MACDL
Massachusetts Association of
Criminal Defense Lawyers

January 4, 2021

Clerk Francis V. Kenneally
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Re: *Commonwealth v. Terrance Gaskins*, FAR-28019
Appeals Court No. 2020-P-0052
Amicus Letter in Support of Defendant's Application for Further Appellate Review

Dear Clerk Kenneally,

The Massachusetts Association of Criminal Defense Lawyers (MACDL), as *amicus curiae*, submits this letter in support of Mr. Gaskins' application for further appellate review of the decision of the Appeals Court dated December 14, 2020 affirming his conviction. See *Commonwealth v. Terrance Gaskins*, No. 20-P-0052 (December 14, 2020).

MACDL is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files *amicus curiae* submissions in cases raising questions of importance to the administration of justice.

In this case, the trial judge concluded that members of the Narcotics Bureau of the Springfield Police Department intentionally destroyed evidence favorable to the defendant:

> I don't buy that it was happenstance * * * in the middle of this issue being litigated before a Superior Court judge, somebody from the Springfield Police Department just happens to pick up the phone and happens to ask for specific trees in a very specific spot that's a subject of ongoing Superior Court litigation be removed * * * I don't know what's going on here, but we're not happy about it at all.

(T.III:173-174)

The trial court did not believe the prosecutor's claim that this was happenstance or a routine matter. Of course, that would have been a truly extraordinary happenstance or routine: the *day after* the trial judge ordered the prosecution to provide the police binoculars to the defense to test the plausibility of a Springfield police officer's story, a sergeant, someone with rank and responsibility, asked the City Forester to trim the two trees near the scene that would have called that officer's credibility into question. Those exact trees were cut on the next day, identified by cell phone photos so there would be no mistake. The trial court's finding—that members of the prosecution team intentionally acted to destroy material evidence favorable to the defense—satisfies Mr. Gaskins' burden of showing that there is "a reasonable possibility, based on concrete evidence rather than fertile imagination," that access to the evidence "would have produced evidence favorable to his cause." See, e.g., *Commonwealth v. Neal*, 392 Mass. 1, 12 (1984).

The destruction of the trees was intentionally aimed at depriving Mr. Gaskins of his right to fully defend against the charges. It was designed to flout the judicial order of the previous day: if the judge was going to force them to hand over the binoculars, they would destroy the trees. And it may also have been aimed at insulating officer Michael Goggin from cross-examination that would have exposed inaccurate or untruthful testimony he gave under oath regarding his observations of Mr. Gaskins engaging in the alleged criminal activity that formed the basis for the charges. And note that this misconduct went undisclosed by the Springfield Police Department—the only reason we know what took place is due to the City Forester's response to a defense FOIA request.

We should call this what it was: undisclosed, intentional misconduct by a police sergeant with rank and responsibility, to insulate a fellow officer's testimony from scrutiny and undermine the purpose and intent of a judicial order, aimed squarely at the heart of the defense. None of this is in serious dispute. The only question before this Court is what should be done about it.

The remedial question calls for the balancing of "the culpability of the Commonwealth, the materiality of the evidence and the potential prejudice to the defendant." *Commonwealth v. Woodward*, 427 Mass. 659, 678 (1998). This case squarely checks all three boxes.

First, culpability could not be greater. Springfield Narcotics Bureau Sergeant Sean Sullivan's request to the Springfield City Forester to cut the trees was impermissible conduct by a government agent who was a member of the prosecution team. See *Commonwealth v. Martin*, 427 Mass. 816, 823-24 (1998) (members of the prosecution team include those who are acting on the government's behalf in a case). When a member of the prosecution team intentionally destroys evidence, resulting in an accused citizen being deprived of his right to defend himself against a criminal charge, it is incumbent upon our judiciary to do more than just express its "unhappiness" with the misdeed. (T.III:173-174). The affirmance by the Appeals Court, and in an unpublished decision, likewise lends tacit approval to such blatant, intentional misconduct.[1]

---

[1] This is not the first time that Sergeant Sullivan has engaged in misconduct on the job, been disbelieved by a Justice of the Superior Court, or had the Appeals Court avert its gaze by tacit endorsement in an unpublished decision. See *Commonwealth v. Cato*, 2019-P-0810 (Decided August 13, 2020; FAR denied (FAR-27816) December 10, 2020). Jason Cato, a thirty-year-old Black man and sole occupant of the car he was driving was pulled over during a traffic stop occasioned by "an expired inspection sticker" as police canvassed the area in response to hearing shots fired. Sullivan testified under oath that he did not have his gun out as he approached Cato. The motion judge (Groce, J.) stated that he did not believe Sullivan's testimony that he didn't have his gun out: "I thought that it was ludicrous." *Commonwealth v. Cato*, 1623CR3688 (T. 8/10/17 at 11). See also *Flynn v. Brassard*, 1 Mass. App. Ct. 678, 681 (1974) (taking judicial notice of record in earlier case). The motion judge also didn't believe Sullivan's testimony that, while being held at gunpoint, Cato "lunged" for the gun under the seat. (T. 8/10/17 at 12).

