

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

Superior  
DISTRICT COURT DEPARTMENT  
NO. 152CR 1553-66

Hearing on  
2/26/19

COMMONWEALTH

v.

DIRON CONYERS

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT'S MOTION FOR  
PRODUCTION OF INTERNAL AFFAIRS AND SELECTMEN'S RECORDS


I, Molly Schranz, state the following is true to the best of my knowledge, information and belief:

1. I am an attorney employed by the Committee for Public Counsel Services and I have been appointed to represent the Defendant in the above-entitled matter.
2. The Defendant allegedly committed the above charged offenses offenses on approximately January 2018.
3. On October 16, 2018 I was notified by Nora Allard, counsel for the co-defendant Alyce Davenport, that one of the officers involved in the case, Shawn Morin, had been fired by the Warren Police Department on May 18, 2018.
4. Mr. Morin was fired by the Town of Warren Selectman after they received a complaint about a meme he posted on the Warren Fire Department's Facebook page.
5. The meme was a clip showing a black woman smelling smoke from a fire and saying "I said, oh, Lord Jesus, it's a fire!"
6. Following a meeting of the Town of Warren Selectman, on May 16, 2018, Shawn Morin was fired on May 18 from the Warren Police Department, according to a Worcester Telegram and Gazette Article. See Exhibit 1.

7. Shawn Morin was hired several months later following an arbitration proceeding.
8. The Defendant seeks disclosure of any and all any internal affairs documents concerning Shawn Morin's termination from the Warren Police Department and subsequent rehiring by the Warren Police Department.
9. The Defendant seeks disclosure of the Town of Warren Selectman minutes from the closed executive session that led the Selectman to have Mr. Morin terminated.
10. Defense counsel reasonably believes that given Mr. Morin's termination and the resulting months during which he was fired by the Warren Police Department for posting a meme the Selectman deemed concerning enough in its attitudes towards African Americans as to terminate Mr. Morin, that there may exist additional evidence of a pattern of biased behavior by Mr. Morin towards African Americans.
11. The defendant in this case, Diron Conyers, is an African American male.
12. Defense counsel spoke with John Melander, attorney for the Commonwealth who confirmed that he intends to produce Shawn Morin as a witness at an upcoming Motion to Suppress evidentiary hearing.
13. Shawn Morin was the officer who first responded to the scene of the alleged breaking and entering and larceny and determined that there was probable cause to place a BOLO out for Alyce Davenport and Diron Conyers.
14. Pursuant to Commonwealth v. Lampron, the requested documents are not otherwise procurable reasonably in advance of trial by exercise of due diligence.
15. Pursuant to Commonwealth v. Lampron, the defendant cannot properly prepare for trial without the production and inspection of the records. Waiting to inspect them on the day of trial would unreasonably delay the trial.

16. Pursuant to Commonwealth v. Lampron, the request for the documents has been made in good faith and is not a “fishing expedition.” Counsel is not pursuing these records for discovery but for valid trial purposes already discussed.
17. “The documentary evidence sought has a rational tendency to prove [or disprove] an issue in the case.” Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989).
18. The Dwyer protocol, while mindful of the need to prevent the unnecessary piercing of a privilege, is primarily a mechanism to protect the Defendant’s right to due process, including the rights to a fair trial, the use of any relevant exculpatory evidence, and the confrontation of one’s accuser. Dwyer recognizes that the disclosure of relevant evidence promotes not simply the truth-seeking functions of the court, by the Due Process rights contained in Article 12 of the Massachusetts Declaration of Rights and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
19. Under Article 12, the Defendant has a constitutional right to the production of all favorable proofs.

Signed under the pains and penalties of perjury this 10<sup>th</sup> day of August, 2012.

  
~~David A. Michel~~ Holly Schanz  
~~BBG #082122~~ 693096

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

WORCESTER DISTRICT COURT  
NO. 1162CR

COMMONWEALTH

v.

DIRONY CONYERS

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR  
PRODUCTION OF INTERNAL AFFAIRS RECORDS

The defendant, Diron Conyers, by and through his attorney, respectfully requests any and all reports, statements of witnesses, written records and notes from which reports and statements of witnesses were created, if such notes exist, photographs, video tapes, audio tapes, tapes or recordings of any kind created by the Worcester Police Department, or any other investigative agency during any internal investigation into Shawn Morin

The defendant makes the aforementioned request in regards to a pending criminal prosecution against him in which he is charged with three counts of assault and battery on a police officer. In support of this request, the defendant submits that the information contained within the requested evidence is material and relevant to any possible claim of self-defense, to the identity of the first aggressor in the underlying incident, and to the credibility of the officer. The requested material is critically necessary to ensure the defendant's ability to present a full and fair defense.

