COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. SJC-10781

COMMONWEALTH,
Appellee

v.

LAMORY GRAY,
Appellant

REPLY BRIEF AND SUPPLEMENTAL RECORD APPENDIX OF LAMORY GRAY, DEFENDANT-APPELLANT

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A reasoned and fair review on appeal cannot disregard the core of this case: the outcome turned on identification during a fast moving event, with opportunity to observe measured in seconds, in circumstances involving passing traffic, a storm, and multiple distractions, none of which were conducive to clear observation. The Commonwealth conspicuously ignores this fact, instead inaccurately emphasizing disputed and conflicting evidence as if such evidence is overwhelming and unopposed. Indeed, in rather extraordinary fashion, the Commonwealth asserts speculative declarations about what meaning a jury would have ascribed to evidence of a failed identification were it admitted, urges the Court to

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[1] Mr. Gray's Opening brief and the Commonwealth's brief are cited as "(D.Br __)" and "(C.Br.__)," respectively. Grand Jury transcripts are cited by date and page as "(Tr. [date] at [page])." Mr. Gray has attached a copy of his motion to Expand/Correct the Record (filed separately) as an Addendum and provides a Supplemental Record Appendix with this submission, cited by page as "(S.R.A. __)." Where possible, Mr. Gray cites to his opening brief for case and record citations contained therein.

adopt one-sided assumptions about how such evidence would have been successfully rebutted by the government, and deems the absence of such evidence inconsequential to Mr. Gray and his constitutional rights. On all counts, the Commonwealth is wrong.

1. The Commonwealth Cannot Avoid the Constitutional Questions Raised on Appeal by Inaccurately Characterizing Jamison's Failed Identification As Limited to a Pretrial Motion in Limine and a Matter of Routine Discretion.

As an initial matter, the Commonwealth fails to acknowledge and address the breadth of constitutional issues before the Court, instead opting to assert that the issues turn on a routine exercise of discretion (C.Br. 13-23). (Compare D.Br. 28-31: exculpatory evidence, due process, right to present complete defense, fundamental fairness, confrontation.) The Commonwealth is not only in error, but contradicts its own assertions: see C.Br. 47, stating "all relevant evidence is admissible except as otherwise limited by constitutional requirements"). *See, e.g.,* citations in D.Br. at 30 including *Commonwealth v. Jewett,* 392 Mass. 558, 563 (1984)(when defendant offers exculpatory evidence regarding misidentification, prejudice not a factor; relevance governs).

The significance of the Commonwealth's failure to address constitutional issues becomes clear when one observes that the defense request to admit the non-identification of Mr. Gray was of constitutional magnitude, repeated during the course of the trial in

direct response to the conduct of the prosecution and substantial reliance on Mr. Jamison's alleged excited utterance as the central component of the government's case (D.Br. 20-22). In fact, at the time the motion in limine was filed and argued (Tr. 4/27/09 at 12-16), the defense was contesting the statement coming in as an "excited utterance" and the judge had reserved on the issue (Tr. 4/27/09 at 16). As noted in Mr. Gray's opening brief (D.Br. 20), the excited utterance eventually came in at trial and was relied upon by the prosecution, and it was in response to this reliance that the defense repeated his requests that the failed identification be admitted (D.Br. 21-22). There cannot be a reasoned dispute that the issue was evolving through trial as competing positions formed. The issue became even more acute when the judge shut down the defense closing argument and prohibited defense counsel from attacking Mr. Jamison's credibility, yet permitted the prosecutor to argue the substance of the non-identification without limitation, and then refused to provide limiting instruction (D.Br. 20-22) -- issues the Commonwealth fails to address in its brief, thereby waiving the opportunity. Mass. R. App. P. 16(a)(4). *See, e.g. Commonwealth v. Lydon,* 413 Mass. 309, 317-318 (1992).