Since 2017, when Sullivan testified under oath in the *Cato* case and was found by a Superior Court judge to have perjured himself twice, he has been rewarded by the Springfield Police Department with a promotion from Detective to Sergeant. See MassLive, *Springfield police officers with dubious disciplinary records make list of prospective sergeants* (Feb. 13, 2018).

Sullivan's promotion also followed a 2014 $1.3 million federal civil rights damage award resulting from a jury verdict arising from 2009 misconduct allegations brought against him. Sullivan was alleged to have abused a fifteen-year-old Black suspect named Delano Walker, Jr., by repeatedly grabbing the young man and sending him spinning into oncoming traffic, where he was struck and killed. "Witnesses say Walker backed into traffic as Sullivan grabbed at his neck because the teen would not hang up his cellphone." WCVB, *Springfield Woman Awarded $1.3M in Death of Son* (Sept. 23, 2014). Walker's grieving mother was the plaintiff in the lawsuit, in which a jury determined that Sullivan had violated her son's civil rights.

The culpability of (and thus the remedy for) police misconduct must be informed by the history of the department in question. And, in Springfield, what ought to be an extraordinary fact pattern—the intentional destruction of evidence—is anything but. The Springfield Police Department's Narcotics Bureau itself has a history of *routinely* engaging in egregious misconduct. On July 8, 2020, the United States Department of Justice Civil Rights Division and the United States Attorney's Office for the District of Massachusetts issued a report concluding that "there is reasonable cause to believe that Narcotics Bureau officers engage in a **pattern or practice** of excessive force in violation of the Fourth Amendment of the United States Constitution." See Department of Justice, *Justice Department Announces Findings of Investigation into Narcotics Bureau of Springfield, Massachusetts Police Department* (July 8, 2020), available at: https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-narcotics-bureau-springfield. According to the report, Springfield police "engage in excess uses of force without accountability" and lie about it in their official police reports.[2]

The recent DOJ report, which itself documents a years-long pattern and practice of misconduct, is hardly the first suggestion of misconduct by the Springfield police. This department is plagued by misconduct. "[C]laims of police misconduct—ranging from false reports, brutal beatings, and wrongful convictions—have been lodged against Springfield officers in courtrooms, in the community, and even from within the ranks." Laura Crimaldi and Shelley Murphy, *'I could crush your [expletive] skull and [expletive] get away with it.' A deep look at the Springfield police*, Boston Globe (Sept. 1, 2018). Between 2006 and 2018 alone, the City settled 31 police misconduct lawsuits and was ordered to pay judgments in two other cases, costing taxpayers at least $4.8 million. See Springfield Community Police Hearing Board (CPHB), Report for 2018, Appendix 2 (Apr. 3, 2019).[3] The history of misconduct by the Springfield Police Department—including racial profiling, excessive force, falsified reports, and a complete lack of institutional accountability—is laid out in a complaint filed by the ACLU of Massachusetts against the Department when it withheld information in response to public record requests.[4]

The lesson of that history is clear: this Department is infected by a culture of impunity. And without accountability, misconduct worsens. Legitimizing this type of misconduct by judicial imprimatur sends an implied message to the citizens of Springfield: "you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged." See *Utah v. Strieff*, 579 U.S. ___ (2016) (Sotomayor, J.,

---

[2] The DOJ report itself is available here: https://www.justice.gov/opa/press-release/file/1292901/download.

[3] Available at: https://www.springfield-ma.gov/cos/fileadmin/law/CPHB/CPHB_Annual_Report_2018.pdf.

[4] The ACLUM complaint is available at: https://www.aclum.org/sites/default/files/field_documents/aclum_springfield_complaint_0.pdf.

dissenting). Deterring police misconduct and motivating police to engage in reform requires leverage. When our courts implicitly condone misconduct by failing to provide redress to citizens whose rights are violated, no leverage gets applied and no meaningful reform occurs.

