No. 21-6612

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Brian K. Cavitt, pro se — PETITIONER
(Your Name)

vs.

Commonwealth of Massachusetts — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Judicial Court of Massachusetts
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brian Keith Cavitt, pro se 1856735
(Your Name)
Red Onion State Prison
P.O. Box 1900
(Address)

Pound, Virginia 24279
(City, State, Zip Code)

276 796 7510
(Phone Number)

QUESTION(S) PRESENTED

1.) Where an incomplete DNA profile, allegedly from a knife handle, is falsely scientifically concluded to be a "match" to a victims complete DNA profile, and is not only offered as evidence in a DNA-STR conclusion report, signed by the lead analyst and a reviewing analyst, but testified to at trial as a complete and accurate report by the lead analyst to a jury, does this:

A.) Violate the defendants Constitutional Due process guaranteed by the 5th, 6th, + 14th Amendments, and right to a fair trial?;

B.) Compromise the integrity/veracity of the DNA-STR conclusion report?;

C.) Violate the FBI's DNA Advisory Board Quality Assurance Standards?;

D.) Constitute perjury?;

E.) Mislead the jury?;

2.) Where a DNA conclusion is proven to be scientifically false, supported by an affidavit from a Serological/DNA expert consultant, and the DNA evidence has been exhausted during initial testing, along with several other DNA evidence, leaving it impossible to be retested, does this:

A.) Compromise the integrity of all of the DNA results;

B.) Render the veracity of the DNA results illegitimate;

C.) Require all of the DNA results to be thrown out as evidence;

D.) Require a new trial or evidentiary hearing;

3.) Where a false scientific conclusion compromising the integrity and veracity of a DNA-STR conclusion report and its results is shown and proven, and both trial and appellate attorneys missed, ignored, chose not to object to, or appeal the issue, does this:

A.) Constitute ineffective assistance of counsel;

B.) Violate the defendants Constitutional Due Process rights guaranteed by the 5th, 6th, and 14th Amendments, and his right to effective counsel, also guaranteed by Article 12 of the Massachusetts Declaration of Rights;

4.) Where trial counsel withholds the knowledge of the only favorable eyewitness who provides a concise timeline that provides the defendant with an alibi, declining to call them to testify, and appellate counsel refuses to appeal trial counsels decisions, does this:

A.) Equate to ineffective assistance of both trial and appellate counsels; making a "manifestly unreasonable" decision;

B.) Violate the 5th, 6th, and 14th Amendments right to due process and the right to counsel, as well as Article 12 of the Mass. Declaration of Rights, right to counsel;

5.) Where Massachusetts state law allows claims of ineffective assistance of both trial and appellant counsels to be made in motion for new trial by a defendant, in accordance with Article 12 of the Declaration of Rights, and allows for the exception of ineffective assistance of trial and/or appellate counsel in granting a new trial motion even if they did not object or raise alleged error on appeal, does it:

A.) Violate the defendants right to a new, and fair, trial to deny him a new trial because the court deems the claims are not "new and substantial" because both trial and appellate counsels knew of the issues;

B.) Violate the defendants right of due process guaranteed by the 5th, 6th, and 14th Amendments, and right to counsel, also

guaranteed by Article 12 of the Declaration of Rights.

6.) Where Plenary Review is mandated in capital/first degree murder convictions under Massachusetts law, of the entire record, and the review does not uncover any errors of law, should the reviewing court be deemed "ineffective" in its plenary review where errors of law have occurred in the record, yet were overlooked or ignored by the court?

7.) Where a police report, approved by a superior officer, gives a compilation of eyewitness descriptions of a suspect, and a single description (pock marked face) not fitting the defendant is later removed from the report by the approving superior officer, when filing for an arrest warrant of the defendant, and that description can not be attributed to any known eyewitnesses or eyewitness statements, does this;

A.) Show that police withheld a material eyewitness and exculpatory eyewitness statement;

B.) Violate the defendants 5th, 6th, and 14th Amendment rights to due process, and Compulsory Process for obtaining witnesses in his favor;

C.) Constitute a Brady violation;

D.) Should an evidentiary hearing and motion for Discovery be held;

E.) And in a criminal case should every description of a suspect in a single report be identified by the eyewitness who gave it;

