SJC-13202

COMMONWEALTH vs. JOSEPH POPE.

Suffolk. March 9, 2022. - June 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Homicide. Practice, Criminal, Postconviction relief, New trial, Disclosure of evidence, Capital case. Evidence, Disclosure of evidence, Exculpatory. Due Process of Law, Disclosure of evidence.

Indictments found and returned in the Superior Court Department on August 15, 1984.

Following review by this court, 406 Mass. 581 (1990), a motion for a new trial, filed on July 3, 2020, was heard by Debra A. Squires-Lee, J.

A request for leave to appeal was allowed by Kafker, J., in the Supreme Judicial Court for the county of Suffolk.

Jeffrey G. Harris for the defendant.

Paul B. Linn, Assistant District Attorney, for the Commonwealth.

The following submitted briefs for amici curiae:

John J. Barter for Committee for Public Counsel Services.

Joshua M. Daniels & Sara E. Silva for Massachusetts Association of Criminal Defense Lawyers.

LOWY, J. The defendant was convicted of murder in the first degree in 1986, after a first trial, in 1985, resulted in a mistrial. Pursuant to G. L. c. 278, § 33E (§ 33E), this court reviewed and affirmed his conviction in 1990. See Commonwealth v. Pope, 406 Mass. 581, 591 (1990). Now, more than three decades later, we consider the defendant's case again, after a Superior Court judge denied his second motion for a new trial and a single justice of this court granted in part the defendant's gatekeeper petition to appeal. See G. L. c. 278, § 33E.

The single justice allowed the defendant to appeal from the denial of his motion for a new trial based on two recent developments. First, in 2017, this court held in Commonwealth v. Brown, 477 Mass. 805, 807 (2017), cert. denied, 139 S. Ct. 54 (2018), that "felony-murder is no longer an independent theory of liability for murder" but rather limited to an aggravating element of murder; the defendant here had been convicted solely on a theory of felony-murder. Second, in 2018, the defendant's postconviction counsel discovered allegedly nondisclosed exculpatory evidence in the Commonwealth's possession.

We conclude that the Commonwealth's nondisclosure of this evidence -- which goes to the credibility of the Commonwealth's key and only percipient witness, with whom this case rises and falls -- constituted a violation of its Brady obligation to

disclose all exculpatory evidence and prejudiced the defendant. We thus reverse the motion judge's denial of the defendant's motion for a new trial on those grounds and do not reach the defendant's argument regarding Brown and the felony-murder rule.

Background. In Pope, 406 Mass. at 582-584, we summarized the facts as the jury could have found them. We do so again here, reserving some facts for later discussion.

The victim's brother, Bienvenido DeJesus (Benny),[1] served as the principal witness for the Commonwealth, with his testimony establishing the narrative of the incident. Pope, 406 Mass. at 582. The defendant did not testify. Id. at 584. Conspicuously relying on Benny's trial testimony, we described the night of the murder as follows:

> "On the evening of May 23, 1984, [Benny] was at home [on Nonquit Street in the Dorchester section of Boston] with various members of his family who were visiting him. At approximately 10 P.M., most of the visitors left, leaving [Benny], his two children, and [his brother Efrain] in the house. [Benny] walked to a nearby liquor store, where he made some purchases. He pocketed the change of approximately [fifteen dollars] and headed back to his house. On the way, he noticed a gray van parked near his house on the opposite side of the street. He observed the defendant emerge from the van and cross the street. The defendant asked [Benny] if [Efrain] was home. [Benny] said that he was. [Benny] entered the house, went upstairs, and told [Efrain] that the defendant was downstairs asking for him. [Efrain] went downstairs.

[1] Because the victim's brother and the victim share a surname, for ease of reference, we refer to the brother by his first name.

