

COMMONWEALTH OF MASSACHUSETTS

Hampden, ss.

Superior Court Department
Of The Trial Court Criminal Nos.
86-6254 through 86-6256

COMMONWEALTH OF MASSACHUSETTS

vs.

MARK SCHAND,
Defendant.

MEMORANDUM IN SUPPORT OF
DEFENDANT MARK SCHAND'S
MOTION FOR A NEW TRIAL

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INTRODUCTION

Mark Schand has been imprisoned since October 29, 1986 for crimes he did not commit, on convictions resulting from a trial in Hampden Superior Court that was fundamentally unfair. Investigators working on Mr. Schand’s behalf have discovered new evidence that proves both of these assertions. This memorandum documents those assertions and Mark Schand’s case for judicial relief from these wrongful convictions.

I. THE CRIMES AT ISSUE.

On September 2, 1986 at approximately 11:15 p.m., Charles [“Heavy”] Stokes, his brother David Stokes were hanging out on Rifle Street next to the After Five Lounge in

Springfield. The Stokeses unsuccessfully negotiated to sell cocaine to Anthony Cooke and Michael Hosten. While Cooke and Hosten were still nearby, several strangers approached the Stokeses, asking about buying drugs. T:294-297.¹ As Heavy Stokes showed some of his wares to one of several prospective customers, one of the men grabbed either at the cocaine or at David Stokes's neck chains. Cooke grabbed the interloper, who then turned, produced a gun² and shot Cooke in the shoulder. Cooke and the two Stokeses ran. The armed man shot again at Cooke, then chased after Heavy, shooting. Heavy tripped and fell in the street near the intersection of Rifle and Central Streets, where the gunman stood over him and robbed him of a pack of cigarettes, matches, half a gram of cocaine and forty dollars. T:301-307, 361-363, 407-412, 525-529, 590-592, 603-611, 631-638. At some point in this

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The trial transcript is sequentially numbered as if it was a single volume. It will be cited as "T:page." The transcript of the July 1987 motion to suppress hearing will be cited as "MTSVolume:page." The transcript of the February-March 1992 motion for new trial hearing will be cited as "MNTVolume:page." Documents set out in the Appendix of Exhibits will be cited as "A.page."

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Like much of the evidence presented in Mark Schand's trial [see Judge Murphy's comment at T:936], the trial testimony regarding the number of armed men was confused and conflicting. Heavy said he saw only one gun but thought there was more than one. T:307, 324. Cooke testified he saw one gun and wasn't sure whether he saw another. Id:361, 376, 392. Hosten vacillated between one gun and two, admitting that he mentioned only one in his pretrial statement. Id:536-537, 548, 552-553. David Stokes testified that he saw two armed men, one who shot Cooke point-blank and another who chased and robbed Heavy. Id:407-410. But David also said that one man shot Cooke and robbed Heavy, although David did not see the robbery. Id:434-436. Two additional eyewitnesses each testified about seeing weapons. William Darko saw one or two. T:606-609. Michael Bernard saw one. T:639. Only .25 cal. ordinance was recovered from the scene. A.351-354.

sequence, a bystander named Victoria Seymour was shot and killed.³

The Trial. From November 9-20, 1987, Mark Schand was tried on an indictment charging him with murder, assault with a deadly weapon and armed robbery arising from these events. *There was not a shred of physical evidence linking Mark Schand to any of these crimes.* T.220; MNTVI:24 [concession by Assistant District Attorney Francis Bloom, the trial prosecutor]. The prosecution rested primarily on the testimony of six local drug dealers/users who claimed to have been eyewitnesses present near the After Five at the time these crimes occurred. They included Anthony Cooke and Heavy Stokes. Although Heavy was the victim of the armed robbery and Cooke was shot, each had to be induced by promises of leniency in outstanding cases to testify against Mark Schand in the trial. David Stokes, Michael Hosten, Michael Bernard and Willie Darko were the other prosecution witnesses. All six received favorable treatment on criminal charges that they faced at the time each identified Mark Schand as the robber or shooter. The six were friends and associates. T.629-630, 323. Each of these six identified Mark Schand as the armed man who chased down and robbed Heavy Stokes.⁴

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Ms. Seymour was pronounced dead on September 3, 1986 at 3:00 a.m., from a single gunshot wound to the back. T:207-208.

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The case was tried on the premise that the man who robbed Heavy Stokes was the man who shot Anthony Cooke and Victoria Seymour. Because the case was submitted to the jury on both joint venture and principal liability theories, and the jury returned a general verdict, it is impossible to know whether the jury found that Mark Schand guilty as the principal, a joint venturer, or both [they were not required to be unanimous on this issue] T.1071-1075.

The defense presented seven eyewitnesses who placed Mark Schand in Hartford, 27 miles away, between 11:00 p.m. and midnight that same day.⁵ The guilty verdicts establish that the jurors believed the prosecution's witnesses over Mark Schand's witnesses. However, in 1991 Mark Schand was examined by an expert polygrapher, James C. Johnson, Esq., and found to be truthful when he denied any involvement in the murder of Victoria Seymour.⁶ A. 4. Further, over the past three years, Centurion Ministries, Inc., a respected innocence project, has developed compelling new evidence that Mark Schand is innocent of these crimes. This evidence, together with newly discovered evidence discovered after the trial, both by Centurion Ministries investigators, both by disclosures made during and after the motion for new trial, and by investigation conducted on Mark Schand's behalf since his trial, demonstrates that, had all of the presently known evidence regarding the

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The defense case is summarized later at pages 11 through 14, *infra*.

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Mr. Johnson asked three questions:

"In September, 1986, did you shoot Victoria Seymour?"

"Did you fire any gunshot that struck Victoria Seymour in September of 1986?"

"In September, 1986, were you present at the shooting of Victoria Seymour?"

Mark Schand answered "no" to each question. Mr. Johnson concluded:

"It is my opinion, based upon the evaluation of the polygraph charts, that the polygraph results to clearly, strongly and consistently support the truthfulness of Mark A. Schand in his answers to the aforementioned relevant questions employed throughout this polygraph examination.

I highly recommend your consideration of the use of polygraph in the defense of Mr. Schand in this matter. I will also provide any testimony or additional relating to this opinion as you may require."

A.4. The first page of Mr. Johnson's report has since been lost. Mr. Johnson has retired, and we have so far been unable to locate him.

After Five events been presented to the jury, it would have acquitted Mark Schand of these charges.

II. MARK SCHAND'S EARLIER CHALLENGES TO THESE CONVICTIONS.

Between 1987 and 1996, Mr. Schand unsuccessfully challenged his conviction in a September 13, 1991 motion for a new trial, in a direct appeal, and in a petition for a writ of habeas corpus in federal court. His consolidated direct appeal of his conviction and the denial of his motion for a new trial was denied in 1995 [Commonwealth v. Schand, 420 Mass 783]. His federal habeas petition was denied an unpublished order in 1996; Schand was not allowed an appeal of that decision.

Early Post Conviction Investigations. In 1989, and again in the course of the motion for new trial ["MNT"] proceedings, the robbery victim, Heavy Stokes, recanted his testimony identifying Mark Schand as the man who robbed him. A.426. In the MNT hearing, the trial prosecutor ADA Francis Bloom discredited David Stokes' identification, testifying that, after Charles Stokes identified Mark Schand on March 11, 1987, Charles "directed his brother to do the same." A. 446. This testimony was the first disclosure of this Brady fact to the defense. In a lobby conference on April 11, 1991 during the trial of Roger Schand for these crimes, Hampshire ADA Elizabeth Scheibel, who was prosecuting the case, told Judge Murphy: "we have been told by David Stokes and his lawyer, Andrew Klyman, . . . that he does not make any moves or does not say anything unless it's been cleared by his brother, Charles." A.448. When Heavy Stokes refused to testify in Roger Schand's trial, David Stokes also refused.

Thereafter, Mr. Schand and his family hired a succession of private investigators in an effort to locate new witnesses, and to locate and re-interview known witnesses who had testified falsely against him or who had not testified in his trial. A. 514-533. Many of these efforts were unsuccessful, but the Schands persisted and eventually appealed to Centurion Ministries in 2000 for help in gathering evidence of Mark's innocence. In 2009, after intensively screening Mr. Schand's case, Centurion Ministries accepted it and launched its own investigation, which is on-going.

Meanwhile, in 1999 and again in 2012, Anthony Cooke, the shooting victim who survived, repudiated his trial identification of Mark Schand as the man who robbed Heavy Stokes, but refused on advice of counsel to sign a statement, citing the risk of perjury charges. A.390-394. In June of 2006, Michael Hosten, one of the Stokes' brothers' companions at the time of these events, signed a detailed, 6-page affidavit repudiating his identification of Mark Schand as the robber. A.361. Mr. Hosten, who knew he had a terminal illness when he signed his affidavit, died in July 2006. His affidavit has not yet been presented to a court. Thus, as of the date of this memorandum, three of the six eyewitnesses have recanted their identification of Mark Schand as a participant in these crimes.

The fruits of Centurion Ministries's ongoing investigation, supplemented by the above-mentioned information, provide the grounds on which this motion for new trial is based.

III. THE FRUITS OF CENTURION MINISTRIES' INVESTIGATION.

Centurion Ministries, Inc., is a nonprofit 501(c)(3) organization founded 32 years ago in Princeton, NJ, by its current Executive Director, James C. McCloskey. The primary mission of Centurion Ministries is to identify and then work to free from prison those innocent men and women across the nation who are serving life or death sentences for the crimes of others. Since its founding in 1980, Centurion Ministries has obtained the freedom of 50 individuals who have collectively served almost 1000 years of unjustified imprisonment. To correct these injustices, Centurion Ministries conducts a thorough investigation in order to develop the new evidence required to overturn a false conviction. It retains and works hand in hand with attorneys and forensic experts to obtain judicial relief for its beneficiaries. It raises and disburses the funds required to meet all legal, investigative, and administrative costs necessary for the successful completion of the casework.

Over the past three years, Richard Hepburn and James McCloskey, investigators for Centurion Ministries, Inc. ["Centurion Ministries"], have located and interviewed many of the key living witnesses who testified for the prosecution and defense in Mark Schand's November 1987 trial. These Centurion Ministries investigators have also interviewed 5 witnesses whom neither the prosecution team nor the defense had previously interviewed [Randy Weaver, Tracy Fisher, Martin Sailor, Lonnie Keith and Calvin Morgan]. The sockdolager of the Centurion Ministries investigation is the testimony of four of the new witnesses: Randy Weaver, Tracy Fisher, Martin Sailor, and Lonnie Keith. Each man admits

to having been present in front of the After Five Lounge at the time of the September 2, 1986 shootings and robbery. Each man says he knew Mark Schand [Sailor said he knew him only on sight] in September 1986 but was neither a friend nor an associate of Schand's. The other three, Randy Weaver, Martin Smith, and Lonnie Keith, admit having been present at the time, although each claims he did not witness the shooting. A.9, 178, 329, 330, 332, 355, 356. Each man states without qualification that Mark Schand was not present at the After Five when the shooting occurred. Id. Moreover, Tracy Fisher admits that he started the struggle that triggered the shootings and robbery. A.328, 330, 333. Calvin Morgan's account of having witnessed a meeting of the men who returned to Bennett's Lounge in Hartford immediately after the shooting corroborates important elements of these participants' statements. A.358.

This newly discovered evidence corroborates and affirms Mark Schand's alibi witnesses and directly refutes the prosecution's eyewitnesses' trial testimony that Mark was the man they saw commit the crimes at issue in this case.

Centurion Ministries investigators have also interviewed Anthony Cooke, who has confirmed and added to his earlier statements repudiating his identification of Mark Schand as the man who shot him. The statements of Hosten, Heavy Stokes, and Anthony Cooke each repudiate their own trial testimony and collectively impeach the integrity of the investigation and trial evidence against Mark Schand.⁷ Of the six men who testified for

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Kenneth Whitted, who was not a crime scene witness, has recanted his testimony that he saw Mark Schand in Springfield on at least three occasions in August 1986, offered to

the prosecution as crime scene eyewitnesses, Anthony Cooke, Michael Hosten and Heavy Stokes have each repudiated his testimony; and David Stokes has been discredited by prosecutors who testified under oath that David gave information and testified under Heavy's control and direction. A brief re-examination of Willie Darko's and Michael Bernard's testimony discloses compelling reasons for rejecting the accuracy of each. [Centurion Ministries has been unable to locate and interview either one; our best information indicates that Bernard is deceased; Darko may have returned to Ghana].

Further, Kenneth Whitted, who was not a crime scene witness, has repudiated his trial testimony that he saw Mark Schand in Springfield on at least three occasions in August 1986. Whitted's testimony was offered to impeach the statement that Lt. McMahon attributed to Mark Schand at the time of his arrest, that Mark had been in Springfield only once before.

Considered in combination with the alibi trial evidence and the repudiations of their identification testimony by the three key prosecution witnesses, this newly discovered evidence establishes that Mark Schand is surely innocent of the After Five crimes that were committed on September 2, 1986. It also establishes that Mark Schand's November 1987 trial was fundamentally unfair and resulted in a verdict that reasonable people cannot accept with confidence as a fair or accurate one.

Each of these assertions is spelled out in detail and documented in the following

impeach the statement that Lt. McMahon attributed to Mark Schand at the time of his arrest, that he had been in Springfield only once. T.460-462.

memorandum. The compelling conclusion is that Mark Schand's trial was fundamentally unfair, and that justice was not done in it.

IV. NEWLY DISCOVERED EVIDENCE: THE REAL PARTICIPANTS

A. Mark Schand's Defense Was Alibi And Misidentification.

Mark Schand's defense was that he was in Hartford throughout the time that the After Five crimes were committed, and that the eyewitness identifications of him as the gunman were false and/or mistaken.

1. Mark Schand's Seven Alibi Witnesses Placed Him In Hartford, Twenty Seven Miles From Springfield, At The Time The After Five Crimes Were Committed.

The defense presented strong, credible testimony from seven witnesses that Mark was not in Springfield when the After Five crimes were committed. The 911 call reporting the shootings came into the Springfield police at 11:32 p.m., a few minutes after the events. A.399. Attorney Anderson presented six eyewitnesses who saw Mark Schand in Hartford, 27 miles south of Springfield, between 11:00 p.m. and midnight on that date. A common challenge in presenting alibi testimony is the need to establish for each witness what it is that makes the date and time in question so memorable to that witness. Three concurrent events independently corroborated Schand's alibi witnesses' memories of September 2, 1986. First, Mark Schand was experiencing severe tooth pain throughout that day, even after he received dental treatment for it. Second, it was the day before school began in the Hartford public schools. Third, it was the day before Carol Parrish traveled to Virginia to attend a relative's funeral. These events converged at Pearl Andrade's hair salon, where

Mark Schand's girlfriend Mia Williams-Bey worked. All but one of the Mark's alibi witnesses passed through the salon between 11:00 p.m. and midnight on September 2, 1986.

Mia testified that she and Mark lived together, and that Mark complained of severe tooth pain the morning of September 2, 1986. See also, A.6 [Affidavit of Mia Schand]. As her work calendar confirmed, she was scheduled to work at Pearl Andrade's salon that day. She called Ms. Andrade to postpone her starting time, and made a noonish appointment for Mark at the University Clinic. The two went to the clinic together, where Dr. Thomas Accierno did a root canal-type procedure on Mark. T.864-872. Dr. Accierno testified about the work he had done and opined that Mark might have experienced considerable tooth pain for 3-5 days after the pain-killing medication used in the procedure wore off. T.761-775.

Leaving the dentist, Mark took Mia to the salon, where her work day began around 2:00 p.m. T.872-901. Mia had some appointments, and several of her friends and relatives brought their school-aged daughters in without appointments, to have their hair done for school, which began the following day. Mia worked the school children in around her scheduled appointments. Id.

One of Mia's customers was Carol Parrish, a 49 year-old woman who was a regular customer. T.780. Ms. Parrish originally had a mid-afternoon appointment but came in after 10 p.m. Her hair was done shortly before or at midnight. Ms. Parrish, who testified by videotaped deposition owing to a heart condition, was having her hair done in preparation for flying to Virginia the next day to attend an uncle's funeral. T.814, Trial

Exhibit 14; Ex. C for Id.

Pearl Andrade, the 64 year-old salon manager, confirmed that Mia started her day late, that Mark Schand was at the salon for much of the September 2 evening. He arrived at the salon around 9-9:30 p.m. to take Mia home, but Mia had not finished her work. Ms. Andrade left before Mia had finished work, around 11-11:30 p.m., and saw Mark sitting in his car outside, waiting. She recommended Bufferin to him for his toothache. Like most of Mark's alibi witnesses, Ms. Andrade was related to Mia: her long ago deceased husband was Mia's mother's brother. T. 776-814.

Mia's 28 year-old sister Lorrie Williams-Bey was the mother of two girls, Ebony and Pavar, aged 7 and 11. She brought her girls to the salon on the evening of September 2 to have their hair done for the beginning of school the following day. Mark drove her and her children home from the salon in time for Lorrie to see the weather report on the 11:00 p.m. news broadcast. T. 836-854. Selena Williams-Bey, Mia's 16 year-old niece (daughter of Mia's sister Rosalyn), was her last customer before Carol Parrish. Selena cleaned the shop while Mia did Ms. Parrish's hair. She saw Mark return at 11:30 p.m. from taking Lorrie Williams-Bey and her daughters home. Mark and Mia drove Selena home after Mia had finished doing Ms. Parrish's hair. T.855-862. Finally, Janice Parker, a mother of two who was unrelated to Mark or Mia, worked at a barmaid at Jerry Mack's bar in Hartford. Mark came into the bar that night at about 11:30 p.m. to play a lottery number and complained of tooth pain. She gave him a shot of rum for it. T.818-835.

2. The Misidentification Defense Was Thwarted By A December 15, 1986 Staged Lineup, By False Testimony And By The Shoddy Investigation Methods And Records Of The Springfield Detectives On This Case.

Through cross examination, defense counsel Anderson attacked the credibility of the prosecution's identification witnesses. Michael Hosten, Anthony Cooke, Kenneth Whitted and Heavy Stokes each admits that he falsely identified Mark Schand in incriminating testimony.⁸ A. 361-368; 394-398; 422-423; 427. The December 15, 1986 lineup at the police station was staged in a way that singled out Mark Schand [A.408-409]; it influenced Cooke's, Heavy Stokes's, and Al Chase's identification testimonies. See Part IVA(1), *infra*. The Springfield police only selectively documented their activities in developing the identifications presented at trial. This practice severely limited Attorney Anderson's ability to challenge the reliability and integrity of their procedures that are summarized, based on testimony and documents, later in this Memorandum, in Part IVA, below. Hosten, Cooke, Heavy Stokes and Whitted all falsely identified Mark Schand, and Hosten, Heavy and Cooke each lied about the inducements that prompted his testimony. See Part VII, below.

B. Centurion Ministries Investigators Have Located And Interviewed Four Of The Six Hartford Men Who Were Present When The After Five Crimes Were Committed.

The Springfield police investigation into the murder of Victoria Seymour, the shooting of Anthony Cooke and the robbery of Heavy Stokes was conducted jointly with

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David Stokes has not repudiated his trial testimony but there is good reason to believe that it was false: he testified on instructions from his brother, Heavy Stokes. A.446.

the Hartford police. Hartford Det. Ronald Faggaini appears to have been the principal liaison with the Springfield police and ADA Bloom in this case. Other Hartford police officers known to have been involved in the Hartford chapter of this investigation were Nicholas Russo, J. Cunningham, Det. Steve Kymnick and Sgt. Robert W. Taylor. None testified in Mark Schand's trial.

The prosecution's witnesses were exclusively from Springfield. The identification evidence was developed by Springfield police working with materials - primarily photographs - provided by Hartford police. Centurion Ministries' investigation establishes, however, that before Mark Schand's trial, the Hartford police developed crucial exculpatory evidence and information that inculpated Randy Weaver - a Mark Schand look-alike - in the After Five crimes. On October 15, 1986, before Mark Schand was arrested, Hartford police officer Nicholas Russo reported to Sgt. Faggaini that he had caught Weaver and another Hartford youth dealing cocaine from a van that corresponded to the description of the van involved in the Seymour homicide. Russo also pointed out to Faggaini that Weaver and Mark Schand were look-alikes. Russo told Faggaini that he was holding the van for photographing if Faggaini wanted that done. See pp. 27-28, below; A. 162-166.

