.
6. Then I went into the dining room, which is the room where I usually sleep on a day bed at 26 Fountain St. I set down my backpack, and took off pants. I have on a pair of athletic shorts underneath my pants. Then I went into Eurie and Norma's bedroom to watch a basketball game on television. Their bedroom is in the back right of the apartment.
7. Eurie and I were in the back bedroom watching a college basketball game when we heard a bang and yelling of "Police!", "Police!". I put my hands up

and knelt on the floor. I was shocked and frightened. The officers directed me to lay on the floor and then a few minutes later they handcuffed me and led me out of the back bedroom, past the kitchen and out to the street and put me in a cruiser. When we passed the kitchen I saw a large pool of blood on the floor. I remember being very cold in the cruiser. I was only wearing a hooded sweatshirt, basketball shorts, sneakers and socks.

8. That night was the first night I had ever been handcuffed or arrested. I learned later that I was being charged with:

a) Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J

b) Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A;

c) Conspiracy to Violate Drug Law, in violation of M.G.L. c.94C, §40.

10. I have no knowledge of any drug dealing that may or may not have been occurring at 26 Fountain Street. I never possessed any drugs, distributed any drugs or conspired with anyone to possess or distribute drugs, nor did I observe any drugs or drug dealing or drug paraphenalia at 26 Fountain Street.

Signed this date under the pains and penalties of perjury.


Davaughn E. Talbert Date

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, ss
COURT

FRAMINGHAM DISTRICT

DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DAVAUGHN E. TALBERT

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS BASED UPON LACK OF PROBABLE CAUSE

NOW COMES THE DEFENDANT, through counsel, Christopher A. Shannon, and submits this Memorandum of Law in Support of his Motion to Dismiss – Lack of Probable Cause.

I. PROCEDURAL BACKGROUND

On January 5, 2011, Mr. Talbert was arraigned in the Framingham District Court on Complaint No. 1149-CR-0024, and charged with one count each of:

- a) Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J
- b) Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A;
- c) Conspiracy to Violate Drug Law, in violation of M.G.L. c.94C, §40.

Mr. Talbert was arrested while visiting 26 Fountain Street, Apt. 1, Framingham, MA 01702, during the execution of a search warrant by the Framingham Police Department. Mr. Talbert's uncle, Eurie Stamps, was shot and later died during the execution of the search warrant, apparently after one of the Framingham SWAT unit officers discharged his gun. The death of Mr. Stamps triggered an extended period for discovery. Mr.

Talbert is before this Honorable Court on a Motion to Dismiss - Lack of Probable Cause. Mr. Talbert is at liberty and is not held.

II. INVESTIGATION AND SEARCH WARRANT

On January 4, 2011, Dinis Avila, a Detective in the Framingham Police Department - Narcotics Unit, submitted a Search Warrant Affidavit to this Court. In that affidavit, Det. Avila details a four week investigation by him and other Framingham police officers into the alleged distribution of cocaine and crack cocaine by two individuals from 26 Fountain Street, Apt. 1, Framingham, MA 01702.

Over the course of their investigation, Det. Avila and his colleagues come to believe that two young African-American males, Joseph Bushfan (08/28/1990), and Dwayne Barrett (11/11/1990), were selling cocaine and crack cocaine and using 26 Fountain Street, Apt. 1 as the base of their operation. Det. Avila verified this information through the use of two confidential informants, persons labeled "CS" (Confidential Source) and "CI" (Confidential Informant), respectively. Det. Avila wrote in his affidavit that both CS and CI are trustworthy and reliable informants who are familiar with the packaging, selling and distribution of illegal drugs; who have provided information leading to the recovery of illegal drugs and to arrests that led to district court complaints and to a superior court indictment against certain individuals.

Over several weeks in December 2010, Det. Avila and other police officers supervised CS and CI as they made controlled purchases of crack cocaine from two individuals. The officers, with the assistance of CS and CI, confirmed the identities of Joseph Bushfan and Dwayne Barrett as the two males selling crack cocaine to CS and CI. The officers confirmed that Dwayne Barrett had a cell phone number (508-309-2849), registered in his name that CI used to contact Barrett to set up a controlled purchase of crack cocaine. The officers confirmed that Joseph Bushfan had a cell phone number (508-371-7497), registered in his name that CI used to contact Bushfan to set up a controlled purchase of crack cocaine. The Framingham police officers confirmed that Joseph Bushfan lived at 26 Fountain Street, Apt. 1, and observed Bushfan and Barrett enter and exit the front door of 26 Fountain Street, Apt. 1, on several occasions.

Another Framingham police officer, Officer Timothy O'Toole, confirmed to Det. Avila that he had been to 26 Fountain Street, Apt. #1 to arrest Joseph Bushfan on an outstanding warrant but that he had been unable to locate him at that time, but other individuals inside the unit had confirmed that Joseph Bushfan lived there.

Detective Avila's Search Warrant Affidavit summarizes what appears to be an extensive investigation spanning several weeks and involving considerable time and effort by the Framingham Police Department Narcotics Unit to confirm the identities and location of Joseph Bushfan and Dwayne Barrett. Yet at no time does the name or presence of this Defendant, DAVAUGHN E. Talbert, appear in the Search Warrant Affidavit. Mr. Talbert is not mentioned by either the CS or the CI. No phone number linked to Mr. Talbert appears in any of the controlled buys supervised by the Framingham Police Department. At no time during their lengthy investigation do any of the Framingham police officers observe Mr. Talbert in the presence or company of Mr. Bushfan or Mr. Barrett. Mr. Talbert does not appear at all until the night the search warrant is executed.

III. EXECUTION OF SEARCH WARRANT AND ARREST

In the late evening of January 4, 2011, the Defendant Davaughn E. Talbert arrived at the home of his aunt and uncle, Norma Bushfan and the late Eurie Stamps, at 26 Fountain Street, Apt. #1, Framingham, MA 01702. Mr. Talbert's cousin, Joseph Bushfan, also lives at 26 Fountain Street. Norma Bushfan and Eurie Stamps were Joseph Bushfan's mother and step-father. Norma Bushfan, Eurie Stamps and Joseph Bushfan were all present and in their home at 26 Fountain Street, Apt. 1, when Mr. Talbert arrived. Also present were two teenaged females, later identified as [REDACTED] and [REDACTED] who were with Joseph Bushfan in his bedroom, which is the room at the front right of the apartment, facing the street. The two females and Mr. Bushfan were talking and playing video games when Mr. Talbert arrived.

At approximately 12:20 a.m. of January 5, 2011, the Framingham Police Department arrested Mr. Bushfan as he walked from 26 Fountain Street to a nearby Gulf

Station with Ms. [REDACTED] and Ms. [REDACTED] neither of the two females were charged with any crime. Lt. Kevin Slattery of the Framingham Police frisked Mr. Bushfan after this arrest and found 8 individually packaged baggies of a white rock like substance alleged to be crack cocaine. Lt. Slattery also found \$299.00 in Mr. Bushfan's pocket, and \$98 in his wallet.

Almost simultaneously with Mr. Bushfan's arrest, the Framingham Police Department executed a Search Warrant of 26 Fountain Street, Apt. 1. This involved shooting a stun grenade, a/k/a/ a "flashbang", through the windows of Joseph Bushfan's bedroom at the front right bedroom of 26 Fountain Street, Apt. 1, and through the windows of the dining room and kitchen, to stun and disorient any residents inside. Mr. Talbert and Mr. Stamps were in the back right bedroom of Apartment 1, at the back of apartment, watching a basketball game. They heard the noise of the flashbang, but were not disoriented by it as they were separated from it by rooms and doors. Mr. Talbert knelt down to the floor of the back bedroom and stayed there until led out of the house by the police. Mr. Stamps went towards the kitchen of the apartment as a Framingham police SWAT unit forced their entry into the apartment. As the SWAT unit encountered Mr. Stamps in the kitchen, one of the officers discharged their weapon. Mr. Stamps was shot in the jaw area. Mr. Stamps died later that night from his wounds. Mr. Talbert was arrested in the back right bedroom of 26 Fountain Street, Apt. 1.

At some point that evening, Detective DeRosa searched the front right bedroom of 26 Fountain Street, Apt. 1, the room that Joseph Bushfan used as his bedroom, and observed a sock in the top drawer of a dresser that allegedly contained individually wrapped corner baggies of an off white substance that appeared to be crack cocaine. Because of the exigent circumstances around the shooting of Mr. Stamps, the Framingham Police did not take that alleged crack cocaine into their custody at that time, nor did they conduct a thorough search and inventory of the apartment at that time.

IV. DISCUSSION

Courts generally do not inquire into the competency or sufficiency of the evidence in support of a criminal complaint. However, despite this general rule, a court may

properly review the evidence presented, to determine whether there was sufficient evidence to find probable cause for an arrest, or to determine whether the acts which the defendant is alleged to have done, constitute a crime. *See e.g., Commonwealth v. McCarthy*, 385 Mass. 160 (1982); *Commonwealth v. O'Dell*, 392 Mass. 445 (1984). Although in a District Court the charging document is the complaint, rather than the grand jury indictment, a determination of probable cause should be similar. *See Commonwealth v. Valchuis*, 40 Mass. App. Ct. 556, 560, 665 N.E.2d 1030 (1996) (“a complaint cannot issue until there has been a determination of probable cause to believe that a crime was committed and that it was committed by the defendant”), citing Smith, Criminal Practice and Procedure §§ 629-632 (2d ed. 1983).

“A defendant against whom a complaint is issued does not lack the opportunity for review of that decision. ‘He may move to dismiss the complaint.’” *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002) citing *Bradford v. Knights*, 427 Mass. 748, 753 (1998). Dismissal of an indictment is called for where the grand jury fails to hear any evidence of criminal activity by the defendant. In order for an indictment to survive such a challenge, the grand jury must be presented with information that, at the very least, is sufficient to establish the identity of the accused and probable cause to arrest him. *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982). Likewise, dismissal of a complaint should be warranted where the Court determines that probable cause did not exist to issue a complaint. *Commonwealth v. DiBennadetto*, 436 Mass. 310, 313 (2002). Probable cause is that amount of information that would warrant a prudent person in believing that the defendant committed the crime. *Commonwealth v. Santaliz*, 413 Mass. 238, 241, 596 N.E.2d 337 (1992).

In this case there was no probable cause to issue a complaint against Mr. Talbert for:

- a) Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J
- b) Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A;
- c) Conspiracy to Violate Drug Law, in violation of M.G.L. c.94C, §40.

There was no mention of Mr. Talbert in the Search Warrant Affidavit. Despite detailed surveillance of Joseph Bushfan and Dwayne Barrett in the weeks leading up to January 5, 2011, Mr. Talbert never appears during any of their alleged drug transactions. Mr. Talbert is never seen with either Mr. Bushfan or Barrett prior to the night of January 4, 2011. No cell phone number linked to Mr. Talbert is ever used for any of the several controlled drug purchases that the Framingham Police conducted with not one, but two confidential sources, "CS" and "CI". Neither CS nor CI ever identify or mention Mr. Talbert to the Framingham Police during their weeks of discussions and controlled buys from, and observations of, Mr. Bushfan and Mr. Barrett.

The only link between Mr. Talbert and the alleged drug dealing of Mr. Bushfan and Mr. Barrett, is that he had the misfortune to visit his relatives at 26 Fountain Street, Apt. 1 at the time the search warrant was executed. There is also the assertion of Det. DeRosa who believed he saw Mr. Talbert engage in what Detective DeRosa alleged appeared to be a hand to hand transaction outside of 26 Fountain Street earlier that evening. But it is unclear who the alleged customer in that transaction was. That person was never stopped, nor searched nor identified and no drugs were recovered from that alleged transaction.

Rarely has the old adage about being in the wrong place at the wrong time affected an individual as harshly as it has Mr. Talbert. The lack of probable cause in each of the Commonwealth's allegations are addressed below.

1. *Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J*
2. *Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A;*

In order to prove Count 2 of the Complaint: Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A, the Commonwealth must prove beyond a reasonable doubt that:

- 1) That the substance in question is a Class B controlled substance, namely cocaine;

2) That the defendant (distributed some perceptible amount of that substance to another person or persons)) or (possessed some perceptible amount of that substance with the intent to distribute it to another person or persons); and

3) That the defendant did so knowingly or intentionally.

District Court Jury Instruction 7.800 "Possession with Intent to Distribute a Controlled Substance" 2009 Edition

The Commonwealth does not present evidence sufficient to establish probable cause to charge Mr. Talbert with Possession with Intent to Distribute. Possession implies "control and power" *Commonwealth v. Pratt*, 407 Mass. 647, 650-52 (1990). Possession may be exclusive or joint, actual or constructive. *Commonwealth v. Deagle*, 10 Mass.App.Ct. 563, at 567 (1980). A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. Mr. Talbert was not in actual possession of any cocaine or crack cocaine when he was arrested. No cocaine or crack cocaine was found on his person or in his clothing or in the rear bedroom where he was watching television with his uncle. However, a person could be in constructive possession of something if he or she knowingly has both the power and the intention at some point in time to exercise dominion or control over a thing, either directly or through another person. *Commonwealth v. Pratt*, 407 Mass. 647, 651 (1990) . But simply being a visitor in an apartment as Mr. Talbert was does not imply constructive possession. See *Commonwealth v. Bongarzone*, 390 Mass. 326, 345-346 (1983).

When the Framingham Police found Mr. Talbert, he was kneeling on the floor of the back right bedroom of 26 Fountain Street, Apt. 1. The alleged crack cocaine that was found in the apartment was found in the front right bedroom used by Mr. Bushfan, and was found hidden in a sock in a drawer in a dresser. No other evidence of intent to distribute was found in the apartment. For instance the Framingham Police report does not specify the amount found in Mr. Bushfan's sock, nor the quality or purity and quantity of this alleged contraband. The Framingham Police did not find any other tools or paraphernalia of the drug trade either hidden or in plain view at 26 Fountain Street, Apt. 1, such as cutting powder, dilutants, scales and packaging materials, customer lists or price lists or other incriminating documents, extra beepers and phones, or police scanners, that

would provide circumstantial evidence that Mr. Talbert knew of, and was participating in, an illegal conspiracy with Mr. Bushfan to possess Class B substances with an intent to distribute them. Mr. Talbert had an ordinary cell phone on him, but he did not have a beeper or any other tool of the drug trade. Mr. Talbert had \$67.00 in his sock, which he told the Framingham Police he had put there because his athletic shorts did not have any pockets. The number of Mr. Talbert's cell phone never came up in the Framingham Police investigation of alleged drug dealing by Mr. Bushfan, and his co-defendant, Dwayne Barrett. Contrast the lack of circumstantial evidence found in this case with the ample evidence of drug distribution found in the apartment in question in *Commonwealth v. Rivera*, where the Worcester Police and Massachusetts State Police found:

"In the larger bedroom, the police found .5 gram of cocaine, also 81 per cent pure. It was inside a film canister in a suitcase near the closet. Inside drawers of a desk they found a strainer (part of a grinder used for cutting cocaine), a zip-lock bag containing traces of cocaine, and a paper with notations, described by the police as a drug code. On top of the desk, the police found a radio scanner and a note listing law enforcement frequencies. A jar of procaine crystal, known to be used to dilute cocaine, was found in an alcove. In the kitchen they found an electric beeper and a plastic strainer, also part of a grinder and interchangeable with the strainer found in the larger bedroom." *Commonwealth v. Rivera*, 31 Mass.App.Ct. 554, at 556 (1991).

At some point in the evening, believed to be between 11:00 pm and 12:00 am, Detective DeRosa of the Framingham Police observed someone he later identified or believed to be Mr. Talbert briefly exit 26 Fountain Street, and engage in what Det. DeRosa believed to be a hand to hand drug transaction with an individual outside. Mr. Talbert states in his Affidavit that he went outside to retrieve the power cable for his X-Box video game console, which he had left in the car of the acquaintance who dropped him off at 26 Fountain Street at approximately 11:00 p.m. This individual with whom Mr. Talbert spoke outside 26 Fountain Street was not stopped, searched or questioned by the Framingham Police after they allegedly witnessed him engage in a drug purchase, and no contraband was recovered from this individual.

When he was questioned later that morning, at 04:45 am in the morning of January 5, 2011, by Framingham Police and the Massachusetts State Police, Mr. Talbert stated that he had exited 26 Fountain Street once to retrieve his X-Box console power

cable from the acquaintance who had dropped him off. Mr. Talbert adamantly denied participating in or conspiring in any distribution or possession of any Class B. Mr. Talbert denied any knowledge of any Class B substances in the apartment.

At approximately 05:03 am in the morning of January 5, 2011, Mr. Bushfan was being interviewed by Massachusetts State Police Trooper Jeffrey A. Saunders and other MSP troopers and Framingham police officers. When told of Mr. Stamps' death during the execution of the search warrant, Mr. Bushfan became visibly upset and asked that the tape recorder be turned off, although he apparently agreed to continue talking after the recorder was turned off. At some point in that non-recorded conversation, Mr. Bushfan was asked if:

"he had any drugs on him when he was arrested and he stated, "I had crack on me, only about five pieces." He further stated that he and his cousin "dabbled in it to take care of our kids." I asked him if he meant selling it and he stated, "Yes."

Interview of Josph Bushfan by MSP Trooper Jeffrey A. Saunders #2924.

Wednesday, January 5, 2011.

MSP - Division of Investigative Services Case # 2010 -110-0005, page 2.

It is well settled in Massachusetts that the extrajudicial statements of joint venturers may be admissible against the others involved if the existence of the joint venture has been proven by other evidence independent of the questioned statements. *Commonwealth v. Beckett*, 373 Mass. 329, 339-340, 366 N.E.2d 1252 (1977). *Commonwealth v. Bongarzone*, 390 Mass. 326, 340, 455 N.E.2d 1183 (1983). *Commonwealth v. Irving*, 51 Mass.App.Ct. 285, 289-290, 744 N.E.2d 1140 (2001).

First, it is not even clear from Trooper Saunders' written notes who Mr. Bushfan is referring to when he references his "cousin". Is Mr. Bushfan referring to Mr. Talbert or Mr. Barrett? Is he referring to a true cousin by blood or marriage, or is he referring to a

street friend or buddy as a "cousin" or a "cuz". Moreover, in this case, there is no other evidence independent of the questioned statements that establishes probable cause against Mr. Talbert for the crime of Possession with Intent to Distribute.

As there is no probable cause to charge with Mr. Talbert with Possession with Intent to Distribute Class B, in violation of M.G.L., c.94C §32A; so Count 1 of the complaint, Drug Violation Near a School/Park, in violation of M.G.L. c.94C, §32J, must also be dismissed for lack of probable cause.

C. *Conspiracy to Violate Drug Law, in violation of M.G.L. c.94C, §40.*

There is no direct evidence to link the Defendant DAVAUGHN E. Talbert to the actions of Joseph Bushfan or those of Dwayne Barrett. Nevertheless, it is well established that a conspiracy may be proven by circumstantial evidence. The Supreme Judicial Court summarized the case law of conspiracy in *Commonwealth v. Nee*, 935 N.E.2d 1276, 458 Mass. 174 (2010):

" The elements of conspiracy are ' a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose....' " *Commonwealth v. Benson*, 389 Mass. 473, 479, 451 N.E.2d 118, cert. denied, 464 U.S. 915, 104 S.Ct. 278, 78 L.Ed.2d 257 (1983), quoting *Commonwealth v. Dyer*, 243 Mass. 472, 483, 138 N.E. 296 (1922). Accord *Commonwealth v. Hunt*, 45 Mass. 111, 4 Met. 111, 123-125 (1842).... To prove a conspiracy, the Commonwealth "must prove that the defendant combined with another ' with the intention' " to " commit the object crime" . *Commonwealth v. Frazier*, 410 Mass. 235, 245, 571 N.E.2d 1356 (1991), quoting *Commonwealth v. Cantres*, 405 Mass. 238, 244, 540 N.E.2d 149 (1989). Proof of an overt act in furtherance of the conspiracy is not necessary. See *Carrasquillo v. Commonwealth*, 422 Mass. 1014, 1015, 665 N.E.2d 993 (1996) (crime of conspiracy " is complete on the formation of the unlawful agreement"); *Commonwealth v. Beneficial Fin. Co.*, 360 Mass. 188, 249, 275 N.E.2d 33 (1971), cert. denied

As with other crimes, a conspiracy may, and typically is, proved by circumstantial evidence, because often there is no direct evidence that an " agreement" was reached. " The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed towards the accomplishment of the same object, especially if by the same means or in the same manner, may be satisfactory proof of

Joe agreed to buy cigarettes for Erika at the Store 24. When they got to the gas station on Fountain Street they were approached by numerous police officers."

Erik P. Gagnon #2523

Trooper, Massachusetts State Police

Middlesex Detectives Unit

Interview with [REDACTED] [REDACTED] at 05:45 am of January 5, 2011

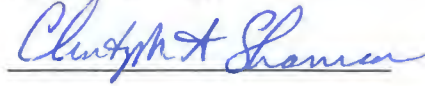
Considering that Mr. Bushfan left for his appointment at the YMCA at 12:20 am, one might infer that he was planning to do something else besides play basketball or workout. Indeed, the Framingham police found 8 baggies allegedly containing crack cocaine in Mr. Bushfan's pocket, as well as \$299 in his pocket and \$98 in his wallet. They do not find Mr. Talbert as part of this late night errand at all. He is not present with Mr. Bushfan. Instead, when the police enter 26 Fountain Street, Apt. 1, they encounter Mr. Talbert in a rear bedroom, not in the front bedroom where they later allege to have found crack cocaine. There is no cocaine found on Mr. Talbert's person, his clothing, or the back bedroom where he was kneeling. There are no fingerprints on the baggies of crack cocaine found in a sock in the front bedroom to suggest that Mr. Talbert ever touched those baggies.

More significantly, Mr. Talbert had never been arrested before. He had no criminal record. Mr. Bushfan had a criminal record and he and Mr. Barrett were known to the police. Det. Avila wrote in his Search Warrant Affidavit that Framingham Police Officer O'Toole had visited 26 Fountain Street to arrest Mr. Bushfan on an active warrant. Mr. Barrett was in the Framingham Police database as an alleged member of a gang known as "Folk Nation." There are no such record or indicia of criminal behavior for Mr. Talbert. There is no evidence, real or circumstantial, to establish probable cause that Mr. Talbert engaged in any conspiracy with Mr. Bushfan.

For the reasons stated above, the above-numbered complaint against the Defendant Davaughn E. Talbert should be dismissed.

Respectfully submitted,

DAVAUGHN E. TALBERT, Defendant,
By his Attorney,

A handwritten signature in blue ink, reading "Christopher A. Shannon", is written over a horizontal line.

Christopher A. Shannon
Walters, Shannon & Jensen, LLC
27 Harvard Street
Brookline, MA 02445
P: (617) 566-2300
F: (617) 566-9350
BBO # 631340
cshannon@wsjlawoffice.com

Dated: September 27, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

FRAMINGHAM DISTRICT COURT

DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DAVAUGHN E. TALBERT

MOTION FOR BILL OF PARTICULARS

Now comes the Defendant in the above-entitled action and hereby respectfully moves this Honorable Court to order the Commonwealth to furnish the Defendant with the following particulars:

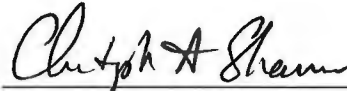
The time, manner, place and means by which the Commonwealth alleges that the Defendant did:

- 1) Commit a Drug Violation Near a School/Park; Possess with Intent to Distribute Class B; and Conspire to Violate Drug Laws;
- 2) Where and when did the Defendant possess Class B within 1000 feet of a school or daycare?
- 3) Where is the alleged Class B that Defendant is alleged to have possessed?
- 4) Where and when allegedly did the Defendant knowingly and intelligently possess, with intent to distribute, said Class B?
- 5) Where, when and with whom did the Defendant conspire to violate drug laws?
- 6) Who were the witnesses, or confidential informants, if any, to any of the alleged crimes;
- 7) And what testimony did they provide in the Affidavit to the Search Warrant that was executed in this case upon the home in which Defendant was standing at the time of his arrest?

The Defendant states in support of his Motion that the above information is critical to his ability to prepare and present his defense and to confront the evidence against him. Sixth and Fourteenth Amendments to the U.S. Constitution; Article XII of the Massachusetts Declaration of Rights; Mass.R.Crim.P. 13(b)(1).

RESPECTFULLY SUBMITTED

DAVAUGHN E. TALBERT
By his attorney,



Christopher A. Shannon
BBO # 631340
7 Harvard Street, Suite 220
Brookline, MA 02445

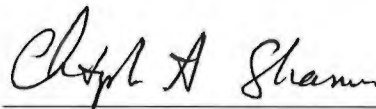
617-738-3246

Dated: September 27, 2011

CERTIFICATE OF SERVICE

I, Christopher A. Shannon, Attorney for the within named Defendant certify that I gave notice of the foregoing Defendant's Motion to Dismiss for a Bill of Particulars, by delivering a copy of said Motion with this Certificate, on this 27th day of September, 2011, to: the Office of the Middlesex District Attorney, 15 Commonwealth Avenue, Woburn, MA 01801.

Signed under the pains and penalties of perjury.



Christopher A. Shannon



THE COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX DISTRICT ATTORNEY
53 FOUNTAIN STREET
FRAMINGHAM, MA 01702

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

Tel: 781-897-8800

Fax: 781-897-8801

FAX TRANSMISSION

To: Nancy ATTN: le Talbert / Bushfan
From: Maggie Pastuszek MIDDLESEX DA'S OFFICE
Date: 3/14/11
Fax Number: 6701 # of pages (including cover):

More Motions on these
matters.

THX,
Maggie

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

FRAMINGHAM DISTRICT COURT

DOCKET NO. 1149-CR-0024

COMMONWEALTH

No objection

v.

DEVON TALBERT

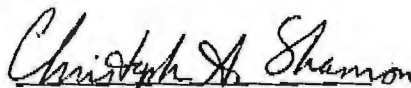
MOTION FOR SEARCH WARRANT AND SEARCH WARRANT AFFIDAVIT

Now comes the Defendant in the above-entitled action and hereby respectfully moves this Honorable Court to authorize the release to the Defendant of the Search Warrant and Search Warrant Affidavit filed against the co-defendant in this matter, Joseph Bushfan. The Defendant states in support of his Motion that the above information is critical to his ability to prepare and present his defense and to confront the evidence against him. Sixth and Fourteenth Amendments to the U.S. Constitution; Article XII of the Massachusetts Declaration of Rights; Mass.R.Crim.P. 13(b)(1).

RESPECTFULLY SUBMITTED

DEVON TALBERT

By his attorney,



Christopher A. Shannon

BBO # 631340

7 Harvard Street, Suite 220

Brookline, MA 02445

617-738-3246

Dated: February 23, 2011

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DEVON TALBERT

MOTION FOR BILL OF PARTICULARS

Now comes the Defendant in the above-entitled action and hereby respectfully moves this Honorable Court to order the Commonwealth to furnish the Defendant with the following particulars:

The time, manner, place and means by which the Commonwealth alleges that the Defendant did:

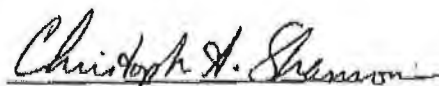
- 1) Commit a Drug Violation Near a School/Park; Possess with Intent to Distribute Class B; and Conspire to Violate Drug Laws;
- 2) Where and when did the Defendant possess Class B within 1000 feet of a school or daycare?
- 3) Where is the alleged Class B that Defendant is alleged to have possessed?
- 4) Where and when allegedly did the Defendant knowingly and intelligently possess, with intent to distribute, said Class B?
- 5) Where, when and with whom did the Defendant conspire to violate drug laws?
- 6) Who were the witnesses, or confidential informants, if any, to any of the alleged crimes;
- 7) And what testimony did they provide in the Affidavit to the Search Warrant that was executed in this case upon the home in which Defendant was standing at the time of his arrest?

The Defendant states in support of his Motion that the above information is critical to his ability to prepare and present his defense and to confront the evidence against him. Sixth and Fourteenth Amendments to the U.S. Constitution; Article XII of the Massachusetts Declaration of Rights; Mass.R.Crim.P. 13(b)(1).

RESPECTFULLY SUBMITTED

DEVON TALBERT

By his attorney,



Christopher A. Shannon

BBO # 631340

7 Harvard Street, Suite 220

Brookline, MA 02445

617-738-3246

Dated: February 23, 2011

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024
COMMONWEALTH
v.
DEVON TALBERT

DEFENDANT'S MOTION FOR DISCLOSURE OF
CONFIDENTIAL INFORMANT INFORMATION

Now comes the Defendant in the above-captioned complaint, and respectfully moves this Honorable Court, pursuant to M.R. Crim. P. 14(a)(2), to enter an order directing the Commonwealth to furnish him, through counsel, with the names, present addresses, and present telephone numbers of any and all informants who supplied any information to the Commonwealth resulting in the entry and search of the Defendant's cousin's residence which took place on or about January 5, 2011, the arrest of the Defendant, and/or the filing of the above-captioned complaint, including, but not limited to, any CI who supplied information to Framingham Police Detective Dinis Avila, who obtained Search Warrant (Docket #11-4-SW-02). With respect to each individual informant so identified, the Defendant further moves the court to order the Commonwealth to disclose the following information:

1. The prior criminal, juvenile, and probation records at each such person;
2. The sum and substance of any plea bargain entered into between said individual and any law enforcement agency, including, but not limited to, any agreement to drop or reduce pending charges, not to charge crimes otherwise susceptible to prosecution, or to make any

specific recommendation with respect to the imposition or reduction of sentence in pending cases;

3. Any and all payments or other financial arrangements made between such individual and any law enforcement agency;

4. Any and all information tending to show that such an individual has made contradictory and/or inconsistent statements with respect to the subject matter of the information provided in reference to this case;

5. Any and all information tending to show that such an individual suffers from any material defect in perception, memory, drug or alcohol addiction, or any mental disease or defect;

6. Any and all information tending to show bias and/or prejudice on the part of such individual towards the Defendant(s);

7. All facts relating to instances of previous arrests and convictions of other individuals made or obtained as a result of information supplied by any such informant, including without limitation, the name and address of the person arrested, the Court where such person was charged, the docket number of the case, and the disposition and date thereof.

As grounds therefor, Defendant avers that such information is essential to preparing an effective defense at trial and to challenging the legality of the search conducted on or about January 5, 2011.

The Defendant relies upon Commonwealth v. Signorine, 404 Mass. 400, 405-408 (1989); Commonwealth v. Rojas, 403 Mass. 483, 485-488 (1988); Commonwealth v. Valdez, 402 Mass. 65, 70-71 (1988); Commonwealth v. Gregory, 401 Mass. 437, 441-443 (1988); Commonwealth v. Monteiro, 396 Mass. 123, 128-130 (1985); Commonwealth v. Nelson, 26 Mass. App. Ct. 794 (1989). See also, Commonwealth v. Parapar, 404 Mass. 319, 321-324 (1989).

RESPECTFULLY SUBMITTED

DEVON TALBERT
By his attorney,


Christopher A. Shannon
BBO # 631340
7 Harvard Street, Suite 220
Brookline, MA 02445

617-738-3246

Dated: January 25, 2011

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss. FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149-CR-0024

COMMONWEALTH

v.

DEVON TALBERT

MEMORANDUM IN SUPPORT OF
MOTION FOR INFORMANT INFORMATION

1. THE COMMONWEALTH'S PRIVILEGE TO WITHHOLD THE IDENTITY OF THE INFORMANT IS NOT ABSOLUTE AND MUST GIVE WAY TO THE REQUIREMENTS OF FUNDAMENTAL FAIRNESS.

The Commonwealth's privilege to withhold the identity of an informant has been justified as a means of encouraging citizens to report violations of the law to the police. Commonwealth v. Martin, 362 Mass. 243 (1972).

This privilege, however, is not limitless. It must give way, for example, to the due process considerations of a fair trial. Roviaro v. United States, 353 U.S. 53 (1957). Further, disclosure will be compelled if the informer is a material witness on the issue of guilt. Commonwealth v. Ennis, 1 Mass. App.Ct. 499, 501 (1973) citing Wigmore, Evidence [McNaughton, rev.] Sec. 2734, p. 768). It is well settled, then, that the informant's identity must be disclosed when his or her testimony is relevant and helpful to the defense of an accused, or is essential to a fair determination of guilt or innocence. Roviaro, 353 U.S. at 60-61.

In Roviaro, supra, the Supreme Court ruled that withholding the identity of an informant was reversible error, where the informant was an active participant and eyewitness to the alleged drug transaction. The Court recognized the legitimate need to protect sources and thus encourage communication to law enforcement agencies but went on to hold:

A further limitation on the applicability of the privilege arises from the fundamental requirement of fairness. where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused. or is essential to a fair determination of a cause, the privilege must give way. id. at 61-62.

The Court stated that there is no fixed rule in determining when disclosure is justifiable and suggested a balancing test. Factors taken into consideration may include the crime charged, the possible defenses, the possible significance of the informant's testimony, the possibility of other witnesses; cf. United States v. Cappabianca, 398 F.2d 356 (2d Cir. 1968), the government's ability (or failure) to amplify the danger to the informant, United States v. Waters, 288 F. Supp. 952 (U.S.D.C. Mass., 1965) and other relevant factors.

The Supreme Judicial Court adopted this balancing test in 1973 in Commonwealth v. Ennis, supra. There the Court required disclosure of an informant who was present at the sale of marijuana to a police officer. The defense raised the issue of identity and provided an alibi for the time of the alleged transaction. The Court held disclosure was required, and the testimony of the informer obviously crucial. Goodman, J. wrote:

"The trial court may compel disclosure if it appears necessary in order to avoid the risk of false testimony or in order to secure useful testimony. For example, disclosure will be compelled if the informer is a material witness on the issue of guilt. Id. at 501.

In the instant case, the informant's testimony may be critical on the issue of intention to distribute. This is not a challenge of a search warrant or some other subsidiary issue, but the trial of the criminal charge itself where "the need for truthful verdict outweighs society's need for the informer privilege," Mccray v. Illinois, 386 U.S. 300, 307 (1967); Commonwealth v. Abdulnour, 11 Mass. App. Ct. 531 (1981)."

(1) The Court went on to point out that the Defendant was not able to determine what the effect of disclosure might have been; whether it would provide a source of contradictions and inconsistencies or whether it would not have exculpated the Defendant. The Court specifically stated that the burden is not on the Defendant to show specific prejudice. As in the present case, it can be surmised that the informant's testimony would be relevant and helpful but, absent disclosure and access, the Defendant cannot prove the exculpatory nature of his testimony.

II. THE DISCLOSURE OF THE INFORMANT'S IDENTITY IS REQUIRED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE XIV OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

The disclosure of an informant's identity is not limited to a single constitutional amendment or article under the Massachusetts Declaration of Rights, but has been tied to several, including the Fourteenth Amendment due process clause (and concomitantly Article XII), Hawkins v. Robinson, 367 F. Supp. 1025 (2d Cir. 1973), the Sixth Amendment and Article XII (right to confront and cross-examine witnesses),

Commonwealth v. Ennis, *supra*; Commonwealth v. Johnson, 365 Mass. 34 (1974); and the Fifth Amendment and Article XII (right not to be compelled to testify). Rovario v. United States, *supra*; United States v. Waters, *supra*. In addition, a Defendant is also entitled under Article XII, to "produce all proofs that may be favorable to him."

Although the Supreme Court in Rovario did not specifically tie its result to the Fourteenth Amendment due process clause, it did base disclosure on the "fundamental requirement of fairness." The second circuit in Hawkins v. Robinson, *supra*, held that the required disclosure of an informant's identity was a guaranteed due process right under the Fourteenth Amendment and stated: "We need not indulge in semantic gymnastics or turn conceptual somersaults over the fact that the Supreme Court did not specifically denote the Due Process Clause as the basis for its decision in Rovario; it is beyond peradventure that the right to a trial in which the "fundamental requirements of fairness" are secured is a right essential to, and at the very heart of, the protections guaranteed by our Constitution. *Id.* at 1034."

The required disclosure has also been tied to the Fifth and Sixth Amendments. In Rovario, the Court pointed out that unless the Defendant waived his constitutional right not to take the stand, the informant was his only material witness. He was the only witness who might have testified to entrapment or identity or the Defendant's knowledge of the drugs. Further, the informant was the only witness who might contradict the arresting officers.

In Ennis, the Supreme Judicial Court used the fairness language of Rovario, but also pointed out in a footnote that "the refusal to disclose the identity of the informer denied the Defendant the right to interview him, to have compulsory process for his presence if necessary, and to cross-examine him," *Id.* at 504.

In Commonwealth v. Johnson, 365 Mass. 534 (1974), the Supreme Judicial Court specifically noted that the Sixth Amendment right to confrontation and Article XII rights required the disclosure of an additional witness's identity. In that case, the refusal of a judge to order a witness to provide disclosure was prejudicial error. The Court noted:

"We have said that a fair and full cross-examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere privilege to be exercised to the sound discretion of the presiding judge, and the denial of the right is prejudicial error . . . cit. om. . . . In criminal cases this principle is related to the Sixth Amendment right of confrontation and to the like guaranty of Article XII of our Declaration of Rights. Id. at 543.

III. DISCLOSURE OF THE INFORMANT'S IDENTITY IS REQUIRED WHERE THE INFORMANT IS A PERCIPIENT WITNESS.

The constitutional basis of compelling disclosure of an informant's identity is not limited to those cases where the informant is a participant, but also applies to the case where, as here, the informant is a "percipient witness." United States v. Leon, 487 F.2d 389 (9th Cir. 1973). The informant in this case is a material witness on several critical issues. The Commonwealth must prove beyond a reasonable doubt that this Defendant intended to distribute it. The informant is likely to possess critical evidence on this issue.