> "[Benny] entered the upstairs bathroom [where he began to give his two children a bath]. Within a few minutes, [Benny] noticed [Efrain], the defendant, and a third person, later identified as Floyd Hamilton, walk by the bathroom door in the direction of [Efrain's] bedroom. [Benny] had never seen Hamilton before this moment. A couple of minutes later, [Benny] saw the same three persons walk past the bathroom in the opposite direction, toward the room where [Efrain] did 'whatever he had to do with cocaine.'
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> "[Benny] heard some people going downstairs. Within seconds, [Benny] heard his brother say from the downstairs area of the house, 'Oh, no, not this. You'll have to shoot.' [Benny] heard stumbling, a scuffle, and, immediately afterward, a shot. [Benny] then heard [Efrain] cry out, 'Compi,' a name which the brothers were accustomed to calling each other. [Benny] walked to the bathroom door. He stopped when a handgun was put to his forehead. At the other end of the gun was the defendant.
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> "The defendant pulled [Benny] into the room where [Efrain's] drug transactions took place, keeping the gun at [Benny's] forehead. Inside the room, the defendant backed away a couple of steps but continued to aim the handgun at [Benny]. The defendant said, 'Give me everything you got.' [Benny] took the change he had received at the liquor store out of his pocket and threw it on a table, where some cocaine lay.
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> "At this point, [Benny] saw Floyd Hamilton running up the stairs. Hamilton was carrying a shotgun. He knelt down and pointed the shotgun at [Benny]. Hamilton [told the defendant it was time to go]. The defendant scooped up the money and cocaine from the table. [Benny] told them to take everything and get out before the police arrived. Hamilton and the defendant left."

Id. at 582-584.

According to evidence presented at trial, at that point, Benny grabbed his children, who were still upstairs, and carried them downstairs, where the victim was lying in a pool of blood. Benny then took his children outside, put them in his car, and

drove them to his girlfriend's house nearby. Minutes later, Benny returned home and called the police. Among the responding officers were Officer Robert Flynn, his partner Officer William Baker, Detective Peter O'Malley, and Sergeant Detective James Curran. The defendant and Hamilton were arrested not long thereafter.

The defendant and Hamilton first were tried together in 1985. After this first trial resulted in a hung jury and mistrial, the defendant was tried alone in 1986. This second trial resulted in a conviction of murder in the first degree on the theory of felony-murder, as well as a conviction of armed robbery. Pursuant to § 33E, this court conducted a plenary review of the record and affirmed the defendant's convictions in 1990. See Pope, 406 Mass. at 591. The defendant filed motions for a new trial in 1996 and 2020; each was denied by a judge in the Superior Court. In 2021, the defendant petitioned this court for leave to appeal from the denial of his second motion for a new trial, and a single justice of this court granted the petition in part, allowing the defendant to appeal from the denial on the basis of purportedly newly discovered evidence and this court's modification of the felony-murder rule in Brown.

Discussion. 1. Standard of review. Where, as here, the motion judge was not the trial judge, did not conduct an evidentiary hearing, and instead relied on the trial

transcripts, affidavits, and other documentary evidence, we review de novo the denial of a motion for a new trial. Commonwealth v. Mazza, 484 Mass. 539, 547 (2020), citing Commonwealth v. Tremblay, 480 Mass. 645, 656 (2018), and Commonwealth v. Lykus, 451 Mass. 310, 325-326 (2008).

2. Gaps and inconsistencies in witness and police accounts. a. Previously disclosed evidence. There is no doubt that the evidence disclosed at the time of the defendant's trial already betrayed certain inconsistencies in Benny's and the police's accounts of the shooting and subsequent investigation. The evolution of these accounts is apparent across the following, all of which were available to the defense at the time of trial:

i. A police report written by Officer Flynn mere hours after the shooting;

ii. Benny's testimony at the defendant's probable cause hearing, see G. L. c. 276, § 38, and Mass. R. Crim. P. 3 (f), which took place on July 19, 1984, approximately eight weeks after the murder;

iii. Sergeant Detective Curran's grand jury testimony, see Mass. R. Crim. P. 5;

iv. Testimony from Benny, Officer Flynn, Officer Baker, and Sergeant Detective Curran at the defendant's 1985 and 1986 trials.