Sometime after Mark schand was arrested, Hartford police Sgt. Robert Taylor reported having received confidential informant information that Randy Weaver - whom Taylor also characterized as a Mark Schand look-alike - had been bragging that he was responsible for the homicide for which Schand had been arrested, and that Weaver had

changed his appearance shortly after Mark's arrest. A. 175. In his January 25, 2012 recorded statement, Weaver confirmed to Centurion Ministries that he changed his appearance because he feared becoming a suspect in the Seymour murder. See pp. 29-30, below. Some if not all of this exculpatory information was apparently conveyed to the Hampden prosecution team but none of it was disclosed to Mark Schand's defense team before trial, and none of it was presented to the jury. A. 467-475.

Most importantly, other evidence newly developed by Centurion Ministries clearly *exonerates* Mark Schand of the After Five crimes. Randy Weaver's statements enabled Centurion Ministries investigators to locate and interview two additional men – Martin Sailor and Lonnie Keith – who were present at the scene, each of whom knew Mark Schand [or knew of him], and each of whom says that Mark Schand was neither present nor involved in these crimes. Three times Tracy Fisher has admitted not only being present, but starting the fight that triggered the shootings and robbery at the After Five. A. 328-334. He also knew Mark Schand and insists that Mark was not present when these events occurred. *Id.* Cumulatively, this evidence would certainly have affected the jury's deliberations and would have led the jury to acquit Mark Schand of these crimes, had it been available and presented at trial.

C. The Hartford Men – Randy Weaver, Tracy Fisher, Martin Sailor, And Lonnie Keith – Each Confirms That He Was Present At The Scene When The After Five Crimes Were Committed, And That Mark Schand Was Not.

Centurion Ministries has obtained statements, or investigators' first-hand reports of statements, by four men from Hartford [“the Hartford Witnesses”]whom Centurion

Ministries investigators interviewed over the past two years. On September 2, 1986, all four lived on West Morningside Street in Hartford, within two blocks of each other. A.176. All four men admit to having gone to Springfield and having been present at the After Five Lounge on September 2, 1986 when the shootings occurred. They are [1] Randy Weaver, the owner of a distinctive blue and white van with Connecticut plates, who drove that evening with Lonnie Keith, Martin Sailor and Tyrone Bridges to the After Five vicinity looking for distinctive gold chains that had been snatched from Weaver's neck at the nearby Sass Lounge on Saturday, August 30, 1986; [2] Lonnie Keith; [3] Martin Sailor⁹, then 15 years old; and [4] Tracy Fisher, who with Ty [also known as "T-Ty"] Johnson that night traveled in a separate car to Springfield independently of Weaver and his passengers. All four say they knew, or knew of, Mark Schand at that time. All four say Mark Schand was not with them.¹⁰

Centurion Ministries investigators have interviewed Weaver, obtained an affidavit and a detailed, consensual recorded statement from him, and had the recording transcribed. A.12-160. Centurion Ministries has interviewed Tracy Fisher, Lonnie Keith and Martin Sailor, and obtained oral statements from each of them, which the Centurion

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Martin Sailor's real surname is Smith. A. 176. Because he was known and is referred to by the other witnesses as Sailor, he will be called Martin Sailor in this memorandum.

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Centurion Ministries has located Tyrone Bridges and Jim McCloskey has spoken briefly with him by telephone. Bridges denied being present with the Weaver cohort and denied knowing anything about the crimes. He initially agreed to an in-person interview but then reneged and has refused to speak with Centurion further. A.481-482.

Ministries investigators have memorialized in written reports that are included in the appendix to this memorandum. In addition, Sailor consented to have his interview recorded, and Centurion Ministries has had a transcript of that interview prepared. A.179-325. Centurion Ministries has also interviewed Lonnie Keith and Tracy Fisher. Keith has refused to sign a statement. A.355-356. Fisher, who is serving a 50 year sentence in Connecticut for a 1987 Hartford murder has said he will not sign a statement or affidavit until he has wrapped up that sentence. A.335. It appears Ty Johnson died of AIDs some time ago, according to Randy Weaver and Tracy Fisher.

Centurion Ministries investigators have also located and interviewed Calvin Morgan, who was working as a bartender at Bennett's Lounge in Hartford on September 2-3, 1986. On March 20, 2011 Mr. Morgan told Centurion Ministries investigator Richard Hepburn that, a little after midnight on September 3, 1986, a group of six young men entered Bennett's Lounge and said they had been to Springfield, where there had been a shooting. Morgan identified the six as Randy Weaver, Lonnie Keith, Martin Sailor, Ty Johnson, Tracy Fisher and Tyrone Bridges. A.357-360.

Weaver, Sailor, Keith and Fisher each says that he knew Mark Schand in 1986 and that Mark Schand was not with them on September 2, 1986; not on at Bennett's Lounge before the trip to Springfield, not on the trip to Springfield, not in Springfield, not at the After Five Lounge, not on the return trip to Hartford, and not at Bennett's Lounge afterward. Morgan confirms that Mark Schand was not with the group at Bennett's Lounge, *either before or* after the trip to Springfield. Id. This newly discovered evidence

powerfully corroborates Mark Schand's trial defenses of alibi and misidentification and refutes the testimony of the Springfield Witnesses. This mutually corroborating new evidence is described below in some detail.

[1] RANDY WEAVER.¹¹

Randy Weaver made oral statements to Centurion Ministries investigator Richard Hepburn on March 12, 2010, April 29, 2010 and September 9, 2010 . On January 25, 2012 he made an audio-recorded statement to Mr. Hepburn and Executive Director James C. McCloskey. The following material is drawn primarily from Weaver's recorded statement.

Mr. Weaver says that he and five or six other young men from Hartford were at the After Five Lounge on September 2, 1986 when the events that culminated in the murder of Victoria Seymour, the shooting of Anthony Cooke and the robbery of Heavy Stokes occurred. Weaver, who knew Mark Schand at that time, says that Mark Schand was not present at the scene of these crimes. Weaver's statements deserve special weight because they are strongly corroborated, and because they are against Weaver's penal interest.¹² The

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Mr. Weaver says that Mark Schand's arrest was a life-changing experience for him. Because he knew that Schand was innocent, Weaver realized that he, too, could be charged with and convicted of a crime he did not commit, and he thought it was more likely to happen if he continued in his criminal activities. He quit selling drugs, went to work and got married. Weaver has been married for 22 years, has raised 10 children since that time and has earned a living primarily as an independent long haul truck driver. A. 138-141. Weaver believes that he is not guilty of any crime in relation to these events, and, as he says in his recorded statement, he realizes that he has nothing to gain, and a lot to lose in coming forward and speaking truthfully about these events. We think his exoneration of Mark Schand is credible.

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Randy Weaver has agreed to take a polygraph examination regarding the truthfulness of

corroborating evidence is found in the pretrial statements of Al Chase, Tonya Pollan and Richard Ramsey, in the trial testimony of Michael Hosten, in Hosten's July 2006 affidavit, in the Hartford Intelligence documents first disclosed in the 1991-1992 Motion for New Trial proceedings, and in the post-trial statements of Tracy Fisher.

Weaver's Van - The Getaway Vehicle

On September 2, 1986 Weaver owned a distinctive, two-tone van that resembled the blue and white van that local residents Ms. Tonya Polon and Mr. Richard Ramsey gave to police the night of the shooting, and that, in his September 3, 1986 statement, Al Chase described as driving away from the Pizza King a few minutes before the shooting. A.341; see also, statements of Tonya Polon, A.172, and Richard Ramsey, A.173. Weaver's van had large, custom side windows and a ladder on the back and bore Connecticut license plates. A.168-170 [color photograph]. It was grey and blue; in an October 15, 1986 arrest report, Hartford police noted that, under street light, it appeared to be blue and white. A.162-165. They associated Weaver's van with the van seen fleeing the After Five area after the shootings and held it for investigation. Id.

Hosten Placed Weaver, Armed, At The Scene Of The After Five Shootings

In the hearing on the motion to suppress [MTS] on July 14, 1987, Michael Hosten testified that he told Springfield police that one of the three men he saw that night outside the After Five was Randy Weaver, and that Weaver had a gun. MTS III:148-149. In trial, Hosten told the jury that he told Springfield police that he saw Weaver at the crime, _____ his statements, A.108, and to give his account in sworn testimony. A.11.

wearing glasses and armed with a gun. T:551-552. Mark Schand has no information that Hosten's assertions about Weaver were investigated by the prosecution team or Hartford police.

Weaver's current account fits much of the evidence known to Schand's defense team before Centurion Ministries interviewed Weaver. In particular, it corresponds to a remarkable degree to Hartford police accounts of their contacts with Weaver in October 1986, accounts that pointed directly to Weaver either as a primary participant in the After Five crimes or an indispensable witness to them. The Hartford police accounts, discussed in detail at pp. 26-30 below, were first disclosed in the course of the 1991-1992 motion for new trial litigation as part of the "Hartford Intelligence" file. Because they were not disclosed to his defense team before his trial, Mark was deprived of the opportunity to conduct a timely investigation of Weaver's involvement, and of the identities of the other Hartford men who were with Weaver and Fisher at the time of the murder. He was also deprived of the opportunity to request and obtain discovery of the significant parts of the Hartford investigation that apparently have still not been disclosed to the defense.

Weaver's Account To Centurion Ministries¹³

Weaver says he and Martin Sailor went to the Sass Club, located less than a block from the After Five, on Saturday, August 30, 1986 after they attended a "Run DMC"

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Weaver's accounts to Mark Schand's defense team include a March 31, 2012 "walkthrough" of the area where the After Five Lounge had been located in September 1986, with James McCloskey and Richard Hepburn of Centurion Ministries, and attorneys Linda and John Thompson.

concert at the Springfield Civic Center earlier that evening. A. 14-15. A fight broke out and someone snatched Weaver's gold neck chain¹⁴ and ran. Weaver chased him up Central Street past Chester Street, but couldn't catch him as the man ran into the projects behind Chester. A.9.

Three days later, on Tuesday, September 2, Weaver was at Bennett's Lounge in Hartford with Martin Sailor, Tyrone Bridges and Lonnie Keith. A. 357-360. Weaver told his companions that he was going to Springfield to try to retrieve his chains; when he left, Sailor, Bridges and Keith went with him in the van. A.9-10. Weaver said he had an unloaded sawed-off shotgun in the van that stayed in the van throughout the events that followed. A.69-70.

After learning that Weaver was going to Springfield, Fisher and Ty Johnson also decided to go, unbeknownst to Weaver and his friends. The Fisher group drove to Springfield. A. 328. They were at the Pizza King when Weaver confronted Al Chase and Lavon Dixon, and they ended up at the After Five at the time of the shootings. A. 330. Weaver says Fisher was driving a dark colored stolen car. A.122. Weaver says he does not know why Fisher and Johnson went to Springfield and the After Five, nor when they

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Weaver said he knew Mark Schand indirectly [through Mark's brother Roger]. A.116-117. ["We just knew each other, our brothers - our brothers were like close friends"]. Weaver said that he and Mark were the only two guys he knew who wore this distinctive "Run DMC" gold chain at that time. Run-DMC was a popular rap group from Queens, New York, whose first multi-platinum album, "Raising Hell," was released in 1986. Among other sartorial flourishes, the band members wore heavy gold neck chains. Wikipedia, Run-D.M.C. entry, last visited August 6, 2012.

arrived. A.10; 34, 36, 40-41.

The trip to Springfield: Pizza King. Weaver, Sailor, Bridges and Keith drove to Springfield, and first went to Pizza King where Weaver went inside and talked to a customer, asking about guys wearing neck chains.¹⁵ A. 35-38. The encounter he describes corresponds closely to Al Chase and Lavon Dixon's description of the encounter they said they had with a man they saw there shortly before the After Five shootings occurred. See Part IVG, *infra*. Weaver said he and Schand had the same hair-style, wore similar Gazelle glasses and were similar in size. A. 122. Weaver's resemblance to Schand was strong enough to draw comments to that effect from his Hartford acquaintances and later prompted Weaver to cut off his braids. A.78-82. Chase and Dixon, who had both been shown three Polaroid photographs of Mark Schand in his braids and Gazelles [A.171] shortly before he first saw Mark in the December 15, 1986 lineup [T.230, 242, 275-278], misidentified Mark Schand as the man who asked about his chains. The evidence - Weaver's description of his involvement in the pizza shop conversations and the suggestive procedures that Chase and Dixon were subjected to - demonstrate that these were misidentifications. Significantly, Chase claimed he had seen the man who questioned him at Pizza King earlier at a "Run DMC" concert in Springfield on a different occasion.

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Al Chase and Lavon Dixon told police of an encounter Chase had in Pizza King, shortly before the shooting, with a man that both teenagers eventually identified as Mark Schand. T. 218-222; . It is impossible to determine whether either was ever shown a photograph of Weaver during the police investigation. Michael Hosten testified he was never shown a photo of Weaver. T.552, 565.

T.223. Weaver and Sailor both say they were at the “Run DM” concert in Springfield on August 30, 1986. A.8, 14; 177. This reinforces the likelihood that Chase misidentified Weaver as Mark Schand. See, Part IVH, *infra*.

The Sass Club And The After Five Lounge: Search For Weaver’s Chains. After leaving the Pizza King, the Weaver group then drove to Central and Chester and parked the van on Chester Street facing away from Central Street. A. 9-10. Fisher followed and parked near the van on the same side of the street, facing in the same direction. A. From Chester Street, the Weaver group went to the After Five and walked through the club, looking for someone wearing Weaver’s gold chain. A.9-10.

Coming out of the After Five, Weaver saw Ty Johnson alone outside on Rifle Street. Weaver asked Johnson what he was doing there, and Johnson said that Fisher was over in the housing project that was at the back of the block across Central Street from the After Five [this is the project that the man who had snatched Weaver’s “Run DMC” chain the previous Saturday had run into to evade Weaver’s pursuit]. A.10. Leaving Johnson with Keith and Sailor in front of the After Five, Weaver and Bridges walked up Central past Chester Street so Weaver could show Bridges where he lost track of the man who had stolen his chain. Sailor and Keith remained with Johnson.¹⁶ A. 125-131. Weaver says he did not actually see Fisher in Springfield that night. A. 130, 132.

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Hosten testified that the 3 men who attacked the Stokeses and Cooke approached them from the Rifle and Central Streets intersection, which is where the front door of the After Five was located. T.519-533.

The Shootings And Return To Bennett's Lounge. At that point Weaver and Bridges heard shots. A.132. They ran down Central back to Chester, where they met Keith and Sailor running toward them. A.133. Keith and Sailor said "Tracy and them did some shit." A. 112, 135, 161. All four ran to Weaver's van and Weaver drove back to Bennett's Lounge in Hartford. Some time after they arrived, Fisher and Ty Johnson showed up. The six men talked about the Springfield shooting.¹⁷ Weaver says that Ty Johnson told him that it all started when Fisher grabbed some drugs and the Springfield guys started shooting at Tracy. Weaver says Johnson said he fired his .38 back at them,¹⁸ pulling out the gun in the bar and openly showed it as he said so. A.112-113, 135.

In short, Weaver knew Mark Schand as an acquaintance before September 2, 1986. Weaver was within a block of the After Five when the confrontation and shootings that form the basis for the crimes at issue here occurred. Three nights earlier, he had been the victim of a chain-snatching incident at Sass, less than a block away. Weaver and his friends

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Calvin Morgan, who is known as "Six-eight" because he is 6'8" tall, told Centurion Ministries investigators that he worked at Bennett's as a bouncer in September 1986. He said that he remembers that shortly before the 1:00 a.m. closing time, a number of men were in the bar talking about a shooting that had occurred in Springfield earlier that night. He recalled that Weaver, Bridges, Keith, Johnson and Sailor, and possibly Fisher were there, but can't recall who was saying what. Morgan knows Mark Schand and said Schand was not in Bennett's that night. He said Mark Schand did not frequent Bennett's; both Weaver and Fisher did, but never together. A.358. Weaver is adamant that he and Fisher were never friends or associates. A.9.

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The Schand defense team is not aware of any evidence that supports the proposition that Johnson fired a .38 at the scene. The ballistic evidence of which we are aware is that only .25 caliber ordinance was recovered from the crime scene and Cooke's shoulder. The projectile removed from Vicky Seymour's body apparently was not classified. A.351-354.

had come from Hartford to Springfield to try to recover his gold neck jewelry. They had a shotgun with them. Tracy Fisher and Ty Johnson had shadowed them; Johnson at least was armed with a handgun. All six of these men were present near the After Five when Fisher confronted the Stokeses and triggered the shooting that killed Victoria Seymour and injured Anthony Cooke. Weaver knew Mark Schand at that time and says that Mark Schand was not with him and his group, and that he did not see Mark Schand there that night. A.9.

The Hartford Police Investigation Of Randy Weaver

In addition to Weaver, Centurion Ministries has interviewed Tracy Fisher, Martin Sailor, and Lonnie Keith. Each of them knew Mark Schand on sight. Each confirms Randy Weaver's assertion that Mark Schand was not with any of them, and none of them saw him there that night. Hartford police records corroborate important details of Randy Weaver's and Tracy Fisher's accounts of their doings that night.

At the Pizza King, Al Chase spoke with a man whose description fits Randy Weaver's. In his September 3, 1986 statement, Chase said the man he spoke with drove away with three others in a "grayish custom van with large windows on the side and a Connecticut license plate" [compare A.166,168-169]. and that two additional men in a car followed the van A.341. This is consistent Weaver's and Fisher's descriptions of that encounter. By October 15, 1986 Hartford police were expressing suspicions to each other about Randy Weaver's possible involvement in the Seymour homicide.

Weaver Arrested In Distinctive Van Associated With The Seymour Murder. On

October 15 Hartford police officers Nicholas Russo and J. Cunningham stopped a 1983 grey and light blue Chevy van in Hartford and arrested both the passenger and the driver, John R. Weaver of 35 W. Morningside St., Hartford, on narcotics charges. A.162-165. The van, which was registered to Weaver, was towed. Officer Russo authored a detailed report of the stop and arrests. Id. An undated, unsigned handwritten note informed Sgt. Faggaini:

Ron,

On Case # 86-50310

* * *

On Case # 86-50336[:]

- 1.) Both suspects carrying beepers and selling Albany & Sterling St.
Weaver's beeper # 002202
Thames " " # 002210
- 2.) **Van fits descriptions of Springfield and owner Weaver has same type glasses but smaller and hair style as Schand.**
I put a hold on vehicle if you want to Polaroid it (at Friendly's) if not I'll release hold tonight.

A.165 [emphasis added]. This report was part of a more than 60-page file labeled "Hartford Intelligence" that was produced to Roger Schand's defense attorney Elda S. James by Hampshire prosecutors in Commonwealth v. Roger Schand, a 1990 prosecution of Mark Schand's older brother for the After Five crimes. Attorney James gave some of the documents from that file to Linda J. Thompson, one of Mark Schand's MNT attorneys, who showed them to Mark Schand's trial lawyer, Roy Anderson. A.91. These documents had not been disclosed to Attorney Anderson before trial. A.88-89. No document that has been disclosed to Mark Schand reports whether or how Det. Faggaini responded to this note.

Weaver Bragging About Seymour Murder Responsibility. Another Hartford police investigator received information linking Weaver to the After Five crimes. The “Hartford Intelligence” file also disclosed that, sometime after Mark Schand’s October 29, 1986 arrest, Sgt. Robert W. Taylor received information from an anonymous informant “regarding the person responsible for a homicide which occurred in Springfield, MA.” In an undated Supplement report in which he identified the accused as “Schand” and the suspect as “Weaver,” Sgt. Taylor wrote:

THAT THE ABOVE ACCUSED WAS ARRESTED FOR SAID HOMICIDE. THAT THE PERSON RELATED THAT A PERSON KNOWN AS RANDY WEAVER, AGE 24, BEING A BLACK MALE WAS IN HARTFORD BOASTING THAT HE WAS RESPONSIBLE FOR THE HOMICIDE IN SPRINGFIELD WHICH “CASH” SCHAND HAD BEEN ARRESTED FOR THE INCIDENT. THAT THE SUSPECT, WEAVER HAD CORN ROLLED BRAIDS BUT HAD CUT HIS HAIR OFF IN AN EFFORT NOT TO LOOK LIKE HE DID AT THE TIME OF THE INCIDENT IN SPRINGFIELD. THAT THE SUSPECT WAS ACTING SCARED AND IS KNOWN TO FREQUENT THE CLARK STREET GYM.