2. The Commonwealth's Argument Improperly Asks the Supreme Judicial Court to Act as a Factfinder, to Find Self-Serving Facts Assumed by the Commonwealth, and to Overlook Conflicting Evidence as if One-sided.

The Commonwealth makes assertions of overwhelming, one-sided evidence in an attempt to make refusal to admit Jamison's failed identification appear inconsequential. In fact, the evidence is to the contrary. This Court need only accurately review the central issue in the case, the state of the evidence and the Commonwealth's contradictory assertions to see that this is so.

This case turned on an alleged excited utterance identification with an opportunity to observe measured in seconds, in an environment not conducive to accurate observation. The content of the alleged excited utterance was itself in conflict, ranging from "that looks like Lawz" to "Lawz, among others (D.Br. 20; *see also* Addendum) -- conflict conveniently ignored by the Commonwealth. One other witness (Williams) thought she saw Mr. Gray, but admitted she was unsure and influenced by what she heard. An eyewitness, very close to the shooter identified someone other than Mr. Gray (D.Br. 5, 9).

The government portrayed Mr. Jamison to the jury as a reliable, cooperating witness who worked with authorities to break the case (D.Br. 43), yet now asks this Court to act as a factfinder and adjudge Jamison a fraud and a liar regarding his inability to recognize Mr. Gray, that inability supposedly an obvious, intentional failure (C.Br. 13-24). To make this point the Commonwealth relies on his grand jury testimony about past exposure to Mr. Gray in a piecemeal manner, without providing the

transcript. Mr. Jamison testified before the Grand Jury that he did not personally know Mr. Gray (9/13/07 at 35), thought he had seen him through glass on one occasion when housed in a separate section of a jail (p. 40), described the person he thought was Mr. Gray as having a slim build and Afro (p. 40), and believed he spoke to Mr. Gray days before he testified (p. 43). The Commonwealth relies on limited portions of Jamison's grand jury testimony regarding his belief about knowing who Mr. Gray is (C.Br. 17), relying only on the words of Jamison -- the same person the Commonwealth asks the Court to now disregard as an obvious liar on the particular points that suite the government.[2]

The Commonwealth tells this Court that when the "whole" of Jamison's testimony is evaluated it is clear he is a liar (C.Br. 18), yet fails to provide the Court with the transcript, thereby concealing that Jamison's testimony was forthright, and that the Commonwealth's case is substantially consistent with what Mr. Jamison conveyed save the failed identification of Mr. Gray. Mr. Jamison

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[2] In fact, the Commonwealth's self-serving attempt to both bolster and attack Jamison's testimony makes little sense. Why would Jamison, without hesitation, testify that he believed he knew who "Lawz" was, and convey his belief that he saw him days before testifying, but then intentionally fail to identify him in a photo array? What this demonstrates is that Jamison's belief is wrong and/or his ability inadequate, not otherwise. As for the Commonwealth's assertion that "it was clear that Jamison knew defendant well" (C.Br. 11), it is inaccurate. Indeed, the record is to the contrary (see Addendum).

recalled what was said and who said it differently than Shagara Williams, for example (all persons in the car offering versions that conflict in one way or another with each other). The Commonwealth ignores Shagara Williams and friends connections to Heath Street and incentive to deny making any statement in the car, and again asks the Court to act as factfinder and determine that Jamison, not the others, was lying (C.Br. 18).[3]

Further contradicting the Commonwealth's assertions of overwhelming, one-sided evidence is the government's failure to produce one shred of evidence that Mr. Gray knew of, planned or prepared to shoot anyone apart from conflicting identification evidence at the scene. The "gang card" -- relied upon by the prosecution -- was nothing more than general assertions of a status used to assert Mr. Gray had motive, without any specific evidence linking that asserted gang status to a particular feud, or to the particular shooting at issue. No evidence addressed the particular motives or actions of Mr. Gray himself. This evidence is far from overwhelming.

