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COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS. **SUPERIOR COURT**
Docket Nos.
CR86-0010 to CR86-0013

COMMONWEALTH

v.

WILLIAM CASCONE

THE COMMONWEALTH OF MASSACHUSETTS
BERKSHIRE S.S. SUPERIOR COURT
FILED JAN 28 2022 FILED

EXPEDITED MOTION FOR STAY OF EXECUTION OF SENTENCE AND ADMISSION TO BAIL PENDING MOTION FOR A NEW TRIAL

William Cascone ("Bill") respectfully moves this Court to stay the execution of his sentence pending the resolution of his Motion for New Trial that was filed on July 1, 2021. The exceptional circumstances in this case warrant a stay because the interests of justice are not served by Bill's continued incarceration where substantial evidence suggests that Bill has been wrongfully imprisoned for nearly thirty-five years. This relief is merited because Bill fully satisfies the requirements for a stay: (1) Bill's pending motion for a new trial raises much more than a "reasonable possibility" of success on the merits, and (2) Bill poses no flight or security risk if released. *Commonwealth v. Charles*, 466 Mass. 63, 77 (2013). Further, Bill is at heightened risk of exposure to COVID-19, particularly the recent Omicron variant, if he remains incarcerated. *Commonwealth v. McDermott*, 171 N.E.3d 1136, 1140 (2021).

BACKGROUND

Bill has been incarcerated for almost 35 years, following his 1987 convictions for arson and second-degree felony murder. In the early morning hours of October 27, 1984, a fire destroyed a 100-year old decrepit residential building at 279 State Street, North Adams. Three children lost their lives in the fire, including one of Bill's closest friends, 16-year-old Brent

MSD

("Buddy") Tatro. Bill was sentenced to three concurrent life sentences for the murders and 18-20 years for the arson.

The night of the fire, Bill, a 17-year-old juvenile with no criminal history, attended a gathering with Buddy at the apartment of Buddy's adult cousin, Jeanette Scott ("Jeanette"). Other party attendees included Glen Sumner, Sherry Tatro, Jay Deeley, and Mike Ritcher, all of whom were adults. Jeanette's two young children were also at the apartment. There was a significant amount of drinking and smoking that night. The seven partygoers smoked at least 250 cigarettes in Jeanette's apartment and on her porch between 8:00 p.m. and 4:00 a.m. Bill left Jeanette's apartment at around 4:45 a.m. and went to sleep in Buddy's car. Bill woke up to something that sounded like an explosion and as soon as Bill realized there was a fire, he ran into the building to warn and attempt to rescue the residents.

The Commonwealth's case against Bill was incredibly weak. His conviction was based on: (1) outdated and faulty arson science that we now know is indisputably false, and (2) testimony from a man named Harvey Chandler, a biased and unreliable witness whose family had a longstanding feud with the Cascone family and who was seeking leniency for his son's serious pending criminal charges. Under the Commonwealth's trial theory, Bill, a 17-year-old with no criminal history, decided to light a fire at an apartment building to "scare" people because he was upset about being kicked out of the party, and then entered the burning building in a "heroic" attempt to rescue residents.[1] Bill has now served almost 35 years in prison for what

[1] Tr. Vol. 9, 1937, 1939, 1944–45, 1951. "You'll hear from the judge that arson, intentionally burning that building, even for a stupid reason to scare people, which results in death is second degree felony murder. And his heroics afterwards and his attempt to get inside that building afterwards...they don't excuse his state of mind when he set that fire down here [indicating]." Tr. Vol. 9, 1944–45.

the Commonwealth contended at trial was a reckless decision by a teenager *who had no intent to hurt anyone.*[2]

In Bill's new trial motion, arson expert Dr. Craig Beyler ("Dr. Beyler") explains that, based on newly-developed arson science, the Commonwealth's trial theory of the cause and point of origin of the fire was scientifically incorrect, and thus, it is impossible to determine if the fire was incendiary. *See* Dr. Beyler's report, attached as Exhibit 1. The only evidence from the fire investigation implicating Bill was Trooper Robert Scott's ("Trooper Scott") belief that Bill was the last person near the point of origin. Newly developed arson science proves Trooper Scott was wrong about the point of origin. Additionally, Trooper Scott only looked for and eliminated accidental causes of the fire in the area immediately surrounding what he thought was the point of origin. Because Trooper Scott was wrong about the point of origin and because Trooper Scott failed to investigate accidental causes elsewhere, it is now impossible to determine whether the fire was accidental or incendiary.

