COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS SUPERIOR COURT
NO: 0383-CR-00300

COMMONWEALTH

v.

FRANCES Y. CHOY

FINDINGS AND RULINGS

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT FRANCES CHOY'S
MOTION FOR POSTCONVICTION RELIEF

Introduction

This case comes to this Court on Defendant Frances Y. Choy's Motion for Post-conviction Relief. This Court presided over the third trial of Frances Y. Choy ("Frances" or "the Defendant") on charges of arson of a dwelling and two counts of murder. The first two times the case went to trial in 2008 and 2011 the juries were hung resulting in mistrials. After a third trial before this Court a jury returned guilty verdicts on all charges on May 16, 2011, and a notice of appeal was filed from those judgments. Post-conviction proceedings have been pending in this Court since 2015, when the defendant filed a motion for discovery and to preserve

evidence. This Court has held numerous hearings and entered rulings on Defendant's motions for discovery and for funds.

The Supreme Judicial Court remanded the case to this Court for consideration of post-conviction discovery motions on February 17, 2016. A Preliminary Motion for Post-conviction Relief filed on June 6, 2016, was remanded to this Court on June 7, 2016. The Defendant filed her Motion for Post-conviction Relief and supporting affidavits, memorandum, and record appendix on January 6, 2020, and a Superseding Motion for Post-conviction Relief on January 9, 2020. This Court granted the Defendant's Motion for Stay of Further Execution of Sentence and Release on Conditions of Recognizance, which the Commonwealth did not oppose, on April 13, 2020.

Counsel for the Commonwealth advised this Court in the Commonwealth's Response to Defendant Frances Y. Choy's Motion for Post-Conviction Relief that the Commonwealth agrees that the motion for new trial should be allowed and that the convictions should be vacated. The Commonwealth does not join in each and every ground for relief as asserted by the Defendant but agrees, after its independent review of Defendant's Motion for Post-conviction Relief and supporting affidavits, the record and transcripts of the Defendant's three trials and the record and transcript of

Kenneth Choy's trial, and newly discovered evidence, that the record establishes that "justice may not have been done." Rule 30(b) Mass. R. Crim. P. The Commonwealth has advised this Court that if the motion for new trial is allowed the Commonwealth may enter a *Nolle Prosequi* as to all charges. The parties have submitted the Motion for Post-Conviction Relief along with supporting memoranda, affidavits, documents, and transcripts, and the Commonwealth's Response to this Court for consideration and ruling. The parties have agreed, in light of the practical considerations brought on by the COVID-19 pandemic, to proceed on this case with a hearing by telephone or video conference.

Rule 30(b) provides in part that "[u]pon the motion the trial judge *shall* make such findings of fact as may be necessary to resolve the defendant's allegations of errors of law." Rule 30(b) Mass. R. Crim. P. (emphasis added). In light of the procedural history, where the parties agree that the Motion for Post-conviction Relief should be allowed, and in light of the Commonwealth's stated intent to consider entering a *Nolle Prosequi* on all charges if the motion is allowed, the Court finds that limited findings and rulings are sufficient.

This Court presided over the Defendant's third trial. The Court has ruled on Defendant's post-conviction motions for

discovery, costs, and stay of execution of sentence, holding multiple hearings. The Court has reviewed the Defendant's motions, memoranda, affidavits, transcripts and other documents submitted to the Court in connection with this Motion for Post-Conviction Relief as well as the Commonwealth's response. Following a review of these materials, and after a hearing where the parties explained their positions, the Court allows the Motion for Post-Conviction Relief and orders that the judgments of conviction on each charge against the Defendant Frances Y. Choy shall be vacated.

Procedural History and Brief Statement of the Record

An indictment was issued by a Plymouth County grand jury on June 13, 2003, charging 17-year-old Frances Choy with two counts of murder and one count of arson of a dwelling. R.A. 47-49. The charges arose from a fire on April 17, 2003, in the Brockton, Massachusetts, home occupied by Frances, her parents, Jimmy and Anne Trahn Choy, and 16-year-old Kenneth S. Choy ("Kenneth"), who was Jimmy Choy's grandson from a prior relationship in Hong Kong. Brockton Fire Department firefighters rescued Frances and Kenneth from their second-story bedroom windows, but despite diligent rescue efforts by the Brockton firefighters Frances's parents Jimmy and Anne Trahn Choy died that same day as a result of exposure to heat and smoke from the fire.

Investigators from the Brockton and State Police departments who arrived on the scene considered the cause of the fire suspicious and suspected gasoline was used as an accelerant. Investigators found the most heat and smoke damage in the bedroom of Jimmy and Anne Choy, and more smoke and heat damage in Frances's bedroom than in Kenneth's. Investigators discovered a rolled towel at the threshold of Kenneth's bedroom door which police believed was placed there to keep smoke from entering the room. Police questioned Kenneth and Frances while they were being treated at the Good Samaritan Hospital in Brockton. Anne Choy was pronounced dead from exposure to heat and smoke at the Good Samaritan Hospital in Brockton. Jimmy Choy was transported to Brigham and Women's Hospital in Boston for further treatment and he also died from exposure to heat and smoke later in the day. Police questioned Frances a second time in an unmarked cruiser near her home and as they drove her from her home to Brigham and Women's Hospital.

The police asked Frances and Kenneth to return to the Choy home that evening and brought them to the Brockton Police station where they were placed in separate rooms for custodial interrogation at approximately 7:40 p.m. The police did not make any audio or video recordings of any of the questions or answers. The police testified that they destroyed their contemporaneous

handwritten notes of the interrogations after they prepared their typed reports.

After administering *Miranda* warnings, Brockton and State Police questioned Frances for over three hours. They repeatedly asked her, as they had asked her earlier in the day, how she would explain the presence of gasoline on her sweatpants, and they asked her how she would explain the presence of gasoline on her hands. Throughout the day, Frances maintained that she was awakened when she heard screams from her mother, and that she responded by calling 911 to report the fire. Despite repeated questioning, Frances maintained that she was not involved and had no knowledge of how the fire started.