In Rovario, the Defendant was charged with a crime analogous to possession with intent to distribute in that he "did fraudulently and knowingly receive, conceal, buy, and facilitate the transportation and concealment after importation of . . . heroin." The government argued that disclosure was not necessary, but the Court required it. They noted that while the informant was

not expressly mentioned, the charge, when viewed in connection with the evidence, was so closely related as to make the informant's identity and testimony highly material.

The Supreme Judicial Court, in Ennis, made this even clearer and refused to distinguish between an informant/ participant and an informant/eyewitness. The Court stated:

"Nor can we accept the distinction urged by the Commonwealth between the informer who participates in the crime and one who is merely a witness. In either event, his involvement is such that the disclosure of his identity is important to a fair determination of the case . . . the significant point is that when an informer participates in a criminal transaction, he ceases to be merely a source of information and becomes a witness". Id. at 503.

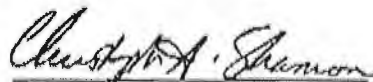
The Supreme Judicial Court has determined that the fact that an informer is an eyewitness to the crime weighs heavily in favor of disclosure. Commonwealth v. Swenson, 368 Mass. 268, 277 (1975).

CONCLUSION

For the foregoing reasons, the Defendant asserts that his right to a fair trial will be prejudiced if the Commonwealth is not required to disclose information relative to the informant listed in the affidavit in support of the search warrant.

RESPECTFULLY SUBMITTED

DEVON TALBERT
By his attorney,



Christopher A. Shannon
BBO # 631340
7 Harvard Street, Suite 220
Brookline, MA 02445

617-738-3246

Dated: January 25, 2011



THE COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX DISTRICT ATTORNEY
53 FOUNTAIN STREET
FRAMINGHAM, MA 01702

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

Tel: 781-897-8800
Fax: 781-897-8801

FAX TRANSMISSION

To:

Nancy

Re: Joseph Bushfan

From:

Maggie Pastuszek

MIDDLESEX DA'S OFFICE

Date:

3/14/11

Fax Number:

6701

of pages (including cover):

lots

For John V for review.

Thx.
Maggie

Bardouille and Fugate
Attorneys at Law
22 Broad Street
Lynn, Massachusetts 01902-5023

Joseph F. Bardouille
Anthony W. Fugate

(781) 593-8888

Michael E. Rudder

Facsimile
(781) 592-2918

March 7, 2011

District Attorney's Office
Framingham District Court
600 Concord Street
Framingham, Massachusetts 01704

Re: Commonwealth v. Joseph Bushfan
Framingham District Court
Complaint No.: 1149 CR 0023

Dear Sir/Madam:

Relative to the above entitled matter which is scheduled for a Pre-Trial Hearing on April 1, 2011, enclosed please find the following:

1. A proposed Pre-Trial Conference report;
2. Motion and Order for Turret Tapes/Police Dispatch Tapes;
3. Motion and Order for Criminal Records
4. Motion for Exculpatory Evidence;
5. Motion to Inspect Evidence;
6. Motion for Statements of Co-Defendants;
7. Motion of Defendant for Impeachment Material as to any NonTestifying Declarant;
8. Motion for a List of Witnesses the Commonwealth Anticipates it may Call at Trial;
9. Motion of the Defendant to be Furnished with Statements of Promises, Rewards, Inducements or Threats;

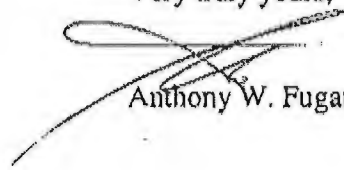
District Attorney's Office
March 7, 2011
Page 2

10. Motion for Discovery of Tests Employed, Test Data and Test Results by the Commonwealth's Expert;
11. Motion for Copies of Photographs;
12. Motion for Disclosure of Prior Bad Acts;
13. Motion to Discover Location of Police Surveillance Post;
14. Motion for Discovery of Electronic Surveillance;
15. Motion for Disclosure of Identity of Commonwealth Informant;
16. Motion of Defendant for the Government to Notify Him of its Intention to Use Evidence;
17. Motion for Discovery of Defendant's Conduct that the Government Intends to Introduce at Trial as an Implied Admission;and
18. Motion for a Copy of the Police Officer's Notes with Reference to Interviews with Witnesses

Because of the amount of Discovery Motions being filed, I wanted to forward them to you ahead of time, because of how hectic it can get on the morning of the Pre-Trial Hearings.

Please feel free to give me a call to discuss the above at your convenience.

Very truly yours,



Anthony W. Fugate

AWF/ajd

Bardouille and Fugate
Attorneys at Law
22 Broad Street
Lynn, Massachusetts 01902-5023

Joseph F. Bardouille
Anthony W. Fugate

(781) 593-8888

Michael E. Rudder

Facsimile
(781) 592-2918

March 7, 2011

Office of the Criminal Clerk
Framingham District Court
600 Concord Street
Framingham, Massachusetts 01704

Re: Commonwealth v. Joseph Bushfan
Framingham District Court
Complaint No.: 1149 CR 0023

Dear Sir/Madam:

Relative to the above entitled matter which is scheduled for a Pre-Trial Hearing on April 1, 2011, enclosed please find the following:

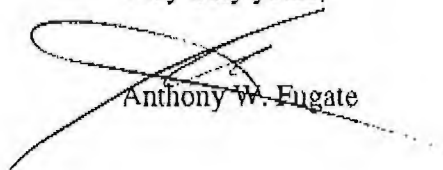
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District Attorney's Office
March 7, 2011
Page 2

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17. Motion for Discovery of Defendant's Conduct that the Government Intends to Introduce at Trial as an Implied Admission;and
18. Motion for a Copy of the Police Officer's Notes with Reference to Interviews with Witnesses

Please file accordingly,

Very truly yours,



Anthony W. Fugate

AWF/ajd

PRETRIAL CONFERENCE REPORT Mass.R.Crim.P. 11(a)(2)(A)	DOCKET NO(s). 1149 CR 0023	Trial Court of Massachusetts District Court Department
Commonwealth vs. <u>Joseph Bushfan</u> <small>NAME OF DEFENDANT</small>		COURT DIVISION Framingham
<i>(To be completed and signed by both parties and submitted to the court at the Pretrial Hearing unless defendant tenders a plea or admission)</i>		
A pretrial conference between the parties was conducted on <u>4-01</u> , 20 <u>11</u> , with the following results:		
I. DISCOVERY		
1. AUTOMATIC DISCOVERY FOR DEFENSE. Pursuant to Mass.R.Crim.P. 14(a)(1)(A), the prosecution has disclosed to the defense and the defense has been permitted to discover, inspect and copy: <input type="checkbox"/> [Completed] all items and information subject to automatic discovery. <input checked="" type="checkbox"/> [Not Completed] all items and information subject to automatic discovery, except the following: <u>See attached list of Discovery Motions</u>		
2. AUTOMATIC RECIPROCAL DISCOVERY FOR PROSECUTION. Pursuant to Mass.R.Crim.P. 14(a)(1)(B), the defense has disclosed to the prosecution and the prosecution has been permitted to discover, inspect and copy: <input type="checkbox"/> [Completed] all items and information subject to automatic reciprocal discovery. <input type="checkbox"/> [Not Completed] all items and information subject to automatic reciprocal discovery, except the following: <input type="checkbox"/> Not yet applicable because the prosecution has not yet completed all automatic or ordered discovery.		
3. UNRESOLVED DISCOVERY ISSUES. With respect to any discovery to which the parties are or may be entitled, automatically or by court order, pursuant to Mass.R.Crim.P. 14 and which has not yet been provided: <input type="checkbox"/> The parties agree as follows (list items and agreed upon date of delivery, inspection, etc.): <input type="checkbox"/> The defense is filing herewith the following motion(s) to compel discovery: <input type="checkbox"/> The prosecution is filing herewith the following motion(s) to compel discovery: 		
4. CERTIFICATE OF COMPLIANCE. The undersigned acknowledge that each party must file a Certificate of Compliance when the party has provided all discovery required by rule, agreement or court order, pursuant to Mass.R.Crim.P. 14(a)(3).		
5. SUBSEQUENTLY DISCOVERED MATERIAL. The undersigned acknowledge their continuing duties regarding discovery pursuant to Mass.R.Crim.P. 14(a)(4).		
II. OTHER PRETRIAL MATTERS		
6. NON-DISCOVERY MOTIONS. In addition to any discovery-related motions listed above, the following motions will be filed on matters upon which the parties have not reached an agreement: <u>Motion to Suppress-Physical Evidence</u> <u>Motion to Suppress-Statements</u> <u>Motion to Dismiss</u>		

7. **NOTICE OF ALIBI** (*Mass.R.Crim.P. 14(b)(1)*). The Commonwealth hereby notifies the defendant that the time, date, and place of the alleged offense was as follows:

N/A

Defendant agrees, if an alibi defense will be offered, to notify the Commonwealth in writing on or before _____, 20__ of the place(s) at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the defendant's alibi witnesses, or may here so state:

N/A

The Commonwealth agrees to notify the defendant in writing within 7 days of service of the defendant's notice of alibi, of the names and addresses of witnesses on whom it intends to rely to establish defendant's presence at the scene of the alleged offense or to rebut any of the defendant's alibi witnesses. Both parties acknowledge their continuing duty under Mass.R.Crim.P. 14(b)(1)(C) to disclose additional alibi witnesses.

8. **NOTICE OF OTHER DEFENSES** (*Mass.R.Crim.P. 14(b)(2), (3)*). If defendant intends to rely upon the defense of lack of criminal responsibility or upon a defense based upon a license, claim of authority or ownership, or exemption, defendant must notify the Commonwealth within 21 days of the assignment of a trial date, or may here so state:

NONE

9. **STIPULATIONS OF FACT:** NONE

10. **CASE INFORMATION** (*not binding*):

Estimated length of trial: 4 days

No. of Witnesses: Prosecution _____ Defense 4-6 Case likely to proceed: ☒ With Jury. ☐ Jury Waived.

11. **CERTIFICATION.** The undersigned certify that the information set forth above is accurate and complete as of the date of this Pretrial Conference Report. Pursuant to Mass. R. Crim. P. 11(a)(2)(A), any agreement between the parties set forth herein shall be binding and shall control the subsequent course of the proceedings.

☐ Assistant District Attorney
☐ Police Prosecutor

☒ Defense Counsel: Anthony W. Fugate, Esq.
☐ Pro Se Defendant

Defendant's Signature (*required if waiver of constitutional right or stipulation of material fact set forth herein*)

III. COURT ORDERS

(To be completed by Judge.) After hearing, the Court orders as follows:

Justice

Date

LIST OF DISCOVERY MOTIONS

1. Motion and Order for a Copy of the Turrett Tape/Police Dispatch Tapes
2. Motion and Order for Criminal Records
3. Motion for Exculpatory Evidence
4. Motion to Inspect Evidence and Reports
5. Motion for Statements of Co-Defendants
6. Motion of Defendant for Impeachment Material as to any Nontestifying Declarant
7. Motion for a List of Witnesses the Commonwealth Anticipates it May Call at Trial
8. Motion of the Defendant to be Furnished with Statements of Promises, Rewards, Inducements or Threats
9. Motion for Discovery of Tests Employed, Test Data and Test Results by the Commonwealth's Expert
10. Motion for Copies of Photographs
11. Motion for Disclosure of Prior Bad Acts
12. Motion to Discover Location of Police Surveillance Post
13. Motion for Discovery of Electronic Surveillance
14. Motion for Disclosure of Identity of Commonwealth Informant
15. Motion of Defendant for the Government to Notify Him of its Intention to Use Evidence
16. Motion for Discovery of Defendant's Conduct that the Government Intends to Introduce at Trial as an Implied Admission
17. Motion for a Copy of the Police Officers' Notes with Reference to Interviews with Witnesses

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH)

v.)

JOSEPH BUSHFAN)MOTION AND ORDER FOR COPY OF
TURRET TAPE/POLICE DISPATCH TAPES

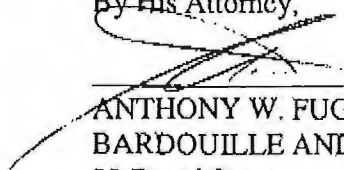
Now comes JOSEPH BUSHFAN, as the defendant in the above-entitled matter, who moves this Honorable Court to order the Framingham Police Department and the Massachusetts State Police, to provide him with a copy of the Turret Tape, and/or Dispatch Tapes. As reasons therefore, such evidence may be exculpatory, is needed for the adequate preparation of this matter, and will cause little or no inconvenience to the Commonwealth. Specific reference is made to the following:

Incident No: 1100091

Dates: January 4 and January 5, 2011

Times: January 4, 2011- 9:00 P.M. to 12: 01 A.M.
January 5, 2011-12:01 P.M. to 3:00 P.M.Location: 26 Fountain Street
Framingham, Massachusetts

Officer: Det. Felipe Martinez, ID# 299

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney,
ANTHONY W. FUGATE
BARDOUILLE AND FUGATE
22 Broad Street
Lynn, Massachusetts 01902
(781) 593-8888
BBO #180980✓
ok
except
time from

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

No copy

COMMONWEALTH)
)
 v.)
)
 JOSEPH BUSHFAN)

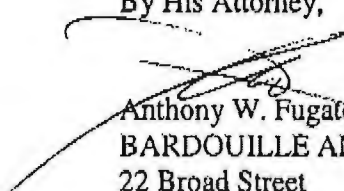
MOTION AND ORDER FOR
CRIMINAL RECORDS

Now comes JOSEPH BUSHFAN as the defendant in the above-entitled matter who moves, pursuant to Mass.R.Crim.P. 14(a)(2), that this Honorable Court order the Commonwealth to provide him with a list of witnesses which it intends to call at trial, along with their dates of birth, their current addresses and any other information needed in order to secure the criminal records, if any, of those witnesses.

The defendant further request that the Criminal History Systems Board, the Commissioner of Probation, and the Probation Department of the Framingham District Court be ordered to furnish him with the criminal records of convictions of those listed witnesses.

1. Devon Talbot
26 Fountain Street, Apt. #1
Framingham, Massachusetts
D.O.B.: 8-05-90

RESPECTFULLY SUBMITTED,
JOSPH BUSHFAN
By His Attorney,


Anthony W. Fugate
BARDOUILLE AND FUGATE
22 Broad Street
Lynn, Massachusetts 01902
(781) 593-8888
BBO# 180980

So Ordered:

Justice:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO.: 1149 CR 0023

COMMONWEALTH)

v.)

JOSEPH BUSHFAN)

MOTION FOR EXCULPATORY EVIDENCE

Now comes JOSEPH BUSHFAN, as the defendant in the above entitled matter who respectfully requests that this Honorable Court order the Commonwealth to furnish him with copies, or the opportunity to view and copy, any and all exculpatory material. This request is made pursuant to Mass.R.Crim.P. 14(a)(1)(C), Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Commonwealth v. Ellison, 376 Mass. 1, 379 N.E.2d 560 (1978); Commonwealth v. Tucceri, 412 Mass. 401, 589 N.E.2d 1216 (1992); and their progeny.

More specifically, the Defendant asks this Honorable Court to require the Commonwealth prior to trial to produce or to provide an opportunity to inspect any evidence, material, or information within the possession, custody or control of the Commonwealth, or that by the exercise of reasonable diligence may be obtained by the Commonwealth, including any information in the possession of any investigative agencies, that is favorable to or exculpates the Defendant in any way; that tends to establish a defense in whole or in part to the allegations in the complaint; that impeaches any witness the state intends to call; or that may help the Defendant avoid conviction or mitigate punishment.

The Defendant's request for such information includes, but is not limited to, the following:

(1) Any evidence, material or information that would tend to impeach the credibility of any person whom the Commonwealth intends to call as a witness. See, Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Mills v. Scully, 653 F.Supp. 885 (S.D.N.Y.1987), rev'd on other grounds, 826 F.2d 1192 (2d Cir.1987).

(a) Any record of the witness' arrest or conviction maintained and prepared by the Immigration and Customs Enforcement, the Drug Enforcement

- ✓ Administration, all other federal law enforcement agencies, the Framingham Police Department and the Massachusetts State Police.

dy (b) Any facts or allegations concerning criminal or other misconduct of the witness that is not reflected on his/her criminal record including any material information found in his/her probation file or any pending criminal charge or investigation against the witness or any business entity with which he/she is connected. See United States v. Striffler, 851 F.2d 1197 (9th Cir.1988), cert. denied, 489 U.S. 1032, 109 S.Ct. 1170, 103 L.Ed.2d 228 (1989) (probation file must be produced if material and relevant).

dy (c) Any material relating to the witness' mental or physical history that tends to impair or reflect adversely on his/her reliability as a witness, including but not limited to any information that would tend to affect the witness' motive to testify or ability to perceive, recall, or understand events.

✓ (d) Any statements made, written or recorded, by or of the witnesses referred to relating to any of the above-mentioned matters.

✓ (e) Any information that tends to contradict the testimony that the Commonwealth anticipates will be given by any of its witnesses. McDowell v. Dixon, 858 F.2d 945 (4th Cir.1988), cert. denied, 489 U.S. 1033, 109 S.Ct. 1172, 103 L.Ed.2d 230 (1989).

dy (f) Any information showing that the testimony was motivated to any degree by a personal animosity or feelings of revenge toward the defendant. E.g., State v. Brown, 552 S.W.2d 383 (Tenn.1977).

✓ (2) ✓ Any and all statements, testimony, memoranda, interviews, documents or summaries, relating to this case, or any portion thereof, by any person, that contradicts, in whole or in part, any statement (by that person or any other person) that the Commonwealth intends to use or rely on in any manner in connection with the trial of this cause. Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

dy (3) All evidence that tends to minimize or negate the probative effect of the Commonwealth's evidence of defendant's participation in the allegations set forth in the complaint.

(4) Any evidence, statement, or information in the possession of the Commonwealth describing or relating to the conduct of the defendant that in any way refutes or is inconsistent with his participation in the alleged offenses, including but not limited to the following:

✓ (a) Any written, recorded, or oral statements or comments made by witnesses or others to any person, including Commonwealth agents, that are favorable to the defendant.

(b) Any written, recorded, or oral statements or comments of persons interviewed by the Commonwealth in this matter who are not expected to be witnesses for the Commonwealth at the trial.

✓ (c) Any results, reports, and opinions obtained from examinations, tests, and experiments on physical items and evidence that indicate a lack of criminal involvement or otherwise favorable to the defendant.

✓ (d) Any evidence, statement or information that tends to contradict the testimony that the Commonwealth anticipates will be given by any one of its witnesses. United States v. Foster, 874 F.2d 491 (8th Cir.1988) (prosecutor failed to correct false testimony which was a violation of due process); Brown v. Wainwright, 785 F.2d 1457 (11th Cir.1986).

✓ (e) Any evidence relating to searches and seizures, electronic or otherwise.

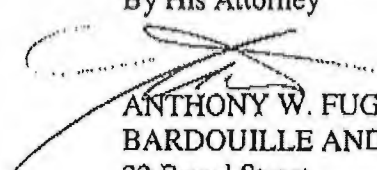
✓ (5) Any written or oral statement and/or confession made by the defendant or co-defendant which is unknown to defense counsel. *See* Government of Virgin Islands v. Martinez, 780 F.2d 302 (3d Cir.1985).

✓ (6) Any information about any eyewitness for which the prosecution has a name and/or address which the Commonwealth does not intend to call. United States v. Cadet, 727 F.2d 1453 (9th Cir.1984).

RESPECTFULLY SUBMITTED,

JOSEPH BUSHFAN

By His Attorney


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BBO #180980

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO.: 1149 CR 0023COMMONWEALTH)

v.)

JOSEPH BUSHFAN)

MOTION TO INSPECT EVIDENCE AND REPORTS

Now comes JOSEPH BUSHFAN as the defendant in the above-entitled matter who moves this Honorable Court, pursuant to Mass.R.Crim.P. 14, to direct the Commonwealth to permit him to inspect and/or copy the following evidence, if any, in the possession, custody or control of the assistant district attorney; Immigration and Customs Enforcement (ICE), the Drug Enforcement Administration, other Federal Law Enforcement Agencies, the Framingham Police Department, or the Massachusetts State Police and/or other law enforcement agency public or private. The existence of which is known or by due diligence may become known to the assistant district attorney:

- ✓ 1. Any and all photographs, including video tapes, taken of the defendant, co-defendant or the location of the arrest;
- ✓ 2. Any and all photographs taken at the scene of the arrest or otherwise relating to this case;
- by 3. Any handwritten notes relating to this case taken by the police or other investigating officers prior to, during or subsequent to the defendant's arraignment, including but not limited to any notes of conversations with the defendant or co-defendant;
- ✓ 4. A copy of each and every document that the Commonwealth intends to introduce as evidence at the trial;
- ✓ 5. A copy of all police reports; including but not limited to reports of the arresting officer and reports written by any investigating officers;
- ✓ 6. A copy of all written reports or notes of any examining expert or laboratory used by the police department, directly or indirectly concerning an examination made by examiner, expert, or laboratory of any physical, electronic or written evidence connected with the investigation and/or prosecution of this action;

Not Notes 7. Any observations reduced to writing made by any police officers involved with this case who the prosecution intends to use or not use at trial which were not part of any so called "official" police reports furnished, or to be furnished, to defense counsel;

- ✓ 8. The time and place of and the name of the officers who gave the defendant his so called Miranda warnings and the names of any officers witnessing this;
- ✓ 9. Any documents containing the circumstances surrounding (a) the defendant's right to make a telephone call, including the time, to whom it was made and the purpose of the call;
- ✓ 10. All written and oral statements of the defendant;
- ✓ 11. Any transcripts and/or tape recording containing any statements made by the defendant or any other individual concerned with this case;
- ✓ 12. Any booking slips or other documents relative to the booking process;
- ✓ 13. The names, addresses, telephone numbers, and statements of (a) all non-civilian witnesses having knowledge of the defendant's case; (b) all persons interviewed by the police, district attorney's office, or any other law enforcement agency, or their representatives or agents; and (c) all witnesses whom the prosecution expects or does not expect to call to testify, including their dates and places of birth and their parent's names;
- ✓ 14. All physical and tangible evidence that the assistant district attorney intends to use at trial;
- ✓ 15. Any persons or other evidence which would tend to exonerate the defendant, give credence to his defense or damage the prosecution's case;
- ✓ 16. Any other available evidence that would tend negate the defendant's guilt or reduce the degree of the offense despite the fact that such evidence might damage the prosecutor's case.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN

By His Attorney,


Anthony W. Fugate

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BBO # 180980

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

**DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023**

COMMONWEALTH)
)
)
 v.)
)
)
 JOSEPH BUSHFAN)

**MOTION FOR STATEMENTS OF
CO-DEFENDANTS**

Now comes JOSEPH BUSHFAN, as the defendant in the above-entitled matter who moves, pursuant to Mass.R.Crim.P. 14(a)(2), Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and Commonwealth v. Moran, 387 Mass. 644, 442 N.E.2d 399 (1982), that this Honorable Court direct the Commonwealth to furnish him with copies of all statements, oral and/or written, made by the co-defendants.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney

ANTHONY W. FUGATE
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22 Broad Street
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(781) 593-8888
BBO# 180980

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

COMMONWEALTH)

v.)

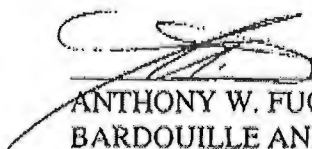
JOSEPH BUSHFAN)

MOTION OF DEFENDANT FOR
IMPEACHMENT MATERIAL AS
TO ANY NONTESTIFYING
DECLARANT

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves for any impeachment material in regard to any non-testifying declarant.

In regard to this, the defendant requests any impeachment material inclusive of prior criminal records, promises, rewards, inducements and threats, prior bad act evidence, prior statements inconsistent with the statements to be offered at trial, and any and all other material to impeach the credibility of the non testifying declarant.

On January 25, 2000 the Supreme Judicial Court adopted proposed rule 806 of the Proposed Massachusetts Rules of Evidence. Commonwealth v. Mahar, 430 Mass. 643, 648-650 (2000).

RESPECTFULLY SUBMITTED,
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COMMONWEALTH OF MASSACHUSETTS

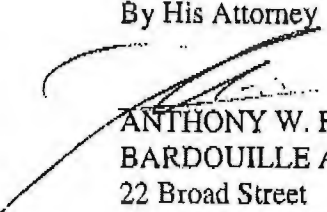
MIDDLESEX, ss

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO.: 1149 CR 0023COMMONWEALTH)

v.)

JOSEPH BUSHFAN)MOTION FOR A LIST OF WITNESSES THE
COMMONWEALTH ANTICIPATES IT MAY
CALL AT TRIAL

Now comes JOSEPH BUSHFAN, as the defendant in the above entitled matter who moves, pursuant to Mass.R.Crim.P. 14(a)(2), that this Honorable Court order the Commonwealth to furnish him with a list of anticipated witnesses to this incident whether they will be called to testify or not, including their names, addresses and birth dates.

RESPECTFULLY SUBMITTED,
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By His Attorney
ANTHONY W. FUGATE
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

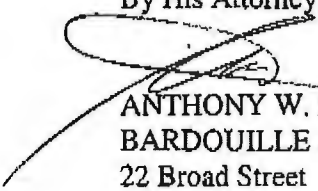
DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH

v.

JOSEPH BUSHFANMOTION OF THE DEFENDANT
TO BE FURNISHED WITH
STATEMENTS OF PROMISES, REWARDS,
INDUCEMENTS OR THREATS

Now comes JOSEPH BUSHFAN, as the defendant in the above entitled matter, who moves this Honorable Court to issue an order requiring the Commonwealth to furnish the defendant with any and all information known to the Commonwealth or that by the exercise of due diligence can be ascertained by the Commonwealth of statements of threats, promises, inducements or rewards of any kind or nature made to any witnesses or witness that the Commonwealth spoke to or intends to rely upon in support of the averments contained in the indictment. Mass.R.Crim.P. 14(a)(1)(C).

The defendant further moves that said order be comprehensive to the point of imposing an ongoing obligation on the Commonwealth until the end of the case in court.

RESPECTFULLY SUBMITTED,
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By His Attorney,
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BBO# 180980

NOT
Informant
just
witness

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

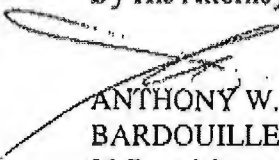
DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH

v.

JOSEPH BUSHFANMOTION FOR DISCOVERY OF TESTS
EMPLOYED, TEST DATA AND TEST
RESULTS BY THE COMMONWEALTH
EXPERTS

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves, pursuant to Mass.R.Crim.P. 14(a)(2), that this Honorable Court order the Commonwealth to produce for him copies of all of the types of tests employed by its experts, the test data and the test results in this case.

As reasons therefore, the information sought is essential for the adequate preparation of this matter.

RESPECTFULLY SUBMITTED,
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By His Attorney
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BBO# 180980

COMMONWEALTH OF MASSACHUSETTS


MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH

v.

JOSEPH BUSHFANMOTION FOR COPIES OF PHOTOGRAPHS

Now comes JOSEPH BUSHFAN as the defendant in the above-entitled matter who moves, pursuant to Mass.R.Crim.P. 14(a)(2), that this Honorable Court order the Commonwealth to provide him with duplicate copies of any and all surveillance tapes, surveillance photographs or other photographs taken in association with any part of the investigation regarding this case.

RESPECTFULLY SUBMITTED,
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By His Attorney,
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

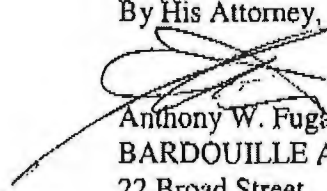
DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

COMMONWEALTH)
)
 v.)
)
 JOSEPH BUSHFAN)

MOTION FOR DISCLOSURE OF PRIOR
AND SUBSEQUENT BAD ACTS

Now comes JOSEPH BUSHFAN, as the defendant in the above entitled matter who moves that this Honorable Court direct the Commonwealth to disclose to him any alleged bad acts allegedly committed by him, either prior or subsequent to the acts which are the subject matter of this complaint, which the Commonwealth intends to introduce at trial, either in its case-in-chief or in rebuttal.

As reasons therefore, such disclosure is essential to the preparation for trial and to ensure the effective assistance of counsel. Further, "[i]t is well established that the Commonwealth may not introduce evidence of prior bad acts by the defendant to prove bad character or a propensity to commit crimes." Commonwealth v. Scott, 408 Mass. 811, 817-818, 564 N.E.2d 370, 375 (1990). While admittedly, such evidence may be admissible "to prove intent, motive, identity, pattern of operation, or common scheme", *id.*, disclosure is required to ascertain whether in fact such anticipated evidence falls within or without the parameters of the general rule.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney,

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO.: 1149 CR 0023

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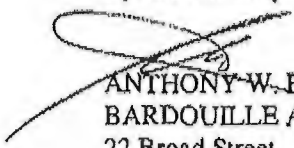
COMMONWEALTH

v.

JOSEPH BUSHFANMOTION TO DISCOVER LOCATION
OF POLICE SURVEILLANCE POST

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves, pursuant to Commonwealth v. Lugo, 406 Mass. 565, 548 N.E.2d 1263 (1990), that the Commonwealth be ordered to reveal the exact location of where the police allegedly made their observations of all alleged transactions.

As reasons therefore, "[disclosure will provide] material evidence needed by the defendant for a fair presentation of his case to the jury." *Id.* at 574, 548 N.E.2d at 1267.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
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BBO # 180980

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

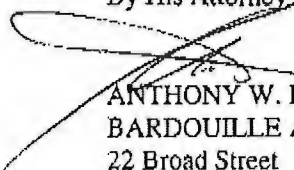
DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH

v.

JOSEPH BUSHFANMOTION FOR DISCOVERY OF
ELECTRONIC SURVEILLANCE

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves, pursuant to G.L. c. 272, §99 and Mass.R.Crim.P. 14(a)(1)(A), 14(a)(2), and 14(d)(2), that he be informed whether or not he, any co-defendant(s) and/or any witness(es) involved in the above entitled case, have been electronically recorded by the Commonwealth.

If so, then the defendant moves that he be provided with copies of all tapes and transcripts from those tapes which were recorded by the Commonwealth pursuant to its electronic surveillance. Additionally the defendant requests that he also be provided with "each document and item which make up each application, renewal application, warrant, renewal order, and return pursuant to which the information was obtained." G.L. c. 272, §99(O).

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney.
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BBO # 180980

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

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COMMONWEALTH

v.

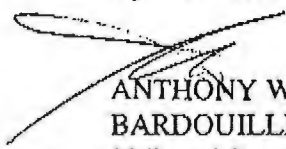
JOSEPH BUSHFAN

MOTION FOR DISCLOSURE
OF IDENTITY IF COMMONWEALTH
INFORMANT

Now comes JOSPH BUSHFAN as the defendant in the above entitled matter moves, pursuant to Mass.R.Crim.P. 14(a)(1)(C) and (a)(2), Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) and Commonwealth v. Ennis, 1 Mass.App.Ct. 499, 301 N.E.2d 589 (1973), that this Honorable Court order the Commonwealth to disclose to his attorney the existence and identity of any informants in this case, whether or not he or she is to be used as a witness in the Commonwealth's case.

Additionally the defendant requests that the location of the informant be revealed as well as the date of birth, location, and parents' names of him or her.

As reason therefore, the defendant has attached a memorandum of law.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

COMMONWEALTH

v.

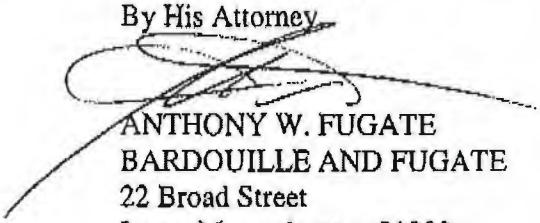
JOSEPH BUSHFAN

MOTION OF DEFENDANT FOR THE
GOVERNMENT TO NOTIFY HIM OF ITS
INTENTION TO USE EVIDENCE

*will use
evidentiary
matter
in reply
next*

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves, pursuant to Mass.R.Crim.P. 13 and 14, that the Commonwealth notify him of its intention to use any evidence which the defendant may be entitled to discover under Rules 13 and 14 in order to afford him an opportunity to move to suppress such evidence.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney


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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023COMMONWEALTH

v.

JOSEPH BUSHFAN

MOTION FOR DISCOVERY OF
DEFENDANT'S CONDUCT THAT THE
GOVERNMENT INTENDS TO INTRODUCE AT
TRIAL AS AN IMPLIED ADMISSION

His statement

Now comes JOSEPH BUSHFAN as the defendant in the above entitled matter who moves this Court for an order compelling the Commonwealth to disclose to him all information pertaining to the alleged conduct of the defendant which the government intends to introduce at trial as constituting an implied admission of guilt by the defendant. See Mass.R.Crim.P. 14(a)(2).

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney,

[Signature]
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NO: 1149 CR 0023

COMMONWEALTH

v.

JOSEPH BUSHFAN

MOTION FOR A COPY OF THE POLICE
OFFICERS' NOTES WITH REFERENCE
TO INTERVIEWS WITH WITNESSES

Now comes JOSEPH BUSHFAN as he defendant moves this Honorable Court,
pursuant to Mass.R.Crim.P. 14(a)(2), to order the Commonwealth to supply him with
a copy of any and all notes taken by any and all police officers concerning this case.
Specific reference is made to all surveillance of the subject location and or all alleged
purchases of narcotics witnessed by the police.

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney,

ANTHONY W. FUGATE
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BBO# 180980

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

DISTRICT COURT DEPARTMENT
FRAMINGHAM DIVISION
COMPLAINT NUMBER: 1149 CR 0023

8/9/11

COMMONWEALTH)
)
 v.)
)
JOSEPH BUSHFAN)

DEFENDANT'S MEMORANDUM TO COMPEL DISCLOSURE OF
COMMONWEALTH INFORMANT

I. Summary of the Facts

1. Mr. John Doe or Ms. Jane Doe, whose identity is being sought herein, was, prior to and at the time of the defendant's arrest on January 4, 2011 acting as an agent of the Framingham Police Department. Within the police report and the affidavit portion of the application in support of the search warrant regarding this matter, the Framingham Police Officers have alleged that the Defendant engaged in two contraband distributions with a "Confidential Informant"(see attached police report and attached search warrant).
2. That between December 4, 2010 and January 4, 2011 on unspecified dates and times, John Doe/Jane Doe discussed this matter with officers of the Framingham Police Department, including Detectives Denis Avila and Felipe Martinez.
3. That it can readily be presumed that John Doe/Jane Doe also took an active part in planning the police surveillance of the planned drug transactions as he/she was the purchaser in direct response to Law Enforcement request.
4. That after making telephone calls arranging the meetings with the defendant, John Doe/Jane Doe participated in the alleged drug transaction:
 - a. Doe allegedly contacted the Defendant on behalf of the police by telephone to arrange to meet for the purpose of purchasing crack cocaine as requested by the Framingham Police;
 - b. That at the scene, the police conducted surveillance of the transaction;

- c. Doe allegedly received the drugs, crack Cocaine, from the defendant, in a quantity that is alleged to fit the amount of money transferred;
 - d. Following the transaction, Doe handed the drugs to the Framingham Police Officers, who then debriefed Doe; and
 - e. That it appears that the alleged private conversations and interactions of Doe and the defendant are the primary basis for the Complaint against the defendant.
5. That although the application for the search warrant gives a starting point for this investigation it is to be noted that for a significant period of time (12-06-10 through 12-23-10), the Defendant could not have been involved early on because he was in custody at the Middlesex County Jail and House of Correction.
6. That at the beginning of the investigation the initial target was known as "D" and in paragraph 15 of the affidavit the target is now noted as the Defendant Joseph Bushfan.
7. That prior to that and specifically in paragraph 12 of the affidavit the police presented a photograph of Defendant Joseph Bushfan to the CI, and as noted in the affidavit "CI was not able to identify the male subject in the photograph at that time".

II. Under Both Federal and State Caselaw, Disclosure Is Mandatory

The United States Supreme Court, in the landmark case of Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), held:

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 77 S.Ct. at 627-628 (footnote omitted).

In Roviaro, several undercover officers met John Doe, who discussed an impending drug transaction. One officer hid in John Doe's trunk, while his partner followed them in an unmarked car. Two other officers also followed, but eventually lost sight of them.

Doe met the defendant who entered the automobile. As they drove around, the agent in the trunk overheard their conversation ostensibly concerning drugs and money owed to Doe by the defendant. When Doe stopped the car, Roviaro got out, went behind a tree and picked up a small package. The officer in the trailing

motor vehicle observed both this and the defendant dropping the package into the car, wave and walk away. Id. at 57, 77 S.Ct. at 626.

Clearly, the facts presented against our defendant are much weaker. As stated previously, it appears that the alleged private conversations and interactions of Doe and the defendant are the sole basis for the Complaint against the defendant. In addition, unlike in Roviaro, there is no specific police confirmation of any alleged conversation or actions by any party.

Roviaro was convicted of selling heroin and of receiving and transporting illegally imported heroin. Interestingly, the government did not attempt to defend its refusal to identify John Doe with regard to the former charge. Id. at 57–60, 77 S.Ct. at 626–27. Rather, the government attempted to defend the non-disclosure on the latter count, arguing "that the conviction [should] be upheld since the identity of the informer, in the circumstances of this case, has no real bearing on that charge and is therefore privileged." Id. at 59, 77 S.Ct. at 627.

The Court rejected that view and held, at pages 63–64, that John Doe's identity and possible testimony

"was highly relevant and might have been helpful to the defense.... Unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness. Petitioner's opportunity to cross-examine [the police officers] was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide."

As John Doe's participation in the instant case, exceeded that of the informant in Roviaro, the disclosure of his identity is mandated.