The defendant's request for documentary evidence maintained by a third party meets the four requirements for such production set out in Commonwealth v. Lampron: (1) relevancy; (2)

admissibility; (3) necessity; and (4), specificity. 441 Mass. 265 (2004). Furthermore, the requested documentation is necessary to ensure the defendant's due process rights under Article 12 of the Massachusetts Declaration of Rights and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

## ARGUMENT

### **I. The Defendant's Motion Should Be Allowed as the Request Complies with the Protocol Set Forth in Commonwealth v. Lampron.**

Under Lampron, a request for internal records maintain by a third party must meet four requirements in order to be produced: (1) relevancy; (2) admissibility; (3) necessity; and (4), specificity. Id. Any request for records of internal investigations maintained by the Worcester Police Department must meet the aforementioned requirements. Id. As the defendant's motion satisfies these pre-trial motions requirements, the motion should be granted and this Honorable Court should order the production of all requested documentation forthwith.

#### **A. Relevance**

Evidence is relevant if it has "a rational tendency to prove or disprove an issue in the case." Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). Under Lampron, the defendant "must show that the documentary evidence sought has a 'rational tendency to prove or disprove an issue in the case.'" Id. at 270, quoting Commonwealth v. Fayerweather, 406 Mass. 78, 83 (1989). Records that bear "on a critical fact in the defendant's case" are relevant and should be disclosed. Commonwealth v. Reed, 444 Mass. 803, 808 (2005). The requested records are relevant to many issues in the instant case, and their production is essential to the full and fair presentation of the defense's case. Excessive use of force and self-defense are closely related claims, and are relevant to each other. See Commonwealth v. THEs, 53 Mass. App. Ct.

719 (2002). Any investigations into the officer's bias towards African Americans would be relevant to his credibility, especially in forming probable cause for a stop and search of the defendant where the defendant, as in this case, is African American. Any records pertaining to misleading, incomplete, inaccurate or false reporting are relevant to the credibility of the complaining and arresting officers, and may be fertile grounds for impeaching these Commonwealth witnesses at trial.

Here, the internal records of investigations into the three arresting officers bear on critical facts in the defendant's case: namely, whether there was probable cause that Mr. Conyers was involved in the alleged breaking and entering he is charged with and the officer's states of mind at the time of the incident, and what potential biases may have shaped the officer's conduct at the time of the alleged incident.

#### **B. Admissibility**

The Supreme Judicial Court held in Commonwealth v. Reed that “[w]hen a party cannot know for certain the contents of a requested document, it is appropriate for a court to order the issuance of a summons pursuant to rule 17(a)(2) on a showing of the relevance of what the document is likely to contain.” 444 Mass. at 808. Furthermore, the SJC stated that “[a] defendant is not required to state with certainty the precise manner in which a [document] would be employed at trial.” Id. Without knowing for certain what the requested internal affairs records contain, it is impossible for defense counsel to state with certainty the precise manner in which the evidence contained in these records will be used at trial. Nonetheless, there are several potential avenues for the admission of these records into evidence, whether for the purpose of impeaching Commonwealth witnesses or for advancing the defense's case in chief.

The documents requested are likely to be admissible under one of several exceptions to the rule against prior bad act testimony: “in support of a claim of self-defense, (1) the accused may offer evidence ... of the victim’s reputation for violence, of specific instances of the victim’s violent conduct, or of statements made by the victim that caused reasonable apprehension of violence on the part of the accused”; and (2) “where the identity of the first aggressor is in dispute, the accused may offer evidence of specific incidents of violence allegedly initiated by the victim.” MASSACHUSETTS GUIDE TO EVIDENCE, Sec 404(a)(2). See Commonwealth v. Adjutant, 443 Mass. 649 (2005); Commonwealth v. Pring-Wilson, 448 Mass. 718, 736 (2007) (prior bad act of the victim admissible as evidence “for purposes of illuminating the identity of the first aggressor.”). The requested documents are also admissible under a character evidence exception that evidence of other crimes or bad acts may be admissible as proof of motive, intent, preparation, plan, knowledge, or absence of mistake or accident. MASSACHUSETTS GUIDE TO EVIDENCE, Sec 404(b).