In a separate interrogation room Kenneth Choy first insisted that he had no knowledge of the cause of the fire. Police then confronted Kenneth with two handwritten notes they discovered on the floor under and next to his bed in a warrant-authorized search of his bedroom. The notes -- one written in a kind of shorthand and the other in longhand -- set forth Kenneth's plans to burn down the house. The written steps included filling bottles with gasoline in his bedroom; spreading the gasoline around the house, including on the stairs leading from the first floor to Frances' bedroom and on the bedroom doors of Frances and her parents;

"firing up" the house; returning to his bedroom; removing and burning the clothing he was wearing; "pull[ing] gas on his door. When the police confronted Kenneth with his notes, he denied writing them. When police told him that the writing matched his writing, his story changed: Kenneth admitted that he wrote the note, but told police that a "black kid" from school told him to write it and to give it to others, to avoid bad luck. When he could not name the student, the police told Kenneth that his story was not credible. Following an admission by Kenneth, police asked him who else was involved, and it was then that Kenneth told police that the fire was Frances's idea and that she directed him to write the notes. He told police that he woke up to a noise and found Frances in the basement holding one (or two) gallon water jugs they had previously filled with gasoline. He told police he refused to light up the basement and ran up to his room and locked the door. He told police that on the way up to his room he observed Frances in the living room holding a gallon water jug and that it appeared she had doused with gasoline the living room couch, the stairs from the first floor leading to the second floor bedrooms, and her parents' bedroom door.

After the police heard this account from Kenneth they confronted Frances with his statements, and brought Kenneth into

the room to further confront her with his accusations against her. Frances continued to deny any knowledge or involvement. The police told her several times that if she was not going to give them different information she would be arrested. When the police made it clear that they were about to book her after over three hours of interrogation, Frances briefly stated she was involved and immediately retracted the statement. The police then brought her to the booking area and handcuffed her to a railing. Brockton Police Detective Eric Clark testified that in a conversation that lasted about a minute, Frances made and retracted statements claiming to have filled "cups" by which she meant "plastic milk containers and soda bottles" with gasoline and placing them on the basement stairs.[1]

The prosecution's theory of the case was that Frances planned and carried out the murder of her parents to collect life insurance money so that she could move out of the house and spend more time with her 18-year-old boyfriend. In support of its case, the

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[1] As Judge Locke, who tried the case the second time observed "the claimed admission followed several hours of police interrogation during which [Frances Choy] consistently denied any involvement in setting the fire, and seemingly occurred as an outburst to police accusations. Whether a genuine expression of culpability or a defiant response to perceived badgering, the admissions were immediately recanted." Memorandum of Decision and Order on Defendant's Motion to Set Bail. Document 188, dated 2/25/11. R.A. 156-153.

Commonwealth emphasized Kenneth's immunized testimony from the second trial, which it presented to the jury in the form of a role play after Kenneth fled to Hong Kong days before the start of the trial. The Commonwealth argued that Kenneth's testimony was corroborated by (1) testimony by a State Police Chemist that the sweatpants Frances was wearing when she was rescued from the fire tested positive for gasoline residue; (2) testimony from police investigators about statements of Frances they characterized as admissions of guilt; and (3) demeanor testimony by fire fighters that Frances was "calm" and police characterizations of Frances as "emotionless."

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 Mass. R. Crim. P. 14, nor pursuant to the Commonwealth's Rule 11 Discovery Agreement in the Pretrial Conference Report, nor was it sought pursuant to Mass. R. Crim. P. 17 by trial counsel; and (8) additional misconduct by the trial prosecutors, including inconsistent legal arguments, knowingly or recklessly inducing false testimony, improper closing arguments, potential violations of pre-trial discovery rules and orders; and factually inaccurate information regarding a *Zanetti* instruction.

Standard of Review

Post-conviction relief may be granted where "it appears that justice may not have been done." Rule 30(b) Mass. R. Crim. P. "The fundamental principle established by Mass. R. Crim. P. 30(b) is that, ***if it appears that justice may not have been done***, the valuable finality of judicial proceedings must yield to our system's reluctance to countenance significant individual injustices." *Commonwealth v. Brescia*, 471 Mass. 381, 388 (2015) (emphasis in original). The question of whether justice was done is the lynchpin of the analysis. See *Commonwealth v. Epps*, 474 Mass. 743, 767 (2016); *Commonwealth v. Ellis*, 475 Mass. 459, 481 (2016); *Commonwealth v. Rosario*, 472 Mass. 69, 77 (2017). When considering a motion under Rule 30(b), the court considers the "confluence of factors" that contribute to the question of whether justice was done, including information from the earlier trial record, newly discovered evidence, and other relevant circumstances. *Rosario*, 477 Mass. at 77-78; *Brescia*, 471 Mass. at 388. The parties in this case agree that the "confluence of factors" in this case includes issues that arose in pretrial proceedings, at trial, newly discovered evidence that was discovered after trial, and ineffective assistance of counsel claims presented in post-conviction filings. Under the

circumstances of this case this Court need not analyze and rule upon each of the issues raised by the Defendant some of which are based upon the trial record and some of which were developed in post-conviction proceedings. Some, but not all, of the issues that arise from newly discovered evidence and ineffective assistance of counsel are discussed below. After considering the "confluence of factors" in this case, the Court finds that "it appears that justice may not have been done" and that the motion for new trial must be allowed.