8) When a pro se defendant makes a substantial showing on an issue of constitutional importance, such as an affidavit confirming a false scientific DNA conclusion, should an evidentiary hearing be held to further help develop the evidence, and help the fact finder?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Commonwealth v. Cavitt, 460 Mass. 617 (2011) (Supreme Judicial Court of Massachusetts) 09/21/11
- Cavitt v. Saba, 1:12-cv-11700-WGY, (U.S. District Court for Massachusetts) (10/31/2014)
- Commonwealth v. Cavitt, Supreme Judicial Court for Suffolk County, No. SJ-2020-0111; Hampden Superior Court NO. 0679CR00831 (09/16/2021)
- Commonwealth v. Cavitt, Motion to appoint counsel to prepare and file motion for forensic and scientific analysis pursuant to G.L.c. 278A s5 (#1120) Denied (11/25/2016)
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[X] reported at SJ-2020-0111; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Hampden County Superior court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was 09/16/2021. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Constitutional and Statutory Provision Involved

1.) Fifth Amendment to the United States Constitution: Due Process, violation

2.) Sixth Amendment to the United States Constitution: Compulsory Process for obtaining witnesses in his favor; to have the Assistance of Caunsel for his defense, violation

3.) fourteenth Amendment to the United States Constitution: Due Process; Equal Protection of the laws, violation

4.) Fed. Rules Evid. Rule 702, 28 U.S.CA.

5.) Fed. Rules Evid. Rule 703, 28 U.S.C.A.

6) 105 A.L.R. Fed. 299 Article VII §702 Testimony by Expert Witness

7) 105 A.L.R. Fed. 299 Article VII §703 Bases of Opinion Testimony by Experts

STATEMENT OF THE CASE

On May 5, 2006 at 8:00 AM a man, described in police report authored by officer Thomas Sheehan and approved by Sgt. Kevin DeVine, as an unknown Hispanic, 20-25 yrs. of age, 5'8-6'2", unshaven, pock marked face, wearing a gray hooded sweatshirt and black pants... pulled a black and white bandana over his face and demanded cash while brandishing a knife. The store clerk (Jennifer Balicki) screamed she'd been robbed after the suspect fled, and 2 store employees (John Ryan and Tony Bruno) gave chase. After nearly running into employee (Sue Tapp) coming in to work, the employees caught up to the suspect at the rear of a Walgreens at St. James and Carew Sts. where the suspect was now wearing a red T-shirt and brown shorts, crouched down picking up money. John Ryan, reaching for the money, was punched in the face causing a laceration to his lip. Both Ryan and the suspect wrestled briefly before being tackled by Bruno. The suspect fled on foot, last seen in the area of Shane Circle. A red shirt was located in front of 131 Shane Circle, near a tree. A pair of blue scrub pants, gray hooded sweatshirt, black T-shirt and a knife were recovered by Ryan and Bruno, from a dumpster at the rear of the Walgreens. A sum, deemed "most of the money", was also recovered.

Police were on scene, with K-9 units, taking statements from multiple eyewitnesses. At 8:48 AM a fire was discovered by firefighter Friberg at an apartment in the Carpe Diem homes on Shane Circle. Inside, the bodies of Milagros Rosario (69) and Edelmira Miranda (67) were found, stabbed multiple times and set on fire. Among other items tagged into evidence were a gold necklace (33.1); A knife (3.16); And a dishtowel (3-10). All submitted for DNA testing (as well as the gray hooded sweatshirt (1-9.1.1); Red T-shirt (1-2.1.1); Black T-shirt (1-8.1.1); Blue scrub pants (1-1.1.1)).

After several anonymous calls giving defendant Brian Cavitt's name as a potential suspect, an arrest warrant requested by Sgt. Kevin DeVine was issued. Sgt. DeVine Altered the description of the suspect to include "light skinned black" or "Dark skinned Hispanic" as some eyewitnesses had described the suspect,

and removing the pock marked face description, as an eyewitness had described. While Officer Sheehans report is attributed to store clerk Jennifer Balicki, Sgt. DeVine also authored a report on May 8, 2006 of an interview with Balicki at her home where she looked at 8 photos of blackmen, choosing 2 photos that had "eyes" that looked like the suspects. Cavitt's photo was chosen as one, but the other photo was said to look most like the suspect. In DeVine's report, which occurred on May 6, 2006, it stated that Balicki "only got a look at the assailants eyes, nose, and cheek areas," due to the bandana over the lower part of his face and the hood from the sweatshirt pulled over the upper part of his head. At trial Balicki was asked if she ever said the suspect had a pock marked face, to which she said "No, She could only see from the middle of the nose up," but that she had said the suspect was unshaven for that portion of his face."

