No. _____

In the Supreme Court of the United States

REMEL AHART,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court for the County of Suffolk, Massachusetts

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Questions Presented

1. When a court issues a procedural ruling not to extend the benefits of a new rule collaterally to those who did not preserve their claim, does the Sixth Amendment protect a criminal defendant from the ineffectiveness of his counsel who admitted reviewing such a claim but chose not to raise it in past proceedings on the incorrect belief that it was not viable, which was contrary to available law at that time.

2. Whether the right to equal protection of the law is violated by Massachusetts's "gatekeeper" provision (M.G.L. c. 278, §33E) for the review of first-degree murder appeals from adverse postconviction decisions because said defendants are being treated differently than all others seeking review of a collateral claim brought in the first available instance due to predecessor counsel's ineffectiveness and the absence of an adequate record on direct appeal to ensure that it was reviewed on its merits.

TABLE OF CONTENTS

Index of Appendices

TABLE OF AUTHORITIES

Constitutional Provisions

Statutes and Court Rules

Other Authorities

Petition for a Writ of Certiorari

Petitioner Remel Ahart respectfully prays for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court for the County of Suffolk, Massachusetts.

Opinions Below

The opinion of Supreme Judicial Court (SJC) for the County of Suffolk, Massachusetts is unreported (App. A) and docketed in No. SJ-2021-0087.[1] The opinion of the SJC, which entered on March 1, 2013, denying Mr. Ahart's direct appeal (No. SJC-10795) from his convictions out of the Middlesex County Superior Court (No. 0681 CR 01015) is reported as *Commonwealth v. Ahart*, 983 N.E.2d 1203 (Mass. 2013).

Statement of Jurisdiction

The decision of Supreme Judicial Court (SJC) for the County of Suffolk, Massachusetts[2] entered on its docket on June 29, 2021.[3] Three timely motions for reconsideration were denied on July 29, 2021, August 25, 2021

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[1] All decisions rendered by Single Justices of the Massachusetts SJC pursuant to M.G.L. c. 278, § 33E are unreported including the decision in this case of June 29, 2021, as appearing at App. A. The denials of three subsequent motions for reconsideration therefrom (July 29, 2021, August 25, 2021, November 30, 2021), entered without a memorandum and order. Notice of denial is reproduced at App. B - D.

[2] The SJC for Suffolk County (despite its name) is a court with statewide jurisdiction in which Single Justices of the SJC hear motions and petitions. *See* http://www.mass.gov/courts/court-info/sjc/about/clerks-suffolk-county/ (visited February 20, 2022).

[3] The docket sheet is attached at App. E.

and November 30, 2021.[4] These decisions are final and unreviewable in any Massachusetts court.[5,6] This Court has jurisdiction under 28 U.S.C. § 1257(a).

Relevant Constitutional Provisions

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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[4] Mr. Ahart timely presented his grievances for reconsideration and rehearing. See *Commonwealth v. Gunter*, 456 Mass. 1017, 1018 (2010)("[w]here, as here, a single justice has denied a gatekeeper application under G. L. c. 278, § 33E, the only remedy for the defendant in the State courts is to file a timely motion for reconsideration with the single justice").

[5] Because Mr. Ahart was convicted of first-degree murder and his conviction was affirmed on direct appeal, M.G.L. c. 278, § 33E dictates that he must obtain leave from a "gatekeeper" Single Justice of the SJC to appeal to the full SJC from the denial of any post-conviction motion for a new trial. A Single Justice substantively reviewed Mr. Ahart's claim and did not exercise her discretion to refer the matter to the full bench and also denied three timely motions for reconsideration therefrom. The judgments are final and unreviewable. M.G.L. c. 278, § 33E; *Commonwealth v. Ambers*, 397 Mass. 705, 707-708 (1986); *Dickerson v. Attorney General*, 396 Mass. 740 (1986); *Leaster v. Commonwealth*, 385 Mass. 547, 548-550 (1982).

[6] *See, e.g., Teamsters v. Lucas Flour*, 369 U.S. 95, 98-101 (1962) (decision by five of nine justices of Washington Supreme Court sitting as a "Department" held highest court in which decision could be had because state law provided no right to further review); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 238 (1967) (Florida intermediate appellate court held highest court for purposes § 1257 where state law foreclosed party from asking Florida Supreme Court for review); *Largent v. Texas*, 318 U.S. 418 (1943) (state trial court held to be "highest court" where state law prohibited any appeal).

The Fifth Amendment provides, in pertinent part: "No person shall... be deprived of life, liberty, or property, without due process of law ...[.]"

The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ... and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment provides in pertinent part: "No State shall . . . deprive any person of life, liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Introduction

In this case, the Massachusetts Supreme Judicial Court has eviscerated the right to the effective assistance of counsel at all stages of a criminal proceeding, including the presentation of meritorious appellate and postconviction claims that were not and could not have been previously reviewed. A ruling on retroactivity of a new law stands distinct from a violation of a defendant's Sixth Amendment protection from counsel's knowing decision to forfeit meritorious claims without her client's informed consent where she wrongly believed that they were not viable. This is not a case of asking counsel to be omniscient but, when aware of a potential claim, relief from her ineffectiveness should occur since it had merit at the time and failing to raise it has prejudiced her client. All available claims with merit

that could have been raised should be protected by the Sixth Amendment guarantee to the effective assistance of counsel.

The SJC's decision not to refer Mr. Ahart's claims of ineffectiveness to the full court for appellate review constitutes a violation of his right to equal protection of the law because he is being treated differently than all other criminal appellants solely because he stands convicted of first-degree murder. Meritorious claims that could not have been raised earlier due to predecessor counsel's ineffectiveness and could not have been previously reviewed on direct appeal in the absence of an adequate record should be referred to the full court. The gatekeeper's review was not adequate, rather it was arbitrary and deprived him his right to be heard where his claims could not have been raised and reviewed earlier. Mr. Ahart's constitutional rights have been violated by the decision to not refer the matter to the full court.

Concise Statement of the Case

A. The Offense and Warrantless Collection of CSLI

On June 3, 2009, a jury found Mr. Ahart guilty of murder in the first degree of the victim, Corey Davis (Corey), on theories of deliberate premeditation and extreme atrocity or cruelty, as well as for armed assault with intent to murder Troy Davis (Troy) and two counts of illegal possession of a firearm. The full Court summarized the trial evidence as follows:

> Bright (Sherrod) believed Corey had stolen $15,000 from him. He offered the defendant $6,000 to kill Corey. He paid the

defendant one half "up front," with the balance due upon completion of the job. During the evening of March 18, 2006, the defendant and Ahmad Bright (Bright), the codefendant who is Sherrod's brother, traveled in a grey Jeep Cherokee to Upton Street in Cambridge, where they picked up James Miller. They tried to recruit Miller to help them kill Corey. Miller told them he would have no part of it, as Corey was a friend. The three men traveled around Cambridge looking for Corey. Miller was the Commonwealth's key witness at trial.

Shortly before midnight they spotted Corey's vehicle and followed him. They found Corey's vehicle parked on Hamilton Street in Cambridge. Bright, who was driving the Jeep, parked a few blocks away, on Pacific Street. After throwing their cellular telephones into the back seat of the Jeep, the defendant, armed with a nine millimeter semiautomatic handgun supplied earlier that night by Sherrod, and Bright, armed with a .38 caliber revolver, proceeded on foot toward Corey's vehicle. The defendant had kept both weapons under his control while they were traveling. Both the defendant and Bright were wearing gloves, and they had different-colored hooded sweatshirts.

After the defendant and Bright left, Miller got out of the Jeep and made a call on his cellular telephone to Corey, telling Corey to meet him immediately on Pearl Street. Miller, fearing for himself, did not tell Corey that the defendant and Bright had just set out to kill him. Miller then made a cellular telephone call to his girlfriend. Cellular telephone records indicated that this occurred at 11:53 P.M.

In the meantime, Corey and his cousin Troy were sitting in Corey's vehicle smoking marijuana. Less than thirty seconds after Miller's cellular telephone call to Corey ended, the defendant opened the back door of Corey's car and shot Corey. Troy ran from the car. Bright aimed at Troy but the ammunition in the revolver failed to discharge. The defendant then shot at Troy but missed. Corey tried to flee but collapsed outside his car. He was taken to a local hospital where he died from his gunshot wounds.

The defendant and Bright fled, throwing their weapons into a construction site as they ran. They encountered Miller on

Watson Street and demanded that he return to the Jeep with them. Fearing for his life, Miller complied. Once inside the Jeep, the defendant said they had "got[ten]" Corey, and he warned Miller that he "better not say anything."

Within thirty seconds of hearing the shots, a Hamilton Street resident telephoned 911. Cambridge emergency communications received the call at 11:53 P.M. Police units were dispatched immediately. Cambridge police Sergeant George Sabbey arrived at the scene at 11:56 P.M. As he was speaking with Troy near the intersection of Hamilton and Pearl Streets, Troy pointed to a grey Jeep Cherokee speeding down Pearl Street and exclaimed, "That's the car, that's the car." He had seen the defendant and Bright in the Jeep at a Cambridge housing project a few weeks earlier.

