

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT
NO: 0383-CR-00300

COMMONWEALTH)
)
)
v.)
)
FRANCES Y. CHOY)

COMMONWEALTH'S RESPONSE TO
DEFENDANT, FRANCES CHOY'S
MOTION FOR POST-CONVICTION RELIEF

Introduction

A District Attorney's job is to serve for the benefit of all of the people who live, work and go to school in his or her county. As a prosecutor for 23 years, District Attorney Timothy J. Cruz has been the one constant in Plymouth County while crime rates, homicide rates, and incarceration rates have decreased. The Plymouth County District Attorney's Office makes a difference, every single day, in its vigorous enforcement of the criminal laws, particularly against the very small percentage of our population who selfishly and violently harm peaceful, law-abiding adults and children. Every day the District Attorney and his staff work to protect the citizens of Plymouth County by reducing criminal activity not only through prosecution, but also by implementing prevention and intervention strategies. The Plymouth County District Attorney's Office has established and fosters community wide task forces that focus on, among other things,

assisting people caught up in the throes of substance use disorders, children who have suffered trauma related to violence at home or in the community, victims of domestic violence, victims of human trafficking, and collaborative approaches to reducing gun violence and homicides.

Accountability is the hallmark of District Attorney Timothy Cruz's Office. Not only does the Office strive to hold accountable those who victimize others, but the Office equally strives to be the best version of itself, by holding itself accountable to fairness, working hard, treating others with respect, embracing diversity, and promoting learning. An accountable criminal justice system fosters community trust.

Another difference District Attorney Cruz makes in commitment to fairness and accountability, is recognizing and taking action when an injustice has been suffered by a person charged with a crime, whether by dismissing a charge, relief from an unfair sentence, or, as in the Frances Choy case, requesting a new trial. Frances Choy's trial, through no fault of her own, lacked the fairness and integrity that we all rely upon to secure justice for defendants, for victims, and for the community.

The Plymouth County District Attorney's Office embraces the greater moral duties of a prosecutor as the representative of the people, recognizing that the government has a broader and deeper duty, to remedy an injustice. Our "interest, therefore, in a

criminal prosecution is not that [he] shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

In the case of Frances Choy, convicted of the murder of her parents by arson, there are a number of facts, some old and some that have newly come to light, that significantly call into question the fairness of the trial, and warrant the agreement now presented to the Court that the defendant, subject to the Court's independent review, be granted a new trial.¹

Even if no one of the issues raised by her new attorneys, standing alone, may suffice to require a new trial, the cumulative effect of her trial attorney's errors, the trial prosecutors' misconduct, the newly disclosed confession of her relative, Kenneth Choy, and racially inappropriate emails of the trial

¹We recognize that even an affirmative pleading seeking relief does not automatically entitle a defendant to relief, as the Court has an independent duty to review the case to determine whether and what action is lawful and appropriate: "Confessions of error are, of course, entitled to and given great weight, but they do not 'relieve this Court of the performance of the judicial function. . . . [and because a Court's "judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties [rather] judicial obligations compel [the Court] to examine independently the errors confessed.'" Commonwealth v. Poirier, 458 Mass. 1014, 1015 (2010) (cites and quotes omitted).

prosecutors, together raise an unavoidable specter of injustice and cast such a pall over the trial that a new trial must be ordered.

Kenneth Choy, who lived in the house and was present when the fire was set that killed Jimmy and Anne Choy, was tried and acquitted of this murder. After his trial and acquittal, his testimony was used to persuade the jury that Frances either planned and set the fire that killed her parents, or knowingly and materially participated in its commission. Now, appellate counsel for Frances has presented Kenneth's confession to his friend that he committed this crime. This confession is in the form of his friend's affidavit and refers to admissions that Kenneth Choy made *prior to the trial* that resulted in Frances's conviction. These newly disclosed admissions by Kenneth Choy should have been known to Frances's trial attorney, and should have been presented at the trial.

In an affidavit, Frances' trial counsel stated that he knew who Kenneth's friend was, and knew that in the past Kenneth had falsely blamed this friend for prior criminal conduct which Kenneth had actually committed himself. Trial counsel acknowledged that he had the ability to call the friend as a witness. However, trial counsel neglected to do so.

"Both the Massachusetts and Federal Constitutions require defense counsel 'to conduct an independent investigation of the facts' . . . [and] [t]he requirement of a reasonable investigation includes a duty to pursue witnesses with potentially exculpatory testimony." Commonwealth v. Diaz Perez, 484 Mass. 69, 74 (2020). Trial counsel's error resulted in a substantial likelihood of a miscarriage of justice because the jury's verdict could have been influenced by the missing testimony. Id. at 76-78. The Massachusetts Supreme Judicial Court recognizes that such ineffective assistance of counsel is found when "counsel neglect[s] evidence that another person committed the crime, and that evidence, if developed, might have raised a reasonable doubt about whether the defendant or someone else had killed the victim." Diaz Perez, 484 Mass. at 76, quoting Commonwealth v. Alcide, 472 Mass. 150, 158 (2015).

Although not technically admissible as 'newly discovered evidence' because trial counsel could and should have already had these statements, a conscientious and moral review of the trial and conviction must take into account these statements and the failings of trial counsel.

Importantly, Frances' trial attorney did not call an analytical chemist at trial. Now, her new attorneys have presented expert evidence which, while subject to being contested

at trial, should have been presented to the jury that convicted her and may have been a real factor in the jury's deliberations.

Frances's attorneys have also presented numerous other issues, including but not limited to the claims that a newly discovered affidavit contradicts testimony that Brockton Police did not have recording devices available in April 2003 that could have been used to record Frances' statements; the circumstances resulting in the Commonwealth's presentation of prior recorded, immunized testimony of Kenneth Choy; the fact that exculpatory information regarding Kenneth's motive was neither provided to trial counsel under Mass. R. Crim. P. 14, nor pursuant to the Commonwealth's Rule 11 Discovery Agreement in the Pretrial Conference Report and was not sought pursuant to Mass. R. Crim. P. 17 by trial counsel; improper closing arguments; and factually inaccurate information regarding a *Zanetti* instruction.

In addition, the same two aforementioned trial prosecutors withheld exculpatory evidence of other fires at the Choy house after Frances was in custody. Furthermore, one of the trial prosecutors knowingly or recklessly induced erroneous testimony from a detective regarding Frances' statements. Moreover, one of the trial prosecutors made inconsistent legal arguments during Kenneth and Frances' trials as to whether Frances' statements were incriminating or not.

Additionally, the trial prosecutors in this case, during the time period of both Choy trials and without the knowledge or sanction of the District Attorney, shared racially insensitive emails that were pejorative against Asians and females. The possibility of a prejudicial effect of perceived racial bias of the two trial prosecutors suggested by the exchange of these emails is palpable.

Both trial prosecutors left PCDAO prior to the emails being discovered. One prosecutor had been terminated, and the other left voluntarily. District Attorney Cruz hired Guidepost Solutions, LLC, to independently investigate the misconduct. Guidepost Solutions, LLC, concluded that emails identified as racially insensitive were "restricted to few staff members and not to have occurred recently." Guidepost ultimately concluded that there was no evidence within the analyzed emails of a culture of racism within PCDAO.

In addition to the independent investigation, District Attorney Cruz engaged a diversity expert to assist the PCDAO in establishing a diversity committee, as well as to provide seminars regarding diversity including, but not limited to, implicit bias. District Attorney Cruz also engaged the Brockton and Boston chapters of the NAACP to develop an education program within the PCDAO, and hired a Director of Diversity and Community Relations. More recently, District Attorney Cruz had an ethics training led

by an Assistant Bar Counsel from the Board of Bar Overseers and a prosecutor from the Office of Middlesex County District Attorney Marian Ryan.

And finally, subsequent to the discovery of these emails, the appellate prosecutor who was assigned to the case, who was terminated, inter alia, for her conduct in this case, withheld post-conviction discovery from the defendant's attorneys in violation of her ethical duties and multiple court orders to produce these emails and other documentation necessary for effective appellate review.

Accordingly, the District Attorney has filed for the Court's consideration a comprehensive memorandum of law analyzing the legal issues, and concedes that due to the cumulative weight of defendant's trial attorney's errors, the confession of Kenneth Choy, the emails and other misconduct of the trial prosecutors, and the improper withholding of post-conviction discovery by the appellate attorney, that a new trial is warranted in this matter to ensure that justice is done, because, above all else:

"The prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is

not that [he] shall win a case, but that justice shall be done."

Berger, at 88.

All involved in the criminal justice system owe a duty to maintain its integrity. We, as prosecutors, must hold ourselves to the highest standards of fairness and integrity. In our commitment to serve the public at the highest level, we must first be our own harshest critics. Conduct that calls into question the fairness, impartiality, or diligence of a prosecutor to any defendant is repugnant to the ideals of equal protection under the law, and must be met with the highest scrutiny and, where appropriate, the swiftest action. The serious questions that remain over the cumulative effect of the errors and misconduct during this trial, and the post-conviction proceedings that followed, require the remedy of a new trial.

The Commonwealth hereby assents to the Defendant Frances Y. Choy's Motion for Post-conviction Relief because, for the reasons set forth below, it appears that justice may not have been done. Counsel for the parties jointly present the case to this Court for consideration, without the need for an evidentiary hearing. If this Court allows the Defendant's Motion for Post-conviction Relief, the Commonwealth may enter a Nolle Prosequi of all charges and will make that determination without delay.

PRELIMINARY STATEMENT

1. Timothy Cruz became the District Attorney of Plymouth County in November 2001.
2. During the ensuing 19 years the Plymouth County District Attorney's Office (PCDAO) has prosecuted to conviction 175 homicide cases. From 2001-2018, PCDAO's homicide clearance rate was 85%, as compared to the national average of 58.4%.
3. This is the first murder conviction in which the District Attorney has determined that the totality of the circumstances calls into question the fairness and integrity of the trial to such an extent that this case requires an affirmative acknowledgment that a new trial should be ordered by the trial court.
4. In 2015, racially and sexually offensive emails transmitted between the trial prosecutors in this case were disclosed to the District Attorney for the first time.
5. At the time these emails were discovered, neither of those persons was then employed by PCDAO. One of these prosecutors had been terminated in 2013, and the other had left the office voluntarily.
6. Immediately after he became aware of the inappropriate emails, District Attorney hired an independent investigative firm, Guidepost Solutions, LLC, ("Guidepost") under the supervision of former U.S.

Marshall Nancy McGillivray, to conduct a detailed review of over 380,000 emails and attachments issued and received by PCDAO staff over an approximately eleven (11) year period (2004-2011). Guidepost analyzed the collected emails to determine if there were any further inappropriate behavior or systemic issues that required remedial action on the part of the PCDAO.

7. Guidepost reviewed office emails from May 19, 2004 through May 6, 2015, completed its review on June 22, 2015 and identified sixty-one (61) emails that were representative of the improper use of the PCDAO email system.
8. Guidepost was further requested by the PCDAO to conduct an additional search for evidence of racism in the PCDAO email server. Nine (9) emails, all of which had been previously made public, were identified as racially disparaging. Emails determined to be racially insensitive were determined to be "restricted to few staff members and not to have occurred recently." Guidepost found no evidence of a culture of racism at the PCDAO after concluding its review of the PCDAO email system.
9. The District Attorney nevertheless engaged a diversity expert to assist the PCDAO in establishing a diversity committee, as well as to provide seminars regarding diversity including, but not limited to, implicit bias.