John Ryan had been visited by officers at his home with the same photo's and supposedly made a positive ID, after some hesitation, of Cavitt as the suspect. Ryan had described the suspect has having no facial hair. Cavitt had been arrested with a goatee, after having received a haircut. The photo chosen of Cavitt was from 4 years prior, with a goatee as well. Cavitt also does not have a pock marked face.

During pretrial 30 pieces of evidence were submitted for DNA testing. DNA technician Lynn Orvis collected DNA samples. In submitting a criminalistic report (#06-05913 Springfield) which stated that a conclusionary test result for a screening test for the presumptive presence of blood was positive on the towel (item 3-10). No other tests were reported being done on the towel. At trial, Orvis revealed, during direct examination, that she had, in fact, done a second test to see if the presumptive presence of blood was human. That test, she revealed, was negative. Orvis testified that she had chose not to put those results in the report. While 2 snippets of the dishtowel were submitted for testing for DNA, snippet #1 (3-10.1.1) came back as being

a match to Cavitt's DNA profile, while snippet #2 (3-10, 2, 1) was concluded to have "insufficient DNA for STR fragment analysis".

DNA analyst Matthew Dindinger submitted a DNA-STR conclusion report, which was reviewed by DNA analyst Jennifer L. Elliot and Notarized by Kristen L. Sullivan. In the report the conclusion for the DNA swab of the Knife handle (3-6.1) is said to be a match to Milagros Rosario's DNA profile. The Identifiler Results Table (allele chart) shows of the 16 locations, only 6 show any results. Dindinger testified that the DNA for the knife handle matched Rosario's profile.

During the trial, defense counsel called 3 witnesses to testify, all were police officers. A fourth witness, Cross-racial identifying expert, gave a voir dire but was not called to testify. fingerprints from the knife recovered from the dumpster did not match Cavitt's fingerprints.

During the appellate process, Cavitt was given a box of paperwork from his appellate attorney, including trial transcripts, eyewitness and witness statements, crimescene photos, etc. One eyewitness statement Cavitt had never seen before. An on the scene statement given by a Melissa R. Cruz who stated seeing victim Rosario outside of his home, twice, even speaking to him, and last seeing Rosario alive at 8:34 Am with his keys in hand, feeding the birds, going back inside of his back door. The police were there in the area. Cruz was not called as a witness, nor was she even on the potential witness list of either the defense or prosecution.

Appellate counsel filed a motion for new trial, which had a hearing, but non-evidentiary, which touched on 4 issues, a photograph showup; confidential informant; suppression of sneakers; and ineffective assistance of counsel for not suppressing the sneakers. Appellate counsel ignored defendants request to raise any other issues, including false DNA conclusion report and police withholding a favorable eyewitness, and defense counsel failing to call the only witness who could've contradicted the

prosecutions witnesses and theory, (Cruz). The motion for new trial was denied, as was the Direct Appeal, Decided Sept. 21, 2011. A Writ of Habeas Corpus was filed Sept. 3, 2012, and Denied Nov. 3, 2014.

Cavitt was transferred to the State of Virginia in Nov. 7, 2016. Prior to his transfer Cavitt had filed a motion to have counsel appointed to prepare and file motion for forensic and scientific analysis pursuaint to G.L.c.278A sec.5 N., on Oct. 27, 2016. It was denied on Nov. 25, 2016. Cavitt was never made aware of this until the Commonwealths Memorandum in opposition of his G.L.c. 278 §33E Gatekeeper petition.

On Dec. 10, 2019 Cavitt filed a second Motion for New Trial and to Allow Discovery, pro se. The motion was Denied on Dec. 23, 2019. A notice of Appeal was mailed (and therefore, documented) from the Virginia prison mailroom at Red Onion State Prison on Jan. 13, 2020 a notice of appeal was mailed, errantly, to the SJC, who apparently forwarded it to the proper court, which was docketed on Jan. 27, 2020. And, while Cavitt sent all other legal papers pertaining to G.L.c. 278 §33E for leave to appeal the Denial of a motion for new trial in a capital case to, apparently the superior court instead of the SJC, Cavitt was given the time to file in the correct court by the clerk of the SJC, Maura S. Doyle, in a letter Dated Feb. 25, 2020.