Indeed, it is bedrock law in this Commonwealth that the identity of an informant is required when that person acts as a participant in and an eyewitness to an offense. In Commonwealth v. Ennis, 1 Mass.App.Ct. 499, 301 N.E.2d 589 (1973), a case on point, the defendant was charged with distribution of marijuana to an undercover police officer. The John Doe in Ennis arranged a meeting with the defendant, undercover police officer and himself. John Doe was also an eyewitness to the alleged distribution of drugs.

"The significant point is that when an informer participates in or places himself in the position of observing a criminal transaction he ceases to be merely a source of information and becomes a witness ... " Ennis, supra at 591, quoting Burks v. Commonwealth, 471 S.W.2d 298, 300, 301 (Ky.1971).

The Commonwealth argued that disclosure was unnecessary in that the John Doe was merely a witness and not a participant. In rejecting that assertion, the court explained its rationale. "Nor can we accept the distinction urged by the Commonwealth between an informant who participates in the crime and one who is merely a witness. In either event his involvement is such that the disclosure of his identity is important to a fair determination of the case." Id.

In Ennis, the informer "was present at the sale, and, what is more, arranged the meeting at which it occurred. On these facts disclosure was required." Id.

So to is disclosure mandated here as this John Doe/Jane Doe did far more than merely arrange and eyewitness the transaction. The Commonwealth should be estopped from denying that the John Doe/Jane Doe here, whose identity is sought, was a material participant in virtually every phase of the undercover operation.

III. CONCLUSION

For the foregoing reasons, the defendant prays that this Honorable Court order the following:

1. That the Commonwealth disclose the identity of the informant;
2. That the Commonwealth furnish the defendant with the informant's address and telephone number, as the defense has a right to interview an eyewitness, Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965), that right is hollow if the witness cannot be located;
3. That the Commonwealth furnish the defendant with the informant's date and location of birth and the names of his/her parents.
4. That the Commonwealth be required to provide the dates and times of all of the alleged transactions involving the Defendant and the "Confidential Informant".

RESPECTFULLY SUBMITTED,
JOSEPH BUSHFAN
By His Attorney



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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

FRAMINGHAM DISTRICT COURT
DOCKET NO. 1149CR0023

1149CR0024

COMMONWEALTH

JOSEPH BUSHEAN
Dr. Talbot

MOTION FOR A DISCOVERY PROTECTIVE ORDER

Now comes the Middlesex District Attorney's Office and moves, pursuant to Mass. R. Crim. P. 14(a)(6), for a protective order. A protective order is necessary in this case where counsel for the defendant in the criminal action is also counsel in an impending civil action prepared by the family of the defendant's step-father.

BACKGROUND

In the early morning hours of January 5, 2011, members of the Framingham Police Narcotics Unit along with members of the Framingham SWAT team executed a search warrant at 26 Fountain Street, the defendant's residence. The defendant was arrested as he exited his residence and charged with possession of cocaine with intent to distribute as well as conspiracy to violate the drug laws and a school zone violation.

Officers then made entry into 26 Fountain Street. During the execution of the search warrant, a Framingham SWAT Team member's weapon discharged and Reggie Stamps, son of the defendant, was killed. The children of Mr. Stamps, who are represented by Attorneys Anthony Tarricone and James Gotz, are preparing a civil lawsuit. Attorney Anthony Fugate, counsel for the defendant in this criminal action, is also counsel for Norma Bushfan-Stamps, mother of the defendant, who is also a party in the impending civil action.

ARGUMENT

While a defendant has the right to evidence that bears on the question of guilt or innocence or that will help his defense, a court may impose limits on pretrial discovery in criminal cases. Commonwealth v. Holliday, 450 Mass. 794, 802 (2208). The conduct and scope of discovery is within the Court's sound discretion. See Doe v. Senechal, 431 Mass. 78, 84 (2000). "The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 617 (1993), quoting Seattle Times Co. v.

Rhinehart, 467 U.S. 20, 36 (1984). Trial judges have discretion to determine the scope and timing of discovery and the "prevention of [discovery] abuse ... sufficient justification for the authorization of protective orders." Cronin v. Strayer, 392 Mass. 525, 536 (1984), quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984).

Rule 14(a)(6) permits entry of protective orders where circumstances require. Specifically the rule states:

Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restrict, or deferred, or make such other order as is appropriate.

The District Attorney's Office has received a public records request from Attorney Anthony Tarricone for copies of all records pertaining to the investigation into the shooting of Eurie Stamps. The District Attorney's Office is in the process of compiling records that are responsive to Attorney Tarricone's public records request. However, certain records contained with the Eurie Stamps file, such as interviews of Framingham Police Narcotics officers, will not be provided to Attorney Tarricone as these records specifically relate to the pending criminal

case against the defendant. See G. L. c. 4, § 7(26)(f) (investigatory materials necessarily compiled out of the public view by law enforcement or other investigators, disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest may be withheld from disclosure). Where this Office is in the process of preparing for trial, disclosure of records pertaining to a pending criminal case to an attorney in a civil action is presumptively prejudicial. See Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 290 n.18 (1979). See also Bougas v. Chief of Police of Lexington, 371 Mass. 59, 62 (1976) (purposes of exemption (f) include the avoidance of premature disclosure of the Commonwealth's case and the prevention of disclosure of confidential techniques, procedures or sources of information). A protective order is necessary where Attorney Fugate is working with Attorney Tarricone in an impending civil action. Any disclosure of materials, provided to the defendant pursuant to discovery, by Attorney Fugate to Attorney Tarricone may interfere with the prosecution of the defendant.

CONCLUSION

Therefore, the District Attorney's Office respectfully requests that this Court order that the defendant not disclose the contents of discovery to anyone but the defendant except with the consent of the District Attorney's Office or by leave of this Court; that counsel for the defendant not disclose the contents of discovery to any attorney who is not counsel of record in the instant criminal action except with the consent of the District Attorney's Office or by leave of this Court; and that counsel for the defendant not use the information or materials provided for any purpose other than in the instant criminal action. Attached is a proposed order that the District Attorney's Office requests this Court adopt.

Respectfully Submitted
For the Commonwealth,

GERARD J. LEONE, JR.
DISTRICT ATTORNEY

JOHN C. VERNER
~~Assistant District Attorney~~
~~Office of the Middlesex District Attorney~~
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DATED: April 1, 2011

Westlaw

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Appeals Court of Massachusetts,
 Plymouth.
 COMMONWEALTH
 v.
 William FIGUEROA.

No. 07-P-1863.
 Argued Oct. 7, 2008.
 Decided Aug. 7, 2009.

Background: Defendant was convicted in the Superior Court Department, Plymouth County, Joseph M. Walker III, and Charles M. Grabau, JJ., of trafficking in cocaine and trafficking in cocaine within 1,000 feet of school. Defendant appealed.

Holdings: The Appeals Court, Brown, J., held that:
 (1) defendant was in constructive possession of cocaine found in apartment;
 (2) any possible defect in Commonwealth's reliance on first-time informant did not vitiate finding of probable cause to support issuance of search warrant;
 (3) identity of confidential informant was not exculpatory information that Commonwealth was obligated under *Brady* to disclose;
 (4) informant's identity was not relevant or essential to fair determination of defendant's guilt; and
 (5) order granting Commonwealth's request made on morning of trial to substitute state trooper expert on customary practices of illegal drug trade for another trooper was not abuse of discretion.

Affirmed.

West Headnotes

[1] Controlled Substances 96H ⚡82

96H Controlled Substances

96HIII Prosecutions

96Hk70 Weight and Sufficiency of Evidence

96Hk82 k. Sale, distribution, delivery,

transfer or trafficking. Most Cited Cases

Defendant was in constructive possession of cocaine found in apartment, as required to support convictions for trafficking in cocaine and trafficking in cocaine within 1,000 feet of school; defendant was alone inside apartment at which police officers had made controlled buys and was seated not more than ten feet away from large quantity of cocaine, police found mail addressed to defendant at that address, drug trafficking paraphernalia was in plain view, defendant evinced strong consciousness of guilt by refusing to admit police when they arrived to execute search warrant, and defendant had ten individually wrapped packets of cocaine in his pocket, which was same type of cocaine found in wastebasket. M.G.L.A. c. 94C, §§ 32E(b), 32J.

[2] Controlled Substances 96H ⚡28

96H Controlled Substances

96HII Offenses

96Hk24 Possession

96Hk28 k. Constructive possession. Most Cited Cases

While mere presence in an area where contraband is found is insufficient to show the requisite knowledge, power, or intention to exercise control over the contraband, presence, supplemented by other incriminating evidence, will serve to tip the scale in favor of sufficiency.

[3] Controlled Substances 96H ⚡148(3)

96H Controlled Substances

96HIV Searches and Seizures

96HIV(C) Search Under Warrant

96Hk144 Affidavits, Complaints, and Evidence for Issuance of Warrants

96Hk148 Informants

96Hk148(3) k. Reliability; corroboration. Most Cited Cases

Any possible defect in Commonwealth's reliance on first-time informant did not vitiate finding of probable cause to support issuance of search

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warrant; police observed informant enter apartment complex in which defendant's apartment was located, complex contained only small number of units, and informant's tip was corroborated by independent police investigation, including receipt of several complaints about heavy traffic going to and from third floor of apartment complex. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

[4] Searches and Seizures 349 ⚡117

349 Searches and Seizures

349II Warrants

349k115 Competency of Information; Hearsay

349k117 k. Reliability or credibility; corroboration. Most Cited Cases

To establish an informant's reliability adequate to support a finding of probable cause, the government must offer sufficient evidence of both an informant's basis of knowledge and veracity. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

[5] Controlled Substances 96H ⚡148(4)

96H Controlled Substances

96HIV Searches and Seizures

96HIV(C) Search Under Warrant

96Hk144 Affidavits, Complaints, and Evidence for Issuance of Warrants

96Hk148 Informants

96Hk148(4) k. Confidential or unnamed informants. Most Cited Cases

A properly monitored controlled purchase of illegal drugs provides sufficient corroborating evidence to overcome any shortfalls in meeting the constitutional reliability requirements imposed on confidential informants. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

[6] Searches and Seizures 349 ⚡40.1

349 Searches and Seizures

349I In General

349k40 Probable Cause

349k40.1 k. In general. Most Cited Cases

Searches and Seizures 349 ⚡113.1

349 Searches and Seizures

349II Warrants

349k113 Probable or Reasonable Cause

349k113.1 k. In general. Most Cited Cases

The standards employed for determining whether the government has met its constitutional burdens in establishing probable cause for a search must be informed by the practical demands of police investigation. U.S.C.A. Const.Amend. 4; M.G.L.A. Const. Pt. 1, Art. 14.

[7] Criminal Law 110 ⚡2001

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

110XXXI(D)2 Disclosure of Information

110k1993 Particular Types of Information Subject to Disclosure

110k2001 k. Other particular issues. Most Cited Cases

Identity of **confidential informant** was not exculpatory information that Commonwealth was obligated under *Brady* to disclose, in trial for trafficking in cocaine and trafficking in cocaine within 1,000 feet of school; Commonwealth did not attempt to establish defendant's guilt by reference to any transactions involving informant, defendant's claim that informant would have testified that he or she had purchased cocaine from someone other than defendant was pure speculation, and in any case, Commonwealth's case did not exclude involvement of coventurers.

[8] Criminal Law 110 ⚡1991

110 Criminal Law

110XXXI Counsel

110XXXI(D) Duties and Obligations of Prosecuting Attorneys

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110XXXI(D)2 Disclosure of Information

110k1991 k. Constitutional obligations regarding disclosure. Most Cited Cases

The holding in *Brady* did not create any general constitutional right to discovery in a criminal case; rather, to be entitled to relief under *Brady*, a defendant is required to make at least a threshold showing that exculpatory evidence was withheld.

[9] Criminal Law 110 627.10(3)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.10 Informers or Agents, Disclosure

110k627.10(2) Particular Cases

110k627.10(3) k. Drug and narcotic offenses. Most Cited Cases

Criminal Law 110 627.10(5)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.10 Informers or Agents, Disclosure

110k627.10(5) k. Informer not a witness to or participant in offense. Most Cited Cases

Confidential informant's identity was not relevant or essential to fair determination of defendant's guilt, in trial for trafficking in cocaine and trafficking in cocaine within 1,000 feet of school; Commonwealth's case depended in no way on any transactions with informant, and informant was not percipient witness to incidents that formed basis of indictments.

[10] Criminal Law 110 627.10(1)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.10 Informers or Agents, Disclosure

110k627.10(1) k. In general. Most

Cited Cases

In order to be entitled to disclosure of the identity of a **confidential informant**, a defendant must establish, at a minimum, that the information sought is relevant and helpful or essential to a fair determination of a cause.

[11] Criminal Law 110 629.5(7)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k629 List of Witnesses and Disclosure of Other Matters

110k629.5 Effect of Failure to Make Proper Disclosure

110k629.5(7) k. Expert witnesses. Most Cited Cases

Order granting Commonwealth's request made on morning of trial to substitute state trooper expert on customary practices of illegal drug trade for another trooper was not abuse of discretion, in trial for trafficking in cocaine and trafficking in cocaine within 1,000 feet of school; defendant had been placed on notice that a state trooper would testify as expert, substitute's expert testimony was likely not substantially different from testimony previous designated expert would have given, and testimony was not overly powerful in relation to other evidence.

[12] Criminal Law 110 469.2

110 Criminal Law

110XVII Evidence

110XVII(R) Opinion Evidence

110k468 Subjects of Expert Testimony

110k469.2 k. Discretion. Most Cited Cases

A trial judge has broad discretion to admit expert evidence.

[13] Criminal Law 110 469.2

110 Criminal Law

110XVII Evidence

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110XVII(R) Opinion Evidence
 110k468 Subjects of Expert Testimony
 110k469.2 k. Discretion. Most Cited

Cases

Criminal Law 110 627.5(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.5 Discovery Prior to and Incident to Trial
 110k627.5(1) k. In general; examination of victim or witness. Most Cited Cases

Criminal Law 110 629(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k629 List of Witnesses and Disclosure of Other Matters
 110k629(1) k. In general. Most Cited Cases

The trial court's broad discretion to admit expert evidence is by no means unlimited; the purpose of pretrial discovery orders is to prevent the admission of surprise evidence and the concomitant prejudice often associated with same, and where a previously undisclosed witness is proffered on the day of trial, the other side may well have difficulty mounting meaningful cross-examination.

*208 Kenneth I. Seiger for the defendant.

Laurie Yeshulas, Assistant District Attorney, for the Commonwealth.

Present: DUFFLY, BROWN, & WOLOHOJIAN, JJ.

BROWN, J.

The defendant was convicted by a Superior Court jury of trafficking in cocaine, G.L. c. 94C, § 32E(b), and the same offense within 1,000 feet of a

school, G.L. c. 94C, § 32J. On appeal, the defendant claims that (1) the Commonwealth failed to meet its threshold burden of proof with respect to the possession element of both offenses; (2) the defendant's motion to suppress was improperly denied, as the Commonwealth failed to establish the veracity of the confidential informant (informant or CI), whose tip led to the search warrant; (3) the defendant's pretrial motion for disclosure of information regarding the government's confidential informant was improperly denied; and (4) the trial judge erred in permitting the Commonwealth to make a change in its witness list on the day of trial. We affirm.

On August 30, 2005, Brockton police received information from a confidential informant that three Hispanic males were *209 selling cocaine from the third-floor apartment of 53 West Park Street in Brockton. This information matched reports received by police from other residents of 53 West Park Street describing frequent visits to the third-floor apartment by multiple persons, activity consistent-at least in the experience of police-with illegal drug [REDACTED]. To corroborate these reports, police conducted two controlled purchases of cocaine from the target apartment using CI to complete the transactions.

On the strength of this information, police obtained a search warrant for the third-floor apartment of 53 West Park Street. When they arrived to execute the warrant, the defendant refused to admit the officers, and police were forced to use a battering ram to gain entry. At the time, the defendant was alone inside the apartment.

Inside, police found 103 individually packaged bags of cocaine concealed in a kitchen wastebasket. The total weight of the drugs was 59.06 grams. Police also discovered a large quantity of drug trafficking paraphernalia, including razor blades, cellular telephones, cut plastic bags, inositol (a common cutting agent), and a police scanner. A search of the defendant yielded ten individually wrapped bags of cocaine with a total weight of 5.9 grams. No pipes

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or other apparatus suggestive of active drug use was found in the apartment. Other pertinent facts are included in our analysis.

[1] 1. *Constructive possession.* The defendant argues that the Commonwealth presented insufficient evidence at trial from which the jury reasonably could have inferred that he constructively possessed the 103 packets of cocaine found in the kitchen wastebasket. Absent such proof, the defendant asserts that he could have been convicted, at most, of simple possession of the smaller quantity of drugs found on his person. In support of his claim, the defendant asserts that he was “merely present” in the apartment at the time the drugs were found; that is to say, that he had no connection to the apartment sufficient to impute ownership of the cocaine found therein to him. We disagree.

At the time of the search, police found the defendant alone inside the apartment. He was seated not more than ten feet away from where a substantial (and valuable) quantity of drugs was concealed. Further, police found mail addressed to the defendant ^{FN1} at the apartment, suggesting that the defendant lived there at least some of the time. *Commonwealth v. Ortega*, 441 Mass. 170, 175, 804 N.E.2d 345 (2004) (discovery of mail addressed to defendant at apartment in which illegal drugs were found significant factor in establishing constructive possession of same). Drug trafficking paraphernalia was in plain view in the apartment, including a police scanner and multiple cellular telephones; the inositol was found in the pantry. We also note that the defendant arguably evinced strong consciousness of guilt by refusing to admit police when they arrived to execute the search warrant. See *Commonwealth v. Hunt*, 50 Mass.App.Ct. 565, 570-571, 739 N.E.2d 284 (2000). Finally, at the time of the search, the defendant had ten packets of cocaine—the same type of drugs found in the wastebasket—in his pocket. See *Commonwealth v. Pratt*, 407 Mass. 647, 652, 555 N.E.2d 559 (1990) (fact that drugs found in possession of defendant were “same type” as drugs found in larger cache supports inference of

constructive possession of latter).

FN1. Some of the mail found in the apartment was addressed to “Jose Figueroa,” the name that appeared on identification papers carried by the defendant at the time of his arrest.

*210 [2] While mere presence in an area where contraband is found is insufficient to show “the requisite knowledge, power, or intention to exercise control over the [contraband], ... presence, supplemented by other incriminating evidence, ‘will serve to tip the scale in favor of sufficiency.’” *Commonwealth v. Albano*, 373 Mass. 132, 134, 365 N.E.2d 808 (1977), quoting from *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir.1976). See *Commonwealth v. Pimentel*, 73 Mass.App.Ct. 777, 780, 901 N.E.2d 718 (2009), and cases cited. Here, the foregoing factors amount to the requisite “other incriminating evidence.” The government’s proof, therefore, was not deficient as to constructive possession. Accordingly, the Commonwealth met its threshold burden of proof as to all charges of which the defendant was convicted.

[3][4] 2. *Reliability of informant’s tip.* The defendant contends that the search of the apartment was unlawful, and so his motion to suppress should have been allowed. Specifically, he asserts that the confidential informant, on whom police relied in establishing probable cause, did not meet minimum constitutional standards for veracity ^{FN2}; as a result, all of the information provided by the informant should have been excluded from the probable cause calculus. See *Commonwealth v. Upton*, 394 Mass. 363, 369-377, 476 N.E.2d 548 (1985) (adopting *Aguilar-Spinelli* ^{FN3} standard for purposes of art. 14 of Massachusetts Declaration of Rights). Absent CI’s information, the argument runs, the warrant application should have failed.

FN2. Under the now-familiar formulation, to establish an informant’s reliability adequate to support a finding of probable cause, the government must offer sufficient

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evidence of both an informant's basis of knowledge and veracity. See *Commonwealth v. Robinson*, 403 Mass. 163, 164-165, 526 N.E.2d 778 (1988) (two-prong test of veracity and basis of knowledge necessary to establish probable cause under art. 14 of Massachusetts Declaration of Rights). The defendant does not contest that the informant's firsthand observations, if believed, would establish his basis of knowledge.

FN3. See *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

[5] The Commonwealth, for its part, concedes that the first-time informant relied on here ordinarily would not meet the veracity requirements imposed by art. 14. See *Commonwealth v. Zuluaga*, 43 Mass.App.Ct. 629, 635, 686 N.E.2d 463 (1997). However, the Commonwealth argues that the two controlled purchases conducted by police render any such defect immaterial. Without question, a properly monitored controlled purchase of illegal drugs provides sufficient corroborating evidence to overcome any shortfalls in meeting the constitutional reliability requirements imposed on **confidential informants**. See *Commonwealth v. Cruz*, 430 Mass. 838, 842 n. 2, 724 N.E.2d 683 (2000); *Commonwealth v. Baldasaro*, 62 Mass.App.Ct. 925, 926, 818 N.E.2d 189 (2004). **The defendant questions whether the controlled purchases here were, in fact, properly monitored.**

The ordinary procedure for carrying out a controlled purchase includes, inter alia, police observation of an informant throughout the transaction to ensure that the target of the investigation is the one from whom the drugs are obtained. Here, police saw the informant enter the multi-unit building in which the defendant's apartment was located but were not able to observe directly which apartment unit he entered. It is at least possible, therefore, that the informant obtained the drugs from another unit

in the building. The defendant contends that this uncertainty prevents the government from relying on *211 the controlled purchase to buttress the informant's reliability.

[6] In establishing probable cause, however, certainty is not required. Moreover, the standards employed for determining whether the government has met its constitutional burdens must be informed by the practical demands of police investigation. Thus, in *Commonwealth v. Warren*, 418 Mass. 86, 90, 635 N.E.2d 240 (1994), the Supreme Judicial Court concluded that police were entitled to infer—and a magistrate could rely on such inference in issuing a search warrant—that an informant who entered a three-unit apartment building had made a controlled purchase within, despite the fact that police did not actually see the informant enter the target unit.

The fact that the apartment building in *Warren*—like the apartment building in the present case—contained only a small number of units was a key factor in concluding that police were entitled to rely on the controlled purchase there in establishing probable cause to search. Unsurprisingly, probability is the touchstone for determining whether probable cause has been established in any particular case. See *id.* at 90-91, 635 N.E.2d 240, and cases cited. In view of the similarity between the factual settings in *Warren* and the present case, **we conclude that the controlled purchases here adequately established the informant's veracity.**

Our conclusion in this regard is bolstered by the fact that **the informant's tip in this case was corroborated by at least some independent police investigation.** See *Commonwealth v. Lyons*, 409 Mass. 16, 19, 564 N.E.2d 390 (1990) (“[i]ndependent police corroboration may make up for deficiencies in [a confidential informant's reliability]”). As the warrant affidavit recites, “[p]olice officers] ... have received several complaints about heavy traffic going to and from the third floor of 53 W. Park St., where some neighbors believed this to be consistent with drug activity.” This type of evid-

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ence is frequently relied upon to shore up defects in an informant's reliability. Compare *Commonwealth v. Soto*, 35 Mass.App.Ct. 340, 344, 619 N.E.2d 629 (1993) (police observation of numerous short visits to target apartment by various unnamed persons relied upon in establishing informant's reliability). While the corroborative evidence here might not, standing alone, establish CI's veracity, when combined with the evidence of the controlled purchases, it is more than sufficient to meet the government's burden. The motion to suppress properly was denied.

[7] 3. *Failure to disclose identity of informant.* Before trial, the defendant moved for disclosure of "the identity of the ... informant ... as well as other information regarding this informant" on the theory that such information amounted to exculpatory evidence subject to the mandatory discovery requirements of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, the defendant asserted that he was entitled to any evidence concerning the circumstances attending the controlled purchases involving CI, at least to the extent that such evidence might have established that someone other than the defendant (i.e., one of the defendant's family members) actually consummated these transactions with CI.

[8] The defendant, however, misconstrues the reach of *Brady*. The holding in *Brady* did not create any "general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). See *United States v. Scott*, 555 F.2d 522, 528 (5th Cir.), cert. denied, *212434 U.S. 985, 98 S.Ct. 610, 54 L.Ed.2d 478 (1977) ("*Brady* does not permit a defense fishing expedition whenever it is conceivable that evidence beneficial to defendants may be discovered ... [but instead] deals with prosecutorial misconduct in the form of withholding [exculpatory] information"). Rather, to be entitled to relief under *Brady*, a defendant is required to make at least a threshold showing that exculpatory evidence was withheld. See *United States v. Nav-*

arro, 737 F.2d 625, 631-632 (7th Cir.), cert. denied sub nom. *Mugercia v. United States*, 469 U.S. 1020, 105 S.Ct. 438, 83 L.Ed.2d 364 (1984). Here the defendant has failed to meet that burden.

The defendant argues in his brief that "the informant was a percipient witness to the incidents forming the basis of the [indictments]." In this he is mistaken, however. The government did not attempt to establish the defendant's guilt by reference to any of the transactions involving CI. Rather, the government relied exclusively on the evidence found in the apartment at the time of the defendant's arrest.

The defendant further argues that CI "had exculpatory information regarding the defendant's presence and activities in the apartment on prior occasions." However, it is wholly speculative on the defendant's part that CI, if called, would have testified that he or she had not purchased any cocaine from the defendant. Cf. *Guzman v. Commonwealth*, 74 Mass.App.Ct. 466, 470-472, 907 N.E.2d 1140 (2009). Further, even assuming that police records (or CI him or herself) would have disclosed—as the defendant now contends—that CI had dealt only with someone other than the defendant, that by no means would amount to exculpatory evidence for *Brady* purposes. The government's case against the defendant did not exclude the possible involvement of coventurers. In these circumstances, we conclude that the defendant has failed to meet his threshold burden of proof under *Brady*.

[9][10] Further, even if the defendant's claim in this regard had not been presented under the rubric of a *Brady* violation,^{FN4} but merely as a general request for disclosure of information regarding a confidential informant, it would still fail. In order to be entitled to such evidence, a defendant must establish, at a minimum, that the information sought "is relevant and helpful ... or ... essential to a fair determination of a cause." *Commonwealth v. Lugo*, 406 Mass. 565, 570, 548 N.E.2d 1263 (1990), quoting from *Roviaro v. United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). In

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determining whether disclosure is required in any particular case, a court must "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." *Commonwealth v. Lugo*, 406 Mass. at 570, 548 N.E.2d 1263.

FN4. Along these lines, we note that the defendant has abandoned any reference to *Brady* in his appellate brief and presents his claims on pure materiality grounds as discussed *infra*.

Here, for the reasons already stated in our analysis of the defendant's *Brady* claim, the evidence concerning both CI's identity and the circumstances of the controlled purchases in which he or she participated were unlikely to be helpful to the defense. Despite the defendant's claims to the contrary, the government's case in no way depended on proof that the defendant was involved in any particular transactions, including the controlled purchases; CI was patently not "a percipient witness to the incidents forming the basis of the [indictments]" as the defendant alleged in his pretrial motion. Contrast *Commonwealth v. Dias*, 451 Mass. 463, 468-470, 886 N.E.2d 713 (2008); *213 *Commonwealth v. Choice*, 47 Mass.App.Ct. 907, 909, 711 N.E.2d 938 (1999) ("stronger reason to disclose the identity of [an informant] who, the authorities claim, has participated in the crime"). Moreover, evidence that others were selling cocaine from the apartment in which he was found would not have negated the inference that the defendant was also involved in such [REDACTED]. Balancing the minimal exculpatory value of the evidence sought by the defendant against the government's interest in preserving the anonymity of its informants, we conclude that the defendant's motion for disclosure of evidence regarding CI was properly denied, however that demand is characterized.^{FN5} See *Commonwealth v. Douzanis*, 384 Mass. 434, 441, 425 N.E.2d 326 (1981) ("government's privilege not to disclose the identity of an informant has long been recognized in this Commonwealth").

FN5. To the extent that it is viewed by the defendant as a separate claim, we conclude on the same basis that the defendant's motion for disclosure of police surveillance positions was likewise properly denied. See *Commonwealth v. Lugo*, 406 Mass. at 570, 548 N.E.2d 1263.

[11] 4. *Substitution of expert witness*. On the morning trial was set to commence, the Commonwealth informed the court that it wished to make a substitution in its witness list; viz., the Commonwealth wanted to call State Trooper Long in place of State Trooper Keating to testify as an expert witness on the customary business practices of the illegal drug trade. The prosecutor explained that, due to the fact that the defendant's trial had been continued twice, Keating was no longer available to testify. The defendant objected to the proposed switch on the ground that he had no time to prepare adequately for cross-examination of Long.

The trial judge then conducted a lengthy voir dire during which defense counsel was afforded ample opportunity to probe both the scope of Long's proposed testimony as well as his expert credentials. At the conclusion of the voir dire, the defendant renewed his objection, again arguing that he would necessarily be prejudiced by any last minute change in the witness list. The judge, however, decided to admit the contested testimony, the defendant's objection notwithstanding.

[12][13] As the defendant concedes, a trial judge has broad discretion to admit expert evidence. See *Commonwealth v. Grissett*, 66 Mass.App.Ct. 454, 457, 848 N.E.2d 441 (2006). However, that discretion is by no means unlimited. The purpose of pretrial discovery orders is to prevent the admission of "surprise" evidence and the concomitant prejudice often associated with same. See, e.g., *Commonwealth v. Fossa*, 40 Mass.App.Ct. 563, 567, 666 N.E.2d 158 (1996). Where a previously undisclosed witness is proffered on the day of trial, the other side may well have difficulty mounting meaningful cross-

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examination. See *id.* at 568, 666 N.E.2d 158. In this particular case, however, we detect little possibility of such prejudice, and conclude that the trial judge did not abuse his discretion in admitting Long's expert testimony.

Supporting our conclusion that the evidence was properly admitted are the following factors: (1) the defendant concedes that he had been placed on notice that a State trooper would testify as an expert on the [REDACTED] practices of the illegal drug trade; (2) Long's testimony was likely not substantially different from the testimony Keating would have offered; and (3) the testimony was not overwhelmingly powerful in relation to other evidence proffered by the government. In all respects, the *214 contested evidence was largely generic and typical of the kind of expert testimony frequently offered in cases involving charges of illegal drug distribution. In these circumstances, we do not detect any prejudice that might entitle the defendant to relief.^{FN6} Compare *Commonwealth v. LaFaille*, 430 Mass. 44, 53, 712 N.E.2d 590 (1999); *Commonwealth v. Junta*, 62 Mass.App.Ct. 120, 123-125, 815 N.E.2d 254 (2004).

FN6. Our decision today should not be read as an invitation to a cavalier disregard of discovery rules. Both sides in a criminal proceeding must make every reasonable effort to comply with their responsibility to disclose the identities of all witnesses in advance-or run the risk of having evidence excluded. The Commonwealth, charged, as it is, with protecting a defendant's due process rights, bears an especially strict burden in this regard. See *Brady v. Maryland*, 373 U.S. at 87, 83 S.Ct. 1194. However, in this case, we are convinced that the government had a legitimate basis for the late substitution of witnesses and that the last minute change did not materially affect any aspect of the defendant's trial strategy or otherwise impair his ability to challenge the evidence against him.

Judgments affirmed.

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Supreme Judicial Court of Massachusetts,
 Essex.

COMMONWEALTH

v.

Wigberto Figueroa LUGO.

Argued Dec. 5, 1989.
 Decided Jan. 25, 1990.

Defendant was convicted in the Superior Court Department, Essex County, of distributing heroin, and he appealed allowance of motion in limine which precluded defendant from questioning officer, who testified concerning sale of drugs by defendant, on exact location of officer's surveillance location. The Appeals Court, Dreben, J., 23 Mass.App.Ct. 494, 503 N.E.2d 974, vacated ruling on motion in limine and directed trial judge to hold in-camera evidentiary hearing to determine whether defendant should have been entitled to disclosure of surveillance location. On remand, the Superior Court Department, Essex County, Ernest S. Hayeck, J., again granted, prosecution's motion in limine, and defendant appealed. The Supreme Judicial Court, Greaney, J., held that defendant was entitled to disclosure of surveillance location.

Reversed, set aside, and remanded for new trial.

West Headnotes

[1] Privileged Communications and Confidentiality 311H 359

311H Privileged Communications and Confidentiality

311HVI Public Officers and Records

311Hk359 k. Surveillance Positions and Locations. Most Cited Cases

(Formerly 110k627.5(6))

Policy reasons comparable to those which fa-

vor nondisclosure of informer support privilege to keep surveillance location secret.

[2] Privileged Communications and Confidentiality 311H 359

311H Privileged Communications and Confidentiality

311HVI Public Officers and Records

311Hk359 k. Surveillance Positions and Locations. Most Cited Cases

(Formerly 110k627.5(6))

Defendant was entitled to disclosure of surveillance location from which police officer allegedly observed defendant selling drugs, where disclosure would have provided material evidence needed by defendant for fair presentation of his case to jury; entire prosecution rested on police officer's credibility, and his ability to observe what he said he had seen from his hidden location; police officer's testimony was not corroborated in any respect; and in-camera hearing by trial court established several inconsistencies as to location of police officer's vantage point and whether it permitted him to have clear view of what he claimed to have seen.

****1263 *565** Elin H. Graydon, Asst. Dist. Atty., for Com.

Hugh Samson, Boston, for defendant, submitted a brief.

Before LIACOS, C.J., and ABRAMS, NOLAN, O'CONNOR and GREANEY, JJ.

***566** GREANEY, Justice.

A jury in the Superior Court convicted the defendant of distributing heroin. The only evidence concerning the defendant's alleged activities came from Sergeant Walter Soriano of the Lawrence police department who testified that, while at an undisclosed location, he had observed the defendant selling drugs in a parking lot. In the initial appeal,

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the Appeals Court considered the correctness of a pretrial ruling by the judge that allowed the Commonwealth's motion in limine to prohibit the defendant's counsel from questioning Soriano on the exact location from which he made his observations. See *Commonwealth v. Lugo*, 23 Mass.App.Ct. 494, 503 N.E.2d 974 (1987). The Appeals Court vacated the ruling on the motion in limine and directed the judge to hold an in camera evidentiary hearing to determine whether the defendant should have been entitled to disclosure of the secret location.

In accordance with the Appeals Court opinion, the judge held an in camera hearing at which Soriano testified and was cross-examined by the defendant's trial counsel. (The defendant had waived his right to be present.) After the hearing, the judge found that Soriano was close to the parking lot and had an unobstructed view, and, consequently, that the defendant had not been prejudiced by not knowing the exact spot from which Soriano made his observations. The judge again granted the Commonwealth's motion in limine. The defendant**1264 appealed the order granting the motion, and we allowed his application for direct appellate review. We conclude that the Commonwealth's motion should have been denied. Accordingly, we reverse and order a new trial.

We first give an account of the trial and the hearing after remand.

(a) *The trial.* At trial, Soriano testified that about 11:30 A.M. on October 13, 1983, he was dropped off at the corner of Walnut and Park Streets in Lawrence. Other officers were left to be called in when needed. Soriano placed himself in a "fixed location" to specifically observe an adjacent parking lot. He stated that he had a clear, unobstructed view of that parking lot. According to Soriano, there were only two people*567 in the lot when he began his surveillance, Hispanic males working on an automobile parked in the middle of the lot at the Bromfield Street end. Later, at approximately 11:45 A.M., a 1968 Volvo automobile,

which Soriano had observed earlier with the defendant driving, drove into the parking lot and backed up to a fence along the Walnut Street end.

Soriano testified that the defendant and another man, identified as David Carrion, got out of the automobile. The defendant walked to the rear, opened the trunk and took out a small plastic bag. He closed the trunk, went to the passenger-side rear tire, leaned down and placed the bag near that tire. Soriano stated that he observed "approximately four or five people at different times—but within a short period of time—come in, walk into the parking lot ... [and] talk to either Mr. Lugo or Mr. Carrion, [who] would immediately approach the individual." He testified that he saw the exchange of money. According to Soriano, "[t]he subject would give either Mr. Carrion or Mr. Lugo some money [and] [o]ne of them would go to the rear of the vehicle, lean down, take something out, go back towards the individual, and hand [it] over." Soriano stated that he was able to observe that the object handed over was blue. After each transaction, the defendant would go to the rear of the automobile, open the trunk and deposit the money. Soriano used a diagram of the area to depict the general area of the parking lot and nearby buildings and obstructions.

After five such transactions, Soriano communicated by radio with other officers who immediately drove to the lot. One of the officers testified that he went to the rear of the defendant's vehicle (at the passenger-side rear tire), reached underneath, and came out with a plastic bag which, upon subsequent chemical analysis, was found to contain heroin. The Volvo and its trunk were searched at some point and a wallet and money were seized from the trunk.

The defendant and one Angel Fernandez testified for the defense. The defendant denied any knowledge or association with drugs and stated that he had come to the Park Street area to see Jose Valentine for whom he occasionally worked. *568 Valentine was not home but was expected back.

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The defendant stated that in order to use his time constructively while waiting for Valentine he returned to his vehicle and began replacing the vehicle's antenna with another antenna he had bought earlier. Because Valentine had not arrived by the time the defendant had finished replacing the antenna, the defendant testified that he began to pass the time talking with Fernandez and his brother about "mechanic" things.

According to the defendant, the police arrived somewhere between 11 and 11:30 A.M., by which time the parking lot was filled with people. The defendant stated that the sight of police sent almost everyone in the lot running in all directions. The defendant testified that one of the police officers detained him while the others searched the entire area. Among the officers was Soriano, whom the defendant knew. According to the defendant, eight months prior to the incident, while the defendant was driving his nephew to school, Soriano had stopped him, searched his vehicle, asserted that the defendant's brother was a drug dealer, and threatened to get the defendant too.

Fernandez corroborated the defendant's testimony as to the events in the parking lot. He testified that when the police **1265 came, the other people in the lot ran away, and that the police had conducted a general search of the area. Fernandez indicated that the police looked into garbage cans and other vehicles, suggesting, perhaps, that the officers conducting the search did not know exactly where to look.