10. The PCDAO also engaged the Brockton and Boston chapters of the NAACP to develop an education program within the PCDAO, and hired a Director of Diversity and Community Relations.
11. More recently, the PCDAO conducted an ethics training led by Assistant Bar Counsel from the Board of Bar Overseers and a prosecutor from the Office of Middlesex County District Attorney Marian Ryan.
12. During the post-conviction litigation of the present case, the appellate prosecutor assigned at the outset of the matter was ordered by the Court in 2015 and 2016 to produce and certify several specific categories of post-conviction discovery. When these items remained outstanding two years later, an order compelling their production was entered in April, 2018. In March, 2019, the discovery orders, some now nearly four years old, remained incomplete and wholly uncertified.
13. That former prosecutor failed to adequately produce post-conviction discovery despite almost monthly requests from the Defendant's appellate attorney and numerous court orders.
14. When the case was reassigned to ADA Joseph Janezic, he expeditiously disclosed the emails as well as other discovery materials requested by the Defendant's attorneys. To date, ADA Janezic has provided 3,691 documents of post-

conviction discovery, not including supplemental information provided on disks.

15. The former appellate prosecutor was terminated by the PCDAO due to, *inter alia*, her unprofessional conduct and actions during the Choy appellate proceedings.

16. The parties agree that the Defendant's Motion for Post-conviction Relief should be allowed because the totality of the circumstances surrounding the trial and post-trial proceedings reveals that "justice may not have been done." As evidence thereof, the parties present the following reasons: (1) newly discovered evidence of the trial prosecutors' racially and sexually offensive emails; (2) the ineffective assistance of Frances' trial counsel to pursue an analytical chemist in Massachusetts, whose findings now present newly discovered evidence about whether gasoline residue was or was not present on Frances' sweatpants; (3) the ineffective assistance of Frances' trial counsel by not appropriately investigating a potential witness who had information about a confession from Kenneth and knew Kenneth to place the blame for his criminal conduct on others; (4) trial prosecutors did not disclose to trial counsel information about subsequent fires at the Choy residence while Frances' was incarcerated; (5) a newly discovered affidavit of former Brockton Police Detective Ken E. Williams contradicts Detective Clark's

testimony that in April 2003 there were no recording devices in the Brockton Police station in 2003 that could have been used to record the defendant's statement; (6) circumstances resulting in the Commonwealth's presentation of prior recorded testimony of Kenneth Choy; (7) exculpatory information regarding Kenneth Choy's motive was neither provided to trial counsel under M.R.Cr.P. 14, nor pursuant to the Commonwealth's Rule 11 Discovery Agreement in the Pretrial Conference Report, and was not sought pursuant to M.R.Cr.P. 17 by trial counsel; and (8) additional misconduct by the trial prosecutors, including inconsistent legal arguments, knowingly or recklessly inducing erroneous testimony, improper closing arguments, potential violations of pre-trial discovery rules and orders; and factually inaccurate information regarding a *Zanetti* instruction.

STATEMENT OF PRIOR PROCEEDINGS

Indictment Through Verdict

On June 13, 2003, Frances Choy (hereafter "Frances") was indicted on two counts of murder in violation of c. 265, § 1, and one count of arson of a dwelling house in violation of c. 266, § 1 (D. RA. 3-4). Following an evidentiary hearing, the Court (Walker, J.) denied Frances's motion to suppress her

alleged statements to police on June 14, 2005.

Kenneth Choy (hereafter "Kenneth") was indicted on June 13, 2003, on two counts of murder in violation of c. 265, § 1 (D. RA. 32, 35, 50-51). On June 28, 2006, while represented by counsel, Kenneth entered into an agreement with the Commonwealth to cooperate in the prosecution of Frances in exchange for a reduction of his pending first degree murder charges to second degree murder (D. RA. 118-19). The Commonwealth and Kenneth entered into a joint recommendation that after he pled guilty to the second degree murder charges he would serve concurrent life sentences (D. RA. 119). On September 26, 2007 Attorney Robert Galibois informed the Commonwealth that he had been retained by Kenneth after the Court allowed Attorney Spillane's motion to withdraw from his representation of Kenneth on January 12, 2007 (D. RA. 120, 123). Attorney Galibois also informed the Commonwealth that Kenneth wished to rescind his cooperating agreement (D. RA. 123).

Frances's first jury trial began on January 14, 2008. It ended on January 24, 2008, when the Court (Grabau, J.) ordered a mistrial because the jury was not able to reach a unanimous verdict.

Kenneth's trial on two counts of murder resulted in not guilty verdicts on both counts on February 1, 2008 (D. RA. 40). On April 8, 2008, at the request of the Commonwealth, the Court

granted Kenneth immunity from prosecution, pursuant to c. 233, § 20D, for arson, conspiracy, or other charges relating to the subject of his testimony, and compelled him to testify at Frances Choy's second trial (D. RA. 143-45, 147).

Frances petitioned the Supreme Judicial Court under G.L. c. 211 § 3 to prohibit her retrial on double jeopardy and related grounds. The Supreme Judicial Court held that the prosecution did not introduce evidence in the first trial "sufficient to justify a jury in deciding beyond a reasonable doubt that Kenneth Choy in fact set the fire," 456 Mass. at 152, but based on the prosecution's representation to the Supreme Judicial Court that Kenneth Choy would testify in the second trial to "his participation in the planning *and execution* of the fire that burned the house and led to the deaths of Anne and Jimmy Choy," 456 Mass. at 153 n. 9 (*emphasis added*), a divided Supreme Judicial Court permitted retrial of Frances Choy as the principal in a joint venture to commit arson and murder based on "specific acts set out in the arson statute for which there is sufficient evidentiary support to warrant a finding of guilt beyond a reasonable doubt" 456 Mass. at 153 & n. 10.

Frances Choy's second trial (before Locke, J.) began on January 25, 2011. Kenneth Choy testified pursuant to the grant of immunity described above. The jury's inability to reach a unanimous verdict resulted in a second mistrial on February 11,

2011. On February 25, 2011, the Court granted Frances Choy's motion for release on bail pending her third trial.

Frances again raised double jeopardy issues in a petition to the Supreme Judicial Court pursuant to G.L. c. 211 § 3. The Single Justice (Cordy, J.) denied the petition, and the appeal from that denial is consolidated with the pending appeal in the Supreme Judicial Court (No: SJC-10966) (D. R.A. 28).

On Monday, May 2, 2011, the day Frances' third trial was scheduled to begin, ADA Bradley informed the Court (Giles, J.) that Kenneth Choy had fled the jurisdiction the previous Friday (T3, 5/3/2011, 59-61). Over the oral and written objection of defense counsel, (T3, 5.2.2011, 16-19; D. R.A. 191-92), the prosecution presented Kenneth's testimony from the second trial at Frances's third trial in the form of a role play, with a PCDAO ADA sitting in the witness box reading Kenneth's answers to ADA John Bradley's questions from the transcript of Frances's second trial (T3, 5/5/2011, 81). On May 16, 2011, Frances was found guilty of two counts of murder in the first degree, and of one count of arson of a dwelling house (D. RA. 12, 18, 21). She was sentenced to two concurrent life sentences on the murder charges, and to four to six years on the arson charge, which she had completed awaiting trial (D. RA. 21). Frances filed her Notice of Appeal from all three convictions on May 17, 2011 (D. R.A. 22).

Post-Trial Discovery Proceedings

Subsequent to Frances's conviction in 2011, ADA Gail McKenna was assigned to represent the Commonwealth in her appeal on behalf of the PCDAO.

In late February or early March of 2015, ADA McKenna sent Attorney John J. Barter, Frances's appellate attorney, a PDF document containing thirty-seven (37) pages of material. (D. R.A. 203-239). Some of those documents were previously filed by the PCDAO in an unrelated murder trial, *Commonwealth v. Michael Goncalves*, including photographs and some of ADA Karen O'Sullivan's inappropriate emails, and appellate counsel had obtained these documents independently. (D. RA. 241-290; D. RA. 343-44). The PCDAO first became aware of these emails during the course of an unrelated, now-resolved civil action, against the PCDAO, District Attorney Cruz and others, and first disclosed them in 2015 during the course of the *Goncalves* matter.

In March and April, 2015, Attorney Barter sent written requests to ADA McKenna for additional information and documents as a result of learning of the emails (D. RA. 343-349; 351). When ADA McKenna failed to provide a substantive response to Attorney Barter's request, on May 19, 2015, Attorney Barter filed a Motion for Discovery and to preserve evidence, focused on materials relevant to the defendant's Motion for New Trial, including

racially and sexually explicit and demeaning emails in the PCDAO system (Document No: 237).

The motion was allowed by the Court (Giles, J.) on September 24, 2015, after affording the Commonwealth an opportunity to respond. The Commonwealth moved for reconsideration, and that motion was denied on October 20, 2015 (No: 244).

ADA McKenna then filed a "Notice of Appeal" and challenged the discovery order in a petition under G.L. c. 211, § 3. On February 2, 2016, the Commonwealth's c. 211, § 3 petition was heard. ADA McKenna conceded that the requested materials should be turned over, but cited a procedural objection to producing the court-ordered discovery, namely that the matter had not been formally referred to the Superior Court by the Supreme Judicial Court. Frances petitioned the Supreme Judicial Court to refer the matter to the Superior Court, it did so in February, 2016, and the Commonwealth's c. 211, § 3 petition was dismissed. (Document No: 245, dated February 26, 2016). The defendant's discovery motions were remanded to the Superior Court on March 2, 2016. (Document No: 246). On June 6, 2016, Frances filed a Preliminary Motion for Post-Conviction Relief and Preliminary Memorandum of Law in support thereof, and the SJC remanded the motion to the Superior Court. (Document No: 249, 250). Following a June 9, 2016 hearing on the discovery

motion in Superior Court, Attorney Barter prepared a proposed order in the form that had been suggested by the Superior Court and sent it to the Plymouth County District Attorney for review and comments on June 11, 2016. When Attorney Barter received no revisions to the draft Order, he sent additional emails to ADA McKenna on June 22, 2016; July 13, 2016; and July 15, 2016. Attorney Barter reported that he received no proposed revisions in response to his three letters. ADA McKenna forwarded one additional page of email correspondence and a 2-page Massachusetts State Police report regarding items held at the East Bridgewater Police Department, along with 8 photocopied pages of those items, on August 3, 2016 (Document No: 254, 9/26/16).

Following yet another unanswered email from defense counsel on August 19, 2016, stating that the Proposed Order would be sent to the Court if no comments or revisions were proposed, on September 7, 2016, the Superior Court ordered the Commonwealth to provide its responses to Frances's counsel by September 26, 2016. On September 26, 2016, in partial compliance with the Court's discovery orders, the Commonwealth produced an unredacted set of the documents that were filed in the *Goncalves* case, and fifty-six pages of emails.

ADA McKenna did not provide full responses or certificates of compliance by the September 26, 2016, deadline. Instead she

sent what Attorney Barter described as "an assortment of documents that were partially responsive to some of the provisions of the Court's Order" (See Paper #254, above).