I. NEWLY DISCOVERED EVIDENCE OF RACIAL BIAS ESTABLISHES THAT JUSTICE MAY NOT HAVE BEEN DONE.

Newly discovered evidence includes racially and sexually offensive emails sent and exchanged by the trial prosecutors.[2] These emails demonstrate the trial prosecutors' racial animus against Frances and her family. Though the courts of the Commonwealth have not addressed a situation quite like this one where the record demonstrates intentional racial bias by prosecutors against a defendant, courts have repeatedly found that

[2] Both trial prosecutors left PCDAO prior to the emails being discovered. One prosecutor had been terminated, and the other left voluntarily. The independent investigation completed by 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.

racial bias in court proceedings cannot be tolerated. *See Commonwealth v. Ortega*, 480 Mass. 603, 607 (2018)(abuse of discretion to send the "unmistakable message that a prosecutor can get away with" race and gender discrimination in jury selection); *Commonwealth v. Soares*, 377 Mass. 461, 492 (1979)(racial discrimination by prosecutors in jury selection in violation of Article 12 "can never be treated as harmless error" and is "prejudicial per se"); *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737 (2016)(reversing state supreme court's denial of certificate of appealability in capital murder case based on newly discovered evidence of race discrimination by prosecutors in jury selection).

The prosecutors' racially derogatory words and images include a depiction of Frances as a girl scout who burned a house down because the occupants did not "buy the fucking cookies," R.A. 1260-1262, and the suggestion that she had committed incest with her accuser Kenneth. R.A. 232, 1276. One email sent by ADA O'Sullivan included a depiction of young girl outfitted in KKK garb. R.A. 205-206, 1215-1216. The trial prosecutors exchanged numerous images of Asian people, some accompanied by pejorative comments, and some unexplained. R.A. 210-211, 217-218, 219-220, 225-226, 227-228, 235, 1295-1297, 1282, 1303-1305. They exchanged "jokes" about Asian stereotypes, and mocking caricatures of Asians using

imperfect English. R.A. 207-209, 1257-1259. The prosecutors' emails degraded their own immunized witness Kenneth based on his race with references to the character Long Duk Dong, from the film Sixteen Candles. R.A. 210-211, 219-220, 235, 1296-1297. The use of Asian stereotypes was directed not only at Frances and Kenneth, but also at other Choy family members who are also the family of the victims Anne and Jimmy Choy. One email exchange made reference to oral argument on an interlocutory appeal in the Supreme Judicial Court in this case in which one prosecutor told the other, I'll be "wearing a cheongsam and will be the one doing origami in the back of the courtroom." R.A. 236.

An Assistant District Attorney conceded to this Court in post-conviction proceedings that "the two [trial] prosecutors were biased against Asians. Their emails prove that. It's reprehensible. We're not standing up and defending that in any way, nor could we." TR. 10/18/2016 at 5. In other hearings before this Court the Commonwealth described the prosecutors' emails as "horrific," TR. 5/31/17, at 30, and further "conceded that these are reprehensible. We've conceded that they never should have been made, that it's wrong." TR. 4/18/18 at 8-9. To the credit of Plymouth County District Attorney Timothy Cruz, the Commonwealth does not attempt to justify the newly discovered emails, to

marginalize their significance, or to argue that the defendant has failed to establish sufficient grounds to vacate her convictions. In addition, post-conviction filings show that District Attorney Cruz has taken steps to provide training that is intended to raise awareness of conscious and unconscious bias and to ensure that his professional staff adheres to the highest professional and ethical standards.

The Defendant argues that the racial bias shown by these prosecutors, along with their behavior in the course of trial, establishes structural constitutional error requiring automatic reversal of her convictions, or in the alternative, that the convictions must be vacated because the Commonwealth cannot meet its burden of proving that the unlawful race and sex discrimination against her was harmless beyond a reasonable doubt. Significantly, the defendant also points to certain rulings made by this Court on issues related to race and potential anti-Asian prejudice. This Court twice exercised its discretion to prevent anti-Asian racial discrimination from infecting the trial. First, the Court asked each potential juror individually at side bar whether the fact that the Defendant and the alleged victims were Asian-American would affect their ability to be fair and impartial. T3: 2-54. Second, after receiving a note from a juror during the trial

expressing concern about another juror's comment about ordering Chinese food that the complaining juror found "was racial toward the defendant and their family," this Court interviewed each of the 15 jurors individually to determine what comments were made and whether the jurors could be fair and impartial. T3: 5/9/11 at 4-46. Following that voir dire the Court, out of an abundance of caution, excused one of the jurors from the panel who had made remarks bearing on issues of race.

If this Court were aware of the trial prosecutors' emails and images demonstrating their anti-Asian bias against the Defendant, her family, and all Asian-Americans, this Court would have declared a mistrial and directed that those Assistant District Attorneys be removed from the case and that District Attorney Cruz be made aware of their racially and sexually degrading emails. Racial bias is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). There is an "imperative to purge racial prejudice from the administration of justice. . .." *Id.* at 859. However, these emails were not brought to the attention of the Court until years after the trial was concluded.

Based upon the full trial proceedings, and the nature and content of the trial prosecutors' emails, the Court agrees with

the parties that justice may not have been done and the convictions must be vacated. Rule 30(b) Mass. R. Crim. P.

II. NEWLY DISCOVERED EXPERT EVIDENCE FROM AN ANALYTICAL CHEMIST ESTABLISHES THAT THE CONVICTIONS SHOULD BE VACATED.

The Commonwealth's case relied heavily on testimony of a State Police chemist who said that he "identified a gasoline residue" on the pants worn by Frances Choy on the night of the fire. T3: 5/10/11 at 96. Since the case went to trial three times it was clear that this scientific testimony offered to link Frances to the crime and to corroborate Kenneth's testimony that Frances carried a gallon jug of gasoline up two flights of stairs and poured gasoline in the house was important; yet the defense did not call an analytical chemist as an expert witness in this case. Prior to 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 (by a motion judge who did not preside over the trial) requiring defense counsel to find an expert in Massachusetts. R.A. 13, 770, 775-776, Docket Entry 108, 114. Defense counsel did not appeal from the ruling that denied funds for such an expert, nor did he secure the services of such an expert. R.A. 768-773, 784-786.