* * *

THE UNDERSIGNED WILL FORWARD THIS REPORT TO THE CAPERS DIVISION FOR DISSEMINATION TO THE SPRINGFIELD, MA. P.D. . THE UNDERSIGNED WILL ATTEMPT TO MAKE CONTACT WITH THE SOURCE OF THE ABOVE INFORMATION TO OBTAIN FURTHER INFORMATION.

A.175. Mark Schand’s attorneys never received any report or other information indicating that Sgt. Taylor ‘pursued the follow-up steps he committed himself to in his report.¹⁹

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In the MNT proceedings, Det. Muise conceded that he had received a Hartford P.D. photo of Weaver’s van before trial. MNTV:9-10. Det. Scammons admitted he had received photos of Weaver and the van from Det. Faggaini, who told him Weaver could be a suspect. MNTII:72-74. Scammons claimed he included Weaver’s photo in a 9-23-86 array shown to Hosten, who identified Weaver, MNTII:120-121, 126, but Hosten testified in trial that he had been shown no photos of Weaver. T.552, 565. ADA Bloom had the Taylor and

A.469-470, 476; MNTIV:95-96.

Randy Weaver Changes Appearance To Evade Suspicion. In his January 25, 2012 interview, Randy Weaver spoke at length and in some detail about his contacts with Hartford police regarding the joint Hartford P.D./Springfield P.D. investigation of the After Five crimes. Weaver acknowledged that he resembled Mark Schand in September 1986, partly because of their similar hairstyles. A.75-76. Weaver said “I end up cutting my hair because they ended up having Mark Schand in jail – And he wore braids – and they said that we resemble each other (.)” A.75. “So, when I start thinking about that, I said, Oh ho, I’m going to cut my hair. I don’t want to resemble nobody – you know?” Weaver told Centurion Ministries that he recalled that he did that before Mark Schand was arrested:

Now – now I can’t say exactly when, ‘cause I wasn’t programmed on, you know, when I cut it, but I ended up cutting it after the fact that everybody kept saying ‘yeah, you know you and Mark had got the braids.’ They had said that first, well, you know, I might have – I might have did cut it before he got arrested, because that’s the last thing I remember that he did – they said that uh, ‘y’all look alike, ‘cause you’ve got braids. JM: Right. Right. RW: And I didn’t want to be no look-alike. JM: I understand. I know. I understand, yep. OK. So you’re saying you may have cut them before he got arrested? RW: Yeah, because I’m not exactly sure when –

A.80. Sgt. Taylor’s informant’s report and Randy Weaver’s account 25 years later are remarkably consistent: Weaver altered his appearance around the time Mark Schand was

Russell reports, and the “Ron” note, which he claimed he disclosed to Attorney Anderson. MNTV:152-154. Atty. Anderson denied that he had received these materials. MNTIV:95-96. Judge Murphy did not resolve this dispute, ruling instead that it was not material because Weaver and Schand were joint venturers. A.500. The newly discovered evidence presented here refutes that finding.

arrested because Weaver feared he was or would become a suspect.

Randy Weaver Interviewed By Hartford Police

Randy Weaver recalled for Centurion Ministries that, some time after Mark Schand had been arrested, Hartford police had interviewed him about the Seymour murder. A. 81, 92. Somebody had talked to his brother, Roy Weaver, and told Roy that Randy needed to go speak with the police because “everybody said it was you.” A.81-83. Randy Weaver went to the police station²⁰ and was questioned by two white detectives [A.86]who wanted to know about his chain that had been snatched on Saturday, August 30, 1986. A.85. They photographed Weaver and his van. Id; A.166 [photos]. The detectives showed him the photos and told him they were going to be sent to Springfield, because “[t]hey had their witnesses.” A.87. They asked him whether Mark Schand was with him in Springfield and he told them “Absolutely not. I said he was not there.” A.90. He didn’t say anything about the other men who were with him because “They never really asked me who else was with me. Not that I can recall. Seems like the only thing they was concerned about was me.” A. 90-91. He was willing to tell the police whatever they wanted to know:

“My mindset was to tell the police the whole story. I had nothing to hide. I didn’t do nothing. So, I mean – I mean, if they all investigating and doing their job right, what they should have did – Cash wouldn’t have been in jail. They (could) have had Tracy Fisher and things would have been right. So I told them pretty much the exact same thing that I’ve been telling y’all.” 83.

A.94. Thus Weaver told the Hartford detectives that he was at the After Five when the

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Weaver was questioned in a room in which only he and the two detectives were present. His interview was not recorded but the detectives took notes. A.91-92.

shootings occurred and that Mark Schand was not²¹, and that Weaver had been in the pizza shop right before he went to the After Five.

The Hartford detectives did not contact Randy Weaver again: “And I guess their witnesses never said me, and they never said anything about my van.” A.88, 92-93. Centurion Ministries investigator Richard Hepburn was the next person to interview Randy Weaver about these events, 24 years later. A.92. **No report of the Hartford police interview of Weaver in October 1986 has been disclosed to the Mark Schand defense team..**

Tracy Fisher’s repeated statements corroborate important elements of Weaver’s account, and are otherwise consistent with it.

[2] TRACY FISHER.²²

Three eyewitnesses – Walter White, Michael Hosten and Heavy Stokes – told police early in the investigation that the shooter was about 30 years old. On September 2, 1986, Mark Schand was 21, Randy Weaver was 23, and Tracy Fisher was 28. In his September 3, 1986 statement that was read to the grand jury, Walter White described the man with the “small handgun” as “between 27 and 35.” A.342. On the same date, Hosten described the shooter as “around 30 years old.” A.369. On September 24, 1986, Heavy Stokes told Dets.

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“This man was nowhere near there. He don’t hang with Tracy Fisher. And he didn’t hang with me.” A.95.

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Since May 1987 Fisher has been serving a 50 year Connecticut prison sentence for his part in a Hartford murder. A.345.

Reid and Scammons that the man who robbed him was “about 30 years old” and “appeared to have bad teeth.” He pointed to a photo of Anthony Atkins. A.338; 343A. In the MNT hearing in February 1992, Stokes said the gunman “had rotten teeth. Like sort of chipped teeth, but they were rotten.” MNT IV:147.

Fisher has been interviewed three times by defense investigators since Mark Schand’s trial: Michael Newman interviewed him on May 24, 1990, A.328; Centurion Ministries investigator Richard Hepburn spoke with him on November 20, 2009, A.395, and Centurion Ministries Executive Director James McCloskey interviewed Fisher on July 18, 2012. A.396. To our knowledge, no law enforcement official has interviewed him about this case. In each of these interviews, Fisher has made three points. First, he was present at the After Five when the shooting occurred. Second, Mark Schand was not there. Third, Fisher started the scuffle by grabbing at a bag of cocaine that Heavy Stokes showed to him. **Heavy Stokes testified that the confrontation began when Heavy passed a large bag of cocaine to “the guy” who then started to pass it around to his companions. Then David’s chain was snatched and Heavy grabbed his cocaine. T.299-300. David Stokes testified that the guy who grabbed David’s gold chain was the shooter. T.406-407; A. 443.**

Fisher says there once was bad blood between him and Mark Schand. He is vehemently hostile to Mia Schand. Fisher claims that at one time Mark Schand shot a hole in the ceiling of Tracy’s house, and that Fisher once fought with Mark’s brother, but he says he has let those issues go. In fact, Fisher said he told Roger Schand years ago that he knew Mark is innocent and had nothing to do with the Seymour murder. A.333.

Tracy Fisher's Account Of His Trip To The After Five Lounge

Fisher says that he and Ty Johnson were in Bennett's Lounge in Hartford on the evening of September 2, 1986. Randy Weaver, Lonnie Keith, Tyrone Bridges and Martin Sailor²³ were there also. A.328-330. In a conversation they had outside the bar, Weaver told Johnson that he was going to Springfield to get even for a chain-snatching incident that occurred in Springfield a few days earlier. Weaver and Fisher did not like each other and never associated with each other. Bridges told Fisher he was going with Weaver in his van to Springfield to look for Weaver's chain. Fisher recalls that Lonnie Keith, Tyrone Bridges, and possibly Martin Sailor were with Weaver that night. A.328, 333.

Fisher Grabs The Cocaine He Was Looking For. Weaver, Bridges, Keith and Sailor left together for Springfield in Weaver's van. Fisher was high on cocaine at Bennett's Lounge; he hoped to score more cocaine in Springfield. Fisher decided to follow the Weaver group in a stolen Audi. A.333. He and Johnson did not tell the Weaver group that they were also going to Springfield. Fisher says he and Johnson caught up with Weaver's van as it entered Springfield and followed them to Pizza King, but Fisher and Johnson did not go inside. When the Weaver group left the Pizza King, Fisher and Johnson followed them to the After Five and also parked on Chester Street. This detail is corroborated by Weaver, and by the disinterested Chester Street residents Tonya Polon and Richard Ramsey. A. 172-173

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According to Randy Weaver and Calvin Morgan, both Tyrone Bridges and Martin Sailor [Smith] were also with Weaver. A.9, 357. Fisher told Newman that the others were not aware that he followed them to Springfield. A.328.

Without having made contact with Weaver and his friends in Springfield, Fisher and Johnson approached some guys near the After Five who were selling drugs. When the Heavy Stokes pulled out a bag, Fisher grabbed it and tried to run but the Springfield guys grabbed him. A.328. Gunfire erupted. Fisher claims he didn't fire a gun and doesn't know which of the Hartford guys did. A. 333-334. Fisher and Johnson ran to the Audi on Chester Street and left the area. He did not know anyone was killed until the next day. A.329. "Fisher knows Mark Schand aka Cash, and did not see Schand in Springfield on the evening of September 2, 1986," according to Newman's 1990 interview report. A. 329.

Fisher said he was unarmed that night. He said Ty Johnson was carrying an unloaded .38 Special and that the kid [Sailor] had a sawed-off shotgun. Johnson told Fisher that Weaver had a .357 that night, but Fisher did not see Weaver with a weapon. A. 334. When Centurion Ministries's McCloskey told Fisher that the murder weapon was a .25 cal. handgun, he seemed startled and "actually blanched."²⁴

Fisher Had Bad Teeth And Was Nearly 30 Years Old On September 2, 1986.

Fisher's identification of himself as the instigator of the struggle over the cocaine casts other, previously available evidence in a new, distinctly exculpatory light: Fisher fits the descriptions of the shooter given contemporaneously by other witnesses, particularly in

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Centurion Ministries has asked Fisher for an affidavit stating that Mark Schand was not present at the After Five on September 2, 1986. He responded: "I told you I'm not doing anything until I'm out of prison." At the beginning of his interview with McCloskey, Fisher said that he "feels for Cash because he wasn't there that night. He wasn't with me and he wasn't with Randy and his group. Cash didn't hang with me or them." He said he will "not put his name on anything" on behalf of Mark Schand until "I'm on the streets and that will be hopefully before 2019 when I max out." A.332.

terms of his age and his bad teeth. Walter White's statement was that the perpetrator had a "small handgun" and was "between 27 and 35." A.342. Hosten said the man who fired the gun was "around 30 years old." A.369. On September 24, 1986, Heavy Stokes told police that the man who robbed him was "about 30 years old" and "appeared to have bad teeth." A.338. In 1992, Stokes elaborated that the man "had rotten teeth. Like sort of like chipped teeth, but they were rotten." MNTVI:147. Weaver and Calvin Morgan each told Centurion Ministries investigators that Fisher has rotten or raggedy teeth because Fisher was shot by a Hartford police officer in the mouth years ago. A.9, 358.

Newspaper accounts obtained by Centurion Ministries investigators report that on October 28, 1977 Fisher sustained facial injuries that required medical attention after having been assaulted with a baseball bat. A.349. On December 13, 1979 Fisher "was shot once in the face by a Hartford police officer while running away from the scene of a burglary. A.350.

In a July 18, 2012 interview, Centurion Ministries investigator Jim McCloskey asked Fisher about his teeth. Fisher said a police officer shot him in the face in 1979. He has a removable partial plate of four false teeth replacing his upper front four. He showed his teeth to Jim McCloskey, who reports that, when the partial plate is in place, the teeth on either side are noticeably longer than the false teeth. A.332-333. Thus Fisher fits the "age 30" and "bad teeth" elements of eyewitness descriptions of the shooter given early in the investigation; he also admits having been the one who grabbed the "fat guy's" drugs. Like Randy Weaver, Fisher knew Mark Schand in September 1986 and insists that Mark was not

present when these crimes were committed. A.329, 330, 332.

[3] MARTIN SAILOR [SMITH]

The juvenile that the older Hartford men referred to as Martin Sailor was 15 years old on September 2, 1986 but he was 6' and 200 lbs.²⁵ His real last name is Smith, but because his step-father's last name was Sailor, he was sometimes called by that surname. Martin was placed in a juvenile detention facility in late 1986. A.176. In May 1987 he was sent to Glen Mills High School [for troubled youth] in suburban Philadelphia. Sailor attended Wesley College and Delaware State in the early 1990s, then served three years at Smyrna State Prison in Delaware from some time in 1993 until January 1, 1997 on various cocaine charges. He then attended cosmetology school and became a licensed, self-employed barber practicing his trade in his home. He returns to Hartford occasionally but hasn't lived there since 1986. A. 176-177. An 11 year-old son and an 18 year-old daughter live with him. A. 178. Executive Director James McCloskey and Investigator Richard Hepburn interviewed Mr. Sailor at his home on June 18, 2012; Mr. Sailor agreed to have the interview tape recorded. A. 179-324.

Martin Sailor's Account Of The Springfield Trip²⁶

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Randy Weaver, Lonnie Keith, Tyrone Bridges and Martin Sailor all lived on West Morningside Street in Hartford within two blocks of each other; Sailor and Bridges lived a couple of houses apart while Weaver and Keith lived across from each other in the next block. Lonnie's brother Eric was Martin's age and was Martin's good friend. A.239-252, 269-270. Lonnie, Randy and Tyrone were in their 20s; Weaver's date of birth is 12/10/1962; Keith's is 6/2/8/1959; and Bridges's is 5/7/1964.

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Sailor's memories sharpened as the two hour interview progressed. What he remembered

Mr. Sailor says that the night of September 2, 1986 was the only night that he, Weaver, Keith and Bridges went to Springfield together. A. 297. Sailor recalls that he and Weaver had gone to a "Run DMC" concert a few nights earlier, A. 293; he thinks that is when Weaver's gold neck chain was stolen. A.193. He does not recall Tracy Fisher or Ty Johnson. He did not recognize a photograph of Fisher, and did not know the name. He never heard of Ty Johnson. A. 259-260. He does recall that, on the night of the shooting, he rode to Springfield from Hartford with Bridges and Keith in Randy Weaver's vehicle. He doesn't recall what type of vehicle, only that Weaver drove and he was in the back seat. A.239-242. He does not remember why they went to Springfield that night; he does not remember the circumstances of the shooting or who the shooter was. Mr. Sailor remembers that there was a "commotion" at the side of a brick building that was on a corner. A.264-265, 275-276, 278-279, 308; compare, A. 464 [photo of After Five Lounge]. When Sailor heard shots, he was not with Randy, but with another person whose name he can't recall [Lonnie Keith, according to Weaver]; they were at the side of a building looking at the commotion. A.264-265.

When he heard the shots, Sailor ducked behind a parked car down the street from the corner where the shooting took place. A.255. Weaver appeared at Sailor's side by the car and the two decided to get out of there for fear of being shot [Sailor says none of the four had any weapons that night, a fact that made him feel insecure when the shooting

at first as a single event gradually separated into two events, one involving the "Run DMC" concert in Springfield and the other the trip to the After Five. A.297-298, 314-315.

occurred]. A.269-270. They moved to Weaver's vehicle and, with Bridges and Keith, drove back to Hartford. Martin does not recall going to Bennett's Lounge after the shooting. He frequented Bennett's at that time, playing pool there with his friends almost every day and using it as a hangout [he didn't drink or smoke then]. He remembers walking home from "Miss Weaver's house" that night. A.262, 274-275. The next day Mr. Sailor was at "Bernie's Warehouse" when he saw a television news report of a shooting in Springfield and realized it happened at the location he was the night before. A.178.

Martin Sailor knew who Mark Schand was in September 1986 but he did not know him personally, had never been in his presence and had never had a conversation with him. A.194-201. When shown a 1986 photograph of Mark Schand by Centurion Ministries investigators, Sailor identified him as "Cash from Albany Avenue." A. 281-282. He knew who Mark Schand was because Mark was "the man" on Albany Avenue. Mr. Sailor said unequivocally that Mark Schand was not with them the night of the shooting. A. 237, 279-280, 311-313. Sailor's account, though much less detailed, strongly corroborates Weaver's on the essential points.

[4]LONNIE KEITH.

Centurion Ministries investigator Richard Hepburn has interviewed Lonnie Keith on two occasions. On October 9, 2009 at his residence at 98 Baltimore Avenue, Hartford, Mr. Keith confirmed that he was one of the men who was at the After Five when the shooting occurred. He claimed not to have seen the shooting and has refused to give any details of what he did do or see. He did say that he did not see Mark Schand there. A.355.

On September 9, 2010, Mr. Hepburn again spoke to Mr. Keith at the same location. The interview was a reprise of the first. Keith acknowledged being present, but insisted: “When I heard the pop, pop, I just put my head down and ran, wouldn’t you do the same thing?” He refused Mr. Hepburn’s request to use a diagram of the area to help him recall details, explaining that he had suffered some head trauma in an accident, with the result that “I don’t think so good.” He repeated that he did not see Mark Schand there that night. A.356.

[5] TYRONE BRIDGES

Centurion Ministries’ Jim McCloskey spoke by telephone with Tyrone Bridges on December 14, 2012. Mr. Bridges admitted he knew Randy Weaver, both in 1986 and at present, but denied that he was present at the After Five or knew anything about the matter. He initially agreed to a personal interview, but reneged the day it was scheduled to occur. He has since refused to be interviewed. A.480-481.

V. SUMMARY OF NEWLY DISCOVERED EVIDENCE

In his 1990 interview with Michael Newman, Tracy Fisher incriminated himself in the murder, but would not sign an affidavit affirming his account. In his 1999 interviews with David Blaschke, Anthony Cooke recanted his testimony identifying Mark Schand as the man who shot him, but on advice of counsel he refused to sign an affidavit to that effect. Years of fruitless investigation followed.

Since 2009 the Centurion Ministries investigation has both confirmed Cooke and Fisher’s post-trial evidence, and uncovered a great deal more that presents striking,

credible evidence that Mark is not guilty of the crimes committed at the After Five on September 2, 1986. The fear of self-incrimination on the part of most of the Hartford Witnesses who were present and admittedly involved in the events that resulted in the murder of Victoria Seymour, the robbery of Heavy Stokes and the shooting of Anthony Cooke, has deterred them from speaking freely, even at this late date. The composite story told by their repeated statements to Centurion Ministries and other investigators is compelling nevertheless: Mark Schand was not present at the After Five on September 2, 1986. Randy Weaver, Martin Sailor, Lonnie Keith, and Tracy Fisher were all present, together with Ty Johnson and Tyrone Bridges. Weaver, Sailor, Keith and Fisher all knew Mark Schand. None was his friend. Each witness states without reservation that he was present at the scene of the crime and that Mark Schand was not.