For example, while Benny initially seemed to tell police that the defendant was downstairs during the shooting, over time his story changed such that later he was sure the defendant was

upstairs during the shooting. Similarly, while in his initial statements about the incident, Benny did not mention his children or the fact that he drove them to a girlfriend's house before telephoning the police, these details were prominent parts of his subsequent testimony. Moreover, reports and testimony from Officers Flynn and Baker and Sergeant Detective Curran were inconsistent about whether the police recovered drug-related material from the scene of the shooting and, if so, what type of material. While earlier police reports made no mention of drugs, later testimony suggested that the police found at least some drug paraphernalia at Benny's home.

b. Newly discovered evidence. The purportedly newly discovered evidence consists primarily of a preliminary field report and a memorandum (the Goodale documents), both written in 1984 by then Assistant District Attorney Robert Goodale.[2] The documents were prepared by Goodale after he reported to the scene of the shooting as part of a "homicide response team." The preliminary field report was prepared early in the morning of May 24, less than twelve hours after the shooting, and the memorandum, which Goodale prepared for the district attorney, is dated May 29, 1984, less than a week after the shooting.

[2] The defendant alleges that a case summary written by Sergeant Detective Curran also was not disclosed to his trial counsel. Beyond briefly describing the defendant's arrest, the summary is otherwise duplicative of disclosed police reports.

These documents memorialized some of Benny's earliest accounts of the night of the murder, as well as statements from the police about Benny and about evidence at the scene of the shooting. The defendant contends that the Goodale documents would have served as vital impeachment evidence -- revealing or exacerbating inconsistencies in Benny's and the police's accounts -- and that they would have provided novel investigative avenues to the defense. We agree. In particular, and as also set forth in the Appendix to this opinion, the Goodale documents significantly exacerbate inconsistencies and contain novel information regarding the following aspects of this case.

i. The defendant's location at the time of the shooting. The Goodale documents accord with Officer Flynn's report and Sergeant Detective Curran's grand jury testimony, indicating that Benny placed the defendant downstairs at the time of the shooting. The documents thus provide further evidence that Benny's testimony at trial -- in which he stated the defendant was in fact upstairs at the time of the shooting -- was inconsistent with prior statements.

ii. Benny's travel to a girlfriend's house and the girlfriend's identity and address. As noted supra, Benny's statements about his actions in the immediate aftermath of the shooting changed over time. Benny initially did not disclose to

the police that he went to a friend's or girlfriend's house after the shooting but before calling 911, but he later testified at great length about this detour during the defendant's probable cause hearing and at both trials. The record suggests that the defendant's trial counsel could not locate the woman at issue, and she did not testify.

Thus, it is quite notable that the Goodale memorandum -- which memorializes an interview between Benny and Detective O'Malley on the very night of the shooting -- contains a detailed account of Benny's travel. Indeed, the memorandum provides important new information about the identity and address of Benny's friend, although he did not identify her as a "girlfriend" at the time. This information is inconsistent with Benny's testimony from the probable cause hearing and the 1985 and 1986 trials.

Specifically, Goodale's memorandum is the only account on record that identifies Benny's friend or girlfriend as "Sonya Fernandez."[3] At both trials, Benny instead identified the friend

[3] The memorandum records a conversation between the police and one "Sonia Fernandez," who identified herself as a friend of the residents of Benny's house on Nonquit Street, and notes that Benny stated he went to "Sonya Fernandez's" house after the shooting. Based on the context, we reason that the memorandum is referring to the same woman in both places.

as "Jeanette Fernandez."[4] In addition, the memorandum gives her address as a location on Monadnock Street around the corner from Benny's house on Nonquit Street, on the same side of Columbia Road; indeed, according to the memorandum, Benny stated that he simply ran to Fernandez's house after the shooting. However, in his testimony at both trials, Benny described having to drive a few blocks, across Columbia Road to reach his friend's house, although he could not remember the precise address.

iii. The presence of Benny's children. There is no mention of Benny's children in Officer Flynn's report or Sergeant Detective Curran's grand jury testimony, although Benny testified about the children at later proceedings. There is likewise no mention of Benny's children in Goodale's preliminary field report. Although the memorandum indicates that Benny acknowledged his children were present at his house at the time of the shooting, he does not mention them in relation to going

[4] Benny also provided the name of this friend at the probable cause hearing, but the piece of testimony was deleted from the transcript at the request of the court. While we do not know what Benny said at the probable cause hearing, we do not think that this deleted testimony lessens the import of the identification of the friend as "Sonya" in the Goodale memorandum. For one, Benny's description of the friend's location at the probable cause hearing was in keeping with his trial testimony about Jeanette Fernandez's location. Moreover, the trial transcripts indicate that defense counsel seemed to accept Benny's identification of the friend as "Jeanette" and did not seek to contradict this identification in any way, despite extensive impeachment of Benny on other issues.

