

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET No. SJ-2018-0342

COMMONWEALTH

vs.

BRUCE ANDERSON

MEMORANDUM OF DECISION

The defendant, Bruce Anderson, was convicted in 1989¹ of first-degree murder based on theories of deliberate premeditation and extreme cruelty and atrocity for stabbing his wife to death. Upon plenary review, this court denied relief. See Commonwealth v. Anderson, 408 Mass. 803 (1990). The defendant's Federal habeas petition relating to the 1989 trial also was denied. See Anderson v. Butler, 23 F.3d 593 (1st Cir. 1994). In 2018, the defendant filed a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), which was denied without hearing.

Before me is the defendant's petition pursuant to the gatekeeper provision of G. L. c. 278, § 33E (§ 33E), for leave to appeal to the full court the denial of his motion for a new trial based on claims of ineffective assistance of counsel. For the reasons that follow, the defendant's petition shall be DENIED.

Where this court has already reviewed a capital case in its entirety, "to the extent that the defendant then seeks additional review, he must first show that there is a 'new and substantial'

¹ This was the defendant's second trial for the same incident; his first conviction had been reversed upon the granting of the defendant's application for writ of habeas corpus. See Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988).

issue that this court could not have considered in the course of plenary review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). See § 33E. For an issue to be substantial, it must be "worthy of consideration by an appellate court." Gunter, supra at 487, citing Dickerson v. Attorney Gen., 396 Mass. 740, 743-744 (1986). "[I]n a capital case, issues raised in a postappeal motion for a new trial that were or could have been raised at trial or in the direct appeal are to be measured by the substantial risk of a miscarriage of justice standard." Commonwealth v. Smith, 460 Mass. 318, 320-321 (2011). "Errors of this magnitude are extraordinary events and relief is seldom granted," particularly following the full court's plenary review of a defendant's murder conviction under § 33E. Id., quoting Commonwealth v. Randolph, 438 Mass. 290, 297 (2002).

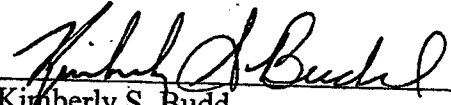
The defendant claims ineffective assistance of counsel based on his attorney's failure to object to portions of the prosecutor's closing argument either at trial or on appeal, and his failure to challenge on appeal blood evidence that was admitted over objection at trial. According to the defendant, these issues are new because he has not previously made a claim of ineffective assistance of counsel. However, "[a]n issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review." Gunter, supra at 487, quoting Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). Here the issues the defendant raises now could have been raised either at trial or as part of his direct appeal. A defendant may not "reframe" an omitted issue as an ineffective assistance of counsel claim. Gunter, supra at 490. "If that were the case, then every claim that was available to the defendant but had been omitted from the trial and direct appeal could be recast in terms of ineffective assistance of counsel; it would then be considered 'new' and automatically eligible for collateral appellate review, despite our having reviewed the entire record under § 33E (including claims not raised by counsel) in the

plenary direct appeal." Id. This is true even where, as here, defense counsel handled both the trial and the direct appeal. See Commonwealth v. Cook, 447 Mass. 1023, 1024 (2006).

As is the case for all first degree murder appeals, the court undertook a plenary review of the entire trial record and found no reason to grant relief pursuant to § 33E. See Anderson, supra at 809-810. Because the defendant's arguments are not new under § 33E, his gatekeeper petition must fail.

ORDER

For the foregoing reasons, the defendant's gatekeeper petition is hereby DENIED.


Kimberly S. Budd
Associate Justice

DATED: October 15, 2018