No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018-2019

JOSE HERNANDEZ,
Petitioner,

-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment is violated where, in reviewing a defendant's a Fourteenth Amendment Due Process violation claim under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, based on the prosecution's failure to disclose favorable evidence to a defendant facing trial, an appellate court applies a prejudice standard requiring a defendant seeking reversal of a conviction (1) to demonstrate a substantial risk that the jury would have reached a different conclusion if the undisclosed evidence had been admitted at trial; and (2) to demonstrate that the undisclosed evidence is relevant for reasons other than the impeachment of a witness.

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Petitioner Jose Hernandez respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

CITATIONS TO THE OPINIONS BELOW

The Supreme Judicial Court for the Commonwealth of Massachusetts ("SJC") affirmed petitioner Jose Hernandez' conviction and sentence in the Massachusetts Superior Court in a criminal case, which judgment was entered on January 9, 2019. The opinion of the SJC affirming Mr. Hernandez' conviction and sentence is reported as Commonwealth v. Hernandez, 481 Mass. 189, 113 N.E.2d 828, 2019 Mass. LEXIS 4 (2019). A copy of the opinion below of the SJC is attached hereto as Appendix A. The petitioner timely filed a *Petition for Rehearing* (attached hereto as Appendix B) in the SJC by mail on January 22, 2019, which was docketed in the SJC on January 23, 2019. See *Docket Entries*, Commonwealth vs. Jose Hernandez, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (attached hereto as Appendix E) (hereinafter, "*Supreme Judicial Court Docket Entries*"), *at 3*; *Petition for Rehearing*, Commonwealth v. Jose Hernandez, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (filed January 22, 2019; docketed January 23, 2019, as paper #56) (Appendix B); Mass. R. App. P. 27(a); compare Sup. Ct. R. 13(3). On March 6, 2019, the Supreme Judicial Court denied the defendant's *Petition for Rehearing.* See *Notice of Denial of Petition for Rehearing,* Commonwealth vs. Jose Hernandez, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (March 6, 2019) (Appendix C) ("The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied."); *Supreme Judicial Court Docket Entries* (Appendix E), at 3. This petition follows.

STATEMENT OF JURISDICTION

The SJC affirmed petitioner Jose Hernandez' convictions and sentence in the Massachusetts Superior Court in a criminal case, which judgment was entered on January 9, 2019. The opinion of the SJC affirming Mr. Hernandez' conviction and sentence is reported as Commonwealth v. Hernandez, 481 Mass. 189, 113 N.E.2d 828, 2019 Mass. LEXIS 4 (2019) (attached hereto as Appendix A). Mr. Hernandez timely filed a *Petition for Rehearing* on January 22, 2019 (attached hereto Appendix B). *See* Mass. R. App. P. 27(a) (as amended effective July 1, 1991) (petition for rehearing must be filed within fourteen days of the rescript). The order denying Mr. Hernandez' petition for rehearing is attached hereto as Appendix C. Upon consideration by the SJC, said petition for rehearing was denied on March 6, 2019. *Notice of Denial of Petition for Rehearing,* Commonwealth vs. Jose Hernandez, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (March 6, 2019) (Appendix C) ("The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied."); *Supreme Judicial Court Docket Entries* (Appendix E), at 3. Jurisdiction in this Court is conferred by 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

CONSTITUTIONAL PROVISIONS

1. Amendment VI of the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defence.

2. Amendment XIV of the Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

3. Article XII of the Declaration of Rights, Constitution of Massachusetts

Art. XII. Prosecutions Regulated; Jury Trial.

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

STATUTES

4. 28 U.S.C. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. . . .

5. Massachusetts General Laws, chapter 265, section 1.

§ 1. Murder.

Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

6. Massachusetts General Laws, chapter 278, section 33E.

§ 33E. Capital Cases --- Appeals.

In a capital case as hereinafter defined the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a verdict of a lesser degree of guilty, and remand the case to the superior court for the imposition of sentence. For the purpose of such review a capital case shall mean: (i) a case in which the defendant was tried

on an indictment for murder in the first degree and was convicted of murder in the first degree; or (ii) the third conviction of a habitual offender under subsection (b) of section 25 of chapter 279. After entry of the appeal in a capital case and until the filing of the rescript by the supreme judicial court motions for a new trial shall be presented to that court and shall be dealt with by the full court, which may itself hear and determine such motions or remit the same to the trial judge for hearing and determination. If any motion is filed in the superior court after rescript, no appeal shall lie from the decision of that court upon such motion unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court.

RULES

7. Rule 10, Rules of the Supreme Court of the United States ["Sup. Ct. R. 10"]

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: . . . . **(b)** a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; **(c)** a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. . . .

8. Rule 13(3), Rules of the Supreme Court of the United States. ("Sup. Ct. R. 13(3)")

Rule 13. Review on Certiorari: Time for Petitioning

. . . .

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment. . . .

9. Rule 27(a), Massachusetts Rules of Appellate Procedure (as amended, effective July 1, 1991) ("Mass. R. App. P. 27(a) (as amended effective July 1, 1991)").

RULE 27. PETITION FOR REHEARING

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing should be filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. . . . (effective July 1, 1991).

10. Rule 27(a), Massachusetts Rules of Appellate Procedure (as amended, effective March 1, 2019) ("Mass. R. App. P. 27(a) (effective March 1, 2019)").

RULE 27 MOTION FOR RECONSIDERATION OR MODIFICATION OF DECISION.

(a) Time for Filing; Content; Answer; Action by Court if Granted. Within 14 days

after the date of the decision of the appellate court, any party to an appeal may file a motion for reconsideration or modification of decision unless the time is shortened or enlarged by order. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present. Oral argument in support of the motion will not be permitted, except by order of the appellate court which decided the appeal. The motion shall be decided by the quorum or panel of the appellate court which decided the appeal. . . . (effective March 1, 2019).

STATEMENT OF THE CASE [1] [2] [3]

On February 3, 2010, an Essex County grand jury returned an indictment charging petitioner Jose Hernandez with first degree murder, G. L. c. 265, § 1, in the death of Roberto Plaza (indictment no. ESCR2010-000143-001). (S.R.A.1-2) On March 20-23, 26-28, 2012, Hernandez was tried in Essex Superior Court before the Hon. David A. Lowy, J., and a jury. (S.R.A.414-415) On March 28, 2012, Hernandez was found guilty of first degree murder by

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[1] Citation to *Defendant's Record Appendix* refers to the Record Appendix filed in the Supreme Judicial Court as an attachment to *Defendant's Brief*. *Defendant's Record Appendix* is hereinafter cited as "(R.A.(page number))".

[2] Transcript, Commonwealth of Massachusetts v. Jose Cotto Hernandez, Essex Superior Court No. ESCR2010-0143, "Jury Trial Day 1"; March 21, 2012 (Court Reporter: Paula Pietrella) (Pages: 189); id., "Jury Trial Day 2"; March 22, 2012 (Pages: 210); id., "Jury Trial Day 3"; March 23, 2012 (Pages: 117); id., (Jury Trial Day 4); March 26, 2012 (Court Reporter: Patricia S. Flaherty) (Pages: 1-216); id., "Jury Trial – Day 5," March 27, 2012 (Court Reporter: Paula Pietrella) (Pages: 122); id., "Jury Trial – Day 6," March 28, 2012 (Pages: 23)(hereinafter, "(Tr. Vol.(volume number)/(page number)"; id., "Motion for New Trial," December 21, 2017; Before: Feeley, J. (Court Reporter: Kathleen L. Canty) (Pages: 1-50)(hereinafter, "12/21/2017 Hrg./(page number)."