The guns were recovered by police. Deoxyribonucleic acid (DNA) testing done on the guns indicated that Sherrod was a major contributor to swabbings taken from the trigger of the nine millimeter handgun.

The defendant arranged a meeting with Sherrod and Miller several days after the murder to discuss an alibi. After he was arrested, the defendant had a telephone conversation with his girlfriend from the house of correction where he was being held pending trial. During that conversation they devised an alibi. The conversation had been tape recorded, and it was played to the jury. Cellular telephone records contradicted their alibi by showing that the defendant and his girlfriend were not together at the time of the crime, which she admitted at trial.

The defense at trial, developed through cross-examination of Commonwealth witnesses and closing argument, was that Miller was not a credible witness, and that it was Miller who had killed Corey. *Miller's cellular telephone records and corresponding cellular tower records indicated that Miller was in a location several blocks away from the murder scene at the time Corey was shot. Similar records for the defendant's and Bright's cellular telephones indicated they were not in use in the minutes before and after the shooting. They also showed the movements of the trio around Cambridge and Dorchester (where Bright lived)*

that corroborated much of Miller's testimony about their activities that night.

Ahart, 464 Mass. at 438-440. Specifically, at trial, the Commonwealth laid the records of the cellular telephone transmitter sites employed in carrying calls against maps of the area to purportedly show the movements of Miller, Ahart and Bright in Cambridge and Boston. It alleged that the technology employed by Sprint/Nextel allows one to know what cell site and sector a certain cell phone call is "hitting off of" or "connecting with" as well as which geographical area the holder of the phone is in during the call.

The CSLI at issue was obtained without a warrant. On May 4, 2006, the Commonwealth presented Lieutenant Edward Forster to testify in front of the Grand Jury. He testified that there were two (2) cellular phones found at the crime scene, which belonged to Corey: (1) a black Nextel with the phone number 401-405-7473 and (2) a silver Samsung with the phone number 617-459-1359. He subpoenaed the call logs for both phones which detailed the outgoing and incoming calls made prior to his death, which caused him to believe that Miller spoke to Corey right before he was shot and killed. He testified that he also subpoenaed call logs from Miller's phone for the period of March 18, 2006 to March 19, 2006 that revealed he called 617-461-8024, which he alleged was registered to Remel Ahart. Miller's logs also showed communications with Sally Teixeira (his girlfriend), Ashley Collins (girlfriend of Larry Ahart, Remel's Brother) and Ashley Brown. Another

Grand Jury summons, using the same language but for the defendant's number 617-461-8024, and that of several others, also issued for the same date(s). While Lieutenant Forster testified that the locations of these people would help his investigation and could be obtained through cellular records, he provided no evidence to suggest that Mr. Ahart played a role in the murder, was in the area of the murder or even knew Corey or his companion at the time of the alleged killing. The prosecutor arguing before the Grand Jury stated that the probable cause standard was met and the subpoenas should issue. Thereafter, the Grand Jury issued a subpoena for Remel Ahart's CSLI along with the other parties mentioned in Lieutenant Forster's testimony and the Commonwealth successfully moved for the production of these records, receiving a court order on May 8, 2006. Later, on June 29, 2006, the court, based on further Grand Jury testimony by Detective Forster, issued an order for the CSLI of several individuals for the period of June 19, 2006 to June 28, 2016 but not Mr. Ahart's CSLI.

Trial counsel, Attorney Roger Witkin, filed a Motion to Suppress the records containing Mr. Ahart's CSLI and, later, on July 16, 2007, a memorandum of law in support thereof, in which he asserted that the data "was obtained without a warrant and without probable cause, in derogation of Ahart's constitutional safeguards under the Fourth and Fourteenth Amendments to the United States Constitution, Article XIV of the

Constitution of the Commonwealth and contravention of the provisions of G.L. c. 276, §§ 1-7." However, he withdrew this motion before being heard and filed a new motion to exclude the CSLI records obtained by the Court Order issued on June 29, 2006. As grounds, he stated that he did so because additional discovery made the former motion "non-viable" but raised issues to be addressed in the latter motion. The motion to exclude was denied on the grounds that Mr. Ahart lacked standing where none of the phones subject to that order were registered to him and, even if he had standing, the order issued properly in compliance with 18 U.S.C. § 2703(d) of the Stored Communications Act (SCA). Trial counsel never again challenged the records allegedly linking his client to the area of the murder, which related to the period of March 18, 2006 to March 19, 2006.

B. Ahart's Direct Appeal

Trial counsel's performance was not challenged by appellate counsel, Attorney Leslie O'Brien. She did not raise any issue concerning the seizure of the CSLI used in this case despite the SJC's decision in *Commonwealth v. Connolly*, 454 Mass. 808 (2009), which issued on September 17, 2009, during Mr. Ahart's appeal and raised a question of the propriety of CSLI collection without probable cause. She also did not challenge the collection of CSLI as failing to meet the standard under 18 U.S.C. § 2703(d). However, she since averred that she reviewed the CSLI issue but did not find it "viable" without

ever discussing such claims with her client. Therefore, the grand jury minutes, motions and orders related to the CSLI production were not part of the record on direct appeal for plenary review under M.G.L. c. 278, §33E.

C. Ahart's Supplemental Motion for New Trial

After the SJC's affirmance and while a motion for new trial, pursuant to Mass. R. Crim. P. 30(b), was pending below on unrelated claims, new postconviction counsel, Attorney Ian Keefe, raised the CSLI claims for the first time in a "Supplemental Motion for New Trial (Mass. R. Crim. P. 30)." This motion was denied on May 16, 2019 and, while counsel concluded that it should be appealed and filed a notice of appeal in the Superior Court, he did not preserve Mr. Ahart's right because he failed to file a gatekeeper petition under M.G.L. c. 278, §33E.

D. Gatekeeper Opinion Below

Now represented by undersigned counsel, a Single Justice of the Supreme Judicial Court permitted Mr. Ahart to file a late gatekeeper petition for full bench review of the lower court's ruling on his Supplemental Motion for New Trial. On June 29, 2021, it was denied on the grounds that, at that time, a warrant was not required to acquire a person's historical CSLI, the rule announced in *Commonwealth v. Augustine*, 467 Mass. 230, 257 (2014)(requiring probable cause for collection), was a new rule that was not to be retroactive to Mr. Ahart because his prior counsel did not raise such a

claim, and his claims of ineffective assistance were not "new and substantial" for gatekeeper relief, *Commonwealth v. Gunter*, 459 Mass. 480, 490 (2011), since they could have been raised by predecessor counsel and, regardless, were subject to the court's plenary review. (App. A). Three timely motions for reconsideration were denied, which raised Fifth, Sixth and Fourteenth Amendment claims. (App. E).

Reasons for Granting the Writ

I. Review below was inadequate where the Single Justice denied Mr. Ahart's gatekeeper petition on the grounds that his issues were not "new" as required under M.G.L. c. 278, §33E because they would have been considered on plenary review during direct appeal; however, the record before the court did not include the grand jury minutes and order related to the CSLI production and he was then represented by counsel whose ineffectiveness is the subject of the instant claims.

Mr. Ahart's case merited review by the full bench and the decision was not adequate to support the judgment. The "adequacy" prong primarily focuses on state court dismissals of federal claims on state procedural grounds, as procedural requirements are by definition logically antecedent. This Court has jurisdiction to review this judgment because the finding that Mr. Ahart's claims were not "new" under M. G. L. c. 278, § 33E, an antecedent state-law ground, was arbitrary, unforeseen and otherwise deprived him of a reasonable opportunity to be heard, see, e.g., *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); see also *Michigan v. Long*, 463 U.S. 1032, 1038 (1983) ["It is, of course, incumbent upon this Court to ascertain for

itself whether the asserted non-federal ground independently and adequately supports the judgment." (internal quotation marks omitted)]; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

M. G. L. c. 278, § 33E provides that postconviction appeals in first-degree murder cases will be referred to the full bench for decision where an 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." The "new and substantial" standard is permissive and looks to the overall worthiness of the case rather than a strict disjunctive analysis of novelty and substantiality. *Commonwealth v. Smith,* 460 Mass. 318, 322 (2011). "The bar for establishing that an issue is 'substantial' . . . is not high. It must only be a meritorious issue in the sense of being worthy of consideration by an appellate court." *Commonwealth v. Gunter,* 459 Mass. 480, 487 (2011), citing *Dickerson,* 396 Mass. at 743-744. There can be little question that the issues in Mr. Ahart's case are substantial where counsel's failure to seek and obtain the suppression of unlawfully collected CSLI evidence was used to secure his conviction, constituting a serious threat to our justice system. "[A]n issue is generally not 'new' under § 33E, where it is not specifically addressed by the court in its opinion on direct appeal but where there is reason to be confident that the issue has been considered and rejected by the court under applicable law

through its plenary review." *Commonwealth v. Johnson*, 461 Mass. 1, 7 (2011) (Gants, J. concurring); citing *Smith*, 460 Mass. at 320–321 n. 1. The ineffective assistance issues presented here could not have been considered on direct appeal because counsel's performance is the subject of the instant action and the record necessary for their adjudication was not then before the court.