The Single Justice denied Cavitts G.L.c. 278 §33E on Sept. 16, 2021, Stating that "the defendant has failed to raise a "new and substantial" question justifying further review, and therefore deny leave to appeal the denial of this motion for new trial to the full court." There were 7 issues brought to the court, however, only 4 are being cited in this writ of Certiorari; 1.) Expert testimony and DNA-STR report authored by DNA analyst Matthew Dindinger, contained false conclusion of a match between the DNA collected from the knife handle and decedent Milagros Rosario; 2.) (fourth argument cited in Denial) police withheld a compulsory eyewitness in Cavitts favor and suppressed their statement; 3.) (fifth argument cited) ineffective assistance of counsel for Defense Counsel not calling Melissa R. Cruz to the Stand, or informing Cavitt of

her existence; 4) The withholding of material DNA testing by Criminologist Lynn Orvis.

A response to the Prosecutions Opposition was filed in January 2021. Also, an affidavit was obtained by Cavitt from Dr. Thomas Fedor, serology and DNA consultant, from Oakland, CA, which was included with the response. A motion for reconsideration, citing the FBI's: DNA Advisory Board Quality Assurance Standards was mailed on Oct. 28, 2021.

Reasons for Granting the Petition

1.) False DNA conclusion of DNA allegedly from knife handle matching decedent/victim Milagros Rosario.

DNA is thought to be infallible. To a certain degree, it is. However, people have been convicted using DNA found at a crime scene for decades. But, over those decades, those same people have been released using the same DNA, with a different methodology of testing. Sometimes the DNA is proven to be someone elses, other times it is shown that the DNA Lab and analysts provided false scientific conclusions, switching DNA profiles/evidence, cross-contamination, or simply lying. At times, it has been a malfunction with the equipment used for DNA testing.

In the case before this Court, DNA allegedly from a knife handle is concluded to be a match to decedent/victim Milagros Rosario's DNA profile. However, a DNA match occurs when DNA in evidence matches a known DNA profile, completely. In this case, 16 locations are used to determine a DNA match. The DNA allegedly from the knife handle shows 5 locations saying "NR" for No Results, 5 locations showing asterisks (*) for potential alleles below threshold, and 6 locations (including gender) showing few information involving alleles. There are no statistics given. It is an obvious false conclusion, supported by the affidavit provided to me from forensic serology and DNA consultant, Dr. Thomas Fedor. (App C).

The SJC's single Justice declared the claim as "inaccurate", stating that although the allele chart did not yield a full DNA profile, what DNA was found was consistent with the victim. This is a scientifically inaccurate statement, and there is no statistical support to back his claim. And, by his own reasoning, some of the alleles are consistent with my DNA, and anyone else who may share those same alleles at those locations.

Our alleles come from our parents, two(2) at each location, one from each parent. Alleles by themselves are not unique, DNA becomes unique when it is

sequenced. Some of us have the same alleles at the same locations which is why a person can be included as a potential contributor. However, an entire 16 location (30 alleles plus gender) in this case, would show a statistical probability that someone else shared that exact DNA sequence, in the one in quintillions, and hundreds of quadrillions.

Only recently have I been made aware of the FBI's : DNA Advisory Board Quality Assurance Standards and learned from an article on DNA forensic testing that errors in DNA testing are common place, so much so, that the Quality Assurance Standard (Standard) 14.1 state's that:

"The laboratory shall have and follow a policy and/or procedures to address nonconformities detected in casework analysis, proficiency tests, testimony, and audits. The laboratory policy and/or procedure shall define when a nonconforming requires documentation and/or corrective action plan."

14.1.1 Corrective action plans shall be documented.

14.2 The laboratory's documented corrective action plan shall include the identification (when possible) of the cause(s) of the nonconformity, corrective actions taken with time frames (where applicable), and preventive measures taken (where applicable) to minimize its reoccurance.