In opening remarks the prosecution emphasized the evidence relating to "a gasoline residue" on the pants of Frances Choy. "We will prove to you, ladies and gentlemen, that the defendant, Frances Choy had gasoline residue on the sweatpants she was wearing the morning of the fire." T3: 5/03/11 at 94. "And we will prove to you that after John Drugan completed his testing, he confirmed the presence of gasoline residue of Frances Choy's sweatpants, the same sweatpants she was wearing the morning of the fire." T3: 5/03/11 at 95.

John Drugan, a State Police chemist, testified that he conducted testing through gas chromatography "GC" and mass spectrometry "MS", collectively "GC/MS" and that he concluded that there was a "gasoline residue" on the pants worn by Frances Choy on the night of the fire. T3: 5/10/11 at 96. The defense did not have an expert chemist who could review the GC/MS testing or who could provide expert testimony on collection, analysis, or identification of ignitable liquids, to rebut the Commonwealth's evidence. The defense presented testimony from a fire protection engineer, who made observations about soot and charring patterns in the home located at 102 Belair Street Brockton, Massachusetts. The prosecutor in cross examination pointed out that the fire protection engineer had no degree in chemistry and had never worked

as a chemist. T3: 5/11/2011 at 104-105. The prosecutor asked: "And you're certainly not capable of forming opinions and rendering opinions in a court of law in matters relating to chemistry, are you?" The defense expert conceded "I am not a chemist that is correct." *Id.* at 113.

The Commonwealth's closing argument referred to the "gasoline" or "gasoline residue" on the pants of Frances Choy repeatedly. T3: 5/12/11, at 55, 56, 57, 58, 59, 66. The Commonwealth emphasized that Frances' sweatpants tested positive for gasoline residue while Kenneth's clothing did not. Moreover, the Commonwealth argued that the chemist's testimony corroborated Kenneth's account that Frances carried gallon jugs of gasoline up two flights of stairs because "it spills." T3: 5/12/11, at 55, 56, 57.

Subsequent to trial, post-conviction counsel retained the services of an analytical chemist to review documents relating to the chemical analysis of the pants worn by Frances Choy. The new analytical chemist has expertise in isolating and analyzing fire and explosion debris in accordance with standard methods, and operating and maintaining laboratory equipment, including equipment used for gas chromatography (GC) and mass spectrometry (MS), and evaluating readings and results of GC/MS testing. R.A.

782-787, 825-829. 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 the 100% gray polyester sweatpants contained a gasoline residue." 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.

The newly available expert affidavit shows that the defense could have presented relevant and material exculpatory scientific evidence if trial counsel had located and retained an expert. The Affidavit of Joseph J. Krowski, states that his failure to retain an expert with skills in analytical chemistry was not a matter of trial strategy. As Mr. Krowski explains, he filed an "Ex Parte

Motion For Funds for a Flammable Petro. Distillate and Evidence Collection Expert," "who could assist the defense in evaluation and/or testimony on specific issues including (a) proper evidence collection techniques in arson cases; (b) forensic analysis and interpretation of samples purporting to contain petroleum distillate such as gasoline, and who could review and evaluate 'the Commonwealth's scientific tests of certain samples, such as Defendant's sweatpants, to rebut or refute the Commonwealth's claim that they contain gasoline.'" Krowski Affidavit at ¶ 7, R.A. 769. Mr. Krowski did not find an expert in this discipline in Massachusetts and he proceeded to trial without the benefit of such an expert. R.A. 768-773.

An indigent defendant in a criminal case should not be denied access to expert evaluation of evidence when it is necessary to develop a defense. "The due process guarantee of the Fourteenth Amendment to the United States Constitution requires that the Commonwealth 'take steps to assure that the defendant has a fair opportunity to present his defense.'" *Commonwealth v. Santos*, 463 Mass. 273, 297-298 (2012), *citing Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). Failure to adequately pursue efforts to retain the services of an expert witness to support a substantial defense may constitute ineffective assistance of counsel. *Commonwealth v.*

Haggerty, 400 Mass. 816, 822 (1987) ("The question of whether death was proximately cause by the defendant required counsel to investigate that defense by seeking the opinion of an expert."); *Commonwealth v. Martin*, 427 Mass. 816, 822 (1998) (failure to retain a toxicologist to rebut testimony that LSD was present in the body of the decedent was ineffective); *Commonwealth v. Millien*, 474 Mass. 417 (2016) (order denying motion for new trial reversed where expert was not called at trial to contest the commonwealth's evidence on "shaken baby syndrome"); *Commonwealth v. Epps*, 474 Mass. 743 (2016) (order denying motion for new trial vacated where counsel failed to find an appropriate expert to advance a defense that could rebut the testimony of Commonwealth's experts).

Attorney Krowski concedes that he "should have done more to pursue funds for an expert in this field, either by appealing from Judge Donovan's ruling, moving for reconsideration, pursuing exhaustive efforts to find such an expert in the Commonwealth of Massachusetts who had the requisite skills and expertise, filing successive motions, or following all of these courses of action to exhaust available methods for obtaining access to an expert who could provide expert analysis, insights, and testimony." R.A. 771-773. Failure to do so was "serious incompetency, inefficiency, or inattention of counsel. . ." *Id.* at 96. *Commonwealth v. Millien*,

474 Mass. at 430 (though the defense was privately funded, when family of defendant would not pay for an expert defense counsel had an obligation to move for funds for such an expert); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed he had received all he could under Alabama law constituted deficient performance.") The defendant was deprived of an otherwise available substantial ground of defense.