Mr. Ahart's CSLI claims are new because they were raised in the first instance with successor counsel. The issue of whether the collection of CSLI was done properly and whether counsel was ineffective in failing to raise the issue on direct appeal could not have been examined on plenary review. Specifically, Mr. Ahart argued that appellate counsel was ineffective for failing to raise the suppression of his historical CSLI for the period of March 18, 2006 through March 26, 2006 on two grounds: first, that the Commonwealth failed to obtain a warrant (and requisite showing of probable cause); and, second, it also did not meet the standard for production under 18 U.S.C. § 2703(d) as "relevant and material" to an ongoing investigation. The foundation of his claim lies in the lower court's allowance of the Commonwealth's "Motion for Court Order Compelling the Production of Certain Records before the Grand Jury" based upon testimony presented before the Grand Jury on May 4, 2006. The Grand Jury minutes for that day, the request for Grand Jury records, the Commonwealth's motion for

production and ensuing Court Order were not part of Mr. Ahart's direct appeal record. The adjudicated pretrial CSLI motion did not concern the CSLI produced according to this order and the motion to suppress that CSLI from March 2006 was waived by trial counsel. Thus, the SJC's holding that Mr. Ahart's gatekeeper petition should not be allowed because his claims were sufficiently vetted during plenary review cannot stand in the absence of a record necessary to conduct such review, which appellate counsel neither provided nor the court sought *sua sponte* if it had been alerted to the "broader issue" of the propriety of the Commonwealth's seizure of CSLI records from March 2006.

The SJC's judgment is not adequate because it has limited collateral review absent comprehensive plenary review, which is arbitrary, unforeseen and deprives Mr. Ahart a reasonable opportunity to be heard on his claims that, because of counsel's ineffectiveness in violation of the Sixth Amendment, CSLI was collected and used to secure his convictions in violation of the 4th Amendment, Article 14 of the Massachusetts Declaration of Rights and 18 U.S.C. § 2703(d).

II. The right to equal protection of the laws is violated by Massachusetts's "gatekeeper" provision (M.G.L. c. 278, §33E) for the review of first-degree murder appeals from adverse postconviction decisions because said defendants are being treated differently than all others seeking review of a postconviction claim brought in the first available instance due to predecessor counsel's ineffectiveness and the absence of an adequate record on direct appeal to ensure that it had been previously reviewed.

The constitutionality of the gatekeeper provision of G. L. c. 278, § 33E has raised concern in the past as to whether it violates the Fourteenth Amendment to the U.S. Constitution's Equal Protection Clause. See *Dickerson v. Latessa*, 688 F.Supp. 797, 798-802 (1988). In *Dickerson v. Latessa*, the U.S. District Court, on habeas review, considered the constitutionality of § 33E after this SJC held that the statute met the "rational basis" test and, thus, was constitutional in *Dickerson v. Attorney General*, 396 Mass. 740 (1986). *Id.* at 798. The defendant argued that "Massachusetts' treatment of post-conviction relief actions creates two classes of convicted persons that are treated differently in violation of the Fourteenth Amendment's Equal Protection Clause" because first-degree murder cases are treated differently on appellate review. *Id.* The Court observed that

> In the first instance, that treatment is highly favorable to defendants. Persons convicted of first degree murder can appeal their convictions directly to the Supreme Judicial Court and there receive plenary review, i.e., broad review of all aspects of the case whether or not specifically raised on appeal. All other convicted persons can appeal only to the Massachusetts Appeals Court, with Supreme Judicial Court review being granted rarely and in limited circumstances. See Mass. R. App. P. 11, 27.1

> (1987). Moreover, for these defendants, review by either Massachusetts appellate court is limited to claims of legal error which were preserved by objection at trial or which present a substantial risk of a miscarriage of justice. *Commonwealth v. Ely*, 388 Mass. 69, 77-78, 444 N.E.2d 1276 (1983); *Commonwealth v. Freeman*, 352 Mass. 556, 564, 227 N.E.2d 3 (1967). However, after these appeals are exhausted, the statutory scheme is considerably less advantageous to those convicted of first degree murder if they subsequently try to pursue postconviction claims. Section 33E prohibits subsequent appellate review of a first degree murder conviction absent determination by a single justice that the appeal presents "a new and substantial question which ought to be determined by the full court." Mass. Gen. Laws ch. 278, sec. 33E. The decision of the single justice to deny leave to appeal is itself unappealable. *Leaster v. Commonwealth*, 385 Mass. 547, 548, 432 N.E.2d 708 (1982). In contrast, Mass. R. Crim. P. 30(c)(8) affords all those convicted defendants not subject to Section 33E a subsequent appeal on the merits as of right to the Appeals Court. Under certain circumstances, such defendants may also appeal directly, or after the Appeals Court's ruling, to the Supreme Judicial Court.

Id. at 798-799. Particularly, the defendant argued that "the less favorable treatment of first degree murder defendants with respect to appeals subsequent to the first, plenary review violates equal protection." *Id.* at 799.

Ultimately, the District Court held that, "as applied to the particular facts of this case," the defendant's right to the equal protection of law was not violated because the gatekeeper process was the practical, functional equivalent of the process granted other defendants and it appeared to screen out only frivolous claims in practice. *Id.* at 798, 800-802. Although Dickerson advanced claims pertaining to errors at trial, which were raised in collateral proceedings, and he did not allege ineffective assistance of counsel, the court

noted that Single Justices "are, properly, being liberal in finding issues raised both new and non-frivilous" in many cases including those of ineffective assistance. *Id.* at 801; citing *Commonwealth v. Florentino*, 396 Mass. 689, 689-690 (1986). Moreover, substantively, the court found that Dickerson, "in the circumstances of this case, received the full measure of his constitutional rights under the Equal Protection Clause" because two of the substantive issues he raised could have been raised on plenary review as they pertained to the trial judge's errors at trial and the remaining claim of how the motion judge handled the motion for new trial was purely a state law matter not appropriate for habeas relief. *Id.* at 802-803.

However, the court's ruling was limited to Mr. Dickerson's unique circumstances while expressing concern generally about a strict interpretation of the gatekeeper provision. The court was unpersuaded by the Commonwealth's claim that "plenary review ... makes reasonable the less thorough post-conviction review afforded first degree murder convicts because every facet of such cases will have already been subjected to full, plenary review." *Id.* at 800-801. On the contrary, the court noted that "numerous post-conviction claims may be raised that could not possibly have been considered by the Supreme Judicial Court in its plenary review, e.g., claims based on new evidence, on failure to disclose exculpatory evidence, on

recantation by prosecution witnesses, and on ineffective assistance of counsel based on conflict of interest to name but a few." *Id.* at 801.

In the case at bar, Mr. Ahart has advanced "new" claims pertaining to the ineffective assistance of appellate counsel that could not have been raised during plenary review as she was his then counsel and her performance is the subject of the present challenge. See *Commonwealth v. Lao*, No. SJ-2006-0357 (Oct. 24, 2006); *Commonwealth v. Hardy*, No SJ-2010-0153 (June 11, 2010) (paper #3) (Spina, J.); *Commonwealth v. Shelley*, 411 Mass. 692, 692-94 & n.1 (1992). Moreover, as discussed *supra*, plenary review did not include the record of the proceedings necessary to adequately review the propriety of the collection of his historical CSLI evidence for the period of March 18, 2006 through March 26, 2006, for which suppression should have been sought, and, thus, his "meaningful" claims should not have been excluded as there is "no reason to be confident that the legal issue was fairly considered and rejected by the court." *Johnson*, 461 Mass. at 4-9 (Gants, J., concurring); citing *Smith*, 460 Mass. at 321 n.1.

Accordingly, Mr. Ahart's right to the equal protection of law, as guaranteed by the Fourteenth Amendment, has been violated because where he raised his claim of ineffective assistance of appellate counsel at the first instance available through new counsel during collateral review and the record on plenary review cannot be said to have vetted his claims, he is being

treated differently than other similarly situated defendants raising the same claims as a result of the application of G. L. c. 278, § 33E, which should be held unconstitutional. See *Commonwealth v. Woods*, 480 Mass. 231, 231, 236-238 (2018); see also *Commonwealth v. Woods*, SJ-2016-0504 (March 24, 2017); *Woods v. Medeiros*, 465 F.Supp.3d 1 (2020).

III. Precedent and policy both counsel in favor of holding that deficient attorney performance resulting in the loss of a known claim cannot be eschewed on procedural grounds and relief should be afforded to remedy the substantive violation.