On or about September 26, 2016, the PCDAO filed a Motion to Compel and for Briefing Schedule (No: 254) and a Motion for Additional Time, Reconsideration, and Clarification of Discovery Order (No: 255). In her Motion for Additional Time, ADA McKenna appears to itemize the discovery provided by the Commonwealth up until that time. It appears that after the initial production of 37 emails in late February or early March, 2015, ADA McKenna had produced a total of 11 additional pages of discovery as of August 3, 2016, plus some additional responsive documents on September 26, 2016 (Paper nos. 254 & 255). At a status hearing on October 18, 2016, the Commonwealth advised the Court that it had complied with the discovery order.

On December 2, 2016, defense counsel sent a detailed letter to the PCDAO itemizing the Commonwealth's specific and verifiable failures to comply with the Court's Order, and he was again met with no response from ADA McKenna. Defense counsel then filed a detailed Motion to Compel along with other motions relating to discovery and costs (No: 266).

At a hearing on May 31, 2017, ADA McKenna took the position that she could not understand the September 7, 2016, Superior Court Order directing the Commonwealth to provide specific

itemized discovery materials, because that Order was "unclear." The Court then ordered the Commonwealth to provide a written certificate of compliance that listed the items produced, or, if not, then attesting to the specific efforts that were made to locate, copy and produce such discovery.

The Commonwealth filed a certificate of compliance on June 30, 2017, that neither itemized what had been produced to that point nor detailed the steps taken to ensure complete production (Document No: 279).

The defendant again filed a Motion to Compel Discovery on November 6, 2017 (Document No: 280).

At an April 4, 2018, hearing on the Motion to Compel, the Commonwealth was asked by the Court if it had provided "any and all emails in the possession of your office."

THE COURT: Did you provide any and all -- you need to certify. Did you provide any and all emails in the possession of your office?

ADA McKENNA: If there was an email that had the name Choy in it, it was provided. If there was an email that had the name Kenny in it, and it wasn't Kenny Chesney, it was provided. (TR, 4.4.2018, 34).

ADA McKenna repeatedly stated at the April 4, 2018, hearing that a disclosure of documents had been made. ". . . [S]o what I did is I provided him the things that had to do with Karen Sullivan and John, whatever his name is [Bradley], in the Choy trial. He got all of those. . . so he got what was related to this trial" (TR, 4.4.2018, 11). "The two attorneys that worked

on the Choy case were Mr. Bradley and Ms. O'Sullivan and their emails were turned over years ago" (TR, 4.4.2018, 21). ADA McKenna, representing the Commonwealth, repeatedly took the position, and repeatedly told the Court, that the Commonwealth had turned over the responsive emails and documents.

Judge Giles allowed Frances's motion to compel on April 18, 2018, (No: 280, 281, 283, 284), and again ordered the Commonwealth to provide itemized categories of discovery, including but not limited to "all sexually and racially offensive communications written by ADA O'Sullivan and ADA Bradley from 2001 until the respective ends of their employment with the Plymouth County District Attorney's Office," to the defense. ADA McKenna again failed to forward discovery, prompting another letter from defense counsel requesting compliance. No record or docket entry can be found of a response or certificate of compliance from ADA McKenna between April 18, 2018, and March, 2019, when defense counsel's second Motion to Compel Compliance was filed. On June 5, 2018, nearly two years after the Court's original Order, ADA McKenna made a request² to

²Massachusetts State Police Lt. Michael Smith reported that he was asked by ADA McKenna to review emails in August and September, 2016, with the aid of the PCDAO Information Technology Department. In a police report dated September 28, 2016, Lt. Smith indicated that he searched 6 total key words ("Choy, Kenny Choy, Galibois, Oriental, Asian, Chinese") and produced what he deemed to be pertinent emails to ADA McKenna. This apparently resulted in a production of 56 pages of emails to appellate counsel on or about

the PCDAO Information Technology (IT) Department to conduct a search for emails that would be responsive to the Court Discovery Orders dated September 24, 2015, September 7, 2016, and April 18, 2018. On June 14, 2018, the PCDAO IT Department provided ADA McKenna the results of the email search in two CD/DVDs. In the spring 2018, ADA McKenna also requested and was provided with a complete copy of the Guidepost report prepared as a result of the independent review of the PCDAO's email servers. On April 25, 2018, ADA McKenna sent an email to defense counsel attaching a report dated June 22, 2015 from "Guidepost Solutions LLC", noting on the email "please find the portion of the report that the Office is releasing."

On or about March 11, 2019, the defense filed another in a series of motions to compel (See Docket No: 285). On March 28, 2019, the Supreme Judicial Court (Botsford, J., Special Master) ordered the Commonwealth to file a status report regarding discovery by April 1, 2019. A status hearing was held before Special Master Botsford on April 3, 2019. The Commonwealth was represented by ADA Janezic and ADA Teresa Anderson, who both had been newly appointed by PCDAO to replace prior counsel. Justice Botsford directed the Commonwealth comply with the outstanding discovery Orders, now nearly three

9/26/16. There is no record of any additional emails being produced by ADA McKenna after 9/26/16.

years old, as follows:

04/08/2019

#67 ORDER: This matter came before me on April 3, 2019 for a status conference with counsel for the defendant and the Commonwealth. It was brought to my attention that the Commonwealth has not yet complied with the April 2018 Orders of the Superior Court regarding post-conviction discovery as detailed below. It is therefore ORDERED that: (1) the Commonwealth shall disclose State Police laboratory testing reports, data, notes, policies, and practices relating to the examination of materials in connection with the fire at 102 Belair Street, Brockton, Massachusetts on April 17, 2003, to this court and the defendant on or before April 12, 2019; (2) the Commonwealth shall provide confirmation that there are no relevant written policies other than those attached to the motion for an order requiring disclosure of policies practices and procedures regarding notes taken by police officers and investigators to this court and the defendant on or before April 12, 2019; (3) the Commonwealth shall provide a copy of the internal independent review report to this court and the defendant on or before April 12, 2019; and (4) as to the September 7, 2016 Order of the Superior Court, the Commonwealth shall certify its responses to request B, C, D, and E more precisely; with regard to Request A, the Commonwealth shall provide all sexually and racially offensive communications written by ADA Karen O'Sullivan and ADA John Bradley from 2001 until the respective ends of their employment with Plymouth County District Attorney's Office to this court and the defendant on or before May 3, 2019.

In response to this Order, ADA Janezic filed the Commonwealth's first Certificate of Compliance on April 12, 2019, along with a CD containing approximately 750 individually Bates-stamped items of discovery. The Commonwealth filed and served its second set of certificates of compliance and substantive responses on May 8, 2019, with an additional 1700 individually Bates-stamped items of discovery, including approximately 1500 pages of emails, within one month of Justice Botsford's order.

In response to the Commonwealth's discovery productions in April and May, 2019, Frances's counsel noted that "the recent disclosures show that prior responses to discovery orders were

not only incomplete but inaccurate to the point of being misleading" (Status Letter to Special Master, 7.26.2019, 3).

In early April, 2019, after her termination from the PCDAO, ADA McKenna filed the two disks of emails she was provided by the IT Department in June, 2018, with the Supreme Judicial Court, rather than returning them to the PCDAO. Their contents were fortunately preserved and mirrored by the PCDAO IT Director, who was able to make a duplicate copy of both to ensure the Commonwealth's timely compliance with Special Master Botsford's April 3, 2019, discovery order. The disks filed with the Supreme Judicial Court were authenticated at a hearing before Special Master Botsford on August 2, 2019, and determined to contain a mirror image of the contents duplicated by the PDCAO IT Department. Those disks are now in the physical possession of the Clerk, Supreme Judicial Court, per Order entered on July 24, 2019.

Neither the District Attorney nor any other member of the PCDAO executive staff were aware that ADA McKenna had failed to comply with the previous Court Orders until March, 2019, when ADA McKenna emailed First Assistant Richard Savignano, Deputy First Assistant Christine Kiggen, ADA Michael Horan, and Administrative Assistant Kendra Salvatore demanding the "full report" prepared by Guidepost following the review of Respondents' email servers.

In response to her email, First Assistant Savignano advised ADA McKenna on March 14, 2019, that he had provided her with a copy of the Guidepost report in 2018. ADA Savignano further advised ADA McKenna that he was "not in a position to provide further explanation or insight as to what Guidepost did, generated, or provided," as he was not with the office at the time the report was generated. As such, ADA Savignano requested that ADA McKenna communicate with Deputy First Assistant Kiggen regarding this issue.

On March 14, 2019, Deputy First Assistant Kiggen indicated to ADA McKenna that she shared First Assistant Savignano's lack of knowledge with respect to the Choy case and the documents ADA McKenna requested. ADA Kiggen further advised ADA McKenna, ADA Savignano, and Salvatore that she was out of the office on trial and would be unavailable to assist them on this matter.

On March 14, 2019, ADA McKenna was once again provided with the full copy of the five (5) page report. ADA McKenna sent that Report to defense counsel on March 14, 2019 with an email stating, "There is an attachment to this email. I will not be certifying this part of the discovery." With respect to the email attachments that underpin the report, there is no record that ADA McKenna ever attempted to obtain them. The emails referenced by Guidepost were produced to the Defendant's appellate counsel by ADA Janezic and ADA Anderson on April 12,

2019.

On March 14, 2019, immediately following ADA Janezic's assignment to support ADA McKenna on the Choy case, ADA McKenna abruptly stated, "Given the way this has developed, I will be unable to certify the discovery. Please let me know who I should give the file to for reassignment."

At the time, ADA McKenna was the only appellate attorney assigned to the Choy matter, and she had been working on the case since 2015. ADA McKenna was the only person in the PCDAO with the requisite knowledge of the status of the case, the various discovery motions and Court Orders that had been filed and issued between 2015 and 2019, and what the PCDAO had provided to counsel for Frances in response to said Orders.

Prior Proceedings on Motion for Post-conviction Relief

On January 6, 2020, Frances filed and served her Motion for Post-conviction Relief together with supporting affidavits, Memorandum of Law, a two-volume Record Appendix, and PDF versions of trial and post-conviction hearing transcripts. On January 9, 2020, Frances filed and served a Superseding Motion for Post-conviction Relief.³ That motion was remanded to the Superior Court by the SJC for disposition (Document No: 301). On March 18,

³ Frances filed a Preliminary Motion for Post-Conviction Relief and Preliminary Memorandum in Support thereof on June 6, 2016. ADA McKenna never filed a response to any of the arguments raised in that motion or the 172 page supporting memorandum.

2020, Frances filed and served her Motion to Stay Further Execution of Sentence Pending Appeal and To Be Released on Terms of Recognizance or Bail, with Exhibits A-D (Document No: 304). On March 23, 2020 Frances filed and served her Motion for Expedited Hearing and Consideration for her Motion to Stay Further Execution of Sentence and for Release on Terms of Recognizance or Bail with supporting affidavit (Document No: 305). On April 7, 2020 Frances filed and served her Emergency COVID-19 Supplement to her Pending Motion to Stay Further Execution of Sentence and for Release on Terms of Recognizance or Bail Pending Appeal with Exhibits (Document No: 308). April 13, 2020, the Commonwealth filed and served its Motion for an Expedited Evidentiary Hearing and Non-Opposition to Defendant's Motion For Stay. On April 13, 2020, this Court granted Frances's unopposed Motion to Stay Further Execution of Sentence Pending Appeal and released her on terms of recognizance (Documents No: 309, 310).