Further, any prior bad acts of the arresting officers in the present case are not merely functions of their jobs. Here, Shawn Morin was fired for posting a meme that a community member and the Town Selectman found to be so concerning in its attitudes towards African Americans that it led to Mr. Morin being fired. Given the severity of the outcome, it is reasonable to believe that there may be additional evidence of biased behavior by the officer towards other African Americans and that this was not an isolated incident. Any internal investigation into the conduct of these officers is necessary to an analysis of their conduct in the arrest at issue in the present case.

Furthermore, the requested documentation may lead to information that the report by Mr. Morin was inaccurate, incomplete, misleading or false reporting and would be admissible on

cross-examination for impeachment purposes. Reputation evidence can be used to impeach a witness as to his truthfulness or untruthfulness. MASSACHUSETTS GUIDE TO EVIDENCE, Sec 608(a). “On cross-examination, inquiry is allowable into relevant specific instances of conduct for impeachment purposes.” MASSACHUSETTS GUIDE TO EVIDENCE, Sec 405(b). As the defendant’s questioning of the officers would occur during cross-examination, any documentary evidence showing instances of misconduct would be admissible to impeach the officers’ testimony. Here there are significant questions as to the veracity of the police report and the truthfulness of the officers regarding the report, which likely provides an additional ground of admissibility and impeachment. While “specific instances of misconduct showing the witness to be untruthful are not admissible for the purpose of attacking or supporting the witness’s credibility,” many instances of such misconduct would speak to the witness’s reputation, which is admissible for attacking the credibility of the witness. MASSACHUSETTS GUIDE TO EVIDENCE, Sec 608(b).

### **C. Necessity**

The documents requested are necessary. Production of documents maintained by a third party is permissible when “a party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial.” Lampron, 441 Mass. at 269, quoting United States v. Nixon, 418 U.S. 683, 699–700 (1974). The defendant has an “unquestioned right” to “obtain relevant evidence that bears of the question of his guilt or innocence.” Commonwealth v. Mitchell, 444 Mass. 786, 795 (2005). Defendant also has a right to potentially exculpatory evidence under the rules outlined in Brady.

### **D. Specificity**



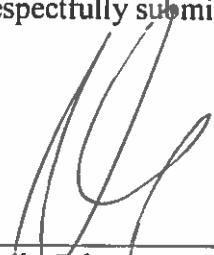
The request was also specific in the documentation to be produced, in that it only requests documentation concerning this specific officer and the grounds for his termination, narrowing down the requested paperwork to very specific types. Under Commonwealth v. Reed, the Court held that “[w]hen a party cannot know for certain the contents of a requested document, it is appropriate for a court to order the issuance of a summons pursuant to rule 17(a)(2) on a showing of the relevance of what the document is likely to contain.” 444 Mass. at 808. The court also stated that “[a] defendant is not required to state with certainty the precise manner in which a [document] would be employed at trial. Id.

Here, the defendant cannot know for certain what the internal investigation records contain, but that does not preclude the production of those documents. The documents themselves, upon the showing of their contents, would self-specify what portions are relevant to the defense. Production would not be a fishing expedition” that Rule 17 prohibits, but rather are necessary to the defendant’s ability determine whether a particular fact critical to the defense’s case could be proven or disproven: whether or not Shawn Morin has a bias towards African Americans that may have impacted his investigation in the case. Lampron, 441 Mass. at 269. The exact nature of the material requested is clear: any and all internal affairs records of the three arresting officers, particularly with regards to excessive use of force, instances of initial aggression, and the completeness and credibility of the officers’ official reports. The defense’s record request pertains to specific internal affairs records of only this officer in the Worcester Police Department, and therefore is specific enough to satisfy this prong of the Lampron requirements.

#### CONCLUSION

For the above-mentioned reasons, the defendant respectfully requests that this Honorable Court grant this motion and order the production of all requested internal affairs records and records of the Town of Warren Selectman executive session concerning Shawn Morin's termination.

Respectfully submitted,



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Dated:

1/11/9

## Warren policeman fired over meme will file grievance

By Tara Vocino, Correspondent

Posted Jun 6, 2018 at 8:43 PM

Updated Jun 7, 2018 at 6:27 PM

WARREN - Selectmen fired a town police officer last month after he admitted he posted a meme on the Fire Department's Facebook page that could be viewed as insensitive.

Shawn Morin, who was employed as a police officer by the Warren Police Department for 23 months, admitted to posting a meme as a comment on a Fire Department post on Facebook that said firefighters were going to a two-alarm building fire on North Street on May 2. The meme is a static picture based on a video clip on YouTube in which a black woman, in a TV news segment about a different fire in an unidentified locale, describes waking up to the smell of smoke and says, "I said, oh, Lord Jesus, it's a fire!"