Mr. Ahart has a state and federal constitutional right to the effective assistance of counsel at trial as well as in presenting his claims of error during appellate proceedings under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See *Evitts v. Lucey*, 469 U.S. 387, 394, 396 (1985)(the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right); *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). "When assessing whether appellate counsel's behavior fell below the standard of an ordinary, fallible lawyer, we focus on whether appellate counsel 'failed to raise a significant and obvious issue . . . which . . . may have resulted in a reversal of the conviction, or an order for a new trial.'" *Commonwealth v. Aspen*, 85 Mass. App. Ct. 278, 282 (2014); quoting *Commonwealth v. Sowell*, 34 Mass. App. Ct. 229, 232 (1993); quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). Here, Mr. Ahart's appellate counsel

provided ineffective assistance in failing to raise two distinct claims: first, that the seizure of CSLI evidence without a warrant and showing of probable cause violated the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights; and, second, that trial counsel was ineffective by withdrawing, without adjudication, a motion for the suppression of the CSLI wrongly produced under the SCA, specifically 18 U.S.C. § 2703(d). See *Commonwealth v. Pena*, 31 Mass. App. Ct. 201, 204 (1991)["[t]he failure of counsel to litigate a viable claim of an illegal search and seizure is a denial of the defendant's Federal and State constitutional right to the effective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 382-383 (1986)"].

A. Loss of Claim under Fourth Amendment and Article 14 of Massachusetts Declaration of Rights

Mr. Ahart does not petition this Court for relief through the retroactive application of *Commonwealth v. Augustine*, 467 Mass. 230, 257 (2014)(analyzing CSLI collection related to a 2004 murder, Article 14 of the Massachusetts Declaration of Rights requires warrant before collection of historical CSLI), or *Carpenter v. United States*, 138 S. Ct. 2206 (2018)(interpreting Fourth Amendment application for CSLI production). His case stands apart from others in this regard. He is entitled to relief from the ineffectiveness of his predecessor appellate counsel because she admitted that she identified the CSLI issues, reviewed them and chose not to raise

them without discussing them with her client because they were not viable. To the contrary, her conclusion was not justified by existing precedent and presenting such claims not only had merit but was invited by the SJC in a 2009 concurrence. Appellate counsel's ineffectiveness is the cause of the finality of his direct appeal without the presentation of the record to support his claims, see *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 736-737 (2007)("application where the defendant's conviction had not yet become final when he moved for a new trial"), *Commonwealth v. Pidge*, 400 Mass. 350, 354 (1987)("should apply to those defendants who have preserved the issue at trial and raised it on direct appeal"), let alone the CSLI claims themselves. Thus, his conviction is tainted, and relief is warranted under the Sixth Amendment.

While a warrant requirement was not announced prior to the conclusion of his direct appeal, a CSLI claim was not futile; rather, it was apparent from the longstanding Fourth Amendment jurisprudence and recent comment by the SJC. Indeed, trial counsel was enough alerted to the claim to file a suppression motion and appellate counsel averred that she reviewed the CSLI claims. Particularly, in *Katz v. United States*, 389 U.S. 347, 351 (1967), this Court first articulated that "the Fourth Amendment protects people, not places," and that a search protected by the Fourth Amendment occurs when the government invades an individual's reasonable

expectation of privacy. See *Id.* at 360-361 (Harlan, J., concurring). There, the Federal Bureau of Investigation (FBI) affixed an electronic listening and recording device to the outside of a public telephone booth and used it to intercept telephone calls placed by the petitioner. *Id.* at 348. The Court concluded that a warrant was required, not because the FBI had seized the telephone booth, but because the FBI invaded the petitioner's reasonable expectation of privacy, repudiating *Olmstead v. United States*, 277 U.S. 438 (1928)(allowing any manner of surveillance device as long as police did not breach physical barriers). *Id.* at 352-353. This Court was clear that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

The *Katz* framework establishing "a constitutionally protected reasonable expectation of privacy[,]" *Id.*, did not limit the Fourth's Amendments protection but invited challenges to keep pace with technological advancement. Indeed, this Court ruled that hidden tracking devices like beepers, *United States v. Karo*, 468 U.S. 705, 716-17 (1984), and thermal imaging, *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001), violated the right to personal privacy in one's home. Even in *United States v. Knotts*, 460 U.S. 276, 281 (1983), when this Court held that a driver on a public road

could not reasonably expect his movements to be private from an officer observing where he drove, the justices observed that "dragnet-type law enforcement practices" could lead to a different result. And as technology has developed, this Court repeated that one "does not leave his privacy behind when he walks out his front door[,]" *Id.* at 284, culminating in *United States v. Jones*, 565 U.S. 400, 415-16, 430 (2012), where a majority of the justices opined that using a GPS tracker to monitor a car's location raised privacy concerns.

Approximately one month before Mr. Ahart's jury verdict, the SJC heard argument in *Commonwealth v. Connolly*, 454 Mass. 808 (2009), which raised concern about electronic tracking. It held that the police's initial installation and use of a surreptitious GPS device on the defendant's motor vehicle constituted a seizure requiring a warrant for purposes of Article 14 of the Massachusetts Declaration of Rights, including that the police use of the vehicle to conduct GPS monitoring for their own purposes also constituted a seizure for which a warrant would be required. *Id.* at 822-824. The concurrence specifically denoted a concern for tracking through cellular phone use due to technological advancement, stating:

> For example, virtually all of us now carry cellular telephones, many of which are equipped with GPS technology, permitting a cellular carrier to learn our precise whereabouts at any given moment. Even without GPS technology, <u>any cellular telephone, when it is turned on, can be traced to the tower with which it is communicating, giving an approximate location</u>. [Note Gants-1:

> Evidence concerning the location of a defendant's cellular telephone at some point in the past (e.g., at the time that a crime was committed), derived from cellular companies' records, is now commonly offered in evidence in criminal cases. See Cellphones Enter Court as Sources of Evidence, New York Times, July 6, 2009, at A15.] Presumably, with the assistance of the cellular company, law enforcement could conduct real-time monitoring of any individual carrying a cellular telephone, without needing to attach anything to any property or person...
>
> Our constitutional analysis should focus on the privacy interest at risk from contemporaneous GPS monitoring, not simply the property interest. Only then will we be able to establish a constitutional jurisprudence that can adapt to changes in the technology of real-time monitoring, and that can better balance the legitimate needs of law enforcement with the legitimate privacy concerns of our citizens. [Note Gants-2: Such a jurisprudence would need to recognize that the assistance of a third party, namely, the cellular company or other service provider, may be needed for the police to conduct certain types of contemporaneous GPS monitoring, or its equivalent. In these instances, we would need to consider whether a warrant was needed before the police could request a third party's assistance to monitor its customers in real time, and whether a court, in the absence of statutory authorization, may order a third party to provide such technical assistance, perhaps analogous to court orders authorizing a wiretap and directing the telephone company to assist law enforcement in the execution of the wiretap warrant. See *New England Tel. & Tel. Co. v. District Att'y for the Norfolk Dist.*, 374 Mass. 569 (1978).]

Connolly, 454 Mass. at 835-836. Thus, as early as 2009, "the issue of search and seizure concerning tracking technology was widely known" in Massachusetts, *Commonwealth v. Broom*, 474 Mass. 486, 492 fn. 9 (2016); however, appellate counsel did not present the issue in postconviction proceedings wrongly believing the issue not viable for presentation under either Article 14 of the Massachusetts Declaration of Rights or the Fourth

Amendment after review. This was the same foundation that alerted counsel to raise such claims in *Augustine*, 467 Mass. at 257 and, later, *Carpenter*, supra. Notably, Mr. Augustine had moved the Suffolk County Superior Court in pretrial proceedings on Docket No. 1184 CR 10748 to suppress the warrantless CSLI collection in his murder case on November 15, 2012, only six days after oral argument in Mr. Ahart's case, and the motion was allowed on February 26, 2013, three days before the SJC's decision on Mr. Ahart's direct appeal. Mr. Ahart's counsel's finding that a challenge to the collection of his CSLI was not "viable" is erroneous and a violation of his right to the effective assistance of counsel under the Sixth Amendment.

Augustine's retroactivity ruling is of no consequence to the analysis of whether Mr. Ahart's Sixth Amendment right was violated by appellate counsel's deficient performance. Whether relief is warranted because she wrongly omitted from direct appeal the CSLI claims that she reviewed and rejected should be governed by *Kimmelman v. Morrison*, 477 U.S. 365, 378-385 (1986). There, on habeas review, the District Court granted relief for counsel's ineffectiveness in failing to raise a pretrial suppression claim and the Court of Appeals affirmed, finding that federal courts may not withhold habeas review under *Stone v. Powell*, 428 U.S. 465 (1976)(may refuse habeas review where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim), because it cannot bar federal habeas

consideration of Sixth Amendment claims based on counsel's alleged failure to litigate Fourth Amendment claims. *Id.* at 365. This Court agreed, holding that "while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values." *Id.* at 375; see also 374 at Fn. 1 ("[r]espondent's Sixth Amendment claim is distinct from his Fourth Amendment claim, and has never been defaulted"). The Court was explicit in its policy that the Sixth Amendment cannot be eschewed, stating:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance, . . . consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to extend *Stone* and hold that criminal defendants may not raise ineffective assistance claims that are based primarily on incompetent handling of Fourth Amendment issues on federal habeas, we would deny most defendants whose trial attorneys performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel. We would deny all defendants whose appellate counsel performed inadequately with respect to Fourth Amendment issues the opportunity to protect their right to effective appellate counsel.