This evidence also refutes any theory that Mark Schand was not the principal but might have been a joint venturer in the After Five Crimes. Schand's new evidence strongly incriminates Tracy Fisher and Ty Johnson, and, possibly, Randy Weaver and one or more of his companions, as the perpetrators of these crimes. Each of these witnesses, however, flatly denies that Mark Schand was either present at the After Five, or involved with any of them in what they were doing at the After Five on September 2, 1986. It is not necessary to establish who the actual perpetrator or perpetrators were to conclude that Mark Schand's newly discovered evidence establishes his innocence.

Furthermore, as the following Part IV of this Memorandum sets out, each of the eyewitnesses to the crimes whom Centurion Ministries investigators have been able to

locate confirms this evidence.

VI. THE NEW EVIDENCE FROM THE COMMONWEALTH'S EYEWITNESSES

Of the purported eyewitnesses who identified Mark Schand as being present either at the After Five crimes scene or as being present in Springfield [to impeach his statement to Lt. McMahon when he was arrested October 29, 1986, that he had been in Springfield only once], Centurion Ministries investigators located and interviewed Anthony Cooke and Kenneth Whitted. Anthony Cooke now says that Mark Schand was not the man who shot him [he does not know who did] and that he did not see Schand there. He says he made a false identification in exchange for leniency on pending charges against him. Whitted repudiates his identification testimony, which is demonstrated here to have been false. Michael Hosten's 2006 death-bed affidavit is similar to Cooke's: he said he falsely identified Mark Schand in exchange for leniency on charges he was then facing. These developments lend after-the-fact credence to Heavy Stokes's repeated recantations of his trial testimony identifying Mark Schand as the perpetrator.

Heavy Stokes' recantations, together with ADA Bloom's and Hampshire ADA Schreiber's Motion for New Trial disclosures discredit the testimony of both of the Stokes brothers, who are shown to have coordinated and bartered their testimony for whatever momentary gain was offered them. The only other two purported eyewitnesses who testified, Willie Darko and Michael Bernard, discredited each other and themselves with their mutually inconsistent and unbelievable stories in the trial. Altogether, the evidence that has been developed after Mark Schand's trial powerfully discredits the

Commonwealth's eyewitness-based case that Schands committed the After Five crimes, either as the principal or as an accomplice. No physical evidence linked Mark Schands to these crimes.

These eyewitness recantations reinforce the newly discovered testimony of the Hartford Witnesses that establishes that there was in fact a group of young men from Hartford who came to Springfield and set off the events that culminated in the September 2, 1986 After Five crimes, and that Mark Schands, who was not among that group, played no part in those crimes. Cumulatively, the newly discovered evidence demonstrates convincingly that Mark Schand's trial was not fair and resulted in a miscarriage of justice.

A. SALIENT FEATURES OF THE PROSECUTION TEAM'S PERVASIVE MISCONDUCT

Before presenting our new evidence that exposes the flaws in the Commonwealth's eyewitness case, we think it will be useful to the reader to have a brief overview of the process by which the Springfield police developed their case against Mark Schand, **using six eyewitnesses who all knew each other well and had frequently been involved together in crime.** T:323, 629-630.

Four categorical errors pervaded the Springfield police investigation: [1] on December 15, 1986, Lt. McMahon and ADA Bloom staged an in-person lineup at the Springfield police station that showcased Mark Schand as the suspect they wanted the witnesses to identify; [2] the detectives uniformly failed to make a complete, reliable record of their use of photographic arrays to develop eyewitness identification testimony, apparently as a matter of established policy and/or practice; [3] the detectives ignored the

evidence of Randy Weaver's involvement in the After Five events; and [4] the detectives ignored the "bad teeth" elements of the descriptions some of the eyewitnesses gave of the assailant.

The first of these errors signaled to Heavy Stokes and Anthony Cooke that the prosecution team wanted Mark Schand identified, and, together with other suggestive methods, induced Al Chase to misidentify Schand. The second systematic error facilitated the presentation of the false identification evidence that was essential to convicting Mark Schand, by preventing the defense from showing how the eyewitness identifications were accomplished. The third and fourth errors foreclosed an understanding of Randy Weaver's role and the possible development of evidence of Tracy Fisher's involvement. They reflect an investigation that focused more on making a case against Mark Schand than on detecting what had occurred and who was actually involved in committing the crimes. The presence of these threads in the original investigation reports corroborates the fruits of the Centurion Ministries investigation.

1. The Staged Lineup.

With the exception of Mark Schand, the December 15, 1986 lineup was composed of individuals who did not even vaguely resemble any of the descriptions the police had of the individuals involved in the After Five crimes. A.408-409. It consisted of Mark Schand, two police officers, two local jail inmates, and a local man who was being held in the police lockup. Four witnesses who identified Mark Schand at trial – Al Chase, Lavon Dixon, Heavy Stokes and Anthony Cooke – were exposed to this lineup. A.407.

Mark Schand was the only person in the lineup whose photo had also been in the arrays shown to the witnesses. T.255-256, 283, 331 [Heavy Stokes]. Chase and Dixon had each been shown three distinctive Polaroids of Mark shortly before the lineup. T.242 (Chase), 275-278 (Dixon); A.171 [the Polaroids]. Mark was noticeably younger and smaller than the others. He was directed to step forward and smile, revealing his front gold tooth. MNTIV:72-73. Chase had not previously mentioned a gold tooth in his descriptions; thereafter he was convinced he had included it in his first description. MTS I:70-71, 74-75. On September 18, 1986 Dixon had pointed to photos of Pruitt and Syms, two braided individuals. A.466A. On September 24, he had pointed to a photo of Mark Schand with 50% assurance. A. 337. At the lineup, and in trial, he identified Mark Schand with absolute certainty. A.407. In a February 13, 2012 interview with Centurion Ministries investigator Richard Hepburn, Dixon explained these changes by saying that, at the lineup and in trial, he was stating positively that Mark Schand was the guy whose picture he had been shown. A.466.

Mark Schand was the only person in the lineup that Heavy Stokes and Anthony Cooke did not know personally. A. 397, 427. Two of the lineup participants were police officers that both Cooke and Heavy Stokes knew as such. A.397, 427; MNTVI:51-59 [ADA Bloom]. Officer Richard Latta, who had arrested Stokes in 1983 [A.427], was also involved in the investigation. A.406. Two were local men taken from the county jail; Cooke and Stokes knew them also. A. 397, 427. The fifth was George Johnson, a good friend of Cooke's [the two had previously lived together] whom Heavy also knew. A.397. The sixth

was Mark Schand, who alone was required to step forward and smile to reveal his gold front tooth. MNTIV:72-73.

This staged lineup plainly told Heavy and Cooke that the prosecution team was not committed to honest testimony, a fact each later exploited in bargaining with his testimony. The impact on the callow Al Chase and Lavon Dixon was more subtle, committing Chase to his identification of the man with the gold tooth and Dixon to the photo of Mark Schand he had seen earlier.

2. Bad, Decaying Teeth.

In his September 24, 1986 interview with Dets. Scammons and Reid, Heavy Stokes described the man who robbed him as having bad or decaying teeth, a description that the prosecution team did its best to banish from the case. A.429. A report of Al Chase's first description of the man he says confronted him in the Pizza King bore a handwritten notation about bad or decaying teeth. A.341. This term calls Tracy Fisher to mind and reinforces other evidence that he was the man who robbed Heavy Stokes.

The term first came into play at the motion to suppress hearing when Attorney Anderson questioned Al Chase about a phrase that was handwritten on Anderson's copy of Det. Scammons' report of his and Det. Doty's September 3, 1986 interview of Al Chase: "bad, decaying teeth." ADA Bloom, Scammons and Chase all said that this notation was not part of Chase's description of the man at the Pizza King. MTS I:77. Bloom and Scammons insisted it had nothing to do with the Seymour investigation. Id; T. 237-240.

That latter representation is belied by two other "bad teeth" notations. Immediately

before speaking with Heavy Stokes on September 24, 1986, Dets. Scammons and Reid had interviewed Chase. On page 2 of Scammons and Reid's September 24, 1986 report of their activities that day [the page that was eliminated in the version given to defense counsel Roy Anderson²⁷], the detectives noted: "We also had a talk with Heavy and (sic) told us that the guy who took hold of his chains as if to rip them off was a blk male about 30 years old, about 5'7" tall 155 lbs. He appeared to have bad teeth and he was wearing a mechanics type uniform, beige or tan colored, matching slacks and shirt." A. 429. The "bad teeth" notation is also recorded in Det. Scammons' notebook record of his September 24, 1986 interview with Stokes: "According BM 5'7" 155 bad teeth slender 30+/- Asked about a change Pool rm Barber St." A. 432, 343A[Atkins mug shot]. It may be that all three notations record Heavy Stokes' September 24, 1986 description of his assailant, a man who could not possibly be Mark Schand. Attorney Anderson's efforts to pursue and develop this issue was thwarted. MNTIII:231-232.

The only distinctive feature of Mark Schand's teeth is a prominent, front gold tooth. MNTIV:129. This gold tooth became a signature feature of both Cooke's and Chase's identifications. Chase claimed he had mentioned it in his September 3, 1986 description, but that detail is not in the police report. MTSI:14, 31; A.341.

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In the Motion for New Trial proceedings, it was established that the prosecution team had altered this activity report from a two-page to a one-page document, and Attorney Anderson testified that only the one-page document had been given to him in discovery. A.508-510; MNTIV:8-12, 91. Heavy Stokes' description of his assailant in terms that could not possibly fit Mark Schand was on the second page; he pointed to Anthony Atkins' photo, apparently because of Atkins' obviously bad teeth. A.429, 343A.

The “bad, decaying teeth” of Stokes’s assailant were not mentioned by any witness in the trial. This feature is detailed here because it corroborates newly discovered information regarding Tracy Fisher’s admitted role in the aborted drug deal that triggered the shootings that killed Victoria Seymour and injured Anthony Cooke. See pages 32-36. It also demonstrates the prosecutor’s deliberate obstruction of the efforts of the court and the defense to discover the source and significance of the “bad teeth” information, MNTIII:231-232, and the prosecution team’s pervasive disregard for the integrity of the criminal process in the investigation and litigation of this case.

3. The Prosecution Team’s Practice Of Not Keeping An Accurate Record Of The Photographic Arrays They Used And The Witness’s Responses To Those Arrays Enabled Them to Later Contrive A Single Array As The One From Which All Eyewitnesses Made Their Identifications.

The detectives involved in this investigation used photographic arrays extensively in their dealings with prospective eyewitnesses, and the jury was falsely told that the identifications of Mark Schand presented in the trial were all made from the same 9-photograph array. T.708-712 [Scammons]; 737-750 [Muisse]. The record does not establish how the prosecution determined that it was this array that was actually shown to each of these witnesses. It does establish that this array was not the product of any written record of the detectives’ activities, and that the single 9-photo array is a fiction.

Worse, it appears that the only factual basis on which the Hartford photos were selected may have been Kenneth Whitted’s account of his robbery encounters with young men from Hartford in the summer of 1986, supplemented by Det. Faggaini’s knowledge

of Hartford street crime at the time.²⁸ Whitted recently said that, at the time he was being questioned about his conflicts with Hartford youth, he thought he was being investigated for the robberies he had attempted or done against them. A.453.

Dets. Scammons, Cheetham, Muise and McNulty each testified about how the arrays were constructed and what the record-keeping practices of the detectives in this case were. In the MTS July 1987 hearing, Scammons was unable to reconstruct his arrays. MNT II:187-189. He had not contemporaneously recorded the composition of the arrays he used and in his reports he only mentioned the photographs that drew a witness response. MNT II:127-128. Det. Cheetham followed the same practice. MNT III:31. Det. McNulty said he only recorded the names and mug shot numbers of photographs picked out by a witness. MNT III:18-22. ADA Bloom overcame this problem at trial by eliciting testimony from

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On September 23, 1986 Det. Faggaini delivered 30 Hartford PD mug shots to Springfield Det. Leonard Scammons for use in the Seymour homicide investigation. Det. Scammons testified that the first Hartford array from Hartford had been selected solely by Kenneth Whitted [who was a non-witness informant] on September 17, 1986. MNTI:112. He said this array did not include Mark Schand's photograph, although the Hartford police had two mug shots of Mark at that time. On September 23, 1986, Det. Faggaini provided the 30 photographs from which the arrays used for the remainder of the investigation were drawn. Det. Scammons was not sure whether Faggaini was provided any witness descriptions to work from in selecting these photographs. Id: 139-140. Scammons testified:

"Up till this point, no identifications had been made of our suspects. According to Detective Fagani (sic) he had many more pictures available. **Detective Fagani was very well versed with street crimes in Hartford, and his instincts and expertise, based on that, he made these pictures available.** Q. So it was basically **you were taking what he gave you?** A. **That's correct.**"

Id:140 [emphasis added]. According to Scammons, Mark Schand's mug shot was given to the Springfield police for the first time in this group. The Springfield police made no record of what photographs they received from Faggaini on this occasion. Id:142.

Dets. Scammons and Muise that a specific 9-photo array was used consistently by all of the detectives after Michael Bernard's October 24, 1986 identification of Mark Schand. T.708-712 [Scammons]; 737-750 [Muise]. It is impossible to determine what the factual basis for this testimony allegedly was.

In the MNT hearing, Assistant Attorney General Cassidy presented testimony by Scammons and Muise in an effort to establish that this 9-photo array was uniformly used. Scammons testified from a list that he said Cassidy had prepared for him "from the testimony of another witness at another hearing." MNT I:144-147. Cassidy successfully invoked the work product privilege and refused to disclose the notes Cassidy had prepared for Scammons, arguing "He (Scammons) has no personal knowledge [of what is in the notes]." Id:187-189.

Det. Muise testified in the MNT hearing that his memory of this "fact" derived from information he got from ADA Bloom in the MTS hearing. MNT V:73-74. In the MTS hearing, ADA Bloom represented to Judge Urbano that he did not have any of the police reports in the case, the documents in which that information would have been recorded. MTS IV:159-160. The reports that have been disclosed to Mark Schand's lawyers do not document the existence of a single, consistently used array; to the contrary, it is clear that several arrays were used. In other words, the single 9-photo array was and is a fiction that lent an artificial and false credibility to the slipshod and untrustworthy process that was used to develop the eyewitness evidence against Mark Schand. This contrivance lent false credibility to the prosecution's eyewitness identification testimony and hobbled Attorney

Anderson's efforts to establish Mark Schand's misidentification defense, which depended on establishing the truth about how these identifications were produced.

To summarize, the record establishes that Heavy Stokes' first recorded description of the man who robbed him, who by the Commonwealth's theory was the man who shot Victoria Seymour and Anthony Cooke, emphasized physical features that cannot possibly describe Mark Schand. The prosecution suppressed this description. On December 15, 1986 the prosecution team staged a lineup that was designed to induce identifications of Mark Schand. Chase and Dixon were fooled by it; Cooke and Heavy Stokes were not, with the result that all four misidentified Mark Schand. The prosecution team did not keep records of their identification exercises with any of the eyewitnesses, which hamstrung the defense of misidentification. A fictitious 9-photo array was presented to the jury as the sole array from which each eyewitness made his identification.²⁹

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ADA Bloom has been disciplined by the Board of Bar Overseers for dishonesty in his conduct of criminal prosecutions at about the time he was prosecuting Mark Schand. On December 16, 1987, one month after the Schand trial, Bloom fabricated a three page confession and forged the signatures of suspect George Perrot and Sgt. Tom Kelly of the Springfield police, on it. The Supreme Judicial Court publicly censured Bloom for this in January 1994, calling his conduct "outrageous" and "reprehensible" A.439.

If the affidavit of 70 year-old Jeremiah Williams is to be believed, ADA Bloom lied during Heavy Stokes's sentencing hearing in April 1988 when he told Judge Welch that, as Judge Welch had instructed him, Bloom had met with Mr. Williams and gotten Williams' approval of a suspended sentence rather than state prison for Heavy. Williams, on whom Stokes had committed armed robbery, swore that ADA Bloom never consulted with him about the proposed sentence. A.441. Bloom contradicted this claim in sworn testimony in the MNT hearing. MNT V:186-189.

Michael Hosten's affidavit, and Anthony Cooke in his statement, allege that Bloom made or approved leniency for testimony agreements with them. Bloom represented in his court filing that he had made no agreement with Cooke, and had only promised Hosten that, if Hosten and Mark Schand both went to prison, Bloom would try to see that they

With this background, we turn to the new information that three of the eyewitnesses have provided to Centurion Ministries, and evaluate the impact of that new information on the Commonwealth's trial evidence.

A. ANTHONY COOKE

Mr. Cooke testified in the trial that Mark Schand was the man who robbed Heavy Stokes. He first identified Mr. Schand on April 10, 1987 while both were in the York Street jail awaiting trial. He now says that his identification was false, and that he identified Mark Schand because ADA Bloom promised he would not go to prison on his pending charges if he did so. Mr. Cooke was released the day he identified Mark Schand and eventually received probation on the pending charges rather than the 6-8 years in state prison he believed he was facing. A.395-397 Since the trial, he has made three detailed statements, two to Centurion Ministries investigators, each repudiating his identification testimony and asserting that he testified as part of a deal with the prosecutor that earned him the leniency he was shown. A.390-397. Cooke has refused to sign a statement to that effect because he fears prosecution for his perjurious testimony in Mr. Schand's trial. A. 397. His evidence is presented here in reports by Centurion Ministries investigators of statements Mr. Cooke made to them. In essence, Cooke the shooting victim says he has no idea who shot him, but it was not Mark Schand.

were in different prisons. A.471-472.

1. Cooke's Early Descriptions Did Not Fit Mark Schand.

Cooke's early descriptions of his assailant cannot be squared with his later identification of Mark Schand, and his dealings with the police reveal the strong concern he had regarding pending criminal charges against him. Cooke, Heavy Stokes and Michael Bernard were the only three testifying eyewitnesses who gave a contemporaneous description of the robber³⁰ to the police. Cooke said in his motion to suppress testimony that he did not look at the face of the man who shot him [MTS I:133], and as he conceded to Centurion Ministries investigators, he had never been in a position to identify his assailant. Although Cooke and Heavy Stokes were crime victims, each negotiated for and received leniency on pending charges that were unrelated to the After Five crimes, as a reward for his testimony against Mark Schand. Cooke now concedes his testimony was false. A. 391, 395-397.

The night he was shot, Cooke was so concerned that he would be arrested on an outstanding warrant that, before he went to the hospital for treatment for his gunshot wound, he wheedled a false identification card from Charles "Heavy" Stokes³¹, to use at

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The investigation and trial proceeded on the assumption that the robber was the person who shot and killed Victoria Seymour, but the jury was permitted to convict Mark Schand either on the theory that he was the shooter or on the theory that he aided and abetted someone else in the shooting, based on testimony that there may have been more than one shooter. Commonwealth v. Schand, 420 Mass at 793-796. However, the only ordinance found at the scene was three .25 cal shell casings. Mr Cooke's injuries were inflicted by .25 caliber projectiles. A. 351-354. The caliber of the projectile removed from Ms. Seymour's body was not determined. A. 354.

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The prosecution's six crime scene eyewitnesses all knew each other well and were

the hospital. There he was questioned early on the morning of September 3, 1986 by Dets. Cheetham and Dean, and gave this description of his assailant:

“A dark black male, 5'11" 165 lbs, 21-23 yrs old maybe an old looking 19 yr old, wearing a white warm up jacket, blue jeans, white leather sneakers and a **regular afro** (sort of full on top).”

MNT EX1 [emphasis added]; MNTI:32. Neither the dark complexion nor the haircut was consistent with Mark Schand’s appearance at that time. Released from the hospital, Cooke was interviewed on September 4 by Dets. Scammons and Doty. Cooke now described his assailant as: “medium to dark complected, about 5'9" tall and with a slender to medium build.”³² A.403.

Cooke did not identify anyone until April 10, 1987 when he was at the York Street Jail. A.411. There he saw Mark Schand in the pretrial section. Cooke called his lawyer, Robert Ghazey, Esq., who also represented Heavy Stokes while Stokes was a witness against Mark Schand. Cooke was taken to the court house, where he identified Mark Schand and was released. A.396-397.