Bill's new trial motion also presents a compelling exculpatory witness, John Perdue ("Perdue"), who wholly discredits the Commonwealth's key witness, Harvey Chandler ("Harvey"). Harvey testified that he overheard Bill confess to starting the fire when Bill was

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[2] From a justice standpoint, it is crucial to consider that Bill would not have been convicted of murder under current law. Massachusetts has eliminated second-degree felony murder precisely because of the unfairness of a murder conviction, like Bill's, based only on constructive malice. *See Commonwealth v. Brown*, 477 Mass. 805, 825 (2017) (holding prospectively that "a conviction of felony-murder will require a finding of actual malice, not merely constructive malice. As a result, felony-murder will no longer be an independent theory of liability for murder."); *see also Commonwealth v. Pfeiffer*, 482 Mass. 110, n.22 (2019) (explaining that the *Brown* court "prospectively abolished the concept of constructive malice, which in turn eliminated our common-law felony-murder rule as an independent theory of murder"). Here, the jury was told twice, as part of the jury charge and in an answer to a jury question, that they could find Bill guilty of *both* second-degree murder by reason of implied malice and second-degree felony murder. However, the jury *only* convicted Bill of second-degree felony murder. Thus, we know from the instructions and the jury question that the jurors specifically deliberated about whether Bill acted with third-prong malice and did not unanimously find that the Commonwealth proved this beyond a reasonable doubt. This is precisely the type of conviction that the *Brown* court abolished because it would be unjust to convict defendants of second-degree murder without proof beyond a reasonable doubt of at least third-prong malice and to "yield verdicts that are just and fair in light of the defendant's criminal conduct." 477 Mass. at 836; *see id.* at n.4 ("This will entirely eliminate the concept of 'felony-murder in the second degree.'").

talking with Harvey's son Charles. Charles refused to testify at Bill's trial, invoking his Fifth Amendment privilege. Perdue's recent affidavit states that a few weeks after the fire, Charles approached Perdue and asked him to falsely implicate Bill by telling police that Perdue heard Bill confess to starting the fire. When Perdue refused to be part of Charles' plot, Charles enlisted Harvey to help him instead. Perdue's affidavit demonstrates that Bill's "confession," as told by Harvey, was the latest iteration of an ongoing scheme by the Chandlers to frame Bill for the fire because of a longstanding family feud.[3] The jury never heard anything about Perdue at Bill's trial.

Trooper Scott's scientifically invalid point of origin and cause determination and Harvey's biased and unreliable testimony were the only pieces of evidence implicating Bill in the State Street fire. Moreover, there are two exculpatory eyewitnesses and compelling third-party perpetrator evidence presented in Bill's motion for a new trial that the jury never heard. Two building tenants, Chris Morehouse ("Morehouse") and Kathy Monette ("Monette"), told law enforcement and the grand jury that they saw an unknown man, who did not match Bill's description, fleeing the apartment building as the fire raged. Defense counsel promised the jury in his opening that they would hear from these two eyewitnesses, but then inexplicably he did not call them to testify. Instead, the jury only heard from the Commonwealth's witness, Patricia Marsh ("Mrs. Marsh"), who also saw the unidentified man but could only recall his shoulder-

[3] The day after the fire, Charles told reporter Barbara J. "B.J." Roche that Bill *and* Michael Cascone "took gasoline and spread it and lit it." This statement was indisputably false because Michael Cascone was never at the scene of the fire and no accelerants were ever recovered from 279 State Street. Then, nine days after the fire, Charles changed his story and reported to police that he had a friend who knew "something" about the fire in North Adams. Charles said that, according to this friend, Bill confessed that he "lit some cardboard boxes on fire," that "his brother was with him" and that he and Michael Cascone "didn't mean to burn people up, they just wanted to end the party." Later, Charles told Trooper Scott that this "friend" was named John Perdue, and repeated his story that Bill confessed to Perdue. In front of the grand jury, however, Charles emphatically denied disclosing Bill and Michael Cascone's alleged confession to Roche and denied that he told Trooper Scott that Perdue said that he heard Bill confessed to starting the State Street fire, effectively calling the reporter and Trooper liars.

length black curly hair. Based solely on Mrs. Marsh's vague description, the Commonwealth argued to the jury that the fleeing man was Bill. Had Morehouse and Monette testified to their more specific descriptions of the fleeing man – specifically, that the height, weight, clothing, and facial hair of the fleeing man did not match Bill – the jury would have realized that the fleeing man was not Bill, thus enabling Bill to present a credible third-party culprit defense. In fact, we now know that there were two compelling alternative perpetrators, who had motive, a history of committing arsons, and who implicated themselves in this crime, but the jury never heard anything about them because defense counsel also did not investigate the alternative perpetrators.

A full recitation of the facts and newly discovered evidence can be found in Bill's Memorandum of Law in Support of Motion for Post-Conviction Relief, filed on July 1, 2021.

I. This Court Has the Authority to Grant Bill's Motion for Stay of Execution of Sentence Based Upon the Exceptional Circumstances in this Case.

This Court has "inherent power to stay sentences for 'exceptional reasons permitted by law.'" *Charles*, 466 Mass. at 72. While the ultimate touchstone is always to do justice, when considering a motion to stay pending a decision on a new trial motion, this Court should consider two factors: (1) whether Bill's motion "presents an issue that 'offers some reasonable possibility of a successful decision,'" and (2) whether Bill poses a security risk, such as a risk of flight or danger to the community, if released. *Id.* at 77-78. This Court should also consider the COVID-19 health risks associated with Bill remaining in custody. *McDermott*, 171 N.E.3d at 1140; *Commonwealth v. Nash, 486 Mass. 394, 407 (2020); Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 433-34 and 436-40, *aff'd as modified*, 484 Mass. 1029 (2020).