Based on the testimony, the defendant's counsel argued to the jury that the parking lot allegedly under surveillance was a "hangout"; that there was a crowd of people there on the morning of October 13, 1987; that Soriano did not see any undisguised transfer of cash for packets as he had claimed; that the most Soriano had seen was suspicious activity obscured by people, trees, and buildings; and that based on suspicion only, Soriano, along with the other officers, had searched the area and detained the defendant, whom Soriano suspected of drug

activity because the defendant's brother was a known drug dealer. Defense counsel supported these *569 arguments with the points noted below, ^{FN1} but the core of the defendant's claim—that Soriano could not have seen all that he said he saw, and that inconsistent statements that had been brought out in the course of the trial could not be explained away—found defense counsel speculating as to where Soriano might have been, rather than arguing from certain knowledge.

FN1. Defense counsel argued (1) previous statements and testimony of Soriano that he saw the defendant place the plastic bag containing the packets by the left rear tire rather than the right; (2) that the rough diagram of the scene drawn by Soriano deceptively portrayed the buildings in the area as having equal and unobstructed views of the parking lot; (3) inconsistencies in the testimony of the officers present at the search of the Volvo regarding what was found and where; (4) that there was no inventory made of items found in the Volvo or on the defendant; (5) that the police made a general unfocused search of the parking lot more suggestive of a "fishing expedition" than a precise response to Soriano's observations; and (6) that the police did not arrest any alleged purchasers.

(b) *Remand hearing.* At the in camera hearing on remand, Soriano identified his location and again testified that from that location, he had a clear, unobstructed view of the defendant distributing drugs. During cross-examination by the defendant's counsel, however, inconsistencies surfaced in Soriano's testimony with respect to: (1) whether he had been let off at the corner of Walnut and Park Streets as he had previously claimed or at the corner of Bromfield and Park Streets; (2) whether his alleged surveillance location was the first house off Walnut Street or the second; (3) whether a fence at the Walnut Street end of the parking lot obscured

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his view because it was higher than the defendant's car; (4) whether he was only a few feet from the incident or was in fact as far away as fifty feet (Soriano conceded that the second house off Park Street on the Walnut Street side of the parking lot, one with no view of the defendant's car and one where the defendant argued at trial Soriano had to have been, if anywhere, would maybe have been forty to fifty feet from the defendant's car); and (5) whether he had observed *570 the defendant place a bag under or near the left rear tire or the right rear tire.

Notwithstanding these discrepancies, and the inconsistencies brought out at trial, the judge concluded that "Sergeant Soriano had a clear and unobstructed view at close range and ... was able to see those things that he said he saw." Based on this finding, the judge concluded that the defendant had not been prejudiced by not knowing the exact surveillance location, and that the Commonwealth's interest in preventing disclosure outweighed the defendant's interest in knowing the location.

[1] With this background in mind, we turn to the applicable law. As the Appeals Court opinion noted, counsel have accepted the existence of a so-called "surveillance location privilege" and recognize that it has been analogized to the well-established informer's privilege. *Commonwealth v. Lugo*, 23 Mass.App.Ct. 494, 497, 503 N.E.2d 974 (1987). Policy reasons comparable to those which favor the nondisclosure of an informer support the privilege to keep a surveillance location secret. *Id.* at 498, 503 N.E.2d 974.

In *Roviaro v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957), **1266 the leading case in this area on the informer's privilege, the United States Supreme Court recognized that privileges of this type are limited by a fundamental requirement of fairness. In general, "[w]here ... disclosure ... is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61, 77 S.Ct. at 628. The Court in *Roviaro* dis-

tinguished between the need for disclosure at a pre-trial suppression hearing and at the trial proper (which was the situation presented in *Roviaro*), and, as to the latter, observed that the privileged material "must be disclosed whenever [it] may be relevant and helpful to the accused's defense" (emphasis supplied). *Id.* at 61-62, 77 S.Ct. at 628. In the last analysis, the Court declined to formulate a fixed rule on the subject. Instead, it noted that "[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances*571 of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the [privileged] testimony, and other relevant factors." *Id.* at 62, 77 S.Ct. at 628.

Cases which have considered the subject have maintained the distinction between a demand for disclosure at a pretrial hearing, where the issue is probable cause for arrest or a search, and a demand for disclosure at trial, where the issue is the defendant's ultimate guilt or innocence. Compare *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); *Scher v. United States*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 151 (1938); *United States v. Green*, 670 F.2d 1148 (D.C.Cir.1981); *Hicks v. United States*, 431 A.2d 18 (D.C.App.1981); *State v. Burnett*, 42 N.J. 377, 201 A.2d 39 (1964) (disclosure not required within the context of a suppression hearing), with *Roviaro v. United States*, *supra*; *Commonwealth v. Johnson*, 365 Mass. 534, 313 N.E.2d 571 (1974); *Commonwealth v. Crespo*, 3 Mass.App.Ct. 497, 334 N.E.2d 641 (1975), overruled on a different point in *Commonwealth v. Niziolek*, 380 Mass. 513, 518-519, 404 N.E.2d 643 (1980); *Commonwealth v. Ennis*, 1 Mass.App.Ct. 499, 301 N.E.2d 589 (1973); *Portomene v. United States*, 221 F.2d 582 (5th Cir.1955); *United States v. Conforti*, 200 F.2d 365 (7th Cir.1952), cert. denied, 345 U.S. 925, 73 S.Ct. 782, 97 L.Ed. 1356 (1953); *Sorrentino v. United States*, 163 F.2d 627 (9th Cir.1947) (disclosure required within the trial

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context). Indeed, we have noted that “[i]t is revealing of the courts’ approach that nondisclosure is rather readily countenanced at pre-trial hearings, but not so at the trial itself.” *Commonwealth v. Johnson*, *supra*, 365 Mass. at 545, 313 N.E.2d 571.

The cases that have required disclosure at trial have all done so on a standard of materiality or something roughly akin thereto. See *Commonwealth v. Johnson*, *supra* (“helpful”); *Commonwealth v. Ennis*, *supra* (“important,” “material,” “relevant,” “helpful”); *Portomene v. United States*, *supra* (“material”); *Sorrentino v. United States*, *supra* (“material”); *State v. Burnett*, *supra* (“essential,” “material”). See also J. Wigmore, Evidence § 2374, at 768 (McNaughten rev. 1985) (“[D]isclosure will be compelled if the [privileged information] is ... material ... on the issue of guilt”). Further, “material” does not necessarily mean ultimately conclusive. *572 “There is ... no requirement that a defendant, denied access to evidence that might prove helpful in his defence, must make a specific showing of just what the evidence would have proved and how far he was prejudiced by the withholding.” *Commonwealth v. Johnson*, *supra*, 365 Mass. at 547, 313 N.E.2d 571. In the informer situation, where the informer is an active participant in the alleged crime or the only nongovernment witness, disclosure usually has been ordered. *Roviaro v. United States*, *supra*; *Commonwealth v. Ennis*, *supra*; *Portomene v. United States*, *supra*; *United States v. Conforti*, *supra*. Also involved is the corollary principle that “[a] fair and full cross-examination to develop facts in issue or relevant to the issue is a matter of absolute right and is not a mere **1267 privilege to be exercised at the sound discretion of the presiding judge, and the denial of the right is prejudicial error.” *Commonwealth v. Johnson*, *supra*, 365 Mass. at 543, 313 N.E.2d 571, quoting *Gossman v. Rosenberg*, 237 Mass. 122, 124, 129 N.E. 424 (1921).

In the *Ennis* case, for example, the crime charged was the sale of marihuana. A police officer testified that he bought the drug from the defendant

at a prearranged sale having met the defendant after a conversation with an informer. On cross-examination, the police officer acknowledged that the informer had also been present at the sale. The defendant denied that any sale had occurred. On these facts, where the issue was whether the police officer was telling the truth or whether the defendant was telling the truth, the testimony of the informer was deemed by the court to be “important to a fair determination of the case[,]” and the withholding of his identity was determined to be error. *Commonwealth v. Ennis*, *supra*, 1 Mass.App.Ct. at 503, 301 N.E.2d 589. *Ennis* has been cited with approval by this court in *Commonwealth v. Johnson*, *supra*, 365 Mass. at 545, 313 N.E.2d 571, and in *Commonwealth v. Swenson*, 368 Mass. 268, 276 n. 8, 331 N.E.2d 893 (1975), and has been relied upon in a case involving an implied surveillance location privilege. *Commonwealth v. Crespo*, *supra*, 3 Mass.App.Ct. at 500, 334 N.E.2d 641.

We come then to the application of the law to this case. In connection with remand, the Appeals Court framed two alternatives for the judge to consider. “If the location is such *573 that Soriano was close to the parking lot and had an unobstructed view, the judge may conclude that the defendant was not prejudiced by not knowing the exact spot.... If, however, Soriano’s view was obstructed, or was distant from the transaction, principles of fairness will require that the defendant be able to put these facts to a jury.” (Citations omitted.) ^{FN2} *Commonwealth v. Lugo*, 23 Mass.App.Ct. 494, 500–501, 503 N.E.2d 974 (1987). In connection with the second alternative, the Appeals Court pointed out (with citation to relevant authority) that “[i]n weighing the interests of both the defendant and the government, the judge is to consider that the standards of disclosure at trial are more demanding than at a suppression hearing ... and that here Soriano’s testimony is crucial to the government’s case and not merely corroborative” (citations omitted). *Id.* at 501, 503 N.E.2d 974.

FN2. With respect to the first quoted al-

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ternative, the Appeals Court cited (*supra*, 23 Mass.App.Ct. at 500, 503 N.E.2d 974) four cases which differ from this case. In two of those cases, the issue of disclosure was raised within the express context of a suppression hearing, rather than a trial. *United States v. Jenkins*, 530 F.Supp. 8; 9 n.* (D.D.C.1981); *United States v. Green*, *supra*. In the remaining two, although the issue of disclosure was raised within the trial context, neither defendant had made a preliminary showing of need. In the first, defendant "offered no showing that there was any vantage point in the relevant area that could not permit a clear view of [defendant's] activities." *Thompson v. United States*, 472 A.2d 899, 901 (D.C.App.1984). In the second, defendant "offered no reason why [any further knowledge of the surveillance location] might be important." *United States v. Harley*, 682 F.2d 1018, 1021 (D.C.Cir.1982). The *Harley* defendant knew the house number of the surveillance location, its approximate height above street level, and its distance from the incident allegedly observed. *Id.* Moreover, the government provided the jury a videotape taken at the time of the surveillance which "indisputably show[ed] the view the officers in the surveillance post had, the distance, the angle, and the existence or nonexistence of obstacles in the line of sight." *Id.* The Appeals Court opinion mentions some of these distinctions. *Commonwealth v. Lugo*, *supra*.

The judge appears to have considered the alternatives posed by the Appeals Court as mutually exclusive, and as requiring a finding of fact on his part of one or the other. In keeping with the first alternative, the judge concluded that Soriano had given credible testimony as to his secret location *574 and, as a result, that the defendant was not entitled to disclosure.

[2] The more proper inquiry, in our view, concerns whether disclosure would have provided material evidence needed by the defendant for a fair presentation of his case to the jury. We conclude that it **1268 would have provided such evidence. The entire prosecution case rested on Soriano's credibility, and his ability to observe what he said he had seen from his hidden location. Soriano's testimony was not corroborated in any respect. The defendant made a strong preliminary showing that he might have need of the privileged information. The in camera hearing on remand established several inconsistencies as to the location of Soriano's vantage point and whether it permitted him to have a clear view of what he claimed to have seen. Added to the inconsistencies that had been brought out at trial, the missing information was significant. The application of the privilege hampered cross-examination of Soriano on the key factual issue before the jury. In the circumstances, "a fair determination of [the] cause," *Roviaro v. United States*, *supra*, 353 U.S. at 61, 77 S.Ct. at 628, required that the defendant's counsel be furnished with the exact place where Soriano claimed to be so that counsel would have been able to inquire on the subject in a concrete manner without being left to speculate about rough (and possibly misleading) diagrams and hypothetical locations. In the last analysis, it would be for the jury in this case to determine, in light of fully disclosed evidence, whether Soriano had a clear or an obstructed view or no view at all. Finally, we see no basis in the Commonwealth's argument about the procedural aspects of this appeal to deny the defendant the review we have given him.

The order allowing the Commonwealth's motion in limine is reversed. The judgment is reversed, and the verdict set aside. The case is remanded for a new trial.

So ordered.

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 v.
 Daniel J. MADIGAN.

Argued Feb. 5, 2007.
 Decided Aug. 13, 2007.

Background: Defendant was charged with trafficking in cocaine. The Superior Court ordered Commonwealth to disclose to defendant relationship between informant and state or local police, as well as any inducements or promises made by Commonwealth to informant. Commonwealth petitioned for relief.

Holding: Following report from single justice of the Supreme Judicial Court, Suffolk County, Spina, J., the Supreme Judicial Court, Marshall, C.J., held that defendant was entitled to disclosure of information related to informant that was material to entrapment defense and potentially exculpatory.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡627.10(3)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclosure
 110k627.10(2) Particular Cases
 110k627.10(3) k. Drug and Narcotic Offenses. Most Cited Cases

Informant's relationship with state or local police and whether informant received benefit from government in exchange for information was material to defense of entrapment and was potentially exculpatory, and thus, defendant was entitled to dis-

closure of information, in trial for trafficking in cocaine; defendant met initial threshold of offering some evidence of inducement by asserting that informant was persistent and repetitive in her efforts to induce defendant to sell cocaine to undercover trooper, and defendant asserted that informant was working as agent, or at direction of police.

[2] Criminal Law 110 ⚡627.10(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclosure
 110k627.10(1) k. In General. Most Cited Cases

The government's privilege not to disclose the identity of an informant serves a substantial, worthwhile purpose in assisting the police in obtaining evidence of criminal activity.

[3] Criminal Law 110 ⚡627.10(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclosure
 110k627.10(1) k. In General. Most Cited Cases

The government's privilege not to disclose the identity of a confidential informant, which is not absolute, should be respected as far as reasonably possible consistent with fairness to a defendant.

[4] Criminal Law 110 ⚡627.10(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclosure
 110k627.10(1) k. In General. Most Cited Cases

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Competing with the government's privilege not to disclose the identity of a confidential informant is the defendant's entitlement to exculpatory or other information that is material to his defense.

[5] Criminal Law 110 ⚡37(2.1)

110 Criminal Law
 110II Defenses in General
 110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
 110k37 Entrapment
 110k37(2) What Constitutes Entrapment
 110k37(2.1) k. In General. Most Cited Cases

There are two elements of the entrapment defense: (1) that the defendant was induced by a government agent or one acting at his direction, and (2) that the defendant lacked predisposition to engage in the criminal conduct of which he is accused.

[6] Criminal Law 110 ⚡330

110 Criminal Law
 110XVII Evidence
 110XVII(C) Burden of Proof
 110k326 Burden of Proof
 110k330 k. Matters of Defense and Rebuttal in General. Most Cited Cases

The defendant asserting an entrapment defense has the initial burden of producing some evidence of inducement by the government; the burden then shifts to the Commonwealth to prove beyond a reasonable doubt that (1) there was no government inducement or (2) the defendant was predisposed to commit the crime.

[7] Criminal Law 110 ⚡569

110 Criminal Law
 110XVII Evidence
 110XVII(V) Weight and Sufficiency
 110k569 k. Defenses in General. Most Cited Cases
 The entrapment defense is appropriately raised

by the introduction of some evidence of inducement by a government agent or one acting at his direction.

[8] Criminal Law 110 ⚡569

110 Criminal Law
 110XVII Evidence
 110XVII(V) Weight and Sufficiency
 110k569 k. Defenses in General. Most Cited Cases

The threshold for a defendant to raise the entrapment issue is low: the inquiry is whether there is any evidence sufficient to raise the defense, even if the evidence is unsubstantial and even if the evidence comes solely from the defendant's testimony.

[9] Criminal Law 110 ⚡37(2.1)

110 Criminal Law
 110II Defenses in General
 110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith
 110k37 Entrapment
 110k37(2) What Constitutes Entrapment
 110k37(2.1) k. In General. Most Cited Cases

The types of conduct that possess the indicia of inducement to engage in criminal conduct, for the purposes of an entrapment defense, include "aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion."

[10] Criminal Law 110 ⚡627.10(1)

110 Criminal Law
 110XX Trial
 110XX(A) Preliminary Proceedings
 110k627.10 Informers or Agents, Disclosure
 110k627.10(1) k. In General. Most Cited Cases

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It is the government that claims the privilege of not disclosing an informant's identity, which is confined to its purpose, and which cannot in any event be asserted where it interferes with a fair defence.

[11] Criminal Law 110 1134.44

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)4 Scope of Inquiry

110k1134.44 k. Discovery and Disclosure. Most Cited Cases
 (Formerly 110k1134(3))

It is for the jury, not an appellate court before trial, to decide whether to credit the Commonwealth's evidence to rebut an asserted entrapment defense, for the purposes of a defendant's request for disclosure of a confidential informant's identity and related information.

****479** Paul B. Linn, Assistant District Attorney (Dean Mazzone, Assistant District Attorney, with him) for the Commonwealth.

James J. Coviello, Revere, for the defendant.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, & CORDY, JJ.

MARSHALL, C.J.

702** This interlocutory matter is here on the Commonwealth's petition for relief pursuant to G.L. c. 211, § 3, reported by a single justice of this court. The Commonwealth challenges an order of a judge in the Superior Court requiring it to disclose to the defendant information concerning the relationship, if any, between an individual, Jane Doe,^{FN1} and State or local police, as well as any promises, rewards, or inducements the Commonwealth may have provided to Doe. See *Commonwealth v. Douzanis*, 384 Mass. 434, 436 n. 5, 425 N.E.2d 326 (1981) (Commonwealth may *480** seek discretionary relief from single justice of this court as ***703** to disclosure order). The defendant has given notice of

his intent to pursue a defense of entrapment, claiming that Doe induced him through "persistent and repetitive" requests to sell cocaine to an undercover State trooper, and that the information he seeks from the Commonwealth—whether Doe was acting as an agent of or at the direction of the government and whether the Commonwealth provided Doe with anything in exchange for her alleged assistance—is "critical" to establishing his entrapment defense. The refusal to provide the information, he argues, interferes with his Federal and State constitutional rights to present a full defense.

FN1. In an affidavit filed in support of his discovery motion, the defendant named the individual referred to as Jane Doe. On appeal both parties refer to her as Jane Doe, and have redacted those parts of the record identifying her.

The Commonwealth's opposition rests largely on its asserted privilege not to disclose the identity of a confidential informant. We conclude that, in the circumstances of this case, the Commonwealth's privilege may not shield information that is material to the defense of entrapment, as to which the defendant has made an adequate pretrial showing. We conclude that the judge was correct and remand the case to the county court for entry of a judgment denying the petition for relief under G.L. c. 211, § 3.

1. *Background.* In December, 2004, a Suffolk County grand jury returned four indictments charging the defendant with trafficking in cocaine, in violation of G.L. c. 94C, § 32E(b), and one indictment charging conspiracy to violate the drug laws, G.L. c. 94C, § 40. According to the Commonwealth,^{FN2} the defendant engaged in a series of illegal drug transactions with Trooper Mary Wakeham, acting undercover. Trooper Wakeham "called the defendant at home" to arrange for the initial purchase of one ounce of cocaine. She subsequently arranged to purchase cocaine from the defendant on four separate occasions between August and September, 2004, in amounts ranging from one

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ounce (for which she paid \$1,100) to four ounces (for which she paid \$4,800). According to the Commonwealth, on two of those occasions, the defendant himself conducted the exchange with Wakeham; on two other occasions, he sent a "runner," Richard Dobbyn, to complete the transactions.

FN2. We summarize here the evidence the Commonwealth "expects to present at trial," which is drawn from police reports of the incidents in question.

The Commonwealth asserts that it also expects to present *704 evidence that the defendant regularly engaged in the sale of cocaine. For example, according to the Commonwealth, following one sale to Trooper Wakeham in August, 2004, the defendant telephoned her to say that he had made a "mistake" by confusing two bags of cocaine and that the bag he sold to her, intended for someone else, was of a lower quality than he had meant to sell to Wakeham. The Commonwealth also points to anticipated evidence to the effect that, during an arranged transaction in September, 2004, the defendant and Dobbyn met Wakeham in a garage where the defendant stated that he had to leave to meet his "supplier" in Winthrop; that, on returning, the defendant showed the trooper a large "chunk" of cocaine, which she estimated to be at least 200 grams; and that the defendant had access to additional cocaine with which to reward Trooper Wakeham for the inconvenience she endured while the defendant went to his supplier.

The defendant was arrested on the evening of October 4, 2004, after Trooper Wakeham picked him up in her automobile and completed a partial sale of two ounces of cocaine. According to the Commonwealth, on the same afternoon surveillance **481 officers reported that they had seen the defendant engaging in conduct consistent with the sale of small quantities of drugs outside a Revere bar.

In January, 2006, the defendant filed notice of an entrapment defense, together with two discovery

motions, one of which sought to discover "any and all government agents, unwitting intermediaries or not, and informants who provided assistance or information" that led to his arrest, as well as "all promises, considerations, rewards, benefits, or inducements made ... to induce or encourage the cooperation of any witness, agent, or informant or that individual's families or friends." According to the defendant, Doe, an acquaintance of his, had been "cultivating" him as a "potential seller" to the undercover trooper for some time. The judge entered a conditional order requiring the defendant to provide an affidavit concerning his prior dealings with Doe, and obligating the Commonwealth, in response, to provide the requested discovery regarding Doe.^{FN3}

FN3. Specifically, the judge ordered the defendant to provide "an affidavit with basic information about when he began communication with [Jane Doe] and over what period of time, and when she introduced the defendant to the undercover trooper. In response the Commonwealth is to provide information about any promises, rewards or inducements made to [Jane Doe] within 6 months before she began speaking to the defendant and continuing to the present."

Thereafter, the defendant filed his affidavit, in which he *705 claims that Doe had contacted him at home on more than one occasion, wanting to "do and to purchase drugs." He claims that, in the summer of 2004, Doe brought Trooper Wakeham to his house and introduced her to him as "Mary the bar manager." Doe, he said, was "persistent and repetitive" in her requests that the defendant sell drugs to Trooper Wakeham. After reviewing the affidavit, the judge concluded that, "in the circumstances of this case, the requested information, if it exists, may be considered exculpatory," and ordered the information produced,^{FN4} in accordance with Mass. R.Crim. P. 14(a)(1)(A)(iii), as appearing in 442 Mass. 1518 (2004).^{FN5}

FN4. The judge ordered the Commonwealth to provide information "within the

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possession of the prosecution or of State or local police with whom the prosecution works concerning the relationship, if any, between [Jane Doe] and [Trooper Wakeham], or between [Doe] and any other member of the State police or member of a local police department who has participated in investigating this or related cases against [the defendant].”

FN5. Rule 14(a)(1)(A)(iii) of the Massachusetts Rules of Criminal Procedure, as appearing in 442 Mass. 1518 (2004), provides in relevant part: “The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information ... Any facts of an exculpatory nature.”

The Commonwealth moved for reconsideration. The judge allowed the motion only to the extent that she would conduct an inspection in camera of the Commonwealth's information in question.

^{FN6} In response to the trial prosecutor's affidavit submitted for in camera review,^{FN7} the judge ordered the Commonwealth to disclose to the defendant the contents of its submission. The Commonwealth's petition for relief under G.L. c. 211, § 3, followed.

FN6. Where disclosure of a confidential informant is at issue, “[t]he use of an in camera procedure has been recognized in the Commonwealth, by other courts, and by commentators.” *Commonwealth v. Douzanis*, 384 Mass. 434, 441-442, 425 N.E.2d 326 (1981).

FN7. The judge impounded the affidavit, pending this appeal.

[1][2][3] 2. Discussion. The government's privilege not to disclose the identity **482 of an informant has long been recognized in this *706 Commonwealth. See, e.g., *Worthington v. Scribner*, 109 Mass. 487, 488 (1872). The privilege “serves a

substantial, worthwhile purpose in assisting the police in obtaining evidence of criminal activity. The privilege, which is not absolute, should be respected as far as reasonably possible consistent with fairness to a defendant.” *Commonwealth v. Douzanis*, 384 Mass. 434, 441, 425 N.E.2d 326 (1981). See *Roviaro v. United States*, 353 U.S. 53, 59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (purpose of privilege is to further and protect public interest in effective law enforcement by encouraging citizens to perform obligation of communicating knowledge of commission of crimes anonymously to law enforcement officials); *Commonwealth v. Brzezinski*, 405 Mass. 401, 408, 540 N.E.2d 1325 (1989) (same).

[4] Competing with this privilege is the defendant's entitlement to exculpatory or other information that is material to his defense. See *Roviaro v. United States*, *supra* at 60-61, 77 S.Ct. 623 (where “the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege *must* give way” [emphasis added]). The cases that have required disclosure “have all done so on a standard of materiality or something roughly akin thereto.” *Commonwealth v. Lugo*, 406 Mass. 565, 571, 548 N.E.2d 1263 (1990).^{FN8} As to materiality, we have said that the “proper inquiry” concerns “whether disclosure would have provided material evidence needed by the defendant for a fair presentation of his case to the jury.” *Id.* at 571-572, 574, 548 N.E.2d 1263.^{FN9}

FN8. Our cases have “maintained the distinction between a demand for disclosure at a pretrial hearing, where the issue is probable cause for arrest or a search, and a demand for disclosure at trial, where the issue is the defendant's ultimate guilt or innocence.” *Commonwealth v. Lugo*, 406 Mass. 565, 571, 548 N.E.2d 1263 (1990). Nondisclosure of a source of information that bears on a preliminary question, such as the suppression of evidence, “is more

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readily tolerated than the nondisclosure at trial of a source of evidence, where guilt or innocence is directly involved.” *Commonwealth v. Snyder*, 413 Mass. 521, 532, 597 N.E.2d 1363 (1992). Although we are concerned here with the rulings of a judge made before trial, they implicate the same concerns that will arise at trial, namely, whether the defendant has a valid defense to the charges, i.e., his guilt or innocence. It is therefore appropriate to examine the defendant’s claim under the standard of “materiality,” as the Commonwealth argues.

FN9. In *Commonwealth v. Lugo*, *supra* at 574, 548 N.E.2d 1263, the issue was whether disclosure of a so-called surveillance location would have provided material evidence needed by the defendant for a fair presentation of his case to the jury.

*707 The Commonwealth argues that the defendant did not make an adequate showing that the requested information would be sufficiently material to his defense to justify invading its privilege on two grounds: that the defendant’s affidavit is “utterly lacking” in specificity, and that the evidence will show that the defendant had a predisposition to commit the crimes for which he is charged. We disagree. For reasons we shall explain, the defendant has raised a potentially viable entrapment defense and has made a sufficient showing that the information he seeks from the Commonwealth regarding Doe is material to that defense.

[5][6] “There are two elements of the entrapment defense: (1) that the defendant was induced by a government agent or one acting at his direction and (2) that the defendant lacked predisposition to engage in the criminal conduct of which he is accused.” **483 *Commonwealth v. Penta*, 32 Mass.App.Ct. 36, 47, 586 N.E.2d 996 (1992). The defendant has the initial burden “of producing some evidence of inducement by the government.” *Id.* The burden then shifts to the Commonwealth “to

prove beyond a reasonable doubt that (1) there was no government inducement or (2) the defendant was predisposed to commit the crime.” *Id.* See *Commonwealth v. Monteagudo*, 427 Mass. 484, 487, 693 N.E.2d 1381 (1998) (defendant’s testimony, if believed, that trooper induced commission of crime raised issue of entrapment and Commonwealth then had burden to prove defendant’s predisposition to commit crime).

[7][8] Our leading case on entrapment explains that the defense “is appropriately raised ... by the introduction of some evidence of inducement by a government agent or one acting at his direction.” *Commonwealth v. Miller*, 361 Mass. 644, 651-652, 282 N.E.2d 394 (1972). That case concerned whether a jury instruction on entrapment was warranted. See *Commonwealth v. Tracey*, 416 Mass. 528, 624 N.E.2d 84 (1993). Here the issue has arisen before the trial, but the showing of inducement the defendant is obliged to make is the same. See *Commonwealth v. Shuman*, 391 Mass. 345, 352, 462 N.E.2d 80 (1984) (describing entrapment evidence proffered by defendant by pretrial motion to dismiss). The question, therefore, is whether the defense of entrapment here has been “appropriately raised.” *Commonwealth v. Miller*, *supra* at 651, 282 N.E.2d 394. “The threshold for a defendant to raise the entrapment issue is low...” *708 *Commonwealth v. Tracey*, *supra* at 536, 624 N.E.2d 84. “The inquiry is whether there is any evidence sufficient to raise the defense, even if the evidence is unsubstantial and even if the evidence comes solely from the defendant’s testimony.” *Id.*, quoting *United States v. Garcia*, 546 F.2d 613, 615 (5th Cir.), cert. denied, 430 U.S. 958, 97 S.Ct. 1608, 51 L.Ed.2d 810 (1977). Cf. *Commonwealth v. Doyle*, 67 Mass.App.Ct. 846, 851, 858 N.E.2d 1098 (2006) (threshold for showing evidence of inducement sufficient to entitle defendant to entrapment instruction is “low threshold”).

[9] We conclude that the defendant has met the threshold of proffering “some” evidence of inducement by a government agent, even if

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"unsubstantial." *Commonwealth v. Miller, supra*. In *Miller*, this court explained that "[m]ere evidence of solicitation is not enough to show inducement, but little more than solicitation is required to raise the issue." *Id.* at 652, 282 N.E.2d 394. The types of conduct that possess the indicia of inducement include "aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion" (emphasis added). *Commonwealth v. Tracey, supra*, and cases cited. In his motion for discovery, the defendant claims that Doe "had been cultivating the defendant as a potential seller to undercover trooper for some time," and in his supporting affidavit, he stated that she "was persistent and repetitive in her requests to sell ... drugs to the undercover State Trooper even after the introduction." It would have been preferable had the defendant's affidavit provided more details of Doe's importuning that he sell cocaine to the undercover trooper, such as the number of occasions, and dates, on which he interacted with Doe concerning Trooper Wakeham, and his response to her cajoling. But the defendant's assertions that Doe "cultivated" him, and that she was not only "repetitive" but was "persistent" in her efforts to get the defendant to sell cocaine to Trooper Wakeham, is sufficient **484 in light of the "low" threshold to establish a potentially viable entrapment defense.

[10] We therefore turn to consider whether the defendant's requested discovery is material to that defense. See *Commonwealth v. Lugo, supra* at 571, 548 N.E.2d 1263. The defendant asserts that *709 Doe was acting as an agent for, or at least at the direction of, the police.^{FN10} The assertion, if true, has a direct relationship to his entrapment defense because entrapment focuses on "evidence of inducement by a government agent or one acting at his direction" (emphasis in original). *Commonwealth v. Tracey, supra* at 537 n. 10, 624 N.E.2d 84. The information, if it exists, is essential to establish his claim that the government induced him to commit the crimes. See *Commonwealth v. Colon*, 33

Mass.App.Ct. 304, 305, 598 N.E.2d 1143 (1992) (necessary for entrapment defense to establish inducer is government agent). The Commonwealth seeks to have the benefit of the informant's privilege while refusing to disclose whether Doe was in fact acting as a government agent. It may not do so. Failure to disclose information about the relationship, if any, between Doe and law enforcement or information as to any promises or inducements made to Doe by the government would defeat the defendant's ability to establish his defense of entrapment.^{FN11} As this court recognized some decades ago: "It is the government that claims the 'privilege,' see *Scher v. United States*, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151 (1938), which is confined to its purpose, and cannot in any event be asserted where it interferes with a fair defence." *Commonwealth v. Johnson*, 365 Mass. 534, 544, 313 N.E.2d 571 (1974).^{FN12}

FN10. The facts of this case are analogous to those in *Commonwealth v. Choice*, 47 Mass.App.Ct. 907, 711 N.E.2d 938 (1999), where undercover police officers asked an individual where they could buy drugs, and the individual led them to the defendant, who sold drugs to the officers and was arrested. The defendant sought to discover the name of the "informant" to substantiate a defense challenging the credibility of the officers. In concluding that disclosure of the identity was required, the Appeals Court stated: "It was sufficient in this case that the Hispanic gentleman, whom the police did not regard as a confidential informant, was placed by the prosecution in a central role in this case. As such, he was also central to the defense." *Id.* at 909, 711 N.E.2d 938. Similarly here, information about whether Doe was acting as a government agent, or whether she received inducements-inducements that may have influenced her actions-has direct bearing on the defense.

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FN11. The Commonwealth argues that this case is controlled by *Commonwealth v. Youngworth*, 55 Mass.App.Ct. 30, 33, 769 N.E.2d 299 (2002), cert. denied, 538 U.S. 1064, 123 S.Ct. 2232, 155 L.Ed.2d 1119 (2003), where the Appeals Court concluded that disclosure of the informant's identity was not required. That case does not concern an entrapment defense.

FN12. Relying on *Commonwealth v. Ramos*, 402 Mass. 209, 215-216 n. 5, 521 N.E.2d 1002 (1988), the Commonwealth argues that the defendant has not shown that the discovery information is material to his defense because his supporting affidavit lacks the necessary specificity. The *Ramos* case, however, concerned a denial of a motion for a hearing to challenge the veracity of statements made in an affidavit in support of a search warrant. This court concluded that the defendant's "mere denial" of the facts in the affidavit was not a "sufficiently rigorous" preliminary showing to require a hearing on the motion under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Commonwealth v. Ramos*, *supra*, quoting *People v. Lucente*, 116 Ill.2d 133, 152, 107 Ill.Dec. 214, 506 N.E.2d 1269 (1987). The defendant here was required to satisfy the materiality standard described above.

*710 The Commonwealth contends that a defense of entrapment is not viable in this case because it expects to prove at trial that Doe did not bring about the defendant's**485 propensity to sell drugs. It points to anticipated evidence that the defendant was willing to make four separate [REDACTED] of cocaine to Trooper Wakeham, was able to provide over \$1,000 worth of cocaine within sixteen days of the first meeting with her, admitted to having a supplier and other customers, obtained a quantity of cocaine far larger than the amount ordered by Trooper Wakeham, and was seen making what ap-

peared to be casual [REDACTED] of drugs to others. See, e.g., *Commonwealth v. Monteagudo*, *supra* at 488, 693 N.E.2d 1381 (evidence of supplier of cocaine, additional customers, and access to large quantities of cocaine sufficient for jury to find beyond reasonable doubt that defendant was predisposed to commit crimes at time of alleged inducement).

[11] Whatever the strength of the evidence at trial, it is for the jury, not an appellate court before trial, to decide whether to credit the Commonwealth's evidence. See *Commonwealth v. Miller*, *supra* at 658-659 n. 3, 282 N.E.2d 394 ("We agree with the great weight of authority that, for compelling reasons, including constitutional considerations, the entrapment issue should be heard and decided by the jury"). At this stage of the proceedings, our concern is only with whether the defendant has satisfied his burden of producing "some" evidence of inducement. *Id.* at 651, 282 N.E.2d 394. See *Commonwealth v. O'Malley*, 14 Mass.App.Ct. 314, 325, 439 N.E.2d 832 (1982) ("In the usual case, therefore, it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense").

The public policy rationale supporting the Commonwealth's informant's privilege is generally stated as protecting the *711 identity of an informant.^{FN13} See, e.g., *Commonwealth v. Brzezinski*, 405 Mass. 401, 408, 540 N.E.2d 1325 (1989), quoting *Commonwealth v. Douzanis*, 384 Mass. 434, 441, 425 N.E.2d 326 (1981) (government's privilege serves purpose of assisting police in obtaining evidence of criminal activity). We reject the defendant's argument that, where the identity of a person suspected of being an informant or agent is known to the defendant, the privilege does not apply. While protecting the identity of informants plainly advances the important public policy interest of encouraging people to inform the police about criminal activity without fear of reprisal for doing so, see *Roviaro v. United States*, 353 U.S. 53,

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59, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), citing *Scher v. United States*, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151 (1938), the inverse is equally true. Revealing to a defendant that a particular individual known to him is in fact acting as an informant for the police will tend to discourage people from cooperating with the police. Certainly such information may place at risk the safety of the individual, once she is revealed as an informant. Cf. *Commonwealth v. Johnson, supra* (protection of informer is factor to consider in disclosing identity). The Commonwealth is, of course, free to use as informants persons known to any defendant, as it has always done. It may not, however, withhold information concerning any informant**486 where, as here, the information is material to the defense and potentially exculpatory. *Roviaro v. United States, supra* at 60, 77 S.Ct. 623.

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FN13. The cases relied on by the Commonwealth to support its claim of privilege concern protection of an informant's identity. See *Commonwealth v. Brzezinski*, 405 Mass. 401, 408, 540 N.E.2d 1325 (1989); *Commonwealth v. Youngworth*, 55 Mass.App.Ct. 30, 32, 769 N.E.2d 299 (2002). Cf. *Commonwealth v. McMiller*, 29 Mass.App.Ct. 392, 406, 560 N.E.2d 732 (1990), quoting *Commonwealth v. Curcio*, 26 Mass.App.Ct. 738, 747, 532 N.E.2d 699 (1989) ("With the informer's identity known, the Commonwealth could not claim the 'informer's privilege' of barring [her] testimony ...").

3. *Conclusion.* The case is remanded to the county court for entry of judgment denying the Commonwealth's petition for relief under G.L. c. 211, § 3.

So ordered.

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P

Appeals Court of Massachusetts,
 Bristol.
 COMMONWEALTH
 v.
 Justin DeMATOS.

No. 08-P-204.
 Argued July 22, 2010.
 Decided Sept. 17, 2010.