Before he was jailed, Cooke participated in a variety of out-of-court identification exercises, but no record, or an incomplete record, was made of each. Despite being shown an unknown number of arrays that included Mark Schand³³ and a photograph of the

frequently involved together in crime. T:323,629-630; MTS I:117-118.

³²

Only the September 4 report was disclosed to the defense before trial; the September 3 report was first disclosed in the MNT proceedings. MNT IV:19-20.

³³

For example, when Cooke heard on television that someone had been arrested for the

December 15, 1986 lineup that featured Mark Schand, Cooke did not identify Schand as his assailant until Cooke was in jail. A:411. Cooke's testimony about these various identification sessions discloses that the police suggested to Cooke two of Mark Schand's signal features as features of Cooke's assailant – Mark Schand's braided hair ["corn rolls"]³⁴ and his gold front tooth. Cooke never did expressly adopt the braided hair, but he ended up embracing the gold tooth as Schand's single most significant feature, even though there is no record of Cooke mentioning a gold tooth even once before he saw Mark Schand in jail. Cooke testified in trial that he just happened to be going to court that day, for a bail review. T:381. At the courthouse, Cooke again viewed the lineup photograph and identified Mark Schand as his assailant. In making this identification, Cooke relied chiefly on Schand's front gold tooth, which he had never before mentioned. He made bail then. T:384, 398. Thereafter, Cooke was married to Schand's gold front tooth as Schand's identifying feature.

After identifying Mark Schand, Cooke attempted to revise his encounters with the police to plant the idea that he had been looking for a gold tooth all along in his pretrial

murder of Victoria Seymour, he went to the police station that day and was shown photographs, including one of Mark Schand, T:379-380, whom he did not identify. T:382.

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It was September 23, 1986 when Dets. McNulty and Fleury showed a photo array to Cooke and Larry Gadsen, another eyewitness. Gadsen remarked on Mark Schand's photo because it was the only one in that array with "corn rolls (rows)," but did not identify him. Cooke's response to that photo was to say that he "**still doesn't recall any corn rolls.**" MNT III:18-22; Appellate App:51 [emphasis added]. As ADA Bloom conceded in his MNT testimony, evidently the police were bringing Mark Schand and his hairstyle directly and repeatedly to Cooke's attention. MNT VI:46-47. This report was not disclosed to the defense until the MNT proceedings. MNT III:18-22.

identification dealings with the police. Cooke testified in the suppression hearing on July 14, 1987, saying: **“I didn’t really look into anyone’s face,”** but “the dude who was shooting; when he fired the shots he kind of had his mouth (open) and I seen gold in his mouth or a shimmer in his mouth like he had something on his teeth.” MTS I:133. He explained his failure to identify Mark Schand on the occasion when Dets. McNulty and “Flores” brought an array of six photos to Cooke’s girlfriend’s house: “the pictures didn’t show anyone with something shiny in their mouth.”³⁵ MTS I:138.

Cooke went to the police station the day he heard on TV that someone had been arrested for shooting Victoria Seymour and him. There he was shown a photograph of the lineup; he claimed he thought he recognized Mark Schand but didn’t say so because “I didn’t see nothing out of his mouth.” MTS I:145, 162. In this way Cooke pinned his identification of Mark Schand to his claim that he had seen his front gold tooth when Schand shot Cooke, a claim he did not articulate to anyone before he made his identification on April 10, 1987 and was released from jail.

In trial, Cooke testified that after he was shot he went into the bathroom and checked to see whether he had been hit. Id:363. Seeing that he was, he went back out just in time to see Charles Stokes prone in the street, being robbed. The robber was not facing Cooke, who only saw his face from an angle. Id:364. Like the guy who shot Cooke, the robber wore a white “kango” hat. He identified Mark Schand as this robber. He did not mention the gold tooth. T:375, 389-393, 395-397.

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But see fn. 35, supra.

2. NEW EVIDENCE FROM ANTHONY COOKE.

[a] Cooke's Statements To Investigator David Blaschke in 1999

Since the trial, Mr. Cooke has repudiated his testimony three times, in convincing detail. First, David Blaschke, an investigator for Absolute Security Detective Agency, interviewed Mr. Cooke on February 9, 1999 at Pondville Correctional Center in Norfolk. A. 390. Cooke said that he was high on cocaine at the time of the shooting and could only recall that the shooter was a black male. A. 391. Like Heavy Stokes, Cooke said that he knew everyone in the December 15, 1986 lineup photo except Mark Schand; it was composed of several people from his neighborhood, two cops and Schand, so naturally he identified Mark Schand. A. 390, 395, 396-397. In April 1987 he was in jail awaiting trial, unable to post bond on a breaking and entering charge on which he believes he faced a sentence of 6-8 years in prison. One day he saw Schand there, recognized him from the lineup photo, and had his attorney contact the District Attorney's office. A.411. ADA Bloom asked him to give a statement identifying Schand as the After Five shooter. Bloom offered Cooke a 2 ½ year suspended sentence and probation in exchange for a written statement and testimony against Mark Schand. A. 391, 397. The offer was not expressed as a quid quo pro, but Cooke understood it that way and that is how things worked out. Cooke made the statement identifying Schand as his assailant and was promptly released. He gave the testimony and received the lenient disposition on his pending cases. A.397.

Cooke now says he does not know who shot him, nor who any of the men with the shooter were. A.396.

On May 8, 1999 Cooke met with David Blaschke and Attorney John Thompson at Pondville Correctional Institution near Norfolk, but told them that a lawyer had advised him not to sign a statement nor to talk about the After Five incident, owing to the risk that he might be charged with perjury for his testimony. A.394.

[b] Cooke's Statements To Centurion Ministries Investigators.

Centurion Ministries has confirmed Cooke's post-trial account, but he has persisted in his refusal to sign a statement of it. On March 10, 2010 Centurion Ministries investigator Richard Hepburn met with Mr. Cooke at his home in Woburn, Massachusetts. Cooke confirmed the essential points of his 1999 statement to Mr. Blaschke. He said he would like to help Mark Schand but refuses to sign a sworn statement without a guarantee that he won't be charged with perjuring himself in the trial. A.395.

Mr. Hepburn and Centurion Ministries Executive Director James McCloskey interviewed Mr. Cooke again at his home in Woburn, Massachusetts [10 Tidd Avenue] on April 13, 2012. 397. Mr. Cooke affirmed his earlier refutations and explanation of his trial testimony but persisted in his refusal to sign any statement concerning them, absent a promise of immunity. Mr. Cooke is employed, was married April 14, 2012 and now appears to be living a law-abiding life.

Mr. Cooke told Centurion Ministries investigators that he remembers the shooting event clearly. A. 396. He said that he and the Stokes brothers were standing together on the corner of Central and Rifle streets, near the After Five Lounge. Suddenly several men appeared out of nowhere, asking for drugs. One became confrontational and heated words

were exchanged.³⁶ One of the men, whose back was to Cooke, pulled a gun. Cooke grabbed him but the man spun and shot Cooke in the shoulder, point blank. Not realizing he had been shot, Cooke ran up Central toward Chester Street, along the southern side of the After Five. Vickie Seymour was standing at the end of the After Five on Central. As he was running toward her, Cooke heard shots and saw her fall; he ran past her as she lay on the ground. Shortly after that, when he thought the incident was over, Cooke retraced his steps, going back on Central to its intersection with Rifle Street. From behind, he saw the man with the gun standing over Heavy Stokes, who was down on the street. Cooke then ran into After Five through the front door.

Cooke says that he was never able to identify the gunman because he never got a good look at his face:

“I don’t know who the shooter was, because I was unable to identify him. I don’t know if Mark was the guy or not. I did not know it then and I don’t know it now.” Regarding his identification of Mark Schand, Mr. Cooke said: “I was saying whatever they wanted me to say. I wasn’t the first person to get a deal. I was in the York Street jail unable to make bail. Word was in the jail that the police were cutting people loose and working out deals if they would identify Mark Schand as the shooter of me and Vicky Seymour.³⁷ At the York Street jail, I saw the dude who everybody was saying was the one arrested for the shooting. I learned that his name was Mark Schand. They said he was the one who shot me and Vicky. I remember that he was on the other side of the fence in the prison yard. I was ready to do anything to get myself out of jail. I contacted my lawyer and told him I wanted to see the DA. *People were saying that he did it because he had braids.* The reason

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Tracy Fisher has twice told Centurion Ministries investigators that he instigated this confrontation by snatching a bag of cocaine from one of the Springfield men. A.330, 333.

³⁷

Heavy and David Stokes.

I said it was Mark Schand that shot us was because I wanted to avoid a long prison term. I was swayed by others, that he could be the guy. I remember that Charles and David Stokes both told me that he's the guy that they arrested for my shooting. On my own, I could never have made an identification. But I saw him in the jail yard and so like the others, I decided to cut a deal and identify him so that I wouldn't have to do an eight year state prison term. It was my initiative. The police did not come to me. I went to them because I saw this as my ticket out of prison."

A.396-397 [emphasis added]. Regarding his trial testimony, Cooke said:

"I also knew from my conversations with the District Attorney, that if I didn't keep my end of the bargain by identifying Mark Schand at his trial, I was going to prison. I definitely felt the pressure to identify him at the trial so that I would not have to do any time in prison."

A.397.

When Mr. McCloskey showed Cooke a photograph of the lineup, Cooke identified the man second from the right as Off. Latta, a narcotics officer and the second person on the left as George Johnson, a good friend with whom he had lived at one time and who was in the police lockup at the time.³⁸ Cooke could not name anyone else but knew who everyone in the lineup was except for Mark Schand, so he knew who the police wanted him to identify. He had no memory of identifying Schand by his gold tooth and could not recall how that part of his identification came about. Cooke reviewed David Blaschke's report from 1999 and confirmed that he had been interviewed then and that the report was accurate. A.398.

Anthony Cooke says his trial identification of Mark Schand as the robber/shooter

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These details are confirmed in Lt. McMahon's notes of the composition of the December 15, 1986 lineup. A.407. Cooke and Johnson's friendship is documented in Cooke's April 10, 1987 statement. A.411.

was false. He further says that he gave it in exchange for a quid pro quo that was understood but not expressly articulated. This is consistent with the conduct of some members of the Hampden District Attorney's office in that time frame.³⁹ The prosecution did not notify the defense that Cooke had been offered any inducement or reward for his testimony; that disclosure was constitutionally required.⁴⁰ MNT VI:94, 108-109. Cooke's claim of a quid pro quo is supported by Hampden Superior Court records that disclose the favorable disposition after Schand's trial of the charges that had been pending against Cooke when he was released from jail in April 1987. A.418. It is corroborated by Michael Hosten's post-trial claim that he had a similar deal. See pp. 65-70, below.

B. MICHAEL HOSTEN

[1] Police Investigation

Michael Hosten was interviewed, viewed books of Springfield Police Department mug shots and gave a statement to police in the early morning of September 3, 1986[A.369]; he was shown books of photographs again a couple of days later. MTS II:151-

39

See, e.g., Commonwealth v. Johnson, 21 Mass App Ct 28, 35-36(1985)[“ An inference would be warranted that [Hampden ADA] Rigali had been counting on a certain sophistication on the part of [witness's attorney] Mr. Winniman that would save Rigali from any reproach of having made a promise although implicitly he had conveyed the substance of one”]; see also, Commonwealth v. Collins, 386 Mass 1, 9-14 (1982) [Hampden District Attorney's offer of leniency to key prosecution witness not disclosed].

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Johnson, supra, at 40-41, holding that an implied promise must be disclosed: “Compare ‘A promise may be lacking, and yet the whole instrument may be “instinct with an obligation,” imperfectly expressed If that is so, there is a contract.’ Cardozo, J., in *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917).”

154. In his September 3 statement [Id:150-151], Hosten described the three men he said confronted the Stokeses,["they were strangers to me"]: two light-skinned males, one about 5'8" and one a little taller, 5'9" or 5'10"; and a dark skinned male, about 5'6." Id: 146-147. In his motion to suppress testimony in July 1987, Hosten named the dark skinned male as "Weaver," and said he learned that name after seeing the man later "on the street." Id:148. Weaver wore a hat and glasses; one of the light skinned men wore a hood, the other, who was bare-headed, wore braids that went back. Id:146, 148. Weaver had a gun. T. 551-553. Hosten did not identify anyone at this time.

On October 30, 1986, in the Hall of Justice, Hosten was shown a photo array that was not recorded, and is reported to have identified Mark Schand as the robber, in a manner that was not recorded. A.370. In the motion to suppress hearing, Hosten testified that on October 30 he made this identification from an array that included two photographs of Mark Schand. MTSIII:155, 158-160, 165. One of the Mark Schand photos" showed his whole body, gold rope, thick gold rope, T-shirt on, something like that." Id:158.⁴¹ Hosten said he identified two photos of Mark Schand from one array: "No, they were all together. I picked out two photos."⁴² Id:158. Then, "[a]fter I picked those two photos, the police said,

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Hosten appears to have been describing two of the Polaroids provided by the Hartford police. A.171, T.230. He may have been referring to one of the Hartford mug shots. A.170.

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Hosten testified that he signed one of the photographs. He signed a "double picture like that, two pictures in one." MTS II:167. In the trial, ADA Bloom had Hosten testify that he had identified one photo from an array of eight, rather than the two photos from the nine-photo array established in his MTS testimony. T.563-564.

I got some good news, this is the kid we arrested last night.” Id:159.

In his trial testimony, Hosten placed himself in the thick of the action. He was with Cooke and the Stokeses outside the After Five when the four were approached by three or more men. Tr. 524. One of these men pulled a chain off the neck of one of the Stokes brothers, triggering a “commotion.” One of the other men pulled out a gun and fired once. Id:525-526. As Hosten ran toward the After Five he heard two more shots. Id:527. Near the front of the bar he looked back and witnessed the robbery. Id:529. He identified Mark Schand as one of the men present when the “commotion” began, and as the robber. Id:525, 532. Hosten testified that he saw Randy Weaver with a gun at the scene wearing glasses, and that, although he gave them Weaver’s name and description on September 3, the police never showed him a photo of Randy Weaver. T:550-552, 564-565.

[3] NEW EVIDENCE: MICHAEL HOSTEN’S JUNE 24, 2006 AFFIDAVIT

Hosten died July 13, 2006. Three weeks earlier, on June 24, 2006, he signed an affidavit disclosing that he and members of the prosecution team had falsified his identification of Mark Schand. The affidavit was obtained by Attorney Chauncey Wood, who was then representing Mr. Schand. On June 27, 2005, Hosten had been interviewed by Attorney John M. Thompson on Mr. Schand’s behalf, and first disclosed that his identification of Mark Schand as the perpetrator of these crimes was falsified through the prosecutor.

Mr. Hosten’s affidavit first describes his involvement in the events at the After Five Lounge in detail. A.361, ¶¶1-17. It then describes, also in detail, how his false identification

was developed in collaboration with the detectives. ¶¶20-35. Then it describes what he was promised and how he was rewarded for his testimony against Mr. Schand. ¶¶35-43. Hosten says he, Anthony Cooke and the Stokes brothers agreed to contrive false identifications of Mark Schand while they were all at the York Street jail. ¶¶23-24, 34. As far as the available evidence shows, only Hosten and David Stokes were at York Street when Hosten made his identification. Hosten testified at trial that he was in the York Street jail on October 30, 1986 when he was brought to the Hall of Justice for a court date and identified Mark Schand. T.553-554. David Stokes was in the York Street jail between October 1986 and January 1987. T.423-424, 426. Given that the Stokeses, Cooke and Hosten were friends, the collaboration Hosten described was possible through David Stokes. Cooke recounted in his April 20, 2012 statement that “Charles and David Stokes both told me that he’s [Schand] the guy that they arrested for my shooting.” A.397. As noted, the four were friends and associates in crime at that time. T.323,629-630.

Hosten’s affidavit description of the way the confrontation and shootings occurred at the After Five is credible because it is consistent with Cooke’s current account, and with Hosten’s trial description, except for the identification of Mark Schand. Hosten, Cooke and the Stokeses had gathered across the street from the After Five to split up some narcotics they had just purchased in New York. A.361, ¶3. The item that was grabbed to start the “commotion” was a bag of cocaine, not a neck chain. Id:¶6. As in his trial testimony, Hosten named Larry Gadsen as a witness to the shooting of Victoria Seymour. Id:¶12. During the commotion, Hosten moved toward the front of the club where the robbery

occurred rather than running away from the club as he testified at trial [T. 526], and witnessed the robbery at the intersection of Rifle and Central streets. He saw the gunman clearly. Hosten Affidavit, ¶15. After the robbery, Hosten drove his car up Rifle Street to a parking lot because he had narcotics in it and on his person. After parking, he went back to the scene and was arrested. Id:¶¶18-20. At the station, the police concluded that, like Cooke and the Stokeses, Hosten was a victim: “The police told me that they had found the drugs in my car but that they did not care about that. They said that all they wanted was Vickie’s killer and asked me to help. The police then let me go.” Id:¶21; compare, MTS II:144 [“I was placed under arrest, took to the Police station. My car was towed”].

Like Cooke, Hosten says his identification was contrived, and important elements of this assertion are independently corroborated. After the shooting, Hosten picked up 14 serious criminal charges: assaults and batteries [4], larceny and receiving stolen property [4], narcotics-related conspiracy and possession [6], breaking and entering a motor vehicle, wanton damage to property, and possession of burglarious tools.⁴³ A.361, ¶42. On October 30, 1986 Hosten was taken from the jail to the Hall of Justice, where the police told him they had just arrested the guy from Hartford who shot Vickie Seymour. They showed him a single mug shot of the killer, a black male wearing sunglasses and thick chains. A.171, T.230 [Exhibits 6A,6B,6C, Polaroids]. They then picked up the photo, put it in a stack of other photos and asked him to identify the guy who robbed Heavy Stokes. Id:¶¶26-27.

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In trial, Hosten also admitted that he was facing an armed robbery charge in Springfield District Court, Complaint # 87-23CR1812. T.555.

Hosten said he had never seen this man before but identified him anyway because “it was obvious that this was the person they wanted me to pick out since they had just shown me his photo and told me he was the shooter.” Id:¶29. The police then told Hosten he had identified Mark Schand and that, if he cooperated, “they would take care of me and make all of my cases disappear.” Id:¶¶29-31. Hosten agreed, and ADA Bloom then came into the room and asked him to confirm the identification.⁴⁴ ¶33. Sometime before the motion to suppress, Hosten saw Weaver on the street and recognized him as the shooter. Nevertheless, to keep his end of the agreement, Hosten testified in the suppression hearing that he saw both Weaver and Schand with a gun, and at trial identified Mark Schand as the shooter. Id:¶¶38, 40. “This was not true. I lied because I had a bunch of pending criminal cases and the police had promised that they would make them disappear if I identified Mark Schand as the guy who attacked Heavy.” ¶31.

Hosten got his payoff. On January 28, 1988, he pleaded guilty to breaking and entering a motor vehicle and was sentenced to six months, deemed served; and to wanton damage to property and possession of burglary tools for concurrent sentences of 3-5 state prison suspended – no imprisonment. The remaining 14 charges were nolle prossed. ¶42; A.372-390.

There are four remarkable elements to Hosten’s affidavit. First, and foremost, Mr. Hosten swore in his June 24, 2006 affidavit that he saw the man who robbed Heavy Stokes

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The October 30, 1986 police report of this event confirms that ADA Bloom was involved in obtaining Hosten’s identification and statement. A.370.

and that man definitely was not Mark Schand. This assertion is corroborated by and consistent with both pretrial evidence and the newly discovered evidence. Second, court records corroborate Hosten's claim that the police promised him favorable dispositions in his District Court cases in exchange for his testimony against Mark Schand, and that ADA Bloom carried out that promise. *Id.* Third, in his MTS testimony and in trial Hosten said that he saw Randy Weaver, with a gun, at the confrontation that led to the shooting, but that he was never shown a photo of Weaver. T. 550, 552; MTS II:146-150. In his October 30, 1986 statement, he said he saw one man with a gun [T.553]; this corroborates his affidavit statement that he added Mark Schand to his September 3, 1986 account to carry out his deal with the police. Fourth, as the reader has just seen, Randy Weaver has admitted being in the vicinity of the After Five Lounge at the time these crimes were committed, although Weaver denies that he was armed or was involved in the crimes. Weaver's admission is corroborated in significant details by Hosten, Sailor, Morgan and Fisher, all individuals with first hand knowledge who place Randy Weaver at the scene at the time of the shootings.