Id. at 378. It also noted that unlike cost analysis supporting the Fourth Amendment habeas restriction, "the Sixth Amendment mandates that the

State bear the risk of constitutionally deficient assistance of counsel" to ensure the justness and constitutionality of each conviction. *Id.* at 379; citing *Murray v. Carrier*, 477 U. S. 478, 478, 488 (1986)(counsel's performance cannot be constitutionally ineffective under the standard established in *Strickland* or it will cause "inequity in a procedural default because when a "procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State").

Thus, in the case at bar, Mr. Ahart asks that this Court accept this case to preserve the right to effective appellate counsel. He is entitled to review of her performance under the Sixth Amendment and whether her error resulted in the loss of his valid claims for relief. This stands separate, distinct and of heightened constitutional importance from the applicability of *Augustine's* retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989). He should receive review of his suppression claim as if his appellate counsel had been effective because "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (interpreting the Due Process Clause of the Fourteenth Amendment). His specific claim that his CSLI should have been suppressed under the Fourth Amendment and Article 14 of the Massachusetts Declaration of

Rights should be heard on the merits and unrelated to whether *Augustine*, supra, or *Carpenter*, supra, are retroactive.[7] The Sixth Amendment demands Mr. Ahart receive a new appeal that is devoid of prejudicial error and constitutional violation. Compare *Commonwealth v. Stote*, 456 Mass. 213, 217 fn. 9 (2010)(stating that if the defendant could establish ineffective assistance of appellate counsel, he would be entitled at this juncture to a new appeal); see also *Commonwealth v. Randolph*, 438 Mass. 290, 294-295 (2002)("Thus, when a defendant alleges that his failure to preserve an issue for appeal stems from ineffective assistance of counsel, as this defendant has, we do not evaluate the ineffectiveness claim separately. If we determine that an error has been committed, we ask whether it gives rise to a substantial risk of a miscarriage of justice -- ineffectiveness is presumed if the attorney's omission created a substantial risk, and disregarded if it did not."); see Article 12 of Massachusetts Declaration of Rights (affording more protection in certain instances than even the Sixth Amendment).

B. Loss of SCA Violation Claim

Mr. Ahart also presented a claim below entirely distinct from Subsection A above yet it was ignored. He argued that the Sixth Amendment applied to appellate counsel's failure to raise the issue of the propriety of the

---

[7] In its written opposition to his Supplemental Motion for New Trial, the Commonwealth admitted that "the evidence presented to the grand jury on May 4, 2006 may not have risen to the level of probable cause."

collection of his CSLI under the SCA standard set forth in 18 U.S.C. § 2703(d). Pretrial, trial counsel was ineffective by failing to press this claim as the order for production issued under it. The Single Justice made no findings on the merits of this claim, as discussed *infra*, wrongly believing it procedurally waived under the gatekeeper provision. However, it survives and should be entitled to review as it stems from appellate counsel's ineffectiveness and was raised in the first instance with new counsel.

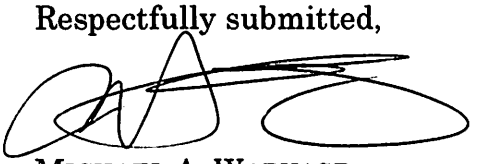
Specifically, suppression of the CSLI still should have been raised by prior counsel as the evidence presented to the Grand Jury on May 4, 2006 failed to meet the standard for production under 18 U.S.C. § 2703(d) as "relevant and material" to an ongoing investigation and not simply the subject of a fishing expedition. The standard required for a § 2703(d) order is less than probation cause, see *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 606 (5th Cir. 2013), and "essentially a reasonable suspicion standard," *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 287 (4th Cir. 2013). However, the mere fact that Mr. Ahart and Miller exchanged calls during the evening, without more, does not establish a reasonable suspicion that he was involved in the murder. At that time, his whereabouts were unknown and sought by obtaining his CSLI. There was no indication that he sought the victim's death or associated with Miller in any criminality. Exchanging phone calls absent any indicia of

wrongdoing does not meet even the low threshold for a valid §2703(d) order and counsel should have sought suppression of the critical CSLI evidence used by the Commonwealth to unconstitutionally convict Mr. Ahart.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Charlestown, MA 02129
(857) 445-0100
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Dated: February 22, 2022

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2021-0087

Middlesex Superior Court
No. 0681CR0105

COMMONWEALTH

vs.

REMEL AHART

MEMORANDUM OF DECISION & ORDER

The defendant, Remel Ahart, has filed an application pursuant to G. L. c. 278, § 33E, for leave to appeal from the denial of his supplemental motion for a new trial and several related motions. For the reasons set forth below, the application is denied.

Background. In 2006, the defendant was indicted for murder in the first degree. Prior to trial, the defendant's trial counsel moved to suppress records of cell site location information (CSLI) from the defendant's cellular telephone (as well as CSLI records from cellular telephones not belonging to the defendant), which the Commonwealth had obtained pursuant to a court order but without a search warrant. Trial counsel withdrew the motion before it was decided, after receiving certain discovery from the Commonwealth that, in counsel's view,

APPENDIX A

made the motion no longer viable. In place of the withdrawn motion to suppress, counsel filed a motion to exclude CSLI records from four cellular telephones not registered to the defendant. That motion focused on the propriety of the court order by which the Commonwealth had obtained the records, asserting that the order was issued without probable cause. The judge denied the motion.

At the defendant's jury trial, the Commonwealth's "key witness" testified that he been with the defendant on the night of the killing. See Commonwealth v. Ahart, 464 Mass. 437, 438 (2013). The Commonwealth introduced the defendant's CSLI records to corroborate the witness's testimony. See id. at 440. The defendant was convicted of murder in the first degree in 2009, and his conviction was affirmed on appeal in 2013. See id. at 438. In connection with this direct appeal, the defendant's appellate counsel did not raise an issue related to the defendant's CSLI records.

Thereafter, the defendant filed several postconviction motions in the Superior Court, each of which has been denied, including a motion for a new trial, a supplemental motion for a new trial, and two motions for reconsideration of the denial of the supplemental motion. He also has filed, pro se, an "addendum" to one of the motions for reconsideration. In his gatekeeper application he seeks leave to appeal from the denial

of the supplemental motion for a new trial, the two motions for reconsideration, and the addendum.[1]

The defendant claims in his motions that his trial counsel was ineffective for failing to move to suppress his CSLI records, and that his appellate counsel was ineffective for failing to raise the CSLI issue on direct appeal. The defendant argues that a motion to suppress would have been successful, see Commonwealth v. Banville, 457 Mass. 530, 534 (2010) (to prevail on claim of ineffective assistance based on grounds not raised in motion to suppress, defendant must show that motion would have been successful), because the Commonwealth had obtained the defendant's CSLI records without a search warrant, see Commonwealth v. Augustine, 467 Mass. 230, 257 (2014), and because the Grand Jury testimony giving rise to the court order for the records did not indicate that the records would be "relevant and material" to the ongoing investigation, see 18 U.S.C. § 2703(d).

Discussion. Because the defendant received plenary review of his conviction of murder in the first degree in his direct appeal to this court, he can appeal from the denial of his postconviction motions only if he "show[s] that there is a 'new

[1] The defendant acknowledges that his application is late with respect to at least some of the motions that are the subject of the application. I allow his request to file it late.

and substantial' issue that this court could not have considered in the course of plenary review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). An issue may be "new" for purposes of G. L. c. 278, § 33E, if it is based on case law not sufficiently developed at the time of the defendant's trial or appeal, such that the claim could not reasonably have been raised during the prior proceedings. See Commonwealth v. Ambers, 397 Mass. 705, 708 (1986). "An 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." Commonwealth v. Johnson, 461 Mass. 1, 2 (2011), quoting Ambers, supra at 707. General Laws c. 278, § 33E, "requires that the defendant present all his claims of error at the earliest possible time, and failure to do so precludes relief on all grounds generally known and available at the time of trial or appeal." Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). An issue is "substantial" for purposes of G. L. c. 278, § 33E, so long as it is "a meritorious issue in the sense of being worthy of consideration by an appellate court." See Commonwealth v. Billingslea, 484 Mass. 606, 621 (2020), quoting Gunter, supra.

The defendant maintains that his trial counsel was ineffective for failing to move to suppress and exclude the

defendant's CSLI records after the Commonwealth obtained the records without a search warrant, and that his appellate counsel was ineffective for failing to raise the same issue on appeal. At the time, however, the law did not require a warrant for the Commonwealth to acquire a person's historical CSLI records. See Augustine, 467 Mass. at 257 ("neither the statute, 18 U.S.C. § 2703 [d], nor our cases, have previously suggested that police must obtain a search warrant in addition to a § 2703 [d] order before obtaining an individual's CSLI from his cellular service provider"). See also Commonwealth v. Collins, 470 Mass. 255, 261 (2014) (counsel not ineffective for failing to make objection that would have been futile under prevailing case law).