Background: Defendant was convicted, after a jury trial in the Superior Court Department, Bristol County, Robert J. Kane, J., of trafficking in cocaine in an amount of 14 grams or more but less than 28 grams, and trafficking within 1,000 feet of a school, and thereafter, on defendant's motion for new trial, the Superior Court Department, Robert J. Kane, J., 2008 WL 7085631, ordered the Commonwealth to provide defendant with information regarding controlled buy, but later denied a *Franks- Amral* hearing regarding the motion. Defendant appealed.

Holdings: The Appeals Court, Dreben, J., held that: (1) Confrontation Clause error in admitting certificates of drug analysis, to show that the substance involved was cocaine, was harmless beyond a reasonable doubt;

(2) Confrontation Clause error in admitting certificates of drug analysis, to show the amount of cocaine involved, was harmless beyond a reasonable doubt; and

(3) an *Amral* in camera hearing to determine whether defendant was entitled to a *Franks* hearing on his allegations, in postconviction motion for new trial, that the search warrant affidavit, which had alleged a controlled drug buy involving a confidential informant, contained a false statement that was included knowingly and intentionally or with reckless disregard for the truth, was not required.

Affirmed.

West Headnotes

[1] Criminal Law 110 662.40

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront Witnesses
 110k662.40 k. Use of documentary evidence. Most Cited Cases

Certificates of drug analysis of the substances involved in the cocaine trafficking prosecution were within the core class of testimonial statements that trigger Confrontation Clause protections. U.S.C.A. Const.Amend. 6.

[2] Criminal Law 110 1168(2)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1168 Rulings as to Evidence in General
 110k1168(2) k. Reception of evidence. Most Cited Cases

In cases tried after the decision of the Massachusetts Supreme Judicial Court in *Commonwealth v. Verde*, and before the decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts*, the standard of review with respect to Confrontation Clause error is whether the admission of the certificates of drug analysis at trial was harmless beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

[3] Criminal Law 110 1168(2)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1168 Rulings as to Evidence in General

110k1168(2) k. Reception of evidence. Most Cited Cases
 The "harmless beyond a reasonable doubt"

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standard of review with respect to Confrontation Clause error in admitting certificates of drug analysis is strict, and the question is whether the appellate court can be satisfied, beyond a reasonable doubt, that the erroneously admitted certificates of analysis had little or no effect on the verdicts; it is not enough for the Commonwealth to demonstrate that its other, properly admitted evidence was sufficient to convict the defendant, and instead, to establish harmlessness beyond a reasonable doubt, the Commonwealth must show that other properly admitted evidence of guilt is overwhelming. U.S.C.A. Const.Amend. 6.

[4] Criminal Law 110 ⚡1168(2)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1168 Rulings as to Evidence in General
 110k1168(2) k. Reception of evidence.
 Most Cited Cases

Factors that may be considered in determining whether Confrontation Clause error in admitting certificates of drug analysis was harmless beyond a reasonable doubt include the importance of the evidence in the prosecution's case, the relationship between the evidence and the premise of the defense, who introduced the issue at trial, the frequency of the reference, whether the erroneously admitted evidence was merely cumulative of properly admitted evidence, and the weight or quantum of evidence of guilt. U.S.C.A. Const.Amend. 6.

[5] Controlled Substances 96H ⚡74

96H Controlled Substances
 96HIII Prosecutions
 96Hk70 Weight and Sufficiency of Evidence
 96Hk74 k. Substance and quantity in general. Most Cited Cases
 Proof that a substance is a particular drug may be made by circumstantial evidence.

[6] Criminal Law 110 ⚡662.40

110 Criminal Law
 110XX Trial
 110XX(C) Reception of Evidence
 110k662 Right of Accused to Confront Witnesses
 110k662.40 k. Use of documentary evidence. Most Cited Cases

Criminal Law 110 ⚡1168(2)

110 Criminal Law
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 110k1168(2) k. Reception of evidence.
 Most Cited Cases

Confrontation Clause error in admitting certificates of drug analysis, to show that the substance involved was cocaine, was harmless beyond a reasonable doubt, in prosecution for trafficking in cocaine in an amount of 14 grams or more but less than 28 grams; defendant admitted to police that he was a substantial user of cocaine and that he was using cocaine at the time of their initial entry into his apartment, defendant told officers he had forgotten "about that cocaine" in the apartment, officers found in the apartment a large sum of money, a scale, plastic bags, and a spoon with powder residue, and defendant fled when officers entered the apartment. U.S.C.A. Const.Amend. 6.

[7] Criminal Law 110 ⚡1168(2)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1168 Rulings as to Evidence in General
 110k1168(2) k. Reception of evidence.
 Most Cited Cases

Confrontation Clause error in admitting certificates of drug analysis to show amount of cocaine involved was harmless in prosecution for trafficking in more than 14 grams of cocaine; when officers asked defendant what he was doing with two

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and one-half ounces of cocaine, defendant stated that because he smoked all the time, three ounces was "no big deal" and pointed out that only half an ounce was found in his apartment, bags of cocaine found by police in defendant's apartment were admitted in evidence and sent to the jury, and other evidence of drug distribution included large amount of cash and digital scale found in the apartment. U.S.C.A. Const.Amend. 6.

[8] Searches and Seizures 349 ↪ 199

349 Searches and Seizures

349VI Judicial Review or Determination

349k199 k. Hearing; in camera inspection.
 Most Cited Cases

Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. U.S.C.A. Const.Amend. 4.

[9] Criminal Law 110 ↪ 1655(1)

110 Criminal Law

110XXX Post-Conviction Relief

110XXX(C) Proceedings

110XXX(C)3 Hearing and Determination

110k1651 Necessity for Hearing

110k1655 Particular Issues

110k1655(1) k. In general. Most

Cited Cases

An *Amral* in camera hearing to determine whether defendant was entitled to a *Franks* hearing on his allegations, in postconviction motion for new trial, that the search warrant affidavit, which had alleged a controlled drug buy involving a confidential informant, contained a false statement that was included knowingly and intentionally or with reckless disregard for the truth, was not required; prosecution provided motion judge with information that satisfied him that there were no misrepresentations,

there was no indication of intentional misrepresentation, and judge concluded that presence of misstatements or omissions in record-keeping on the buy monies and the drugs involved in the controlled buys added up to mere negligence. U.S.C.A. Const.Amend. 4.

****994** Joseph M. Kenneally for the defendant.

Steven E. Gagne, Assistant District Attorney, for the Commonwealth.

Present: DUFFLY, DREBEN, & KAFKER, JJ.

DREBEN, J.

***728** Charged with trafficking in cocaine in an amount exceeding twenty-eight grams and trafficking within 1,000 feet of a school, the defendant, Justin DeMatos, was convicted of the lesser included offense of trafficking in cocaine in an amount of fourteen grams or more but less than twenty-eight grams, G.L. c. 94C, § 32E(b)(1), and was also convicted of the school zone violation. In his direct appeal, the defendant claims that he was deprived of his constitutional right of confrontation by the admission, over his objection, of certificates of drug analysis of the substances involved. His case was tried after the decision in *Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (2005), and before the decision in *Melendez-Diaz v. Massachusetts*, — U.S. —, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

Postconviction, he claimed his counsel was ineffective in not seeking a *Franks-Amral*^{FN1} hearing, and he sought such a ****995** hearing in support of his motion for a new trial. The motion was denied. That denial was consolidated with his direct appeal. We affirm his convictions and the denial of his motion for a new trial.

FN1. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Commonwealth v. Amral*, 407 Mass. 511, 554 N.E.2d 1189 (1990).

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1. *Evidence at trial.* Viewed in the light most favorable to the Commonwealth, see *Commonwealth v. Latimore*, 378 Mass. 671, 677–678, 393 N.E.2d 370 (1979), the evidence at trial was as follows: On March 26, 2003, armed with a search warrant,^{FN2} Fall River police officers announced their presence and, after receiving no response, forced their way into the defendant's first-floor apartment at 162 McCloskey Street. Inside were three men and a pit bull terrier. Upon seeing the police, the defendant fled, carrying a pink box; some of its contents fell along the path of his flight. Among items subsequently retrieved were several vials of steroids, hypodermic needles, and a key. Police later used the key to open a safe in the defendant's apartment.

FN2. The police obtained two search warrants, one for the defendant's apartment and one for his business. The two affidavits in support of the applications were almost identical except for the address. Nothing of significance was found at the business address. One of two controlled buys referenced in the warrant affidavits took place near the defendant's place of business.

When the defendant was apprehended shortly after the chase, the pink box was next to him and contained \$8,000 wrapped in a rubber band. Two golf-ball-sized plastic bags containing white *729 powder believed to be cocaine were near the box. The police handcuffed the defendant and brought him to his apartment where he waived his Miranda rights.^{FN3} When questioned, he told police that he did not have any money or contraband other than what was in the pink box. Police, however, found in his apartment an additional bag of white powder, \$2,679, a spoon with a powder residue, baggies, and three rolled-up dollar bills.^{FN4} Near the rear entrance through which the defendant had fled, police retrieved a small digital scale. The money, the three bags of white powder, the rolled-up dollar bills, the scale, the baggies, and the spoon with the

residue were among the exhibits at trial and were sent to the jury.^{FN5}

FN3. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN4. There was testimony that rolled-up dollar bills are used to snort cocaine.

FN5. The jury were not informed of other items found, e.g., other narcotic pills and brass knuckles.

After having been shown the bag of white powder found in the apartment, the defendant said, "Oh I forgot about that cocaine. Besides, that's just personal use." When asked what he was doing with two and one-half ounces of cocaine,^{FN6} he told the officer that he smokes cocaine all the time, and that three ounces were "no big deal to him." According to the officer, the defendant pointed out that the police only found one-half of an ounce in his house and also stated that he was smoking cocaine when the police initially knocked on the door. The police officer in charge of the investigation (Paul Gauvin) indicated on cross-examination that he believed the defendant "was a little high" when apprehended.

FN6. The record does not explain how the officer knew the weight of the cocaine at the time the defendant was questioned. We note the police had found a scale.

****996** Certificates of drug analysis were admitted in evidence showing that each of the three bags as well as the residue on the spoon were cocaine. According to the certificates, one of the two bags found with the defendant after his chase contained 27.79 grams of cocaine, the other bag contained 27.91 grams, and the bag found in the apartment contained 14.86 grams of cocaine (a total of 70.76 grams).

After a voir dire, a police officer with extensive experience in narcotics investigations testified that fourteen grams is one-half *730 of one ounce and

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that twenty-eight grams is one ounce, that one ounce of cocaine would sell for between eight and twelve hundred dollars, and that one-half of one ounce would sell for between four to six hundred dollars. When asked whether the possession by a person of sixty-eight to seventy grams of cocaine was consistent with personal use or with distribution, his answer was distribution, and when asked whether that amount of cocaine and \$10,000 in cash was consistent with personal use or with distribution, he stated it would be consistent with distribution.

[1][2][3] 2. *Melendez-Diaz* issue. The United States Supreme Court's decision in *Melendez-Diaz* requires us to hold that the admission of the drug certificates was constitutional error. The certificates were within the "core class of testimonial statements" that trigger confrontation clause protections. *Melendez-Diaz*, *supra* at 2532, quoting from *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Here, the defendant objected to their admission, and, in any event, in cases tried after the decision in *Commonwealth v. Verde*, 444 Mass. 279, 827 N.E.2d 701 (2005), and before *Melendez-Diaz*, the standard of review is whether the admission of the drug certificates at trial was harmless beyond a reasonable doubt. *Commonwealth v. Vasquez*, 456 Mass. 350, 352, 923 N.E.2d 524 (2010). The standard is strict, and the question is whether

"we can be satisfied, beyond a reasonable doubt, that the erroneously admitted certificates of analysis had little or no effect on the verdicts.... It is not enough for the Commonwealth to demonstrate that its other, properly admitted evidence was 'sufficient' to convict the defendant.... Rather, to establish harmlessness beyond a reasonable doubt, the Commonwealth must show that other properly admitted evidence of guilt is 'overwhelming.'"

Id. at 362, 923 N.E.2d 524, quoting from *Commonwealth v. Tyree*, 455 Mass. 676, 701, 704 n. 44, 919 N.E.2d 660 (2010).

[4] The Supreme Judicial Court has identified a number of factors that may be looked at,^{FN7} see *Vasquez*, *supra* at 360 n. 12, 923 N.E.2d 524, but has stated "there is no uniform standard for all cases." *Ibid.*

FN7. Factors that the *Vasquez* court stated may be considered include "the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; ... and the weight or quantum of evidence of guilt." *Id.* at 360 n. 12, 923 N.E.2d 524, quoting from *Commonwealth v. Tyree*, *supra* at 701, 919 N.E.2d 660.

[5] *731 "Proof that a substance is a particular drug 'may be made by circumstantial evidence.' " *Commonwealth v. Charles*, 456 Mass. 378, 381-382, 923 N.E.2d 519 (2010), quoting from *Commonwealth v. Dawson*, 399 Mass. 465, 467, 504 N.E.2d 1056 (1987). In *Dawson*, one of two questions reported was:

"Whether a substance can be identified as a controlled drug as defined by G.L. c. 94C, § 31 through the testimony of **997 experienced police officers or the users of the drug rather than through laboratory analysis or testimony by a qualified chemist?"

Id. at 466-467, 504 N.E.2d 1056. The court answered the question in the affirmative adding:

"The trial judge will first have to make a finding that any police or drug-user witness's experience with a drug would or would not permit him to give an opinion as to what drug a particular substance was. If the judge finds the witness qualified, the knowledge and competence of that witness, and his lack of training in chemical analysis, will bear on the weight to be given to his testimony. We suspect it would be a rare case in

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which a witness's statement that a particular substance looked like a controlled substance would alone be sufficient to support a conviction."

Id. at 467, 504 N.E.2d 1056. See *Vasquez, supra* at 365, 923 N.E.2d 524. The court in *Dawson* also noted that "[t]he great weight of authority in this country permits, for example, an experienced user of a controlled substance to testify that a substance that he saw and used was a particular drug." *Dawson, supra*.

[6] In this case, the defendant was a user of drugs. Indeed, he admitted to the police that he was using cocaine at the time of their initial entry—a statement buttressed by the police officer's testimony that the defendant was a little high when apprehended. The defendant stated that he smoked all the time, that he had forgotten "about that cocaine" in the apartment, that *732 the cocaine was for his personal use, and that three ounces was not a big deal.

In these circumstances, where the defendant admitted to being a substantial user of cocaine, stated that he was using cocaine in his apartment at the time the police arrived, and when shown the drugs found in the apartment, acknowledged that he had forgotten that cocaine was there, we consider the evidence that the composition of the drugs in the apartment was cocaine was so powerful that the certificates had little or no effect on the verdicts. See *Commonwealth v. Harris*, 75 Mass.App.Ct. 696, 707 & n. 10, 916 N.E.2d 396 (2009) (error harmless beyond a reasonable doubt where, among other evidence, defendant had signed statement admitting substance was cocaine). Equally strong, particularly in view of the defendant's statement that "three ounces was no big deal," is the inference that the bags of white powder found near him after he was apprehended was the same substance.

The overwhelming evidence of narcotics, including the large sum of money, the scale, the baggies, the spoon with a powder residue, and the defendant's flight, together with the defendant's ad-

mission that he was using cocaine when the police entered, and his implicit, if not explicit, admission that the drugs were cocaine lead us to conclude that the admission of the drug certificates had little or no effect in proving the substances found were cocaine.^{FN8}

FN8. We note that the prosecutor did not refer to the certificates during his closing argument. Contrast *Commonwealth v. Tyree, supra* at 702, 919 N.E.2d 660; *Commonwealth v. Ware*, 76 Mass.App.Ct. 53, 57–58, 918 N.E.2d 861 (2009); *Commonwealth v. Perez*, 76 Mass.App.Ct. 439, 444, 922 N.E.2d 855 (2010).

[7] The evidence of the certificates as to the amount of cocaine, although a more difficult question, was also, in our view, harmless beyond a reasonable doubt. The defendant was convicted of the lesser included offense of trafficking in fourteen or more grams of cocaine. When asked what he was doing with two and one-half ounces **998 of cocaine, the defendant did not deny the amount, but rather stated that because he smoked all the time, three ounces was no big deal. He took pains to point out that only one-half of an ounce (fourteen grams) was found in his apartment. That he knew the actual weight of the cocaine can be inferred from the scale in his apartment. The one-half of an ounce bag as well as the two golf-ball-sized bags were admitted *733 in evidence and sent to the jury. The jurors could determine that the weight of the cocaine in the three bags exceeded fourteen grams (half an ounce).^{FN9} See *Commonwealth v. Connolly*, 454 Mass. 808, 831, 913 N.E.2d 356 (2009). While there was testimony that seventy grams was more indicative of distribution than of personal use, the jury rejected the weight of seventy grams stated in the certificates. The other evidence of distribution, including the large amount of cash, the scale, and the baggies was such that we consider the error in admitting the certificates as to weight had little or no effect on the verdict and hence was harmless beyond a reasonable doubt.

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FN9. Moreover, the digital scale was in evidence and sent to the jury room.

[8] 3. *Motion for new trial.* Subsequent to his convictions, the defendant brought a motion for a new trial (which was heard by the trial judge) on the ground that his counsel had been ineffective in failing to seek a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In support of his motion, he sought discovery and also a *Franks* hearing. He claims that the two controlled buys, which were essential to the validity of the warrant affidavit, never occurred.
 FN10 Under *Franks*,

FN10. We agree that the controlled buys were essential to the warrants' validity.

"where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request."

Id. at 155–156, 98 S.Ct. 2674. If perjury or reckless disregard is established by a preponderance of the evidence and the remaining content of the affidavit is insufficient to provide probable cause, the search warrant must be voided, and the evidence seized excluded. *Id.* at 156, 98 S.Ct. 2674.

In *Commonwealth v. Amral*, 407 Mass. 511, 522, 525, 554 N.E.2d 1189 (1990), the Supreme Judicial Court held that a defendant, under a less stringent test than *Franks*, may be entitled to an in camera hearing to determine whether he or she must receive a *Franks* hearing. *Amral*, *supra* at 525, 554 N.E.2d 1189. The court held "that the public *734 interest in deterring police misconduct requires the trial judge to exercise his or her discretion to order an in camera hearing where the defendant by affidavit asserts facts which cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential

informant." *Id.* at 522, 554 N.E.2d 1189. FN11 See generally Smith, Criminal Practice and Procedure §§ 4.36 — 4.40, 4.42 (3d ed.2007); **999 Grasso & McEvoy, Suppression Matters Under Massachusetts Law §§ 10–6[a]–[e] (2010–2011).

FN11. The court continued, "Mere suspicion that there was no informant, or that the informant's 'reliability' credentials have been misstated, or that his information was other than as recited by the affiant, is not enough to trigger an in camera hearing, but an assertion of facts tending to confirm such a suspicion is sufficient." *Amral*, *supra* at 522, 554 N.E.2d 1189.

Here, the motion judge was satisfied that further inquiry was required. The question before us is whether his inquiry went far enough. We hold that it did, that an additional hearing was not necessary, and that the judge's denial of a new trial was within his discretion.

We take the facts relevant to the new trial motion from the record and the judge's careful memorandum. The defendant, in conjunction with his motion for a new trial, moved for extensive discovery concerning the controlled buys, pursuant to Mass.R.Crim.P. 30(c)(4), 435 Mass. 1501 (2001), including: the date and times of the alleged controlled buys; identity of the confidential informant; amount of narcotics alleged to have been purchased; amount of money alleged to have been paid in the two controlled buys; serial numbers of the money alleged to have been used in the controlled buys; and results of chemical analyses conducted on the drugs alleged to have been purchased in the two controlled buys.

The defendant filed a supporting affidavit, not included in the record, which the judge stated averred: that the material contained in Officer Paul Gauvin's warrant affidavit setting forth the two controlled buys was false; that the defendant never sold drugs to anyone; and that, despite explicit requests, the Commonwealth never turned over to the de-

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fense the analyses from the alleged controlled drug buys, Gauvin's request for funds for the two buys or the reports, logs, or memoranda regarding the two alleged controlled buys.

*735 The judge noted appellate counsel's claim that the only information relevant to the controlled buys given to the defendant was a single document. The record shows that that document, entitled "Fall River Police Department Evidence/Property Custody Document," was dated March 28, 2003, two days after the warrants were executed and was redacted in two places. The document states that, as a result of the controlled buys, an unspecified amount of cocaine and "O.C." pills were received by Gauvin. It named Justin DeMatos (the defendant) as the person from whom the drugs were received and stated they were found at the defendant's address.

After recounting the pretrial proceedings and emphasizing the defendant's repeated requests for discovery, the judge summarized:

"DeMatos, by affidavit, denied that any drug sale took place. During 2005 and 2006, the Fall River Police Department failed to supply any information or documentation of the use of buy monies allegedly used in the controlled buys. Despite being directly ordered by the court [a different motion judge not the trial and current motion judge] to disclose such information, if available, the Fall River Police Department failed to provide any information tracing the existence of an account for buy monies, the use by Gauvin of buy monies, or the transfer of buy monies to the informant for use in the controlled buys. The question, therefore, arises whether trial counsel, faced with discrepancies in the handling of drugs pursuant to G.L. c. 94C, § 47A,^[FN12] together with a curious **1000 absence of records accounting for the buy monies involved in the controlled buys, should have, as a matter of effective representation, moved for a *Franks* or *Amral* hearing."

FN12. General Laws, c. 94C, § 47A, as

amended by St.1983, c. 184, § 1, provides in part:

"The department shall keep a record of the place where such controlled substances or narcotic drugs were seized, of the kinds and quantities of drugs received, by whose order the controlled substance or narcotic drugs were received, by whom the controlled substance or narcotic drugs were delivered and received, the date and manner of destruction or disposition of such controlled substances or narcotic drugs, and a report under oath of such destruction or disposition shall be made to the court, which record shall be open to inspection by attorneys of record in the case and by all federal and state officers charged with enforcement of federal and state narcotic laws."

*736 The judge did not directly answer the question in his memorandum, but pointed out that the Commonwealth's failure to provide documentation of the use of buy monies "does not derive from the Commonwealth's assertion of a privilege based on protecting the informant's identity." ^{FN13} He stated that the absence of documentation on the use of monies in the two controlled buys leads to the reasonable inference that no public moneys were transferred to the informant. The judge concluded that the defendant's affidavit, together with this inference and the discrepancies in following the requirements of G.L. 94C, § 47A, see note 12, *supra*, "provides enough heft to make it worthy of further exploration." He then ordered the Commonwealth "[t]o supply the court and appellate counsel with all information regarding the narcotics alleged to have been purchased and the buy monies alleged to have been used in the two controlled purchases."

FN13. The judge noted that the "absence of such an objection" may have been because the government believed that the defendant knew the identity of the informant.

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The warrant affidavit stated that the informant and the defendant "used to be close friends."

In response to the court order, the Commonwealth submitted:

- "1. Memorandum from Sgt. Paul Gauvin, Fall River Police (1 page);
- "2. Fall River Police Evidence/Property Custody Document (1 page); and
- "3. Controlled Purchase Buy Money Ledger (redacted, 1 page)."

Gauvin's memorandum, addressed to an assistant district attorney, stated that he was enclosing "the controlled buy log and the evidence custody document," and requested that they be sanitized. He also added that "as discussed during the trial with [the prosecutor], both the defendant and his brother had some involvement in threatening and physically assaulting several people in Fall River, in an effort to uncover the informant." ^{FN14}

FN14. In a motion for reconsideration of the denial of his motion for a new trial, the defendant appended an affidavit from his trial attorney indicating that neither the district attorney's office nor the police department ever gave him an indication that the defendant was engaging in such action. He also presented a request to the police department seeking records of any such action by the defendant. He received no response.

The Evidence/Property Custody Document was the document *737 provided earlier, the only difference was that the portion that had previously been redacted now showed "1 bag cocaine" and "4 OCS pills." ^{FN15} Upon receipt of this material, the judge entered the following order:

FN15. The third document was an untitled page, without the name of the defendant,

and included the headings: "Date," "Detective," "Purpose used," "Amount Used," "Balance," and "Serial # 's.'" The date given was March 18; the detective listed was P. Gauvin; the purpose was "controlled buy B"; and under serial numbers was written "see copies for serial #."

"Sergeant Paul Gauvin shall submit an affidavit addressing the authenticity of the 'buy money ledger' previously submitted**1001 to the court and the content of his one page memorandum on controlled buys that was also submitted to the court."

In response, Gauvin filed an affidavit stating that he participated in two controlled buys, that he obtained a certain sum of money for what is termed on the control buy log as "controlled buy 'B'" which covered both buys, that his memorandum attested to his concerns regarding safety, that both the controlled buy log and the Evidence/Property Custody documents are kept in the normal course of business, that he filled out the latter accurately, that the discovery materials submitted constitute the entirety of the information regarding the narcotics alleged to have been purchased and the buy monies, and that at the time the documents were drafted the department did not have a "controlled policy." ^{FN16} A controlled buy policy was put in place on April 17, 2003.

FN16. A policy document attached to the affidavit set forth the policy and gave its effective date as stated in Gauvin's affidavit.

Considering that he had "authoriz[ed] discrete discovery and [had] examin[ed] the results of that discovery process," the judge entered an order denying the motion for a new trial. In his view, the defendant had failed to demonstrate that the motion to suppress would have been successful and hence failed to show that counsel was ineffective. See *Commonwealth v. Cutts*, 444 Mass. 821, 830, 831 N.E.2d 1279 (2005).

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The defendant's main focus on appeal is that the judge erred *738 in failing to order a *Franks* hearing because the defendant had made a substantial showing that the Fall River police intentionally fabricated the account of the controlled buys alleged in the warrant affidavits. He lays stress on the following: that no document exists prior to the warrant affidavits suggesting that the defendant was involved in a controlled buy; while the controlled buy ledger which was not produced until after many requests and several court orders predates the affidavit, it makes no mention of the defendant; the copies of the money referenced in the controlled buy ledger do not exist; the drugs from the buy were not turned in to the evidence officer until two days after the execution of the warrant and one week after the buys allegedly took place; the drugs no longer exist; and there is no documentation supporting the claim that the defendant was threatening individuals in an attempt to learn the name of the informant and defendant's trial counsel never heard such a claim.^{FN17}

FN17. He also argues that there are a number of other matters which are suspicious, including that the records of the District Court clerk's office do not show issuance of the warrant and the signature of the clerk on the warrant varies significantly from the stamped signature of the same clerk on another warrant.

[9] It is true that the matters listed required further inquiry and, indeed, so the judge determined. However, they did not require a *Franks* hearing or even an *Amral* hearing. In *Commonwealth v. Alcantara*, 53 Mass.App.Ct. 591, 595, 760 N.E. 2d 1236 (2002), where statements of the affiant concerning the informant in the affidavit in support of the warrant appeared to be inconsistent with other warrant applications, the judge, after a hearing, found that the affiant was credible, the affiant's explanation for the apparent inconsistencies acceptable, and that the affidavit in support of the warrant application "did not contain misrepresentations

sufficient to 'cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant.' " *Ibid.*, quoting from **1002 *Commonwealth v. Padilla*, 42 Mass.App.Ct. 67, 72, 674 N.E.2d 1102 (1997). On appeal in *Alcantara*, the defendant argued that the failure of the judge to conduct an in camera *Amral* hearing in which the affiant was required to disclose the identity of the informant or informants was an abuse of discretion. Noting there was no showing of clear error *739 in the judge's findings of fact, and that the challenge to the judge's decision was nothing more than an argument about the affiant's credibility, an area in which deference is given to the motion judge, we held that there was no abuse of discretion in the judge's acceptance of the affiant's explanation and that an *Amral* hearing was not needed.

In the present case, the prosecution supplied the judge with information that satisfied him that there were no misrepresentations. Despite the fact that withholding of information had been shown, there was no indication of intentional misrepresentation. Gauvin had been the primary prosecution witness at trial, and the judge had observed him and could assess his credibility. In his memorandum requiring additional discovery from the Commonwealth, the judge correctly pointed out that "the presence of misstatements or omissions in record-keeping on the buy monies and drugs involved in the controlled buys adding up to negligence" would not require either a *Franks* or *Amral* hearing. See *Commonwealth v. Nine Hundred and Ninety-Two Dollars*, 383 Mass. 764, 767, 422 N.E.2d 767 (1981).

Implicit in his decision denying the motion for a new trial was a finding that Gauvin was credible, that the discrepancies and late production were most likely the product of negligence and that, in any event, there were no misrepresentations sufficient to "cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant." *Amral*, *supra* at

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522, 554 N.E.2d 1189.

Although the judge did not hold a preliminary hearing, as the judge did in *Alcantara, supra* at 595, 760 N.E. 2d 1236, the motion judge here ordered additional discovery, examined the documents that had been provided, and required an additional affidavit from Gauvin in which he swore to the authenticity of the documents. In following this course, the judge did not abuse his discretion in accepting the documents as authenticated by Gauvin and, based on this material and his assessment of Gauvin's credibility during trial, in determining that an *Amral* hearing was not necessary.

Judgments affirmed.

Order denying motion for new trial affirmed.

Mass.App.Ct.,2010.
Com. v. DeMatos
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END OF DOCUMENT

COMMONWEALTH vs. Eric SHAUGHESY. [FN1]

SJC-10416

October 6, 2009. - November 19, 2009.

Privileged Communication. Practice, Criminal, Disclosure of identity of informer, Affidavit, Waiver, Attorney's fees.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 2, 2009.

The case was reported by *Spina*, J.

Mary E. Lee, Assistant District Attorney, for the Commonwealth.

Michael B. Galvin (*Thomas J. Carey, Jr.*, with him) for the defendant.

Peter B. Krupp, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

CORDY, J.

At issue in this case is whether the Commonwealth's privilege not to disclose the identity of an informant can be overcome on the basis of an affidavit submitted ex parte by the defendant. [FN2] The particular question we must answer is whether the judge abused his discretion in accepting and relying on the ex parte affidavit without affording the Commonwealth access to it and an opportunity to respond to its contents.

The defendant claims that the judge's handling of the matter was consistent with language that this and other courts have used in the past concerning the use of ex parte submissions in circumstances such as presented here, where it is not otherwise clear from the record of the case that disclosure of the informant's identity would provide something material to the defense. The defendant also claims that the judge's acceptance and reliance on the ex parte affidavit in this case is similar to the use of ex parte submissions (that we have approved) in cases where the defendant's submission would likely furnish the prosecution with "information incriminating to the defendant which it otherwise would not be entitled to receive." *Commonwealth v. Mitchell*, 444 Mass. 786, 796, 797 (2005) (ex parte submission of application, including affidavit, in order to obtain summons pursuant to Mass. R.Crim. P. 17[a][2], 378 Mass. 885 [1979], may be used by defendant in "exceptional circumstances").

The Commonwealth, on the other hand, argues that stripping it of the informant privilege on the ex parte word of a defendant alone, with no meaningful opportunity to contest the proffer, "is to strike the death knell for the protection of all confidential informants in Massachusetts." It urges us to order that "trial courts may never order the disclosure of the identity of an informant" based on such a submission, lest we be seen to promote "the defendant's right to commit perjury without any potential for consequences."

We conclude that the use of ex parte affidavits should only be permitted in exceptional circumstances but that the judge did not abuse his discretion in accepting the affidavit in this case. However, before a defendant's ex parte affidavit can overcome the Commonwealth's privilege, a judge must afford the Commonwealth some avenue of response. This may include ordering that the Commonwealth be provided with a redacted or summary version of the material included in the affidavit.

Background. The defendant was indicted for trafficking in Oxycodone in violation of G.L. c. 94C, § 32E (c), after being arrested in front of a Plymouth residence, which the police had under surveillance in anticipation of a delivery of a quantity of Oxycodone pills to the defendant from his supplier. As the police moved in, the defendant saw them and dropped a bag containing ninety-seven Oxycodone pills. Another bag of one hundred pills was subsequently recovered from a hole in the ceiling of the

residence. [FN3]

The surveillance and the arrest arose out of a series of telephone calls made to the defendant by a confidential informant after the informant had been arrested by Marshfield police in an unrelated matter earlier in the day. The informant told the police that he had purchased Oxycodone from the defendant in the past, and he agreed to act as a purported purchaser on their behalf.

[FN4] The informant then telephoned the defendant and arranged to make a purchase from him that afternoon. The informant told the police that he was to pick up the Oxycodone pills at the address of the residence after the defendant received a delivery from his supplier. The informant spoke to the defendant by telephone several times during the day and updated the police about the progress of the proposed purchase and the expected arrival of the supplier. These telephone calls apparently were all made from the police station where the informant remained in custody. The informant was not present when the police made the arrest, which was sequenced to occur right after the alleged supplier arrived at the residence.

After his indictment, the defendant moved for the disclosure of the identity of the informant, arguing that disclosure was necessary to his defense of entrapment, in that the informant was a participant in the activities that led to his arrest and possessed "exculpatory evidence." No affidavit was filed in support of the motion and, at a hearing, the judge stated his view that the defendant had not satisfied his burden of demonstrating why and how the identity of the informant was material to his defense.

Thereafter, defense counsel submitted his own affidavit outlining the information he had obtained about the informant from the police reports, grand jury testimony, and the testimony of police officers (taken at a motion to suppress hearing). Based on this information, defense counsel asserted that "the initiation of [the] alleged drug transaction by the confidential informant and the quantity of ongoing communication between the confidential informant and the police would tend to indicate entrapment, which is a major defense of this matter." At a subsequent hearing, the judge remained unsatisfied that the defendant had made a sufficient showing of inducement by the informant to warrant piercing the privilege. The judge then suggested that an affidavit from the defendant might be necessary to bridge that gap. Defense counsel expressed concern about his client's "exposure" should he sign an affidavit, but suggested that if it could be submitted "ex parte" and "under seal," an affidavit from the defendant "could be more thorough than I was in my affidavit." In the absence of such an affidavit, the judge denied the motion "at this point based on what's before me."

Represented by new counsel, the motion for the disclosure of informant information was renewed, now based on an affidavit from the defendant that counsel proposed to submit for the judge's inspection "in camera," that is, for his sole inspection. At the hearing on the renewed motion, the judge first considered whether to accept the defendant's affidavit "ex parte" and asked the prosecutor whether she wanted to be heard on that point. The prosecutor responded that she did not, and voiced no objection to the judge's acceptance and review of the affidavit on that basis. The judge then examined the affidavit. In the affidavit, the defendant revealed the name of the person whom he believed was the confidential informant, and outlined his contacts with that person. [FN5]

The judge asked for further argument on the informant disclosure issue, to which the prosecutor responded first by noting the "difficult position" she was in to be "arguing against an unknown document." The prosecutor then reiterated arguments she had previously made, essentially, that the confidential informant was not present when "the deal was done" and that the information provided to the police that led to the defendant's arrest was information concerning the arrival of the defendant's supplier, an arrangement that predated the informant's contacting the defendant at the behest of the police. Consequently, the prosecutor argued that the situation was no different from that of an informant who merely passes credible information along to the police, who then use that information as a basis for probable cause to arrest or search. In such a situation, the prosecutor contended, disclosure would not ordinarily be required unless the informant was a percipient witness or a direct participant in the charged offense.

The judge ruled that the defendant, in his affidavit, had provided a version of the contacts between himself and the person he identified, which suggested "importuning" by the informant sufficient to meet the defendant's burden of demonstrating why disclosure of this person's status as an informant

was material to the defendant's entrapment defense. The judge therefore ordered the Commonwealth to confirm or deny that the named individual was the confidential informant, and directed defense counsel to provide the name of the individual to the prosecutor for that purpose. [FN6] If the named individual was the informant, the Commonwealth was further ordered to provide information about promises, rewards, or inducements offered or provided to him in exchange for his cooperation.

Eight days later, the Commonwealth filed a motion to reconsider, seeking access to the defendant's ex parte affidavit and a reopening of the hearing on the motion for disclosure of the informant's identity. The motion was opposed, and after a hearing, the judge affirmed his order of disclosure. The judge explained that, in the circumstances of this case, where, in order to meet his burden, the defendant was required to reveal a course of dealings with a person that was incriminating and, if the person was not the informant, the Commonwealth might not know about, it was appropriate for the judge to receive the affidavit ex parte in order to preserve the defendant's rights under the Fifth and Sixth Amendments to the United States Constitution. The prosecutor responded that the Commonwealth faced a dilemma, because the entrapment defense might never be used at trial, and the Commonwealth would have exposed an informant to potential hazards for no reason. The judge then questioned whether the prosecutor's "objection to the procedure I employed relates [only] to the timing of the disclosure." The prosecutor responded, "Yes and no," and proceeded to argue, essentially, that the use of confidential informants was very important; that the disclosure of the identity would discourage future cooperation; and that there might be a risk to the informant's safety. [FN7] The prosecutor further argued that the defendant was predisposed to commit the crime in light of his record, and therefore an entrapment defense was not viable. The judge responded to this latter argument by pointing out that the ultimate viability of the defense of entrapment was not a matter appropriately considered at this stage and that the defendant had a right to the information if it was material to his defense, a burden that he had met in his affidavit. The prosecutor finally argued that because she had no right to access the affidavit, the Commonwealth did not get a "full blown hearing" on the disclosure question. [FN8]

The judge concluded by ruling that "the only appropriate way for the [c]ourt to receive the information necessary for the defendant to make his initial showing and protect [his] Fifth and Sixth Amendment rights at this stage," was to receive the information in the form that the judge did. He also emphasized to defense counsel that the only purpose for which the identity of the informant was ordered released was for use in an entrapment defense at trial. [FN9] He then invited the Commonwealth to seek an interlocutory appeal, and, subsequently, stayed the trial pending the outcome of these proceedings, which the Commonwealth initiated pursuant to G.L. c. 211, § 3.