When considering a pending motion for new trial, the motion judge may stay a sentence in "exceptional circumstances." *Charles*, 466 Mass. at 74. "'Exceptional circumstances' are not

specifically defined." *McDermott*, 171 N.E.3d at 1139. Nonetheless, the Court's inherent power affords the motion judge the opportunity to do justice in "occasions not provided for by established methods." *Id.*

This case is precisely a case in which "established methods" have failed thus far to achieve justice. This case presents this Court with exceptional circumstances warranting a stay because "the interest of justice is not served by [Bill's] continued imprisonment" where there is significant evidence supporting a finding that Bill was wrongfully convicted of murder almost 35 years ago. *Charles*, 466 Mass. at 72-74. As explained in detail in Bill's motion for a new trial, newly developed arson science demonstrates that the Commonwealth's trial theory of how and where the fire started was simply incorrect and it is impossible to determine if the fire was even incendiary. Further, Bill's motion sets forth significant exculpatory evidence that the jury was wholly unaware of – a credible witness statement that completely discredits the only evidence connecting Bill to setting the fire, and multiple witness statements that point persuasively at alternative perpetrators.

Courts in the Commonwealth have repeatedly found that significant evidence of a wrongful conviction constitutes exceptional circumstances warranting a stay of execution of sentence pending a new trial motion, particularly in light of the health risks associated with the COVID-19 pandemic.[4] *Commonwealth v. Shaun Jenkins*, No. 0384CR10364 (Mass. Super. Sept. 24, 2021) (granting an assented-to motion to stay execution of sentence based on newly discovered exculpatory evidence); *Commonwealth v. Raymond Gaines*, No. 7584CR91203 (Mass. Super. Apr. 23, 2021) (granting a motion to stay execution of sentence where the defendant put forth newly discovered evidence in the form of a witness recantation, an unreliable

[4] Recent written decisions granting motions to stay the execution of sentence while a new trial motion was pending are attached as Exhibit 2.

eyewitness identification, and improper police methods); *Commonwealth v. James Watson*, No. 8084CR28954 (Mass. Super. Apr. 16, 2020) (granting a motion to stay execution of sentence while the defendant litigated issues of police and prosecutorial misconduct that contributed to his wrongful conviction); *Commonwealth v. Robert Foxworth*, SJ-2020-0753 (Dec. 23, 2020) (granting an assented-to motion to stay execution of sentence premised on newly discovered evidence of innocence); *Commonwealth v. Thomas Rosa*, SJ-2020-0637 (October 14, 2020) (granting an assented-to motion to stay execution of sentence based on potential DNA evidence, a third-party culprit defense that was not raised at trial, statements in the prosecutor's closing argument, and issues with eyewitness identification procedures that could establish a "confluence of factors" supporting a new trial).

Further, the exceptional circumstances surrounding Bill's conviction demonstrate a failure of the criminal justice system's "established methods" of achieving justice, warranting this Court's exercise of its inherent powers. *McDermott*, 171 N.E.3d at 1139. At the time of the fire, Bill was a 17-year-old juvenile with no criminal history who, under the Commonwealth's trial theory, impulsively lit a fire at an apartment building to "scare" people and then "heroically" entered the building in an attempt to rescue residents.[5] The nearly 35 years of incarceration that Bill has already served is an extraordinarily lengthy sentence for a crime that, according to the Commonwealth, was committed by a juvenile who *had no intent to hurt anyone.* Bill has consistently and emphatically maintained his innocence; thus, he has waived his right to parole hearings three times despite the fact that he is an excellent candidate for parole, because he simply cannot accept responsibility for a crime he did not commit.[6] The "established methods"

[5] Tr. Vol. 9, 1937, 1939, 1944–45, 1951.

[6] Neil Miller was convicted of rape, robbery, and breaking and entering in Boston in 1990 and was sentenced to prison for ten to twenty-five years. In 1997, he was denied parole "because he proclaimed his innocence and refused to enter treatment for sexual deviance." David Wedge, *Innocent Man Free After Long 10 Years*, BOSTON HERALD,

of seeking relief, such as parole proceedings, do not provide an opportunity for justice where, as here, a litigant has put forth significant evidence of innocence, yet remains incarcerated for months, or even years, as that evidence is further investigated and considered by the Commonwealth and this Court. *McDermott*, 171 N.E.3d at 1139.

Here, a further exceptional circumstance warranting a stay is the fact that the Commonwealth is considering this case as a conviction integrity matter and therefore defense counsel and the Commonwealth anticipate ongoing collaboration and investigation to determine whether justice is served by Bill's convictions. Given the "uncertainty about when such investigation will be completed, the interest of justice is not served by the continued imprisonment of a defendant who may be entitled to a new trial." *Charles,* 466 Mass at 74. Because this case is not currently going through the typical adversarial, litigation process, and it may take more time for the parties to attempt to collaborate to reach a just result, this case presents exceptional circumstances under which this Court should consider a Motion to Stay the Execution of Sentence. *See Charles*, 466 Mass. at 77 (explaining that justice requires a defendant's motion to stay a sentence be "decided in an expeditious manner," untethered from the timelines of lengthy investigation and legal proceedings.").[7] The practice of granting a stay of execution of sentence "is grounded in rudimentary notions of justice" because a "conviction may be reversible, but the time spent in prison is not." *Charles*, 466 Mass. at 77.