Following the disposition of the defendant's direct appeal, the court in Augustine, 467 Mass. at 257, concluded for the first time that, under art. 14, "the Commonwealth generally must obtain a warrant before acquiring a person's historical CSLI records." The court clarified that the "new rule" it announced "applies only to cases in which a defendant's conviction is not final, that is, to cases pending on direct review in which the issue concerning the warrant requirement was raised." Id. Here, because the defendant was convicted and his direct appeal was decided before Augustine, the new rule announced therein does not apply to his case. Had the court not addressed the

question of the retroactivity of its holding when it decided Augustine, there would be a legitimate question for the full court to consider now -- that is, whether the defendant gets the benefit of the new rule. But because the court expressly addressed this point, holding that the new rule does not apply retroactively, there is nothing left at this juncture for the full court to decide.

The defendant's claim does not become "new and substantial" simply because he has framed it as an ineffective assistance of counsel claim. If that were possible, then virtually any prospective rule could nevertheless be raised collaterally under the rubric of ineffective assistance in cases that have already been finally adjudicated and long since closed. See Gunter, 459 Mass. at 490.

The defendant next contends that trial counsel was ineffective for failing to move to suppress and exclude the defendant's CSLI records because the Commonwealth had not met the statutory requirements for a court order for such records under 18 U.S.C. § 2703(d), and that his appellate counsel was ineffective for failing to raise the issue on direct appeal. The issue is not "new." See Johnson, 461 Mass. at 2. The nature of plenary review in a capital case is such that the court considers the entire record, including potential errors that appellate counsel may have missed, on direct appeal. See

Commonwealth v. Smith, 460 Mass. 318, 320 (20110). "Given the thoroughness of this unique form of review contemplated by [G. L. c. 278, § 33E], it should be a very rare situation where, following the direct appeal, relief is granted based on a claim of error that either was or could have been raised at the trial or in the direct appeal." Id.

The root contention of the defendant's ineffective assistance claims is that the Commonwealth did not provide "specific and articulable facts showing that there are reasonable grounds to believe" that the CSLI records sought were "relevant and material to an ongoing criminal investigation," 18 U.S.C. § 2703(d) -- an issue that could have been raised either at the trial or in the direct appeal. Indeed, the defendant's trial counsel moved to exclude other CSLI records based on 18 U.S.C. § 2703(d), alerting the full court to the broader issue on plenary review. See Smith, supra at 320 n.1 ("trial judges, counsel, and litigants are entitled to assume that, when this court conducts plenary review in an appeal from a conviction of murder in the first degree, it takes this obligation seriously and conducts a thorough review to the best of its ability"). "Reframing an omitted issue as an ineffective assistance of counsel claim does not necessarily make it 'new.'" Gunter, 459 Mass. at 490.

Conclusion. Upon consideration, it is ORDERED that the defendant's application for leave to appeal is hereby DENIED.[2]

/s/ Dalila Argaez Wendlandt
Dalila Argaez Wendlandt
Associate Justice

Dated: June 29, 2021

[2] To the extent that the defendant argued in his pro se "addendum" that the trial judge erred in failing to instruct the jury pursuant to G. L. c. 233, § 78, after admitting the CSLI evidence as a business record, he does not appear to claim in his gatekeeper application that there is anything new or substantial about that, nor do I find it to be new and substantial.

July 29, 2021

RE: No. SJ-2021-0087

COMMONWEALTH
v.
REMEL AHART

Middlesex Superior Court
No.0681CR01015

NOTICE OF DOCKET ENTRY

You are hereby notified that on July 27, 2021, the following was entered on the docket of the above referenced case:

Defendant's MOTION for Reconsideration of the Single Justice's Memorandum of Decision and Order, Dated June 29, 2021, Concerning His Gatekeeper Petition with Certificate of Service and attachment filed by Atty. Michael Waryasz. (7/29/2021: "Per the Within, MOTION is DENIED WITHOUT HEARING." (Wendlandt, J.))

/s/ Maura S. Doyle
Maura S. Doyle, Clerk

To: Michael A. Waryasz, Esquire
Hallie White Speight, Assistant District Attorney
Thomas D. Ralph, Chief, App. Div.
Middlesex Superior Court Dept.

APPENDIX B

August 25, 2021

RE: No. SJ-2021-0087

COMMONWEALTH
v.
REMEL AHART

Middlesex Superior Court
No.0681CR01015

NOTICE OF DOCKET ENTRY

You are hereby notified that on August 25, 2021, the following was entered on the docket of the above referenced case:

Defendant's Second MOTION for Reconsideration with Certificate of Service filed by Atty. Michael A. Waryasz.

(08/25/2021 "Per the within, Motion is denied, without hearing." (Wendlandt, J.))

/s/ Maura S. Doyle
Maura S. Doyle, Clerk

To: Michael A. Waryasz, Esquire
Hallie White Speight, Assistant District Attorney
Thomas D. Ralph, Chief, App. Div.
Middlesex Superior Court Dept.

APPENDIX C

Gmail **Michael Waryasz <mwaryasz@gmail.com>**

SJ-2021-0087 - COMMONWEALTH v. REMEL AHART

2 messages

Nicole Sasso <nicole.sasso@jud.state.ma.us> Tue, Nov 30, 2021 at 3:06 PM
To: "mwaryasz@gmail.com" <mwaryasz@gmail.com>, "hallie.speight@state.ma.us" <hallie.speight@state.ma.us>, "Tom.ralph@MassMail.state.ma.us" <Tom.ralph@massmail.state.ma.us>, "middlesex.clerksoffice Mailing List." <middlesex.clerksoffice@jud.state.ma.us>

RE: No. SJ-2021-0087

COMMONWEALTH

v.

REMEL AHART

Middlesex Superior Court

No.0681CR01015

NOTICE OF DOCKET ENTRY

You are hereby notified that on September 24, 2021, the following was entered on the docket of the above referenced case:

Defendant's Third MOTION for Reconsideration with Certificate of Service filed by Atty. Michael A. Waryasz. (11/30/2021: "Per the within, Defendant's Third MOTION for Reconsideration is DENIED WITHOUT HEARING." (Wendlandt, J.))

Please consider this email notice.

Sincerely,

Nikki

Nicole Sasso

APPENDIX D

Single Justice Coordinator

Supreme Judicial Court for Suffolk County

Office of Clerk Maura S. Doyle

John Adams Court House

1 Pemberton Square, Ste.1-300

Boston, MA 02108

Main No: 617-*557*-1100

Direct Dial: 617-*557*-1182

Website: www.mass.gov/courts

NOTICE OF ELECTRONIC FILING IN TWO CASE TYPES: The Office of Clerk Maura S. Doyle is now accepting filings through eFileMA in single justice cases concerning **Mass. R. Crim. P. 15(a)(2) applications** and **G.L. c. 180, § 11A nonprofit charitable corporate dissolutions**. Counsel are strongly encouraged to eFile their pleadings and correspondence in these types of cases. Further information can be found at http://www.efilema.com/ and https://www.mass.gov/guides/electronic-filing-at-the-supreme-judicial-court-single-justice.

Lucille M Pasquale <lucille.pasquale@jud.state.ma.us> Tue, Nov 30, 2021 at 3:23 PM
To: Nicole Sasso <nicole.sasso@jud.state.ma.us>, "mwaryasz@gmail.com" <mwaryasz@gmail.com>, "hallie.speight@state.ma.us" <hallie.speight@massmail.state.ma.us>, "Tom.ralph@MassMail.state.ma.us" <tom.ralph@massmail.state.ma.us>, "middlesex.clerksoffice Mailing List." <middlesex.clerksoffice@jud.state.ma.us>

Received, thank you. LP

Lucie Pasquale

Assistant Clerk Magistrate – Criminal

Middlesex Superior Court

200 Trade Center

Courtroom 630

Woburn, MA 01801

781-939-2763

[Quoted text hidden]

SUPREME JUDICIAL COURT
for Suffolk County
Case Docket

COMMONWEALTH v. REMEL AHART
PARTIALLY SEALED
SJ-2021-0087

CASE HEADER

Case Status	278/33E NT appeal denied
Status Date	06/29/2021
Nature	Gatekeeper c 278 s 33E
Entry Date	03/08/2021
Sub-Nature	Mot for New Trial
Single Justice	Wendlandt, J.
TC Ruling	
TC Ruling Date	
SJ Ruling	
TC Number	
Pet Role Below	
Full Ct Number	
Lower Court	
Lower Ct Judge	Elizabeth M. Fahey, J.

ADDITIONAL INFORMATION

PAPER #8 (SEALED Grand Jury Documents) LOCATED IN BROWN EXPANDABLE FOLDER ATTACHED TO FILE.