Discussion. We first deal summarily with three issues raised by the parties on appeal, and then we discuss in more detail the principal issue in the case.

1. The Commonwealth argues that its failure to object contemporaneously to the judge's acceptance of the affidavit should not result in a waiver of its claims because the Commonwealth timely filed a motion to reopen the hearing, on which the judge held a hearing and fully considered and denied the Commonwealth's objections on their merits. We agree that in the circumstances of this case, the issue has been preserved for appeal.

2. The Commonwealth contends that the defendant failed to meet his burden to justify an exception to the informant privilege where the informant was not physically present during the drug activity for which the defendant has been indicted, where there is evidence that the defendant was predisposed to commit the crime, and where the defendant could not have shown that the communication between the informant and the defendant reached the level of entrapment. With respect to these arguments, we concur with the judge that the informant's lack of physical presence is not determinative and that whether there is evidence that the defendant was predisposed to commit the crime is an issue on which the Commonwealth must carry the burden at trial, and is not a proper basis on which to deny discovery where the defendant has presented sufficient evidence of inducement, *Commonwealth v. Madigan*, 449 Mass. 702, 710 (2007). Further, having reviewed the sealed affidavit in this case, we conclude that the reason and basis for the judge's order of disclosure are clear and supported.

3. The Commonwealth argues that the defendant's request for costs and attorney's fees incurred in

connection with bringing this action under G.L. c. 211, § 3, are not permitted. With this proposition we are also in agreement, at least to the extent that there is nothing so frivolous or unmeritorious in this case that would justify such an award in the absence of a statute or rule requiring that one be granted. Unlike Mass. R.Crim. P. 15, as appearing in 422 Mass. 1501 (1996), and Mass. R.Crim. P. 30, as appearing in 435 Mass. 1501 (2001), G.L. c. 211, § 3, contains no provision for the award of costs and fees.

4. With respect to the principal issue in the case, the Commonwealth argues that for "strong and well-established policy reasons," "[i]n camera proceedings are permissible *only* for the Commonwealth to protect an informant's identity prior to disclosure" (emphasis added), and that the defendant should not be able to "hide" from the Commonwealth the factual basis for attempting to pierce the informant privilege. Consequently, the Commonwealth contends that the judge erred in inviting and accepting the affidavit and in basing his order on it without any meaningful opportunity for the Commonwealth to be heard to protect its privilege.

The informant privilege serves a "substantial, worthwhile purpose in assisting the police in obtaining evidence of criminal activity," *Commonwealth v. Madigan*, *supra* at 706, quoting *Commonwealth v. Douzanis*, 384 Mass. 434, 441 (1981), and has long been recognized in the Commonwealth. See *Commonwealth v. Dias*, 451 Mass. 463, 468 (2008); *Worthington v. Scribner*, 109 Mass. 487, 488 (1872). While the privilege is not absolute, it "should be respected as far as reasonably possible consistent with fairness to a defendant." *Commonwealth v. Douzanis*, *supra*, and cases cited. One thing it may not do is "shield information that is material to the defense of entrapment, as to which the defendant has made an adequate pretrial showing." *Commonwealth v. Madigan*, *supra* at 703.

In order to obtain the identity of a confidential informant, the burden is on a defendant to demonstrate that an exception to the privilege ought apply, that is, that the disclosure would provide him with "material evidence needed ... for a fair presentation of his case to the jury." *Commonwealth v. Lugo*, 406 Mass. 565, 574 (1990). With respect to obtaining discovery of an informant's identity for the purpose of establishing a defense of entrapment, we recently held that a defendant may meet his burden by proffering evidence of inducement, which must be more than solicitation, but may take the form of "aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion." *Commonwealth v. Madigan*, *supra* at 708, quoting *Commonwealth v. Tracey*, 416 Mass. 528, 536 (1993). This evidence can come from information contained in the record of the case, such as police reports, grand jury testimony, and exhibits, or from the defendant's own version of events. Once evidence of inducement has been produced, the materiality of determining whether the person who engaged in the inducement was an informant, that is, an agent of the government or one acting at his direction, is apparent. *Commonwealth v. Madigan*, *supra* at 709.

We have also said that "where it is not clear from the record that disclosure of an informant's identity would provide something material to the defense, a judge may hold an in camera hearing to assist in making that determination." *Commonwealth v. Dias*, *supra* at 472. The nature of the in camera hearing is left to the discretion of the judge. *Id.* at 472 n. 15. This language provides the legal justification for the judge's rulings with respect to his ex parte acceptance and use of the affidavit. It is also the nub of the defendant's argument as to why the judge acted properly, and the point on which the Commonwealth seeks clarification.

The defendant concedes, as he must, that the available case law on the use of ex parte submissions (and their in camera inspection by judges) arises almost exclusively in the context of the Commonwealth's making such submissions for the purpose of opposing motions to disclose the identity of its informants.

[FN10] The reason for this is apparent and logical. The identity of an informant must be kept confidential until the judge is in a position to make a determination whether the privilege should give way. This determination, on occasion, will require the judge to receive information about the informant,

and the attendant circumstances of his conduct, which, if disclosed to the defendant, would, as a practical matter, vitiate the privilege by identifying the informant without a ruling as to the appropriateness of doing so. Cf. *Commonwealth v. Amral*, 407 Mass. 511, 523-526 (1990) (judge instructed to hold in camera hearing, excluding defense counsel, to question informant to determine

whether defendants have made sufficient showing for evidentiary hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 [1978]). Consequently, the use of ex parte submissions by the Commonwealth, or in camera proceedings that exclude the defense, may be justified in certain circumstances by the Commonwealth's significant interest in protecting the identity of confidential informants from disclosure except where plainly necessary to the defense.

When important public policies conflict, here the protection of informants, the right to a fair trial, and the right not to be compelled to incriminate oneself, a balance must be struck. We have already concluded that the privilege must give way when information is material to the fair presentation of a defense, and that the defense of entrapment may present such a circumstance. The question we must answer in this case more narrowly relates to the tools available to the judge to obtain information critical to making the determination whether the privilege must give way without requiring that the defendant's Fifth Amendment privilege also give way.

In *Commonwealth v. Mitchell*, 444 Mass. 786 (2005), we faced a similar dilemma. In that case, the judge had allowed defendant's motions, filed ex parte, for the issuance of summonses pursuant to rule 17(a)(2) to compel the production, in advance of trial, of documents important to the defense of the case. *Id.* at 787. The motions were accompanied by affidavits setting forth a factual basis that the judge found sufficient to satisfy the requirements of relevance, admissibility, necessity, and specificity. See *Commonwealth v. Lampron*, 441 Mass. 265, 269 (2004). The Commonwealth, having learned of the summonses, sought access to the ex parte filings (including the affidavits), and requested that the orders calling for production be vacated. *Commonwealth v. Mitchell*, *supra* at 788.

In the *Mitchell* case, we noted that, in *Commonwealth v. Lam*, 444 Mass. 224 (2005), and *Commonwealth v. Lampron*, *supra*, we struck a balance between, on the one hand, the interest of the Commonwealth in ensuring that rule 17(a)(2) is not improperly used and that witnesses are not harassed, and, on the other hand, the interest of the defendant in obtaining documents relevant to his defense from third parties in advance of trial. *Commonwealth v. Mitchell*, *supra* at 790. We then focused on the further complication posed when the detailed showing required by *Commonwealth v. Lampron*, *supra*, cannot be made without implicating other important rights and policies, that is, "without revealing information that may prove incriminating or when advance notice of a request for such a summons would likely result in the destruction or alteration of the documents themselves." *Commonwealth v. Mitchell*, *supra* at 793-794. The court proceeded to expand the tools available to the judge by allowing for ex parte submission in what it characterized as "exceptional circumstances." *Id.* at 793. Such circumstances included those "where the defendant has demonstrated ... a reasonable likelihood that the prosecution would be furnished with information incriminating to the defendant which it otherwise would not be entitled to receive." *Id.* at 797. That the submission might reveal "trial strategy or work product or might disclose client confidences" would not be sufficient to warrant this exception; the ex parte procedure was not to become the "norm." *Id.*

In the present case, we view the Commonwealth's interest, as embodied in the informant privilege, to be stronger than the Commonwealth's interest in rulings regarding the issuance of rule 17(a)(2) summonses. A judge's ruling authorizing the issuance of the latter does not effectively cut off the rights of the affected parties. The recipient of the summons can move to quash it, and the Commonwealth can participate in such a proceeding. In contrast, a ruling by the judge abrogating the privilege in the circumstances presented here would afford no rights to, or protections for, the parties most affected by it. In other words, such a ruling is not a step along the road. It is the end of the road.

Having made these observations does not lead us to conclude, as the Commonwealth urges, that a judge may never exercise his discretion to accept and consider an ex parte affidavit from the defendant in deciding whether he has met his burden of demonstrating materiality. The particular facts of this case offer a convenient example. The matter of materiality had been fully argued by both sides based on a fairly extensive record of reports and testimony available to the parties, but without, as the judge noted, a missing piece that only the defendant could provide, that is, the specific inducements alleged to have been made. As the judge recognized, the additional information necessary to his determination might well provide the Commonwealth with incriminating information about the defendant's relationship, transactions, and conversations with a person that, if the person

was not the informant, the Commonwealth would not be entitled to receive. These facts, closely akin to the exceptional circumstances described in *Commonwealth v. Mitchell*, *supra*, justified the use of an ex parte procedure.

However, even in *Commonwealth v. Mitchell*, *supra* at 797, the court made it clear that the "judge should seal or impound only as much of the motion and affidavit as is absolutely necessary to protect the defendant's interests." In our view, even more is required in matters where the informant privilege is at stake. If there was error in this case, it was not in the judge's acceptance and review of the affidavit, but in the judge's failure to afford the Commonwealth an adequate opportunity to respond to its essential contents.

Before relying on an ex parte submission to overcome the privilege, a judge must require that a redacted or summary of the submission be provided to the Commonwealth so that it effectively might be heard in response. [FN11],

[FN12] If the Commonwealth wishes to respond with an ex parte filing of its own, it will need to make the case for it with the judge. If the judge ultimately concludes that the privilege has been overcome, a protective order ought ordinarily be entered, ensuring that the identity of the informant not be used for any purpose beyond the reason for its disclosure.

The case is remanded to the Superior Court to afford the Commonwealth the opportunity to respond to a redacted or summary version of the defendant's affidavit, which is to be prepared by the defendant or his counsel and approved by the judge.

So ordered.

FN1. As is our practice, we spell the defendant's name as it appears in the indictment. See, e.g., *Commonwealth v. Perez*, 444 Mass. 143, 143 n. 1 (2005).

FN2. While the parties variously use the terms "ex parte," "in camera," and "under seal," what we are considering in this case is an affidavit submitted by the defendant (with the knowledge of the Commonwealth), under seal and for in camera inspection by the judge only.

FN3. An additional 200 pills were found in the motor vehicle of the person alleged to be the defendant's supplier. These pills are not part of the trafficking indictment presently pending against the defendant.

FN4. The gender of the informant is variously characterized in the record as "he" or "she"; we use the pronoun "he" for convenience.

FN5. The affidavit remains under seal in this court.

FN6. In framing his ruling, the judge told counsel, "I think for purposes of my ruling, I will reference the named individual, ordering the Commonwealth to confirm or deny this person's identity." Defense counsel asked whether it would "make more sense for the Commonwealth to just give you the name [of the informant] and then you can compare the names." The judge replied that he did not want to know the name if it was not the person. The prosecutor expressed no view on the wording of the order. Consequently, the judge's order included the name of the person identified in the defendant's affidavit. The Commonwealth raised no objection to the inclusion of the name, either at the time or when it filed its motion for reconsideration of the disclosure order. Before this court, the Commonwealth for the first time asks that the name be removed from the motion judge's order and the Superior Court docket sheet. This matter is an appropriate one to be raised by the Commonwealth in the Superior Court.

FN7. No specifics on this point were provided to the judge or argued by the Commonwealth.

FN8. The Commonwealth did not ask to make its own ex parte submission to the judge on the issue whether the identity of the informant ought be disclosed.

FN9. The Commonwealth did not seek, nor did the judge enter, a protective order with respect to the informant's identity. Cf. *United States v. Pesaturo*, 519 F.Supp.2d 177, 187 (D.Mass.2007) ("Neither the Defendant nor counsel shall disclose to anyone else ... the identity of the confidential informant, absent further Order of the Court").

FN10. Having conducted "[e]xtensive research" of State and Federal cases, the defendant cites one case, *United States v. Pesaturo*, 519 F.Supp.2d 177 (D.Mass.2007), in which the defendant sought disclosure of the government's informant based on an "in camera" submission. However, a review of that case suggests that, while the defendant submitted his motion for disclosure (for purposes of raising an entrapment defense) "[u]nder seal," it was not submitted without the prosecutor viewing it. *Id.* at 181. Indeed, the contents of the defendant's submission are discussed in some detail in the decision ordering disclosure. The decision's only reference to an "ex parte" filing relates to the submission made by the government in response to the defendant's submission. *Id.* at 183.

FN11. The fact that, having received such a redaction or summary, the Commonwealth may submit evidence contradicting the defendant's version of events is not determinative of the question whether the defendant has met his burden of materiality. A statement under oath by the defendant may suffice even if contradicted by the statements of others, unless the defendant's statements are "intrinsically improbable" or "flatly contradicted by irrefutable evidence." *United States v. Pesaturo*, 519 F.Supp.2d 177, 184 (D.Mass.2007).

FN12. If the judge concludes that, in light of the record submitted by the defendant, the affidavit is not sufficient to overcome the privilege, the affidavit may be sealed for purposes of appellate review or returned to the defendant and not provided to the Commonwealth.

Westlaw

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H

Appeals Court of Massachusetts,
 Middlesex.
 COMMONWEALTH
 v.
 Fred C. VELEZ.

No. 07-P-1960.
 Argued March 4, 2010.
 Decided July 16, 2010.

Background: After denial, by the Superior Court Department, Middlesex County, Thomas A. Connors, J., 2006 WL 6400558, of defendant's motion to suppress and for disclosure of the identity of a **confidential informant**, defendant was convicted, at a jury-waived trial in the Superior Court Department, Middlesex County, Stephen E. Neel, J., of trafficking in cocaine. Defendant appealed.

Holdings: The Appeals Court, Mills, J., held that:
 (1) vehicle stop and arrest were based on probable cause;
 (2) **disclosure of identity of confidential informant was not required; and**
 (3) defendant was not prejudiced by counsel's allegedly deficient performance in conceding defendant's guilt.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡ **1134.49(4)**

110 Criminal Law
 110XXIV Review
 110XXIV(L) Scope of Review in General
 110XXIV(L)4 Scope of Inquiry
 110k1134.49 Evidence
 110k1134.49(4) k. Illegally obtained evidence. Most Cited Cases

Criminal Law 110 ⚡ **1158.12**

110 Criminal Law
 110XXIV Review
 110XXIV(O) Questions of Fact and Findings
 110k1158.8 Evidence
 110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases

In reviewing the denial of a motion to suppress, the appellate court accepts the motion judge's subsidiary findings of fact absent clear error, and conducts an independent review of the judge's ultimate findings and conclusions of law.

[2] Searches and Seizures 349 ⚡ **113.1**

349 Searches and Seizures
 349II Warrants
 349k113 Probable or Reasonable Cause
 349k113.1 k. In general. Most Cited Cases

To establish probable cause to search, the facts contained in an affidavit, and reasonable inferences that may be drawn from them, must be sufficient for the magistrate to conclude that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 ⚡ **108**

349 Searches and Seizures
 349II Warrants
 349k105 Complaint, Application or Affidavit
 349k108 k. Necessity for writing; oral presentation or supplementation. Most Cited Cases

The sufficiency of a search warrant application to establish probable cause is judged solely within the four corners of the application. U.S.C.A. Const.Amend. 4.

[4] Controlled Substances 96H ⚡ **148(4)**

96H Controlled Substances
 96HIV Searches and Seizures

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96HIV(C) Search Under Warrant
 96Hk144 Affidavits, Complaints, and
 Evidence for Issuance of Warrants
 96Hk148 Informants
 96Hk148(4) k. Confidential or un-
 named informants. Most Cited Cases

Confidential informant's veracity was estab-
 lished, for purposes of probable cause for a warrant
 to search defendant's apartment for drugs, by the
 fact that she had previously given information
 which led to at least one arrest and seizure of con-
 traband, and by the corroborative effect of three
 controlled buys of drugs at defendant's apartment.
 U.S.C.A. Const.Amend. 4.

[5] Controlled Substances 96H ⚡146

96H Controlled Substances
 96HIV Searches and Seizures
 96HIV(C) Search Under Warrant
 96Hk144 Affidavits, Complaints, and
 Evidence for Issuance of Warrants
 96Hk146 k. Probable cause in general.
 Most Cited Cases

The facts that the defendant's residence was
 located within a three-unit dwelling, and that the
 police did not observe which unit the **confidential**
informant entered for a controlled buy, did not pre-
 clude probable cause for a warrant to search de-
 fendant's apartment for drugs. U.S.C.A.
 Const.Amend. 4.

[6] Controlled Substances 96H ⚡149

96H Controlled Substances
 96HIV Searches and Seizures
 96HIV(C) Search Under Warrant
 96Hk144 Affidavits, Complaints, and
 Evidence for Issuance of Warrants
 96Hk149 k. Lapse of time; staleness.
 Most Cited Cases

Delay of 72 hours between the third controlled
 buy of drugs and the application for a search war-
 rant did not preclude probable cause to search de-
 fendant's apartment for drugs, where the other in-
 formation in the search warrant affidavit, including

the two other buys, established a continuing pattern
 of conduct in a fixed location over a comparatively
 longer time frame. U.S.C.A. Const.Amend. 4.

[7] Arrest 35 ⚡63.4(5)

35 Arrest
 35II On Criminal Charges
 35k63 Officers and Assistants, Arrest
 Without Warrant
 35k63.4 Probable or Reasonable Cause
 35k63.4(5) k. Nature of offense; felony
 or misdemeanor. Most Cited Cases

Arrest 35 ⚡60.3(2)

35 Arrest
 35II On Criminal Charges
 35k60.3 Motor Vehicle Stops
 35k60.3(2) k. Particular cases. Most Cited
 Cases
 (Formerly 35k63.5(6))

While warrant to search defendant's apartment,
 for drugs, did not give troopers authority to seize
 defendant one and one-half blocks from his apart-
 ment, troopers' awareness, when they stopped de-
 fendant's vehicle one and one-half blocks from the
 apartment, that three controlled buys had occurred
 at the apartment during the preceding month, with
 the most recent buy within 72 hours of the stop,
 provided probable cause to believe that the defend-
 ant had committed a cocaine trafficking felony of-
 fense, justifying the stop and the subsequent war-
 rantless arrest. U.S.C.A. Const.Amend. 4;
 M.G.L.A. c. 94C, § 32E(b).

[8] Searches and Seizures 349 ⚡62

349 Searches and Seizures
 349I In General
 349k60 Motor Vehicles
 349k62 k. Probable or reasonable cause.
 Most Cited Cases

Under the automobile exception to the search
 warrant requirement, the warrantless search of a car
 is justified as long as the police have probable

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cause to believe that there is contraband in the car.
 U.S.C.A. Const.Amend. 4.

[9] Controlled Substances 96H 627.10(5)

96H Controlled Substances

96HIV Searches and Seizures

96HIV(B) Search Without Warrant

96Hk110 Motor Vehicle Searches

96Hk112 k. Probable or reasonable cause. Most Cited Cases

Trooper had probable cause to believe that there was contraband in defendant's car, for purposes of automobile exception to search warrant requirement; trooper was trained in identification of marijuana, including its appearance and odor, he had smelled burnt marijuana in the past, and, when he approached the driver's window, he detected an odor of burnt marijuana. U.S.C.A. Const.Amend. 4.

[10] Criminal Law 110 627.10(5)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)5 Theory and Grounds of Decision in Lower Court

110k1134.60 k. In general. Most Cited Cases

The appellate court is free to affirm a ruling on a suppression motion on grounds different from those relied on by the motion judge if the correct or preferred basis for affirmance is supported by the record and the findings.

[11] Criminal Law 110 627.10(5)

110 Criminal Law

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158.8 Evidence

110k1158.12 k. Evidence wrongfully obtained. Most Cited Cases

Appellate court defers to the motion judge's assessment of credibility of testimony at a suppression hearing.

[12] Criminal Law 110 627.10(5)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.10 Informers or Agents, Disclosure

110k627.10(5) k. Informer not a witness to or participant in offense. Most Cited Cases

Disclosure of identity of **confidential informant**, so that defendant could prepare his defense, was not required, in prosecution for trafficking in cocaine, where informant did not actively participate in the charged crime, and instead, she acted only as a tipster.

[13] Criminal Law 110 627.10(1)

110 Criminal Law

110XX Trial

110XX(A) Preliminary Proceedings

110k627.10 Informers or Agents, Disclosure

110k627.10(1) k. In general. Most Cited Cases

Commonwealth's privilege against disclosure of **confidential informant's** identity applied even if the defendant knew informant's true identity.

[14] Criminal Law 110 1885

110 Criminal Law

110XXXI Counsel

110XXXI(C) Adequacy of Representation

110XXXI(C)1 In General

110k1879 Standard of Effective Assistance in General

110k1885 k. Exceptions to two-pronged standard. Most Cited Cases

Defense counsel's failure to subject the prosecution's case to meaningful adversary testing constitutes prejudice per se, for purposes of a claim of ineffective assistance of counsel, only when the attorney's failure to test the government's case is "complete." U.S.C.A. Const.Amend. 6.

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[15] Criminal Law 110 ⚡1943

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1941 Argument and Conduct of
 Defense Counsel

110k1943 k. Admissions or concessions. Most Cited Cases

Defense counsel's concessions of guilt did not constitute a complete lack of adversary testing of Commonwealth's case, and thus, defendant was not entitled to a presumption of prejudice, for purposes of his claim of ineffective assistance of counsel, in prosecution for trafficking in cocaine; defense counsel had competently argued issues relating to the search of the defendant's apartment, his stop and arrest, and the search of his car, but defendant's motions to suppress were denied, the evidence against defendant was overwhelming, and defendant, against counsel's advice, had rejected a favorable plea deal. U.S.C.A. Const.Amend. 6.

[16] Criminal Law 110 ⚡1943

110 Criminal Law
 110XXXI Counsel
 110XXXI(C) Adequacy of Representation
 110XXXI(C)2 Particular Cases and Issues
 110k1941 Argument and Conduct of
 Defense Counsel

110k1943 k. Admissions or concessions. Most Cited Cases

Defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's allegedly deficient performance in conceding defendant's guilt, in prosecution for trafficking in cocaine; the trial was jury-waived, the trial judge repeatedly recognized the proper scope of his role as fact finder, and the trial judge indicated that counsel's behavior did not influence him. U.S.C.A. Const.Amend. 6.

[17] Criminal Law 110 ⚡656(2)

110 Criminal Law
 110XX Trial
 110XX(B) Course and Conduct of Trial in
 General
 110k654 Remarks and Conduct of Judge
 110k656 Comments on Evidence or
 Witnesses

110k656(2) k. Examination and cross-examination of witnesses. Most Cited Cases

Trial judge's questions during Commonwealth's direct examination of former drug chemist with state police crime laboratory were proper, in prosecution for trafficking in cocaine; questions simply clarified the representative sampling procedure the chemist employed regarding weight and identity of certain substances admitted in evidence, and the questions did not alter Commonwealth's burden.

*986 Carlene A. Pennell, for the defendant.

Fawn D. Balliro Andersen, Assistant District Attorney, for the Commonwealth.

Present: MILLS, GREEN, & KATZMANN, JJ.

MILLS, J.

The defendant was indicted on a charge of trafficking in cocaine, in violation of G.L. c. 94C, § 32E(b)(2).^{FN1} After hearing, a judge denied the defendant's motion to suppress evidence and seeking disclosure of the identity of a confidential informant. Trial was jury-waived before a different judge, who found the defendant guilty.^{FN2}

FN1. The grand jury also indicted the defendant on charges of possession of marijuana with intent to distribute, G.L. c. 94C, § 32C(a); three counts of possession of a class E drug with intent to distribute, G.L. c. 94C, § 32D(a); and possession of a hypodermic needle, G.L. c. 94C, §§ 27, 38.

FN2. Prior to trial, the Commonwealth filed a notice of nolle prosequi on the charge of possession of a hypodermic

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needle. The judge found the defendant guilty on the marijuana charge, but that conviction was placed on file and is not before us. The judge found the defendant not guilty on the charges alleging possession of a class E drug with intent to distribute.

In this consolidated appeal from his conviction and from the trial judge's denial of his new trial motion, the defendant argues that (1) his motion to suppress evidence obtained by searches of his automobile and apartment was erroneously denied and there was no probable cause for his warrantless arrest; (2) the identity of the informant should have been disclosed; (3) he received ineffective assistance of counsel; (4) the judge improperly questioned one of the Commonwealth's witnesses; and (5) these errors cumulatively require reversal. We affirm.

Background. We summarize the relevant facts from the judge's findings on the motion to suppress, supplementing them where appropriate by uncontested testimony from the suppression hearing. See *Commonwealth v. Washington*, 449 Mass. 476, 477, 869 N.E.2d 605 (2007). We save for later discussion the facts pertinent to the issues arising at trial.

The defendant was suspected of selling drugs from his residence at 116 Perkins Street, apartment 3, in Somerville. On September 1, 2005, Trooper Steven Racki secured a warrant to search that apartment, and he and Trooper Scott Holland took positions near the apartment in anticipation of executing the warrant. At approximately 2:30 P.M., the defendant and a *987 female were observed leaving the apartment while carrying several bags. They entered an automobile and drove away. Trooper Fallon, who was in a marked State police cruiser, stopped the defendant's car about one and one-half blocks later. Trooper Holland positioned his unmarked vehicle behind Trooper Fallon's cruiser, and as Holland approached the car, the defendant was exiting at Fallon's direction and Fallon stated that

he "smelled weed in the car." Trooper Holland, an experienced narcotics officer trained in the identification of marijuana by sight and smell, walked to the driver's window and detected an odor of burnt marijuana emanating from the car's interior. Opening the door, he observed marijuana roaches in the ashtray and, in the center console, a clear plastic bag containing marijuana. A further search of the car revealed a leather bag behind the driver's seat, in which were found clear plastic bags with a "white rock powder" that Trooper Holland believed to be cocaine. The defendant was transported to the police station for booking and the troopers returned to the apartment to execute the warrant, discovering narcotics, hypodermic needles, cash, personal papers, and other items.

[1] *Discussion.* 1. *Motion to suppress.* "In reviewing the denial of a motion to suppress, we accept the motion judge's subsidiary findings of fact absent clear error, and conduct an independent review of the judge's ultimate findings and conclusions of law." *Commonwealth v. Stephens*, 451 Mass. 370, 381, 885 N.E.2d 785 (2008).

[2][3] a. *The search of the defendant's apartment.* The defendant argues that the search warrant was not supported by probable cause. "To establish probable cause to search, the facts contained in an affidavit, and reasonable inferences that may be drawn from them, must be sufficient for the magistrate to conclude 'that the items sought are related to the criminal activity under investigation, and that they reasonably may be expected to be located in the place to be searched at the time the search warrant issues.'" *Commonwealth v. Lopes*, 455 Mass. 147, 164-165, 914 N.E.2d 78 (2009), quoting from *Commonwealth v. Anthony*, 451 Mass. 59, 68, 883 N.E.2d 918 (2008). The sufficiency of a search warrant application to establish probable cause is judged solely within the four corners of the affidavit. See *Commonwealth v. Connolly*, 454 Mass. 808, 813, 913 N.E.2d 356 (2009). In assessing the contribution of a confidential informant's tips to the probable cause analysis, we employ the familiar

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tests of the informant's veracity and basis of knowledge. See *Commonwealth v. Upton*, 394 Mass. 363, 374–375, 476 N.E.2d 548 (1985). We briefly summarize pertinent facts as set forth in the affidavit.

In January, 2005, Trooper Racki spoke with a confidential informant he referred to by the pseudonym "Mary." She had provided information to police in the past that led to an arrest and seizure of drugs; most recently, three months prior to the affidavit. Mary stated that she knew of an individual named "Freddy Velez" who sold cocaine and marijuana. She provided a detailed physical description, offered his address and cellular telephone number, and stated that he sold drugs from his apartment and also made deliveries. Police investigation confirmed the defendant's name, description, residency at the given address, and use of the given telephone number. During the month preceding the defendant's arrest, Mary, under police supervision, made three controlled purchases of cocaine at the defendant's apartment. The third buy occurred within seventy-two hours of the application for the search warrant, which Trooper Racki *988 submitted on the same day as the defendant's arrest.

[4] We conclude that, in this case, Mary's veracity was established by the fact that she had previously given information which led to at least one arrest and seizure of contraband. See *Commonwealth v. Perez-Baez*, 410 Mass. 43, 46, 570 N.E.2d 1026 (1991), and cases cited. Any weakness in her veracity, or in her basis of knowledge—if the latter was not fully established by her statements that the defendant had drugs in his apartment at a certain address and used a certain telephone number, and sold \$50 quantities of cocaine in small glassine bags—was cured by the corroborative effect of the three controlled buys at that location. See *Commonwealth v. Blake*, 413 Mass. 823, 828–829, 604 N.E.2d 1289 (1992).

[5][6] The controlled buys in this case followed the familiar protocol recited in multiple cases. See, e.g., *Commonwealth v. Desper*, 419 Mass. 163,

168, 643 N.E.2d 1008 (1994), and cases cited. The facts that the defendant's residence was located within a three-unit dwelling, and that the police did not observe which unit the informant entered, do not render the search warrant invalid. See *Commonwealth v. Warren*, 418 Mass. 86, 90, 635 N.E.2d 240 (1994) ("police [are] not required to risk disclosure of their surveillance by accompanying the informant" to an apartment within a multi-unit dwelling). Additionally, the seventy-two-hour delay between the third controlled buy and the application for the search warrant is not troubling in these circumstances because the other information in the affidavit, including the two other buys, established a continuing pattern of conduct in a fixed location over a comparatively longer time frame. See *Commonwealth v. Rice*, 47 Mass.App.Ct. 586, 590, 714 N.E.2d 839 (1999) ("Where conduct is shown to be continuing ... the passage of time becomes less important and staleness may be overcome"). The descriptions of the three buys, which all occurred at the residence that was the target of the search warrant, as well as the information provided by Mary, furnished probable cause to issue the search warrant for the defendant's apartment.

[7] b. *The stop and arrest of the defendant.* The defendant correctly asserts that the search warrant itself did not give the troopers authority to seize him one and one-half blocks from his apartment. See *Commonwealth v. Charros*, 443 Mass. 752, 764, 824 N.E.2d 809 (2005). However, at the time the car was stopped, the troopers were aware of the three controlled buys. Furthermore, they knew that these buys occurred during the month preceding the September 1, 2005, stop of the car, with the most recent within seventy-two hours of the stop. Accordingly, they had probable cause to believe that the defendant had committed a felony as proscribed by G.L. c. 94C, § 32E(b), and thus both the initial stop and subsequent warrantless arrest were valid. See *Commonwealth v. Charros*, 443 Mass. at 764–765, 824 N.E.2d 809 (controlled buy made under police supervision within past fifteen days provided a basis for arrest, independent of recently

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issued search warrant).

[8][9][10][11] c. *The warrantless search of the defendant's car*. Although the troopers did not have a warrant to search the car, under "the automobile exception to the warrant requirement, the search of the [car] was justified as long as the [troopers] had probable cause to believe that there was contraband in the car." *Commonwealth v. Garden*, 451 Mass. 43, 47, 883 N.E.2d 905 (2008). At the motion hearing, Trooper Holland testified that he was trained in the identification of marijuana,*989 including its appearance and odor, that he had smelled burnt marijuana in the past, and that when he approached the driver's window, he detected an odor of burnt marijuana. FN3 This alone furnished probable cause to believe that there was marijuana in the car and thus its search was justified.FN4 *Id.* at 48, 883 N.E.2d 905 ("the odor of marijuana is sufficiently distinctive that it alone can supply probable cause to believe that marijuana is nearby").FN5

FN3. Because a trained officer's detection of the smell of burnt marijuana permits a search of a vehicle's passenger compartment under the automobile exception, see *Commonwealth v. Garden*, 451 Mass. 43, 48, 883 N.E.2d 905 (2008), we need not consider the apparent inconsistency as to when the marijuana roaches were actually discovered.

FN4. While the motion judge invoked the automobile exception based upon the probable cause supporting the defendant's arrest for drug distribution, he noted in dictum his view that police detection of the odor of marijuana also justified the search. In any event we are "free to affirm a ruling on grounds different from those relied on by the motion judge if the correct or preferred basis for affirmance is supported by the record and the findings." *Commonwealth v. Va Meng Joe*, 425 Mass. 99, 102, 682 N.E.2d 586 (1997). We also need not consider the applicability of the doctrine of

search incident to lawful arrest. See, e.g., *Commonwealth v. Bongarzone*, 390 Mass. 326, 351, 455 N.E.2d 1183 (1983).

FN5. The defendant argues that the smell of burnt marijuana was a pretext to justify the search of the car. We defer to the motion judge's assessment of credibility of testimony, *Commonwealth v. Druce*, 453 Mass. 686, 699, 905 N.E.2d 70 (2009), and in this case, he explicitly found that Trooper Holland detected an odor of burnt marijuana. The defendant offered nothing that would undermine that finding. Additionally, the lack of a certificate of analysis of the marijuana roaches does not support the defendant's fabrication argument when the roaches were never introduced in evidence at any proceeding, and the defendant was not charged with possession of the roaches. Production of the roaches is not required when there is credible police testimony concerning the smell of marijuana. Compare *Commonwealth v. Kitchings*, 40 Mass.App.Ct. 591, 595-596, 666 N.E.2d 511 (1996).

In sum, the three controlled buys detailed in the affidavit supplied probable cause for the search warrant; the stop and arrest was supported by probable cause to believe the defendant had engaged in cocaine distribution; and the search of the car was proper under the automobile exception. Thus, the motion judge properly denied the defendant's motions to suppress evidence.

[12][13] 2. *Confidential informant*. The defendant argues that the identity of the informant should have been disclosed. Here, Mary did not participate in any of the charged crimes and she was not present during the execution of the search warrant, the seizure of the items from the defendant's apartment, or the defendant's arrest. She acted only as a tipster, not as an active participant in the crimes charged, and thus disclosure of her identity was not required. See *Commonwealth v. Brzezinski*,

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405 Mass. 401, 408, 540 N.E.2d 1325 (1989) (government not required to **disclose identity** of informant who is mere tipster and not active participant in charged offense); *Commonwealth v. Fernandes*, 30 Mass.App.Ct. 335, 339, 568 N.E.2d 604 (1991) (disclosure not required when informant did not participate in crime charged, even though he had participated in controlled buy within seven days of application for search warrant); Mass. G. Evid. § 509(a) (2010 ed.). Additionally, the Commonwealth's privilege applies even if the defendant knows Mary's true identity. See *Commonwealth v. Madigan*, 449 Mass. 702, 711, 871 N.E.2d 478 (2007). In balancing the public interest in *990 maintaining the confidentiality of the informant against the defendant's right to prepare his defense, disclosure was not required in this case. See *Commonwealth v. Lugo*, 406 Mass. 565, 570–572, 548 N.E.2d 1263 (1990).^{FN6}

FN6. The defendant's argument that Mary's identity was subject to automatic discovery lacks merit. The Commonwealth did not intend to present testimony from Mary at trial (and indeed did not do so) and thus any “promises, rewards or inducements” made to her did not need to be disclosed. Mass.R.Crim.P. 14(a)(1)(A)(ix), as appearing in 442 Mass. 1518 (2004).

3. *Ineffective assistance*. The defendant argues that he received ineffective assistance of counsel based upon the relaxation, intentional or otherwise, of the adversary process. The record reflects that defense counsel in effect pursued a strategy of “jury nullification” (despite that this was a bench trial), conceded liability for some of the crimes charged, and used the trial in an extended effort to seek leniency in sentencing.^{FN7}

FN7. For example, defense counsel informed the court that after the defendant was arrested, “he went to work in the financial district earning a tremendous salary, earning hundreds of thousands of dollars legitimately, not on the streets, and that is

a tremendous turn around.” Defense counsel further argued that the defendant “has had a remarkable turnaround in his life” and that “[v]ery few criminal defendants can come before the Court and say, guess what I turned my life around, yes I made a mistake, yes this is what I did.”

In closing argument, defense counsel continued this strategy. He asked the court, “[w]hy should [the defendant] be held accountable for something that is so widely used,” and suggested that based on the evidence, “this is just a, ‘Low level operation.’ ” Perhaps most troublesome is his argument that the defendant does not “need to sit in a cell for five years to be told that what he did in 2005 was wrong; he already knows that, Judge.”

Although we normally review claims of ineffective assistance under the familiar principles of *Commonwealth v. Saferian*, 366 Mass. 89, 96, 315 N.E.2d 878 (1974), the defendant seeks to bring his claim within dicta from *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), in which the United States Supreme Court identified three classes of ineffectiveness in which no showing of prejudice is required: a presumption of prejudice arises when there is (1) a “complete denial of counsel ... at a critical stage of [the] trial”; (2) “if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing”; and (3) where, “although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate.” ^{FN8} *Id.* at 659–660, 104 S.Ct. 2039. See *Commonwealth v. Satterfield*, 373 Mass. 109, 115, 364 N.E.2d 1260 (1977) (acknowledging there are some circumstances where a showing of prejudice is not required).