II. Bill Meets the Requirements for a Stay of Execution of Sentence and Justice Requires his Immediate Release from Incarceration.

1. Bill's motion for a new trial raises much more than a "reasonable possibility" of success on the merits, based on newly developed arson science, prosecutorial misstatements of crucial evidence, and multiple deprivations of effective

May 11, 2000. DNA evidence exonerated Miller in 2000. National Registry of Exonerations, Neil Miller, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3472 (last visited Jan. 25, 2022).

[7] To date, it has been nearly seven months since Bill filed his Motion for a New Trial on July 1, 2021, and the Commonwealth has not yet filed a response.

assistance of counsel such that the jury never heard from many important witnesses.

The first factor the judge must consider in evaluating a motion for stay is whether the defendant's motion for a new trial offers "some reasonable possibility" of success on the merits. *Charles*, 466 Mass. at 76. This standard does not place an onerous burden on the defendant—he need only present a "colorable claim." *Id.* ("We offer no opinion on the ultimate merits of Charles' motion for a new trial, but simply determine that he has presented a colorable claim."). Here, Bill clearly meets this factor, as he presents newly-developed arson science that entirely contradicts the Commonwealth's trial theory of how and where the fire started, and significant deprivations of his right to effective assistance of counsel, including that exculpatory eyewitnesses and third-party perpetrator evidence were never presented to the jury.[8]

A. Newly-Developed Arson Evidence

As presented in Bill's new trial motion, arson expert Dr. Beyler concluded that the fire investigator at the time of trial incorrectly determined the point of origin of the fire and also incorrectly determined that the fire must have been incendiary. Dr. Beyler will testify that the fire investigator's point of origin determination relied on now-debunked interpretations of the area of lowest burning, the area of greatest damage, v-shaped burn patterns, and drop-down fires. The investigator's reliance on outdated and faulty fire science, including invalid point of origin indicators, caused him to incorrectly conclude that the fire originated in the southwest corner of the second floor (first floor rear) porch. Dr. Beyler also found that the investigator's cause determination can no longer be credited because he only considered possible accidental causes of the fire in the area around the *incorrect* point of origin. Dr. Beyler further explains that the

[8] As recognized in *Commonwealth v. Rosario*, "more recent fire science research, some of which was not completed until 2005, ha[s] led to new protocols for evaluating the source of a fire," resulting in new understandings of points of origin and the distinction between arson and accidental fires. 477 Mass. 59, 75 (2017).

investigator improperly relied on a now-rejected theory called "negative corpus" to determine that the fire was incendiary,[9] and the investigator was incorrect in his conclusion that discarded smoking materials could not have been a cause of the fire.[10] The deficient and unscientific investigation of the fire scene makes the investigator's origin and cause determinations wholly unreliable.

Like the new fire science in *Commonwealth v. Rosario*, Dr. Beyler's testimony "provide[s] an alternate theory regarding the start and spread of the fire," calls into question the validity of the Commonwealth's theory, and shows that the Commonwealth did not meet its burden of proving arson beyond a reasonable doubt, raising much more than a "colorable claim" that justice was not done. 477 Mass. 59, 81 (2017) (affirming grant of new trial due to newly available arson science disproving the Commonwealth's theory of the case).

Bill further argues in his motion for new trial that by misstating critical arson evidence in her closing argument, the trial prosecutor created a substantial likelihood of a miscarriage of justice. At trial, the defense expert testified twenty-one times that he could not determine the point of origin of the fire, yet the prosecutor said seven times in her closing argument that he could. Inexplicably, the prosecutor told the jury that the defense expert agreed with the Commonwealth's expert regarding the point of origin.[11] The repetition of these misstatements created a substantial likelihood of a miscarriage of justice because the Commonwealth's case relied on the fire's point of origin. *See Commonwealth v. Brown*, 477 Mass. 805, 818–19 (2017) ("Because trial counsel did not object, we consider whether any of the challenged statements was improper and, if so, whether it created a substantial likelihood of a miscarriage of justice");

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[9] *Negative corpus* was not rejected by NFPA 921 until 2011.
[10] It was not until 1999 that research confirmed that cigarettes can transition to flames in as little as ten minutes and that these fires will not necessarily smolder or create a lot of smoke.
[11] Tr. Vol. 9, 1920–21, 1928, 1943, 1945.

Commonwealth v. Lewis, 465 Mass. 119, 130–31 (2013) ("When determining whether error in a prosecutor's closing argument requires reversal, 'we consider (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusion'").

B. Bill's Trial Counsel Failed to Investigate and Present Numerous Pieces of Exculpatory Evidence, Including Eye-Witness Testimony that he Promised in his Opening Statement and Third-Party Perpetrator Evidence.