Standard 9.10 states:

"The laboratory shall have and follow procedures for statistical calculations and the reporting of results and conclusions that address the following:

9.10.1 The assumptions that can be made when formulating conclusions;

9.10.2 Performing statistical analysis in support of any inclusion that is determined to be relevant in the context of the case.

9.10.3 Documenting of the genetic loci and assumptions used for statistical calculations, at a minimum, in the case notes.

9.10.4 not using uninterpretable data in statistical calculations

9.10.5 The approaches to performing statistical calculations.....

9.12 The laboratory shall have and follow a procedure for the detection and control of contamination.

11.1 The laboratory shall have and follow procedures for taking and maintaining casework notes to support the conclusions drawn in laboratory reports. The laboratory shall maintain all analytical documentation generated by technicians and/or analysts related to case analyses. The laboratory shall retain, in written, printed, or electronic format, sufficient documentation for each technical analysis to support the report conclusions such that another qualified individual can evaluate what was done and interpret the data.

11.2 Casework reports shall include the following elements:

11.2.1 Case identifier;

11.2.2 Description of evidence examined and identification of samples tested;

11.2.3 Technology used;

11.2.4 Loci, sequence region, or amplification system;

11.2.5 Results and/or conclusions for each forensic sample tested;

11.2.6 A quantitative or qualitative interpretative statement to support all inclusions;

11.2.7 Date of the report;

11.2.8 Disposition of evidence;

11.2.9 A signature and title, or equivalent identification, of the person accepting responsibility for the contents of the report.

The fact that this false conclusion appears in the report, and was testified to as accurate, shows that these Standards were not followed or adhered to.

The single justice goes on to say that a lack of a match would have made no difference with respect to the central issue in the case, which was the identity of the killer, not the victim. I don't disagree. However, the issue at hand is not about a lack of a match or its impact. It is the fact that there is proof that Analyst Dindinger, at some point, either mixed up lab results, cross-contaminated evidence, or switched DNA profiles in evidence. Had the FBI's: Quality Standards been followed, this false conclusion would not be presence. The question then becomes, if Dindinger followed the standards, how did he conclude the DNA on the knife handle was a match to decedent Milagros Rosario, when it clearly isn't? Is the conclusion correct and the allele chart wrong? Was there cross-contamination? And if so, what other "nonconformitys" or cross-contamination may have occurred with other DNA evidence? Because the DNA from the knife handle was used to exhaustion during initial testing, it can not be retested, nor can several other items of DNA evidence, making it impossible to determine what went wrong.

The issue at hand is that the same process that cause detectable errors can also cause undetectable errors. If DNA is detected in a control sample, or a match occurs where a partial profile exists, it would/should be obvious that something is wrong; but, if the suspects DNA is accidentally, or purposely, transferred into an evidentiary sample, the error is not obvious, and can simply be explained as: the suspect is the source of the evidentiary DNA.

Throughout the country, dishonest DNA analyst have been exposed, from former FBI analyst Jacqueline Blake in New York, to Analyst Sarah Blair of Orchid-Cellmark. from California, Arizona, Texas, to Massachusetts, and even the United States Army.

In this case, defense counsel did not call a DNA forensic expert to testify. Counsel did hire an analyst in California (Brian Wraxall) with the Serological Research Institute (SERI) to review the DNA-STR report, who also either missed or ignored the false conclusion. Dr. Thomas Fedor, who also once worked for SERI, has expressed his willingness to testify on my behalf concerning the false DNA conclusion and its implications and impact on this case.

The fifth circuit in Keko v. Hingle, 318 F.3d 639, 644 (2003) ruled that, 'a false or scientifically inaccurate report is equivalent to any other false evidence created by investigators, such as false reports by police. The 5th Circuit in Brown v. Miller, 519 F.3d 231, 2008 U.S. App. LEXIS 4169 (2008) held that the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounts to a violation of a defendants due process rights, and that a reasonable lab technician in 1984 would have understood that those actions violated those rights. This case is about due process being violated where the veracity and integrity of DNA results and conclusions were admitted into evidence, prejudicing the defendant and preventing him from having a fair trial, creating a substantial miscarriage of justice. The lower courts have disregarded the facts and continued to rely on inculpatory DNA against me, despite its unreliability, and is in direct conflict with the 5th Circuit. Analyst Dindinger also testified to the veracity of the report.