The defendant was prejudiced in her defense when no expert witness was called to present an alternative evaluation of the underlying test results. *Commonwealth v. Epps*, 474 Mass. at 766 ("competent counsel today would, with diligent effort, have been able to retain such an expert and offer the jury an alternative interpretation of the evidence.") Such evidence "would probably have been a real factor in the jury's deliberations" and its absence at trial "casts real doubt upon the justice of the conviction." *Commonwealth v. Cowels*, 470 Mass. 607, 617 (2015). The Court finds that "justice may not have been done." Rule 30(b) Mass. R. Crim. P.

III. FRANCES' TRIAL COUNSEL'S INADEQUATE INVESTIGATION OF A KNOWN WITNESS WHO ULTIMATELY HAD INFORMATION REGARDING A CONFESSION MADE BY KENNETH CHOY THAT HE SET FIRE TO THE FAMILY HOUSE ESTABLISHES THAT JUSTICE MAY NOT HAVE BEEN DONE.

In the Affidavit of Nicole Weljkovic she states that Kenneth Choy admitted that he is the one who started the fire in the Choy family home and that he did it in revenge. These specific admissions by Kenneth contradict his testimony at trial where he expressly denied starting the fire and claimed that he withdrew from any plan to set the fire. This evidence from a person who knew Kenneth states that he told her that he set the fire in the home of his grandparents. R.A. 563-567. "Kenneth Choy would also brag about getting found not guilty because he is the one who bought the gasoline, set the fire, and had gas on his clothes. He said that he wrote up all the steps for setting the house on fire and that he set the fire. . . . Kenneth Choy told me that he and his mother were mad at the Choys because they kept asking for more money and Kenneth Choy and his mother wanted to kill Jimmy and Anne Choy in revenge." R.A. 564-565. These newly disclosed admissions by Kenneth Choy were not discovered by Frances's trial attorney or 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.

In a motion for new trial this Court is not required to credit either the Affidavit of Nicole Weljkovic or the Affidavit of Joseph J. Krowski. However, the Court may credit such affidavits. *Commonwealth v. Mazza*, 484 Mass. 539, 545-547 (2020). The account of Kenneth Choy's statements, as related by Nicole Weljkovic, based upon the case as a whole has sufficient indicia of reliability to accept it as evidence in this motion for new trial. If the evidence were presented at trial it would have been up to a jury to evaluate its credibility and weight. If this evidence had been available at the time of trial, but for counsel's ineffective assistance, it would have carried "a measure of strength in support of the defendant's position." *Grace*, at 306. According to trial counsel, he was not aware of this evidence. "At the time the trial started I did not have the information that is contained in the Nicole Weljkovic Affidavit, showing Kenneth Choy's motive and his direct admission that he set the fire. I did not have information at the time that would have led me to suspect that Kenneth Choy confided in Ms. Weljkovic, and that she could be a source of information about his motives and his actions. . . . I never discovered it myself. . . I would have sought to offer it in evidence, through the testimony of Nicole Weljkovic, as prior inconsistent statements of Kenneth Choy, if I had this evidence available to me at the

time of trial." R.A. 601. However, trial counsel did acknowledge that prior to Frances' trial he "was aware that she [Nicole Weljkovic] was with Kenneth Choy on the night of April 19, 2011 [night of Kenneth's OUI car crash], I was aware that she was blamed for the offense, and I was aware of her address, so I would be able to call her as a witness if Kenneth Choy appeared to testify." R.A. 600.

The Court credits the Affidavit of Joseph J. Krowski to the extent that it states that he was unaware that Nicole Weljkovic had this information about Kenneth, and that if he were aware of such information he would have sought to introduce it at trial as a prior inconsistent statement of Kenneth. These inconsistent statements of Kenneth, if known at the time of trial, could have been used to impeach him. *See Commonwealth v. Parent,* 465 Mass. 399-400 (2013); *Commonwealth v. Bookman,* 386 Mass. 657, 665 (1982); *Commonwealth v. McGhee,* 472 Mass. 405, 422 (2015). *See also* Mass. G. Evid. § 801 (d)(1)(A) (2015). Such evidence would have rebutted Kenneth's trial testimony, showing that he had a motive to harm Jimmy and Anne Choy and it would have provided the jury with impeachment evidence to evaluate his credibility regarding his other statements implicating Frances.

The Court also finds that Frances' trial counsel inadequately investigated Nicole Weljkovic, a witness that he had the ability to call. Counsel's ineffective assistance by neglecting exculpatory evidence resulted in a substantial likelihood of a miscarriage of justice because the jury's verdict could have been influenced by the missing testimony.

Regardless of whether these statements fall within the category of "newly discovered evidence," or whether Frances' trial counsel was ineffective in failing to discover them, a conscientious and moral review of the trial and conviction must take these statements into account in determining whether justice may not have been done. The Court finds that "justice may not have been done." Rule 30(b) Mass. R. Crim. P.

IV. NEWLY DISCOVERED, BUT PREVIOUSLY UNDISCLOSED, EVIDENCE OF ADDITIONAL FIRES IN THE CHOY RESIDENCE THAT OCCURRED WHILE FRANCES WAS IN JAIL AWAITING TRIAL ESTABLISH THAT JUSTICE MAY NOT HAVE BEEN DONE.

Newly discovered evidence reveals that there were subsequent fires in the Choy home while Frances Choy was incarcerated awaiting trial. No evidence of these subsequent fires was presented at trial. Newly disclosed emails show that the prosecuting attorneys were aware of these subsequent fires. An ADA, who was the "duty attorney" on September 2, 2009, wrote an email message to ADA John

Bradley at 2:38 AM on that day, telling ADA Bradley of a new fire at the Choy residence, explaining that the fire department responded and crime scene services wanted to know if the scene should be "re-boarded up." R.A. 1266. The duty attorney wanted to be sure that ADA Bradley was aware of the fire, and aware that a tentative decision was made that the fire scene would not need to be preserved as evidence. *Id.* A narrative report in a Brockton Dispatch Log dated September 26, 2009, at 4:53 PM, states that a fire crew returning from a different call, noticed smoke coming from the building. "Someone took off the plywood and made entry to the building and lit a couch on fire. This was done today. The couch was not involved in the homicide fire or the second fire Friday morning." R.A. 637. Defense counsel was not aware of these subsequent fires at the time of trial and the prosecuting attorneys did not advise him of these fires.