Bill's trial counsel was constitutionally deficient in multiple respects. First, he promised the jury in his opening statement that two eye-witnesses would give exculpatory testimony but then failed to call either witness to testify despite both witnesses being credible, disinterested, available, and prepared to testify to the exculpatory information they previously provided to law enforcement and in their grand jury testimony. The Supreme Judicial Court has held that a new trial is warranted when defense counsel fails to present exculpatory evidence promised in the opening statement, which is precisely what happened here. *See Commonwealth v. Lane*, 462 Mass. 591 (2012) (new trial warranted because trial counsel told jurors they would hear testimony from an eyewitness who did not identify the defendant but counsel did not put the eyewitness on the stand); *Commonwealth v. Chambers*, 465 Mass. 520 (2013) (new trial required because trial court's exclusion of evidence prevented defense counsel from presenting exculpatory testimony promised in opening). At trial, Mrs. Marsh testified that, around 5:00 a.m. as the fire was raging, she saw an unidentified man going down the stairs with shoulder-length black curly hair.[12] Mrs. Marsh could not remember what the man was wearing or provide any

[12] Tr. Vol. 5, 1061–62.

additional description. The Commonwealth's theory at trial, based only on Mrs. Marsh's vague description, was that this fleeing man was Bill. Morehouse and Monette had both described this fleeing man in significantly more detail to law enforcement and in their grand jury testimonies. Their descriptions of the fleeing man did not match Bill's physical appearance or what he was wearing the night of the fire.[13]

In a 2020 affidavit attached to Bill's new trial motion, Morehouse confirmed that he would have testified at trial in accordance with his grand jury testimony and prior statements to law enforcement and that no one from Bill's defense team interviewed him prior to or during trial. Monette also confirmed that no one from Bill's defense team interviewed her during trial. Testimony from Morehouse and/or Monette would have directly contradicted the Commonwealth's theory that Bill was the man Mrs. Marsh saw fleeing from the building, thus enabling Bill to present a third-party culprit defense. Both the absence of material exculpatory eyewitness evidence and the negative inferences drawn by the jury when defense counsel promised, but failed to deliver, exculpatory eyewitness testimony were highly prejudicial, raising much more than colorable claims that Bill was denied his state and federal Constitutional rights to effective assistance of counsel.

Second, defense counsel failed to investigate and present compelling third-party culprit defenses. William Stanley ("Stanley") made statements to both Trooper Scott and ADA Daniel

[13] Monette described the fleeing man as having dark brown or black hair and a moustache and wearing a jean jacket. Grand Jury Tr., 11/12/85, 103, 109; Phone Call Report by Trooper Richard Smith 10/31/84. She said the man was short, 5'2" or 5'3", and skinny, weighing about 130 pounds. Grand Jury Tr., 11/12/85, 109. Morehouse described the fleeing man as short, 5'9", and with a small build. Grand Jury Tr., 11/12/85, 120. He also said the man had short dark brown or black hair. Grand Jury Tr., 11/12/85, 125. In contrast, Bill was very heavy set and had shoulder length blond hair. Tr. Vol. 3, 570; Tr. Vol. 4, 629–30, 804–05, 831; Tr. Vol. 8, 1682, 1828–30. Bill had been wearing a leather jacket and leather vest that night, but was shirtless when he re-entered the building to warn residents and when he stayed on the scene to assist the injured. Tr. Vol. 3, 570; Tr. Vol. 4, 629, 804, 831; Tr. Vol. 8, 1682; Tr. Vol. 9, 1938; Trooper Scott 9/10/85 Interview with Glen Sumner. At no point that night was Bill wearing a jean jacket like the man Monette described.

Ford that Wayne Nassif ("Nassif") confessed to starting the State Street fire with George Belanger ("Belanger").[14] Unlike Bill, both Nassif and Belanger had lengthy criminal histories, including arson convictions, and compelling motives to set the fire. Nassif told Stanley that his motive in setting the fire was revenge against his former landlord, Mr. Simon, who had evicted Nassif from 279 State Street prior to the fire. Belanger, Nassif's alleged co-conspirator, had a previous romantic relationship with Jeanette (the party host) and they had broken up only about a week prior to the State Street fire. According to Belanger's sister, Belanger was very angry that Jeanette had moved on so quickly and was already dating Jay Deeley, another party attendee. Also unlike Bill, Belanger matched the descriptions provided by Morehouse and Monette of the man they saw fleeing the building.

Defense counsel never made any attempt to talk to Stanley, Nassif, or Belanger, despite receiving Stanley's letter to ADA Ford and Stanley's statements to Trooper Scott in discovery. Trial counsel's failure to even investigate Stanley's implication of both Nassif and Belanger in the State Street fire falls measurably below that which might be expected from an ordinary fallible lawyer. *See Commonwealth v. Phinney*, 446 Mass. 155, 163–65 (2006) (affirming grant