With Massachusetts being one of only six states nationwide[5] having no authority to decertify officers who engage in misconduct, the judiciary must do more than express unhappiness when confronted with an intentional violation by the police of the constitutional rights of our citizens by a police department and officer with a lengthy track record of such misconduct. See Goldman, *Importance of State Law in Police Reform*, 60 St. Louis U. L.J. 363 (2016). An intentional constitutional violation requires a strong judicial remedy—here, dismissal of the indictment—to ensure the government misconduct does not recur. Affirmance, on the other hand, is a license. Misconduct occurs when the police know they will suffer no sanction from their Department, their county prosecutor's office, or this Court. By all appearances, Sergeant Sullivan has avoided any professional consequence whatsoever for his misconduct (like many Springfield police officers before him). If anything, it seems he has been promoted. See *supra* note 1. If the Springfield Police Department will not impose any discipline for misconduct, it should, at the very least, never be allowed to capitalize on intentional misconduct to obtain a conviction.[6]

The rights violation that flows from such misconduct is so egregious that it threatens the very foundation of the constitutional protections afforded to all citizens. The intentional destruction of evidence simply cannot be countenanced. This Court should not fall into lockstep with the willingness of the trial court, as well as the Appeals Court, to tolerate law enforcement tactics that cross the line established by the Due Process Clause. Contrary to the view of this misconduct taken by the Appeals Court panel, every time a citizen suffers a violation of this nature, and our courts fail to provide redress, "irremediable harm" results. See *Commonwealth v. Gaskins*, No. 20-P-52, slip. op. at p. 8 (December 14, 2020). Egregious misconduct requires strong medicine.

But this is not solely a matter of deterrence of misconduct—Mr. Gaskins suffered very real prejudice from the destruction of the trees, just as Sergeant Sullivan intended. A finding by the Appeals Court that Mr. Gaskins could still make a "plausible argument" to the jury in the wake of the intentional destruction of

---

[5] The others being California, Hawaii, New Jersey, New York, and Rhode Island. Goldman, *Police Officer Decertification: Promoting Police Professionalism Through State Licensing and the National Decertification Index*, POLICE CHIEF, Nov. 2014, at 41 n.1.

[6] There is also no other way for a litigant to provide that deterrence, since officers are entitled to absolute immunity from damages even for perjured trial testimony. See *Rehberg v. Paulk*, 566 U.S. 356 (2012); *Briscoe v. LaHue*, 460 U.S. 325 (1983).

evidence material to his defense is belied by the very misconduct that occurred. If this evidence were unimportant or cumulative, the Springfield police surely would not have gone to such lengths to destroy it. The willingness of the police to engage in blatant misconduct suggests that this was an effort to cover up something even more egregious: perjury. Why else would they have ordered the destruction of the trees?[7] Further, the prosecutor was permitted to argue to the jury in a manner that contradicted the judge's finding of intentional misconduct: that Sergeant Sullivan's request was routine, and that the defense investigator should have documented the scene earlier. See (T.IV/20-21). The defendant was entitled to the evidence the officer ordered destroyed. The prosecutor should not have been allowed to argue the officer's inadvertence when the judge found that this was intentional. The Commonwealth should never be permitted to take advantage of misconduct in this manner.

Indeed, the trial judge himself found that the defendant's argument concerning the officer's credibility was *not* sufficient to replace the destroyed evidence. The judge denied the defendant's motion to suppress for that very reason: because he could not "conclude that [the officer's] testimony was undermined by the defendant's investigator's observations made a year after the fact without benefit of low light binoculars." (R.A. 13, 20). The defendant needed more; the evidence he had was not enough. And it was for that very reason that the judge allowed the defense to borrow the binoculars, leading to the intentional destruction of the trees the next day. Given this, it simply *cannot be true* that, as the Appeals Court panel found, Mr. Gaskins was not prejudiced "due to the availability of photographic and video evidence both before and after the tree cutting," Slip op. at 9. There is no reason to think the jury was not looking for more specific evidence, just as the judge had when he ordered the defendant to go get the evidence that the police then immediately destroyed.