[3] *Defendant's Supplemental Record Appendix* is cited as "(S.R.A.(page number))". The *Supplemental Addendum* to the *Supplemental Brief* is cited as "(S.A.(page number)".

deliberate premeditation and was sentenced to life imprisonment without parole, with 704 days of jail credit. (S.R.A.415) Mr. Hernandez filed a notice of appeal in Essex Superior Court on March 29, 2012. *Docket Entries*, Commonwealth v. Jose Hernandez, Essex Superior Court No. 1077CR00143 (ESCR2010-00143) (Appendix D) (hereinafter, "*Superior Court Docket Entries*"), at 5; (S.R.A.415) This case was entered in the SJC on June 5, 2013. *Supreme Judicial Court Docket Entries*, (Appendix E), at 1. On December 5, 2014, the petitioner filed by mail *Defendant's Brief and Record Appendix* and *Impounded Record Appendix*, docketed in the SJC on December 8, 2014. *Supreme Judicial Court Docket Entries* (Appendix E), at 2.4 After briefing, oral argument was scheduled for May 8, 2015. (S.R.A.409) On May 7, 2015, Hernandez' motion to continue oral argument and for a stay to investigate potential motion for new trial issues was allowed. See *Supreme Judicial Court Docket Entries* (Appendix E), at 2.[5] (S.R.A.409) On July 24, 2015, Hernandez filed by mail in the SJC his *Motion for a New Trial Pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure,* with *Memorandum of Law in Support of Motion for a New Trial Pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure, Affidavit of Attorney David H. Mirsky* with attached exhibits, docketed and remanded to Essex Superior Court on July 27, 2015. See *Supreme Judicial Court Docket Entries* (Appendix E), *at 2;* (S.R.A.3-294,409) The Commonwealth filed its opposition to the motion for a new trial on January 15, 2016. See *Superior Court Docket Entries* (Appendix D), at 7; (S.R.A.295-301)

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[4] The issues raised in the petitioner's initial brief are not the subject of this petition.

[5] See Commonwealth v. Hernandez, 481 Mass. 189, 195 (2019) (Appendix A, at 6) ("Prior to oral argument on the defendant's direct appeal, the defendant's appellate counsel became aware that Koester had work-related performance issues on his record and had since resigned from the State Police crime laboratory (crime lab). Oral argument was postponed to allow the defendant to file a motion for a new trial based on this information.").

On June 17, 2017, petitioner Hernandez filed a reply memorandum and supplemental affidavit with attached exhibits. *Superior Court Docket Entries*, at 7; (S.R.A.302-383) After the trial judge, Lowy, J., was elevated to the SJC, this case was reassigned to Feeley, J., who heard argument on December 21, 2016 and denied the petitioner's motion for a new trial on December 27, 2016. *Superior Court Docket Entries* (Appendix D), at 7; (S.R.A.384-405); Hernandez filed a notice of appeal in Essex Superior Court on December 27, 2016. *Superior Court Docket Entries* (Appendix D), at 7-8. (S.R.A.406) The petitioner's appeal from Essex Superior Court's denial of his motion for a new trial was docketed in the SJC on May 18, 2017. On April 6, 2018, the petitioner filed by mail in the SJC, *Defendant's Supplemental Brief and Supplemental Record Appendix*, docketed in the SJC on April 9 2018. On September 21, 2018, the petitioner filed by mail in the SJC, *Defendant's Supplemental Reply Brief*, docketed in the SJC on September 24, 2018. Oral argument was heard before the SJC on November 9, 2018. On January 9, 2019, the SJC issued its full opinion (attached hereto as Appendix A) affirming the judgment and denying the motion for a new trial. *Supreme Judicial Court Docket Entries* (Appendix E), *at 3*. The petitioner timely filed a *Petition for Rehearing* (attached hereto as Appendix B) in the SJC by mail on January 22, 2019, which was docketed in the SJC on January 23, 2019. The petitioner's *Petition for Rehearing* was denied by the SJC on March 6, 2019. See *Notice of Denial of Petition for Rehearing*, Commonwealth vs. Jose Hernandez, Supreme Judicial Court for the Commonwealth of Massachusetts No. SJC-11467 (March 6, 2019) (Appendix C); *Supreme Judicial Court Docket Entries* (Appendix E), at 3.

STATEMENT OF FACTS

A. Petitioner's claim of self-defense.

In Massachusetts, The evidence is sufficient to raise the issue of self-defense where it warrants at least a reasonable doubt that the defendant:

> (1) had reasonable ground to believe that he was in imminent danger of death or serious bodily harm, from which he could save himself only by using deadly force, (2) had availed himself of all proper means to avoid physical combat before resorting to the use of deadly force, and (3) used no more force than was reasonably necessary in all the circumstances of the case.

Commonwealth v. Harrington, 379 Mass. 446, 450 (1980).

Petitioner Jose Hernandez testified:

Hernandez knew decedent Roberto Plaza for about five years; they would drink and use drugs. About a week before June 7, 2009, Plaza became threatening toward Hernandez, he would talk to Hernandez in a very threatening manner because Plaza wanted drugs and Hernandez didn't have any drugs. Hernandez told Plaza not to come to his house because Plaza was threatening him. (Tr. Vol. 4/110-113) On June 7, 2009, Roberto Plaza was standing outside the defendant's door, arguing with the defendant, saying, "'I wanted something,' but that's all he said." Plaza and the defendant were both loud. The defendant's friend Jorge Santiago, a/k/a David Santiago (Tr. Vol. 2/120), asked Plaza to "Please leave. Leave[.]" Tr. Vol. 2/109-116, 141-143. When the defendant finally opened the door, "he said to Roberto to leave, he doesn't want him there[.]" Plaza didn't leave when he was asked to leave, he went down the stairs, saying he wanted something; he was yelling and using profanity at Hernandez. They were arguing: Plaza was saying he wanted something, and Jose Hernandez was telling him to leave; they were both yelling and using profanity.

At some point, Plaza finally left. (Tr. Vol. 2/140-143) When Plaza left, Hernandez went inside the porch with Santiago. Hernandez said, "Do you think he's left? He must have left already," Santiago went and checked, and said, "No, he's still there, and the car is on."

(Tr. Vol. 4/121-122) Approximately 3 to 5 minutes had passed between the time Hernandez had closed the door on Plaza and the time Plaza was seen sitting outside. Hernandez decided to go and tell Plaza to leave because Plaza was putting him in a bad situation with his neighbors by screaming and talking in a threatening way. Plaza's car was parked in front of the house of a neighbor. Jose left his house and walked to where Plaza was parked; Plaza's car was on. (Tr. Vol. 4/123-125) When Jose got to the passenger window, he told Plaza,

> Man, you just have to leave because this is not good with my relationship with my neighbor, you're going to cause me problems.

(Tr. Vol. 4/125) When Jose was having this discussion, one hand was on his hip, the gun Santiago had given to Jose was in his back pocket, and Plaza said to Jose:

> **Okay, I'm going to leave, but don't give me your back because if you do, I'm going to kill you. You know what, I'm going to kill you right now** (emphasis added).

(Tr. Vol. 4/125-126) When Plaza said that, Jose was kind of frozen and didn't know where to move. Plaza went towards the passenger seat, without saying anything, and Plaza grabbed something that the defendant thought looked "**kind of shiny** (emphasis added)." When Plaza did that, Hernandez thought Plaza was going to kill him, so Hernandez took the revolver and shot, but it was not his intention to shoot Plaza, he just shot. Right before Hernandez pulled out the gun, he saw Plaza reach for something and thought Plaza was taking out a weapon, a gun, and he thought Plaza was going to kill him. (Tr. Vol. 4/126-128) Commonwealth cooperating witness Jorge Santiago, a/k/a David Santiago **could not see Plaza at the point when he was shot "because it was dark** (emphasis added)." (Tr. Vol. 2/120) Santiago testified: that on the night of June 7, 2009, an argument was taking place between Hernandez and Roberto Plaza on Hernandez' porch, it went down the stairs, to the sidewalk, and

continued there, they were both loud, and Santiago said to Plaza, "Please leave. Leave[.]" (Tr. Vol. 2/114-116) Plaza seemed desperate (Tr. Vol. 2/145) Plaza got in his car, which was parked right in front of the house, Plaza's car was on and was idling, the argument continued, and Hernandez said, "Get the fuck out of here." (Tr. Vol. 2/116-117) Santiago testified he told Plaza, "Roberto, it's like" – and, Plaza said, "Okay, I'm leaving then. I'm leaving", and that a gun went off from the passenger side. Hernandez had the gun and pulled the trigger. The gun was facing inside the vehicle. Santiago couldn't see Plaza at this point "because it was dark." (Tr. Vol. 2/118, 120)

Medical examiner Dr. Henry Nields performed an autopsy on Roberto Plaza on June 9, 2009. (Tr. Vol. 3/17-19) He found a projectile inside Plaza. The cause of death was a gunshot wound to the torso, with perforations of the heart, liver, and stomach. In Nields' medical opinion, **it was certainly possible that the deceased, when he was shot, might have been leaning forward. Evidence showed that when Roberto Plaza was shot he might have been leaning forward.** (Tr. Vol. 3/16-23, 37-38) Plaza had alcohol and opiates in his system. (Tr. Vol. 3/28) Dr. Nields' testimony corroborates the defendant's testimony that Plaza was reaching for something when he was shot. See Tr. Vol. 4/126-128.