[14] Stanley was arrested on December 12, 1984 for attempted larceny, possession of marijuana, and possession of drug paraphernalia. Stanley offered to trade information about the State Street fire in exchange for his release from prison. Stanley told Trooper Scott the following: "The day after the State Street fire, Wayne Nassin [Nassif] told me that he set the fire that killed the two little kids. He said that him and another guy set the fire in some rags on the back porch. That Bill [Buddy] Tatro and him started the fight. Him and the other guy set it to break up the party. Wayne said that he soaked the rags in some gasoline and the other [guy] lit the match and told him to run." On September 3, 1985, Trooper Scott spoke with Stanley again after Stanley was released from jail. During that meeting, Stanley told Trooper Scott that he overheard two inmates talking about the fire. Trooper Scott clarified, "You mean that Wayne didn't tell you himself that he set the fire?" According to Trooper Scott, Stanley responded: "No he didn't, I heard someone else talking." On December 12, 1985, Stanley wrote a follow-up letter to Berkshire Assistant District Attorney Daniel Ford, who was the lead prosecutor in the State Street fire investigation at that time. Stanley stated he had spoken with someone from the Berkshire District Attorney's Office a week prior "about the fire on State St. that resulted in the death of 2 young children." Stanley stated, "Mr. Wayne Nasive [sic] told me about what happened and that he participated in starting the fire and he was telling me just about the hole [sic] story of how it did in fact happen." Stanley wrote that he had previously told a law enforcement officer that another person was with Nassif when he started the fire, and Stanley learned the name of the other person who started the fire: "Mr. Gorge Blanger or Blanged Jr." Stanley ended the letter by asking ADA Ford if this information "would help me in the outcome of my case" because he "would like very much to be with my wife and daughter sir."

of new trial for counsel's failure to investigate third-party culprit defense). This failure prejudiced Bill by depriving him of a substantial third-party culprit defense, raising more than a colorable claim that Bill was denied his state and federal Constitutional rights to effective assistance of counsel.

Third, defense counsel failed to investigate Perdue, an exculpatory witness who would have wholly discredited Harvey's testimony that he overheard Bill confess to starting the fire. Harvey and his son, Charles, had significant motives to falsely implicate Bill. Bill was a Commonwealth witness in Charles' insurance fraud case and Bill's brother, Michael Cascone, was a Commonwealth witness in Charles' pending child rape case and a victim in Charles' threats to assault and intimidation of a witness case. After Charles failed to implicate Bill *and* Michael Cascone in the State Street fire through statements to reporter B.J. Roche and Trooper Scott, Charles tried to convince Perdue to lie to police by saying Bill told Perdue he started the fire. After Perdue refused to participate in Charles' scheme, Charles enlisted his father instead, and his father eventually testified at Bill's trial to the same fabricated confession story that Charles tried, and failed, to get Perdue to say. Just like many other key witnesses in this case, trial counsel *did not even interview* Perdue. Failing to investigate credible evidence that an informant in a murder case with substantial motive for revenge previously attempted to frame the defendant with a fabricated confession for the same crime falls measurably below that which might be expected from an ordinary fallible lawyer. *See Commonwealth v. Diaz Perez*, 484 Mass. 69, 74 (2020) ("The requirement of a reasonable investigation includes a duty to pursue witnesses with potentially exculpatory testimony"); *Commonwealth v. Garcia*, 66 Mass. App. Ct. 167, 170–71 (2006) (holding that counsel's failure to interview a witness whose statements to police undercut the complainant's credibility did not put counsel in a position to make tactical

decisions at trial, especially where the case hinged on the complainant's credibility). This failure prejudiced Bill because (1) significant inculpatory evidence was not challenged and (2) significant exculpatory testimony was not presented, raising more than colorable claims that Bill was denied his state and federal Constitutional rights to effective assistance of counsel.

Lastly, defense counsel failed to effectively present evidence in his summation that showed the fire may have been accidental. By repeatedly referring to the "crime" and "murder" in his own closing argument, defense counsel deprived Bill of a compelling defense, which was supported by his own expert's trial testimony: that no crime occurred at all.

All of these factors, independently and in confluence, show that justice was not done in this case and satisfy Bill's burden to present a colorable claim for post-conviction relief in order to succeed on a Motion to Stay the Execution of Sentence.

2. Bill poses no risk of flight or security risk.

The second factor for this Court is whether Bill's release will pose a security risk or risk of flight. *Charles*, 466 Mass. at 77. Relevant issues to consider in making this determination include "the defendant's familial status, roots in the community, employment, prior criminal record, and general attitude and demeanor." *Id.* Bill successfully satisfies all of these criteria and poses no risk of flight or a security risk.

Bill is supported by his close-knit family in western Massachusetts, where he lived for his entire childhood. His mother, Nancy Cascone, owns a five-bedroom home in Rowe, Massachusetts, where Bill grew up and attended Rowe Elementary School. He and his mother have maintained a strong and loving relationship through the years. They remain in contact through frequent letters and visits. Bill's brother, Michael Cascone, also lives with his wife in

nearby Shelburne Falls, Massachusetts. He and Bill have also stayed in close contact through letters and visits.

Bill's mother and brother are financially stable and self-sustaining. They are both willing and able to provide financial assistance to Bill until he becomes fully self-sufficient. If released pending resolution of his Motion for New Trial, Bill will live with his mother. Furthermore, Bill's brother has confirmed that his employer at Harris Rebar in Deerfield, Massachusetts would hire Bill for a full-time manufacturing position upon his release.

Further, Bill has already collaborated with the Social Service Advocate from Boston College Law School Innocence Program (hereinafter Social Service Advocate) to coordinate his transition from prison should this Court grant this motion. Specifically, the Social Service Advocate will provide additional assistance to Bill in securing stable employment, counseling, healthcare, and obtaining necessary identification. *See* Social Service Advocate Affidavit and Re-entry Plan, attached as Exhibit 3.