Thus, Hosten and Cooke have each said that they were rewarded by the prosecution team for giving contrived, false testimony that Mark Schand was the armed gunman who robbed Heavy Stokes.

C. CHARLES STOKES

Charles [Heavy] Stokes is a discredited figure in this case. Like Anthony Cooke, he is a surviving victim of the After Five crimes who received leniency in exchange for his

testimony against Mark Schand. His reward was a suspended 18-20 year sentence with five years' probation on his April 1988 guilty plea to assault and battery with a dangerous weapon on a person over 65. To persuade the reluctant Hampden Superior Court Justice William Welch to follow his recommendation, ADA Bloom said that he was rewarding Stokes for his testimony against Mr. Schand. A.433-434. Within months Heavy was in state prison serving the 18-20 years. MNT VI:112-115.

In a July 7, 1989 hand-written affidavit, Heavy repudiated the testimony he had given against Mark Schand, and disclosed that the December 15, 1986 lineup had been staged to spotlight Mark Schand as the person the police wanted him to identify. A.426-427. This assertion is corroborated by Cooke. A.397. Lt. McMahon's notes support these witness's accounts of who was in the lineup. A.407. In the aborted Roger Schand trial in Hampshire Superior Court in 1991, Heavy dramatically refused to testify, defying Judge Murphy's repeated orders. He accused ADA Bloom of having gotten him to testify falsely against Mark Schand. A.476-478. David Stokes also refused to testify against Roger Schand. Id. In the Motion for New Trial hearing, Heavy again recanted his trial testimony under oath from the witness stand, but Judge Murphy did not credit this recantation.⁴⁵ A.505.

In this Motion For New Trial, Mr. Schand does not rely on Heavy Stokes' 1989 and 1992 recantations of his trial testimony as a basis for relief. However, the record regarding

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Heavy Stokes claimed he was "coerced" to testify; ADA Bloom said Heavy "didn't have any choice but to trust me." MNT VI:112-115.

the prosecution team's dealings with Heavy Stokes corroborates both Cooke's assertion that the December 15, 1986 lineup was stacked against Mark Schand, and Cooke and Hosten's assertions that the prosecution team rewarded them to give false identification testimony against Mark Schand.

Heavy viewed the December 15, 1986 lineup in person. A:407. Like Cooke, he knew everyone in the lineup but Schand, and understood that Mark Schand was the person the police wanted him to identify [Mark Schand was the only one whose photo he had been shown, T. 331]. A.426-427. But he did not identify Mark Schand as the robber until he stood to benefit from doing so. In the interim, Heavy's girlfriend Denita Eddy was arrested, and on March 11, 1987, unable to make bail, she was about to be transported to MCI Framingham to await trial. MNT IV:221-222. That day, Heavy was shot in the leg. Det. Scammons came to his aid and called an ambulance for him. In the hospital, Det. Muise showed Heavy a photo array from which he identified Mark Schand as his assailant, and he made a written statement. MNTII:244. No record was made of the photographs in the array or the manner in which it was displayed him. Ms. Eaddy was not taken to Framingham. MNT IV:222. On March 23, 1987 David Stokes also identified Mark Schand as the robber. A.442. The prosecution team knew that David did this on Heavy's instructions. A.445.

1. Heavy's False Testimony In The Motion To Suppress Hearing.

On July 14, 1987 Heavy testified in the hearing on the motion to suppress the identifications. He testified falsely that, when police officers questioned him at his

mother's house on September 24, 1986, he had told them nothing. MTS II:107-108, 171-172. ADA Bloom did not correct this false and deliberately misleading testimony. In the same hearing, Det. Scammons – one of the detectives who questioned Heavy on September 24, – testified falsely that he had had no contact with Heavy Stokes before March 11, 1987. MTS IV:51. Bloom did not correct this testimony either.

These events demonstrate that, well before he testified, the prosecution team had sound reasons to believe that Heavy Stokes' trial testimony would not be truthful. Rather than setting the record straight, they encouraged and facilitated his false account by trying to hide or obscure his September 24 statement. Det. Scammons' report of his and Det. Reid's September 24 activities was falsified to eliminate their interview with Heavy, and the falsified version was given to Mr. Anderson in discovery. MNTIII:231-232, IV:20-24. Neither Heavy nor Scammons was cross examined about this event.

On June 4, 1987, Heavy was arrested and charged with two counts of unarmed robbery and assault and battery with a dangerous weapon on a person over 65 years of age. MNTIV:16, VII:96. He was released, and arrested again on serious felony charges on June 29, 1987; thereafter, he was held in the York Street jail until Mr. Schand's trial.⁴⁶

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Before he was jailed on July 29, 1987, Heavy made a nuisance of himself at the courthouse, stopping ADA Bloom in the halls and asking him for reassurance that Stokes had a deal. Bloom testified that Heavy became "a haunt . . . he was around all the time, in the courthouse and so forth." MNT VI:75. After he was jailed, Heavy drew ADA Bloom's ire by telling other prisoners that he has a special relationship with Bloom. MNT V:176, VI:114; A.507-508. ADA Bloom met with Heavy and his lawyer, Robert Ghazey, who said Bloom:

"told Charles that he could not continue to get in trouble and expect that Fran would be able to help him out. He told him not to be bandying his

MNTVII:104-106. Five felony charges stemming from these two incidents were pending when Heavy testified. MNT VII:104.

2. Heavy's False Trial Testimony.

At trial, Heavy identified Mark Schand as the man who robbed him. T.306-310. He was not questioned about his description of the robber given in his September 24, 1986 Scammons-Reid interview.⁴⁷ In cross examination, Stokes denied that he had a deal for his testimony. He was not; he said he was testifying "because a friend of mine, Victoria Seymour, was killed by Mark Schand, and I'm doing what's right," and because people in his neighborhood let him know that they expected him to speak up.⁴⁸ T.338. About the pending charges, he said: "I'm not guilty of these charges" and "I'm going to beat my case." T:337, 339. ADA Bloom remembered the arrangement differently: in the MNT hearing, Bloom testified that he believed he had Heavy Stokes in a position where "he

name about the jail inmates that he had a connection with Mr. Bloom and that he was a friend of Mr. Bloom's and that Mr. Bloom would take care of his cases."

MNT VII:109.

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In his trial testimony, Scammons made a single mention of this event on redirect examination. Anderson, focused on a different issue, apparently missed it. T.731-733.

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In Heavy's guilty plea proceeding after Schand's trial, Bloom told the judge that "a number of these people cooperated in this investigation because of people that I had as informants in the past who interceded and told them to talk." A. 435. These may be the "neighbors" that Heavy was referring to in his testimony. This information was not disclosed to the defense before trial. A.476.

didn't have any choice" but to cooperate with Bloom.⁴⁹ MNTVI:114-115. ADA Bloom and Heavy's lawyer never discussed trial, only disposition. *Id.* Because ADA Bloom did not disclose this exculpatory information either until after trial, it was never presented to the jury. A.472-473, 476.

Mark Schand's new evidence from the Hartford Witnesses confirms that Heavy's identification of Mark Schand was false. Heavy's testimony and post-trial statements corroborate Cooke's claim that the December 15, 1986 lineup was stacked against Mark Schand; and Cooke's and Hostens' statements that they were rewarded for giving false testimony identifying Mark Schand.

D. DAVID STOKES

David Stokes spoke to the police only when Charles Stokes directed him to do so. In the MNT hearing in 1992, ADA Bloom testified that, after Charles Stokes identified Mark Schand in March 1987, Charles "directed his brother to do the same." MNT VI:111. This testimony was the first disclosure of this Brady fact to the defense. A.472-473. In a lobby conference on April 11, 1991 during the trial of Roger Schand for these crimes, Hampshire ADA Elizabeth Scheibel, who was prosecuting the case, told Judge Murphy: "we have been told by David Stokes and his lawyer, Andrew Klyman, . . . that he does not make any moves or does not say anything unless it's been cleared by his brother, Charles." 4-11-

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Heavy acknowledged this in his MNT testimony, stating that he was a narcotics addict at the time and was willing to do anything to get out of jail and attend to his needs. MNT IV:148. Indeed, during the MTS hearing in July 1987, he got high during the lunch break and, when he returned to resume his testimony, the judge sent him home because he was visibly intoxicated. MNT VI:59 [ADA Bloom recounting event].

91Tr:7. Accordingly, when she wanted to persuade David Stokes to testify against Roger Schand for this murder, ADA Scheibel contacted Heavy Stokes and asked him to arrange for David Stokes to cooperate with her. MNTVI:129, 131, 145, 148.

In trial, ADA Bloom elicited David Stokes's testimony that he initially refused to cooperate with police but later contacted police and identified "sometime after you learned that your brother gave a statement[.]" T:416. David said that, when they showed him the array, he knew the police had someone specific in mind. Id:429. David went home from jail the day he made his statement. T.421-422.

Mr. Schand submits that these facts essentially discredit the trial testimony of David Stokes. Centurion Ministries has been unable to interview him despite intensive efforts to arrange a meeting with him. On November 18, 2012 Centurion Ministries investigator Richard Hepburn spoke with David Stokes by telephone; Mr. Stokes said he could not agree to an interview without checking first with his brother Heavy. A.449.

E. KENNETH WHITTED

The record provides no way to understand how Kenneth Whitted came to be involved in the investigation of the Seymour homicide. It appears that Det. Leonard Scammons, who treated Whitted as a confidential informant, MNT II:26, initiated contact with him in mid-September 1986 and learned that Whitted had had several confrontations in Springfield with some guys from Hartford in August 1986. MTS IV:127-128. Scammons testified that, at that point, the investigators were "grasping at straws." MNT I:80. Whitted says now that he thought he was being investigated for trying to rob the Hartford guys.

A.454.

On September 17, 1986, Det. Assad arranged for Scammons and him to take Whitted from the York Street jail, in the company of a jail employee named Sebastian Dimauro, to the Hartford police station. MNT I:93. There Whitted spent several hours viewing Hartford mug shots. He selected 6 or 7 that he recognized as some of the Hartford guys he had confronted. MNT I:92. He identified Tracy Turmon,[Hartford mug shot #1606], as the man with braided hair whom he had confronted at Antonio's Grinders.⁵⁰ A. 459; MNTII:181-183; MTS II:24; MNTII:30. Although Hartford police had two mug shots of Mark Schand at that time, A. 170, Scammons said that Whitted did not select either one. T.697. Mark Schand's hair is braided in both mug shots, but Turmon's photo was the only one with braided hair that Whitted selected. MNT I:111-112 [they were not trying to put together an array of men with braided hair].

Whitted was presented as a trial witness for the sole purpose of rebutting a statement that Lt. McMahon said Mark Schand made to him when McMahon arrested Mark on October 2, 1986. The statement was that Mark had been to Springfield only once in his life. Whitted testified that he had seen Mark Schand in Springfield on three occasions in August 1986: at the Harambee Festival, at Dearborn Pharmacy, and Antonio's Grinders. T.690-693. Whitted testified that he made an out of court identification of Mark Schand on

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Tracy Turmon was also one of the individuals Heavy Stokes selected in his September 24, 1986 interview with Scammons and Reid. A. 338.

December 12, 1986.⁵¹ On cross examination, Whitted testified that this occurred with officers Scammons and Doty on November 12, 1986: his "first conversation with the police. . . when you were shown the pictures by the police and it was in this courthouse." T.694.

Scammons testified that on September 24, 1986 Whitted was shown a different array, not recorded, and made a positive identification of Mark Schand. T. 699-700. He did not testify about the November 12 identification. He testified that Det. Faggaini had provided all of the photographs received from the Hartford police. T.687, 714-716. Scammons testified in trial that he and Det. Assad had gone to Hartford "before September 23" to look at some photos and brought a few back that they had gotten from Det. Faggaini.⁵² T.687. Thus Whitted's role in selecting the September 17 photos was eliminated and so was his identification of Turmon as the individual with the braided hair he had confronted in August 1986. The jury never heard these facts.

Centurion Ministries investigator Richard Hepburn interviewed Kenneth Whitted

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When he selected the array on September 17, Whitted gave reasons why he selected each individual. Scammons noted these in his personal notebook but did not document them in any report. MNT II:24-27. The report that he wrote does not describe the photographs Whitted selected nor name Whitted. Id:26. Whitted identified Tracy Turmon as the man with the braided hair whom he confronted at Antonio's. Id:24. Whitted identified Mark Schand on November 12, 1986, as that same man he confronted at Antonio's. Scammons "incorporated" Whitted's reasons for identifying Turmon into the November 12 statement as Whitted's reasons for identifying Mark Schand. Id:25. In short, Scammons and Whitted substituted Mark Schand for Tracy Turmon in Whitted's November 12 identification.

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In Scammons' notebook recording of this event, Whitted's name is crossed out and "X" is written in. A.458. ADA Bloom testified in the MNT hearing that he was never told that Whitted was involved in the investigation before September 24, 1986. MNT IV:64.

in Plymouth County Correctional Facility on January 13, 2010. A.455. Soon afterward, Whitted sent a "To Whom it may concern" letter to Centurion Ministries in which he explained that he felt the police manipulated him in their dealings regarding the Victoria Seymour murder. A.452. He said he thought he was taken to Hartford because the Hartford police were investigating him for his snatching neck chains and fighting in Springfield with his Hartford counterparts. Id:454. He identified Mark Schand as "the person that I tried to rob in Springfield ma." Id:453. He puzzled about why the police first approached him: "How they knew about me from the beginning, I do not know. I believe that someone told them about robbing people from Hartford there is nothing else that I can state and I hope that this case gets justified on behalf of mark schand of being innocent." A.454.

Centurion Ministries Executive Director James C. McCloskey and Richard Hepburn interviewed Mr. Whitted on April 13, 2012 in a cold call at his home. They prepared a detailed report of this interview. A.450. In it they report that Whitted said he felt that the police and DA Bloom "forced Mark (Schand) on me as far as saying he was in Springfield." A.451. He said he had never seen Mark Schand in Springfield at any time before or after the shooting at the After Five Lounge. Id.

Kenneth Whitted's testimony in Mark Schand's trial served merely to impeach the statement that Lt. McMahan attributed to Mark at the time of his arrest, that Mark had only been in Springfield once before. But the way the prosecution team handled Whitted as a witness seems to typify the fundamental dishonesty that pervaded the prosecution of Mark

Schand. Like Hosten's, Cooke's and the Stokeses', Whitted's testimony was manipulated to fit the prosecution's case.

F. MICHAEL BERNARD AND WILLIAM DARKO

Four of the six men who testified as eyewitnesses to the Stokes robbery have either corrected their false identification testimony [Cooke, Hostens, Heavy Stokes] or been discredited [David Stokes]. Whitted has backed away from his dubious claim that Mark Schand was involved in the summer 1986 Hartford-Springfield rivalry that he used to excuse the robberies he engaged in. Mark Schand's investigators and lawyers have been unable to locate or interview either Michael Bernard or William Darko. A brief summary of the trial testimony of these two men demonstrates why it does not support Mr. Schand's convictions.

Darko, who was a friend of the Stokeses [T.617], claimed to have been Victoria Seymour's boyfriend [T.580], but he never volunteered any information to the police. [On September 18 1986, Darko's photo was in the array shown to Tonya Pollon, who said one of the men she saw had hair like Darko's. A. 172]. The police happened on him only by chance, when an inventory of his property at the time of his December 31, 1986 drug arrest disclosed a notebook in which he had made a note that he was present when Ms. Seymour was shot. T.577, 597-598. In an interview with Det. Scammons, who said he showed him the purported standard 9-item photo array [T.707], Darko said he saw the entire event from his vantage point on the roof of the After Five Lounge [A.464]. Bernard identified Mark

Schand as the robber.⁵³ One of the photos in the array was MTS Ex. 2B, one of the distinctive Polaroids of Mark Schand wearing gazelle glasses and sporting a braided hairdo. MTS II:42-43. The photo Darko signed was Hartford Police Department mug shot # 20618 [Id:38], so there were two photos of Mark Schand in that array.⁵⁴ This fact was not brought out in the trial. T. 577-622. Although he was arrested for possession of a Class A narcotic, Darko went home after giving his statement and identifying Mark Schand as the robber. T.615.

Mr. Bernard's role in the prosecution of Mark Schand was much more central to the case: on October 24, 1986 he became the first witness to positively identify Mark Schand as the robber.⁵⁵ T.704. In his September 3, 1986 statement, Bernard told the police that the assailants were people he had never seen before in his life. T.647. But when he testified in

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No police report records the array shown to Darko. Dets. Scammons and Muise testified at trial that by this time [December 1986], the same array of 9 young black men was being shown to all witnesses. T.600, 708-712, 737-750. Darko testified at trial that when he looked at the array, he recognized "the guy with the braided hair," T.594, as if Mark Schand's photo was the only one of an individual with braided hair. Darko also said the robber wore a jacket over his shirt, a detail that brings to mind Heavy Stokes' September 24, 1986 description of Anthony Atkins to Scammons and Reid, recorded on the second page of the mysteriously altered report. A.429. Apparently, Darko's photo had been removed from the arrays being used by December 1986. A. 172.

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Michael Hosten also selected two Mark Schand photos from a single array on October 30, 1986. MTS II:158-160.

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Bernard was interviewed and shown photographs on September 3, 1986. He gave a description of the robber that did not fit Mark Schand, saying the robber was a person he had never seen before. A.463. He did not identify anyone from the photos he was shown then, which apparently were all Springfield Police Department mug shots.

trial, Bernard said he had lived in Hartford, either from 1968 through 1975 or from 1970 through 1977. T. 624, 661. He claimed he recognized Mark Schand's photo as a photo of a person he had known during that period. T. 642-645. That is, given Mr. Schand's birthdate of 1965, Bernard claimed to have known Schand sometime during a period when Schand was between 3 and 12 years old, and to have recognized him at the After Five from that acquaintance.⁵⁶

Mr. Darko did not claim to have known Mark Schand before September 2, 1986. His identification was based on his assertion that he heard an argument, looked in that direction and watched the snatch, chase, shooting and robbery scenario unfold without ever losing sight of the robber. T.601-602.

Darko testified that he and Bernard were together from before the time Darko heard the argument until the shooting stopped, when Bernard went down to the street. T.608-611. There was an apartment on the roof of the After Five and Bernard had the key to it. Several people, including Bernard, Darko, and Vicky Seymour, had been up on the roof off and on throughout the evening. According to Darko the trouble broke out when he and Bernard were on the roof smoking marijuana and getting high. T.602-603. When the first shot was fired, Darko and Bernard both ran to the safety of the apartment but Bernard had trouble getting the key into the lock. Darko lay face down while he waited for Bernard to solve the lock. They both dashed inside as soon as Bernard got the door open. T. 608-611.

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In a leading question, the prosecutor added the detail that Bernard knew Schand from Albany Avenue in Hartford. T.645.

Although he was high and anxious for his own safety, he never took his eyes off the man who robbed Heavy Stokes. That is why he was sure of his identification. T.619.

Mr. Bernard⁵⁷, also a friend of the Stokeses [T.626], had a strikingly different tale, one that came in three or four variations. He did not mention Darko or getting high. In the MTS hearing, Mr. Bernard had said he was standing on the sidewalk near Vicky Seymour and, when he heard the first shot, he “hit the ground” and watched the robbery unfold from that vantage point.⁵⁸ MTS II:178-179. At trial, Bernard testified on direct that he was on the sidewalk next to the After Five when some guys walked toward “a group of us”⁵⁹; the enlarged group then moved across the street where an argument broke out. By then, Bernard had recrossed the street and climbed the stairs to the landing on the roof when he saw somebody snatch a bag from Heavy Stokes. T.632-633. Under cross examination, Bernard that he was about 12 stairs up from the sidewalk when he heard the

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The MNT testimony supports a conclusion that Bernard benefitted from a surreptitious deal that rewarded him for his testimony. Judge Murphy summarized the evidence: Bernard faced 16 indictments. After Mark Schand’s trial, he pleaded guilty to 11 and 5 were nolle prossed. Bernard was sentenced to 3 years straight probation in a sentencing in which his Schand testimony was noted. His lawyer, Attorney Ghazey, testified that his time records indicated that this arrangement may have been made before November 1987. A.507-508.