The Appeals Court panel applied the wrong standard to the prejudice analysis. Mr. Gaskins had a constitutional right to make an argument that was more than just "plausible." Slip op. at 8. Affirmance strips the defendant of the Due Process protections that our state and federal Constitutions afford him. Fourteenth Amendment to the United States Constitution, art. 12 of the Massachusetts Declaration of Rights. See *Commonwealth v. Gaskins*, 20-P-52 Slip. Op. at p. 8 (December 14, 2020). The panel's rulings are clearly at odds with the trial court's finding that "the shading provided by the trees" cut was a material issue in this case. (R.A. 25). No reasonable remedy was provided for this intentional destruction of what was likely to have been exculpatory evidence, as judicial expressions of unhappiness

[7] The inference of perjury from the intentional destruction of the trees is indeed strong. Only an officer who is knowingly lying would have an incentive to destroy the evidence of his dishonesty. A truthful officer, on the other hand, would have every incentive to preserve the trees just as they were, to prove that he in fact *could* see what he claimed to see, thus strengthening his credibility and the prosecution's case against the defense's suggestion of untruthfulness.

provide cold comfort to a wrongfully convicted man targeted by intentional police misconduct. Dismissal of an indictment is required under these circumstances unless the trial can proceed completely "free of the taint" of the misconduct. *Commonwealth v. Manning*, 373 Mass. 438, 444 (1977). The question is not whether Mr. Gaskins was "unduly hampered" by this misconduct, slip op. at 9, but whether he was hampered *at all*. See *Commonwealth v. Hines*, 393 Mass. 564, 571 (1984) (holding that dismissal is required for intentional misconduct that results in the defendant being "prejudiced *to some extent*," citing *Manning*). The Commonwealth cannot receive even an iota of benefit from intentional police misconduct. Here, of course, they received much more.

"[T]he Constitution guarantees criminal defendants a meaningful right to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation marks omitted). Whether this right is rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, either way the right is guaranteed by our Constitution. *Brown v. Ruane*, 630 F.3d 62, 71-72 (2011) *quoting Crane* at 690, *see also California v. Trombetta*, 467 U.S. 479, 485 (1984). The Supreme Court has described this right to present a complete defense as "a fundamental element of due process of law." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) *quoting United States v. Scheffer*, 523 U.S. 303, 308 (1998) (internal quotation marks omitted).

Mr. Gaskins had a right to prove that "there is no way that Officer Goggin could see what he said he saw, even with those binoculars. And he was denied that." (T.IV:13). If the loss or destruction is "due to deliberate and egregious action by the prosecutor or unintentional conduct resulting in irremediable harm to the defendant," *Commonwealth v. Cronk*, 396 Mass. 194, 199 (1985), then dismissal of the indictment is appropriate. This Court has affirmed the dismissal of an indictment even in the absence of intent or bad faith. See *Commonwealth v. Henderson*, 411 Mass. 309 (1991). But intentional misconduct "requires special scrutiny." *Commonwealth v. Sanford*, 460 Mass. 441, 450 (2011). "Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced." *Manning*, 373 Mass. at 444. See also *CPCS v. Attorney General*, 480 Mass. 700, 725 (2018) (concluding that "the very strong medicine of dismissal with prejudice is required" in a case involving dishonesty and non-disclosure by prosecution team).

Alternatively, were the testimony of Officer Goggin regarding his observation from amid the tree line to be excluded, dismissal of the indictment would follow, for no evidence would remain upon which to base an indictment. If ever the sanction of dismissal is going to be deemed an appropriate sanction for the Commonwealth's intentional destruction of evidence, it should be applied to this case. *Commonwealth v. Light*, 394 Mass. 112, 115-117 (1985) (Liacos, J. dissenting) (there comes a point when the prosecutor's failure to disclose exculpatory evidence is so extreme it is

unconscionable, and dismissal of the complaint is the only just remedy). If they will suffer no professional sanction, the Springfield Police should at least know that indictments will be dismissed when they intentionally engage in misconduct. The Appeals Court's decision sends exactly the wrong message to the Springfield Police Department, and all others across the Commonwealth.

Because there is a reasonable probability that Mr. Gaskins was denied his right to fully defend himself at trial with evidence that was destroyed as a result of intentional government misconduct—misconduct that is consistent with a pattern perpetrated by this specific officer, see *infra* note 1, and the Springfield Police Department in general—justice demands that this Court grant the defendant's application for further appellate review and vacate this wrongfully obtained conviction.

Respectfully submitted,
on behalf of the
Massachusetts Association of Criminal
Defense Lawyers,

/s/ Amy M. Belger

_____

AMY M. BELGER
B.B.O. No. 629690
Law Office of Amy M. Belger
841 Washington Street
Holliston, MA 01746
508-893-6031
appellatedefender@gmail.com