Upon receiving this information, ADA Bradley contacted ADA O'Sullivan at 8:16 AM, asking "Kenny did make bail, didn't he?" The response of ADA O'Sullivan in this email chain at 9:25 AM was "*I think you should just NP Frances's case right now.*" *Id.* (*Emphasis added*). The ADA who was initially handling the post-conviction discovery did not disclose this email. It was disclosed in early 2019 after new counsel was assigned to this case. Clearly

these subsequent fires were not set by Frances -- she was incarcerated -- but by a different person who was motivated to engage in arson of this specific residence. "Third-party culprit evidence is 'a time-honored method of defending against a criminal charge.'" *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 800-801 (2009), *quoting Commonwealth v. Rosa*, 422 Mass. 18, 22 (1996).

Another email in this chain regarding the subsequent arsons at the Choy home was sent to ADA Bradley inquiring "Did you see this?" and attaching a *Brockton Enterprise* newspaper article. R.A. 223-224 (9/25/09 @ 12:44 PM). Within minutes of receiving that email, ADA Bradley forwarded the newspaper article to ADA O'Sullivan stating, "I bet it was Krowski and Powder." R.A. 223-224 (9/25/09 @ 12:58 PM). ADA Bradley "joked" that "Krowski," referring to Frances' trial attorney Joseph F. Krowski, started the fire, but there is nothing in the record suggesting that ADA Bradley advised Attorney Krowski of this new evidence.

On this same topic, ADA Bradley sent an email to ADA O'Sullivan, on September 25, 2009, stating that Kenneth's attorney Galibois "left me a voicemail . . . assures us that Kenny didn't do it . . . big sigh of relief." R.A. 238. ADA O'Sullivan responded, "He left me a text assuring me as well." R.A. 238. In these emails, which were disclosed after trial, these ADAs describe

"assurances" that "Kenny didn't do it" that they each received from counsel for Kenneth, who had by that time already been acquitted of the murder charges that were brought against him.

The failure of ADAs Bradley and O'Sullivan to disclose this information to the defense raises due process issues and the obligation to disclose exculpatory evidence in the possession of the prosecution. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995); *Commonwealth v. Ellison*, 376 Mass. 1 (1978); *Commonwealth v. Tucceri*, 412 Mass. 401 (1992); *Commonwealth v. Holbrook*, 482 Mass. 596, 610-611 (2019) (first degree murder conviction overturned where CDs containing potentially exculpatory evidence were not disclosed prior to trial). The trial prosecutors' failure to disclose this information in the circumstances of this case supports a conclusion that justice may not have been done. Rule 30(b) Mass. R. Crim. P.

V. NEWLY DISCOVERED EVIDENCE AND POST-CONVICTION DISCOVERY CONTRADICT THE TRIAL TESTIMONY OF DETECTIVE CLARK REGARDING THE AVAILABILITY OF RECORDING DEVICES AT THE BROCKTON POLICE DEPARTMENT.

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. R.A. 1341. Such evidence "would probably have been a real factor in the jury's deliberations" and its absence at trial "casts real doubt upon the justice of the conviction." *Cowels*, 470 Mass. at 617 (2015The Court finds that "justice may not have been done." Rule 30(b) Mass. R. Crim. P.

VI. THE CIRCUMSTANCES RESULTING IN THE COMMONWEALTH'S PRESENTATION OF PRIOR RECORDED TESTIMONY OF KENNETH CHOY, AS AN IMMUNIZED MISSING WITNESS WHO WAS NOT AVAILABLE FOR LIVE CROSS EXAMINATION, CAST DOUBT ON THE CANDOR OF THE TRIAL PROSECUTORS, DEMONSTRATING JUSTICE MAY NOT HAVE BEEN DONE.

The defense argues that the Commonwealth's presentation of the testimony of its immunized witness Kenneth Choy and the related jury instructions collectively violated Frances's constitutional rights to confront and cross examine her accuser. While the Court finds the resolution of this question unnecessary to the resolution of this case, the post-conviction record raises questions about

the candor of the trial prosecutors regarding Kenneth's departure from the United States to Hong Kong just days before the start of Frances's third trial.

At trial ADA Bradley advised this Court that he was thrown a "curve ball" when he learned shortly before the scheduled trial date that Kenneth Choy fled to Hong Kong. T3: 5/2/11 at 5. The Commonwealth moved to introduce Kenneth's prior recorded testimony from Frances's second trial. Introduction of prior recorded testimony is not unusual provided that "the declarant is unavailable to testify *and* the defendant had an adequate prior opportunity to cross-examine the declarant." *Commonwealth v. Gonsalves*, 445 Mass. 1, 3 (2005). However, the argument made by ADA Bradley in support of admitting such evidence, in light of the post-conviction record, raises concerns about ADA Bradley's candor with the Court. ADA Bradley advised this Court that he learned about Kenneth's departure from the United States in an email from ADA O'Sullivan, and that ADA Bradley in turn sent an email to State Police Lt. Warmington asking him to investigate Kenneth's departure. T3: 5/2/11 at 13-14; T3: 5/3/11 at 57-58. In post-conviction discovery this Court ordered the Commonwealth to provide all emails, text messages, and other notes and documents relating to Kenneth's departure. Document No: 237, 253, 280. The

Commonwealth did not provide the defense with copies of any of the emails that ADA Bradley referred to in his remarks to this Court at the time of trial nor has the Commonwealth discovered or produced any such emails -- or any other notes or memoranda -- concerning Kenneth's departure to date.

