CLERK'S NOTICE	DOCKET NUMBER 0584CR10266	Trial Court of Massachusetts The Superior Court
CASE NAME: **Commonwealth vs. Brian E Smith**		Maura A. Hennigan, Clerk of Court
TO: Rosemary C Scapicchio, Esq. Law Office of Rosemary Scapicchio, Inc. 107 Union Wharf Boston, MA 02109		COURT NAME & ADDRESS Suffolk County Superior Court - Criminal Suffolk County Courthouse, 14th Floor Three Pemberton Square Boston, MA 02108

You are hereby notified that on 03/27/2018 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER:

Following Remand on Defendant's Motion for New Trial: ALLOWED, Conviction VACATED and new trial ORDERED

Judge: Sanders, Hon. Janet L

DATE ISSUED	ASSOCIATE JUSTICE/ ASSISTANT CLERK	SESSION PHONE#
03/28/2018	**Hon. Janet L Sanders**	**(617)788-8160**

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
INDICTMENT
NO. 05-10266

COMMONWEALTH

vs.

BRIAN SMITH

MEMORANDUM OF DECISION AND ORDER
FOLLOWING REMAND ON DEFENDANT'S MOTION FOR NEW TRIAL

On August 18, 2006, the defendant was convicted of armed home invasion and armed assault with intent to murder among other charges. Superior Court Judge Thomas Connolly (now retired) sentenced him to thirty to thirty five years in prison. His convictions were affirmed on appeal. See Commonwealth v. Smith, 75 Mass.App.Ct. 196 (2009), aff'd, 456 Mass. 1101 (2010). In 2012, the defendant filed a Motion for a New Trial. The motion raised six separate grounds for a new trial. On July 28, 2014, this Court denied the motion without an evidentiary hearing and the defendant appealed.

The Appeals Court reversed, concluding that the motion raised a "substantial issue" warranting an evidentiary hearing as to several of the grounds that the motion raised. One of those grounds was that the Commonwealth failed to disclose before trial information relating to Niki Semnack, who was the girlfriend of the alleged target of the home invasion and who was present at the time of incident itself. The Appeals Court all but concluded that, if it were determined that the Commonwealth had indeed failed to disclose this information, then the defendant was likely deprived of information important to his defense in violation of the prosecution's obligations under Brady v. Maryland, 373 U.S. 83 (1963). . Because of the

number of issues raised by the motion, it was agreed among the parties that an evidentiary hearing would be scheduled first on the Semnack issue. That hearing having been held, this Court now concludes that the Motion for New Trial must be **ALLOWED**.

BACKGROUND

Based on the evidence presented at the hearing together with the exhibits presented by both parties, this Court makes the following findings of fact.

1. The Defendant's Trial

The testimony at the defendant's trial is summarized in the parties' memoranda. This Court has also reviewed the trial transcript. At trial, the Commonwealth alleged that the victim of the home invasion was one Kenneth Lowe, who in 2005 resided at 98 Walford Way in Charlestown. Living with Lowe at the time was his then girlfriend Niki Semnack. Lowe testified at trial that around 11:30 p.m. on March 13, 2005, the defendant arrived at Lowe's apartment asking him to come downstairs because a friend of the defendant "wanted something." Lowe understood this to mean that Smith wanted to buy crack cocaine, since he had purchased crack from Lowe several times before that.

While they were speaking at the door, an unidentified man ran up the building's inside stairs with a bandana over his face, carrying a gun. Lowe tried to push the door shut, but Smith's foot prevented it from closing entirely. Still, Lowe managed to get the door closed; the gun went off and Lowe (initially thinking that Smith had been shot) heard the defendant say "what the fuck you doing, man." Lowe testified that both Smith and the gunman then started pushing on the door, and a gun poked through the opening, firing off another shot that hit a picture on the wall of the apartment. The gun was then yanked out of the doorway, and Lowe managed to close and lock the door. He heard the footsteps of one person exiting through the back door of the

building, then heard a second person exiting through the same door. Lowe called 911 and said that he knew at least one of the two men. Two weeks later, Lowe picked the defendant out of a photographic array.