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Hosten and David Stokes said it was Larry Gadsen who was next to Vickie Seymour when she was shot. T.308, 325, 530. Bernard placed Gadsen across the street with the Hallmark group when the argument began. T.631.

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With this testimony, Bernard appears to place himself with the Stokeses, Hosten and Cooke, each of whom claimed they were approached when they were across the street from the After Five, in front of the Hallmark store. Hosten also testified that Bernard was with that group. T.522.

first shot. T. 645. Reminded of his MTS testimony that he had “hit the ground” when he heard the first shot [MTSII:178], Bernard agreed that he had not done that from 12 steps up. T.645, 653, 661. At first he suggested he had really “hit the stairs” but then agreed he had actually been on the sidewalk rather than the stairs. He claimed Vicky Seymour was “three feet from me” when she was shot, and said he turned her over then.⁶⁰ T.646, 660. His friend Michael Hosten saw Larry Gadsen attending to Vicky at that time. T. 530. In any event, Bernard was able to identify the robber, because had kept his eye on the robber continuously throughout. T.661.

G. AL CHASE⁶¹ AND LAVON DIXON.

Two local middle school students, Al Chase (15) and Lavon Dixon (16), each testified that he saw Mark Schand at the Pizza King, five or six blocks from the After Five, shortly before the shootings. T.219-220; 274. In addition, Chase said he had seen Mark Schand in Springfield several other times, echoing Kenneth Whitted. T.222-224. Randy Weaver’s and Tracy Fisher’s statements demonstrates that the two misidentified Randy Weaver as Mark Schand. Chase’s first account of the event corroborates Weaver and Fisher on a crucial point.

On September 3, 1986 Chase told an employee of a local liquor store that he and

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Bernard admitted that he lived in the apartment on the roof of the After Five. T.624. Perhaps mercifully, no one asked him whether he had unlocked and opened the door to the apartment to shelter Darko and himself from the shooting. Compare, T.608-611.

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Al Chase is also referred to as Al Busch and Jermaine Chase at various points in the record. MNTI:100.

Dixon had encountered some men at the Pizza King who had asked Chase about neck chains shortly before the shooting. T:269. Interviewed by Dets. Assad and Reid on September 3, 1986, Chase and Dixon said the men had left and driven toward the area where the After Five Lounge was located. "Four ... got into a greyish Custom Van with large windows on the side and bearing conn. Reg. CO-189?. The other two got into a dark colored car." A.341. This corroborates Randy Weaver's and Tracy Fisher's accounts of their route in Springfield to the After Five by way of the pizza shop, traveling in a distinctive custom van with Connecticut plates and a small car.

Chase said that, inside the Pizza King, one of the men had asked him about the chains around Chase's neck, and Chase had the sense that the man might rip them off. Again, this corroborates Weaver's account of his activities inside the pizza shop. Chase described the man primarily in terms of his style:

"B— 20 yrs-5'7"-well built. Black hair worn in braids, wearing a brown and white stripe short sleeve shirt, Blue pants, blue sneakers with kangaroo dotted in. Sunglasses with brown frame and lenses, gold trim on each side."

A.341. Chase described three other men in lesser detail.⁶² Id. Dixon's first description of any of the men was not documented. By the time of the MTS hearing ten months later, each teen claimed that he described the man Chase spoke to as having a gold tooth. MTS I:64, 65.

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In the MTS hearing, Chase testified that his first description of the man who spoke to him at Pizza King had a gold tooth and wore his hair in braids. MTS I:14, 31. Neither of these details was recorded in Scammons's September 3, 1986 activity report, which was first produced to the defense in the MNT proceedings. A341.

Dets. Scammons and Reid showed Dixon an array on September 24, 1986 and reported that he pointed to mug shots of Mark Schand [50% sure] and Roger Schand [30-40% sure] as men he had seen at the Pizza King. A337. In the December 15, 1986 lineup, in the suppression hearing and at trial he identified Mark Schand with 100% certainty. A.407. But on September 18, 1986, Dixon identified two individuals named Pruitt and Syms as “possibly” at Pizza King and Chase “liked” an unidentified subject wearing corn rolls. A.467. The defense did not have this report. In a February 9, 2012 interview with Investigator Richard Hepburn at the Gaston Correctional Center in Dallas, North Carolina, Dixon said that he was referring to the photograph he had been first shown rather than to his memory of the encounter at the Pizza King. He had no memory of seeing a gold tooth or testifying that he had seen one. A.466.

Randy Weaver’s and Tracy Fisher’s strongly corroborated statements establish that Chase and Dixon misidentified Randy Weaver as Mark Schand. The two men resembled each other in appearance and style. The little that the Springfield police recorded of their pretrial identification exercises with these young witnesses documents that each was exposed to highly suggestive Polaroids of Mark Schand shortly before he viewed the lineup, and Mark Schand was the only person in the lineup whose photo they had seen before. By the time of the MTS hearing, both had adopted Mark’s front gold tooth as an identifying feature, but neither had mentioned it earlier.

Chase’s claim that he had seen Mark Schand at Sass and at the Run DMC concert, as Det. Scammons revealed in the MNT hearing, further supports the inference that he

spoke with Randy Weaver at the Pizza King, but misidentified Weaver as Mark Schand.
MNTI:150.

VII. SUMMARY OF NEW EVIDENCE

The evidence of Mark Schand's actual innocence of these crimes is unusually strong. Randy Weaver's and Tracy Fisher's accounts of their trips to Springfield on September 2, 1986 are mutually corroborating, and on all major points, consistent with the other known evidence. Those accounts are strongly corroborated by Martin Sailor's and Calvin Morgan's accounts, which are also each independently credible. Lonnie Keith has not said much, but the five together are unanimous on the two crucial points: they were all present at the After Five when Victoria Seymour was murdered, Anthony Cooke was shot and Heavy Stokes was robbed; and they each say that Mark Schand was not.

Anthony Cooke and Michael Hosten confirm that the sordid conduct of the prosecution team, which put together a false case against Mark Schand rather than investigating the crimes, rendered Mark Schand's trial fundamentally unfair. The crucial eyewitness identification testimony was falsified and obtained with concealed promises of leniency and rewards: Cooke, Hosten, Bernard, David Stokes and Darko were each released from custody right after identifying Mark Schand. After Mark Schand's trial, Cooke, Hosten, Bernard and Heavy Stokes received very favorable dispositions on pending cases as rewards for their testimony. Heavy and David Stokes were used as key witnesses even though the prosecution team knew they were collaborating on and contriving their testimony. The stacked lineup signaled to the Stokeses and Cooke that the prosecution

team was manufacturing a case against Mark Schand, and Hosten also received that message. All three took advantage of the opportunity. Chase and Dixon were drawn into making mistaken identifications. Bernard and Darko were unreliable witnesses at best. The result was an awful miscarriage of justice.

VIII. RECAPITULATION OF THE COMMONWEALTH'S EVIDENCE

Even though he knew nothing of these vagaries, the trial judge was skeptical of the Commonwealth's case. During the charge conference, Judge Murphy offered this characterization of the Commonwealth's evidence overall:

"The facts in this case are such that it would not be unreasonable for the jury to infer just about anything, and it would be reasonable for a jury to sit there and say he [Schand] was there but we have no concept of what happened based on the evidence, on the characters that have testified in this case, so they could reasonably infer just about anything that was going on there at this scene, but they could still find that Schand was there and he was the shooter. So I'm going to include it [an involuntary manslaughter instruction] in that manner just for the purposes of the belt and suspenders."

T:936. At this juncture, that characterization can be seen as overly generous to the prosecution, considering the import of Mark Schand's new evidence.

IX. CLAIMS FOR RELIEF

A. MARK SCHAND IS INNOCENT OF THE MURDER OF VICTORIA SEYMOUR, THE SHOOTING OF ANTHONY COOKE, AND THE ARMED ROBBERY OF HEAVY STOKES.

A justice of the Superior Court is empowered to grant a new trial when he or she has been persuaded that "justice may not have been done." M.R.Crim.P. 30(b); Commonwealth v. McCarthy, 375 Mass 409, 414-415 (1978). This power is now codified in Rule 30(b), the first sentence of which is identical to, and taken directly from, G.L. c. 278,

§29, the statute that was in effect before the implementation of the Rules of Criminal Procedure. Reporter's Notes to Rule 30(b).⁶³ The Supreme Judicial Court elaborated on this power in McCarthy, a case in which the trial judge granted a new trial following a second degree murder conviction, without specifying any legal error in the trial as grounds for granting the motion:

“First, we reject the Commonwealth’s suggestion that, under G.L. c. 278, §29, it was necessary for the judge to base his decision to order a new trial on the ground that a particular legal error occurred at trial. A motion for a new trial is addressed to the sound discretion of the trial judge [citations omitted]. While the proper exercise of this discretion under G.L. c. 278, §29, of course does not include actions which are arbitrary, frivolous, or contrary to law, [citation omitted], it necessarily includes the flexibility to consider the case as a whole, to assess the weight of the evidence, and to bring the interest of justice to bear.”

375 Mass at 414-415. The basis of a motion for new trial can be occurrences in the trial or the discovery of new facts that bear on the guilt of the accused, including the testimony of a trial witness who corrects his or her previous testimony, or a combination of new evidence and trial evidence. See, Commonwealth v. Markham, 10 Mass App Ct 651, 653-655 (1978).

The accounts of Randy Weaver, Tracy Fisher, Martin Sailor, and Lonnie Keith regarding their activities at the After Five Lounge at the time these crimes were committed, and the corroborating statement of Calvin Morgan, constitute powerful new evidence that Mark Schand is not guilty of any of the After Five crimes for which he was convicted. This

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The statute was amended in 1966 to liberalize the standard from “justice *has* not been done” to “justice *may not have been* done.” St. 1966, c. 301; Commonwealth v. Markham, 10 Mass App Ct 651, 653 (1980).

evidence, which qualifies as newly discovered under Massachusetts law, is credible and substantial, and establishes that Mark Schand's convictions cannot conscientiously be allowed to stand.

The record in this case establishes that two types of false and materially misleading evidence were presented to the jury in Mark Schand's trial. Anthony Cooke and Michael Hosten gave false eyewitness identifications of Mark Schand. Cooke and Hosten each also testified falsely regarding the rewards promised him for his testimony. The evidence strongly suggests that Bernard and Heavy Stokes did also. Stokes falsely testified that he was going to trial and expected to be acquitted. The standard for assessing whether this type of evidence requires a new trial depends on whether or not a member of the prosecution team knew or should have known that the testimony in question was false or materially misleading. This evidence also establishes that the prosecution team violated its due process and state law discovery obligations by failing to disclose this specifically requested exculpatory information to the defense. Commonwealth v. Tucceri, 412 Mass 401, 412 (1992)[“In that situation, a defendant need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure”].

The newly discovered evidence must be considered cumulatively, and evaluated in relation to the pretrial and trial evidence. Commonwealth v. Limone, 2001 Mass. Super. LEXIS 7,*26-*29; See, Kyles v. Whitley, 514 U.S. 419, 435* (1995) [Evidence that is newly discovered because it had been suppressed by the prosecution is considered cumulatively, in light of pretrial and trial evidence].

B. NEWLY DISCOVERED EVIDENCE.

1. The Legal Standards: Doubt As To The Justice Of The Convictions.

Evidence is considered to be “newly discovered” if it was unknown and unavailable at the time of trial despite the reasonable diligence of the moving party. Commonwealth v. Kobrin, 72 Mass App Ct 589, 612-613 (2008). To warrant a new trial, the new evidence must be “material and credible [and] also carry a measure of strength in support of the defendant’s position.” Commonwealth v. Grace, 397 Mass 303, 305-306 (1986). The defendant must establish that the evidence “would probably have been a real factor in the jury’s deliberations” had it been available and presented at trial. Kobrin, supra; Commonwealth v. Chiappini, 72 Mass App Ct 188, 197 (2008). That is, it is not necessary to establish that, had the evidence been presented, the jury would have reached a different verdict, but rather that the evidence had a strong potential for affecting the outcome. Id.; Commonwealth v. Tucceri, 412 Mass 401, 413 (1992)[Question is “whether there is a substantial risk that the jury would have reached a different conclusion”]. The evidence presented in Schand’s 1992 motion for new trial is relevant to the assessment of his newly discovered evidence. Commonwealth v. Limone, 2001 Mass. Super. at *26-*27.

Here, Mark Schand’s new evidence from the Hartford Witnesses alone is so compelling that it easily exceeds this standard. It is not cumulative: none of it and nothing like it was presented at trial. Viewed in light of the history of the total universe of the evidence in this case, and the history of the litigation, it both supports Mark Schand’s alibi defense and refutes the prosecution’s case. It does this both by casting the previously

known evidence in a radically new light, and by establishing entirely independent grounds for concluding that Mark Schand was not present at the time and place these crimes were committed, and did not participate either as the principal or as a joint venturer.

2. The Evidence Tendered In Support Of Mark Schand's Motion For New Trial Is Newly Discovered.

In terms of the impact of newly discovered evidence, Mark Schand's case is like the defendants' cases in Commonwealth v. Limone, supra, but stronger. There, more than 30 years after trial, Assistant United States Attorney John Durham disclosed documents to the Suffolk County District Attorney's office and to the defendants that recorded FBI complicity in the knowing presentation of false testimony [not known by the original prosecutors to have been false] to obtain the convictions of five men for first degree murder. Judge Gertner described what followed:

"When, in 2000, Special Attorney Durham, head of the DOJ's Justice Task Force, sent the plaintiffs' then-attorneys and Suffolk ADA Mark Lee the five Durham documents, he expressly acknowledged their significance in the plaintiffs' efforts to secure their release. And he was right: In short order, on January 5, 2001, at a hearing on Limone's Motion for New Trial before Judge Hinkle, ADA Lee explained:

[t]hese reports had been previously undisclosed to anyone concerned with this litigation. And when these reports, Your Honor, are read, particularly with an eye towards comparing the reports to the existing evidence which includes the trial testimony, the trial transcripts which are part of the record, the Commonwealth concludes that these FBI reports *undermine material aspects of the testimony that was given at trial by the Commonwealth's chief witness. In addition, the FBI reports clearly undermine the theory of the Commonwealth's case with respect to Mr. Limone.*

The Commonwealth immediately moved to vacate Limone's conviction, grant him a new trial, and admit him to bail. Judge Hinkle granted the motion for a new trial on the basis of . . . the FBI records, nothing more."

Exh. 1 at 15 (italics supplied). Within a month, the Commonwealth entered nolle prosequis in its case against Limone and Salvati, concluding that it did not have a good faith basis “legally or ethically” to proceed with the cases. See Exh. 3B; Exh. 3D. Nolle prosequis were later entered posthumously as to Greco and Tameleo. See Exh. 3g; Exh. 3H.

Limone v. United States, 497 F. Supp. 2d 143, 216 (D. Mass. 2007). A similar course of action and result is warranted here.

[a] The Hartford Witness Affidavits And Statements Are Newly Discovered.

As mentioned in Part II, supra, p. 7, Mark and Mia Schands, working on their own and with assistance from Attorneys John Thompson and Chauncey Wood, have hired at least six investigators over the past 23 years in their efforts to discover the evidence that Centurion Ministries’ investigators finally unearthed over the past three years. A.2; 6; 514-533. In 1990, Michael Newman interviewed Tracy Fisher, who implicated himself in the murder and said he did not see Mark Schand present. A.328-330. In early 1999, David Blaschke of Absolute Security Detective Agency interviewed Fisher again and obtained a more detailed and somewhat different account that implicated Randy Weaver and Lonnie Keith, and an unknown “kid” [apparently Martin Sailor], but Fisher refused to participate in a follow-up interview. A. 391-393. Blaschke also interviewed Anthony Cooke, who repudiated his identification of Mark Schand as the person who shot him, and disclosed that he had testified in exchange for leniency on pending charges. A.390-391. Cooke at first agreed to sign a statement but backed out on legal advice. A.394. Blaschke located Michael Hosten’s mother but was unable to contact him, and failed to locate Michael Bernard. In 2001, Mark Schand was given a polygraph examination by Richard C. Johnson,

Esq., who found his denials of involvement in the Seymour homicide to be truthful. A.3-5.

After this encouraging beginning, the Schand and their investigators made no further progress until 2005, when Attorney Thompson interviewed Michael Hosten in prison. A.532-533. The Schand hired investigators Judith Glenn, Nicholas Cockoros and Thomas Rondeau in 1999 and 2000 without any results. An effort in 2001 to engage the Springfield chapter of the NAACP to help locate witnesses was unproductive. A.515, 519-522. The Schand hired a Milwaukee, Wisconsin investigator in 2002 and paid him a substantial fee, but he did no interviews and produced no new evidence. A.523-529. In 2002 they hired Richard Williams of All Counties Investigations, who worked off and on into 2008, but his efforts were unproductive. A. 530-531.

The breakthrough came in September 2009, with Centurion Ministries' interview of Randy Weaver, who agreed to testify. For the first time after Mark Schand's trial, Weaver's willingness to sign an affidavit and testify gave Mark a live witness to support his claim of innocence. Martin Sailor adds to this evidence with his affidavit, and Calvin Morgan with his. This newly available evidence adds strength and credibility to the earlier statements of Cooke and Fisher, which are statements against each declarant's penal interest, now corroborated by Weaver, Sailor and Morgan. Commonwealth v. Galloway, 404 Mass 204, 208 (1989).

A post-trial admission by a trial witness that contradicts his or her trial testimony is newly discovered. Chiappini, supra at 197. Michael Hosten's affidavit and Anthony Cooke's statements are in this category.

Randy Weaver's statement is newly discovered because it was not available before trial. Kobrin, 72 Mass App Ct at 612-613. Michael Hosten testified in the July 1987 motion to suppress hearing and at trial that he saw Weaver at the scene of the crimes carrying a handgun. Had Mark Schand's investigator located Weaver, Weaver likely would have made himself unavailable as a witness by invoking his privilege against self-incrimination. Galloway, supra [witness who invokes privilege is unavailable]. As Weaver recounted in his January 25, 2012 recorded statement, at that time he had changed his appearance and was trying to avoid being implicated in the crimes. If he had been compelled to appear as a witness, he would have invoked his privilege against self-incrimination. Weaver's claim of innocence would not deprive him of that privilege. Ohio v. Reiner, 532 U.S. 17, 22 (2001) [per curiam].

The fact that Attorney Anderson knew about Weaver does not mean his evidence is not newly discovered. The crucial element of Weaver's evidence is that Mark Schand was not involved in these events. This eliminates any possibility that Mark could be a joint venturer or accomplice of any kind. Sailor's evidence and Fisher's evidence are of the same type. Tracy Fisher's name does not appear in any police report or other discovery material provided by the prosecution to the defense. As far as we know, his role in these events was known only to the small group at Bennett's Lounge. The same is true of Tyrone Bridges, Lonnie Keith and Calvin Morgan.

Martin Sailor was also unavailable; his real name was Martin Smith, a fact that no one connected with either Mark Schand or the state investigators knew. In 1987, when

Roger Schand was questioned about the Seymour homicide and named Martin Sailor as an important witness, the police could not find Sailor, and didn't know his name was Smith. A.534.

[b] The Statements Of The Hartford Witnesses Are Credible "Would Probably Have Been A Real Factor In The Jury's Deliberations" Had It Been Presented At Trial.

Randy Weaver and Tracy Fisher's accounts are consistent with the core facts of this case: a group of young men from Hartford drove to Springfield in a customized van to look for special neck chains and a medallion. They stopped at the Pizza King where one of them quizzed Al Chase about whether he had seen anyone wearing that jewelry, then continued to the area where Weaver had lost track of the thief who stole his chains. Separately, Fisher and his two companions followed Weaver to the pizza restaurant [they did not go in], and then to the night club area. Weaver was not aware that Fisher and his friends had followed him and his group.