B. Evidence collection.[6]

State Trooper James Crump, with the Crime Scene Services Section of the Danvers laboratory, responded to the scene of Plaza's vehicle on June 7, 2009; he took photographs of the exterior and through the windows. (Tr. Vol. 4/78-81) The car was towed to [Coady's]

[6] The reports referenced in this section ("Maxwell Report" and "Koester Criminalistics Report") were available to trial counsel, but the significance of the evidence therein was masked by the Commonwealth's failure to disclose to the defendant that the quality of Erik Koester's work was under the suspicion and scrutiny of the Crime Lab.

Towing in Lawrence, where Crump documented, photographed, and assisted in examining and searching the vehicle. (Tr. Vol. 4/81-84) **Crump did not recover the evidence.** (Tr. Vol. 4/91-94)

In the evening of June 7, 2009, State Police Sgt. Stephen O'Connor responded to the crash of the decedent's Oldsmobile, and worked with Erik Koester and others at the scene. (Tr. Vol. 3/40-42) **O'Connor viewed the vehicle that crashed and its interior, and made note of items inside that car, including a baseball cap on the front passenger's floor, a cigarette lighter, a cell phone, and a vehicle security device called a "club."** A club is "a red metal bar type of thing that attaches to the steering wheel to prevent or to help prevent your vehicle from getting stolen." The red metal vehicle security device, the club, was on the front passenger floor. O'Connor was not sure if the cell phone was on the passenger or the driver's floor, "but **the hat and the club were definitely on the passenger's front floor** (emphasis added)." (Tr. Vol. 3/47-48) **From the angle at which the photograph Trial Exhibit #12[7] was taken, you can't see the cell phone that was found in the front seat and you can't see the security bar that was found in the front seat.**[8] (S.R.A.77-78) **There were no pictures of what was underneath the front seat. O'Connor did not search this vehicle.** O'Connor asserted that "Crime Scene Services" searched underneath the front passenger seat, "when it was processed." (Tr. Vol. 3/57)

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[7] Trial Exhibit #12 (S.R.A.77-78) is attached hereto as Appendix F.

[8] Trial Exhibit #12 (Appendix F) becomes an alarming document when viewed and considered in light of the new Erik Koester evidence. Trial Exhibit #12 does not show pertinent items that were present in Mr. Plaza's car and yet it was presented as documentation of what the decedent's car looked like at the crime scene. Additionally, the items themselves were not collected. See infra Maxwell Report, at 2 (Mirsky Aff., at ¶ 9; Mot.Ex.6, at 2 (S.R.A.98)).

On June 7, 2009, at approximately 9:25 p.m, Lawrence police officer Carleton Trombly responded to the area of the parking lot of Rita Hall, where Plaza's vehicle had gone through the fence and into a couple of parked motor vehicles. (Tr. Vol. 2/69-72) Trombly looked into the interior of the car and recalled only seeing blood on the steering wheel. **Trombly never did an exhaustive search of the interior of the vehicle and did not know if anyone else did.** He did not do a search around the perimeter of the parking lot or on Hampshire Street to determine if there was a firearm on the street. (Tr. Vol. 2/87-89)

Erik Koester testified that he was a crime scene analyst for the State Police crime laboratory, that **as a crime scene analyst he supervised a team of crime scene responding forensic scientists, that he supervised three counties and was on call 24 hours a day, every day, and that when a crime scene came in, he was notified and then dispatched the appropriate personnel.** Koester testified that **if it was a complicated scene, such as a homicide, Koester would supervise the scene, make sure the evidence was being processed, collected.** On June 7, 2009, Koester responded to Hampshire Street in Lawrence, accompanied by two chemists. When they first arrived, they found a brown Cutlass [Mr. Plaza's vehicle] that was smashed into a fence that was nearby the parking lot of 490 Hampshire Street. (Tr. Vol. 3/67-69) Koester and the others did an investigation into the surrounding parking lots, looking for anything of what he considered evidentiary value. **They did not find anything.** The Oldsmobile was towed to Coady's tow yard in Lawrence, for further examination. **Koester didn't do that examination.** Koester came to the scene of the accident and examined the exterior of the motor vehicle. **Koester did not thoroughly examine the interior of the motor vehicle and did not go to the location where the**

vehicle was towed to do a more thorough examination of the interior of the vehicle. (Tr. Vol. 3/69-70, 74)

Motion Exhibit 6 ("Mot.Ex.6"), is a copy of a 3-page Crime Scene Report, dated July 6, 2009, by Justin L. Maxwell, Chemist III, of the State Police Crime Laboratory, reporting on the examination of materials in connection with the shooting of Roberto Plaza in Lawrence on or about June 7, 2009. Mirsky Aff., at ¶ 9; Mot.Ex.6, at 1-3 ("Maxwell Report"). (S.R.A.97-99) The Maxwell Report indicates that on June 7, 2009, Chemist Kerrie Donovan, Koester, and Chemist Justin L. Maxwell, reported to 490 Hampshire Street in Lawrence at approximately 12:15 a.m. on June 8, 2009, where they met with Trooper Stephen J. O'Connor, Trooper James C. Dowling, Lieutenant Michael Holleran, Trooper James Crump, Trooper Michael O'Connor, and Trooper Brian Lombard, and examined a 4-Door Oldsmobile Cutlass vehicle that was found partway through the fence separating the parking lot of 490 Hampshire Street from the sidewalk alongside Hampshire Street. Mot.Ex.6, at 1-2. **The Maxwell Report indicates that when the Oldsmobile Cutlass was examined at Coady's Towing in Lawrence at approximately 1:30 a.m., "On the front passenger side floor was a baseball cap, a cell phone and a steering wheel lock", and that of these items found on the passenger side floor, the cell phone and the steering wheel lock were not "collected from the scene and transported to the Crime Laboratory** (emphasis added)". Mirsky Aff., at ¶ 9; Mot.Ex.6, at 2. (S.R.A.98) **The Maxwell Report indicates that Koester was involved in evidence collection regarding Plaza's vehicle.** See S.R.A.97-99.

Motion Exhibit 7 ("Mot.Ex.7"), is a copy of a 3-page Criminalistics Report, dated July 20, 2009, by Erik Koester, Chemist III, of the State Police Crime Laboratory, reporting

on the Examination of Materials in Connection with a Fatal Shooting in Lawrence on or about June 07, 2009 ("Koester Criminalistics Report"), which the defendant's undersigned counsel, Attorney David H. Mirsky, obtained from the trial file documents provided by the defendant's trial counsel, Attorney Aviva E. Jeruchim. Mirsky Aff., at ¶ 13; Mot.Ex.7, at 1-3. (S.R.A.1011-103) The Koester Criminalistics Report indicates that **of the items of evidence pertaining to the June 7, 2009 shooting of Roberto Plaza that were examined, including items specifically labeled as having been obtained from the "Cutlass", no cell phone or steering wheel lock was examined.** See Mirsky Aff., at ¶ 10; Koster Criminalistics Report (Mot.Ex.7, at 1-3;S.R.A.101-103) **This report indicates that Koester was involved in evidence collection regarding Plaza's vehicle.** See id.

C. Significance of Evidence Collection Supervisor Erik Koester.

At trial Erik Koester testified as to his own purported proficiency and credibility in his position at the Massachusetts State Police Crime Laboratory: that he would act as a technical liason between the crime lab and various investigating agencies, that he provided technical advice when needed, that he also worked in the Criminalistics Unit on evidence collected at the crime scene or submitted by investigating agencies, and testified to his observations in court; and, most importantly, that as a supervising crime scene analyst at the State Police Crime Laboratory he supervised a team of crime scene responding forensic scientists, in three counties, that he was on call 24 hours a day, every day, that when a crime scene came in he was the person who dispatched the appropriate personnel, and that if it was a complicated scene, such as a homicide, he would supervise the scene and "**make sure that evidence is being processed, collected** (emphasis added).". (Tr. Vol. 3/67-68)

Koester testified that on June 7, 2009, he was called to Hampshire Street in Lawrence, where he and others found a brown Cutlass smashed into a fence near the parking lot of 490 Hampshire Street, that he and others did an investigation into the surrounding parking lots, looking for anything of what he considered evidentiary value, that they did not find anything, and that it was decided to tow the Oldsmobile to Coady's tow yard in Lawrence, for further examination. Koester didn't do that examination. (Tr. Vol. 3/68-70) Koester did not thoroughly examine the interior of the motor vehicle. (Tr. Vol. 3/74) In his testimony, Koester made no mention of any question or challenge regarding his ability to do his job, his competence, or his truthfulness in responding to challenges to the quality of his work, by any superior or colleague of Koester, during the course of his employment at the State Police Crime Laboratory. See Tr. Vol. 3/67-74.