to his friend's house -- a trip Benny later claimed was motivated by a desire to remove his children from the scene of the shooting.

iv. The type of drug-related materials found at the scene. Goodale's memorandum is the only piece of the record that indicates that genuine cocaine was recovered from Benny's house. Officer Flynn's police report contains no mention of cocaine. Later testimony from Sergeant Detective Curran and Officers Flynn and Baker suggested that the police found a "burn" at the scene, although it remained ambiguous whether the "burn" consisted of packets filled with a white powdery substance or empty packets.[5]

v. The victim's drug usage. Goodale's memorandum records statements from the victim's former fiancée, Marla Dickson, who claimed that the victim neither used nor sold cocaine. These statements contradict Benny's repeated declarations that the victim both used and sold cocaine. Dickson's assessment of the

[5] During his grand jury testimony, Sergeant Detective Curran defined a "burn" as "[a] small package to look like cocaine" with "sugar or a white substance in it." But across the trials, at which Sergeant Detective Curran and either Officer Flynn or Officer Baker testified, there was some ambiguity about whether a "burn" refers specifically to the substance that is placed into prefolded packets and meant to serve as a "dupe" for cocaine -- as Sergeant Detective Curran indicated at the probable cause hearing -- or whether a "burn" can refer more broadly to the prefolded packets, even if empty.

victim's relationship, or lack thereof, with cocaine is nowhere else in the record.

vi. The police's suspicions about Benny. Finally, Goodale's memorandum provides critical insight, likewise found nowhere else in the record, into the police's suspicions of Benny. In particular, the memorandum notes that Detective O'Malley disbelieved Benny and thought that Benny himself was involved in dealing cocaine.

Although all these areas of inconsistency or doubt could have weakened the Commonwealth's case, we focus our analysis on the Goodale memorandum's revelations about Sonya Fernandez and her address, Dickson's statements regarding the victim, and Detective O'Malley's suspicions regarding Benny. Under the favorable standard of prejudice we must apply here, the nondisclosure of these pieces of information constitutes a prejudicial violation of the Commonwealth's Brady obligation and requires the defendant be granted a new trial.

3. Brady obligation. "Under the due process clause of the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights, a prosecutor must disclose exculpatory information to a defendant that is material to either guilt or punishment." Matter of a Grand Jury Investigation, 485 Mass. 641, 646 (2020), citing Brady v. Maryland, 373 U.S. 83, 87 (1963). "[I]n Massachusetts, when we

speak of a prosecutor's Brady obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability." Matter of a Grand Jury Investigation, supra at 649. See Mass. R. Crim. P. 14 (a) (1) (A) (iii), as amended, 444 Mass. 1501 (2005).

"Where the government fails to comply with this duty to turn over exculpatory evidence to the defense, a convicted defendant may be entitled to a new trial." Commonwealth v. Caldwell, 487 Mass. 370, 375 (2021). To obtain a new trial on the grounds that the Commonwealth failed to disclose certain exculpatory evidence, "a defendant must establish (1) that the evidence [at the time of trial] was in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control, (2) that the evidence is exculpatory, and (3) prejudice" (quotations and alterations omitted). Id., quoting Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017). Of course, inherent in that analysis is the presupposition that the exculpatory evidence at issue was actually undisclosed and is newly discovered. See Commonwealth v. Caillot, 454 Mass. 245, 261-262 (2009), cert. denied, 559 U.S. 948 (2010) ("To establish a Brady violation, a defendant must show that . . . the prosecutor failed to disclose the evidence"). Cf. Mazza, 484

Mass. at 547, quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986) ("A defendant seeking a new trial on the ground of newly discovered evidence must establish . . . that the evidence is newly discovered"). Here, the parties contest whether the defendant can establish that the Goodale documents were not disclosed at the time of his trial. Thus, we consider four issues in turn: first, whether the evidence was in the Commonwealth's possession at the time of trial; second, whether evidence was, in fact, not disclosed at that time; third, whether the evidence is exculpatory; and fourth, whether the nondisclosure of the evidence prejudiced the defendant.