The After Five Lounge was located at the corner of Rifle and Central Streets. Across Central Street from the After Five was the Hallmark building. The first street up Central, west of Rifle, was Chester, where Weaver had parked his van, and Fisher later parked his car. Behind the area framed by Rifle and Chester and a wooded area to the east was the housing project where Weaver had lost track of the thief a few days earlier.

Weaver's group walked through the After Five looking for his neck chains. They left the shotgun and handgun they had with them in the van, and so were unarmed.

Independently, Fisher and Ty Johnson went to the same area. Fisher was looking to buy cocaine. In the meantime, Weaver's group left the After Five through the front door.

They saw Johnson, asked him what he was doing there, and then heard for the first time that Fisher was nearby. Weaver and Bridges had already walked west on Central Street toward Chester so Weaver could show Bridges where he lost track of the chains thief; they did not know where Fisher was. Sailor and Keith continued to converse with Johnson.

Heavy and David Stokes were negotiating to sell cocaine to Anthony Cooke and Michael Hosten when Fisher, Johnson and possibly Keith approached the Stokeses. At least one member of the Fisher group was armed; Weaver says Johnson declared later at Bennett's Lounge that he was. At some point during the ensuing negotiations, Fisher grabbed a bag of cocaine from Stokes, and the shootings followed. Alone, Sailor ran west on Central toward the van. Hearing the shots, Weaver and Bridges ran back toward the After Five and met Sailor and Keith near Chester Street. Sailor and Keith exclaimed that "Tracy and them" were involved in the commotion. The four ran to the van and drove back to Bennett's Lounge in Hartford, where Calvin Morgan was working. Fisher and Johnson also returned to Bennett's, where Johnson told the Weaver group that he and Fisher had been shot at, and returned fire.

None of this information was presented to the jury.

[c] Mark Schand Has A Substantial Basis For Asserting That He Was Prejudiced By The Suppression Of Exculpatory Impeachment Evidence Known To The Prosecution.

Anthony Cooke and Michael Hosten say that they plugged Mark Schand into this scenario as a way of dealing with the unrelated criminal charges they were facing at that time. Each falsely identified Mark Schand as the individual who grabbed Heavy's coke [or chain, according to David Stokes]. According to them and David, this was the man who

shot Cooke and Vicky Seymour, and robbed Heavy. Heavy Stokes says he was rewarded with a lenient disposition of unrelated charges for his identification of Mark Schand. Although ADA Bloom denied having made a deal with Stokes, he had maneuvered Stokes into such a dependent position that, as Bloom described it, before Heavy was jailed, he “became a haunt” in the courthouse, begging Bloom to tell him what his sentence was going to be. See, p. 70, n. 46. After Heavy was jailed, he spread the news of his “special” relationship with ADA Bloom so persistently that Bloom appealed to Ghazey to shut him up. *Id.* This exculpatory information was not disclosed to the defense. None of this information was presented to the jury.

This newly discovered evidence corroborates Mark Schand’s alibi defense: he was not in Springfield. When considered together, these two bodies of evidence would almost surely have led the jury to acquit Mark Schand.

B. PRESENTATION OF FALSE AND MATERIALLY MISLEADING EVIDENCE

Due process forbids the prosecution team to knowingly present false evidence. *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959). This prohibition applies equally to evidence that is materially misleading. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957). If a prosecutor becomes aware that a witness has testified falsely, the prosecutor has a constitutional duty to correct that testimony even if it was given in response to defense questioning. *Giglio v. United States*, 405 U.S. 150, 151-155 (1972). This applies to testimony relevant to the credibility of an important prosecution witness as well as testimony bearing directly on guilt or innocence. *Id.* These principles are to be strictly enforced to safeguard against

corruption of the truth-finding function of the adversary criminal justice system and to insure that the prosecution does not benefit from false evidence. Id.

1. The Testimony Of Cooke, Hosten, And David Stokes Identifying Mark Schand As The Robber; And Kenneth Whitted's Identification Of Mark Schand As A Person He Had Seen Earlier In Springfield, Was False.

Anthony Cooke and Michael Hosten each says his identification of Mark Schand as the principal perpetrator of the After Five crimes was false, given in exchange for promises of leniency in unrelated cases that were pending against them at the time of Mark Schand's trial. A.396-398; 363-368. David Stokes' identification testimony was given on his brother Heavy's instructions; Heavy Stokes says that his own identification of Mark Schand was false. A.446, 427.

The prosecution team had reason to believe that Cooke's and Heavy Stokes's identification testimony was false because ADA Bloom and Lt. McMahon staged the December 15, 1986 sham lineup with a composition that clearly pointed to Mark Schand as the individual to be identified. The mocking manner in which the Stokes brothers responded to the police, which was used at trial as evidence that the Stokeses knew all along that Mark Schand was the perpetrator, takes on a diametrically opposed meaning once it is understood that the Stokeses were responding to the open signals by the police that they wanted Mark Schand identified. For Cooke and the Stokeses, the fact that they knew everyone in the lineup except Mark Schand was a clear signal to these three witnesses that the police and ADA Bloom wanted them to identify Schand.⁶⁴

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Heavy Stokes' testimony was false in another particular, and the prosecutor knew it.

The presentation of David Stokes's identification testimony further proves the prosecution team's willingness to use false testimony. ADA Bloom knew that David Stokes had identified Mark Schand only at Heavy's direction. Although not conclusive, that is strong additional evidence that David's identification testimony was false. The prosecutor's failure to disclose that exculpatory fact to defense counsel before trial is further evidence of deliberate deception in the presentation of David's testimony, as is the knowing presentation of Cooke's and Heavy Stokes's known false testimony. Finally, the thinly disguised contrivance of Hosten's identification while ADA Bloom remained off-stage but in the wings, emerging to put his imprimatur on the process by confirming the identification the detectives had worked out with Hosten also points to knowing manufacture and presentation of false evidence by the prosecution team.

If believed, Hosten's description of the process by which his identification was elicited and confirmed by the prosecution team establishes that both ADA Bloom and the detectives had strong reasons for believing that it was false. A. 363-368. Kenneth Whitted says that his testimony identifying Mark Schand as the person he confronted at Harambee, Antonio's Grinders and other spots in Springfield in the summer of 1986 was false. A.450-456. At a minimum, ADA Bloom and Scammons knew that Whitted's trial testimony that he had spoken to Springfield police and made an out of court identification from a photo

Stokes testified that he was not guilty of the pending charges and that he was going to fight his case. ADA Bloom testified in the MNT hearing that he and Attorney Ghazey, Heavy's lawyer, never discussed trial but only a guilty plea when Bloom assumed responsibility for prosecuting Heavy's charges after Mark Schand's trial. MNT VI:114-115.

array only once – on November 12, 1986 – was false. This falsity hid the fact that on September 17, 1986, Whitted had identified Tracy Turmon as the man he identified in trial as Mark Schand. See pp. 73-75, *supra*.

2. This False Testimony Might Reasonably Have Affected The Jury’s Judgment.

The knowing presentation of false testimony by a prosecutor or prosecution team requires a new trial unless the Commonwealth establishes that there is no reasonable likelihood that the false testimony could have affected the jury’s judgment.⁶⁵ Napue v. Illinois, 360 U.S. 264, 270 (1959). “Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is ‘virtually automatic’[.]” United States v. Wallach, 935 F2d 445, 456 (2nd Cir. 1991). The impact of false testimony is assessed cumulatively. Jenkins v. Artuz, 294 F3d 284, 295 (2nd Cir. 2001). The false testimony knowingly presented in Mark Schand’s trial easily meets this standard.

Cooke testified that he was shot point-blank by Mark Schand. Heavy Stokes testified that Mark Schand stood over him, misfired his gun in his face and robbed him. David Stokes and Michael Hosten each testified that these events occurred right in front of him and identified Mark Schand as the robber. Powerful circumstantial evidence

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“As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” Giglio v. United States, 405 U.S. 150, 153 (1972); see also, Napue v. Illinois, 360 U.S. at 269. “A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Kyles v. Whitley, 514 U.S. 419, 433 n. 7 (1995); Commonwealth v. Collins, 386 Mass 1, 14-15 (1982).

established that the man who shot Cooke and robbed Stokes almost certainly shot Victoria Seymour, as the prosecutor argued in summation.

These were the four key eyewitnesses in the prosecution's case. Michael Bernard and Willie Darko chimed in, but their problematic testimony, standing alone, was weak. Chase's and Dixon's identifications of Mark Schand as the man they encountered in the Pizza King is shown by Weaver's testimony to have been mistaken. Chase's testimony that he had seen Mark Schand in Springfield otherwise contradicted Mark's purported statement to Lt. McMahon, but did not bear directly on guilt. There is no question that the jury's judgment was affected by the false testimony of Cooke, Hosten, and the Stokeses. Put another way, unquestionably the jury's judgment would have been affected by the knowledge that these witnesses had testified falsely, with the apparent connivance of the prosecution team, had it been informed after the false testimony was given. Commonwealth v. Nelson, 3 Mass App Ct 90, 100-101 (1975); Kyles v. Whitley, 514 U.S. 419, 446 (1995).

Even if it is assumed that the prosecution team believed that the openly suggestive lineup and the inducements of bail and lenient dispositions for identifying Mark Schand would produce accurate and truthful identifications, the fact remains that Cooke's, Hostens' and the Stokeses' identification testimony was false and that its falsity is newly discovered. Even if it is assumed that the prosecution team was not aware that Hosten and the Stokeses gave false testimony, a new trial is required on this ground.

3. Kenneth Whitted's Trial Testimony That Mark Schand Was The Person He Confronted In Springfield In The Summer Of 1986.

Whitted's testimony did not amount to much. Like Chase, he contradicted the statement that Lt. McMahon attributed to Mark Schand when Schand was arrested: that he had been in Springfield only once before.

Whitted's testimony and his repudiation of it is more noteworthy as an illustration of the wholesale manipulation of a great deal of the evidence that was presented in Mark Schand's trial. The police relied on Whitted for background narrative, and his misidentification of Mark Schand may have triggered a focus on Schand as a suspect. However, the police showed no interest in Tracy Turmon one of the men whose photo Whitted identified following his curious trip as a jail inmate to Hartford.⁶⁶ The "To Whom It May Concern" letter Whitted sent to CMI indicates that, at the time, Whitted thought he was being investigated for "rip-offs" he had committed and was trying to deflect suspicion from himself. A.453-454. This is like the self-exculpating accomplice testimony that has long been regarded as "inherently unreliable." Lilly v. Virginia, 527 U.S. 116, 131 (1999). The most noteworthy feature of Whitted's testimony is the unscrupulous way in which ADA Bloom and Det. Scammons misrepresented it, as set out above. See, pp. 73-74.

The presentation of Whitted's testimony typified the pervasively dishonest style of the prosecution in this case.

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The withheld second page of the altered September 24, 1986 Scammons/Reid report discloses that Heavy Stokes also chose Turmon's photo that day, a fact the jury never learned. A.338; Tr.286 - 351 [Stokes testimony].

4. Det. Scammons' False Testimony In Trial And In The MTS Hearing About His Contacts With Heavy Stokes, Al Chase, Lavon Dixon, And Kenneth Whitted.

The prosecution made Heavy Stokes', Al Chase, Lavon Dixon and Kenneth Whitted's identifications of Mark Schand seem more certain by suppressing 6 police reports that disclosed occasions when these witnesses responded positively to photographs of other suspects than Schand. These 6 reports were marked as MNT Exhibits 1, 4, 5, 15, 17 and 21. This was exculpatory information that was specifically requested in a pretrial motion [A.471]; each contained descriptions of photographic identification proceedings that must be disclosed as a matter of due process. Commonwealth v. Dougan, 377 Mass 303 (1979).

MNT Exhibit 5 is the report of a September 17, 1986 trip to Hartford in which Det. Scammons and Assad transported Whitted in the company of a Hampden County jail employee, Sebastian DiMauro. For approximately four hours, Whitted pored over photos of young black men, identifying 7 or 8 he believed he had seen in Springfield between June 23 and the end of August, 1986. At this time, the Hartford police had two photos of Mark Schand, dated June 30, 19986 and September 5, 1986. A. 170; MNT III:36. As he selected these photos, Whitted attributed certain activities to particular persons; some are recorded in notes Scammons took at the time. MNT Ex. 15. Whitted chose a black male with braids whom Whitted claimed to have had confrontations on four different occasions, including Antonio's Grinders, Dearborn Pharmacy and the Harambee festival. The black male with braids whose photograph he chose was Tracy Turmon [Hartford mug shot #1606]. MNT II:24; MNT Exs. 5, 15.

In the MTS hearing, both Whitted and Scammons testified that on September 24, 1986 Whitted identified a photo of Mark Schand as that person. MTS III:130, 142, 144. In that hearing, Whitted testified that, 2 days after the shooting, police had shown him 3 photos of Mark Schand, CITE: 910, including one where “he had his head like it is now”; (2) one with a big “rope” on his neck; and (3) one smiling, showing a gold tooth. MTS III:127; Compare Trial Exs. 3I, 4, 6A, 6B, 6C. Whitted also testified that after the shootings, Dets. Scammons and Doty had visited him at the jail and showed him Hartford mug shots: “They asked me who was this guy, such and such, who is this, have you seen these guys here.” The motion judge asked Whitted when this had occurred; ADA Bloom interjected: “He doesn’t know. According to the documents, **the first time was the 24th of September.**” MTS III:149-150 (emphasis added). Bloom testified in the MNT hearing that he had never reviewed the police file. MNT VII:31.

Det. Scammons falsely testified that, other than on September 24 and November 12, 1986, he had no other conversations with Whitted. MTS IV:39-40. He did not disclose his note of his September 24 conversation with an unnamed witness, who described a man “BM 5'7" 155 bad teeth slender 30+ Asked about a change,” A.343, in which the witness apparently described a man who asked about a “chain,” or necklace.

Scammons also testified that he spoke to Chase only twice, on September 24, 1986 while showing him photographs at Chase’s school, and once while transporting Chase to the station to look at photo arrays of vans. Scammons specifically denied having spoken to Chase before September 24, 1986. MTS IV:32-33. MNT Exhibit 1 documents that on

September 18, 1986 Scammons showed an unrecorded photo array to Chase and Dixon and records that each responded affirmatively to photographs other than Mark Schand's. Chase "liked" subject with "corn rolls as hanging around Pizza King," the person he identified in the MTS hearing and at trial as Mark Schand. App:48. Dixon liked "Pruitt and Syms," two men in photos selected by Whitted at the Hartford police department on September 17. Id; A.467. At trial, Scammons testified only that he showed photographs to Chase and Dixon on a single occasion at their school on September 24, creating the false impression that only this showing intervened between their encounter at the Pizza King and the December 15 lineup. Ttr. 700-702. ADA Bloom asserted in closing that this was fact. Id:992. This contradicted the teenagers' testimony that they had each been shown 3 Polaroids of Mark Schand shortly before viewing the December 15 lineup. See p. 44, supra.

In the MTS hearing, Det. Scammons testified that he had not had any contact with Heavy Stokes about this case until March 11, 1987. MTS IV:51.

Without identifying Scammons or Reid, Stokes testified in the MTS that he had been interviewed at his mother's house and shown photo arrays at some unspecified time after the shootings, but claimed that he had told the police nothing on that occasion. MTS I:102-107. In trial, this was presented as a willful refusal to cooperate with the police. Ttr. 312-314; 982-984 (summation). Stokes testified that he recognized Mark Schand when the police showed him the array that included Schand's photograph. He said he looked through the array, singled out Mark Schand's photograph and placed it on the top of the stack, smiled and handed it back to the officers. Ttr. 313. Scammons described the same

charade in his trial testimony and said it occurred September 24, 1986.⁶⁷ TTR. 731. But in the report Det. Scammons and Reid made of that event, Heavy was cooperative, selecting photos of Anthony Atkins, Mark Schand and Tracy Turmon, assigning degrees of confidence to each, and offering to view a lineup. A.338. The trial testimony was false, and known to be so.

These details of falsified testimony and suppression of exculpatory evidence were presented to the Supreme Judicial Court on direct appeal, though many were not addressed in its ruling. They are not presented here as independent grounds for relief, but rather as background and context information that helps shed light on the significance of Mark Schand's new evidence. Most importantly, they lend credence to Cooke's and Hostens' assertions that their identification testimony was false, and known to be false, when presented at trial, and Whitted's claim that Mark Schand was "pushed" at him when he was given the task of fingering his Hartford antagonist from the summer of 1986. They support the conclusion that the Stokeses testimony was known to be false when presented.

D. SUPPRESSION OF EXCULPATORY INFORMATION.

When exculpatory evidence is suppressed, it is sometimes to facilitate the presentation of false or materially misleading testimony. The exculpatory information is commonly the information that would expose or lead to the exposure of the falsehoods. E.g., Giglio v. United States, 405 U.S. 150, 153-155 (1972). Most of the exculpatory

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This was the only time, other than on page two of the altered Scammons/Reid summary, that this event connected with this date. Compare, GJ 14-15; MTS I:00-108; 168-179.

information suppressed in Mark Schand's case facilitated the false presentations just demonstrated. Much of the suppressed information had been specifically requested in Schand's pretrial discovery motions.

On April 3, 1987 ADA Bloom posted a written response purporting to address six of Defendant Schand's discovery motions. A.471. In fact, Bloom responded only to Schand's motions for disclosure of out of court identification procedures; for witness statements and police reports; and for promises, rewards or inducements to Commonwealth witnesses. *Id.* ADA Bloom represented that "[a]ll of the out of court identification procedures concerning your client are contained in the statements you have previously received." He represented that all witness statements and police reports had been furnished to the defense. *Id.* He said that no promises had been made to anyone but Michael Hostens, to whom Bloom promised that he would do all he could to see to it that, if Hostens went to jail, and Mark Schand was convicted, the two would not be placed in the same institution. *Id.*

Bloom's assertion that "[a]ll of the out of court procedures concerning [Mark Schand] are contained in the statements you previously received [with the exception of the statements of Heavy and David Stokes, enclosed with the letter]" was shown in the MTS hearing in July 1987 and in the February 1992 MNT hearing to be grossly inaccurate. His April 3, 1987 offer to make arrangements for Attorney Anderson to "see the array of photos used in the out-of-court procedure (sic)" was disingenuous and grossly misleading, given the facts that [1] there was no single array used and [2] the detectives had made no record

of the various arrays they used, nor of the witnesses' responses to the arrays.

Mark Schand's new evidence proves that Bloom misrepresented his agreement with Hosten and misrepresented that he had no agreement with Cooke. He promised Hosten that Hosten would not go to jail at all, and Hosten did not. Hosten was not cross examined about promises of leniency. Cooke testified that his release on bail on April 10, 1987 was unrelated to the fact that he had made his statement identifying Mark Schand as the person who shot him. T.393-395. He made and kept a leniency agreement with Cooke on Cooke's pending charges that he did not disclose. Cooke was not cross examined about promises of leniency. The degree of lenience each actually received for his testimony was substantial and would likely have affected the jury's evaluation of Cooke's and Hosten's credibility.

CONCLUSION

The core of Mark Schand's present claims is that he is actually innocent of the After Five Crimes. In trial, his alibi witnesses placed him in Hartford, engaged in activities centered on Pearl Andrade's salon, between 10 p.m. and midnight on September 2, 1986. The statements of the five Hartford men who were at the After Five when these crimes were committed affirmatively exonerate Mr. Schand. It is now clear that Mark Schand was in fact in Hartford, and not involved in the commission of these crimes in any way.

Anthony Cooke's and Michael Hosten's statements expose their trial identification testimony as falsified, and the best that can be said for the Stokeses' testimony is that they collaborated on it and it was presented in a false light. It was almost surely false. Weaver and Fisher's statements demonstrate that Chase and Dixon made misidentifications of

Mark Schand, and Kenneth Whitted's testimony was both false and presented in a false light. In short, the trial was constitutionally unfair. The injustice of a wrongful conviction is not a surprising outcome. The Court now has the opportunity to rectify this injustice.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Memorandum has been served in hand on District Attorney Mark Mastroianni this 5th day of March, 2013.

John M. Thompson