The Commonwealth's assertion that Mr. Jamison's inability to identify Mr. Gray was inconsequential would perhaps seem less astounding if it did not so directly contradict the Commonwealth's judgments during trial. At

[3] As noted in the attached motion (Addendum), Ms. Garvin's testimony before the grand jury was consistent with Jamison's testimony before the grand jury regarding who made a comment mentioning the word "Lawz."

trial the Commonwealth made a concerted effort (see, for example, Tr. IV/14-18) to place before the jury even the most minor conflicts between grand jury and trial testimony -- our rules having permitted those conflicts to be freely presented. It is disturbing that the Commonwealth seeks to deprive Mr. Gray in a case of such enormous consequence of some semblance of equal treatment.

3. Defense Counsel's Repeated Request that Jamison's Inability to Identify Mr. Gray Be Admitted Was Grounded in the Events *At Trial* and Clearly Evidenced an Effort to Counter, or Impeach, the Commonwealth's Reliance on Jamison's Alleged Statement in the Car. It is Inaccurate to Say that Defense Counsel's Requests For Admission Were Limited to "Substantive" Use of the Failed Identification To the Exclusion of Use for "Impeachment."

The Commonwealth confounds questions concerning how admitted evidence can be used or considered by the jury once admitted, on the one hand, with the threshold question of whether the evidence is admissible, on the other. (See C.Br. 19-23, relying on distinction between "substantive" admission and "impeachment.") During trial defense counsel repeatedly requested introduction of the failed identification as essential to the defense case to counter (or, colloquially speaking, "impeach") the government's evidence; he was not required to do more to preserve the issue. The point made in Mr. Gray's opening brief (see D.Br. 25-27) is that the evidence was clearly admissible even if the judge was to draw a distinction

regarding how it could be considered by the jury once admitted, i.e., limit its use.

It is noteworthy that on the question of admissibility in these circumstances there is no distinction between admission for "substance" versus "impeachment" made by [Prop.] Mass. R. Evidence 806 (attack on hearsay statement may be supported "by any evidence" and "[e]vidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain.). See D.Br. 25-26.[4]

The Commonwealth's further arguments grounded in this distinction between "substance" and "impeachment" are likewise baseless. The Commonwealth speculates that not seeking "impeachment" as distinct from "substantive"

[4] Nor does the substance/impeachment distinction relative to the issue at bar make much sense, where the only sensible, common-sense purpose behind the defense request to admit the failed identification was to demonstrate an inability to recognize and identify, countering or "impeaching" -- the label does not matter -- the notion that Jamison had the ability to accurately identify Mr. Gray on the day in question. In other words, this is not an issue involving a statement, for example, that can either establish an asserted matter contained therein or be admitted for some other more limited purpose. The Commonwealth's assertion that an inability to identify Mr. Gray in a photo array was not inconsistent with the alleged excited utterance at the scene (C.Br. 23) is utterly frivolous. *E.g., Commonwealth v. Pickles*, 364 Mass. 395, 402 (1973)(to be inconsistent it is enough that the statement's "implications tend in a different direction" than the trial evidence).

admission was a "reasoned strategic decision" because, had the defense used the failed identification as "impeachment," the Commonwealth would have responded by proving the "intentional falsity of the misidentification" (C.Br. 21). Contrary to these assertions, defense counsel never conditioned his repeated requests that the misidentification be admitted on what the Commonwealth could introduce in response. He wanted the information before the jury to be evaluated and weighed with all of the other evidence. Moreover, what the Commonwealth fails to recognize is that labeling introduction of the non-identification as "impeachment" versus "substantive" would have had little effect, if any, on what the Commonwealth could introduce in an effort to respond, were such an effort deemed appropriate and permitted by the trial judge (C.Br. 21-22). Simply stated, the government's ability to rehabilitate, rebut or respond -- where permissible -- is not limited to evidence labeled as "impeachment evidence" once admitted, and the Commonwealth offers no authority to the contrary. In this light, the Commonwealth's assertion that defense counsel made a "strategic decision" not to "impeach" to avoid such rehabilitation is an all-too-apparent fiction.