Bill poses no flight risk. He was only seventeen years old at the time of the tragic fire for which he was later convicted. He has no prior convictions on his record. Furthermore, even according to the Commonwealth's theory of the case, Bill did not intend to hurt anyone. After the fire, Bill remained in his community to finish high school at Mohawk High. He then enlisted in the Marine Corps to serve his country. He trained as a combat engineer and was deployed to Japan and South Korea. Following his arrest in this case, Bill was released on bail. Prior to and throughout his trial, Bill remained in his community and abided by all conditions of his bail. He found employment installing swimming pools in Turners Falls, Massachusetts. When pool season ended, Bill found work in Deerfield, Massachusetts, assembling heavy machinery for the military. He consistently devoted his energies to finding employment and remaining a

productive member of his community, even while under the stress of an impending trial for a crime he did not commit. Bill did not make any attempts to flee, despite the seriousness of the charges against him.

Bill has no incentive to flee. He has roots in western Massachusetts and a demonstrated, abiding commitment to proving his innocence. He will remain present and answerable to this Court. Bill understands that to achieve his goal of proving his innocence, he must remain in the state. Moreover, he is eager to rejoin his family, especially his mother, who is in her late-seventies and whose health has suffered in recent years. During his incarceration, both Bill's father and younger brother have died. Bill's desire is to return to his family in western Massachusetts, not to flee from them.

Bill has demonstrated future-oriented behavior throughout his incarceration and his institutional record shows that he poses no risk to the community. In his nearly thirty-five years of incarceration, Bill has only had six minor disciplinary infractions, *only one of which occurred in the last sixteen years*. Bill has participated in a number of prison community groups, including the Veteran's Group, Lifer's Group, Music Program, Small Engine Repair, Toastmasters, Jericho Circle, and Alternative to Violence Groups. Unfortunately, the COVID-19 pandemic has significantly limited programming at MCI Norfolk.

Bill's strong community ties, loving and supportive family, coupled with his desire to learn and grow, will make him a positive and contributing member of society. He is willing to submit to any restrictions or conditions suggested by this Court. Bill has secure housing in the company of a family that supports him and prospects for employment with the assistance of a committed brother. All of these factors make Bill uniquely situated to succeed upon release and provide compelling evidence that he is not a flight or security risk.

3. *The interests of justice further support Bill's release because of the significant risk posed by the Omicron variant of COVID-19 to incarcerated inmates, like Bill.*

COVID-19 concerns can buttress motions to stay the execution of a sentence while a new trial motion is pending because risk of infection and transmission is present at all times, to every defendant remaining in custody. *McDermott*, 171 N.E.3d at 1141; *Nash*, 486 Mass. 394. The unprecedented danger of the virus, "when combined with other factors, might present an exceptional circumstance in a particular defendant's case." *McDermott*, 171 N.E.3d at 1140.

Courts should "consider both the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant." *Christie v. Commonwealth*, 484 Mass. 397, 401-02 (2020). Courts should also aim to "reduce temporarily the prison and jail populations, in a safe and responsible manner, through the judicious use of stays of execution of sentences pending appeal." *Nash*, 486 Mass. at 406.

A defendant's lack of special vulnerability does not preclude consideration of the COVID-19 factor in a motion to stay execution of a sentence pending resolution of a new trial motion because everyone in a prison setting is subject to a greater risk of COVID-19 infection. *McDermott*,171 N.E.3d at 1141. Moreover, uncertainty concerning the duration and efficacy of immunity provided by vaccinations, combined with the potential for rapid increases in case counts and breakthrough infections, require consideration of the COVID-19 factor, even for vaccinated individuals. *Id.*

Bill is 54 years old and suffers from, and is currently medicated for, high blood pressure (hypertension)[15] and a thyroid condition. Bill received his first two doses of the COVID-19

[15] In a study conducted from March 1 to March 30 of 2020, 27 out of 57 (47.4%) of patients aged 50-64 who were hospitalized with COVID-19 suffered from hypertension. Shikha Garg et al., *Hospitalization Rates and*

vaccine in January and February 2021 and a booster shot on December 9, 2021. Despite being vaccinated, Bill is still at risk of contracting and becoming ill from COVID-19 given the uncontrolled spread of the Omicron variant,[16] which has driven COVID-19 cases and hospitalizations to record highs. Research suggests that Omicron is significantly more transmissible than previous variants.[17] The CDC warns that even if the proportion of infections associated with severe outcomes is lower with Omicron, given the inevitable increase in the number of infections, the number of people with severe outcomes could be substantial.[18] Data released by the Massachusetts Department of Health on January 13 shows 3,180 COVID-19 patients currently hospitalized in Massachusetts; the most COVID-19 hospitalizations in the Commonwealth since May of 2020.[19]

The Omicron variant poses a unique risk because it is able to evade immunity conferred by past infection or vaccination, resulting in a much higher incidence of so-called "breakthrough" cases, in which fully vaccinated individuals become infected with COVID-19.[20] On January 11, Massachusetts health officials reported that there had been 82,466 new

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Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019 – COVID-NET, 14 States, March 1—30, 2020, 69(15) Morbidity and Mortality Weekly Report 458–464 (Apr. 17, 2020).