The defendant's trial counsel painted Lowe, an admitted drug addict with a lengthy criminal record, as an unreliable and untrustworthy witness. His trial testimony was also not entirely consistent with what he had told police and the grand jury. Although defense counsel did not question Lowe's identification of the defendant, he did question the inference that the prosecution asked the jury to draw from Lowe's trial testimony – namely, that the defendant and man in disguise were working together. As Lowe had testified, both he and Smith were on generally friendly terms in the months leading up to the incident. Lowe had used crack earlier that day, and was not in a position (the defense suggested) to perceive events accurately. As defense counsel argued to the jury, Smith could well have been trying to get into the apartment in order to get away from the gunman, with whom he had no connection. Indeed, the prosecutor did not present any evidence to show that defendant had any particular motive to kill Lowe.

2. Niki Semnack

Neither the prosecution nor the defense at the defendant's trial called Semnack as a witness. Semnack was in the room with Lowe when the gunman fired a shot into the apartment. Unbeknownst to defense counsel, Semnack was also a key witness in a murder case that was just about to go to trial, Commonwealth v. Vasquez et al., Crim. Nos. 01-11145, 01-11150, 01-1149, 01-11151 (Suffolk Superior Court) (Vasquez). Semnack testified over two days in that trial beginning on March 14, 2005, just one day after the home invasion.

Although Smith had no connection whatsoever with the defendants in the Vasquez trial or the allegations that gave rise to the charges, the evidence in Vasquez is relevant to the issue of

whether Semnack's role as a witness in that case should have been disclosed to Smith's trial counsel. In the Vasquez case, four men, Ismael Vasquez, Luis Vasquez, Harold Parker and Scott Davenport, were charged with the brutal murder of Io Natchtwey on November 3, 2001. Natchtwey as well as Semnack were among a group of homeless people who hung out in an area at Harvard Square known as "the Pit." This Court's review of the Vasquez transcript shows that Semnack was an important prosecution witness in that trial. A summary of that testimony is as follows.

Around Halloween of 2001, the defendants Ismael Vasquez and Harold Parker, who were among those hanging out at the Pit, started talking about gangs and ultimately persuaded the group (including Semnack) to form their own "Crips" gang. The group convened at a Motel 6 in Braintree. Rules were handed down and there was a "blessing" ceremony where couples were "married" to each other as king and queen. One of the most important rules governing the group was: "Once you're in, there's no getting out." Vasquez Trial Transcript (3/14/05) Vol. VI, p. 140. As described by Semnack: "If they can't get to you to hurt you, they're going to go to the person closest to you, meaning family, friends, kids, whoever they can get because they can't get you." Id at p. 152. Over the next few days after the Motel 6 meeting, ranks were assigned and members were sent out on "missions," which including robbery. The evidence showed that some members of the group had access to guns.

Semnack herself did not have any role in the murder of Natchtwey, who was apparently singled out to be killed because she was considered too frail to engage in the group's missions. On November 3, 2001, Natchtwey and some members of the group again went to a Motel 6 in Braintree. Sometime thereafter, Natchtwey was stabbed and bludgeoned to death in what the prosecution described as a "brutal and ruthless message and lesson from gang leaders to gang

recruits." In the meantime, Semnack and other members of the group had convened in Harvard Square about their increasing dissatisfaction with how the group was being run. They contemplated rescuing Natchtwey, whom they believed to be in danger. On November 4, Semnack contacted the police. She was shown a photo of Natchtwey's dead body and identified it as a person she knew as Rook. Thus, although Semnack was not a percipient witness to the murder, she provided important corroboration for those who were, since she was able to describe the culture and inner workings of the gang, provide some motive for the killing and describe the event leading up to the murder.