D. Closing argument demonstrating the importance of whether evidence collection of the decedent's car was substandard.

The prosecutor stated in closing:

> Nothing is taken from the car. There's no weapon in that car.
>
> The police then seize the car, bring it back, and three separate people search that car. You heard from Trooper Crump yesterday. He was looking for little shell casings. He looked in every nook and cranny in that car.
>
> And what did they find? A cell phone, a hat, a twenty-dollar bill that you see the picture of, and what they want to claim is something that may be construed or mistaken for a weapon: a club you put on your car.
>
> And how was that described? It's about this long and it's bright red. Was that the handgun that he was searching for? No way. That's his story to try to get out of what he said and what he did. . . .

(Tr. Vol. 5/37)

The defendant's closing argument emphasized the defendant's assertion that he acted in self-defense. See Tr. Vol. 5/12-35. Defense counsel stated in part:

> . . . . And what does Mr. Hernandez do? He's afraid that Mr. Plaza's going to make

another scene, do something. So he goes over to the car. He leans on the car. He puts his hand on his hip. He's leaning into the car and he's saying, "Please go. Leave. Go." That's what he's saying.

Think about it, ladies and gentlemen. What's Mr. Plaza doing? Mr. Plaza is sitting in the driver's seat while Mr. Hernandez is leaning in.

. . . .

Does Mr. Plaza leave? No. He could have left. He could have driven off, but he doesn't like to be told no, and he's going to get his way no matter what it takes.

. . . .

Look at Mr. Hernandez. He's outrunning a bullet? I don't think so. And standing there straight, what's the next thing that Mr. Plaza does?

He says, "No, I'm going to kill you," and he leans forward and reaches for something, something shiny, that only Mr. Hernandez can see in the car.

What do you think he thought that was? He told you what it was. He told you he thought it was a gun. He didn't see a gun. He didn't have to see a gun. He didn't have to wait for the muzzle of that gun to be at his face.

Those words gave an unmistakable impression about what was going to happen.

And why do you know that that was the truth? Because in the car, that picture of the car, on the other side, the side you can't see because Crime Scene Services didn't take a picture of it, but testified to it, was a cell phone, a cap, and a bar, a security bar, a safety bar that you put across the steering wheel of a car. Shiny. It looks just like a gun in the dark, especially when you're reaching for it and saying, "I'm going to kill you."

Was there a gun in the car? We'll never know. Maybe, maybe not. They didn't find a gun, but they didn't really look that hard.

Crime Scene Services said, "Oh, yeah, we searched that car thoroughly, looked in and out." Did you hear any reports about said search? No. You have a question about whether or not there was really a thorough search done that night?

That's it. We don't even have a picture of the cap or the cell phone or the steering bar. How much of a search was done that night?

I'm not going to tell you there was a gun. We don't know. But certainly Mr. Hernandez thought in that second that that's exactly what was going to happen.

And why do you know that he was reaching for something? Because Dr. Nields confirmed it with the trajectory of that bullet. There was no way for that bullet to go in the direction that it went, no way unless he was reaching for the gun.

Think about it. If you're sitting in a seat in a car and there's a gun -- I don't care how tall you are – being aimed through a window, it's not going to go in your chest and down into your abdomen. It's just not, not unless it's a bullet that can travel around like in the cartoon comics. It doesn't work that way.

The only way that that bullet could have gone the way it was is if Mr. Plaza turned his body, avoiding the steering wheel, reaching down, and the bullet goes right into the sternum and it lodges downward and backwards into the abdomen. . . .

(Tr. Vol. 5/26-33)

E. The New Erik Koester Evidence.[9]

On May 7, 2015, in preparing for the oral argument in the SJC in this case, scheduled for May 8, 2015, the undersigned counsel, Attorney Mirsky, learned from petitioner's trial counsel, Attorney Aviva Jeruchim, that a man involved in supervising crime scene services on this case, who had testified at petitioner's trial, Erik Koester, had resigned his position subsequent to the trial based on what appeared to have been the substandard performance of his duties. Mirsky Aff., at ¶11. (S.R.A.66) On May 7, 2015, following receipt of the foregoing information, Attorney Mirsky contacted Attorney Anne Goldbach, Director of Forensic Services at the Massachusetts Committee for Public Counsel Services (CPCS), who provided him with documents regarding Koester's competency evaluations and discipline by the Crime Lab (Mirsky Aff., at ¶12), including the following documents and information:

> Motion Exhibit 8 ("Mot.Ex.8"), the Disclosure Memo, states:
>
> In **March of 2012, Mr. Koester became the subject of an ongoing corrective action by Lab Management**, due to deficiencies identified during the annual proficiency testing program (part of the Crime Lab's Quality Assurance Program) (emphasis added).

Mot.Ex.8, at 1. (S.R.A.105)

Motion Exhibit 9 ("Mot.Ex.9") contains Koester's testimony in Commonwealth v. Daniel Gonzalez, Middlesex Superior Court No. MICR2009-888, Jury Trial, April 25, 2013):

> Q. Okay. What are the factors on what considerations go into your decision as to test or not test different items?
> A. You -- as the case progresses and more information becames(sic) -- becomes available to you, and you take those things into consideration. Typically, you'll have meetings with the case officer, district attorney's office and determine more facts to the case and then **as a criminalist you more less weed out those items which have less probative value.** You're trying to find those

[9] Petitioner was tried on March 20-23, 26-28, 2012. Koester testified on March 23, 2012.

> items that would most directly link a potential suspect to a crime scene or to a victim and you narrow down those items and list them as items that you would recommend that would go forward for DNA testing. If additional items are requested at a later time, they can certainly be added (emphasis added).

Mirsky Aff., at ¶ 14; Mot.Ex.9, at 98. (S.R.A.67,206)

Motion Exhibit 10 ("Mot.Ex.10") contains 51 pages of State Police documents pertaining to the competency of Erik Koester to perform his duties as a Crime Scene Analyst for the State Police. Mirsky Aff., at ¶15; Mot.Ex.10. (S.R.A.67,244-294)

Mot.Ex.10 includes a document entitled, "MASSACHUSETTS STATE POLICE CRIME LABORATORY SYSTEM, PROFICIENCY TESTING PROGRAM RESULTS", dated **February 10, 2012**, which originally indicated Koester had obtained a "Satisfactory" result as to a "Crime Scene – Bloodstain Pattern" proficiency test, which document indicates that the Satisfactory determination was "Rescinded" on "**3/15/12** (emphasis added)". Motion Exhibit 10, at 40. (S.R.A.283)

On **March 5, 2012**, Michelle Levasseur, Technical Leader, Criminalistics and Crime Scene Response, State Police Forensic and Technology Center, was asked by Quality Assurance Manager Kristen Sullivan to review a determination that Erik Koester had failed a proficiency examination that he had previously been determined to have completed satisfactorily. Koester's deficiency involved not measuring a stain to the appropriate degree and not using the proper equipment to make the measurement. Mirsky Aff., at ¶ 15; Mot.Ex.10, at 1. (S.R.A.244) On **March 9, 2012**, Sullivan and Levasseur contacted Koester and informed him that the satisfactory result he had achieved on his 2011 external crime scene proficiency test was being rescinded and that he would receive an unsatisfactory result; that Koester admitted to Sullivan and Levasseur "**that he did not follow the proper**

procedure which included using a measuring loupe to take the measurements". On **March 15, 2012**, Technical Leader Cathleen Morrison received the results of the 2010 internal/external crime scene proficiency test which were being graded by the Maine State Police Crime Laboratory, which indicated Koester's examination of the angle of impact measurements was unsatisfactory. Mot.Ex.10, at 1. (S.R.A.244)