a. Possession. A prosecutor's duty to disclose "extend[s] to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office." Commonwealth v. Woodward, 427 Mass. 659, 679 (1998), quoting Commonwealth v. St. Germain, 381 Mass. 256, 261 n.8 (1980). The Goodale documents were written by an assistant district attorney, and Goodale's memorandum was prepared specifically for the district attorney. These documents were in the possession of the Commonwealth.

b. Disclosure. In the Brady context, the defendant bears the burden of establishing that purportedly nondisclosed

exculpatory evidence was not in fact disclosed by the Commonwealth at the time of trial. Cf. Mazza, 484 Mass. at 548 ("To demonstrate that the proffered evidence is newly discovered, a defendant must establish that the evidence was not discoverable at the time of trial despite the due diligence of the defendant or defense counsel" [quotation and citation omitted]). The Commonwealth contends that the motion judge correctly found that the defendant failed to meet this burden here. We disagree. In Mazza, this court made clear that a defendant can meet this burden through circumstantial evidence. Id. at 550. Here, the defendant has pointed to several compelling pieces of such evidence that "[w]hen viewed as a whole" effectively establish that the Goodale documents were not disclosed at the time of the defendant's trial. Id. As in Mazza, "this is not a case where the only evidence of absence is the absence of evidence." Id.

In Mazza, the defendant similarly sought a new trial on the basis of newly discovered evidence, which in that case consisted of certain witness statements. Id. at 547. As here, the defendant's trial counsel was deceased, and his case files could not be located. Id. at 548. And, as here, the Commonwealth argued that, because there was no affirmative proof that the proffered evidence was not disclosed at the time of trial, the defendant had failed to establish that the evidence was newly

discovered; the Commonwealth did not offer, however, any of its own affirmative proof that the evidence had been disclosed. Id. In Mazza, this court reviewed affidavits from the defendant and from the defendant's postconviction counsel, each of which averred that the defense did not have the witness statements at issue at the time of trial, and trial transcripts, which revealed the defense's extensive use of other witness statements. Id. at 548-550. Based on this constellation of evidence, this court concluded that the defense must not have had the witness statements at issue and that they therefore constituted newly discovered evidence. Id. at 550.

In the instant case, the circumstantial evidence of nondisclosure is considerably greater. First, the defendant's trial counsel repeatedly inquired about the existence of any notes regarding the police's initial investigation and interview with Benny. Counsel presumably would not have asked such questions if he had had the notes at the time. Second, and relatedly, in closing at each trial, defense counsel emphasized the lack of any such notes. Third, the Commonwealth -- through both the prosecutor and police witnesses -- consistently asserted that no notes had been taken regarding the initial police interviews with Benny, and even mentioned the lack of notes in its closing argument. The Commonwealth likely would not have so asserted if it had disclosed notes of precisely that

nature. Fourth, as in Mazza, defense counsel's trial strategy provides additional circumstantial evidence of nondisclosure. For example, counsel sought to impeach Benny numerous times with prior inconsistent statements and spent a significant part of cross-examination questioning Benny about his claim that he drove his children to a girlfriend's house after the shooting. Despite counsel's strategic focus on impeachment and substantive focus on Benny's postshooting drive to a girlfriend's house, counsel never questioned Benny about inconsistencies in his statements about the identity and address of the girlfriend to whose house he went. These inconsistencies would have been revealed only through the Goodale documents.

Consequently, we disagree with the motion judge and conclude that counsel's trial strategy -- taken with the other significant circumstantial evidence -- does not suggest that counsel made a tactical decision not to use the Goodale documents but rather suggests that counsel never had the documents.

c. Exculpation. "[E]xculpatory is not a narrow term connoting alibi or other complete proof of innocence" (alterations omitted). Sullivan, 478 Mass. at 381, quoting Commonwealth v. Healy, 438 Mass. 672, 679 (2003). Rather, "[e]vidence is exculpatory if it 'provides some significant aid to the defendant's case, whether it furnishes corroboration of

the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.'" Commonwealth v. Barry, 481 Mass. 388, 399, cert. denied, 140 S. Ct. 51 (2019), quoting Commonwealth v. Watkins, 473 Mass. 222, 231 (2015).