Finally, the Commonwealth argues that, had the failed identification evidence been admitted, the Commonwealth had evidence with which it could have persuaded the jury that Jamison was capable of identifying

Mr. Gray. The Commonwealth asks the Court to play the role of a jury, to evaluate the evidence, assess how it would have been perceived and weighed, and determine what conclusions would have been drawn. It is a -- "if they did that, we would have done this, and we would have been more persuasive, so the argument on appeal must fail" -- argument.

Setting aside Mr. Gray's vigorous disagreement with the Commonwealth's view of the evidence, and setting aside all of the ways in which Jamison' grand jury testimony was beneficial to the defense, the Commonwealth's argument reveals the breadth of its misunderstanding. **The question before this Court is not who, at the end of the day, had a better chance of persuading the jury. The question concerns whether a defendant, confronted with the government's intention to take away his liberty for life, is entitled to introduce evidence that the primary -- yet unavailable -- identification witness against him, was unable to identify him when an attempt was made.** The Commonwealth can rebut that evidence as they choose; that is what trials are made of. But if the trial is to be a fair one, a defendant's repeated request to admit such crucial evidence, as occurred here, must not be denied.

4. The Prosecutor's Opportunity and Motive Before the Grand Jury on the Sole Issue of Identification is Clear. Even if, *Arguendo*, One Assumes Otherwise, Constitutional Principles Required Admission of Jamison's Failed Identification.

As noted above, this identification case was by no means overwhelming. Where the typical test for admission of grand jury testimony concerns a prosecutor's opportunity and motive when conducting the grand jury, the fact that this case turned on a single issue -- identification -- makes such opportunity and motive obvious.[5]

Moreover, the flaw in the Commonwealth's argument is exposed by the argument itself: the Commonwealth relies on the extent to which the prosecutor did develop testimony before the grand jury as a basis to assert that Jamison was not credible (C.Br. 18). This demonstrates that the prosecutor had motive and opportunity and acted on it. The fact that Jamison was brought back a second day for purposes of making the identification (R. 20-29) should serve as evidence enough of the prosecutor's motive.

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[5] The Commonwealth inaccurately tells this Court that in *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997), the Sixth Circuit adopted a general "premise" that there is always similar opportunity and motive during grand jury proceedings (C.Br. 16). As this Court can confirm by reviewing the cases cited at pp. 955-956 of that decision, the Sixth Circuit was simply citing cases where similar motive and opportunity was found or suggested by other courts. The Commonwealth also recites three factors mentioned in the Reporter's Notes, Fed. R. Evid. 804(b)(1), and makes the conclusory statement that none are present. Mr. Gray disagrees. In any event, it appears that not a single federal or state court has relied upon these factors, and the Commonwealth cites no authority to the contrary.

Furthermore and most importantly, the Commonwealth simply fails to acknowledge the nature of this case and the issue before the Court. This case turns on identification and involves the government's reliance on an alleged out of court statement of Jamison to prove identification. Such circumstances clearly distinguish this case from the run of the mill request that grand jury testimony be admitted. In the words of defense counsel, "it is exculpatory" and "essential to my defense" (Tr. VI/51). In these circumstances, admitting the evidence was not simply a matter of discretion. *United States v. Foster, supra* at 956 (exculpatory evidence); *United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990)(evidence went to heart of defense); authorities cited at D.Br. 29-31.

5. The Commonwealth's Suggested Legal Standard For the Admission of Grand Jury Testimony at the Defendant's Requests is Grounded in Inaccurate Assumptions About the Grand Jury Process and Would Violate Due Process and Equal Protection Guarantees On Account of the Obvious Inequities.