Mot.Ex.10, supra, contains a memo dated May 14, 2012, in which Michelle Levasseur, Technical Leader, Criminalistics and Crime Scene Response, of the State Police Forensic and Technology Center, reported that on March 5, 2012, she was asked by Quality Assurance Manager Kristen Sullivan to review a determination that Erik Koester had failed a proficiency examination that he had previously been determined to have completed satisfactorily. Koester's deficiency involved not measuring a stain to the appropriate degree and not using the proper equipment to make the measurement. Mirsky Aff., at ¶ 15; Mot.Ex.10, at 1-2. (S.R.A.67,244-245) This memo, dated May 14, 2012, indicates: that on March 9, 2012, Sullivan and Levasseur contacted Koester and informed him that the satisfactory result he had achieved on his 2011 external crime scene proficiency test was being rescinded and he would receive an unsatisfactory result, and that Koester admitted to Sullivan and Levasseur "**that he did not follow the proper procedure which included using a measuring loupe to take the measurements**"; that on March 15, 2012, Technical Leader Cathleen Morrison received the results of the 2010 internal/external crime scene proficiency test which were being graded by the Maine State Police Crime Laboratory, which indicated Koester's examination of the angle of impact measurements was unsatisfactory; and that on April 13, 2012, Levasseur met with Koester during his mid-year review "and informed him that **he received an unsatisfactory result for his 2010 internal crime scene**

proficiency test." Koester informed Levasseur "**that he was following proper procedures in all other types of examinations he performs** (emphasis added)." Mot.Ex.10, at 1 (S.R.A.244) In this regard, Motion Exhibit 10 contains a document entitled, "MASSACHUSETTS STATE POLICE CRIME LABORATORY SYSTEM, PROFICIENCY TESTING PROGRAM RESULTS", dated **February 10, 2012**, which originally indicated Koester had obtained a "Satisfactory" result as to a "Crime Scene – Bloodstain Pattern" proficiency test, which document indicates that the Satisfactory determination was "Rescinded" on "**3/15/12** (emphasis added)". Mot.Ex.10, at 40. (S.R.A.283)

In a memo dated November 5, 2012, to Dr. Guy Vallaro, Director, and Kristen L. Sullivan, Deputy Director/Quality Assurance Manager, Levasseur stated that on October 11, 2012, she learned of a contamination event involving contamination by material identified as matching the [DNA] profile of Crime Scene Response Supervisor Erik Koester. Mot.Ex.10, at 13-14. (S.R.A.256-257) As a result, on October 19, 2012, Koester was removed temporarily from crime scene response and evidence handling procedures. Id. After discussion of the matter with Koester, the source of the contamination was not confirmed. See Mot.Ex.10, at 13-14. (S.R.A.256-257) Levasseur reported that one possible source of the contamination was the touching of swab containers with bare hands. Mot.Ex 10, at 14. (S.R.A.257)

In a memo dated May 1, 2013, on the subject of "Identification of required Corrective Action" regarding Erik Koester, Levasseur reported,

> On January 30, 2013, I administered an internal crime scene proficiency test to Erik Koester for the year 2012. I observed Mr. Koester document and test the mock crime scene. As part of the proficiency test administration, I

observed his notes prior to his departure and noticed he had misinterpreted the patterns located on the southeast corner of the wall. . . .

Mot.Ex.10, at 17. (S.R.A.260) After consulting with a Forensic Scientist III regarding the bloodstain pattern in question, **in grading the 2012 internal crime scene proficiency tests, Levasseur determined that Koester had documented and reported inconsistent results** for the red-brown stains located on the southeast corner wall by documenting and reporting the stains as a "cast-off"[10] pattern when they were not a cast-off pattern. Mot.Ex.10, at 17-18. (S.R.A.260-261) A corrective action plan included the removal of Mr. Koester "from all duties associated with crime scene response and bloodstain pattern analysis." Mot.Ex.10, at 18. (S.R.A.261) In a memo dated October 25, 2012, Levasseur reported, the "root cause" of Koester's 2010 Proficiency test issue "was determined to be analyst based in that **the analyst [Koester] did not use the appropriate tool to accurately measure the bloodstains** (emphasis added)." Mot.Ex.10, at 5. (S.R.A.248)

In a memo dated October 26, 2012, on "Identification of required Corrective Action" as to Koester, Levasseur reported the misidentification of a bloodstain pattern at a crime scene where Koester was supervising, which involved a report that a red-brown arterial spray pattern was located on a ceiling at a crime scene where the ADA involved indicated that "'the Medical Examiner says the victim's arteries were not severed, and though the throat wound was severe, would not have caused spray anywhere near powerful enough to reach a

[10] A cast-off pattern is a bloodstain pattern resulting from blood drops released from an object due to its motion. Federal Bureau of Investigation, Forensic Science Communications, April 2009, Vol. 11, No. 2, Scientific Working Group on Bloodstain Pattern Analysis: Recommended Terminology, "Cast-Off Pattern", available online at https://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/april2009/standards/2009_04_standards01.htm.

ceiling.'" Mot.Ex.10, at 10. (S.R.A.253) The report indicates a person supervised by Koester sought his advice on this matter, as crime scene supervisor, and

> Mr. Koester informed her that this instance was not a big deal, this happens all the time and the misidentification can be explained in court by explaining that all of the information was not available at the scene and based on that, interpretations can be changed based on the new information.

Mot.Ex.10, at 10-11. (S.R.A.253-254) According to this supervisee of Koester, "it was decided that a corrected report not be issued due to the fact that the trial already began." Mot.Ex.10, at 11. (S.R.A.254) Levasseur further reported,

> Per Mr. Koester, he relayed that he identified the pattern as an arterial spray pattern based on what he observed at the scene. He stated that a pattern may be changed based on the receipt of additional information. He did not think a corrected report was required correcting the misidentification of the pattern. . . .

Mot.Ex.10, at 11. (S.R.A.254) On October 25, 2012, Levasseur and Sullivan met with Koester to discuss the misidentification, and Koester stated that "These misidentifications do not occur all the time and never in his experience." Mot.Ex.10, at 11. (S.R.A.254) In the October 26, 2012, memo, Levasseur reported that a corrective action plan for Koester directed that Koester

> will read the Quality Assurance Manual and discuss it with me to demonstrate understanding of when corrected or supplemental reports should be issued.

Mot.Ex.10, at 11. (S.R.A.254)

In a memo dated September 3, 2013, Lynn Schneeweis, Forensic Biology Manager of the State Police Forensic and Technology Center, and Michelle Levasseur, Section Supervisor, Criminalistics and Crime Scene Response, reported on the subject of "Identification of Required Corrective Action" regarding Erik Koester, stating,

> 9. In addition to the aforementioned issues, there were several instances that called into question Mr. Koester's knowledge and understanding of the

procedures used in the Criminalistics Unit. On or about May 8, 2013, Ms. Levasseur approached Mr. Koester in regards to his oversight of an analyst not documenting the proper information on a biological test which he signed for. Mr. Koester relayed that while he routinely performs this procedure correctly out of practice he was not certain what information was required per protocol. Ms. Levasseur relayed to Mr. Koester that it is her expectation that as a supervisor he is familiar with the requirements contained within the protocols. He acknowledged this expectation.

10. On June 12, 2013, Ms. Levasseur was notified of a situation where the information received from Mr. Koester in regards to a technical question was discrepant from the procedure. Specifically, it was relayed to Ms. Levasseur by other analysts in the Unit that Mr. Koester informed analysts that it was permissible for them to write their lot numbers on scratch paper, transcribe the information onto the official lot number worksheet, and discard the scratch paper. In addition, it was relayed that Mr. Koester informed them it was permissible for analysts to review only the examination pages in order to provide verbal results.

. . . .

14. In addition to the previously described areas of concern, analysts had approached Ms. Levasseur with questions after previously receiving technically incorrect information from Mr. Koester because they did not feel confident in his answers.

15. On July 2, 2013, Ms. Levasseur and Ms. Schneeweis met with Mr. Koester to discuss his pending corrective actions as well as the above listed information and provide him an opportunity to respond to these concerns. Mr. Koester responded that he did not agree with the events as described above. He confirmed that he requested clarification for the requirements for the release of verbal results and subsequently, relayed the appropriate information to the analysts. Additionally, he relayed that there have been a lot of changes to the Criminalistics procedures and although he understands the protocols as a whole, there are finer points that he is missing, not ignoring. He also relayed that he researches answers to analyst's questions and if he cannot find them, he seeks technical advice from Ms. Levasseur.

16. In consultation with the Quality Assurance Management Section corrective action team this matter has been determined to be a Level I Non-Conformity.

Mot.Ex.10, at 24-26. (S.R.A.267-269) The corrective action plan as to the foregoing included the determinations that

The root cause has been determined to be analyst based. The analyst demonstrated that he does not follow procedure, completely understand procedures or comply with

corrective action plans.