Someone complained about the posting in an email to the Board of Selectmen, according to Mr. Morin.

Mr. Morin was not on duty at the time he posted the meme.

Losing his job "came as a complete shock to me," Mr. Morin said in an interview Monday night. "According to my letter of termination, it was solely due to the meme."

"The meme is from that (video) link, which is years old and is not racial or sexual," resident Jim Gagner said Wednesday. "It's just funny." He is a firefighter in town but said later he was not speaking for the Fire Department.

Mr. Morin indicated he will file a grievance.

At Tuesday night's meeting of the Board of Selectmen, resident Megan Lafko asked selectmen if they can prohibit freedom of speech and violate First Amendment rights. She said town money was being wasted on this issue and other Police Department pursuits.

"I am requesting on behalf of the town to rehire the police officer and just do the right thing,"

Ms. Lafko said. "Put an end to it and do what is right."

She was among about 60 people who attended the meeting. None spoke against Mr. Morin.

Selectmen said Mr. Morin was still in a probationary period for new hires so they were allowed to end his employment.

But Mr. Morin said the probation period is 12 months. Mr. Morin said he marked his two-year job anniversary on Memorial Day.

At Tuesday's meeting, the board decided that Mr. Morin and the Warren Police Union will go before an executive session of the Board of Selectmen with a grievance at 6 p.m. next Tuesday.

According to police union president Jeffrey Von Dauber, a Warren police officer who was at Tuesday's meeting to seek Mr. Morin's reinstatement, the three selectmen voted in executive session May 16 to terminate Mr. Morin's employment, and he was fired May 18. Officer Von Dauber said he wanted Mr. Morin reinstated with back pay, including compensation for missed details and lost overtime.

Marc Richard, chairman of the Board of Selectmen, said in response to Ms. Lafko's remarks that this is the way they do business when a complaint arises.

"We had concerns," Mr. Richard said. "We don't target the Police Department. Everything to do with town business is public record. That's why I personally don't do email or Facebook. I don't own a cellphone. The social media policy has turned into a nightmare."

After Tuesday's meeting, Mr. Morin said an unnamed resident had told the selectmen about the meme by email. He wasn't sure who it was. He went on to say that he intended the meme as a joke, and that it was in reference to a charity police-fire competition that Mr. Morin was hosting at Dean Park. He said the fundraiser had to be canceled as a result of his firing. No one at the meeting mentioned the racial aspect of the meme.

"I have a good rapport with the Fire Department," Mr. Morin said. "However, it was assumed by the resident that I meant it to harm."

Fire Chief Adam Lavoie said in a separate interview Tuesday morning that he can't give a personal opinion on an ongoing investigation with the selectmen and police union. Chief Lavoie added that the intent of the Fire Department's Facebook page is to keep the public aware of their activities and involvement in the community and serves as a way to provide safety information.

"Our Facebook page is a public page not directly managed by the town; however, our administrators monitor the content regularly and remove comments occasionally with the intent of always maintaining a professional and appropriate public forum," Chief Lavoie said. "We do not allow the general public to post anything to our page and monitor the comment section continuously."

Chief Lavoie said the meme posted by Mr. Morin was deleted from the page, as was another comment.

In a separate interview Tuesday, Police Chief Bruce Spiewakowski, after seeing the meme, said he believed that better judgment could have been used, and he said he can see how it could be construed as insensitive to the people affected by the Warren fire May 2. According to Firefighter Gagner, the fire victims weren't black.

"We strive to be empathetic and responsive to the needs and expectations of our community," Chief Spiewakowski said. "In looking at this issue from a standpoint of how it was posted and interpreted, I think that it lacked empathy, and it could affect the public respect of the department, which would be detrimental towards our mission and goals."

Chief Spiewakowski said he didn't receive any formal complaints about the posting, but that in looking back at the Fire Department page he saw that meme postings are a rarity.

When asked whether he has a say in Mr. Morin's case, Chief Spiewakowski answered that he hasn't seen all the information or received input from the people affected and concerned, and therefore, he could not comment on how he would have dealt with it.

Officer Von Dauber said Wednesday the police chief's role in the case is up to the selectmen.

Besides organizing the police-fire competition, Mr. Morin was co-organizer of the Civilian Police Academy with Officer Joseph A. LaFlower.