FACTUAL BACKGROUND

1. The Fire at 102 Belair St.

On April 17, 2003 at 4:50 a.m. 17-year-old Frances Choy called 911 to report a fire at the Choy home located at 102 Belair St. in Brockton.⁴ Living in the home at the time were

⁴ Two 911 calls were recorded but only the tape of the second call was produced to the defense and is part of the record in this case. The first 911 call was not produced to the defense, and though the PCDAO has recently sought to find that recording it cannot currently be located.

Jimmy and Anne Choy; their daughter Frances; and Kenneth Choy, Jimmy Choy's 16-year-old grandson from a prior relationship in Hong Kong, who came from Hong Kong to live with the Choy family in 2000 following the death of his father -- Jimmy Choy's son -- by suicide.

The Brockton Fire Department responded to the Choy home. Firefighters observed smoke coming out of the second-floor windows (T3, 5.3.11, 136). Frances told both Deputy Chief Gustin and Firefighter Dion that "her parents were still in the house," (T3, 5.3.11, 122, 195-96), and she directed them to the location of her parents' second-floor bedroom (T3, 5.3.11, 195-96; TKC, 1.28.08, 55).

Firefighters used ladders to rescue Frances and Kenneth from their respective second-floor bedroom windows. When Deputy Chief Gustin went inside with the extinguishment team he noticed a "glow around the staircase and to the left of the staircase," including the back of a couch that was on fire (T3, 5.3.2011, 128). Furthermore, he observed a fire "travelling across just to the left of the cellar door" (T3, 5.3.2011, 129). Firefighter Nardelli proceeded up the six stairs, with flames on both sides, to the second floor (T3, 5.3.2011, 155-157). After hearing on his

The tape of the second 911 call, which was not played for the jury or introduced into evidence in the third trial, records Frances twice advising the 911 operator that her parents and Kenneth were also in the house. Frances can also be heard coughing, crying, and calling out to first responders for help.

radio that Kenneth and Frances had already been rescued, Firefighter Nardelli, crawling because of the "significant heat," headed to the master bedroom where he noted that the bedroom door felt "crispy" (T3, 5.3.2011, 157-59, 177). Furthermore, the second floor had a significant amount of "very dark acrid smoke" (T3, 5.3.2011, 160).

Inside the master bedroom, Firefighter Nardelli first carried a woman, later identified as Anne Choy, outside where she was rushed to the hospital and subsequently died of smoke and soot inhalation and burn injuries (T3, 5.3.2011, 162, 202; T3, 5.9.2011, 107; T3, 5.10.2011, 9). Firefighter Nardelli returned to the master bedroom and carried another person, later identified as Jimmy Choy, outside where CPR was administered and he was transported to the hospital (T3, 5.3.2011, 164-65, 200-01).

Jimmy Choy was subsequently transported to Brigham and Women's Hospital in Boston where he died of smoke and soot inhalation with burn injuries (T3, 5.9.2011, 149; T3, 5.10.2011, 10, 168).

2. The Cause and Origin of Fire.

Trooper Jeanne Stewart, who was assigned to the Massachusetts State Police Fire and Explosion Investigation Section, arrived at 102 Belair Street at 6:20 a.m. while Brockton firefighters were still on scene (T3, 5.3.2011, 220, 224). Her

primary role was to determine the origin and cause of the fire (T3, 5.3.2011, 225). Based on her training and observations, Trooper Stewart concluded as follows:

My opinion is that the fire originated at the lower right-hand corner of the mattress in the cellar, the center mattress, the one that was stacked in between the box spring and the outer mattress that extended upward and outward from the sandwiched mattress, extended--burned through the wall paneling into the cold air return chase and ignited the back of the couch. And the cause of the incendiary was the result of a deliberate act. (T3, 5.9.2011, 51).

This, Trooper Stewart concluded, caused the back of the couch to burn, producing heat, soot and smoke going up to the second floor (T3, 5.5.2011, 51, 68).

In addition, while Trooper Stewart and firefighters smelled a gasoline smell in various areas of the house, and Trooper Stewart was told "at some point during the course of this investigation that there were containers of gasoline in various locations within the house," (T3, 5.5.2011, 66), Trooper Stewart's training and observations led her to conclude that the fire did not involve the use of accelerants (T3, 5.5.2011, 53). She explained that if an accelerant were used, "You would see more damage than what we saw at this scene," and that "if an accelerant were used on a couch, you would see more significant damage than we had found on that couch. The cushions were still intact. And the fire damage was rather natural coming from the back to the front" (T3, 5.5.2011, 51-52). The couch cushions made of "a velvet type

material [were] undamaged on the front of the couch" (T3, 5.5.2011, 33-34). Trooper Stewart observed "that the frame was more burned on the back side of the couch than on the front side of the couch," that the bottom of the couch was "clean," and that the wood there was "unburned" (T3, 5.5.2011, 34-35). She also observed part of an afghan or a blanket that was on the couch that was "still undamaged" (T3, 5.5.2011, 34). She did not smell gasoline near the couch (T3, 5.9.2011, 94). "[T]he accelerant detection K-9 did not alert" to "the couch," "the cushions on the couch," or "the afghan" (T3, 5.9.2011, 111). It "was not [her] belief that there was any liquid or accelerant used on any of these items" (T3, 5.9.2011, 111). Trooper Stewart also pointed to the fact that there was "no fire damage to the wooden stairs" leading from the living room to the second floor as being inconsistent with the presence of any gasoline on those stairs (T3, 5.5.2011, 69; T3, 5.9.2011, 90).

The "bulk of the exterior damage" surrounded Jimmy and Anne Choy's bedroom window (T3, 5.3.2011, 227, 231). Inside on the second floor where the three bedrooms were located, Trooper Stewart observed a "significant amount of heat, smoke and soot damage" in the bedroom of Jimmy and Anne Choy (T3, 5.3.2011, 238; T3, 5.5.2011, 23). Given that there was "much more damage in this [master bedroom] room than we have seen in any of the other rooms," Trooper Stewart concluded that the master bedroom door

was open during the fire and the other bedroom doors were closed (T3, 5.5.2011, 30).

Trooper Stewart observed that Frances's bedroom was located at the top of the stairs leading from the living room to the second floor (T3, 5.9.2011, 100). Frances's room abutted and shared a common wall with her parents' bedroom (T3, 5.9.2011, 100). Trooper Stewart observed "heat, smoke, and soot condensation throughout [Frances's] room" (T3, 5.5.2011, 21), and she observed "more soot, smoke and heat damage in [Frances's] room" than there was "down the hall" in Kenneth's room (T3, 5.5.2011, 237-38). On cross-examination, Trooper Stewart testified that she observed "a rolled towel . . . near the threshold separating the hallway from Kenneth Choy's room," and that Kenneth Choy "may have" been trying to prevent smoke from coming in his room by putting the rolled towel there" (T3, 5.9.2011, 53-55). Trooper Warmington also testified that there was a rolled towel at the threshold of Kenneth's bedroom door that he "inferred was used to prevent soot, smoke, and heat from getting into Kenneth Choy's room" (T3, 5.9.2011, 189). No rolled towel was found at Frances's door (T3, 5.9.2011, 189). Trooper Stewart also observed a refillable lighter and a can of lighter fluid in Kenneth's room (T3, 5.9.2011, 97-98). No ignitable fluid or matches were found in Frances's room (T3, 5.9.2011, 190). Frances's computer was in her room at the time of the fire

(T3, 5.9.2011, 95). Kenneth's computer, which he testified his mother bought for him for \$3,000 brand new in July of 2002, (T3, 5.5.2011, 149), was not found in his room or at the Choy home at the time of the fire.

3. Kenneth Choy's prior immunized testimony from the second trial read to the jury in the third trial.

Kenneth Choy's father was Jimmy Choy's son from a prior relationship in Hong Kong. Following the death of Kenneth's father by suicide, in March of 2000 Kenneth's mother brought him from Hong Kong to Brockton to live with Jimmy Choy (T3, 5.5.2011, 81-83, 127). Kenneth had never met Jimmy, Anne, or Frances Choy before (T3, 5.5.2011, 83). He was not related to Anne Choy (T3, 5.5.2011, 83). His mother left him with the Choy family, and she returned to Hong Kong, for "financial reasons" (T3, 5.5.2011, 84).⁵

Kenneth attended Brockton High School (T3, 5.5.2011, 85). Frances helped Kenneth "a lot" including teaching him English, showing him how to dress, and driving him to school (T3, 5.5.2011, 87).

Kenneth testified on direct examination that his relationship with his grandfather during that time was "not well,

⁵ Kenneth testified that his mother left him with his grandfather for financial reasons, because "financially she couldn't support me" and "financially he would take care of me better" (T3, 5.5.2011, 84).

but good. Very good" (T3, 5.5.2011, 86). He testified he did not have any serious problems with his grandfather (T3, 5.5.2011, 86). Kenneth testified that Jimmy took him in, fed him, clothed him, schooled him (T3, 5.5.2011, 148). However on cross-examination Kenneth admitted he got along with his grandfather "not very well....[pretty good]" (T3, 5.5.2011, 145). Jimmy Choy had a "big temper[]" and "was angry at everybody" (T3, 5.5.2011, 155). Kenneth admitted that Jimmy was verbally and physically abusive to him.⁶ One time after Jimmy hit Kenneth, he "ran away for one day" (T3, 5.5.2011, 86-87, 145-47, 153, 156-57). Kenneth often told people that his grandfather was mean to him" (T3, 5.5.2011, 156). Kenneth testified that Jimmy treated Frances much better than him (T3, 5.5.2011, 157).

Kenneth testified that he got along "[v]ery good" with Anne Choy," (T3, 5.5.2011, 86-87), but he admitted on cross-examination that less than, or around a month, before the fire, Anne accused Kenneth of stealing her jewelry (T3, 5.5.2011, 155). However on re-direct he testified that Anne did not ever accuse him of taking it, and that she had misplaced money before (T3, 5.5.2011, 165-66).

Kenneth testified that his grandfather bought him clothes, sent him to school, and paid for "everything," (T3, 5.5.2011, 87),

⁶ Kenneth told Trooper Warmington that his grandfather, Jimmy, would beat him "if he didn't take out the garbage when he was supposed to" (TKC, 1.30.2008, 53)

but on cross-examination he admitted that his mother sent money "for [his] expense ... all the time" (T3, 5.5.2011, 158). He admitted that on the Chinese New Year, Jimmy and Anne would give him substantially less money than they gave Frances, and he didn't like that because he wanted more money to buy games (T3, 5.5.2011, 148). Despite the fact that he would "stay up in [his] room a lot of times playing video games," (T3, 5.5.2011, 151-52), he testified that he did not know where his computer was after the fire and did not care about it (T3, 5.5.2011, 162).