Mot.Ex.10, at 26. (S.R.A.269) This corrective action plan also included the statement that "The analyst has been removed from all aspects of casework including technical and administrative reviews." Id. The "remediation plan" regarding this matter included the requirement that the courtroom testimony of Koester

> will be frequently monitored. Testimony review forms will be completed by the reviewer for each testimony observed. Any deficiencies in the testimony will immediately be reported to the Acting Director and Quality Assurance Manager via the appropriate supervisory channels.

Mot.Ex.10, at 26. (S.R.A.269)

In a memo dated October 13, 2013, on "Follow up of Required Corrective Action," Levasseur reported that a review of casework by Koester between November 8, 2010 and May 11, 2012, indicated

> Mr. Koester may have disregarded the trace documentation and reporting requirements as defined by the Recovery and Initial Classification of Trace Evidence protocol.

and Levasseur further reported,

> In consultation with the Quality Assurance Management Section corrective action team, the root cause of this issue was determined to be an inaccurate examination by Mr. Koester, and a Level I Non-Conformity. It is unclear as to why this has occurred, and efforts to determine this have been unsuccessful. In addition, the failure to collect potentially probative trace evidence questions the quality of Mr. Koester's work and the potential for it being a systemic issue. As a result, it has been determined that a more extensive investigation into Mr. Koester's work is required.

Mot.Ex.10, at 9. (S.R.A.252)

On January 23, 2014, Kristen Sullivan, Laboratory Director FSG, of the State Police Forensic and Technology Center, issued Erik Koester a one-day suspension of pay without benefits for failure to establish and maintain competency. Mot.Ex.10, at 28-29. (S.R.A.271-

272) In her memo to Koester regarding this suspension, Sullivan notified Koester,

> Please be aware that any future incidents related to this matter may result in additional disciplinary action up to and including termination.

Mot.Ex.10, at 29. (S.R.A.272)

Arguments Below Regarding Question Presented

In the petitioner's *Memorandum of Law in Support of Motion for a New Trial Pursuant to Rule 30(b) of the Massachusetts Rules of Criminal Procedure* (S.R.A.6-63), filed on July 24, 2015, and remanded to Essex Superior Court on July 27, 2015, the petitioner asserted the following: 1) that his conviction must be reversed and a new trial ordered because the newly discovered evidence showing substantial deficiencies in the quality and reliability of Supervising Crime Scene Analyst Erik Koester's conduct, and his lack of competence, would have materially supported the defendant's assertion that at the moment the defendant was threatened with shooting by the decedent the defendant saw the decedent reaching for a gun (or a shiny object resembling a gun) immediately before firing a shot in self-defense; and 2) that petitioner's conviction must be reversed and a new trial ordered because the Commonwealth withheld from him materially exculpatory evidence that was available to the Commonwealth at the time of the defendant's trial, citing, inter alia, Brady v. Maryland, 373 U.S. 83 (1963) (applying 14th Amendment's Due Process Clause), Kyles v. Whitley, 514 U.S. 419 (1995); and United States v. Bagley, 473 U.S. 667 (1985). (S.R.A.44-62)

In the *Defendant's Supplemental Brief*, at 28-50, the petitioner argued: 1) that the newly discovered Koester evidence shows that the jury received a materially inaccurate picture of the reliability of evidence collection at the crime scene and the likely contents of

the decedent's car at the time of the alleged offense, requiring reversal; and in support thereof: (a) that petitioner's claim of self-defense was substantial; (b) that the medical examiner's opinion and testimony corroborated petitioner's testimony that the decedent had been leaning forward at the time the decedent was shot; (c) that the collection of evidence at the alleged crime scene was deficient; and (d) that the new Koester evidence raises doubt as to the accuracy and reliability of evidence collection in this case; and 2) that his conviction must be reversed because the Commonwealth withheld from him materially exculpatory evidence as to the deficient performance and incompetence of crime scene analyst and evidence collection supervisor Koester that was in the possession of the Commonwealth's investigative team at the time of trial, citing, inter alia, Brady, Kyles and Bagley.

In *Defendant's Supplemental Reply Brief*, filed by mail in the SJC on September 21, 2018, and docketed in the SJC on September 24, 2018, the petitioner argued 1) that the new Erik Koester evidence shows, in conjunction with the remainder of the available evidence, that the jury received an inaccurate picture of the reliability of evidence collection at the crime scene and an inaccurate picture of the likely contents of the decedent's car at the time of the alleged offense, leading to an unreliable and unfair assessment of the defendant's claim of self-defense; and 2) that the defendant's conviction must be reversed under the 14th Amendment's Due Process Clause and Article 12, because the Commonwealth withheld from the defendant at the time of trial evidence materially favorable to the defendant as to the deficient performance, incompetence, and bias, of crime scene analyst and evidence collection supervisor Erik Koester, which evidence, when viewed collectively, could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict, citing, inter alia, Smith v. Cain, 565 U.S. 73 (2012); Brady v. Maryland, 373

U.S. 83 (1963), Turner v. United States, 137 S. Ct. 1885 (2017); United States v. Bagley, 473 U.S. 667 (1985); and Kyles v. Whitley, 514 U.S. 419 (1995).

In his *Petition for Rehearing* (Appendix B), the petitioner argued: 1) that the SJC erroneously failed to apply the standard of materiality required by the 14th Amendment's Due Process Clause, Kyles and Bagley for determining whether the new Koester evidence should result in a new trial for the defendant; 2) that the SJC failed to acknowledge controlling law as stated in Kyles, that in Bagley the U.S. Supreme Court disavowed any difference between exculpatory and impeachment evidence for the purposes of Brady, and that under Bagley, regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; 3) that, under Kyles, one shows a Brady violation by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict; 3) that under Bagley and Kyles, materiality of the nondisclosed favorable evidence is defined in terms of suppressed evidence considered collectively, not item by item; 4) that contrary to the requirements of Kyles, the SJC viewed the undisclosed evidence and the newly available evidence under the same prejudice standard, that is, whether there is a substantial risk that the jury would have reached a different conclusion if the evidence had been admitted at trial, that application of the substantial risk standard was erroneous because that standard is exceedingly demanding, intended to enforce the preference that trial error be preserved at trial and not raised for the first time on appeal, because a substantial risk of a miscarriage of justice exists when the court has a serious doubt whether the result of the trial might have been different had the error not been made citing Commonwealth v. Randolph,

438 Mass. 290 (2002), Commonwealth v. Azar, 435 Mass. 675 (2002); Commonwealth v. LeFave, 430 Mass. 169 (1999); and because in Massachusetts errors sufficient to create a substantial risk of a miscarriage of justice are extraordinary events as to which relief is seldom granted, citing Commonwealth v. Amirault, 424 Mass. 618 (1997), whereas, to the contrary, Brady and its progeny are intended to impose a heavy burden on the prosecution to compel compliance with the 14th Amendment Due Process requirements of disclosure, which is why redress of a Brady violation requires only a demonstration that confidence in the verdict is undermined and not that there is a substantial risk that the verdict would have been not guilty, citing Kyles; 5) that under Wearry v. Cain, 136 S. Ct. 1002 (2016), evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury and that to prevail on his Brady claim, a defendant need not show that he more likely than not would have been acquitted had the new evidence been admitted but must show only that the new evidence is sufficient to undermine confidence in the verdict; 6) that, contrary to the SJC's opinion, reviewing courts are not permitted to impose any different test as between exculpatory and impeachment evidence for Brady purposes, citing Kyles and Bagley, and that this error is compounded by the fact that the Koester evidence was materially and substantively relevant; 7) that the SJC's opinion erred by failing to acknowledge the substantive relevance and materiality of the Koester evidence; and 8) the SJC's exclusion from consideration of the new Koester evidence occurring posttrial is erroneous as that evidence describes the character and behavior of Koester, which are relevant to determining whether the nondisclosure undermines confidence in the verdict, citing. Kyles.

REASONS FOR GRANTING REVIEW

Certiorari should be granted because Massachusetts has rejected this Court's definitions of what is material evidence and what is favorable evidence under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Compare Commonwealth v. Hernandez, 481 Mass. 189 (2019). These definitions are lynchpins of a scheme intended to induce voluntary compliance by prosecutors with the requirement to disclose the evidence a defendant needs to obtain a fair trial, including the known facts necessary to fairly investigate and present a defense. Certiorari is appropriate as Massachusetts has both decided important federal questions in a way that conflicts with relevant decisions of this Court, Sup. Ct. Rule 10(c), and has decided important federal questions in a way that conflicts with the decisions of other state courts of last resort and with United States courts of appeal. Sup. Ct. Rule 10(b). The petitioner's case is an exemplar of the kind of impeachment/exculpatory evidence that Brady was intended to encompass. In the absence of the withheld evidence showing Erik Koester's known incompetence and questionable integrity, the jury would have likely believed that crime scene evidence collection proceeded routinely and competently, and that no shiny object was present in the decedent's vehicle at the time he was shot. Utilizing the new Koester evidence referenced hereinabove, reasonable doubt exists as to the contents of that vehicle, and the defendant's trial counsel has the material to investigate and present a significantly more viable defense.