It is of Constitutional importance that the U.S. Supreme Court grant certiorari in this matter. DNA evidence has become a central tool heavily relied upon in criminal cases that have seen hundreds, if not thousands, of people convicted using questionable DNA evidence and analysts. The FBI created the Quality Standards to prevent such occurrences, the latest revision was approved by the Director of the FBI to take effect July 1, 2020. (APP.E)

Clearly, in this case, those Standards were not adhered to. This Courts granting of this Writ of Certiorari would force labs all over this country to adhere to the Quality Standards set out by the FBI, and enforce the Constitutional right to Due Process and a fair trial.

The lower court also leans heavily on evidence being "New" and "Substantial" It concluded that none of the issues were new and substantial to merit consideration by the full court. However, Mass. Article XII of the Declaration of Rights guarantees the right to counsel, including appellate counsel in first degree murder convictions. This also ensures every defendant the right to effective assistance, also granted by the fifth, SIXth, and fourteenth Amendments to the constitution.

Throughout the Commonwealth's and lower Courts arguments against me they make the argument, constantly, for ineffective assistance of counsel and appellate counsel, but combat the argument by asserting that ineffective assistance of counsel shouldn't be used to call an issue "new". However, I have proven that I tried to bring these issues up in the Direct Appeal, but was denied by my appellate counsel. If identification is the central issue, and DNA is heavily relied upon, doesn't that make the claim that the DNA report's integrity is compromised, pretty substantial?

And, according to the Mass. App. Ct. in Comm v. Sowell, (Mass. App. Ct. March 22, 1993), 34 Mass. App. Ct. 229, 609 N.E. 2d 492, 1993 Mass. App. LEXIS 267, "Defendant is precluded from asserting in motion for new trial claims of error which he could have raised, but did not raise, at trial or on appeal, even if claimed errors are of constitutional dimension, ~~with exceptions~~ being that (1) judge may resurrect and preserve for appellate review issues which he considers, and (2) trial and/or appellate counsel may have furnished ineffective assistance.

furthermore, Under Article 12, the SJC's own inquiry as to ineffective assistance of counsel is two-fold:

> for the defendant to prevail on his claim of ineffective assistance of counsel, we must conclude, first, that defense counsel's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer' and, second, that the defendant's case was

prejudiced by counsel's conduct such that the conduct 'has likely deprived the defendant of an otherwise available, substantial ground of defense'.

Comm. v. White, 409 mass. 266, 272 (1991) quoting Comm. v. Sefarian, 366. mass. 89, 96 (1974).

Under the Sixth Amendment, a defendants right to counsel is violated if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. 668, 687 (1984).

Once again, the single justice is in direct conflict with his very own SJC and this court. furthermore, the lower court leans heavily on the plenary review of the SJC, a plenary review that claims to review the entire record, yet made no mention of the false conclusion when going over its thoughts on the DNA. I posed a question to the single justice; Does it equate to ineffective plenary review where the SJC missed the DNA error? whatever the case may be, in Comm. v. Smith, 460 mass. 318, 320 (2011) the court stated ("it is not uncommon for a superior court judge considering a motion for new trial after plenary review to summarily reject any basis in the motion that could have been raised in the direct appeal or considered under the SJC's §33E plenary review power; it should be a very rare situation where relief will be granted on a claim that could have been raised at trial or on appeal.") (underlined emphasis added)

I believe this is that very rare situation, where compromised DNA was allowed into evidence, causing an unfair trial, violating my right to due process.

2) On the issue of police officers withholding exculpatory evidence in the form of of a compulsory eyewitness in my favor and their statement, it doesn't become clear

until all of the pieces are put together. That is, once one has gone through every eyewitness statement and their descriptions of the suspect, and after Balicki's testimony saying she never said the suspect had a pock marked face, and the fact that officer Sheehans report is not a statement given by Balicki, but a compilation of eyewitness statements, and that no eyewitness statement in evidence gives a pock marked face description, it is clear that an eyewitness and their statement is missing. If that is not compelling evidence, Sgt. Kevin Devine approved Sheehans report, interviewed Balicki, himself, with 2 other detectives, and removed the one physical description that didn't match my description, pock marked face, to apply for an arrest warrant.