INVOLVED PARTY	ATTORNEY APPEARANCE
Remel Ahart Defendant/Petitioner	Michael A. Waryasz, Esquire
Commonwealth Plaintiff/Respondent	Hallie White Speight, Assistant District Attorney Thomas D. Ralph, Chief, App. Div.

DOCKET ENTRIES

Entry Date	Paper	Entry Text
03/08/2021		Case entered.
03/08/2021	#1	MOTION to Waive Filing Fee with Certificate of Service filed for Remenl Ahart by Atty. Michael Waryasz.
03/08/2021	#2	Petition Pursuant to G. L. c. 278, § 33E for leave to Appeal Orders of the Superior Court Denying Defendant's Supplemental Motion for New Trial, Pursuant to Mass. R. Crim. P. 30, and Subsequent Motions for Reconsideration and Addendum with Certificate of Service filed for Remel Ahart by Atty. Michael Waryasz.
03/08/2021	#3	Verified MOTION for Enlargement of Time to File Memorandum of Law and Exhibits in Support of His Petition, Pursuant to G. L. c. 278, § 33E with Certificate of Service filed by Atty. Michael Waryasz.(3/11/2021: "Per the within, Motion is Allowed Without Hearing." (Wendlandt, J.))
03/08/2021	#4	Notice of Appearance of Counsel for the Defendant, Remel Ahart by Atty. Michael A. Waryasz.
03/11/2021		Motion (Paper no. 3) Under Advisement. (Wendlandt, J.).
03/12/2021	#5	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 3 filed.
03/30/2021	#6	Defendant's Memorandum of Law in Suport of His Petition Pursuant to G. L. c. 278, § 33E for Leave to Appeal a Decision of the Superior Court Denying His Supplemental Motion for New Trial (Mass. R. Crim. P. 30) and Subsequent Motions for Reconsideration/Addendum with Certificate of Service filed by Atty. Michael Waryasz.
03/30/2021	#7	Volume I of Defendant's Appendix in Support of His Petition Pursuant to G. L. c. 278, § 33E filed by Atty. Michael Waryasz.
03/30/2021	#8	(SEALED) Volume II of Defendant's Appendix in Support of His Petition Pursuant to G. L. c. 278, § 33E, filed for Remel Ahart by Atty. Michael A. Waryasz.
03/30/2021		PARTIALLY SEALED DOCKET NOTE: Paper #'8: Volume II of Defendant's Appendix in Support of Petition - GRAND JURY MINUTES are SEALED in accordance with G.L. c. 268, Sec. 13D.
06/07/2021	#9	Commonwealth's Opposition to Defendant's Petition with Certificate of Service filed by ADA Hallie White Speight.
06/08/2021		Under advisement. (Wendlandt, J.).

APPENDIX E

06/29/2021 #10 Memorandum of Decision & Order: "The defendant, Remel Ahart, has filed an application pursuant to G. L. c. 278, § 33E, for leave to appeal from the denial of his supplemental motion for a new trial and several related motions. For the reasons set forth below, the application is denied.

Background. In 2006, the defendant was indicted for murder in the first degree [RAI/17]. Prior to trial, the defendant's trial counsel moved to suppress records of cell site location information (CSLI) from the defendant's cellular telephone (as well as CSLI records from cellular telephones not belonging to the defendant), which the Commonwealth had obtained pursuant to a court order but without a search warrant [RAI/65-67]. Trial counsel withdrew the motion before it was decided, after receiving certain discovery from the Commonwealth that, in counsel's view, made the motion no longer viable [RAI/77]. In place of the withdrawn motion to suppress, counsel filed a motion to exclude CSLI records from four cellular telephones not registered to the defendant [RAI/85]. That motion focused on the propriety of the court order by which the Commonwealth had obtained the records, asserting that the order was issued without probable cause [RAI/81]. The judge denied the motion [RAI/88].

At the defendant's jury trial, the Commonwealth's "key witness" testified that he been with the defendant on the night of the killing. See Commonwealth v. Ahart, 464 Mass. 437, 438 (2013). The Commonwealth introduced the defendant's CSLI records to corroborate the witness's testimony. See id. at 440. The defendant was convicted of murder in the first degree in 2009, and his conviction was affirmed on appeal in 2013. See id. at 438. In connection with this direct appeal, the defendant's appellate counsel did not raise an issue related to the defendant's CSLI records [RAI/92].

Thereafter, the defendant filed several postconviction motions in the Superior Court, each of which has been denied, including a motion for a new trial, a supplemental motion for a new trial, and two motions for reconsideration of the denial of the supplemental motion. He also has filed, pro se, an "addendum" to one of the motions for reconsideration. In his gatekeeper application he seeks leave to appeal from the denial of the supplemental motion for a new trial, the two motions for reconsideration, and the addendum.[1]

The defendant claims in his motions that his trial counsel was ineffective for failing to move to suppress his CSLI records [RAI/32; D Memo at 28], and that his appellate counsel was ineffective for failing to raise the CSLI issue on direct appeal [RAI/32; D Memo at 23]. The defendant argues that a motion to suppress would have been successful [RAI/44], see Commonwealth v. Banville, 457 Mass. 530, 534 (2010) (to prevail on claim of ineffective assistance based on grounds not raised in motion to suppress, defendant must show that motion would have been successful), because the Commonwealth had obtained the defendant's CSLI records without a search warrant, see Commonwealth v. Augustine, 467 Mass. 230, 257 (2014) [D Memo at 2], and because the Grand Jury testimony giving rise to the court order for the records did not indicate that the records would be "relevant and material" to the ongoing investigation, see 18 U.S.C. § 2703(d) [D Memo at 28, 30, 34-35].

Discussion. Because the defendant received plenary review of his conviction of murder in the first degree in his direct appeal to this court, he can appeal from the denial of his postconviction motions only if he "show[s] that there is a 'new and substantial' issue that this court could not have considered in the course of plenary review." Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). An issue may be "new" for purposes of G. L. c. 278, § 33E, if it is based on case law not sufficiently developed at the time of the defendant's trial or appeal, such that the claim could not reasonably have been raised during the prior proceedings. See Commonwealth v. Ambers, 397 Mass. 705, 708 (1986). "An 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." Commonwealth v. Johnson, 461 Mass. 1, 2 (2011), quoting Ambers, supra at 707. General Laws c. 278, § 33E, "requires that the defendant present all his claims of error at the earliest possible time, and failure to do so precludes relief on all grounds generally known and available at the time of trial or appeal." Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). An issue is "substantial" for purposes of G. L. c. 278, § 33E, so long as it is "a meritorious issue in the sense of being worthy of consideration by an appellate court." See Commonwealth v. Billingslea, 484 Mass. 606, 621 (2020), quoting Gunter, supra.

The defendant maintains that his trial counsel was ineffective for failing to move to suppress and exclude the defendant's CSLI records after the Commonwealth obtained the records without a search warrant, and that his appellate counsel was ineffective for failing to raise the same issue on appeal [D Memo at 23, 28]. At the time, however, the law did not require a warrant for the Commonwealth to acquire a person's historical CSLI records. See Augustine, 467 Mass. at 257 ("neither the statute, 18 U.S.C. § 2703 [d], nor our cases, have previously suggested that police must obtain a search warrant in addition to a § 2703 [d] order before obtaining an individual's CSLI from his cellular service provider"). See also Commonwealth v. Collins, 470 Mass. 255, 261 (2014) (counsel not ineffective for failing to make objection that would have been futile under prevailing case law). Following the disposition of the defendant's direct appeal, the court in Augustine, 467 Mass. at 257, concluded for the first time that, under art. 14, "the Commonwealth generally must obtain a warrant before acquiring a person's historical CSLI records." The court clarified that the "new rule" it announced "applies only to cases in which a defendant's conviction is not final, that is, to cases pending on direct review in which the issue concerning the warrant requirement was raised." Id. Here, because the defendant was convicted and his direct appeal was decided before Augustine, the new rule announced therein does not apply to his case. Had the court not addressed the question of the retroactivity of its holding when it decided Augustine, there would be a legitimate question for the full court to consider now -- that is, whether the defendant gets the benefit of the new rule. But because the court expressly addressed this point, holding that the new rule does not apply retroactively, there is nothing left at this juncture for the full court to decide.

The defendant's claim does not become "new and substantial" simply because he has framed it as an ineffective assistance of counsel claim. If that were possible, then virtually any prospective rule could nevertheless be raised collaterally under the rubric of ineffective assistance in cases that have already been finally adjudicated and long since closed. See Gunter, 459 Mass. at 490.

The defendant next contends that trial counsel was ineffective for failing to move to suppress and exclude the defendant's CSLI records because the Commonwealth had not met the statutory requirements for a court order for such records under 18 U.S.C. § 2703(d) [D Memo at 30], and that his appellate counsel was ineffective for failing to raise the issue on direct appeal [D Memo at 28]. The issue is not "new." See Johnson, 461 Mass. at 2. The nature of plenary review in a capital case is such that the court considers the entire record, including potential errors that appellate counsel may have missed, on direct appeal. See Commonwealth v. Smith, 460 Mass. 318, 320 (20110). "Given the thoroughness of this unique form of review contemplated by [G. L. c. 278, § 33E], it should be a very rare situation where, following the direct appeal, relief is granted based on a claim of error that either was or could have been raised at the trial or in the direct appeal." Id.