The Commonwealth suggests that this Court should preclude the defense from using grand jury testimony under an overly strict standard that would violate due process and equal protection guarantees. *See Wardius v. Oregon*, 412 U.S. 70 (1972). *See also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Pyler v. Doe*, 457 U.S. 202, 216 (1982). Grand jury testimony is no more reliable for the prosecution than it is for the defense, yet our jurisprudence is now freely permitting trial by grand jury

transcript, as was fully evidenced in this case where the prosecutor freely bounced back and forth from trial testimony to grand jury transcripts for even the most minor apparent contradictions of tangential facts.[6]

Certainly in a case such as this, where the sole issue was identification during grand jury proceedings and at trial, a standard with any semblance of equitable treatment must permit a defendant to introduce critical, contrary testimony in the form of a failed identification. Due process and equal protection principles require a "balance of forces between the accused and his accuser." *Wardius*, at 474.[7]

II. THE PROSECUTOR'S ONGOING EFFORTS TO INTRODUCE THE VIDEO AS PART OF HIS CASE IN CHIEF AND THE ABSENCE OF ANY DEFENSE CHALLENGE TO THE NOTION OF GANG MEMBERSHIP DURING TRIAL MAKES CLEAR THE PROSECUTOR'S INTENTION AND PURPOSE WHEN EVENTUALLY PERMITTED TO PLAY THE VIDEO UNDER THE GUISE OF NEEDED "REBUTTAL." FURTHERMORE, THE *DE MINIMIS* PROBATIVE VALUE OF THE

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[6] The very notion that the grand jury transcript is nearly always reliable enough for a prosecutor but practically always inadmissible for a defendant, is grounded in grossly inaccurate assumptions about the grand jury process (see motion at Addendum, *infra*) and is already creating troubling disparate treatment in our courts of law, as occurred here.

[7] *See also, id.* at 480 (Douglas, J., concurring) ("The *Bill of Rights* does not envision an adversary proceeding between two equal parties[,]" but "is designed to redress the advantage that inheres in a government prosecution. It is not for the Court to change that balance"); *Holmes v. South Carolina, supra* at 324 (due process "is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"), and cases cited therein.

VIDEO FAR OUTWEIGHED BY UNFAIR PREJUDICE IS CONFIRMED BY THE COMMONWEALTH'S CONCESSION THAT OTHER EVIDENCE OF GANG MEMBERSHIP RENDERED THE VIDEO CUMULATIVE.

The Commonwealth suggests that Mr. Gray "misconstrues the purpose of the video's introduction, which was to rebut the defendant's suggestion that he was not a member of Heath Street at the time of the murder" (C.Br. 26-27). Mr. Gray harbors no misunderstanding. As the record makes clear, the prosecutor repeatedly sought to introduce the video in his case in chief as supposed evidence of gang membership, thereby indicating a motive and intent to kill Herman Taylor years after the video was made. At bottom, the prosecutor wanted the video in evidence because it obviously painted Mr. Gray in a very prejudicial light and, despite having nothing to do with the pertinent identification issue in the case, went a long way toward prejudicing the jury against Mr. Gray.

The notion that the video was properly admitted to "rebut" defense assertions that Mr. Gray was not a gang member (C.Br. 24) is contrary to the record and cannot withstand analysis. Indeed, the commonwealth's brief concedes defense counsel had a different purpose in asking a single question about the photo. (C.Br. 12, stating that purpose was grounded in highlighting appearance).[8]

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[8] Defense counsel conceded membership in his opening, refrained from pursuing any challenge to gang membership, and pursued a theory that did not require or focus on challenging membership. Defense counsel even made clear a

Footnote continue on next page ...