The Goodale documents constitute exculpatory evidence. First, the proffered evidence here reveals a number of inconsistencies in the testimony of Benny, the Commonwealth's key witness. See Commonwealth v. Liebman, 388 Mass. 483, 489 (1983) ("Evidence which impeaches the credibility of a key prosecution witness is exculpatory for the defendant"). Second, the Goodale memorandum exposes police doubt about Benny's reliability and may have lent itself to a Bowden defense, see part 3.d.iii, infra, which could have cast doubt on the prosecution's version of events by casting doubt on the underlying police investigation. See Sullivan, 478 Mass. at 382 ("this evidence also was exculpatory because it bolstered the defendant's Bowden defense").

d. Prejudice. Thus, having determined that the Commonwealth possessed but did not disclose exculpatory evidence at the time of the defendant's trial, we now assess whether the nondisclosure of such evidence constituted a prejudicial error requiring a new trial. The Commonwealth's case rose and fell

with the believability of a witness whose testimony was riddled with inconsistencies. Given the additional inconsistencies and information laid bare by the Goodale documents, particularly the information about "Sonya Fernandez," Dickson's statements, and Detective O'Malley's concerns about the Commonwealth's key witness, we conclude that the nondisclosure of the Goodale documents amounted to prejudicial error.

The defendant benefits from the standard of prejudice we apply when the defendant has made a specific request for exculpatory evidence. The defendant argues and the Commonwealth concedes that the defendant had specifically requested the evidence at issue at the time of his trial. "[W]hen the omission of the prosecution is knowing and intentional or follows a specific request, a standard of prejudice more favorable to the defendant is justified in order to motivate prosecutors to be alert to defendants' rights to disclosure." Commonwealth v. Tucceri, 412 Mass. 401, 407 (1992). Specifically, "a defendant need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." Id. at 412. See Healy, 438 Mass. at 680 ("In cases involving a specific request for evidence, we look to the record to determine whether we can be confident that, even if the prosecution had supplied the report to the defendant in timely fashion, the report or available evidence disclosed by it

would not have influenced the jury" [alteration, quotation, and citation omitted]). "[T]he burden of establishing the requisite 'substantial basis' for a claim of prejudice rests with the defendant." Healy, supra.

While we have often held that "[n]ewly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial" (citation omitted), Sullivan, 478 Mass. at 383, this reasoning is not dispositive here. It remains true that such evidence will not ordinarily be the basis of a new trial, particularly -- although not exclusively -- under a standard less favorable to defendants. See, e.g., Barry, 481 Mass. at 401-403; Commonwealth v. Hernandez, 481 Mass. 189, 194-198, cert. denied, 140 S. Ct. 168 (2019); Commonwealth v. Sena, 441 Mass. 822, 830-832 (2004); Commonwealth v. Lo, 428 Mass. 45, 53 (1998). Sometimes, however, such evidence is.

"[W]e have never adopted an inflexible rule that newly discovered evidence that merely . . . impeaches a witness's testimony is an insufficient basis for a motion for a new trial." Commonwealth v. Cowels, 470 Mass. 607, 621 (2015). Even where we have held that newly discovered impeachment evidence was insufficient to merit a new trial, we have often considered the particularities of the scope and impact of that evidence and, importantly, the strength of the Commonwealth's

case. See, e.g., Commonwealth v. Upton, 484 Mass. 155, 168 (2020) (newly discovered impeachment evidence was insufficient to require new trial where there was "'web of evidence' strongly supporting the defendant's guilt" and "defendant's version of events . . . strained credulity"); Barry, 481 Mass. at 399-404 (newly discovered impeachment evidence was insufficient to require new trial where evidence was "cumulative of evidence already before the jury" or was based on uncorroborated, unsubstantiated, or secondhand information); Hernandez, 481 Mass. at 196-198 (newly discovered impeachment evidence was insufficient to require new trial where "only substantive testimony" of witness who would have been impeached "was ultimately made moot by the defendant's own admission"); Sullivan, 478 Mass. at 384 (newly discovered impeachment evidence was insufficient to require new trial where "nondisclosed evidence . . . [was] not directly related to the crimes at issue"); Sena, 441 Mass. at 831-832 (newly discovered impeachment evidence was insufficient to require new trial where it revealed only "minor and inconsequential" inconsistencies in witness testimony); Lo, 428 Mass. at 54 (newly discovered impeachment evidence was insufficient to require new trial where evidence impeached one of multiple witnesses who testified as to criminal responsibility). In rare cases, however, "we have found that . . . a new trial may be warranted 'where the