The Commonwealth, in a Certificate of Compliance dated May 8, 2019, states that emails generated at that time were backed up and archived, but it was possible for a person with access to the email system to delete an email before it would be permanently archived. R.A. 1022-1023. This Court need not make a finding as to whether (1) ADA Bradley's representations about receiving and sending emails about Kenneth's departure were accurate; or (2) whether ADA Bradley, ADA O'Sullivan, or someone else removed the emails ADA Bradley referenced before they were backed up and archived. Regardless of whether the emails ever existed, or whether they were destroyed, the fact that such emails were not available to disclose to the defense as directed by this Court's orders causes this Court to have doubts about the representations made to the Court about the circumstances of Kenneth's departure, and the trial prosecutors' candor on the subject.

This Court ordered the Commonwealth to provide a copy of any summons or subpoena that was served upon Kenneth Choy prior to his

departure. "The Commonwealth must exercise substantial diligence in order to meet its burden of showing a witness's unavailability." *Commonwealth v. Ross*, 426 Mass. 555, 557-58 (1998). The Commonwealth has not shown that the trial prosecutors caused a trial summons to be served on Kenneth before his departure; it has only provided a copy of a summons that may have been mailed to the law office of Attorney Galibois. In a criminal case a summons "shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode . . . or by mailing it to the witness' last known address." Rule 17 (d) (1) Mass. R. Crim. P. Properly serving a summons is the first step in an effort to secure the presence of a witness for trial. *See Commonwealth v. Housewright*, 460 Mass. 665 (2015)(summons was returned with a note from a doctor regarding the medical condition of the witness); *Commonwealth v. Florek*, 48 Mass. App. Ct. 414, 415-16 (2000)(Commonwealth knew address of witness but did little more than send a summons); *Commonwealth v. Lopera*, 42 Mass. App. Ct. 133, 137 (1997)(the witness was summoned by the Commonwealth on an earlier scheduled date but not the date when the trial actually took place). If ADA Bradley had advised this Court at the time of trial that the Commonwealth had not properly served a summons on Kenneth before his departure from the

country, that may have affected this Court's ruling on the admissibility of his prior recorded testimony.

This case presented a highly unusual situation where the Commonwealth's chief witness was immunized yet he was not personally available at trial to be questioned and confronted by the defense. In light of the arguments that have been presented and a review of the record as a whole, the Court finds that justice may not have been done. Rule 30(b) Mass. R. Crim. P.

VII. EXCULPATORY INFORMATION REGARDING KENNETH CHOY'S MOTIVE WAS NEITHER PROVIDED TO TRIAL COUNSEL UNDER RULE. 14 MASS. R. CRIM. P., NOR PURSUANT TO THE COMMONWEALTH'S RULE 11 DISCOVERY AGREEMENT IN THE PRETRIAL CONFERENCE REPORT.

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).

The parties agree that these documents in Detective Clark's files contain exculpatory evidence suggesting a motive for Kenneth

Choy to harm his grandfather Jimmy Choy and the Choy family home. At trial there was evidence that Jimmy Choy had been physically and verbally abusive to Kenneth, 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). Neither of the prosecuting attorneys provided this discovery to defense counsel. Failure to comply with an agreement to supply discovery supports granting a motion for new trial. *Id.*

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, ADAs John Bradley and Karen O'Sullivan failed to disclose these documents and this exculpatory evidence was not available to the defense at the time of trial. This failure to

disclose exculpatory evidence further supports the Court's conclusion that justice may not have been done.

VIII. THE TRIAL AND POST-CONVICTION RECORD REVEAL ADDITIONAL MISCONDUCT BY THE TRIAL PROSECUTORS CASTING DOUBT ON THE INTEGRITY OF THE VERDICT SUCH THAT JUSTICE MAY NOT HAVE BEEN DONE.

Where, as in this case, the evidence was "not overwhelming by any means",[3] false, misleading, and unsupported statements made by the prosecution may be prejudicial and likely to cause a miscarriage of justice. *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 808-810 (2009)(misstatements of the record in ADA Bradley's closing argument required reversal of first degree murder conviction); *Commonwealth v. Niemic*, 483 Mass. 571, 595-596 (2019)(cumulative effect of improper closing arguments in context of the case, required a new trial).

In closing, ADA Bradley argued that Kenneth's "credibility," and Frances's guilt, were evidenced by proof that there was gasoline residue on the pants of Frances Choy but "[n]othing Kenney Choy was wearing tested positive for gasoline." T3: 5/12/11 at 55.

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[3] In Memorandum and Order on the defendant's motion for bail pending appeal, Locke, J., noted that the evidence in the second trial, over which he presided was "not overwhelming by any means." Memorandum of Decision and Order on Defendant's Motion to Set Bail. Document 188, dated 2/25/11, at 5. This Court concurs that the evidence in the third trial was not "overwhelming by any means" either.

This argument conveyed the impression that the Kenneth's clothing was submitted for testing and tested negative for gasoline, two propositions that are not supported by the trial or post-conviction record. Records of the State Police Laboratory that are part of the post-conviction record show that Kenneth's clothing was not GC/MS tested, or even submitted for GC/MS testing. R.A. 830-831 (listing items submitted for testing); R.A. 848 (listing items for which testing was requested); 851-991 (documenting testing process and showing 11 items tested, not including Kenneth's clothing); R.A. 998 (showing that State Police had Kenneth's shirt and shorts, but showing no request for testing).

ADA Bradley also argued in closing that the jury should credit Kenneth's immunized testimony because he still had charges pending against him for possessing a Class A substance in a school zone, a factual assertion that ADA Bradley knew or should have known to be false. ADA Bradley argued in closing: "You heard that *he has a pending criminal charge of distribution of heroin in a school zone.* Those are things you are absolutely entitled to consider in evaluating his credibility." TR3: 5/12/11 at 46 (emphasis added). Contrary to ADA Bradley's assertion to the jury, the school zone charge was dismissed prior to Frances's second trial without objection from the Commonwealth. R.A. 440-442, 524. ADA Bradley's

official emails to the prosecutors handling Kenneth Choy's "school zone" charge, plus ADA Bradley's position as a supervisor of the prosecutors practicing in the Brockton District Court at that time, provide further reason to believe ADA Bradley's representations to the jury about the status and significance of the school zone charge were knowingly or recklessly false. R.A. 323, 1234, 1249-50.