Kenneth testified that the relationship between Frances and her parents was "very good," and that there were "no problems" (T3, 5.5.2011, 88). They bought her a computer and a new car (T3, 5.5.2011, 148-50). Kenneth also testified that in the summer of 2002, Jimmy forbade Frances from seeing her boyfriend William Som (T3, 5.5.2011, 88-90, 147-50), and that her father slapped her once about two months before the fire because he had "caught the boyfriend at the house" (T3, 5.5.2011, 157).

Kenneth testified that a month before the fire at 102 Belair, Frances told him "[s]he want better parents. Just mad about something" (T3, 5.5.2011, 90). He testified that it was "because of the boyfriend situation" -- "[t]he parents just not understanding about the relationship." (T3, 5.5.2011, 90). He testified that Frances told him that she wanted "freedom" and wanted to live "somewhere else" because she and her boyfriend

"want to be together." (T3, 5.5.2011, 90). Kenneth testified that in that same conversation Frances also said something "[a]bout staging a robbery so insurance company will, you know, replace the damage and stuff," but "that quickly went out the window" because "if you stage a robbery the insurance company is just gonna replace everything and she's not going to go anywhere. She still will stay at the house" (T3, 5.5.2011, 91). He testified that they also had a "quick conference" that night in his bedroom in which Frances mentioned "just staging a fire, about burning the property of the living room" (T3, 5.5.2011, 82-84, 90-92).⁷

Kenneth testified that "[p]robably a day or two after" that while Frances was driving him home from school, "[s]he talk about how to stage a fire and burn the furniture and the house and how to get money and so she can have freedom" (T3, 5.5.2011, 92). He said she talked about "using gasoline" (T3, 5.5.2011, 92).

Kenneth testified that he and Frances had another conversation discussing the "details" of "staging a fire" a week or two before the fire (T3, 5.5.2011, 92). On direct he testified

⁷ Kenneth did not tell Detective Warmington that Frances brought up staging a robbery or staging a fire in conversation in his bedroom a month before the fire. Rather he told Detective Warmington that Frances suggested staging a robbery in a different conversation "two to three weeks before the fire, so it would have been about a week after that initial conversation" (TKC, 1.30.2008, 66). Moreover, Kenneth told Detective Warmington that the first mention of staging a fire took place in a third conversation "two to three days after that [when] they were in the car coming home from school" (TKC, 1.30.2008, 66-68).

this conversation occurred in his bedroom, but on cross examination he testified it took place in Frances's room" (T3, 5.5.2011, 137-38). He testified that Frances explained to him "the exact steps that we gonna go through to and follow the steps in staging the fire," including saving four plastic "milk containers" or "water containers" so "later on we can put gasoline inside" (T3, 5.5.2011, 93). He testified that she said "[w]e gonna get the gasoline from the basement where we use it for the snowblower and lawnmower and ... put the gasoline inside the milk jugs" and "hid[] it behind the recycling bin" (T3, 5.5.2011, 94). He testified that Frances told him "steps to do it" and "we gonna put the gasoline [a]t first in the basement then lead to the living room and then the living room stairs to the bedroom and then douse it on some of the doors and the bathroom" (T3, 5.5.2011, 94).

Kenneth testified that Frances wanted him to take "notes in shorthand" and so he did (T3, 5.5.2011, 95). Kenneth identified and Commonwealth introduced into evidence as Exhibit 25 a single-page note Kenneth described as in his "shorthand writing" (T3, 5.5.2011, 96). Kenneth described the note's contents as "on top is staging the robbery and on the bottom was the fire [plan]" (T3, 5.5.2011, 96). Kenneth testified to the meaning of the bottom half of the shorthand note as follows: go to basement, pull gas to a water bottle; fire up basement; pull

gas over kitchen, living room, and stairs, make sure they connect; pull gas into grandpa's room and fire it up during pull;⁸ pull gas into Frances's room and fire it up during pull; fire up kitchen, living room, and stairs; pull gas on grandpa's doors; pour gas on Frances's door; throw the bottle on the floor; go to own room; take the bottles; pull gas on two rooms, his room and the bathroom; pull gas on the clothes and fire it up; pull gas on outside of [his] door. "And then that's the final plan" (T3, 5.5.2011, 129-37). Kenneth testified that while he was making this short hand note, "he was thinking that [Frances] was just taking it out on anger, like you know, she was just blowing some steam off" (T3, 5.5.2011, 94-95).

Kenneth testified that when he showed the "shorthand" note to Frances she "d[id] not understand" it (T3, 5.5.2011, 95). He testified that she "want me to write it on a detail plan (T3, 5.5.2011, 95). So I wrote it a detail plan and it wasn't right, and then it took a couple times until to write the detail plan that she agree on" (T3, 5.5.2011, 95).⁹

Kenneth identified, and the Commonwealth introduced into

⁸ Kenneth initially testified his note referenced "probably garden room, garden container," but then he admitted it referenced his grandfather's room instead (T3, 5.5.2011, 134).

⁹ Kenneth told Trooper Warmington that he wrote a third note which he discarded "in the shredder in his bedroom" (TKC, 1.30.2008, 70-71) ("He discarded the piece of paper with a plan written on it in the shredder in his bedroom.").

evidence as Exhibit 26, a "second long letter" Kenneth described as "the final detail plan that I wrote in my handwriting that she agree on that I understand what is the plan" (T3, 5.5.2011, 96-97). He wrote this longer note "[t]o explain to American speaking" (T3, 5.5.2011, 138).

The note was on stationary printed "A Note from Kenneth Choy" (T3, 5.5.2011, 137-38). To the left of line 1 on the note is the writing "3:30 a.m." Kenneth testified to some of the content of this "second, long letter" as follows: 1) go to his "own room, get the gas ready, pull bottle, put it near TV; 2) go to basement, pull (pour) gas into three bottle; 3) put two near stair and one at basement; 4) fire up basement; 5) pull gas into two room and fire it up; 6) fire living room and kitchen; 7)back to room; 8) change clothes; 9) fire up clothes in hallway and fire up hallway; 10)fire up bathroom and go back to room" (T3, 5.5.2011, 131-33).

Kenneth testified that after he showed these two handwritten notes to Frances he carried them in his school notebook for a while and they ended up on his "nightstand or desktop, probably" (T3, 5.5.2011, 97). Kenneth testified "I didn't think it was gonna happen" (T3, 5.5.2011, 97).

State police investigators found both of Kenneth's notes on the floor underneath and next to Kenneth's bed when they moved his bed away from the wall while searching his bedroom (T3,

5.10.2011, 21-24). Both had only his fingerprints on them (T3, 5.10.2011, 17, 22-23). Frances's fingerprints were not on either note (T3, 5.10.2011, 17).

Exhibit 26 -- the note that Kenneth testified was the "final detailed plan" approved by Frances -- included "pull gas to a water bottle," which Kenneth admitted a native English speaker like Frances would not use (T3, 5.5.2011, 131). The note instructed 1) to get the gas ready in Kenneth's own room and "put it near TV,"; 2) to "go to the basement, pull gas into three bottle"; 3) to "put two near the stair and one at basement"; 4) "fire up basement,"; 5) "pull gas into two room and fire it up,"; 6) "fire living room and kitchen,"; 7) back to room,; 8) "change clothes", "fire up clothes at hallway and fire up hallway" "pull the gas onto grandpa's door," "pour gas onto Frances' door," "pull gas on outside of my door" (T3, 5.5.2011, 131-37).

Kenneth testified that "days" before the fire, he and Frances filled two water jugs and two plastic "twenty ounce Sprite Bottles" with gasoline (T3, 5.5.2011, 97-98). He testified he got the gas from "in the house.... It was meant for the snowblower and the lawnmower" (T3, 5.5.2011, 98). Kenneth testified that while "[i]t was supposed to be four milk or water jugs, [he] only end up saving two water containers, the gallon jugs" and

two plastic "twenty ounce Sprite bottles" (T3, 5.5.2011, 98).¹⁰

On the night of the fire, Kenneth testified he was awakened by a noise (T3, 5.5.2011, 97). After seeing no one in the bathroom or Frances's room, he went to the basement where he saw Frances holding two plastic gallon jugs of gasoline he testified he and Frances had filled "days ago" (T3, 5.5.2011, 98).¹¹

Kenneth testified that he asked Frances what she was doing and that she told him "tonight is the night we gonna do it" (T3, 5.5.2011, 99). Kenneth testified that he told her "this is not funny. It's not a joke," and she replied "I'm doing it" (T3, 5.5.2011, 99).¹²

Kenneth testified that Frances "gave [him] the two Sprite bottles of gasoline" and "[he] was supposed to lit the basement on fire while she go upstairs to the living room and kitchen and bathroom and lit those places on fire" (T3, 5.5.2011, 99-100). After telling Kenneth to use the two Sprite bottles to spread

¹⁰ Kenneth told Trooper Warmington that these activities occurred the very next night, rather than days before. He told Trooper Warmington "that Frances took the plastic gas container from the shelf" (TKC, 1.30.2008, 72). He stated that she filled the "milk containers with gasoline and that he filled the two Sprite bottles with gasoline" (TKC, 1.30.2008, 71-72).

¹¹ Kenneth told Trooper Warmington Frances was holding "a plastic milk container, the one filled with gasoline, she had it in her hand" (TKC, 1.30.2008, 73).

¹² Kenneth told Trooper Warmington that he asked Frances "What do you want me to do?" (TKC, 1.30.2008, 73).

gasoline around the basement and light the basement on fire,¹³ Frances went upstairs with the two gallon jugs of gasoline (T3, 5.5.2011, 100).

Kenneth testified that he had "no intention of doing it," so he placed the two Sprite bottles on the basement steps and went back upstairs to see Frances (T3, 5.5.2011, 100). He believed he placed the Sprite bottles on different stairs, but he did not recall (T3, 5.5.2011, 101).¹⁴

Kenneth testified that he saw Frances in the living room holding "one jug ... not two" (T3, 5.5.2011, 101). He testified that the living room couch, the stairs from the living room to the second floor bedrooms, and the door of Jimmy and Anne's room were all wet with gasoline:

I saw the gasoline. It was on the stairs from the living room to the bedrooms. I see it was wet, so I probably was stepping on it. I saw the couch was wet. Where her parents, where Jimmy and Anne's door was set. The door was wet. That's what I saw. (T3, 5.5.2011, 102).

On cross-examination Kenneth testified that while he saw Frances with a water jug, he could not tell "if it was full or half full" (T3, 5.5.2011, 141). He testified, "[i]t might be

¹³ Trooper Warmington testified in Kenneth's trial that "Kenneth told me that Frances told him that -- to take those two Sprite bottles, put them on the same step on the basement, and to light up the basement" (TKC, 1.30.2008, 73-74).

¹⁴ Trooper Warmington testified that Kenneth told him that he "did take the two plastic Sprite bottles, and he put them on the same step" (TKC, 1.30.2008, 74).

water, it might be gasoline, I cannot tell you that" (T3, 5.5.2011, 141). He testified that "I see the gasoline being poured -- I know it's on the stairs leading to the living room stairs and the sofa" (T3, 5.5.2011, 141). He testified "[s]he wasn't exactly pouring, like dumping it, but she had the jug and it was soaked everywhere... Yes on the couch and on the -- mainly on the floor" (T3, 5.5.2011, 143). He agreed "[i]t was soaked on the couch, soaked on the floor" (T3, 5.5.2011, 143).