I. Massachusetts is in conflict with this Court's cases which prohibit the government's nondisclosure of material evidence regardless of whether the evidence can be characterized as exculpatory or impeachment evidence.

> [T]he government violates the Constitution's *Due Process Clause* "if it withholds evidence that is favorable to the defense and *material* to the defendant's guilt or punishment." Smith v. Cain, 565 U.S. 73, 75 . . . (2012) (emphasis added)

(summarizing Brady[11] holding).[12]

Turner v. United States, 137 S. Ct. 1885, 1888 (2017).

A. Under Kyles v. Whitley, 514 U.S. 419 (1995) (applying United States v. Bagley, 473 U.S. 667 (1985) and United States v. Agurs, 427 U.S. 97 (1976)), impeachment evidence is "favorable" evidence.

> In . . . United States v. Bagley, 473 U.S. 667 . . . (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs*[13] circumstances, i.e., the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a **reasonable probability** that had the evidence been disclosed, the result of the proceeding would have been different (emphasis added)." 473 U.S. at 682[.]

Kyles v. Whitley, supra, 514 U.S. at 433-434.

> Impeachment evidence . . ., as well as exculpatory evidence, falls within the *Brady* rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S., at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.

United States v. Bagley, supra, 473 U.S. at 676.

B. Massachusetts erroneously treats the government's withholding of impeachment evidence as ordinarily unprotected by Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

Hernandez contradicts controlling U.S. Supreme Court authority by treating evidence that is admissible for impeachment of a government witness as less deserving of protection simply because it is impeachment evidence. The SJC states:

> As the evidence regarding Koester's competence could have been introduced only to impeach him, its absence does not rise to the level of prejudice entitling the defendant to a new trial. See [Commonwealth v.] Sullivan, 478 Mass. [369,]

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[11] Brady v. Maryland, 373 U.S. 83 (1963).

[12] "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[13] United States v. Agurs, 427 U.S. 97 (1976).

383 [(2017)], quoting Commonwealth v. Lo, 428 Mass. 45, 53 . . . (1998) ("Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial").

Commonwealth v. Hernandez, supra, 481 Mass. at 198.

II. Massachusetts is in conflict with this Court's cases which hold that evidence is material, i.e., sufficient to reverse a guilty verdict under Brady, if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. at 435.[14]

One shows a Brady violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Kyles v. Whitley, supra, 514 U.S. at 435 (footnote omitted).

[E]vidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury.

Wearry v. Cain, 136 S. Ct. 1002, 1006 (2016) (citations and quotation marks omitted).

To prevail on his Brady claim, [a defendant] need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 73, ___, 132 S. Ct. 627, 630 (2012) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to "undermine confidence in the verdict." Ibid.

Wearry v. Cain, supra, 132 S. Ct. at 1006.

Hernandez erroneously permits a prosecutor to withhold favorable evidence from a defendant unless the evidence creates a "serious doubt" that the verdict might have been different. In Hernandez, the SJC states:

[W]e view the undisclosed evidence and the newly available evidence under the same prejudice standard, that is, "whether there is **a substantial risk** that the jury would have reached a different conclusion if the evidence had been admitted at trial (emphasis added)."

Commonwealth v. Hernandez, supra, 481 Mass. at 197 (quoting Commonwealth v. Murray,

[14] Materiality is defined "in terms of suppressed evidence considered collectively, not item by item." Kyles v. Whitley, 514 U.S. at 436.

461 Mass. 10, 21 (2011) (quoting Commonwealth v. Tucceri, 412 Mass. 401, 413 (1992)).[15]

Massachusetts defines a "substantial risk of a miscarriage of justice" as follows:

> A substantial risk of a miscarriage of justice exists when we have '**a serious doubt whether the result of the trial might have been different** had the error not been made.' [Commonwealth v. Azar,] 435 Mass. [675,] 687 [(2002)], quoting Commonwealth v. LeFave, 430 Mass. 169, 174 . . . (1999). **Errors of this magnitude are extraordinary events and relief is seldom granted.** Commonwealth v. Amirault, [424 Mass. 618,] 646-647 [(1997)] (emphasis added)."

Commonwealth v. Randolph, 438 Mass. 290, 294-295, 297 (2002). To the contrary, a Brady violation requires only a demonstration that confidence in the verdict is undermined, see Kyles, 514 U.S. at 435, and not that there is a "substantial risk" that the verdict would have been "not guilty." This Court's cases require only that a defendant must show that

> there is "any reasonable likelihood" [the undisclosed evidence] could have "'affected the judgment of the jury.'" [Giglio v. United States, 405 U.S. 150,] 154 [(1972)] (quoting Napue v. Illinois, 360 U.S. 264, 271 . . . (1959).

See Wearry v. Cain, supra, 132 S. Ct. at 1006. As stated in Wearry v. Cain, supra:

> To prevail on his Brady claim, [the defendant-petitioner] need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 73, - , 132 S. Ct. 627, 630 . . . (2012) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to "undermine confidence in the verdict." Ibid.

Wearry v. Cain, 132 S. Ct. at 1006.

III. Other Jurisdictions Which Have Addressed Situations Analgous to This Case Oppose Massachusetts by Defining "Favorable" Evidence to Include Impeachment Evidence, as Required by Bagley and Kyles and by Applying the Materiality Standard of Kyles, Bagley, and their Progeny.

[15] Compare Commonwealth v. Ferreira, 481 Mass. 641 (2019) ("[W]e consider whether there was prejudice from the nondisclosure of exculpatory evidence under the standard used to assess the impact of newly discovered evidence, Commonwealth v. Murray, 461 Mass. 10, 21 . . . (2011), and evaluate 'whether there is a substantial risk the jury would have reached a different conclusion if the evidence had been admitted at trial." Commonwealth v. Tucceri, 412 Mass. 401, 413 . . . (1992).") (addressing Erik Koester evidence in a different context).

1. Federal Circuit Courts of Appeal.

First Circuit: Conley v. United States, 415 F.3d 183 (1st Cir. 2005) (affirming grant of motion to set aside perjury conviction due to prosecution's failure to disclose impeachment evidence - an FBI memorandum containing witness's self-impeaching statement. Conley v. United States, supra, 415 F.3d at 186; applying the following:

> The suppression of impeachment evidence is "material" when a reasonable probability exists "that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler[v. Greene], 527 U.S. [263,] 289 [(1999)]. A "reasonable probability" exists if the Government's evidentiary suppression undermines confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 434 . . . (1995). "This somewhat Delphic 'undermine confidence' formula suggests that reversal might be warranted in some cases even if there is less than an even chance that the evidence would produce an acquittal." United States v. Sepulveda, 15 F.3d 1216, 1220 (1st Cir. 1993)[.]

Conley v. United States, supra, 415 F.3d at 188-189).

Second Circuit: Fuentes v. Griffin, 829 F.3d 233 (2d Cir. 2016) (reversing denial of a habeas corpus petition, as to convictions of first degree rape and first degree sodomy. Prosecution had suppressed a psychiatric record of the complaining witness, relevant to support the petitioner's version of events, to show complainant participated willingly, where complainant had provided the only evidence of a crime, and where that record was the only evidence that could have impeached complainant's credibility. Id., 829 F.3d at 236-237, 240; applying the following:

> In United States v. Bagley, 473 U.S. 667, 676 . . . (1985), the Court held that the duty to disclose exists irrespective of whether the information bears on the defendant's innocence or a witness's impeachment. And if the withheld evidence contains material for impeachment, it falls within the Brady principles even if it may also be inculpatory. "Our cases make clear that Brady's disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness." Strickler v. Greene, 527 U.S. 263, 282 n. 21 . . . (1999); see e.g., Bagley, 473 U.S. at 676.

Fuentes v. Griffin, 829 F.3d at 246; and also applying the following:

> [o]ur touchstone on materiality is Kyles v. Whitley, 514 U.S. 419 . . . (1995). Kyles instructed that the materiality standard for Brady claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435.