These are facts, not speculation. In any case, the description of a suspect is important, and who gives the description has to be known. In this case, it is clear that an eyewitness gave a description of the suspect having a pock marked face, which is no less important than Balicki saying the suspect was unshaven above the bridge of his nose, or Ryan claiming the suspect had no facial hair while making a "positive" I.D. of me with a goatee (and my subsequent arrest, with a goatee).

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), this Court held that the government violates the constitutions Due Process Clause "if it withholds evidence that is favorable to the defense and material to the defendants guilt or punishment."

The description of a pockmarked face describes an alternative suspect, where identity is the central issue, whomever this eyewitness was was favorable to my defense. On Nov. 27, 2007 Pursuant to Mass. R. Crim. P. 14 (a)(3), the Commonwealth claimed to have disclosed and made available all items subject to discovery. There was no eyewitness statement describing the suspect having a pockmarked face. In fact, the description only ever

appears in Officer Sheehan's report, and no where else.

In Washington v. Texas, 388 U.S. 14, 18-19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967) "The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This court had occasion in In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed 682 (1948), to describe what it regarded as the most basic ingredients of due process of law." It observed that:

> 'A person's right to reasonable notice of a charge against him, had an opportunity to be heard in his defense - a right to his day in court - are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' 333, U.S., 273, 68 S. Ct. 507. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecutions witnesses for the purpose of challenging their testimony, he has the right to present his own witness to establish a defense. This right is a fundamental element of due process of law." As quoted in U.S. v. Mendez-Rodriguez, 450 F. 2d 1 (9th Cir. 1971). In Mendez-Rodriguez, the court stated;
>
> "Appellant concedes that he is unable to show that the witnesses in question would have offered testimony favorable to the defense, such statement is understandable in view of the fact that appellant was, by government action, deprived of the opportunity to interview said witnesses. Appellant couldn't know what these witnesses might say, if anything. We decline to indulge in any speculation that the interviews would, or would not,

have been fruitful to the defense." 450 f. 2d at 5.

The lower court has basically repeated what the Commonwealth argued, and made the claim that Balicki gave the pockmarked face description to Officer Sheehan, however, as stated earlier, Sheehan's report is not a statement given by, or signed by, Balicki. Secondly, Sgt. DeVine authored a report where he and 2 other detectives went to Balicki's home and interviewed her, and never is there a mention from her through DeVine of a pock marked face description. It's as if the lower court is ignoring the most basic principles of evidence. We know that there is an eyewitness and eyewitness statement missing, the pock marked face description can be attributed to none of the eyewitnesses or their statements, and Balicki testified that she did not give the description. which is partly why I filed a motion for Discovery, to further help develop the evidence, and believe an evidentiary hearing was necessary.

It is important that this court grant certiorari in this case for multiple reasons already explained, but in this instance, the police and prosecution have gotten away with violating my constitutional right to present witnesses in my favor by simply ignoring the fact that no one is attributed to making the pock marked face description, and putting the burden on the defense to show that Balicki didn't give the description. She was the prosecutions witness, it wasn't in any signed statement from her. There's nothing for the defense to impeach. No one testified that Balicki gave that description. It's as if the lower court is simply repeating the Commonwealth's arguments, which don't even address the actual claims being made, based on the evidence provided.

Others in my situation who can show evidence of descriptions

or accounts of events not attributed to any known witness would benefit greatly if the police were forced to be more thorough and accountable for evidence that favors a defendant. In my case, along with the compromised DNA, the missing eyewitness and statement shows that multiple issues to bring about an unfair trial persist. Without this Court granting certiorari, I believe the courts will continue to ignore the constitutional violations, or its own contradictive rules.

Lastly, trial counsel withheld knowledge of an eyewitness who not only saw decedent Rosario, twice, outside of his home, and spoke to him once, with the police in the area, but documented the time with her phone at 8:34 am, a full half hour after the suspect disappeared. The lower court concedes that Melissa R. Cruz's statement, that would have cast doubt on the chronology of events put forward by the prosecution, could have been marginally helpful by narrowing the window of time in which the killings could have been committed by me, but that it was far from disproving the Commonwealth's theory of the case. Ms. Cruz wasn't on either the defendant's or prosecutions witness list, and I didn't receive her statement or knowledge of her existence until the appellate process was over a year in.