Kenneth testified that the door of Jimmy and Anne's bedroom, which he testified was wet with gasoline, was shut (T3, 5.5.2011, 102). After telling Frances he did not light the basement on fire, she "got very angry" at Kenneth, told him he was dumb and "just ... go to your room" (T3, 5.5.2011, 101). Kenneth testified that he "went into [his] bathroom, (T3, 5.5.2011, 102), or that he "immediately" went into his bedroom and locked the door (T3, 5.5.2011, 101). While in his room he heard "more water sound, like she pouring gasoline. Like a water sound. Like a pouring gasoline sound. And then I hear a whoosh sound, like fire starting. You know, like you light the match and something just light on fire very quick or you light something very quick" (T3, 5.5.2011, 102-03). He testified that he did not know where that sound was coming from (T3, 5.5.2011,

103).¹⁵ The next thing Kenneth heard was Anne Choy screaming Frances's name and that "the house is on fire" (T3, 5.5.2011, 103). He heard Frances and was "sure she's on the cell phone with the fire department or the police" (T3, 5.5.2011, 105).

Kenneth testified that he had not placed anything under the door to prevent the smoke from coming into his bedroom (T3, 5.5.2011, 106). He testified "[t]hat's what's in the script after I got arrested they see the rolled towel," but claimed "[i]t's probably just a towel on the floor 'cause I throw my clothes everywhere on the floor" (T3, 5.5.2011, 144). He testified "[i]t's not exactly rolled. It's just a towel there . . . I did not roll it" (T3, 5.5.2011, 145).

He testified that he opened his door and a cloud of black smoke came into his room (T3, 5.5.2011, 103). He opened up a window on the driveway side of his room because his other bedroom window was blocked by his "computer desk" (T3, 5.5.2011, 104).

Kenneth testified that after a firefighter rescued Frances from her window they were together on the driveway and then in an ambulance together (T3, 5.5.2011, 106-107). Frances told Kenneth not to say anything to anybody (T3, 5.5.2011, 107, 111).

¹⁵ Trooper Warmington reported that "Kenneth Choy stated that Frances Choy lit the gasoline on fire in the living room and also outside her parents' bedroom door after pouring gasoline on the outside surface of the door." Bates 2471. Handwritten notes of the trial prosecutors provided to defense counsel in post-conviction discovery contain the notation that Kenneth told them he "Saw F pouring gas in living room." Bates 3660.

Following their release from Good Samaritan Hospital, Kenneth and Frances went to "Frances's relative's house to take a shower because we were covered in smoke" (T3, 5.5.2011, 108). Kenneth, Frances, her relatives, and William Som all returned to 102 Belair St. where Frances spoke with "some police detective or fireman" (T3, 5.5.2011, 109). Kenneth understood that Frances' cousin and aunt were concerned about the property because the house would have been unprotected (T3, 5.5.2011, 118). Eventually they "were saying we have to go see Jimmy because he's in the hospital, that's the most important thing right now" (T3, 5.5.2011, 109). Kenneth rode to Brigham & Women's Hospital with Frances's relatives and her boyfriend while "Frances was in the police cruiser to the hospital" (T3, 5.5.2011, 109). Later William Som drove Kenneth and Frances to his house in Lynn until "[t]he state police called [Frances] and told her that you can come get your wallet," and William Som drove them back to Brockton (T3, 5.5.2011, 109).

When they got to 102 Belair St, the police separated Frances and Kenneth and took them in different police cars to the Brockton Police Station (T3, 5.5.2011, 111). Kenneth waited for "probably an hour" until Nhan Chiang arrived to serve as his legal guardian because he was 16 years old (T3, 5.5.2011, 112). The police confronted him with the two handwritten notes, Exhibits 25 and 26 (T3, 5.5.2011, 113). Kenneth lied to the

police by telling them that list he carried to school with him was a "chain letter" that was "given to [him] by a black guy" whose name he didn't know" (T3, 5.5.2011, 119-20). He "just made it up" (T3, 5.5.2011, 120). Eventually he "gave up" and gave police a statement (T3, 5.5.2011, 123).

Kenneth admitted that he kept lighters and lighter fluid in his bedroom which he testified he used to light incense for respect for his deceased father (T3, 5.5.2011, 113-114). He testified that because Jimmy had been a heavy smoker before he quit smoking, "we still have lighters around everywhere" (T3, 5.5.2011, 114-115).

Kenneth maintained that he thought Frances "was just blowing steam" and that he "did not know that the plan was going to get carried out" (T3, 5.5.2011, 115). He admitted he had pending cases in the Brockton District Court where he was charged with possession of heroin and possession with intent to sell heroin, and that a third charge of possession of heroin in a school zone was dismissed, but he testified that he did not have any deals with the PCDAO about his pending case in exchange for his testimony (T3, 5.5.2011, 116, 124, 126).

When asked if he had spoken with ADA O'Sullivan about his testimony Kenneth testified "I did not talk to Ms. O'Sullivan at all" (T3, 5.5.2011, 121). He testified that "Mr. Bradley did talk to me about me coming today and he did give me the immunity

papers to sign" and that "the district attorney will decide if I'm lying or not and it will press charges against me or not" (T3, 5.5.2011, 121-122).

4. Investigation of Frances Choy by Brockton Police
Detective Eric Clark and State Trooper Scott Warmington.

Trooper Warmington and Detective Clark first questioned Frances Choy around 8:20 a.m. when they found her receiving oxygen in a hospital bed at Good Samaritan Hospital (T3, 5.9.2011, 125-27). Trooper Warmington described Frances to be "calm, unemotional" and he had no problem understanding her (T3, 5.9.2011, 139). After questioning Frances and Kenneth separately, Trooper Warmington collected their clothing, returned to 102 Belair St, and gave the clothing to Trooper Peters for canine accelerant detection (T3, 5.9.2011, 153, 242). The dog alerted to Frances's sweatpants (T3, 5.9.2011, 242).

At around 10:15 a.m. Trooper Warmington saw Frances with her relatives and her boyfriend standing across the street from 102 Belair St. (T3, 5.9.2011, 146-47). She agreed to speak with him and Detective Clark in Trooper Warmington's unmarked cruiser (T3, 5.9.2011, 148). Trooper Warmington testified that when asked why she came back to the scene, Frances said that she was concerned about the house and her personal property (T3, 5.9.2011, 149). In response to police comments about insurance, Frances answered that she was the sole beneficiary on a MetLife insurance policy and it was in excess of \$100,000, with \$36,000 owed on the

mortgage (T3, 5.9.2011, 150-51). Frances denied knowing how a container with a gas odor was found in her parents' bedroom or how an accelerant was found on her pants (T3, 5.9.2011, 151-52).

Trooper Warmington and Detective Clark questioned Frances in the car for an hour. When family members attempted to interrupt to take Frances to the hospital to see her dying father, Trooper Warmington told Frances that "if we could drive her to the hospital so we could speak to her []this would eliminate the need for us to speak with her later" (GJ, 6.13.2003, 19). As a result, rather than riding with her family, Trooper Warmington and Detective Clark drove Frances to Brigham and Women's Hospital, continuing to question her during the 30-40 minute drive from Brockton to Boston (T3, 5.9.2011, 155).

Trooper Warmington testified that in response to their questions Frances stated that her "family responsibilities" affected her relationship with her boyfriend and that her father "forbid her from seeing him [boyfriend]" (T3, 5.9.2011, 156-57). She further stated that "her mother and father were a burden . . . she always felt that she was under the control of her father. And that was the primary reason why she was not going to go away to college, because she had to care for her parents" (T3, 5.9.2011, 158). Frances acknowledged that she was responsible for the indoor chores, while Kenneth did the outside chores like lawn mowing and snow blowing (T3, 5.9.2011, 161). Eventually, Trooper

Warmington felt that Frances "tried to divert the conversation towards the end by asking questions to try to move us off that topic . . ." (T3, 5.9.2011, 163).

After witnessing her father's death with family members at Brigham and Women's Hospital, Frances's went to her boyfriend's parent's house in Lynn, where Kenneth joined them (T3, 5.5.2011, 110-11). Trooper Warmington called Frances at 5:55PM telling her that he had some of her property and wanted her to come view it (T3, 5.9.2011, 165-66). When she indicated she did not want to come to the house and that she was two hours away, Trooper Warmington told her "that we were going to board up the house and it would be kind of dangerous for her to come later" (T3, 5.9.2011, 166).¹⁶ As a result, Frances's boyfriend drove her and Kenneth back to the Choy house at 7:30 PM (T3, 5.9.2011, 166-67). Trooper Warmington testified that he walked over to Frances and offered his condolences to her about the death of her mother and father, and that Frances asked "[h]ow's my stuff?" (T3, 5.9.2011, 167). Trooper Warmington told her that "that we had taken some articles out but we were headed back to the police station, we wanted her to come back to the police

¹⁶ Trooper Warmington testified at Kenneth's trial that the reason he called Frances and told her "we had some items back at the police station that -- from the home that they may want to look at, and suggested we go back to the police station" is that he "wanted to get them back to the police station" for purposes of an interview (TKC, 1.30.2008, 56).

station to view it" (T3, 5.9.2011, 167). Trooper Warmington then drove Frances to the Brockton police station (T3, 5.9.2011, 167).

Once at the Brockton police station, Trooper Warmington did not ask Frances to view any articles police had removed from her home. Instead he brought Frances to a room off the Brockton Police Detective's main office where officers advised her of her rights per Miranda and interrogated her for the next 3 1/2 hours (T3, 5.10.2011, 39, 41, 57). Trooper Warmington and Detective Clark participated in questioning Frances (T3, 5.10.2011, 39). This custodial interrogation began at about 7:45PM and ended after 11:00PM (T3, 5.10.2011, 52-53).

Detective Clark is the only witness who testified about the custodial interrogation of Frances at the Brockton police station. He testified that throughout the questioning, Frances repeatedly denied knowing the cause of the fire that killed her parents and denied any involvement in panning or setting the fire (T3, 5.10.2011, 54, 159). Detectives Clark and Warmington asked her more than once "how she could explain the presence of a gas substance on her pants," (T3, 5.10.2011, 43-45), and she answered that "she didn't know" (T3, 5.10,2011, 44). When they continued to ask Frances that question even after her repeated denials, Frances speculated that "perhaps the smoke from the house got a smell on her pants" or when she "stepped in some

sticky substances" when she got something for her mother downstairs, or "perhaps something got on them" when "she left the pants on the washing machine sometimes downstairs" (T3, 5.10.2011, 44). Frances denied coming in contact with the gasoline container in the basement of the Choy home (T3, 5.10.2011, 47).

During part of this time, Kenneth, accompanied by Frances's cousin Nhan Chiang, because he was 16 years old at the time, was questioned by Troopers Warmington, Lilly, and Dolan in a separate room for about two hours (T3, 5.9.2011, 168; 5.10.2011, 147). Kenneth admitted writing the two notes found in his room (TKC, 1.30.2008, 64). At first Kenneth told police "a black guy from school had given him a plan to set fires and told him if he didn't rewrite the plan and distribute that plan to 10 friends, he would have bad luck" (TKC, 1.30.2008, 64-65). Eventually he stated "we didn't want to kill anyone" (TKC, 1.30.2008, 65). When investigators asked "who else was responsible for setting and planning this fire with him, Kenny said 'Frances'" (TKC, 1.30.2008, 65).