Fuentes v. Griffin, 829 F.3d at 246 (quoting Banks v. Dretke, 540 U.S. 668, 698 (2004) (emphasis in Fuentes); applying the following: "[T] Brady materiality

> [The Brady materiality] question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678.

Fuentes v. Griffin, 829 F.3d at 246 (quoting Kyles, 514 U.S at 434 (emphasis in Fuentes)).

Ninth Circuit: Aguilar v. Woodford, 725 F.3d 970 (9th Cir. 2013) (involving a first degree murder conviction, reversing a district court's denial of a habeas corpus petition where prosecution had used police dog scent identification to connect defendant to a car purportedly involved in the crime, holding that the prosecution's failure to disclose police dog's history of having made mistaken scent identifications violated Brady; applying the following:

> *Brady* evidence is material if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. at 435. Aguilar does not need to prove that a different result would have occurred in his case. He needs to show only that that the state court unreasonably decided that there was not "a reasonable probability of a different result." Id. at 434 (internal quotation marks omitted).

Aguilar v. Woodford, supra, 725 F.3d at 983; and also applying the following:

> "[I]mpeachment, as well as exculpatory evidence falls within *Brady*'s definition of evidence favorable to the accused." United States v. Marashi, 913 F.2d 724, 732 (9th Circuit 1990) (internal quotation marks omitted).

Aguilar v. Woodford, supra, at 982).

2. Highest State Appellate Courts.

Supreme Court of Delaware: Atkinson v. State, 778 A.2d 1058, 2001 Del. LEXIS 202 (2001) (conviction for attempted sexual intercourse reversed due to Brady violation by withholding of notes of witness interviews which revealed that State's main witness (alleged victim) had not initially described a sexual component to the assault to three of State's witnesses, precluding use of the information for cross-examination; applying the following;

> "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching[[.]

Atkinson v. State, supra, 778 A.2d at 1062-1063 (citing and quoting Strickler v. Greene, 527 U.S. 263, 281-282 (1999)), and the following:

> In *Kyles*, the Court held that materiality does not require a showing that the suppressed evidence ultimately would have resulted in an acquittal. Rather, the *Kyles* Court required that the defendant, in light of the undisclosed evidence, receive a fair trial, "understood as a trial resulting in a verdict worthy of confidence." Thus, in order to show a reasonable probability of a different result, a defendant need only show that the suppressed evidence "undermines [the] confidence in the outcome of the trial."

Atkinson v. State, supra, 778 A.2d at 1063 (citing a quoting Kyles v. Whitley, supra, 514 U.S. 419; id. at 434 (foonotes omitted)).

Supreme Court of Louisiana: State v. Bright, 875 So. 2d 37, 2004 LEXIS 1783 (2004) (conviction of second-degree murder reversed pursuant to Brady, and its progeny, where prosecution failed to disclose the criminal history of sole witness who identified defendant as the shooter thus precluding jury from learning witness had prior burglary conviction and was on parole at time of the offense and at time of his identification of defendant, State v. Bright, 875 So. 2d at 42-43; applying the following:

> The Brady rule encompasses evidence which impeaches the testimony of a witness when the reliability or credibility of that witness may determine guilt or innocence.

State v. Bright, supra, 875 So. 2d at 41 (citing Bagley, 473 U.S. at 676);

> [T]he reviewing court does not put the withheld evidence to an outcome-determinative test in which it weighs the probabilities that the petitioner would have obtained an acquittal at trial or might do so at a second trial. Instead, a Brady violation occurs when the "evidentiary suppression 'undermines confidence in the outcome of the trial.'"

State v. Bright, supra, 875 So. 2d at 42 (quoting Kyles v. Whitley, 514 U.S. at 434 (quoting Bagley, 473 U.S. at 678)).

Court of Appeals of Maryland: State v. Williams, 392 Md. 194, 896 A.2d 973, 2006 Md. LEXIS 187 (2006) (murder conviction and related convictions reversed due to Brady violation by State's nondisclosure that prosecution witness was a long-time paid informant who had cooperated with State in a number of cases and had in the past received lenient treatment for his cooperation; at trial that witness testified that defendant admitted to the murder and the purchase of murder weapon and testified he was getting nothing out of his testimony; applying the following:

> [T]he Supreme Court has outlined the three elements of a *Brady* violation. Stickler v. Greene, 527 U.S. 263, 281-282 . . . (1999). The Court has explained: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

State v. Williams, supra, 392 Md. at 199 (quoting Stickler v. Greene, supra, 527 U.S. at 281-282);

> Evidence is material under *Brady* when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435[.] . . Moreover, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-435[.] . .

> All that is required is a showing of 'a reasonable probability of a different result", Kyles, 514 U.S. at 434 (citing Bagley, 473 U.S. at 678 . . . (internal quotation marks omitted).

State v. Williams, 392 Md. at 229 (footnote omitted).

Supreme Court of West Virginia: State v. Youngblood, 221 W. Va. 20, 650 S. E. 2d 119, 2007 W. Va. LEXIS 23 (2007) (convictions of various sex and weapons offenses reversed and new trial ordered due to State's Brady violation in failing to disclose to defendant a note allegedly written by the victim that could reasonably have been interpreted as showing that defendant engaged in consensual sex with the victim; applying the following:

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" State v. Fortner, 182 W. Va. 345, 353, 387 S. E. 2d 812, 820 (1989) (quoting United States v. Bagley, 473 U.S. 667, 682 . . . (1985)). Additionally, it has been said that "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." Kyles, 514 U.S. at 434. . . . All that is required is a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435[.]

State v. Youngblood, 221 W. Va. at 32).

District of Columbia Court of Appeals: Vaughn v. United States, 93 A.3d 1237, 2014 D.C. App. LEXIS 191 (2014) (defendant Morgan's convictions for aggravated assault and assault on a law enforcement officer (involving attack on a fellow inmate and on a corrections officer who came to that inmate's aid) reversed due to government's Brady violation in suppressing favorable impeachment evidence which established that identifying government witness had a track record for untruthfulness and was willing to make false reports implicating inmates in assaults on law enforcement agents; applying the following:

> [B]oth the Supreme Court and this court have repeatedly made clear that impeaching

> information does not have a lesser standing in the context of the government's Brady disclosure obligations. Rather, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Bagley, 473 U.S. at 476 (quoting Napue v. Illinois, 360 U.S. 264, 269 . . . (1959))[.]

Vaughn v. United States, supra, 93 A.2d at 1254;

> To assess materiality, we consider whether there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting Bagley, 473 U.S. at 682). The reasonable probability standard does not require a showing that it is more likely than not the defendant would have been acquitted. Kyles, 514 U.S. at 434. Rather, since Brady is a rule of fairness, the materiality threshold is met if, in the absence of proper disclosure, we question whether the defendant received a fair trial and our "confidence" in the outcome of the trial is thereby "undermine[d]." [Smith v.]Cain, 132 S. Ct. [627,] 630 [(2012)] (quoting Kyles, 514 U.S. at 434)[.]

Vaughn v. United States, supra, 93 A.3d at 1262-1263 (footnoted omitted).

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

Jose Hernandez,

By his Attorney,

Date: May 31, 2019

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018-2019

JOSE HERNANDEZ,
Petitioner,

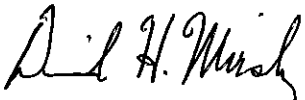
-v.-

COMMONWEALTH OF MASSACHUSETTS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

CERTIFICATE OF SERVICE

I, David H. Mirsky, hereby certify that on this 31st day of May, 2019, I served the Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis on all parties to be served. In accordance with Rule 29(3) of the Supreme Court Rules, said service has been made by first class mail, postage prepaid, to the office of Thomas E. Bocian, Deputy Chief, Appeals Division, Office of Attorney General Maura Healey, Commonwealth of Massachusetts One Ashburton Place, 19th Floor, Boston, MA 02108. I also certify that I mailed a copy to the petitioner Jose Hernandez.



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AFFIDAVIT OF TIMELY FILING BY MAIL

David H. Mirsky, on oath, deposes and says:

1. I am a member of the Bar of this Court.

2. I submit this affidavit in accordance with Rule 29 of this Court.

3. The petition for certiorari enclosed herewith is being mailed today, May 31, 2019, by United States mail, first class, postage prepaid, in a package delivered to the United States Post Office in Exeter, New Hampshire 03833 and addressed to:

Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543.

4. The mailing is within the permitted time for filing the petition for certiorari.

Made this 31st day of May, 2019, at Exeter, NH under the penalties of perjury.

David H. Mirsky