FN8. This third category can arise, for example, when “designation of counsel [is]

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either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard.” *United States v. Cronin*, 466 U.S. at 660, 104 S.Ct. 2039, quoting from *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

[14] The Supreme Court has emphasized that the second category, which establishes prejudice per se when defense counsel fails to subject the prosecution's case to meaningful adversary testing, applies only when the attorney's failure to test the government's case is “complete.” *Bell v. Cone*, 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). While Massachusetts has not had the opportunity to *991 apply these principles to circumstances such as those presented here, courts in other jurisdictions have held that unauthorized concessions of guilt can constitute a lack of adversary testing within the meaning of *United States v. Cronin*, *supra*.^{FN9}

FN9. See, e.g., *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir.1991) (defense counsel's concession in closing that there was no reasonable doubt about disputed factual issues “compel[led] an application of the *Cronin* exception”); *People v. Dodson*, 331 Ill.App.3d 187, 194, 264 Ill.Dec. 882, 771 N.E.2d 586 (2002) (*Cronin* review warranted when defense counsel did not mount a true challenge to the State's case, in an effort to procure leniency); *State v. Carter*, 270 Kan. 426, 441, 14 P.3d 1138 (2000) (attorney's “guilt-based defense” in the face of his client's claim of innocence “compel[led] application of the *Cronin* exception”); *State v. Anaya*, 134 N.H. 346, 354, 592 A.2d 1142 (1991) (prejudice was presumed when defense counsel, against the wishes of the defendant, argued to the jury for an acquittal on the charged offense of accomplice to first degree murder but for a con-

viction as an accomplice to second degree murder); *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504 (1985) (“ineffective assistance of counsel, per se in violation of the Sixth Amendment [to the United States Constitution], has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent”).

[15] We conclude that while some of defense counsel's remarks were improper, there was not a complete lack of adversary testing. Defense counsel competently argued, and preserved for our review, issues relating to the search of the defendant's apartment, his stop and arrest, and the search of his car. After the defendant's unsuccessful motions to suppress, the evidence against him was overwhelming and, against counsel's advice, he rejected a favorable plea deal. We note that conceding guilt to less serious offenses can be an appropriate litigation strategy, see, e.g., *Commonwealth v. Durakowski*, 58 Mass.App.Ct. 92, 93, 788 N.E.2d 568 (2003), and in these circumstances, we do not discern a complete abandonment of the adversary process. Accordingly, the defendant is not entitled to a presumption of prejudice.

[16] Nevertheless, we still assess the defendant's ineffective assistance claim under *Commonwealth v. Saferian*, 366 Mass. at 96, 315 N.E.2d 878. Here, the trial judge repeatedly recognized the proper scope of his role as fact finder, and he indicated that the attorney's behavior did not influence him.^{FN10} Even if the “behavior of counsel [fell] measurably below that which might be expected from an ordinary fallible lawyer,” the defendant has failed to demonstrate that he was deprived “of an otherwise available, substantial ground of defence.” *Ibid*.

FN10. During direct examination of the defendant's mother, the judge stated, “[o]bviously the question of guilt is still to be determined.” Following counsel's closing argument, the judge stated, “[t]he

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Court will of course apply the law to the facts that it finds from the evidence.”

[17] 4. *The judge's questioning.* During trial, the Commonwealth elicited testimony from Andrew Bogle, a former drug chemist with the State police crime laboratory, regarding the weight and identity of certain substances that were admitted in evidence. During the Commonwealth's direct examination, the judge questioned the witness. The defendant argues that the judge's questions, which span approximately four transcript pages, impermissibly aided the Commonwealth in meeting its burden of proof. We disagree. The judge's questions, which simply clarified the representative sampling procedure the chemist employed, were proper and did not alter the Commonwealth's burden. See *Commonwealth v. Dias*, 373 Mass. 412, 416, 367 N.E.2d 623 (1977) (“[A] judge *992 may properly question a witness, even where to do so may strengthen the Commonwealth's case, so long as the examination is not partisan in nature, biased, or a display of belief in the defendant's guilt”); *Commonwealth v. Hassey*, 40 Mass.App.Ct. 806, 810, 668 N.E.2d 357 (1996) (“[A] trial judge may question witnesses to clarify the evidence”).

5. *Cumulative errors.* From what we have said above, it follows that we are not persuaded by the defendant's argument that his conviction should be reversed due to cumulative errors.

Judgment affirmed.

Order denying motion for new trial affirmed.

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DISTRICT COURT OFFICES

- AYER
- CAMBRIDGE
- CONCORD
- FRAMINGHAM
- LOWELL
- MALDEN
- MARLBOROUGH
- NATICK
- NEWTON
- SOMERVILLE
- WALTHAM
- WOBURN

May 10, 2011

Christopher Shannon, Esq.
Law Offices of Christopher A. Shannon
7 Harvard Street, Suite 220
Brookline, MA 02445-7379

Dear Attorney Shannon,

Attached is a CD containing the interview with Joseph Bushfan on 1/5/2011.
Please note that the CD is being produced with the understanding that you will continue
to abide by the protective order issued by Justice Cunis. Thank you.

Sincerely,

John Verner
Chief, PACT Unit
Assistant District Attorney
Middlesex District Attorney's Office





The Commonwealth of Massachusetts

MIDDLESEX DISTRICT ATTORNEY

15 COMMONWEALTH AVENUE WOBURN, MA 01801
WWW.MIDDLESEXDA.COM

GERARD T. LEONE, JR.
DISTRICT ATTORNEY

TEL: 781-897-8300
FAX: 781-897-8301

EXECUTIVE

- ADMINISTRATION
- COMMUNICATIONS
- INTERVENTION &
PREVENTION PROGRAMS
- PUBLIC POLICY
- LEGISLATION
- VICTIM WITNESS BUREAU

TRIAL TEAMS

- CAMBRIDGE REGION
SUPERIOR COURT
- MALDEN REGION
SUPERIOR COURT
- WOBURN DISTRICT COURT

SPECIALTY UNITS

- APPEALS & TRAINING
BUREAU
- CYBER PROTECTION
PROGRAM
- FAMILY PROTECTION
BUREAU
- CHILD ABUSE UNIT
- DOMESTIC VIOLENCE UNIT
- ELDER/DISABLED UNIT
- PUBLIC PROTECTION,
ANTI-TERRORISM,
CORRUPTION &
TECHNOLOGY
(PACT)

STATE POLICE DETECTIVES

- COMPUTER FORENSICS
- HOMICIDE
- PACT

REGIONAL OFFICES

- CAMBRIDGE
- FRAMINGHAM
- LOWELL

DISTRICT COURT OFFICES

- AYER
- CAMBRIDGE
- CONCORD
- FRAMINGHAM
- LOWELL
- MALDEN
- MARLBOROUGH
- NATICK
- NEWTON
- SOMERVILLE
- WALTHAM
- WOBURN

May 10, 2011

Anthony Fugate, Esq.
Bardouille and Fugate
22 Broad Street
Lynn, Massachusetts 01902

Dear Attorney Fugate,

Attached is a CD containing the interview with Joseph Bushfan on 1/5/2011.
Please note that the CD is being produced with the understanding that you will continue
to abide by the protective order issued by Justice Cunis. Thank you.

Sincerely,

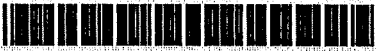


John Verner

Chief, PACT Unit

Assistant District Attorney

Middlesex District Attorney's Office




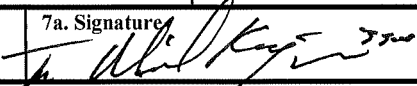
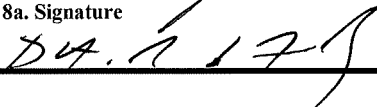
1. Station CSSS - Boston		2. Case No. 11-00191 	
3. Department MSP Middlesex County Detective Unit	4. Department Case No. 2011-110-0005	5. Report No. 1	6. Page 1 of 1
7. Reporting Officer (Rank, First, MI, Last & ID#) Trooper Karrol G. Setalsingh, #1875		7a. Signature 	7b. Date Prepared 1/7/11
8. Approved by (Rank, First, MI, Last & ID#) Sergeant David C. Mahan, #1416		8a. Signature 	8b. Date Approved 1-13-11
9. Subject: Fatal Shooting			

Date of Offense: 1/5/2011
Offense Location: Framingham
Investigator: Trooper Erik P. Gagnon #2523
Victim(s): Eurie Stamps
Suspect(s):

1. On January 06, 2011, I attended and photographed the autopsy of OCME case # 11-0286 (Eurie Stamps), it was performed by Dr. Henry Nields. At the completion of the autopsy, I took major case prints of the decedent.

Massachusetts State Police Crime Scene Services Section

Report of Investigation

1. Station CSSS - Sudbury		2. Case No. 11-00191 	
3. Department MSP Middlesex County Detective Unit	4. Department Case No. 2011-110-0005	5. Report No. 3	6. Page 1 of 1
7. Reporting Officer (Rank, First, MI, Last & ID#) Trooper Michael Kerrigan, #3300		7a. Signature 	7b. Date Prepared 01/24/2011
8. Approved by (Rank, First, MI, Last & ID#) Detective Lieutenant Robin L. Fabry, #0973		8a. Signature 	8b. Date Approved 2/7/11
9. Subject: Fatal Shooting			

Date of Offense: 1/5/2011
Offense Location: Framingham
Investigator: Trooper Erik P. Gagnon #2523
Victim(s): Eurie Stamps
Suspect(s):



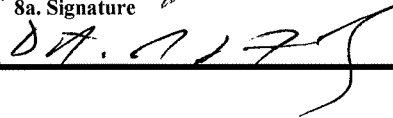
On January 5, 2011, I, Trooper Michael Kerrigan received a call from AHQ to respond to 26 Fountain St in the City of Framingham to assist Framingham PD in a police involved shooting investigation. I then notified Detective Lieutenant Robin Fabry and advised her of the situation. She in return authorized me to call another Trooper for additional support. Edward Kenney was then called and also advised of the situation. Upon arrival, at approximately 0330 AM I met with officers of Framingham PD along with other State Police personnel. Framingham PD had the scene secure. State police chemist and ballistics were also called to the scene.

I documented the scene with over all digital photographs, notes, and a sketch of the area. Trooper Kenney documented the scene with digital video. A drug search warrant was also served and documented at this same address. The drug search warrant was documented by me with still digital photographs. All photographs and video taken were sent to the appropriate personnel.

I respectfully request that this case be closed, pending further information

Massachusetts State Police Crime Scene Services Section

Report of Investigation



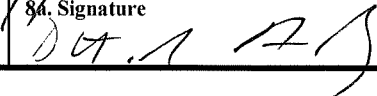
1. Station CSSS - Sudbury		2. Case No. 11-00191 	
3. Department MSP Middlesex County Detective Unit	4. Department Case No. 2011-110-0005	5. Report No. 4	6. Page 1 of 1
7. Reporting Officer (Rank, First, MI, Last & ID#) Trooper Edward Kenney, #3299		7a. Signature 	7b. Date Prepared 02-01-2011
8. Approved by (Rank, First, MI, Last & ID#) Detective Lieutenant Robin L. Fabry, #0973		8a. Signature 	8b. Date Approved 2/7/11
9. Subject: Fatal Shooting			

Date of Offense: 1/5/2011
Offense Location: Framingham
Investigator: Trooper Erik P. Gagnon #2523
Victim(s): Eurie Stamps
Suspect(s):

On Friday January 28, 2011 I was contacted by Trooper Steven walsh of the State Police Ballistics Section who requested I document the front grip from Item 2-1 with digital photographs. At approximately 1300 Hrs Tpr Walsh delivered the front rifle grip to the Sudbury lab where it was visually observed and photographed. Tpr Walsh returned this item to the Ballistics section. These photographs have been sent to the appropriate personnel.

Massachusetts State Police Crime Scene Services Section

Crime Scene Report

1. Station CSSS - Sudbury		2. Case No. 11-00191 	
3. Department MSP Middlesex County Detective Unit	4. Department Case No. 2011-110-0005	5. Report No. 7	6. Page 1 of 1
7. Reporting Officer (Rank, First, MI, Last & ID#) Trooper Regina G. Cameron, #0704		7a. Signature 	7b. Date Prepared 3/2/11
8. Approved by (Rank, First, MI, Last & ID#) Detective Lieutenant Robin L. Fabry, #0973		8a. Signature 	8b. Date Approved 3/3/11
9. Subject: Fatal Shooting			

Date of Offense: 1/5/2011
Offense Location: Framingham
Investigator: Trooper Erik P. Gagnon #2523
Victim(s): Eurie Stamps
Suspect(s):

1. On March 2, 2011, at approximately 1000 hours, I was dispatched to respond to the Massachusetts State Police Ballistics Section at the Forensic and Technology Center in Maynard to assist in the above investigation.
2. At approximately 1005 hours I arrived at the Ballistics Section and met with case officer Trooper Steve Walsh and Detective Lieutenant Michael Coleman and I photographed a weapon as requested by Trooper Erik Gagnon of the Middlesex State Police Detective Unit.
3. The item was documented with appropriate digital photographs as requested by Trooper Gagnon and sent to the appropriate personnel.



DEVAL L. PATRICK
GOVERNOR

TIMOTHY F. MURRAY
LIEUTENANT GOVERNOR

MARY ELIZABETH HEFFERNAN
SECRETARY

COLONEL MARIAN J. MCGOVERN
SUPERINTENDENT

The Commonwealth of Massachusetts

Department of State Police

Firearms Identification Section - Maynard

124 Acorn Street

Maynard, Massachusetts 01754

Telephone (978) 451-3480 Facsimile (978) 451-3481

COPY

FIREARMS IDENTIFICATION SECTION REPORT (Addendum)

Case Number:	11-0191	Date:	January 15, 2011
Agency:	MSP Middlesex County Detective Unit	Agency Case Number:	2011-110-0005
Defendant or Suspect:		Case Type:	Fatal Shooting
Victim(s):	Euris Stamps	Date of Incident:	1/5/2011

On January 05, 2011, Trooper Steve Walsh of the SP Ballistics - Maynard received item 2-1 at the Framingham Police Station Range and submitted it to this section for examination:

2-1 5.56mm caliber Colt M-4 Commando semi-automatic/automatic rifle serial number A0230821 and (1) magazine containing twenty-six (26) live cartridges from weapon. There was one live cartridge in the chamber when the weapon was cleared. Also submitted were two magazines and fifty-six (56) live cartridges.
Barrel Length: 13 inches including flash suppressor.
Overall Length: 30 1/2 inches as submitted
Test Fire: Yes Malfunctions: None
Trigger Pull: Semi-automatic 6.22 - 6.95 lbs. Automatic 9.28 - 9.82 lbs

2-2 .40 S&W caliber Sig Sauer model P226 semi-automatic pistol, serial number UU635241 with three magazines and thirty-seven live cartridges.

Pursuant to a search warrant executed at 26 Fountain Street, Framingham, the following evidence was recovered:

3-1 One (1) 5.56 mm caliber discharged cartridge casing recovered from the laundry room adjacent to the rear bedroom. Headstamp: "LC 08".

On January 6, 2011 I received from Technician Nikia Hackett at the Office of the Chief Medical Examiner 720 Albany Street Boston:

6-1 Spent lead and jacket fragments weighing 15.1 grains, recovered during an autopsy of the above victim

LIMS#11-00191


As a result of a physical and microscopic examination of the evidence discharged cartridge casing (item 3-1) and the discharged cartridge casing test fires (items 2-1.1) it is my opinion:

A/ They both share the same class characteristic of caliber and firing pin impression shape, however, they lack sufficient agreement of unique microscopic marks to determine the source weapon. My result is inconclusive.

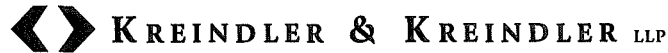
B/ The item 6-1 spent jacket and lead fragments were too damaged for further identification.

C/ Item 2-2 was not examined.

COPY


Trooper Stephen Walsh
Massachusetts State Police
Firearms Identification Section
swalsh@pol.state.ma.us

cc: Trooper Eric, P. Gagnon #2523
MSP Middlesex County Detective Unit



KREINDLER & KREINDLER LLP

TRADITION OF EXCELLENCE

277 Dartmouth Street
Boston, MA 02116-2805
(617) 424-9100
Fax: (617) 424-9120
www.kreindler.com

RECEIVED
SEP 23 2013
Per _____

September 10, 2013

Via U.S. Mail

Marian T. Ryan, District Attorney
Office of the Middlesex District Attorney
15 Commonwealth Avenue
Woburn, MA 01801

Re: Eurie Stamps, Jr. et al v. Town of Framingham, et al (Civil Action No.: 12-cv-11908 (FDS)).

Dear Attorney Ryan:

I am writing with regard to the Subpoena to Produce Documents that was sent to your office on August 8, 2013, in which we requested documents pertaining to the fatal shooting of Eurie Stamps, Sr. on January 5, 2011 in Framingham, Massachusetts by Framingham Police Officer Paul Duncan. The deadline by which all documents were to be produced, as specified on the subpoena, was September 9, 2013. We are not yet in receipt of any documents, or any correspondence objecting to the production of the requested documents, by your office.

At this time and pursuant to the Subpoena to Produce Documents, we request the immediate production of the following documents:

1. All documents concerning the homicide investigation conducted by the Office of the Middlesex District Attorney regarding the January 5, 2011 shooting of Eurie Stamps, Sr., at 26 Fountain Street in Framingham, Massachusetts.
2. All documents, correspondence, memoranda, and/or communication of any kind, including emails and text messages, transmitted between the Office of the Middlesex District Attorney and any employee or law enforcement personnel of the Framingham Police Department related to the shooting of Eurie Stamps, Sr. on January 5, 2011 at 26 Fountain Street in Framingham, Massachusetts.
3. All documents concerning or referring to the conduct of Officer Paul Duncan during the execution of the search warrant on January 5, 2011 at 26 Fountain Street in Framingham, Massachusetts and during the shooting of Eurie Stamps, Sr.
4. All investigative records and reports, including but not limited to the complete police report for the execution of the search warrant at 26 Fountain Street in Framingham and the shooting

New York Office

750 Third Avenue, New York, NY 10017-2703
Tel: (212) 687-8181 Fax: (212) 972-9432

California Office

707 Wilshire Boulevard, Los Angeles, CA 90017-3613
Tel: (213) 622-6469 Fax: (213) 622-6019

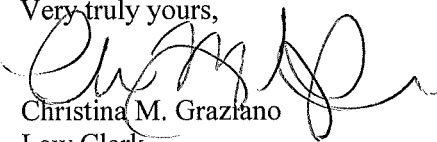
of Eurie Stamps, Sr.

5. Complete ballistics reports.
6. Written or recorded witness statements.
7. Emails, cell phone records, and/or text messages sent or received by members of the Framingham Police Department regarding the shooting.
8. Correspondence from the past ten years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the Massachusetts State Police regarding the adequacy of SWAT training and/or lack of qualifications of the Framingham SWAT team.
9. Personnel files for Officer Paul Duncan.
10. Any written review or record of consultation compiled by the National Tactical Officers Association or its members.
11. All documents concerning the After Action review and critique conducted by the Framingham Police Department after the execution of the search warrant on January 5, 2011 at the home of Eurie Stamps, including the review report and all documents relied upon when preparing the report.
12. All Framingham Police Department protocols and policies relating to the use of force, including excessive force, including but not limited to the "Stop, Frisk and Threshold Inquiries" departmental policy.
13. All SWAT team training manuals.
14. All training manuals, updates, and other written materials provided to the SWAT team members and trainees concerning legal issues regarding execution of search warrants, the use of deadly force, and 4th Amendment issues.
15. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
16. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.

A copy of the subpoena is attached for your convenience. Based on the foregoing, we demand that copies of the aforementioned documents be produced to this office within ten (10) days.

Thank you for your cooperation and attention to this matter.

Very truly yours,


Christina M. Graziano
Law Clerk

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

Eurie A. Stamps, Jr. et al.

Plaintiff

v.

Town of Framingham, et al.

Defendant

Civil Action No. 1:12-cv-11908-FDS

(If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Office of the Middlesex District Attorney
15 Commonwealth Avenue, Woburn MA 01801

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See attached list.

Place: Kreindler & Kreindler, LLP
277 Dartmouth Street 4th Floor, Boston MA 02116

Date and Time:

09/09/2013 9:00 am

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 08/08/2013

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Eurie Stamps, Jr., who issues or requests this subpoena, are:

Joseph Musacchio, Kreindler & Kreindler LLP, 277 Dartmouth St. Boston MA 02116, Tel. (617) 424-9100. Email: jmusaccio@kreindler.com

Civil Action No. 1:12-cv-11908-FDS

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____
_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Attachment A:

List of documents, electronically stored information, and/or objects to be produced

1. All documents concerning the homicide investigation conducted by the Office of the Middlesex District Attorney regarding the January 5, 2011 shooting of Eurie Stamps, Sr., at 26 Fountain Street in Framingham, Massachusetts.
2. All documents, correspondence, memoranda, and/or communication of any kind, including emails and text messages, transmitted between the Office of the Middlesex District Attorney and any employee or law enforcement personnel of the Framingham Police Department related to the shooting of Eurie Stamps, Sr. on January 5, 2011 at 26 Fountain Street in Framingham, Massachusetts.
3. All documents concerning or referring to the conduct of Officer Paul Duncan during the execution of the search warrant on January 5, 2011 at 26 Fountain Street in Framingham, Massachusetts and during the shooting of Eurie Stamps, Sr.
4. All investigative records and reports, including but not limited to the complete police report for the execution of the search warrant at 26 Fountain Street in Framingham and the shooting of Eurie Stamps, Sr.
5. Complete ballistics reports.
6. Written or recorded witness statements.
7. Emails, cell phone records, and/or text messages sent or received by members of the Framingham Police Department regarding the shooting.
8. Correspondence from the past ten years, by and between any former or present member of the Framingham Police Department (including but not limited to the Chief of Police), and the Massachusetts State Police regarding the adequacy of SWAT training and/or lack of qualifications of the Framingham SWAT team.
9. Personnel files for Officer Paul Duncan.
10. Any written review or record of consultation compiled by the National Tactical Officers Association or its members.
11. All documents concerning the After Action review and critique conducted by the Framingham Police Department after the execution of the search warrant on January 5, 2011 at the home of Eurie Stamps, including the review report and all documents relied upon when preparing the report.
12. All Framingham Police Department protocols and policies relating to the use of force, including excessive force, including but not limited to the "Stop, Frisk and Threshold Inquiries" departmental policy.
13. All SWAT team training manuals.

14. All training manuals, updates, and other written materials provided to the SWAT team members and trainees concerning legal issues regarding execution of search warrants, the use of deadly force, and 4th Amendment issues.
15. All statements of police officers who participated in or who were present at or in the vicinity of the Stamps Shooting;
16. All documents concerning the identity and role of each member of the Framingham Police SWAT team who participated in or who were present at or in the vicinity of the Stamps Shooting.



Middlesex Sheriff's Office • Civil Division, P.O. Box 410180, Cambridge, MA 02141-0002 • (617) 547-1171
Middlesex, ss.

August 20, 2013

I hereby certify and return that on 8/19/2013 at 3:00 PM I served a true and attested copy of the SUBPOENA DUCES TECUM, ATTACHMENTS in this action in the following manner: To wit, by delivering in hand to JESSICA LANGSAM, agent, person in charge at the time of service for OFFICE OF THE MIDDLESEX DISTRICT ATTORNEY, at 15 COMMONWEALTH Avenue Woburn, MA 01801 . Fees: Attest (\$5.00) Basic Service Fee (\$30.00) Postage and Handling (\$1.00) Travel (\$6.40) Witness Fee (\$2.70) Total: \$45.10

A handwritten signature in black ink, appearing to read "Daniel M. M...".

Deputy Sheriff

13025492.

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**EURIE A. STAMPS, JR. and NORMA
BUSHFAN-STAMPS, Co-Administrators of
the Estate of Eurie A. Stamps, Sr.,**

Plaintiffs,

v.

**TOWN OF FRAMINGHAM and PAUL K.
DUNCAN,**

Defendants.

**Civil No.
12-11908-FDS**

**MEMORANDUM AND ORDER ON
PLAINTIFFS' MOTION TO COMPEL**

SAYLOR, J.

I. Background

This is a civil rights action arising out of the shooting of an individual during the execution of a search warrant. On January 25, 2011, Eurie Stamps, Sr., was shot and killed in his home by defendant Paul Duncan, an officer of the Framingham Police Department. Plaintiffs Eurie Stamps, Jr., and Norma Stamps are the co-administrators of the elder Stamps's estate. They have brought suit on behalf of the estate against Duncan and the Town of Framingham, alleging violations of the constitutional rights of the elder Stamps under 28 U.S.C. § 1983, and wrongful death under the Massachusetts Torts Claims Act, Mass. Gen. Laws ch. 258, § 2.

The Middlesex District Attorney's Office performed an investigation into Stamps's death to determine whether Duncan, or any other individual, should be prosecuted. The office decided against prosecuting Duncan.

the scene of Stamps's death, but does not remember which officer. (*Id.* ¶ 5). Finally, he states that he wrote the handwritten notes on pages 919-24 as part of his investigation. (*Id.* at 6).

The Magistrate Judge denied the motion for reconsideration, stating that it would be unfair for him to consider the late production of relevant evidence on the issue of privilege. The DA's office filed an objection to the Magistrate Judge's order on the motion for reconsideration, contending that it did not discover that Verner wrote the notes until February 27, 2014, and that the timing of the production of Verner's affidavit did not constitute a waiver of the privilege.

Plaintiffs have also filed an objection to the Magistrate Judge's order, contending that the deliberative process privilege and the attorney work-product doctrine do not apply to the documents on pages 146-49, 211-14, 262-63, and 323-24.¹

II. Standard

A party may object to a magistrate judge's report and recommendation on nondispositive matters. Fed. R. Civ. P. 72(a). "The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." *Id.*

A court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed. R. Civ. P. 42(d)(3). Under Rule 45, a party withholding privileged information under a claim that it is privileged must (1) expressly make the claim and (2) describe the nature of the withheld documents that will enable the parties to assess the claim. Fed. R. Civ. P. 45(e)(2)(A). In federal cases, "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of

¹ To the extent that the Magistrate Judge's order was not objected to, it will be adopted.

than purely factual import.” *Hall*, 734 F.2d at 66. “[T]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.” *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). To qualify for the privilege, the government must prove the document at issue was (1) “prepared prior to a final decision in order to assist an agency decisionmaker in arriving at his decision,” and (2) “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Town of Norfolk v. United States Army Corps of Eng’rs*, 968 F.2d 1438, 1458 (1st Cir. 1992) (internal quotations omitted).

1. Objections by Plaintiffs

Plaintiffs contend that the documents on pages 146-49, 211-14, and 323-24 are not covered by the deliberative-process privilege because the privilege does not protect observations of fact or comments about routine administrative matters. However, “handwritten notes taken in the course of witness interviews and while reviewing transcripts are part of the deliberative process which could reflect judgments regarding [a prosecutor’s] decision not to prosecute [a] case.” *Gomez v. City of Nashua, N.H.*, 126 F.R.D. 432, 436 (D.N.H. 1989); *see also Starkey v. Birritteri*, 2013 WL 3984599, at *2 (D. Mass. Aug. 2, 2013) (noting the deliberative-process privilege applies “not only to decisions made by federal government agencies, but also decisions by prosecutors”). Documents discussing whether criminal charges should be brought against an individual are direct parts of a deliberative process on legal matters, and therefore fall under the deliberative-process privilege. *See Town of Norfolk*, 968 F.2d at 1458.

The documents on pages 146-49 consist of a memorandum from the district attorney to his subordinates commenting on a draft report regarding the shooting, with handwritten notes

Accordingly, the Court finds that the Magistrate Judge's order sustaining the assertion of the deliberative-process privilege as to the documents on pages 146-49, 211-14, and 323-24 was not clearly erroneous or contrary to law.

2. Objections by the DA's Office

The DA's office contends that the documents on pages 1-16, 150-202, 817, and the handwritten notes on pages 919-24 are protected by the deliberative-process privilege. The Magistrate Judge rejected the claim of privilege on the grounds that the office provided the basis for its assertion of the privilege only after he had decided the motion.

Under Fed. R. Civ. P. 45, the party claiming that documents are privileged must describe the nature of those documents so the parties can assess the claim. "[C]ourts consistently have held that the rule requires a party resisting disclosure to produce a document index or privilege log." *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) (collecting cases). "A party that fails to submit a privilege log is deemed to waive the underlying privilege claim." *Id.* at 576. "[T]he failure to produce a log of sufficient detail [also] constitutes a waiver of the underlying privilege or work product claim." Charles A. Wright & Arthur R. Miller, 8 Fed. Prac. & Proc. Civ. § 2464 (3d ed.).

Originally, the DA's office provided no information as to who made the notes at issue, why they were made, or how they were intended to be used. Because that information was not provided, the DA's office failed to comply with Rule 45(d)(2) by failing to produce a privilege log containing enough detail to allow the Magistrate Judge to evaluate its claim of privilege.

The DA's office has subsequently represented to the Court that it only discovered the notes were written by Verner after February 27, 2014. (Obj. to Mot. to Reconsider, Docket No.

(quoting *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 10-11 (1st Cir. 1991)). While other sanctions may be appropriate for late disclosure, waiver—the most extreme sanction—should be used rarely.

The DA's office appears to have made a good faith attempt to comply with Rule 42(d)(3). Although it should have conducted a more thorough review of the disputed documents and provided the information in the Verner affidavit at an earlier date, the late disclosure does not rise to the level of waiver of the deliberative-process privilege. The office also does not appear to have disclosed the information late in bad faith or deliberately delayed the adjudication of its claim of privilege. The Court therefore will consider the merits of the privilege claim.

The documents on pages 1-16 and 150-202 contain notes Verner took on taped interviews, and were used to assist the DA's office in deciding whether to prosecute Duncan. The interviews were already turned over to plaintiffs. The documents fall squarely under the deliberative-process privilege. *See Gomez*, 126 F.R.D. at 436.

The document on page 817 contains Verner's impressions of the strengths and weaknesses of the case against Duncan. The documents on pages 921-24 are model jury instructions with handwritten notes on them that also contain Verner's impressions of the strengths and weaknesses of the case against Duncan. The notes on those documents were made by Verner to assist the DA's office in deciding whether to prosecute. They also therefore fall squarely into the deliberative-process privilege. Plaintiffs have not proved a sufficient need for the documents to overcome the privilege.

Accordingly, the Court will overrule the Magistrate Judge's order as to the documents on pages 1-16, 150-202, 817, and 919-24. The motion to compel will be denied as to the documents

document if prepared for a nonparty to the litigation, work product protection does not apply, even if the nonparty is a party to closely related litigation.”).

Thus, “many courts have found the work-product privilege unavailable when a prosecutor in a prior criminal investigation later objects to discovery by a litigant in a related and subsequent civil lawsuit.” *Ostrowski v. Holem*, 2002 WL 31956039, at *4 (N.D. Ill. Jan. 21, 2002) (collecting cases); *see also Klein v. Jefferson Parish Sch. Bd.*, 2003 WL 1873909, at *3 (E.D. La. Apr. 10, 2003); *Boyd v. City and Cnty. of San Francisco*, 2006 WL 1141251, at *3-4 (N.D. Cal. May 1, 2006); *Carter v. City of Philadelphia*, 2000 WL 632988, at *1 (E.D. Pa. May 5, 2000). There appears to be no contrary authority in this circuit, and one district court has agreed. *See Gomez v. City of Nashua, N.H.*, 126 F.R.D. 432, 434 n.1 (D.N.H. 1989).

The DA’s office contends that attorney work product from third parties is protected by Fed. R. Civ. P. 45(d)(2), which governs objections to subpoenas served on third parties. It also contends that the common-law work-product protection extends beyond the plain text of Rule 26(b)(3), citing *Wood v. McCown*, 784 S.W.2d 126 (Tex. App. 1990).³

Several courts “have extended the work-product protection to non-parties when that vindicated the purposes underlying the doctrine.” *Jean v. City of New York*, 2010 WL 148420, at *2 (E.D.N.Y. Jan. 12, 2010) (collecting cases). “The purposes underlying the doctrine, gleaned from *Hickman v. Taylor*, 329 U.S. 495 (1947), include protecting an attorney’s ability to formulate legal theories and prepare cases, preventing opponents from “free-loading” off their

³ The DA’s office also cites *Federal Election Comm’n v. Christian Coalition*, 179 F.R.D. 22 (D.D.C. 1998), for the proposition that the work-product doctrine protects non-parties. That case is inapposite because it interpreted Rule 26(b)(3) to determine whether to approve a stipulated protective order seeking to withhold the documents allegedly protected by the work-product doctrine from public view. 179 F.R.D. at 23-24. No party has moved for a protective order in this case.

approach the office would take toward this case. Because the interests outlined in *Hickman* are fully implicated by these documents, the Court finds that the Magistrate Judge's decision that they are protected by the attorney work-product doctrine was not clearly erroneous or contrary to law.

Accordingly, the Court will adopt the Magistrate Judge's order as to the documents on pages 262-63.

2. Objections by the DA's Office

The DA's office contends that the documents on pages 100-01 are protected by the attorney work-product doctrine. Those documents are notes prepared by a police officer working on the investigation of Stamps's death. Verner was handed these notes at the scene of Stamps's death but he cannot remember which officer handed them to him.⁵ The notes themselves contain a factual timeline of the events leading up to Stamps's death.

Preventing disclosure of those notes does not implicate any of the interests protected by the work-product doctrine. Again, those interests include protecting an attorney's ability to formulate legal theories and prepare cases, preventing opponents from freeloading off their adversaries' work, and preventing interference with ongoing litigation. *Jean*, 2010 WL 148420, at *2. The notes in question contain purely factual statements and do not include any opinions or impressions. The Court sees no reason, and the DA's office has provided none, as to why the ability of assistant district attorneys to formulate legal theories and prepare cases would be affected by the disclosure of notes that are made by police officers in the ordinary course of their employment and that include only factual information. *Cf. Textron*, 577 F.3d at 31 (work-

⁵ The Court also concludes that the late production of this information does not constitute waiver of the attorney work-product doctrine by the DA's office.

So Ordered.

Dated: April 16, 2014

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
(EASTERN DIVISION)**

EURIE A. STAMPS, JR. and NORMA
BUSHFAN STAMPS, Co-Administrators of the
Estate of Eurie A. Stamps, Sr.,

Plaintiffs,

Civil Action
No.:

v.

THE TOWN OF FRAMINGHAM, and
PAUL K. DUNCAN, individually and in his
Capacity as a Police Officer of the
Framingham Police Department

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

PRELIMINARY STATEMENT

On January 5, 2011, Eurie A. Stamps, Sr. was seized, shot, and killed in his home by Paul Duncan, a police officer employed by the Framingham Police Department and assigned to the department's SWAT team. The unlawful shooting of Mr. Stamps occurred during the execution of a search warrant at 26 Fountain Street, Framingham, Massachusetts. Mr. Stamps was not the target of the search warrant, was not suspected of any crime, did not resist the police, and posed no risk of danger to the police. This is an action for compensatory and punitive damages brought by the plaintiffs under 42 U.S.C. § 1983 for the violations of Mr. Stamps' Fourth and Fourteenth

Amendment rights granted under the United States Constitution and for Wrongful Death under Massachusetts law.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1343(1) in that the action arises under the Constitution of the United States. Specifically, the plaintiffs seek damages for the violation of Mr. Stamps' rights secured under the Fourth and Fourteenth Amendments of the Constitution as applied to the States. This Court has pendent jurisdiction over the plaintiffs' State law claim.
2. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because the majority of the parties reside therein and the events giving rise to this cause of action occurred in this judicial district.
3. This Court has personal jurisdiction over the defendants because they reside within the Commonwealth of Massachusetts.

THE PARTIES AND ESTATE BENEFICIARIES

4. The plaintiff, Eurie A. Stamps, Jr., a son of Eurie A. Stamps, Sr., is the duly appointed Co-Administrator of the Estate of Eurie A. Stamps, Sr. (Middlesex County Probate No.: MI 11 P 1321) and resides in Woburn, Middlesex County, Massachusetts.
5. The plaintiff, Norma Bushfan Stamps, the surviving wife of Eurie A. Stamps, Sr., is the duly appointed Co-Administrator of the Estate of Eurie A. Stamps, Sr. (Middlesex County Probate No.: MI 11 P 1321) and resides in Arlington, Middlesex County, Massachusetts.
6. Kyon Stamps-Murrell, a son of Eurie A. Stamps, Sr. and a beneficiary of his Estate, resides in Missouri City, Texas.

7. Robin L. Stamps-Jones, a daughter of Eurie A. Stamps, Sr. and a beneficiary of his Estate, resides in Springfield, Massachusetts.
8. Marlon Stamps, a son of Eurie A. Stamps, Sr. and a beneficiary of his Estate, resides in Lynn, Massachusetts.
9. This action is brought by the plaintiffs on behalf of the Estate of Eurie A. Stamps, Sr. and his survivors and next-of-kin.
10. The defendant, Town of Framingham, is a Massachusetts municipality located in Middlesex County and organized under the laws of Massachusetts.
11. The defendant, Paul K. Duncan, is and was at all relevant times a police officer employed by the Town of Framingham, Massachusetts, County of Middlesex, and a resident of Shrewsbury, Massachusetts, Worcester County.
12. In May of 2006, the decedent, Eurie A. Stamps, Sr., retired from the Massachusetts Bay Transportation Authority where he had worked for 20 years as a mechanic. At the time of his death, Mr. Stamps was noticeably handicapped by arthritis and walked with the aid of a cane.

FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

The Search Warrant and the Planned Execution of the Warrant

13. On January 4, 2011, Detective Dinis Avilia of the Framingham Police Department (FPD) obtained a search warrant for a two-family dwelling located at 26 Fountain Street, Framingham, Massachusetts.
14. The search warrant was issued based on probable cause to believe that two individuals, Joseph Bushfan and Dwayne Barrett, were distributing illegal drugs from the first floor apartment at 26 Fountain Street.