When officers confronted Frances with Kenneth Choy's statements to police alleging she participated in the crime, Frances responded "that she doesn't know what he's talking about" and that "maybe he put stuff on her pants" (Bates 02574). At that point, "she got agitated and said, I don't know, It feels

like a ghost is doing this," and she repeated that "she had nothing to do with it" (T3, 5.10.2011, 47-48). When officers brought Kenneth into the room where they were interrogating Frances in order to confront her with him, Frances continued to deny any involvement (Bates 02457; 02574). Trooper Warmington asked Frances's cousin Nhan Chiang to urge Frances to tell them the truth, and Frances continued to deny their accusations (T3, 5.10.2011, 158-59). The officers questioned Frances about Kenneth's accusations against her for "probably the last hour" of her custodial interrogation (T3, 5.10.2011, 80).

Detective Clark testified that Frances "didn't want to go to the booking area" (T3, 5.10.2011, 78). When he prepared Frances to be taken to the booking area, "she did not want to go. She said she wanted to talk some more" (T3, 5.10.2011, 48). He testified that "then she again got a bit agitated and then she stated, 'Fine, I planned it,' [but] shortly after that she stated that she did not, that she had nothing to do with it again" (T3, 5.10.2011, 48). She stated that "maybe it's Kenneth trying to put her name into it" (T3, 5.10.2011, 48). Kenneth "wanted her family's money . . . he wanted her family, her parents, dead" (T3, 5.10.2011, 48).

Around 11:00 PM, police took Frances to a holding area in the Brockton Police Department and handcuffed her to a railing (T3, 5.10.2011, 75). Detective Clark testified that he had a

further conversation with Frances after she indicated she wanted to talk while she was handcuffed to the railing (T3, 5.10.2011, 48-49, 53). He testified that the conversation lasted "probably a minute" (T3, 5.10.2011, 67). He testified that Frances told him "she was involved" and had "got[ten] up at 3:00 or 4:00 in the morning, went downstairs, filled the cups with fuel . . placed the cups on the stairway from the basement up to the living room. And she indicated she had used milk and soda containers" that she got from downstairs (T3, 5.10.2011, 49, 75). She "stated she put one on each stair from the basement ... to the living room" (T3, 5.10.2011, 64). In response to questions from ADA O'Sullivan, Detective Clark testified that Frances said she obtained the fuel "from downstairs" (T3, 5.10.2011, 50). After saying this, Frances stated "she was lying and she had nothing to do with it" (T3, 5.10.2011, 50).

On cross-examination Detective Clark agreed that Frances "stated [the cups] were filled from the gas container outside," (T3, 5.10.2011, 64), but then after he admitted "there were no gas containers found on the outside of the house," he testified that "she indicated the gas container was downstairs and that she filled them outside" (T3, 5.10.2011, 68).

Detective Clark testified that his interview of Frances while she was handcuffed to the railing -- both her statements and her retraction of those statements -- lasted a minute or two

(T3, 5.10.2011, 67).

Detective Clark repeatedly testified that he had no handwritten notes of his interrogation of Frances Choy or her statements (T3, 5.10.2011, 54-55, 59, 62, 67). After referencing his typed report of Frances's interview, Detective Clark testified as follows:

Q. And there is nothing else in existence, apart from these four sentences, regarding what she said, correct?

A. Notes or recordings? No, that's correct.

Q. This is it, sum total right here, that I'm holding up, a page and a half report, correct?

A. Correct (T3, 5.10.2011, 67-68).

On redirect, ADA O'Sullivan elicited from Detective Clark testimony that he had destroyed his notes after typing up his report pursuant to Brockton Police Department policy (T3, 5.10.2011, 77). ADA O'Sullivan also presented Detective Clark's testimony that in the Brockton Police Department in April of 2003 there was no policy to record video or audio and no means to do such a thing (T.3, 5.10.2011, 77).

Trooper Warmington and Detective Clark repeatedly characterized Frances's demeanor when they questioned her throughout the day as "emotionless," "unemotional," or showing "no emotion" (T3, 5.9.2011, 139, 141, 163; T3, 5.10.2011, 42-43, 50-51). However, Trooper Warmington admitted on cross-examination that he could not know what Frances's emotions were or whether she was grieving for her parents (T3, 5.9.2011, 184-85). In contrast, Frances's relatives described her demeanor at Good

Samaritan Hospital as "stunned" (T3, 5.10.2011, 152), "shocked," "out of it," "tired" (T3, 5.10.2011, 178). Later at her relatives' house she looked "out of it. Very fatigued" (T3, 5.10.2011, 179). At Brigham and Women's hospital she was "emotional" and looked like she had been crying (T3, 5.10.2011, 186). Her cousin saw her "hysterically crying" at her father's bedside (T3, 5.10.2011, 152-53, 166).

5. State Police Chemist and K-9 Unit Testimony about Physical Evidence Containing Gasoline Residue or Gasoline

a. Frances's sweatpants.

State Police Chemist John Drugan testified that he "identified a gasoline residue" on the sweatpants Frances Choy was wearing when she was rescued from the fire (T3, 5.10.2011, 95-96). Defense counsel did not call an analytical chemist as an expert witness at trial. The defense moved for funds for an expert with expertise in flammable petroleum distillates and evidence collection, but that motion was denied without prejudice requiring defense counsel to find an expert in Massachusetts (D. R.A. 13, 770, 775-76, Docket Entry 108 , 114 (Donovan, J.)).

b. Two melted plastic discs.

Trooper Michael Peters, a certified accelerant detection K-9 handler, deployed his K-9 Gala who alerted to a melted plastic disc in the entrance doorway to the master bedroom (T3, 5.9.11, 237). Gala did not alert to the melted plastic disc found at the bottom of the living room stairs. Trooper Peters submitted the

two melted discs to the Massachusetts State Police Crime Lab. State Police Chemist Drugan found each sample to have an odor similar to gasoline and to contain gasoline residue (T3, 5.10.2011, 97-99).

c. Two Sprite bottles.

Trooper Peters saw two bottles of Sprite on one of the top stairs leading from the kitchen to the basement when he and Gala first approached the basement area, but Gala did not alert to the soda bottles (T3, 5.9.2011, 247-248; T2, 1.31.2011, 22). Later, Trooper Stewart informed Trooper Peters that Detective Eric Clark believed the Sprite bottles contained gasoline (Bates 02498). At Trooper Stewart's direction, Trooper Peters "returned to the basement and examined the two Sprite or 7-UP bottles that were on the basement stairs that [he] had seen in [his] first deployment of Gala," and collected liquid samples from them that he submitted to the state police lab for analysis (T3, 5.9.2011, 247-49). State Police Chemist Drugan found the samples to be gasoline (T3, 5.10.2011, 97-98).

There was no documentation or testimony regarding who removed the Sprite bottles from the fire scene. State police documentation indicates that the bottles were processed for fingerprint testing, but no record of testing results was produced to the defense or is part of the current record (Bates 00517, 00552-553; 00574-575; 00578; 00586). The Sprite bottles

found in the basement were not introduced into evidence in the trial of Kenneth Choy or in the first two trials of Frances Choy; however in third trial of Frances Choy prosecutors elicited testimony from Trooper Warmington that two 16-ounce Sprite bottles introduced into evidence in the third trial were brought to his attention by Detective Clark "after they had been entered into evidence" (T3, 5.9.2011, 169). Defense counsel informed the Court that he had "made some moment of the fact that we couldn't find the Sprite bottles. This is the first time I've seen them," (T3, 5.9.2011, 170), but ADA Bradley represented to the Court that defense counsel "saw them when [he] went down to look at the evidence in the case years ago" (T3, 5.9.2011, 170).

6. Stipulations regarding fingerprint testing.

The parties stipulated that "Frances Choy's fingerprints were not found on the "two Sprite bottles found on the basement stairs," or on "[t]wo notes found in Kenneth Choy's bedroom," or on "a disposable lighter found in the living room" (T3, 5.10.2011, 17).¹⁷ Kenneth Choy's fingerprints were found on "the

¹⁷ At Kenneth Choy's trial the parties also stipulated that "no fingerprints were found" on the two red gasoline containers found in the basement (TKC, 1.30.2008, 21). State police documentation reports that the "Sprite bottles" were "processed by JJS" on "5/2/03," (Bates 00517, 00553, 0075, 00578, 00586) but no documentation of the testing results were produced to the defense or made part of the record in this case.

two notes found in [his] bedroom" (T3, 5.10.2011, 17).¹⁸

Newly Discovered Evidence

1. Trial Counsel Failed to Retain And Present An Analytical Chemist At Trial; Newly Discovered Expert Testimony From Analytical Chemist Susan Seebode Hetzel Contradicts Trial Testimony of State Police Chemist Regarding the Presence of Gasoline Residue on Frances Choy's Sweatpants.

On May 31, 2017 Judge Giles allowed Ms. Choy's motion for costs, expenses, and funds to hire Susan Hetzel, an expert, to further analyze the State Police GC and MS procedures and analysis, as well as the fire debris (D. RA. 765; Post-trial hearing, 5.31.2017, 56). Ms. Hetzel had reviewed the GC/MS graphs and test data, and stated that the conclusion that gasoline existed on the Defendant's pants was unfounded (Post-trial hearing, 5.31.2017, 58). The analytical chemist, Susan Seebode Hetzel, has filed a detailed affidavit summarizing her qualifications and her expert opinion based upon a review of the available GC/MS test results (Affidavit of Susan Seebode Hetzel, Document No: 303.1, filed on March 18, 2020, at p. 1-5). The analytical chemist concluded, contrary to the opinion of the State Police chemist called to testify at trial that the test data "when measured by the applicable and generally accepted objective scientific standards, does not support a conclusion that

¹⁸State police documentation indicates that a "cover of gasoline can," "spout and cover of second gas container" were "processed by JJS" on "5/2/03," (Bates 0517, 00553, 0075, 00578, 00586), but no documentation of the testing results were produced to the defense or made part of the record in this case.

the 100% gray polyester sweatpants contained a gasoline residue." (D. R.A. 782-787). Ms. Hetzel affirms by affidavit that if she had been retained as an expert witness before trial "I would have been able to testify about the scientific bases of my opinion including the scientific data and scientific literature that would not support a conclusion that there was 'a gasoline residue' on Item 1." (Affidavit of Susan Seebode Hetzel Document No: 303.1 at p. 16, ¶ 22).

On April 12, 2019, the Commonwealth certified compliance with disclosing the State Police crime lab material relating to the fire (D. RA. 766). Based upon laboratory procedures at the time, the State Police crime lab did not retain the digital data generated by the GC/MS testing, but only certain laboratory reports, notes and graphs. According to the defense expert the materials currently available for review, in her opinion, do not support a conclusion that the "sweatpants contained a gasoline residue" (Doc. No. 268, R.A. 782-87; Doc. No. 303.1 at p. 16, ¶ 22.).