Before trial began, the prosecutor in Vasquez expressed some concern for the safety of its witnesses, which included Semnack. This was based not only on the nature of the case itself but also because, as the prosecutor informed the court, a court officer had observed the defendants looking at the Commonwealth's witness list: at least some of them appeared to be writing information down. This was on March 9, 2005. Although Semnack's address on the witness list was not the Charlestown address where Lowe lived, the defendants clearly knew that she would be testifying, since she was in court that day to be recognized. She had been brought to court by an investigator for the Suffolk County District Attorney's office. She was ordered to take care of certain warrants, which she did the next day in the company of a Massachusetts state trooper. The home invasion occurred shortly before midnight on Sunday March 13, 2005. Semnack was in court testifying in the Vasquez matter the next day.

3. The Prosecution's Knowledge and the Failure to Disclose

Both the Vasquez and the Smith cases were prosecuted by the Suffolk County District Attorney's Office. On the first day of Semnack's testimony in Vasquez, Lowe was giving a statement to police on the ninth floor of the Suffolk County courthouse about the home invasion.

That evening, Semnack was interviewed at the police station about the same thing. Emails among assistant district attorneys dated March 15, 2005 show that prosecutors were aware that Semnack was living with Lowe at the time and was a possible percipient witness to the home invasion. I also find that they did not disclose this information to either Smith's appointed counsel, Bruce Carroll, or his later retained trial counsel, Robert Sheketoff. Nor did either lawyer have any independent knowledge that Semnack was a scheduled to testify in the Vasquez trial the day after the masked gunman had come to the apartment where she and Lowe were residing.

I further find that that this information was exculpatory and could have been a real factor in the jury's decision. The theory of Smith's defense was not one of mistaken identification but rather that he was not acting together with the gunman. This theory already had some support in the evidence, particularly since the prosecution did not itself offer any motive to explain why Smith would be targeting Lowe, as the Commonwealth alleged. However, that evidence was limited to Lowe himself and defense counsel's ability to impeach him as a reliable observer. Defense counsel did not call Semnack or even think to interview her, since the only information available at that point was that she would corroborate Lowe's account. Had he known that she was scheduled to give important testimony in the Vasquez trial the day after the home invasion, defense counsel testified that he would have proceeded differently since he regarded this information as helpful to Smith's defense. I credit this testimony.

As defense counsel explained, the information about Semnack provided additional support for his overall theory that Smith was simply at the wrong place at the wrong time and had no connection to the gunman. Specifically, the information suggested that there were others with a motive to harm or kill – namely, anyone with any association to the gang that Semnack

described at the Vasquez trial. Because Smith had no connection to anyone in the Vasquez case, there would be no reason for him to assist any gunman acting on behalf of the Vasquez defendants. As trial counsel testified, since the Commonwealth theory was that Smith was there to get Lowe, "anything that would have made that less likely would have been helpful to me." I credit this testimony.

DISCUSSION

To establish a Brady violation, a defendant must show that: 1) there was material information in the possession of the prosecutor (or those who participated in the investigation and presentation of the case); 2) the information tended to exculpate him; and 3) the prosecutor failed to disclose it. Commonwealth v. Caillot, 454 Mass. 245, 262-262 (2009), quoting Commonwealth v. Daye, 411 Mass. 719,934 (1992). As is apparent from my fact findings, this Court concludes that the defendant has established a Brady violation that requires a new trial.

It is essentially undisputed that Semnack's role in the Vasquez trial was known to the prosecution throughout the pendency of the case against the defendant. It is equally clear (based on the credible evidence presented at the hearing) that defense counsel was not aware of this information. What is in dispute is whether it is material and whether it is information that would tend to exculpate the defendant. This Court concludes that both of those requirements are met here.

As the SJC has explained, "'[E]xculpatory' is not a technical term meaning alibi or other complete proof of innocence, but simply imports evidence 'which tends to negate the guilt of the accused...or stated affirmatively, supporting the innocence of the defendant.'" Commonwealth v. Ellison, 376 Mass. 1, 22, n. 9 (1978), quoting Commonwealth v. Pisa, 372 Mass. 590, 595 (1977). That would include evidence tending to impeach the credibility of a key prosecution witness.