Commonwealth's case depends so heavily on the testimony of a witness' and where the newly discovered evidence 'seriously undermines the credibility of that witness'" (alteration omitted). Cowels, supra, quoting Liebman, 388 Mass. at 489.

i. The identity and address of Benny's girlfriend. As an initial matter, Benny's statements about "Sonya," as recorded in Goodale's memorandum, would have been a basis to cross-examine him about his prior inconsistent statements. And based on counsel's trial strategy, see part 3.b, supra, it seems likely that counsel would have used Benny's prior inconsistent statements for that purpose. Moreover, Goodale's memorandum notes that police spoke to Sonya at the scene of the shooting, and so defense counsel may have been able to inquire about Sonya during his cross-examination of police witnesses. In addition, with this novel information about Benny's girlfriend, the defendant's counsel may have been able to investigate or presumably locate the girlfriend to whom Benny referred.

Benny's testimony about driving to the house of a friend or girlfriend, whom he identified as "Sonya" in his initial police interview but "Jeanette" at trial, was particularly significant as it related to the defense's theory of Benny's bias. Benny testified that he drove to a girlfriend's house -- before calling the police -- in order to remove his children from a dangerous crime scene, but defense counsel suggested that Benny

was instead trying to cover up his involvement in a drug business operated out of his house by bringing drugs or drug-related items to another location. The fact that Benny's statements related to his friend or girlfriend and her address changed over time could have lent credence to the defense's theory that Benny was a biased witness who may have had reason to mislead the Commonwealth about the events of the night of the shooting.

The inconsistencies between Benny's earlier statements and his in-court statements are quite notable. This person was one with whom Benny felt comfortable leaving his children and whom Benny identified at trial as his "girlfriend." While we do not know what the jury would have inferred if confronted with the fact that Benny's in-court testimony was inconsistent with prior statements about this girlfriend, they may have been struck by the fact that Benny would misremember or confuse the name of someone seemingly so important to him. Moreover, Benny described reaching this person's house differently in his police interview and at trial. While at first, he told police he ran to a house around the corner -- and did not mention taking his children -- at trial he stated he drove his children to a house notably farther away.

ii. Marla Dickson's statements. Likewise, Dickson's statements about the victim's lack of drug use could have served

as impeachment evidence going to Benny's bias and over-all credibility. The defendant's trial counsel could have called Dickson to testify as to her personal knowledge of the victim and his drug usage. This testimony would have been admissible for the truth of the matter asserted, impeaching Benny by contradiction and undermining the Commonwealth's theory of the case. At trial, the Commonwealth argued that the robbery and resultant shooting were related to the victim's and the defendant's involvement with cocaine and drug dealing. Benny testified that the victim used and sold cocaine and that it was the victim's involvement with drugs that entangled the victim with the defendant and Hamilton in the first place. Dickson's statements would have directly contradicted this testimony. Her prior statements would have called into question Benny's reliability and would have complicated aspects of the Commonwealth's proposed narrative of the events surrounding the shooting.

iii. Detective O'Malley's suspicions. Finally, the Goodale memorandum reveals police skepticism about Benny's version of events -- the version of events eventually presented by the Commonwealth at trial -- and could have been used to formulate a compelling Bowden defense. See Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). "A defendant may rely on deficiencies or lapses in police investigations to raise the

specter of reasonable doubt." Commonwealth v. Moore, 480 Mass. 799, 807 (2018), citing Bowden, supra. "Because any statements introduced as part of such a defense are offered not for their truth, but to prove that the police did not take 'reasonable steps to investigate,' those statements are not hearsay." Commonwealth v. Bizanowicz, 459 Mass. 400, 414 (2011), quoting Commonwealth v. Ridge, 455 Mass. 307, 316 (2009). Accordingly, Detective O'Malley's statements, as recorded in the Goodale memorandum, would have been admissible to help demonstrate that the police should have investigated Benny's account further.