As noted in Mr. Gray's opening brief (D.Br. 40-47), even if one assumes that defense counsel's single question about a photograph justified a response, it certainly did not justify admission of the highly inflammatory rap video. The Commonwealth concedes that introduction of the video added little to no probative value by asserting "overwhelming" evidence of gang membership and characterizing the video as merely "cumulative" (C.Br. 29, 32).[9]

Finally, assuming, *arguendo*, that defense counsel opened the door to the rap video, the Commonwealth's assertion that doing so was strategic and effective advocacy is belied by the record (D.Br. 38-39). Defense counsel repeatedly represented to the judge that he was not challenging membership, conceded Mr. Gray's membership in his opening, and did not challenge membership when examining witnesses or in closing argument. In fact, sustaining the Commonwealth's assertion would require this

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willingness to stipulate to gang membership were it ever in question. Thus there was nothing to rebut (D.Br. 38-39).

[9] It bears repeating that the video itself undermines the government's claims of probative value. There is nothing in the rap video that provides a reasoned foundation to conclude it was a so called "gang pledge," or that it was the organizational statement of a 200 person gang, or that it could have served as evidence of individuals involved in a gang feud years later, or established persons willing and able to kill in furtherance of that feud. All of these assertions are speculative without any basis in fact or evidence. Nor did Mr. Gray author, produce or create the video.

Court to conclude that defense counsel pursued a strategy of no challenge to membership until a single question was asked at Volume 5 of the transcript, after which the original strategy was resumed. The Commonwealth's assertion is baseless.

III. CONTRARY TO THE ASSERTIONS OF THE COMMONWEALTH, DETECTIVE SHEEHAN'S AFTER-THE-FACT TRIAL CONSTRUCT CANNOT BE SUBSTITUTED FOR CRITERIA USED TO ENTER MR. GRAY INTO THE GANG DATABASE. ON THE SUBJECT OF WITHHOLDING GANG DISCOVERY, THE COMMONWEALTH'S POSITION EVIDENCES CIRCULAR REASONING THAT SHOULD GIVE RISE TO THIS COURT'S CONCERN.

Gang Criteria. The Commonwealth repeats claims about Det. Sheehan's supposed basis in knowledge -- seeing Mr. Gray on various occasions over many years, reviewing a video, reading documents, knowledge of a truce[10] -- and

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[10] The Commonwealth repeats Det. Duggan's self-serving claim that Mr. Gray -- despite telling police he was not a gang member -- supposedly went on to say he didn't participate in the gang truce because he was incarcerated (C.Br. 48). Though Det. Duggan's self-serving version of the interrogation is insulated from anyone's review on account of the BPD's failure to record the questioning, it just so happens to be well publicized fact, and the Commonwealth is well aware, that the truce took place during the several weeks after the shooting at issue in this case (C.Br. 7) at a time when Mr. Gray was not incarcerated (Tr. V/189-190). Mr. Gray rejects Det. Duggan's self-serving version of what Mr. Gray said as false and an effort to provide some explanation for why Mr. Gray was not involved in any truce. Det. Duggan's partiality was further reflected in his claim that he could not find anyone named Alicia Robinson of appropriate age in the state of Rhode Island, while failing to mention what he did to look. A simple internet search may have helped him were he genuinely interested in finding a result.

leaps to the conclusion that it establishes Lamory Gray's participation in a gang feud and motive to kill. These are general assertions, they demonstrate no basis to make such allegations about Mr. Gray in particular, and they are allegations that could be applied equally to a multitude of similarly situated individuals -- which is exactly what is wrong with standards being utilized by the government.[11]

The Commonwealth suggests that the defense employs "the artifice of a hypothetical person" who is entered into the gang database on limited criteria, and asserts that the defense "ignores the inconvenient reality" that Mr. Gray was classified "based on satisfying all of the potential criteria" except self admittance or identification by a parent or guardian (C.Br. 37-38). The Commonwealth is dead wrong. In fact, the inconvenient reality, ignored by the Commonwealth, consists of the fact that the government is purportedly unable, or perhaps just