[16] As of January 4, 2022, the Omicron variant made up 95% of sequenced COVID-19 cases in the U.S. *Omicron makes up 95% of sequenced Covid cases in U.S. as infections hit pandemic record*, CNBC (Jan. 4, 2022), https://www.cnbc.com/2022/01/04/omicron-makes-up-95percent-of-sequenced-covid-cases-in-us-as-infections-hit-pandemic-record.html.

[17] *Omicron Variant: What You Need to Know*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html?s_cid=11734:omnicron%20variant:sem.ga:p:RG:GM:gen:PTN:FY22 (last updated Dec. 20, 2021).

[18] *Covid Data Tracker Weekly Review*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html.

[19] On January 13, the Massachusetts Department of Public Health reported an additional 18,721 confirmed COVID-19 cases. Of the 3,180 hospitalized COVID-19 patients, 484 were in an intensive care unit and 270 were intubated. There were 36 confirmed COVID-19 related deaths in Massachusetts on January 13. *18,721 new COVID-19 cases, 36 additional deaths reported in Massachusetts*, WCVB (Jan.13, 2022), https://www.wcvb.com/article/massachusetts-covid-19-cases-breakthrough-dph-data-january-13-2022/38760939; *82,466 New Breakthrough Cases in Mass., Nearly Doubling Week Over Week*, NBC Boston (Jan. 11, 2022), https://www.nbcboston.com/news/coronavirus/82466-new-breakthrough-cases-in-mass-nearly-doubling-week-over-week/2610539/.

[20] *Covid Data Tracker Weekly Review*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html.

breakthrough COVID-19 cases over the past week[21] and 112 more deaths in people with breakthrough cases, bringing the total number of breakthrough cases in Massachusetts to 262,060 and the death toll among people with breakthrough infections in Massachusetts to 1,054.[22] While the vaccine is effective in preventing serious illness in most people, over 45% of those hospitalized for COVID-19 in Massachusetts are fully vaccinated.[23]

Given the particular dangers of prison settings in a pandemic, the courts' ongoing interest in reducing the inmate population, and the persistent uncertainty concerning the trajectory of the pandemic, the risk of COVID-19 infection also comprises an exceptional circumstance in support of Bill's motion to say execution.

In addition to the unprecedented health risks associated with COVID-19, life in prison during a global pandemic presents an extraordinary circumstance. Bill's unit is currently on lock down due to a COVID-19 outbreak, as are five other units at MCI-Norfolk. Programs at MCI-Norfolk are currently running at a fraction of their pre-pandemic capacity. As a result, Bill has not been able to participate in any programming since March 2020. Due to restrictions on in-person visits, Bill's mother and brother have not been able to visit him in person in nearly two years. On January 10, 2022, MCI Norfolk again closed the gym and reduced access to the yard in response to rising COVID-19 cases. Limited freedoms are to be expected in a penal

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[21] This is an 83% increase in the rate of new breakthrough cases in Massachusetts from the previous week. *82,466 New Breakthrough Cases in Mass., Nearly Doubling Week Over Week*, NBC Boston (Jan. 11, 2022), https://www.nbcboston.com/news/coronavirus/82466-new-breakthrough-cases-in-mass-nearly-doubling-week-over-week/2610539/.

[22] *82,466 New Breakthrough Cases in Mass., Nearly Doubling Week Over Week*, NBC Boston (Jan. 11, 2022), https://www.nbcboston.com/news/coronavirus/82466-new-breakthrough-cases-in-mass-nearly-doubling-week-over-week/2610539/.

[23] 1,348 of the 2,970 people hospitalized with COVID-19 are fully vaccinated. 82,466 New Breakthrough Cases in Mass., Nearly Doubling Week Over Week, NBC Boston (Jan. 11, 2022), https://www.nbcboston.com/news/coronavirus/82466-new-breakthrough-cases-in-mass-nearly-doubling-week-over-week/2610539/.

institution, but the ongoing restrictions on programming and visitation stemming from COVID-19 are significant.

CONCLUSION

Bill's pending motion for a new trial raises much more than a "reasonable possibility" of success on the merits. In that motion, Bill presents newly-developed arson science showing that the fire investigator at the time of trial incorrectly determined the point of origin of the fire and also incorrectly determined that the fire must have been incendiary. Bill also presents evidence that his trial counsel was constitutionally ineffective for failing to investigate and present numerous pieces of exculpatory evidence, including eye-witness testimony and third-party perpetrator evidence. Moreover, Bill's lack of criminal record, lack of any defaults or failures to appear pretrial, excellent behavior in prison, and close family connections to the area all demonstrate that he poses no risk of danger to the public, nor any risk of flight.

The significant newly discovered evidence in Bill's case suggesting that he was wrongfully convicted, the fact that he poses no flight or security risk, the risk to Bill of contracting COVID-19 in prison, and the ongoing imperative to reduce the risk of COVID-19 infection in prisons, all warrant the exercise of this Court's authority to grant a stay of execution of Bill's sentence, pending the resolution of his motion for new trial.

WHEREFORE, Bill Cascone respectfully requests that this Court grant this motion and stay execution of his sentence.

Date: January 28, 2022

Respectfully Submitted for Mr. Cascone,

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