2. The Ineffective Assistance Of Frances' Trial Counsel By Not Appropriately Investigating A Potential Witness Who Had Information About A Confession From Kenneth And Knew Kenneth To Place The Blame For His Criminal Conduct On Others.

On February 25, 2015, Nicole Weljkovic signed an affidavit stating that if called as a witness, she would testify that Kenneth Choy was a drug dealer, lied, manipulated others, and told her that he planned and set the fire at the Choy's house

(D. RA. 567). Ms. Weljkovic stated that on April 19, 2011, she was the front seat passenger in a car driven by Kenneth Choy when the car crashed into a telephone pole (D. RA. 563). Kenneth had told her to say she was the one driving, which she initially did, only to later tell the truth to the East Bridgewater Police before being transported by an ambulance to the hospital (D. RA. 563). Ms. Weljkovic had met Kenneth while working together at Viking Pizza in East Bridgewater (D. RA. 564). At one point, Ms. Weljkovic began living on and off with Kenneth and the family he was staying with for about a year (D. RA. 564). During that time, Kenneth mentioned to her that he had "beat" a criminal charge for murder and "brag[ged]" about being found not guilty because "he is the one who bought the gasoline, set the fire, and had gas on his clothes" (D. RA. 564-65). Kenneth also told Ms. Weljkovic that his mother brought him to live with the Choy's after his father, who was in the Hong Kong mafia, was killed over a drug deal (D. RA. 565). He said he and his mother were "mad" at the Choy's and wanted to "kill" Jimmy and Anne Choy in revenge for asking his mother for more money (D. RA. 565). Ms. Weljkovic also learned that Kenneth was seen "buying luggage" and her fiancé told the police that Kenneth "would be leaving the country" (D. RA. 566).

3. The Trial Prosecutors Did Not Disclose to Trial Counsel Information About Subsequent Fires at the Choy House While Frances Choy Was Incarcerated.

Included in the disclosed emails was an email thread from September 25, 2009, regarding another fire at the Choy's residence (D. RA. 1266). The thread begins between an on-call ADA informing ADA Bradley that the Brockton Police and Fire Department, and crime scene services, responded to another fire at the Choy's house (D. RA. 1266). The question was raised as to whether the District Attorney's Office wanted to preserve the "6 y[ea]r old crime scene" (D. RA. 1266). ADA Bradley then forwarded the email to ADA O'Sullivan alluding to Kenny as a potential suspect, with ADA O'Sullivan responding that "I think you should just NP Frances's case right now" (D. RA. 1266). ADA Bradley then forwarded ADA O'Sullivan a *Brockton Enterprise* article discussing how the Choy's house had been set on fire (D. RA. 223). The article states that the "now-vacant" house was the same address where the Choys were killed on April 17, 2003, and that their daughter was awaiting trial on the murder of her parents (D. RA. 223-24). ADA Bradley responded to ADA O'Sullivan by saying, "I bet it was Krowski" (D. RA. 223). The Commonwealth has not located any documents that support a conclusion that ADA Bradley ever advised Attorney Krowski of these subsequent fires at the Choy house, which occurred while Frances was incarcerated awaiting trial, and after Kenneth Choy had been acquitted of the murder charges.

4. The Newly Discovered Affidavit of Former Brockton Police Detective Ken E. Williams Contradicts Detective Clark's

Testimony That In April 2003 There Were No Recording Devices In The Brockton Police Station In 2003 That Could Have Been Used To Record The Defendant's Statement.

The affidavit of Ken E. Williams states that in April of 2003, Brockton Police Detectives had access to recording equipment that they could use, and did use, to record statements of witnesses or suspects. This newly discovered evidence contradicts Detective Clark's testimony in multiple proceedings that in 2003 the Brockton Police Department did not have any tape recording or video recording equipment that he could have used to record his custodial interrogation and other questioning of the defendant. The newly discovered evidence on this point is consistent with a Brockton Police Department Policy Procedures and Guidelines manual that provides "If a tape recorder is available, all conversations with witnesses should be recorded." D. RA. 1341.

5. Exculpatory Information Regarding Kenneth Choy's Motive Was Neither Provided To Trial Counsel Under M.R.Cr.P. 14 Nor Pursuant To The Commonwealth's Rule 11 Discovery Obligations In The Pretrial Conference Report, Nor Was Sought Pursuant to M.R.Cr.P. 17 by Trial Counsel.

The Commonwealth produced in its March 16, 2020, post-conviction discovery the file of Brockton Police Detective Eric Clark. Detective Clark's file contained two Brockton Police department documents showing that in January of 2003 Jimmy Choy reported to the Brockton Police Department that the reason Kenneth left and did not return home in January of 2003 was because Kenneth

was "selling drugs." Bates 02480 (Missing Person Report dated January 11, 2003; Bates 02481 (CAD System Report dated January 11, 2003). These two police documents show that the police resolved the missing person aspect of the matter when they located Kenneth at Brockton High School. Bates 02480, 02481. The May 28, 2003, print time stamp on the CAD System report indicates the copy in Detective Clark's file was printed out on May 28, 2003, which was after the Choy homicide investigation was underway but long before Frances' first trial.

The parties agree that these documents in Detective Clark's files contain exculpatory evidence suggesting a motive for Kenneth Choy to harm Jimmy Choy and the Choy family home. At trial there was evidence that Kenneth Choy's grandfather had been physically and verbally abusive to him, T3: 5/5/2011 at 86-87; 145-47; 152-153, 156-57, and that Anne Choy accused Kenneth of stealing her jewelry, (T3, 5.5.2011, 155), but Kenneth downplayed his disputes and disagreements with Jimmy and Anne Choy, saying they were "nothing serious." T3: 5/5/11 at 86. ADA Bradley also downplayed Jimmy Choy's beatings of Kenneth and the other issues and tensions between Kenneth and Jimmy and Anne Choy in his closing argument, characterizing them as nothing more than "teenagers almost invariably have issues with their parents." T3: 5/12/2011 at 53. Moreover, in his closing argument ADA Bradley asked the jurors "[w]hat motive would Kenneth Choy have to burn the house down?" and

argued "[i]t makes absolutely no sense" that Kenneth would "burn[] the house down." T3: 5/12/11 at 53-54.

These documents indicating that Kenneth Choy ran away from home over a dispute with his grandfather over Kenneth's drug dealing and that Jimmy Choy reported Kenneth's drug dealing to the Brockton Police are exculpatory evidence that could have been used to show Kenneth Choy had a motive to commit the crimes and to impeach a key Commonwealth witness. *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Commonwealth v. Ellison*, 376 Mass. 1, 22 (1978). See also *Commonwealth v. Noeum Sok*, 439 Mass. 425, 435 (2003) (witness may always be cross examined to show bias). In a Pretrial Conference Report dated August 8, 2003, signed by ADA Bradley, the Commonwealth agreed to provide "exculpatory evidence within the possession, control, or custody of the Commonwealth." R.A. 52. "Agreements reduced to writing in the conference report shall be binding on the parties and shall control the course of the proceeding." Rule 11(a)(2)(A) Mass. R. Crim. P. Such agreements are the equivalent of a Court Order. *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 (1987); *Commonwealth v. Gliniewicz*, 398 Mass. 744, 747 (1986). Failure to produce discovery covered by the pretrial conference report is grounds for allowing a motion for new trial. *Id.* Neither of the prosecution ADAs provided this discovery to defense counsel.

These documents were contained in Detective Clark's file, and appear to have been in the possession of the Commonwealth before

and during Frances' three trials. Whether these documents were subject to automatic discovery disclosure rules, whether they should have been disclosed pursuant to the obligation undertaken in the Pretrial Conference Report, or whether Attorney Krowski should have requested them with greater specificity, these arguably exculpatory documents were not available to the defense at the time of trial.

6. Post-Conviction Discovery Indicates That ADA O'Sullivan Knowingly or Recklessly Induced Erroneous Testimony By Detective Clark Regarding The Defendant's Statements.

ADA O'Sullivan elicited testimony from Detective Clark that Frances told him she got gasoline "from downstairs" even though ADA O'Sullivan was present in Frances's first trial, elicited this testimony from Detective Clark on direct examination, and was present when he admitted on cross-examination that his direct testimony was not correct (T3, 5.10.2011, 50; T1, 1.17.2008, 168, 173-174). Despite having this knowledge, on May 9, 2011, at 9:50 p.m. the night before Detective Clark's testimony in Frances's third trial, ADA O'Sullivan sent Detective Clark an email to his personal email account (detecclark@yahoo.com) attaching a script for his testimony the next day. ADA O'Sullivan's script for Detective Clark's testimony included the following question and answer which she knew Detective Clark had already sworn under oath to be incorrect:

"did she say from where she obtained the fuel?"

from downstairs.

(D. R.A. 1226) (*italics in original*).¹⁹

The next day, ADA O'Sullivan elicited from Detective Clark direct testimony explicitly following word for word the script she emailed him the previous night:

Q. Did she say from where she obtained the fuel?

A. From downstairs.

(T3, 3.5.2011, 50).

7. Post-Conviction Discovery Reveals Potential Breaches of Automatic Discovery Rules.

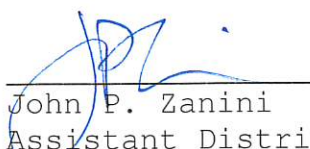
In 2019, after ADA McKenna was replaced by ADA Janezic and ADA Anderson, defense counsel were allowed to review the trial file and to request copies of documents in the files. Upon review and investigation it appears that certain documents and other evidence subject to automatic discovery was not disclosed to the defense at trial. The files contained letters Frances wrote and mailed to family members shortly after she was placed in custody. Frances's letters should have been produced before trial as "statements of a defendant," but it appears that they were not disclosed until the post-conviction discovery stage.

¹⁹ The Commonwealth made ADA O'Sullivan's 5/9/11 email to Detective Clark available to the defense in 2019 after the Commonwealth agreed at a hearing before Justice Botsford, to provide Frances with "open file" discovery. Current counsel for the Commonwealth permitted Frances's post-conviction counsel to inspect several boxes of materials at the PCDAO. A print out of ADA O'Sullivan's 5/9/11 email to Detective Clark was in one of the boxes

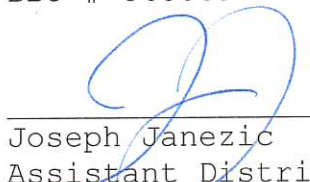
Rule 14 Mass. R. Crim. P. Similarly the record shows that Frances made two 911 calls on the night of the fire, but only the recording of the second call was provided to the defense prior to trial. The tape of Frances' first 911 call cannot be located at this time. Both calls would have been statements of the defendant that should have been preserved and disclosed. The record also indicates that Frances made recorded telephone calls from the Brockton Police Station on April 17, 2003, but the Commonwealth is now unable to locate or disclose those recordings which would be "statements of a defendant."

In light of other matters that have been disclosed in post-conviction discovery, these potential breaches of automatic discovery rules are a matter of concern to the OPCDA, and contribute to its conclusion that justice may not have been done in this case.


Respectfully submitted,



John P. Zanini
Assistant District Attorney
For the Plymouth District
BBO # 563839



Joseph Janezic
Assistant District Attorney
For the Plymouth District
BBO # 658558



B. Patrick Nevins
Assistant District Attorney
For the Plymouth District
BBO # 704518