The court once again makes the argument for ineffective assistance of counsel and appellate counsel when he states: "furthermore, none of the issues qualifies as "new" under §33E. Although the issues were not considered in the defendant's direct appeal, all are based on grounds that were known to both trial and appellate counsel. In his closing, the single justice ends with: "In any case, following a conviction of first degree murder, a defendant challenging his counsel's strategic decision must show that the decision was "manifestly unreasonable" and that it created a substantial likelihood of a

miscarriage of justice. Comm. v. Burgos, 462 mass. 53, 69 (2012). There is no reason to believe that the defendant's appellate counsel was unreasonable in choosing to not focus on any of the issues raised by the defendant in his gatekeeper petition!

In this case, identity is the prime issue. When I gave my alibi, it placed me halfway across the city. Other witnesses provided the time of 9 AM that I was seen at my apartment. Cruz' testimony would have strengthend my alibi, making it impossible for me to have committed these crimes. To not call her as a defense witness, keeping her existence from me, is the very definition and prime example of a "manifestly unreasonable" decision, for appellate counsel to refuse to appeal the trial counsels decision, even at my insistance, was also "manifestly unreasonable".

The single justice, once again, states that the issues are not "new" and "substantial". However, there are 5 exceptions to this traditional rule that a new trial is not allowed if defendant did not object or raise alleged error on appeal, as described in Comm. v. Miranda (Mass. App. Ct. April 7, 1986), 22 mass. App. Ct. 10, 490 N.E. 2d 1195, 1986 mass. App. LEXIS 1483;

1.) Review of convictions of first degree murder under ALM G.L.c. 278§33E;
2.) If there is substantial risk of miscarriage of justice from error of law;
3.) If there is error of constitutional dimension and constitutional principle was not fully developed at time of defendant's trial;
4.) Ineffective assistance of counsel; and
5.) Discretionary power of trial judge to consider issue at motion for new trial.

In Comm. v. Killburn, 438 mass. 356, 360-61 (2003), the SJC set yet another standard to grant post-appellate relief asserting, "the court will consider the case as a whole and must resolve four (4) questions:

1.) Whether there was error;

2.) Whether the defendant was prejudiced by the error;

3) Considering the error in the context of the entire trial, whether would it be reasonable to conclude that the error materially influenced the verdict; and

4.) whether the court can infer from the record that defense Counsel's failure to object or raise a claim of error at an earlier date was not a reasonable tactical decision.

Only if the answer to all four (4) questions is "yes" may the court grant relief." In this case the answer to all four (4) questions is "yes" at every juncture.

The Supreme Courts granting of certiorari on these matters would correct the lower courts erroneous rulings; force the lower courts to adhere to their own rules; allow myself to have a fair trial; force DNA labs to be held responsible for their follies and adhere to the FBI's Quality Standards; And force defense attorneys to comply with a defendants constitutional right to have effective assistance of counsel, throughout the country. A denial would not only allow these issues to persist in this case, but would allow these issues to manifest themselves continuously, and unchecked, throughout the country.

As stated earlier in the writ of certiorari, a motion for reconsideration was filed, in Oct. 2021, of the denial of the gatekeeper petition §33E. In Comm. v. Gunter, 456 mass. 1018, 924 N.E.2d 687(2010), The SJC noted that the only remedy for someone in the defendants position was to seek reconsideration from the single justice.

In Trigones v. Attorney General + another, 420 Mass. 859; 652 N.E.2d 893; 1995 Mass, LEXIS 319 SJC-06574, it states... "A single justice of this court, acting as gatekeeper, remanded the matter to the superior court for an evidentiary hearing to determine

wether the motion raised any "substantial" issues which would justify review by the full court."

The single justice has not ruled on this motion as I write this writ of certiorari, An evidentiary hearing would be proper to further develop the facts of both the veracity of the DNA conclusion report and discovery of a withheld materially exculpatory eyewitness statement and compulsory eyewitness in my favor describing an alternative suspect description.

I already have Dr. Feder willing to testify.

Conclusion

for the reasons stated in this petition, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Date. December 6, 2021

Brian k. Cavitt, pro se, 1856735
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JACKIE EDWARDS
NOTARY PUBLIC
Commonwealth of Virginia
Registration No. 7867502
My Commission Expires 4/30/2024

I certify that the above notary is not a party to this action.

Inmate Signature