15. The first floor apartment at 26 Fountain Street was leased to Eurie A. Stamps, Sr. and his wife, Norma Bushfan Stamps. (26 Fountain Street will hereinafter be referred to as the "home" or "house").
16. All FPD officers involved in obtaining the search warrant and executing the warrant, including the FPD SWAT team, knew that Eurie A. Stamps, Sr., his wife, Norma Bushfan Stamps, and her son, Joseph Bushfan (age 20) resided at the home.
17. All FPD officers involved in obtaining the search warrant and executing the warrant, including the FPD SWAT team, knew that Eurie A. Stamps, Sr. was an elderly black man, approximately 68 years of age.
18. The FPD officers involved in obtaining the search warrant and executing the warrant, including the FPD SWAT team, had no information indicating that Eurie A. Stamps, Sr. was involved in any criminal behavior, owned or possessed a firearm, or posed a danger to the police.
19. Joseph Bushfan (Bushfan) and Dwayne Barrett (Barrett) were the targets of the search and the criminal investigation into illegal drug activities. Eurie A. Stamps, Sr. was not a suspect.
20. Deputy Chief Craig Davis decided to utilize the FPD SWAT team to assist in the execution of the search warrant at the home because Bushfan had a history of prior violent criminal offences and Barrett was affiliated with a gang.
21. Members of the SWAT team first became aware of their involvement in the execution of the search warrant when each received an electronic page from the FPD between 9:30 p.m. and 10:30 p.m. on January 4, 2011.

22. At approximately 11:00 p.m., the SWAT team met at FPD Headquarters to plan the execution of the warrant.

23. The FPD has established policies and procedures that require a written Operations Plan for SWAT team missions, which includes details on assignment of responsibilities and coordination of the mission.

24. The FPD Policy on SWAT Team #100-23 provides that:

“[t]he SWAT team will utilize a written planning process for all operations that are proactive or anticipatory in nature, such as warrant service. The written process will include a format that will document how the operation is to be:

- a. Conducted
- b. Commanded
- c. Controlled
- d. Communication
- e. Support Required

The SWAT Commander will cause a log of events to be recorded on all SWAT operations, and will also cause all planning or decision making documents to be recorded.”

25. In direct violation of established policies, the FPD and officers planning the execution of the warrant did not prepare a written Operations Plan and failed to record all planning and decision making prior to execution of the search warrant at the Stamps home. Additionally, the SWAT Commander did not record a log of events for the SWAT operation as mandated by FPD policies.

**The Arrest of Joseph Bushfan, the Primary Target of the Warrant,
Prior to the Execution of the Warrant on January 5, 2011**

26. Prior to execution of the search warrant, police Detectives Jeffrey DeRosa and Matthew Gutwill were positioned outside of the Stamps home conducting surveillance that began at 6:30 p.m. on January 4th and continued until execution of the warrant approximately six hours later. During this period of surveillance, the FPD detectives never observed Barrett at or near the house.
27. Prior to execution of the search warrant, the SWAT team arrived in the neighborhood and used the parking lot of the Gulf Station as a “staging area”. The Gulf Station is approximately 150 feet from the home.
28. Before entry into the home was initiated, Detectives DeRosa and Gutwill observed Joseph Bushfan and two females exit the front door and walk south towards Waverly Street and the Gulf Station, where the SWAT team was staged. Detectives DeRosa and Gutwill left their surveillance position and followed Bushfan. They confronted Bushfan over 200 feet from the house near the intersection of Fountain and Waverly Streets, in the general area where the SWAT team was waiting. The detectives searched Bushfan and immediately arrested and detained him.
29. The members of the SWAT team personally observed the arrest of Bushfan. They knew, prior to the execution of the warrant, that Bushfan, the target of the investigation and subject of the warrant known to be in the house, was in police custody and did not pose a threat. They also knew, based on six hours of surveillance, that the other target of the warrant, Barrett, was never seen at the home.

30. Attempts by Detective Gutwill to abort the execution of the warrant because Bushfan was already arrested went unheeded.

Execution of the Warrant and Entry into the House on January 5, 2011

31. A Tactical Emergency Medical Team (TEMS Unit), a medical support group for the members of the SWAT team, accompanied the SWAT team to the staging area.
32. Before execution of the warrant, there were approximately twenty (20) FPD personnel at or near the home, including the SWAT team, the TEMS Unit and the FPD detectives.
33. Sometime after Bushfan was arrested, at least thirteen (13) members of the FPD SWAT team began execution of the search warrant and entry into the home.
34. When the SWAT team approached the home, they encountered Ms. Bushfan Stamps, Eurie A. Stamps, Sr.'s wife, on the steps of the home. She was ordered to lie on the ground, seized and detained, and then taken down the street and guarded by a police officer, all before the SWAT team entered the home.
35. No FPD officer or member of the SWAT team asked Mrs. Bushfan Stamps to identify the individuals remaining in the house.
36. Members of the TEMS unit approached the house with the SWAT team and positioned themselves behind a vehicle parked in front of the home.
37. SWAT team Officers Brian Curtis and Greg Reardon approached the left side of the house with the protection of metal shields. Officer Curtis, armed with an MF4 machine gun and a sidearm pistol, took a position on the left side of the house while officer Reardon, armed with a MP5 machine gun and a sidearm pistol, guarded the rear and right side of the house.
38. Two teams of three SWAT members assembled in two so-called "stacks" at the front door to the house. In a "stack" formation, one officer stands directly behind the officer in front

of him or her. One "stack" consisted of Lieutenant Robert Downing and Officers Michael Sheehan and Timothy O'Toole. The second "stack" consisted of Sergeant David Stuart and Officers Paul Duncan and James Sebastian.

39. The front of the house on Fountain Street faces North. On January 5, 2011 the floor-plan and condition of the house upon entering the front door from outside consisted of: (1) a common hallway with a stairway on the left East side leading to the second floor apartment; (2) a closed door on the right West side of the hallway, which opened into a room used as a bedroom on the West front side of the house; (3) a closed door at the South end of the hallway that led into the kitchen; (4) the kitchen had an open doorway to a laundry room on the South wall, an open doorway on the West side to the dining room, and a door to the cellar stairway on the North side next to the entrance from the common hallway; (5) the dining room and front bedroom were connected by a large open doorway; (6) and the laundry room at the rear of the home had two doors on the West side, one to a bathroom and the southernmost door leading to a rear bedroom.
40. The front door to the house was unlocked. The two "stacks" of officers, totaling six, entered the house through the front door into the common hallway.
41. Officer Chris Illiardi also entered the hallway and positioned himself at the bottom of the stairway leading to the second floor apartment.
42. Sergeant David Stuart then knocked on the closed door on the right side of the hallway leading into a bedroom and announced, "Framingham Police, Search Warrant." Receiving no response, Sergeant Stuart gave the verbal command to "execute."
43. Immediately after the execution order was given, Sergeant Robin Siviglio, armed with a long gun and a pistol, immediately broke windows on the front of the house using a long

rake in a “rake and break operation.” After the front windows were broken, Officer Shawn Riley looked into the room and pointed his MP5 machine gun through the window.

44. Simultaneously with the rake and breaking of the front windows, Officers Stephen Casey and Christopher Langmrye broke the kitchen window on the left or East side of the house using a “bang pole” and set off a “flash bang” in the kitchen. The “flash bang” is an explosive device that makes a loud noise and creates smoke, and is intended to function as a diversionary device to shock and distract the people in the house while the officers are making entry.
45. Officer Casey remained outside after deploying the “flash bang” and never entered the house until after Mr. Stamps was shot.
46. After hearing the “flash bang”, Officer Paul Duncan used a battering ram to forcibly open the door to the front bedroom on the right side of the hallway. Officer Duncan was the first man to enter the bedroom followed by the other men in the “stack”, Sergeant Stuart and Officer Sebastian. Duncan’s Colt M4 Commando machine gun was in a semi-automatic mode with the safety “off” when he entered. Officer Duncan scanned the room and did not see any threats.
47. Immediately after hearing the “flash bang” and simultaneously with the other officers’ entry into the front bedroom, the second “stack”, consisting of Lieutenant Downing and Officers Sheehan and O’Toole, entered the illuminated kitchen through the unlocked door at the South end of the hallway.
48. After clearing the front bedroom area, Officers Duncan and Sebastian proceeded through a curtain in a doorway leading to the dining room. Officer Duncan scanned and secured the dining room, observing no threats.

The Seizing of Eurie A. Stamps, Sr. and Arrest of Devon Talbert

49. Upon entering the kitchen, Officers Sheehan and O'Toole observed something at ground level in the laundry room moving toward the bathroom. Officer O'Toole ordered, "Come out with your hands up."
50. Eurie A. Stamps, Sr., who had been in his bedroom in the rear of his home watching television, entered the laundry room and stood at or near the open doorway threshold between the laundry room and kitchen. Officer O'Toole, armed with an M4 machine gun, a 40 caliber Sig Sauer handgun, and a Taser, ordered Mr. Stamps to get down. Mr. Stamps complied and knelt down with his hands up. Officer O'Toole then ordered Mr. Stamps, to "Get all the way down." Mr. Stamps complied by lying on his belly with his hands above his head, as ordered, with his head facing the kitchen at the threshold between the kitchen and laundry room.
51. As a result of the officers' conduct, Mr. Stamps was not free to move and was "seized."
52. After Officers O'Toole and Sheehan entered the kitchen, Officer Christopher Langmyre, who re-deployed to assist in securing the house, entered and observed Officers Sheehan and O'Toole giving orders to Mr. Stamps.
53. After Mr. Stamps was seized, Officers O'Toole and Sheehan stepped over Mr. Stamps and entered the laundry room.
54. Officer Langmyre also stepped over Mr. Stamps and followed Officers Sheehan and O'Toole into the laundry room.
55. As Officers O'Toole, Sheehan and Langmyre were dealing with Mr. Stamps and entering the laundry room, Lieutenant Downing and Officers Sebastian and Riley were also in the kitchen standing near the cellar door.

56. After stepping over Mr. Stamps, Officers Sheehan, O'Toole and Langmyre all had their backs to Mr. Stamps and did not perceive him as a threat.
57. Lieutenant Downing and Officers Sebastian and Riley also had their backs to Mr. Stamps and did not perceive him as a threat.
58. Officers O'Toole and Sheehan heard sounds from the bathroom. They entered the bathroom and, after observing open space behind an interior wall, ordered, "Come out with your hands up." Officer Sheehan contemplated using less than lethal force by using his Taser rather than his firearm. At this point, the officers observed a cat trying to escape through the bathroom window. No person was found in the bathroom.
59. While Officers O'Toole and Sheehan were securing the bathroom, Officer Langmyre entered a rear bedroom off the laundry room where he observed Devon Talbert kneeling on the floor with his hands up. Officer Langmyre seized Devon Talbert by pointing his MP5 machine gun at him. Officer Langmyre waited for assistance from another officer before making physical contact with Talbert and handcuffing him.

**Officer Duncan's Unlawful and Unconstitutional
Shooting and Killing of Eurie A. Stamps, Sr.**

60. While in the dining room, Officer Duncan heard Officer O'Toole in the kitchen ordering someone to get down on the ground. Sergeant Stuart ordered Officer Duncan to enter the kitchen to assist Officer O'Toole.
61. Upon entering the kitchen, Officer Duncan observed Officers O'Toole and Sheehan in the laundry room. He also observed Mr. Stamps lying on his stomach with his hands above his head and his elbows resting on the floor. Mr. Stamps had his head up looking into the kitchen at Officer Duncan.

62. Officer Duncan pointed his M4 machine gun at Mr. Stamps' head with the machine gun on semi-automatic with the safety "off."
63. When Officer Duncan was in the kitchen pointing his machine gun at Mr. Stamps, Lieutenant Downing and Officers Riley and Sebastian remained in the kitchen near the cellar door.
64. At all times while Officer Duncan had his machine gun pointed at Mr. Stamps' head, the machine gun was in a semi-automatic setting with the safety "off."
65. At all times while Officer Duncan had his machine gun pointed at Mr. Stamps' head, Duncan's finger was on the trigger inside the trigger guard.
66. While pointing his machine gun at Mr. Stamps' head, Officer Duncan discharged his machine gun by using his finger to apply force to the trigger.
67. Officer Duncan's machine gun did not discharge due to a malfunction or some force other than pulling the trigger by his finger.
68. The bullet discharged from Officer Duncan's machine gun and struck Mr. Stamps on the left side of his face in a trajectory consistent with Duncan aiming the machine gun from a standing position. The bullet exited through the upper neck and reentered Mr. Stamps' body through his left lower neck/clavicular region, entering the left ventricle of Mr. Stamps' heart and left lung.
69. Officer Duncan did not give any verbal commands to Mr. Stamps or speak to him prior to discharging his machine gun.
70. When Officer Duncan shot Mr. Stamps in the face, Lieutenant Downing and Officers Riley and Sebastian were still in the kitchen.
71. At no time did Officer Duncan seek assistance from any other officer.

72. Realizing that Mr. Stamps had been shot, members of the SWAT team called out, "TEMS up", the code word for the TEMS Unit to move into the house.
73. Jeffrey Beckwith, David McKay, and Joseph Hicks, members of the TEMS Unit, entered the home and met Lieutenant Downing, who directed them to the rear of the apartment. They observed Mr. Stamps lying on his stomach on the floor bleeding with a pool of blood near him. The paramedics turned Mr. Stamps on his back and began to render medical care. Using a webbing device, the paramedics dragged Mr. Stamps into the kitchen, placed him on a backboard, removed him from the home on a stretcher, and placed him in an ambulance.
74. Mr. Stamps died as a result of the gunshot wound.
75. At all times before and after he was seized, Mr. Stamps was unarmed, defenseless, made no furtive gestures or movements, complied with the officers' demands, and did not attempt to flee or resist the police.
76. Officer Duncan's explanation or "story" of what happened is that his machine gun discharged when he lost his balance and fell while he was attempting to secure Mr. Stamps' hands, without assistance from other officers, and while he was holding his machine gun with the safety "off."
77. Officer Duncan's explanation or "story" of what happened is fundamentally inconsistent with the physical evidence and forensic analysis, and contrary to the laws of physics.

The Arrest of Devon Talbert

78. After Mr. Stamps was shot, Officer Sheehan entered the rear bedroom to assist Officer Langmyre in searching and arresting Talbert. Officer Langmyre did not attempt to search

Mr. Talbert or make physical contact with him without the assistance of another officer.

Officer Sheehan handcuffed Talbert and searched him for weapons. He was unarmed.

The Outcome of the Searches of Mr. Stamps' Home

79. During the January 5, 2011 search of the home, the FPD found no weapons or firearms.

80. On January 5, 2011, Lieutenant Edward Foster of the Massachusetts State Police obtained a search warrant for the Stamps home for the purpose of obtaining evidence relating to the homicide of Eurie A. Stamps, Sr. During this search, no weapons or firearms were found.

The Inadequate Training and Policies of the Framingham Police Department

81. Prior to the execution of the warrant, the FPD failed to provide adequate training to the members of the SWAT team concerning execution of a search warrant in a private residence including, but not limited to, proper and reasonable procedures to assess whether individuals and non-suspects encountered at the residence pose a danger to the police; the proper procedures relating to the use of the safety on a firearm and the location of an officer's finger outside of the trigger guard when the police encounter individuals and non-suspects that pose no immediate or defined threat; the proper procedures for encountering, handling, securing, and/or searching of individuals and non-suspects for weapons to avoid harm to them, including the use of two officers when physically encountering an individual; the proper procedures for entering and clearing rooms and encountering persons in a room during the execution of a search warrant; the proper procedures for an officer to assess when he or she is "ready to fire" when encountering a person during the execution of a search warrant; the proper procedure for ensuring that a weapon is placed on "off-safe" until an officer is ready to fire; and the proper procedures to make a preliminary assessment

of the risk or danger posed by each known occupant of a residence prior to the execution of a search warrant.

82. The FPD had a policy of not complying with its own established procedures concerning the planning of SWAT operations.

83. The FPD had a policy of not establishing adequate and appropriate protocols, in accordance with widely accepted police practices nationwide, for the use of automatic weapons during SWAT operations.

84. The FPD had a policy of not establishing procedures to address changes in circumstances during SWAT operations.

COUNT I

Claim Against Officer Paul Duncan For Violating Eurie A. Stamps, Sr.'s Fourth Amendment Rights Predicated On The Intentional Use Of Deadly Force During The Course Of A Seizure In Violation Of 28 U.S.C. § 1983

85. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

86. The Fourth Amendment to the United States Constitution guarantees citizens the right to be secure in their person against the use of excessive and/or deadly force during the seizure of a person.

87. By the means of Officers Duncan's and O'Toole's actions of pointing their weapons at Mr. Stamps, their verbal commands and show of force, and the presence of five other armed officers, Mr. Stamps' freedom of movement and ability to walk away was restrained and prohibited and he was seized within the meaning of the Fourth Amendment.

88. Officer Paul Duncan's shooting of Mr. Stamps, under the color of State law, was intentional. Officer Duncan:

- a. Placed his machine gun in a semi-automatic setting;

- b. Pointed his machine gun at Mr. Stamps;
- c. Placed his finger inside the trigger guard;
- d. Placed his finger on the trigger;
- e. Discharged his machine gun by intentionally applying force to the trigger; and
- f. Intended to shoot Mr. Stamps and to cause him severe physical injury or death.

89. Officer Duncan's machine gun did not discharge due to a malfunction or some force other than the forced applied to the trigger by his finger.

90. At the time of the shooting, Mr. Stamps was defenseless; had not committed a crime; was not a suspect concerning the commission of a crime; was not the target of the search warrant; was not armed; did not resist the police; did not attempt to flee; and posed no immediate or future threat of harm to Officer Duncan, other police officers, or any other person.

91. Officer Duncan's intentional use of deadly force was excessive and unjustified in violation of Mr. Stamps' right to be free from unreasonable seizures of his person secured under the Fourth Amendment.

92. As a direct and proximate cause of Officer Duncan's intentional conduct, Mr. Stamps was subjected to excessive force during the course of a seizure in violation of his Fourth Amendment rights and was killed.

93. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourth Amendment right through his intentional use of deadly force was clearly established under existing case law or general Fourth Amendment principles and statements of law such that it was apparent to him that his conduct was unlawful and unconstitutional.

94. Officer Duncan's intentional and excessive use of deadly force was such an obvious and/or apparent violation of the Fourth Amendment general prohibition against unreasonable force that a reasonable officer would not have required prior case law to be on notice that his conduct was unlawful and unconstitutional.

95. A reasonable police officer in Officer Duncan's position should have understood that his conduct violated Mr. Stamps' right to be free from the excessive use of deadly force.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT II

Claim Against Officer Paul Duncan For Violating Eurie A. Stamps, Sr.'s Fourth Amendment Rights Predicated On The Unintended But Unreasonable Infliction Of Deadly Force During The Course Of A Seizure In Violation Of 28 U.S.C. § 1983

96. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

97. The Fourth Amendment to the United States Constitution guarantees citizens the right to be secure in their person against unreasonable seizures of the person.

98. A Fourth Amendment violation occurs when a police officer's actions resulting in the unintentional discharge of his weapon during a seizure causes injury or death and those actions leading to and culminating in the discharge of his weapon are objectively unreasonable.

99. By the means of Officers Duncan's and O'Toole's actions of pointing their weapons at Mr. Stamps, their verbal commands and show of force, and the presence of five other armed

officers, Mr. Stamps' freedom of movement and ability to walk away was restrained and prohibited and he was seized within the meaning of the Fourth Amendment.

100. Officer Duncan's shooting of Mr. Stamps during the course of a seizure by the police officers constituted the reckless and unreasonable use of excessive force in violation of his rights secured under the Fourth Amendment.

101. At the time of his seizure, Mr. Stamps had not committed a crime, was not a suspect concerning the commission of a crime, and was not the target of the search warrant.

102. At the time of his seizure, Mr. Stamps was unarmed, harmless, and defenseless.

103. Mr. Stamps immediately surrendered to the authority of the police and their show of force by lying down and putting his hands above his head, a position maintained until Officer Duncan shot him, and posed no immediate or future threat to the officers.

104. At all times before the shooting, Mr. Stamps did not resist his seizure or attempt to move or flee.

105. Officer Duncan's act of shooting Mr. Stamps before making physical contact with him or while making physical contact with him in an attempt to physically restrain him was reckless and objectively unreasonable in the following respects:

- a. Officer Duncan lacked probable cause to believe that Mr. Stamps committed a crime;
- b. Officer Duncan lacked articulable reasonable suspicion to believe that Mr. Stamps was armed or dangerous;
- c. Officer Duncan failed to obtain the assistance of other officers who were standing within feet of him and available to assist him in further physically restraining Mr. Stamps;

- d. Officer Duncan held his machine gun and pointed it at Mr. Stamps with the weapon on a semi-automatic setting;
- e. Officer Duncan failed to place his weapon on a "safety" setting to prevent the discharge of the weapon;
- f. Officer Duncan held his machine gun and pointed it at Mr. Stamps while his finger was inside the trigger guard and on the trigger;
- g. Officer Duncan pulled the trigger and shot Mr. Stamps even though Mr. Stamps was not fleeing, was not resisting his seizure, was not making any furtive movements, was not posing any threat to Officer Duncan or any other officer or person, and while he was complying with police commands;
- h. The conduct of Officer Duncan was not performed pursuant to a written operational plan that adequately defined the roles of each officer;
- i. The verbal operational plan was deficient because it failed to provide adequate protocols and procedures for the encountering and seizing of individuals during the execution of the search warrant; and,
- j. The execution of the search warrant should have been aborted once Bushfan was arrested.

106. Officer's Duncan's unreasonable conduct and use of excessive force described in the preceding paragraph was contrary to and in violation of established police protocols and standards concerning the seizing of a person; clearly established constitutional rights; FPD's Policy on Search and Seizure #100, Section 8(b)(i) & (ii); and/or Officer's Duncan's training.

107. A reasonable probability existed that Officer Duncan's machine gun would discharge while pointed at Mr. Stamps with the safety "off" and his finger on the trigger.
108. The discharging of the machine gun posed a risk of grievous harm and death to Mr. Stamps.
109. The discharge of the machine gun and the killing of Mr. Stamps would have been avoided through the exercise of reasonable and required precautions that imposed a slight burden on Officer Duncan and would not have exposed him or any other officer to a risk of injury.
110. All of Officer Duncan's actions leading up to and resulting in the shooting of Mr. Stamps were committed under the color of State law.
111. Officer Duncan's objectively unreasonable actions (as described above) committed during the seizure of Mr. Stamps were the direct and proximate cause of the shooting of Mr. Stamps and his resulting death.
112. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourth Amendment right through his use of excessive deadly force, even if unintended, was clearly established under existing case law or general Fourth Amendment principles and statements of law such that it was apparent to Officer Duncan that his conduct was unlawful and unconstitutional. Specifically, it was apparent and/or clearly established in this judicial circuit and in other circuits that unintended harm inflicted during the course of an intentional seizure constitutes a violation of the Fourth Amendment where the officer's conduct resulting in the harm was objectively unreasonable.
113. Officer Duncan's use of excessive deadly force, even if unintended, was such an obvious and/or apparent violation of the Fourth Amendment general prohibition against

unreasonable force that a reasonable officer would not have required prior case law to be on notice that his unreasonable conduct was unlawful and unconstitutional.

114. A reasonable police officer in Officer Duncan's position should have understood that his conduct violated Mr. Stamps' right to be free from the excessive use of deadly force.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT III

**Claim Against Officer Paul Duncan For Violating Eurie A. Stamps, Sr.'s
Fourth Amendment Rights Predicated On The Unintentional Infliction
Of Greater Force To Restrain Mr. Stamps Than Intended
In Violation Of 28 U.S.C. § 1983**

115. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

116. Prior to the shooting of Mr. Stamps, Officer Duncan did not speak to Mr. Stamps.

117. Officer Duncan pointed his machine gun at Mr. Stamps with the intent of using his machine gun to restrain Mr. Stamps' freedom, control his movement, and seize him.

118. By the means of Officers Duncan's and O'Toole's actions of pointing their weapons at Mr. Stamps, their verbal commands and show of force, and the presence of five other armed officers, Mr. Stamps' freedom of movement and ability to walk away was restrained and prohibited and he was seized within the meaning of the Fourth Amendment

119. Mr. Stamps was seized by the instrumentality (Officer Duncan's machine gun) used by Officer Duncan to achieve that result.

120. Mr. Stamps was meant to be restrained in his freedom of movement by the machine gun being pointed at him and he was so restrained.

121. By unintentionally discharging his machine gun, Officer Duncan used more force to seize Mr. Stamps than intended.
122. Officer Duncan's intentional use of his machine gun, under color of State law, to seize Mr. Stamps, and the unintentional use of his machine gun to cause more harm and physical control than intended was objectively unreasonable and constituted a violation of Mr. Stamps' right under the Fourth Amendment to be free from unreasonable seizures of his person.
123. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights through his unreasonable use of more force than intended to seize was clearly established under existing case law or general Fourth Amendment principles and statements of law such that it was apparent to Officer Duncan that his conduct was unlawful and unconstitutional. Specifically, it was apparent and/or clearly established in this judicial circuit and in other circuits that unintended harm inflicted during the course of an intentional seizure constitutes a violation of the Fourth Amendment where the officer's conduct resulting in the harm was objectively unreasonable.
124. Officer Duncan's unreasonable use of more force than intended to seize Mr. Stamps was such an obvious and/or apparent violation of the Fourth Amendment general prohibition against unreasonable force that a reasonable officer would not have required prior case law to be on notice that his unreasonable conduct was unlawful and unconstitutional.
125. A reasonable police officer in Officer Duncan's position should have understood that his conduct violated Mr. Stamps' right to be free from the excessive use of deadly force.

126. Officer Duncan's objectively unreasonable actions committed to seize Mr. Stamps under the color of State law were the direct and proximate cause of the shooting of Mr. Stamps and his resulting death.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT IV

Claim Against Officer Duncan Predicated on the Infliction of Deadly Force During an Unlawful Search Without Probable Cause Or Reasonable Suspicion in Violation of Eurie A. Stamps Sr.'s Fourth Amendment Rights

127. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.

128. At all relevant times, Mr. Stamps was defenseless; had not committed a crime; was not a suspect concerning the commission of a crime; was not the target of the search warrant; was not armed; did not resist the police; did not attempt to flee; and posed no immediate or future threat of harm to Officer Duncan, other police officers, or any other person.

129. Officer Duncan lacked probable cause to believe that Mr. Stamps had committed a crime and lacked probable cause to arrest him.

130. At all relevant times, Mr. Stamps was not under arrest.

131. Officer Duncan lacked articulable reasonable suspicion to believe that Mr. Stamps was armed or dangerous.

132. Officer Duncan's touching and/or searching of Mr. Stamps without probable cause to believe he had committed a crime or reasonable suspicions that he was armed and

dangerous constituted a violation of Mr. Stamps' Fourth Amendment right to be free from unreasonable searches.

133. Officer Duncan's shooting of Mr. Stamps during a search without probable cause constituted the unreasonable use of excessive force in violation of the Fourth Amendment.

134. Officer Duncan's unconstitutional actions committed during a search of Mr. Stamps were committed under the color of State law and were the direct and proximate cause of the shooting of Mr. Stamps and his resulting death.

135. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights through his use of excessive force during a search of Mr. Stamps without probable cause or reasonable suspicion was clearly established under existing case law or general Fourth Amendment principles and statements of law such that it was apparent to Officer Duncan that his conduct was unlawful and unconstitutional.

136. Officer Duncan's violation of Mr. Stamps' rights was such an obvious and/or apparent violation of the Fourth Amendment general prohibition against unreasonable force that a reasonable officer would not have required prior case law to be on notice that his conduct was unlawful and unconstitutional.

137. A reasonable police officer in Officer Duncan's position should have understood that his conduct violated Mr. Stamps' right to be free from searches without probable cause or reasonable suspicion and from the excessive use of deadly force.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Fourth Amendment rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT V

Claims Against Officer Paul Duncan Predicated Upon Reckless Or Callous Indifference To Eurie A. Stamps, Sr.'s Rights Under The Fourteenth Amendment To The United States Constitution In Violation of 42 U.S.C. § 1983

138. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.
139. The Fourteenth Amendment protects citizens from the deprivation of life, liberty, or property without due process of law.
140. Prior to his death on January 5, 2011, Eurie A. Stamps was not a criminal suspect and the Framingham police did not have probable cause to arrest him or to otherwise take him into custody.
141. At the time of his seizure, Mr. Stamps had not committed a crime, was not a suspect concerning the commission of a crime, and was not the target of the search warrant.
142. At the time of his seizure, Mr. Stamps was unarmed and defenseless.
143. Mr. Stamps posed no immediate or future threat to the officers.
144. Mr. Stamps immediately surrendered to the authority of Officers O'Toole and Sheehan and their show of force by lying down and putting his hands above his head.
145. As a result of the actions of Officers Sheehan and O'Toole, Eurie A. Stamps, Sr. was seized within the meaning of the Fourth Amendment and the seizure was completed before Officer Duncan had any involvement or contact with Eurie A. Stamps, Sr.
146. At all times before being shot, Mr. Stamps did not resist his seizure or attempt to move or flee.
147. When Officer Duncan shot Mr. Stamps, he was in Duncan's custody and control.

148. Officer Duncan's acts and omissions, as described above, were committed under the color of State law and reflected a reckless or callous indifference to the clearly established rights of Eurie A. Stamps, Sr. in violation of his Fourteenth Amendment right to life.

149. As a direct and proximate cause of Officer Duncan's reckless or callous indifference, Eurie A. Stamps, Sr. was deprived of his life without due process of law.

150. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourteenth Amendment rights through his reckless and callous conduct was clearly established under existing case law or general Fourteenth Amendment principles and statements of law such that it was apparent to Officer Duncan that his conduct was unlawful and unconstitutional.

151. Officer Duncan's violation of Eurie A. Stamps, Sr.'s Fourteenth Amendment rights through his reckless and callous conduct was such an obvious and/or apparent violation of the Fourteenth Amendment general prohibition the deprivation of life without due process of law that a reasonable officer would not have required prior case law to be on notice that his conduct was unlawful and unconstitutional.

152. A reasonable police officer in Officer Duncan's position should have understood that his conduct violated Mr. Stamps' right to life.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Fourteenth Amendment rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT VI

**Claims Against Paul Duncan For Punitive Damages Under 42 U.S.C. § 1983
Predicated On The Excessive Use Of Deadly Force In Violation
Of The Fourth Amendment And For The Deprivation Of Life Without
Due Process Of Law In Violation Of The Fourteenth Amendment**

153. Plaintiffs incorporate the preceding paragraphs as if fully stated herein.

154. Officer Duncan's actions as expressly set forth above resulting in the death of Mr.

Stamps were motivated by evil motive or intent or were committed recklessly or with callous indifference to Mr. Stamps' federally protected rights under the Fourth and Fourteenth Amendments.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan for punitive damages for the violation of Eurie A. Stamps, Sr.'s Fourth and Fourteenth Amendment rights, for the costs of this action, for attorney's fees, and for all other just and proper relief.

COUNT VII

**Claim Against The Town of Framingham For Negligent Training And Supervision
Of Its Police Officers In Violation of 42 U.S.C. § 1983 Predicated Upon Deliberate
Indifference To The Constitutional Rights Of Persons Encountered By Their Officers**

155. Plaintiffs incorporate the preceding paragraphs as if fully stated herein.

156. The Town of Framingham, through its agents, servants, and employees in the Framingham Police Department, had the duty and responsibility for the training and supervision of its police officers regarding the appropriate use of force during a seizure and the appropriate methods and practices to avoid the infliction of deadly force upon a seized person, including those who do not pose an immediate risk of serious harm to others.

157. On or before January 5, 2011, the Town of Framingham's policy makers knew or should have known that their police officers had in the past, and would in the future, be faced with situations similar to the circumstances and facts heretofore alleged wherein the police

officers could inflict deadly force despite the fact the plaintiffs' decedent posed no immediate danger to the police officers or others, and despite the fact that the plaintiffs' decedent had no weapon and was lying face down on the floor when he was shot.

158. The Town of Framingham failed to provide, under the color of State law, adequate training to its officers regarding procedures and methods to avoid the infliction of deadly force, whether intentionally or unintentionally inflicted, on a seized person who submits to the authority of the police, complies with an officer's demand not to move, and poses no apparent or immediate threat of harm, including, but not limited to, the following:

- a. the proper and reasonable procedures for identifying and assessing a scene prior to restraining and making physical contact with a person;
- b. the proper and reasonable procedures for the safe and proper method to restrain an individual without causing him great bodily injury or death;
- c. the proper and reasonable procedures to assess whether individuals or non-suspects encountered at the residence pose a danger to the police;
- d. the proper and reasonable procedures to assess when an officer should or should not be ready to fire his or her weapon;
- e. the proper and reasonable procedures relating to the use of the safety on a firearm, including requiring officers to set their firearms on safety mode until the moment the officer is ready to fire his weapon;
- f. the proper and reasonable procedures concerning the placement of an officer's finger outside of the trigger guard when the police encounter an individual or non-suspect that poses no immediate threat;

- g. the proper and reasonable procedures concerning the placement of a weapon on safety mode when approaching and/or making contact with a person;
- h. the proper and reasonable procedures for encountering, handling, securing, and/or searching an individual or non-suspect for weapons to avoid physical harm, including the use of two officers when physically encountering an individual or non-suspect;
- i. the proper and reasonable procedures for entering and clearing rooms and encountering persons in a room during the execution of a search warrant;
- j. the proper and reasonable procedures for an officer to assess when he or she is “ready to fire” when encountering a person during the execution of a search warrant; and,
- k. the proper and reasonable procedures to make a preliminary assessment of the risk or danger posed by each known occupant of a residence prior to the execution of a search warrant.

159. Prior to January 4, 2011, Officers assigned to the FPD SWAT team expressed concerns to the Framingham Police Chief about inadequacies in the training provided to the SWAT team, the lack of skill and capabilities of members of the team, the inadequacies in the process of selecting team members, and deficiencies in the leadership of the team. Although these complaints were received years before the shooting of Mr. Stamps, they were ignored by Framingham policymakers.

160. Alternative procedures existed which could and should have been implemented that would have prevented the shooting of Mr. Stamps. Officer Duncan should have been trained in those procedures including, but not limited to, requiring officers to set their

firearms on safety mode until the moment the officer is ready to fire his weapon and the use of two officers when physically encountering an individual or non-suspect.

161. The FPD had a policy of not complying with its own established procedures concerning the planning of SWAT operations and of not establishing adequate and appropriate protocols, in accordance with widely accepted police practices nationwide, for the use of automatic weapons during SWAT operations.
162. The FPD had a policy of not establishing procedures to address changes in circumstances during SWAT operations.
163. The death of Eurie A. Stamps, Sr. was caused pursuant to the Town of Framingham's policy or custom for the inadequate training and supervision of its police officers, including Officer Duncan, its failure to provide adequate protocols, and its failure to follow existing protocols.
164. The Town of Framingham's policy or custom of grossly inadequate training and supervision of its police officers and failures relating to protocols demonstrated gross negligence amounting to deliberate indifference to the clearly established constitutional rights of others, including Mr. Stamps, to be free from the deprivation of life without due process of law and to be free from the use of excessive force.
165. The reckless or grossly negligent manner in which the Town of Framingham trained and supervised its officers, failed to provide protocols, and failed to follow existing protocols created a high risk of death to others, including Mr. Stamps.
166. Policymakers for the Town of Framingham know to a moral certainty that their police officers, including Officer Duncan, would be required to encounter and seize individuals, including individuals present at the scene of the execution of a search warrant.

167. The inadequacies of its protocols and the training and supervision provided by the Town of Framingham were so obvious and likely or probable to result in the violation of constitutional rights that the policymakers of the Town acted with deliberate indifference to the need to protect citizens and acquiesced in and implicitly authorized the use of excessive force during a seizure of a person.

168. The Town of Framingham had knowledge of an obvious risk to the constitutional rights of persons that the police would come in contact with and there was a conscious failure to act despite the obvious risk.

169. The above alleged constitutional violations committed by Officer Duncan were proximately caused by the Town of Framingham's deliberate indifference to the training and supervision of Officer Duncan and by the customs, practices, decisions, and policies of the Town of Framingham, through the Framingham Police Department, with respect to the use of force and the proper procedures and methods to avoid deadly force during the seizure of a person.

WHEREFORE, the plaintiffs demand judgment against the Town of Framingham in an amount that provides full and fair compensation for the violation of Eurie A. Stamps, Sr.'s Constitutional rights, for the costs of this action, for attorney's fees, for interest as allowed by law, and for all other just and proper relief.

COUNT VIII

Claim Against Paul Duncan For Wrongful Death Under G.L. c. 229, § 2 Predicted On Intentional Conduct

170. Plaintiffs incorporate the preceding paragraphs as if fully stated herein.

171. Officer Paul Duncan's shooting of Mr. Stamps was intentional in that he intended to pull the trigger and intended to cause physical harm to Mr. Stamps.

172. At the time of the shooting, Mr. Stamps was intentionally seized and/or in the custody of the police and posed no immediate threat of harm to Officer Duncan, other police officers, or any other person.

173. As a direct and proximate cause of Officer Duncan's intentional and unjustified conduct, Mr. Stamps was wrongfully killed.

WHEREFORE, the plaintiffs demand judgment against Officer Duncan in an amount sufficient to fully and fairly compensate the Estate of Eurie A. Stamps, Sr. under G.L. c. 229, § 2, the Massachusetts Wrongful Death Statute, for the costs of this action, for interest as allowed by law, and for all other just and proper relief.

THE PLAINTIFFS DEMAND TRIAL BY JURY ON ALL COUNTS OF THEIR COMPLAINT

By their attorneys,

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Dated: _____