[11] The Commonwealth asserts that the BPD standards are similar to some other states, but relies only on general language that fails to address how the standards are applied in practice or limited by constitutional principles. The Commonwealth further ignores the fact that many of these states require evidence of ongoing activity and organizational criminal conduct, often requiring commission of particular enumerated offenses. *See, e.g.*, Fla. Stat, § 874.03; Ill. Comp. Stat. 147/10 § 740; Kan. Stat. Ann. §21-4226(6) (and others reproduced at Comm. Appx. 73-85). Such requirements are vastly different than grounding "gang membership" on as little as being seen with someone and frequenting a particular area of the city.

unwilling, to reveal the basis upon which Mr. Gray was entered into the gang database (entry which is the source of gang allegations at trial). Detective Sheehan conceded that he had no knowledge or awareness of who entered Mr. Gray into the database or what criteria were used (D.Br. 54). Detective Sheehan's testimony is the product of an after the fact, arm-chair review of documents in pursuit of a conviction. Such a review applying the BPD gang criteria could serve as a basis to allege a motive to kill relative to any number of individuals.[12]

Discovery. On the issue of discovery, the Commonwealth knows well that there is no need to "speculate" (C.Br. 42) about what discovery the defense sought. Defense counsel requested the discovery, drafted a motion demanding it, and the prosecutor refused to provide it on the record, claiming that the documentation requested was too "burdensome" (Tr. 4/27/09 at 33; D.Br. 57; R. 60-66). It should be quite obvious to the Commonwealth that merely providing an initial incident report while withholding further information relative to

[12] The Commonwealth states that familial ties are not used to determine gang membership, ignoring the testimony at trial (see D.Br. 53). Familial ties are not a formal criteria, but are a factor used by the BPD. Quite obviously, familial ties are coextensive with being seen with a gang member in a particular "territory," which demonstrates the problem with such broad criteria. Regardless, the Commonwealth concedes that familial ties or place of residence are enough to be entered into the gang database as a "gang associate" -- a significant concession that should trouble this Court.

the variety of general incidents occurring in a certain section of the city -- ranging from personal injury to property damage -- will tell little to nothing about what the incident actually consisted of. Providing such limited discovery makes it easy for the government to claim each incident is part of a specific feud while withholding evidence of other possible culprits and disputes, which is exactly what was done in this case. As trial counsel noted (R. 60-66), further information about the incidents such as whether anyone was suspected or arrested was clearly relevant, went directly to the assertions that all of these incidents were part of a particular gang feud, and was exculpatory.

Most troubling is the Commonwealth's disturbing willingness to take a position that shows no regard for due process and basic fairness. After refusing to provide the discovery, the Commonwealth now seeks to prevail on Mr. Gray's claim by asserting that he has not "demonstrated that such follow-up evidence actually existed" or "that evidence would have tended to exculpate him," and that it would have made no difference anyway (C.Br. 43). As an initial matter, the prosecutor's basis for refusing disclosure ("burdensome"; see also Tr. 4/27/09 at 176 (admitting did not turn over everything he received)) implicitly conceded that further documentation exists. Furthermore, the Commonwealth's position -- that it may refuse to provide information below and then rely

upon the absence of that information to defeat the issues arising from its refusal -- should give this Court pause.[13]

IV. THE EXCESSIVE AND INFLAMMATORY GANG EVIDENCE IN THIS CASE WITHOUT ANY SPECIFIC FACTUAL CONNECTION TO CONDUCT OF MR. GRAY AND THE CRIME AT ISSUE RENDERED THAT EVIDENCE INADMISSIBLE. THE COMMONWEALTH'S NEW-FOUND THEORY ON APPEAL -- THAT MR. GRAY ACTED ALONE RATHER THAN WITH AND IN FURTHERANCE OF A GANG -- FURTHER HIGHLIGHTS THE ABSENCE OF NECESSARY FOUNDATIONAL EVIDENCE.