A recurring issue in the trial was whether this Court would give an instruction under *Commonwealth v. Zanetti*, 454 Mass. 449 (2009), or under the authority of an interlocutory decision in this case, *Choy v. Commonwealth*, 456 Mass. 146 (2010). In advocating for an instruction under *Zanetti*, ADA Bradley represented to this Court that the *Choy* appellate decision was "pre-*Zanetti*" thereby suggesting that *Zanetti* was the more recent controlling precedent. T3: 5/2/11 at 45. The record confirms that this argument was not factually accurate. The *Choy* case was decided in the subsequent calendar year, and both the majority and dissenting opinions in *Choy* cite the *Zanetti* decision. *Choy* at 154, n. 12, 159. On a related point, this Court asked ADA Bradley whether Judge Locke gave "the so-called *Zanetti* instruction." T3: 5/2/11 at 46. ADA Bradley replied, "He did not, Your Honor. That was something that was a mistake that I made in not requesting

one." *Id.* The transcript of the second trial shows that a *Zanetti* charge was not given because both Judge Locke and ADA Bradley recognized that the template for an instruction was provided by the SJC in *Choy v. Commonwealth*, and not by *Zanetti*. T2: 2/6/11 at 21-22. ADA Bradley's inaccurate representations to this Court on this point go beyond the limits of zealous advocacy, and cannot be condoned by this Court.

The transcripts of Kenneth's trial first became available to the defense after Frances's third trial. In Kenneth's trial, ADA Bradley argued that incriminating statements attributed to Frances should not be admissible in evidence. Kenneth Choy Trial: 1/30/08 at 4-3. "I don't think it qualifies as a statement against penal interest because she admits then immediately retracts it. And I don't think that's a statement that would tend to subject her to criminal liability." Kenneth Choy Trial: 1/30/08 at 4-3. In the case tried before this Court ADA Bradley took the opposite position, arguing in his opening statement that Frances "admitted to doing it. . ." T3: 5/3/11 at 86. In his closing argument, ADA Bradley urged the jury to convict Frances based upon "her own words." "[T]he most damning evidence in this case, ladies and gentlemen, against this defendant, are her own actions and her own words." T3: 5/12/11 at 58. While a prosecutor is not required to

offer the same evidence in successive prosecutions of a defendant or codefendant, the inconsistent positions taken by ADA Bradley here, in light of the issues discussed above, and in the context of the full case are matters of concern. The Supreme Judicial Court has emphasized the special role that prosecutors serve in the criminal justice system. *See Commonwealth v. Keo*, 467 Mass. 25, 35-36 (2014). In that case which involved successive trials of co-defendants, the Court noted the caution that must be exercised by a prosecutor in the separate trial against co-defendants. "[O]ne issue worthy of discussion is the conflicting closing arguments advanced by the prosecutor" in the separate trials against co-defendants. *Id.* at 35. "Prosecutors have a special role in the criminal justice system 'in the search for truth in criminal trials.' *Strickler v. Greene*, 527 U.S. 263, 281 (1999)." 467 Mass. at 35. *See also, Imbler v. Pachtman*, 424 U.S. 409, 424 (1976), *Berger v. United States*, 295 U.S. 78 (1935), *Commonwealth v. Weaver*, 400 Mass. 612, 615-616 (1987); *Commonwealth v. Ware*, 482 Mass. 717, 721-722, 725, 730 (2019).

ADA O'Sullivan elicited testimony from Detective Clark that Frances told him she got gasoline "from downstairs" even though ADA O'Sullivan was present at earlier proceedings where Detective Clark conceded that such 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 attaching her anticipated questions and his anticipated answers for his testimony. R.A. 1226. ADA O'Sullivan's script for Detective Clark's testimony included a question and the answer which Detective Clark had already sworn under oath to be incorrect. That testimony was presented to the jury. T3: 3/5/2011, 50.

Both the knowing presentation of false testimony and failure to correct false testimony is improper and can create a substantial likelihood of a miscarriage of justice. *Commonwealth v. Forte*, 469 Mass. 469, 490 (2014); *Commonwealth v. Hurst*, 364 Mass. 604, 608 (1974). In providing a witness with scripted questions and scripted answers, at least one of which was not factually accurate, ADA O'Sullivan created a scenario by which the testimony she elicited was the product of her script, not the witness's memory. The affirmative presentation of testimony that the witness himself had previously conceded to be inaccurate adds to the Court's concern about the fairness and integrity of the trial proceedings.

Collectively the prosecution's misleading statements to the Court and in closing argument, presentation of evidence that

appears in retrospect to have been false, and inconsistent positions in this case convince this Court that justice may not have been done. Rule 30(b) Mass. R. Crim. P.

CONCLUSION AND ORDER

The Defendant has presented the Court with an extensive record including transcripts of four trials and hundreds of pages of exhibits, including affidavits and newly discovered evidence along with thorough and detailed memoranda of law. The Commonwealth has also filed a detailed and thorough responsive memorandum. The parties have agreed that the grounds outlined above are supported by the law and the record, and that these grounds support allowing the Motion for Post-conviction Relief and vacating the convictions. There is no need for this Court to reach the other issues offered by the defense as grounds for the motion for new trial. Frances Choy's Motion for Post-conviction Relief is allowed, with the assent of the Commonwealth.

The conviction for arson and the two convictions of murder are vacated. SO ORDERED.

By the Court,

Linda E. Giles
Associate Justice
Superior Court Department
of the Trial Court for the Commonwealth

Dated: Sept. 17, 2020