Moreover, it seems quite likely that the defendant's trial counsel would have used the Goodale memorandum in this way. In his closing argument at the 1986 trial, the defendant's trial counsel presented a theory to the jury that Benny was unreliable and biased and had misled the police; if given evidence that the police themselves were concerned about Benny's unreliability, counsel would likely have expanded his theory to include a Bowden defense.

Such a defense could have powerfully undermined the strength of the Commonwealth's case. The record demonstrates that the defendant's trial counsel sought to suggest that Benny was more involved with the cocaine than he claimed and that consequently he was a biased witness. Taken with the inconsistencies in Benny's narratives, including his changing

descriptions about leaving the scene before calling the police, see supra, the police's admitted suspicion of Benny could have cast doubt on the adequacy of the police investigation. See Commonwealth v. Mattei, 455 Mass. 840, 859 (2010) (trial judge erroneously "prevented the defendant from establishing that [certain witnesses] may have had an incentive to misdirect the police during the investigation to deflect attention away from themselves"). After all, the Commonwealth seemed ultimately to embrace straightforwardly Benny's account, and without Benny's account, the Commonwealth's case could not stand; yet, the Goodale memorandum indicates that the Commonwealth itself harbored doubts about Benny and the story he provided.

Furthermore, the Commonwealth repeatedly asserted, including in its closing argument, that there were no notes taken during or about Benny's initial interviews with the police. The very existence of the Goodale documents demonstrates the inaccuracy of these assertions and calls into question aspects of the Commonwealth's investigation or preparation for trial.

In sum, given the potential impact of Benny's prior inconsistent statements about his girlfriend, Dickson's testimony, and Detective O'Malley's statements of suspicion about Benny, the defendant's specific request for exculpatory evidence and the concomitant lower burden, and the over-all

weaknesses in the Commonwealth's case, the defendant has established a substantial basis for claiming prejudice. At trial, Benny provided the only percipient account of the shooting. Benny was not simply the Commonwealth's key witness; he was the linchpin of the Commonwealth's entire case. The Goodale documents not only exacerbate the inconsistencies already apparent in Benny's testimony, such as his changing statements about the defendant's location at the time of the shooting, but also reveal new inconsistencies in his testimony entirely different in kind.

Conclusion. Because the defendant has established that the Commonwealth failed to disclose exculpatory evidence and that such nondisclosure was prejudicial, we reverse the denial of the defendant's second motion for a new trial.

So ordered.

Appendix.

	Defendant's location at time of shooting	**Cocaine at scene or victim's cocaine usage**	**Presence of Benny's children**	**Travel to friend's house and her identity**
Flynn report	Downstairs	No mention	No mention	No mention
Curran's case summary*	Downstairs	No mention	No mention	No mention
Goodale field report*	Downstairs	No mention	No mention	No mention
Goodale memorandum*	Downstairs	Police found ten packets of cocaine at the scene. Benny knew the victim dealt cocaine and thought the defendant worked for the victim. Victim's former fiancée contested Benny's statements, saying the victim did not use or sell cocaine. Police were suspicious of Benny and thought he was involved in drug dealing.	No mention	Benny said that he "ran" to his friend's apartment after the shooting. Benny identified his friend as "Sonya Fernandez," and she provided her address as a location on Monadnock Street.

Probable cause hearing	Upstairs	Officer Flynn said no drugs were found at the scene. Benny testified that the defendant stole cocaine in addition to cash.	Benny stated his children were upstairs at the time of the shooting. He said that he drove his children to a friend's house after the shooting.	Benny's friend's name was not included in the transcript, and Benny could not provide the address of his girlfriend.
Sergeant Detective Curran's grand jury testimony	Downstairs	Curran suggested the shooting was motivated by a drug transaction or rip-off. Curran described a "burn" found at the scene.	No mention	No mention
1985 and 1986 trials	Upstairs	Benny testified that the victim used and sold cocaine, some of which the defendant stole. Police testified about finding a "burn" or "papers" at the scene.	Benny stated his children were upstairs at the time of the shooting and that he drove them to a friend's house immediately afterward.	Benny identified his girlfriend as "Jeanette Fernandez" and described driving to her house a few blocks away, across Columbia Road.

* These items were not disclosed to the defense at the time of the defendant's trial.