The Commonwealth seeks to set the bar so low that prosecutors can declare intent and motive to kill a particular person based solely on an alleged general status -- "gang member" -- that the Commonwealth conveniently defines, without the need to connect that status to specific facts intertwined with the crime at issue. In this case the Commonwealth has no evidence that a particular incident or event led to the shooting. There is no evidence that Mr. Gray was part of a plan or scheme to kill. There is no evidence that Mr. Gray participated at any time in a particular gang feud, or that he was aware of it. The victim was not a gang member. The Commonwealth conveniently ignores an apparent argument between the shooter and the victim.

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[13] This Court should order the Commonwealth to gather and provide for an in camera review any and all documents relating to investigations of the incidents relied upon in this case as evidence of a gang feud. A precise determination can then be made regarding exculpatory material, and whether the Commonwealth is improperly concealing information.

Despite pursuing a gang feud theory at trial, now, for the first time on appeal, the Commonwealth claims Mr. Gray acted alone, "motivated by the feud his gang was having" and, one day, went to the H-Block territory to murder a rival gang member acting alone (C.Br. 45). This newfound theory is further removed from an adequate evidentiary foundation, devoid of any evidentiary support. The Commonwealth has not a shred of evidence that Mr. Gray harbored any such personal motivation, or engaged any such personal plan, apart from his general status as a "gang member," a status easily proffered based on the Commonwealth's self-serving standards.

V. THIS COURT SHOULD NOT PERMIT THE NATURE OF A CASE TO SERVE AS THE BASIS UPON WHICH THE PROSECUTION ATTACKS WITNESS CREDIBILITY UNLESS A SPECIFIC FACTUAL BASIS HAS BEEN DEVELOPED IN SUPPORT. OTHERWISE, "FEAR" BECOMES A UNIVERSALLY APPLICABLE RESPONSE TO ANY DISAGREEMENT WITH THE GOVERNMENT REGARDLESS OF ACTUAL CIRCUMSTANCE.

Due to page limitations, Mr. Gray simply refers the Court to his opening brief.[14]

VI. THE PROSECUTOR SOUGHT TO IMPROPERLY ELICIT TESTIMONY THAT SUGGESTED MS. GARVIN RECOGNIZED MR. GRAY FROM THE DAY OF THE SHOOTING. THE COMMONWEALTH'S ASSERTIONS OTHERWISE ARE NOT TRUE TO THE RECORD.

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[14] The Commonwealth attempts to limit the challenge on appeal and suggests that Mr. Gray does not challenge the prosecutor's reference to "secret" grand jury proceedings. The Commonwealth's suggestion is baseless, failing to note that the very subject is recited in Argument Header V at D.Br. 61, and that Mr. Gray's brief cites the dialogue beginning at Tr. V/82 as well as trial counsel's further objection and request for a mistrial. See D.Br. 62-63.

Due to page limitations, Mr. Gray relies on his opening brief regarding the Commonwealth's response to Argument VI in his opening brief (D.Br. 64). He does, however, take this opportunity to note the Commonwealth's representation that the prosecutor did not seek to convey that Ms. Garvin recognized Mr. Gray from the day of the shooting during trial or closing argument (D.Br. 66-67).[15]

CONCLUSION

On all of the points and authorities in the opening and reply briefs of Lamory Gray, his convictions should be reversed.

Respectfully submitted,
LAMORY GRAY,
By his attorney,

Robert F. Shaw, Jr.

[15] Mr. Gray attaches pages from the transcript that evidence the prosecutor's repeated attempt during trial to elicit testimony insinuating that, when Ms. Garvin met Mr. Gray well after the shooting, she recognized him as the shooter, despite the fact that doing so was misleading. It was only due to the judge's persistent intervention and defense counsel's repeated objections that the prosecutor's efforts were limited. The relevant closing argument referencing comments made about persons in the photographs are also attached. (S.R.A. 2-11.)