		The root contention of the defendant's ineffective assistance claims is that the Commonwealth did not provide "specific and articulable facts showing that there are reasonable grounds to believe" that the CSLI records sought were "relevant and material to an ongoing criminal investigation," 18 U.S.C. § 2703(d) -- an issue that could have been raised either at the trial or in the direct appeal. Indeed, the defendant's trial counsel moved to exclude other CSLI records based on 18 U.S.C. § 2703(d), alerting the full court to the broader issue on plenary review. See Smith, supra at 320 n.1 ("trial judges, counsel, and litigants are entitled to assume that, when this court conducts plenary review in an appeal from a conviction of murder in the first degree, it takes this obligation seriously and conducts a thorough review to the best of its ability"). "Reframing an omitted issue as an ineffective assistance of counsel claim does not necessarily make it 'new.'" Gunter, 459 Mass. at 490. Conclusion. Upon consideration, it is ORDERED that the defendant's application for leave to appeal is hereby DENIED.[2]" (Wendlandt, J.) [1] The defendant acknowledges that his application is late with respect to at least some of the motions that are the subject of the application. I allow his request to file it late. [2] To the extent that the defendant argued in his pro se "addendum" that the trial judge erred in failing to instruct the jury pursuant to G. L. c. 233, § 78, after admitting the CSLI evidence as a business record, he does not appear to claim in his gatekeeper application that there is anything new or substantial about that, nor do I find it to be new and substantial.
06/29/2021	#11	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 10 filed.
07/27/2021	#12	Defendant's MOTION for Reconsideration of the Single Justice's Memorandum of Decision and Order, Dated June 29, 2021, Concerning His Gatekeeper Petition with Certificate of Service and attachment filed by Atty. Michael Waryasz. (7/29/2021: "Per the Within, MOTION is DENIED WITHOUT HEARING." (Wendlandt, J.))
07/28/2021		Motion (paper no. 12) Under Advisement. (Wendlandt, J.).
07/29/2021	#13	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 12 filed.
08/24/2021	#14	Defendant's Second MOTION for Reconsideration with Certificate of Service filed by Atty. Michael A. Waryasz. (08/25/2021 "Per the within, Motion is denied, without hearing." (Wendlandt, J.))
08/24/2021		Motion Under Advisement. (Wendlandt, J.)
08/25/2021	#15	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 14 filed.
09/24/2021	#16	Defendant's Third MOTION for Reconsideration with Certificate of Service filed by Atty. Michael A. Waryasz. (11/30/2021: "Per the within, MOTION is Denied Without Hearing." (Wendlandt, J.))
11/30/2021	#17	EMAIL Notice to Counsel/Parties and Lower Court Re: P.# 16 filed.

As of 11/30/2021 3:25pm

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2006-1015

COMMONWEALTH

vs.

REMEL AHART

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S SUPPLEMENTAL MOTION FOR NEW TRIAL

Defendant was convicted of first degree murder of Corey Davis on March 18, 2006. His conviction was upheld on March 1, 2013. Defendant filed a Motion for New Trial, which the trial judge denied in January 2018.

Defendant's Supplemental Motion for New Trial, filed on December 17, 2018, seeks a new trial on the basis that his trial and appellate counsel[1] was ineffective.

For the reasons stated by the Commonwealth in its Opposition to Defendant's Motion, this court is satisfied that the Supreme Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018) should not be applied retroactively, at least not to a case as old as this defendant's which had no appellate issue pending when Carpenter was decided on June 23, 2018, and which case involved a statute not at issue in this case.

For his claims, defendant relies on the CSLI records produced during discovery on which the Commonwealth relied at trial. The first Grand Jury summons sought the call logs for the two victims' phones. Another Grand Jury's Duces Tecum Order summons that went to Nextel in this case sought "subscriber, incoming, outgoing calls and all direct connect calls for March 18, 2006

1 Though initially defendant claims his trial counsel was ineffective, he later claims that his appellate counsel was ineffective for the same reason, failure to raise the issue concerning the obtaining and use of CSLI.

#143

APPENDIX F

EXHIBIT B

to March 19, 2006[2] for cell phone number 617-315-5167," of James Miller, the Commonwealth's chief witness. This court considers this to be "telephone CSLI," not "Registration CSLI" as described by Gants, J. in Commonwealth v. Augustine, 467 Mass. 230, 251 (2014). Another Grand Jury summons, using the same language but for the defendant's number 617-461-8024, and that of several others, also issued for the same date(s), which would also be telephone CSLI, not Registration CSLI. After obtaining the Grand Jury subpoena, the Commonwealth then got a court order for this defendant's CSLI.

Prior to trial, defendant's trial counsel filed a Motion to Suppress the defendant's CSLI, asserting it was obtained without a warrant and without probable cause. That counsel later withdrew this Motion to Suppress and instead filed a Motion to Exclude Evidence.[3] The Commonwealth used the CSLI records to show the locations of this defendant, Miller and the co-defendant during the approximate time period of the shootings. Defendant's appellate counsel did not assert any appellate issue regarding the Commonwealth's use of the CSLI.

Augustine, supra, involved a search for similar "telephone CSLI," not Registration CSLI, supra at 233-4, and sought records for fourteen days, substantially more than the one day requested in this case, notwithstanding that two days of calls were provided. The SJC specifically in Augustine, "announced a new rule" which "applies only to cases pending on direct review in which the issue concerning the warrant requirement was raised." Augustine at 257. Defendant had no appellate issue concerning the warrant requirement for CSLI records pending when Commonwealth v. Augustine was decided by the Supreme Judicial Court on

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2 That calls for records only for March 18, 2006, not through March 19, 2006. If it were interpreted as "through" March 19, 2006, it would be at most two days. Calls for both dates appear to have been produced.

3 The trial judge denied defendant Ahart's Motion to Exclude Evidence, ruling that he did not have standing and that the court order properly issued. Defendant's Memorandum in Support of Defendant's Supplemental Motion for New Trial also states on page six that "(t)he Court found that there was no indication that Ahart was linked to any of the phone numbers identified in the order, or that law enforcement discovered any information related to Ahart based on the cellsite information disclosed pursuant to the June 29 court order."

February 14, 2014. Since this defendant never presented this issue until his Supplemental Motion for New Trial was filed on December 17, 2018, he is not entitled to raise this issue, per the Supreme Judicial Court language in Augustine.

Defendant claims that his trial and appellate counsel were ineffective in withdrawing his Motion to Suppress the CSLI records. However, defendant's trial counsel cannot be ineffective on those grounds where the SJC specifically held its ruling in Commonwealth v. Augustine to be a new rule of law without retroactive effect for cases as old as this defendant's case. In fn 37 of Augustine, the Supreme Judicial Court in part specifically states, "Nevertheless, it would be reasonable to assume that a request for historical CSLI of the type at issue in this case for a period of six hours or less would not require the notice to obtain a search warrant in addition to a § 2703(d) order." Given the one day of records which the Commonwealth requested by way of its summons in this case, this court is satisfied that the holding of Augustine would not likely even apply.

On a motion for a new trial, the judge may rule on the motion "on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits." Mass. R. Crim. P. 30(c)(3). Assessment of whether the motion and supporting materials suffice to raise a "substantial issue" involves consideration of the seriousness of the issue itself and the adequacy of the showing that has been made with respect to that issue. See Commonwealth v. Arriaga, 438 Mass. 556, 571 (2003) and cases cited; Commonwealth v. Stewart, 383 Mass. 253, 257-258 (1981).

A defendant's submissions in support of a motion for a new trial need not prove the factual premise of that motion, see Commonwealth v. Licata, 412 Mass. 654, 662 (1992), but they must contain sufficient credible information to "cast doubt on" the issue. Commonwealth v.

Britto, 433 Mass. 596, 608 (2001). A judge may also consider whether holding a hearing will add anything to the information that has been presented in the motion and affidavits. See Commonwealth v. DeVincent, 421 Mass. 64, 68 (1995). "If the theory of the motion, as presented by the papers, is not credible or not persuasive, holding an evidentiary hearing to have the witnesses repeat the same evidence (and be subject to the prosecutor's cross-examination further highlighting the weaknesses in that evidence) will accomplish nothing." Commonwealth v. Goodreau, 442 Mass. 341, 348-349 (2004). Given the Supreme Judicial Court language in Augustine, this court is satisfied that this defendant fails to raise a substantial issue worthy of a hearing.

ORDER

Defendant is not entitled to a hearing on defendant's Supplemental Motion for New Trial. Defendant's Supplemental Motion for New Trial is **DENIED**.

Elizabeth M. Fahey
Justice of the Superior Court

Date: May 16, 2019