Commonweal v. Neal, 392 Mass. 1, 11 (1984). Evidence is " 'material' if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Prochilo, 629 F.3d 264, 268 (1st Cir. 2011). A "reasonable probability" exists if the evidence that was not disclosed "undermines confidence in the outcome of the trial." Kyloes v. Whitley, 514 U.S. 419, 434 (1995), quoting United States v. Bagley, 473 U.S. 667m 678 (1985).

As explained above, the defense strategy at the first trial was that the evidence was insufficient to show a joint venture between the gunman and the defendant. The only evidence that the two acted together was the testimony of Lowe (identified by the indictment as the target of the home invasion) and even then, that testimony as to what happened at the apartment door was subject to different interpretations: was the defendant's foot in the door so that he could get inside and escape the gunman or was he actively assisting him in an effort to break in? Moreover, Lowe's credibility was open to question. The information as to Semnack -- and that she could have been the target of the home invasion – was material when viewed in the context of the defense strategy, and could very well have led to a different outcome in the trial. In other words, the inability of the defense to explore and exploit this information undermines this Court's confidence in the outcome.

That Semnack was at some risk of harm as a result of her role in the Vasquez case was not simply an abstract proposition. The Vasquez trial was about gangs, guns, and retaliation. As Semnack testified, "If they can't get to you to hurt you, they're going to go to the person closest to you, meaning family, friends, kids, whoever they can get because they can't get you." The Vasquez prosecutor expressed a concern for the safety of his witnesses, including Semnack. That the apartment she resided in would be the subject of an armed attack only hours before her

testimony was information that was material enough to require the prosecution to disclose that information to Smith's trial counsel. Contrary to the Commonwealth's suggestion in its latest submission on the instant motion, there is no evidence to suggest that Smith would have tipped off anyone in this gang that Semnack was living with Lowe, much less that he would have accompanied that other person to Lowe's door in order to assist him in some way. Particularly given the fact that the prosecution did not itself present evidence as to a motive, any information that the gunman was after Semnack, not Lowe, would have supported the overall defense strategy of "decoupling" Smith from the gunman (as his trial counsel described it).

Significantly, the Appeals Court did not seem to question the materiality of this information when it reversed and remanded for an evidentiary hearing. In its rescript opinion, the Court explained that, although the prosecution did not have to prove what motivated the home invasion, any evidence as to motive should have been made available to both sides. Particularly given the Commonwealth's position that Lowe was the target, it was all the more important that the prosecution disclose evidence which could support a motive to kill Semnack. The Appeal Court went on to state:

> If the Commonwealth failed to disclose Semnack's witness status, then the defendant was deprived of the ability to present evidence in support of his claim that he was only there to buy drugs. Evidence of a motive to harm Semnack could have "rounded out the jury's picture of [the] case and shed light [] on other evidence" offered by the defendant to show that the gunman acted alone, Sidney Binder Inc. v. Jewelers Mut. Ins. Co., 28 Mass.App.Ct. 459, 462 (1990) and "[i]f evidence 'provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question material, although not indispensable element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness,' that evidence should reach the defendant's hand before trial, it all possible." Commonwealth .v Daniels, 445 Mass. 392, 401-402 (2005), quoting from Commonwealth v. Ellison, 376 Mass. 1, 22 (1978).

Notably, the defendant has raised several additional grounds for his new trial motion, several of which the Appeals Court found to be equally meritorious. Because the issue about Semnack is

sufficient in and of itself to warrant a new trial, this Court sees to no need to waste valuable judicial resources in order to explore these other issues.

For all the foregoing reasons, and for other reasons set forth in defendant's various memoranda in support, the Motion for New Trial is **ALLOWED,** his conviction is **VACATED** and a new trial is **ORDERED.**

Janet L. Sanders
Justice of the Superior Court

Dated: March 28, 2018