Docket No. _____

Supreme Court
of the United States

Kyle Watkins
Petitioner

v.

Sean Medeiros, Superintendent
Respondent

On Petition for Writ of Certiorari

Petitioner's Brief

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QUESTION PRESENTED

In a habeas case involving a first degree murder conviction, whether a Court can construe *Brady's* prejudice prong so strictly that it becomes, in effect, an automatic means of excusing unconstitutional law enforcement practices.

LIST OF PARTIES

The parties are listed in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statues and Constitutional Provisions

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court ["SJC"] appears at Appendix A, and is reported at *Commonwealth v. Watkins*, 473 Mass. 222, 41 N.E.3d 10 (2015).

The Memorandum and Order of the District Court of Massachusetts appears at Appendix B and is reported as *Watkins v. Medeiros*, 2020 WL 636443 (2020).

The opinion of the First Circuit Court of Appeals appears at Appendix C, and is reported at *Watkins v. Medeiros*, 36 F.4th 373 (2022).

The Order of the First Circuit Court of Appeals denying Petition for Rehearing En Banc appears at Appendix D.

STATEMENT OF JURISDICTION

The date on which the First Circuit Court of Appeals decided this case was June 10, 2022. The date on which the Court denied the Petitioner's request for en banc review was August 4, 2022.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.§ 1254.

CONSTITUTIONAL PROVISIONS

Amendment XIV

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

STATEMENT OF THE CASE

On September 25, 2003, Kyle Watkins was charged with murder and with unlawful possession of a firearm. From May 24 until June 2, 2005, the indictments were tried before a Bristol County jury. The jury returned verdicts of guilty, and the Court sentenced Watkins to a term of his natural life. The Supreme Judicial Court entered the case on March 2, 2007, and stayed the appeal to allow filing of a Rule 30 Motion for a New Trial ["MNT"]. After four days of evidentiary hearings, the Superior Court denied Watkins's MNT, and the Supreme Judicial Court affirmed the judgment of conviction and the denial of the MNT on November 24, 2015.

Watkins filed his Habeas Petition on May 16, 2016, and the District Court denied his Petition and dismissed the habeas case on January 7, 2020 and granted a Certificate of Appealability. The District Court also denied the Petitioner's Motions for Reconsideration on February 11, 2020.

Watkins filed a timely Notice of Appeal and, on April 13, 2020, the First Circuit Court of Appeals issued an order which stated, "... "[i]f the district court grants a certificate of appealability, it must state

which issue or issues satisfy the standard set forth in 28 U.S.C. Sec. 2253(c)(2)." In response, on April 2, 2020, the District Court entered an order which stated, "Notwithstanding its dismissal of the petition, the Court found that Petitioner was entitled to a certificate of appealability out of an abundance of caution because he had raised genuine, non-frivolous issues of constitutional significance regarding alleged *Brady* violations." *Brady v. Maryland*, 373 U.S. 83 (1963).

On May 8, 2020, the Petitioner requested that the First Circuit Court of Appeals expand the certificate of appealability to include the other issues he raised in his Habeas Petition, but the First Circuit Court of Appeals denied that request.

On June 10, 2022. The First Circuit Court of Appeals affirmed the District Court's denying habeas corpus relief, and on August 4, 2022, the Court also denied the Petitioner's request for en banc review.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Court should grant certiorari to clarify and ensure that *Brady's* prejudice prong is not construed so strictly that it becomes, in effect, an automatic means of excusing unconstitutional law enforcement practices.

FACTUAL BACKGROUND

Facts Presented at Trial

The Commonwealth's only identification witness was Vern Rudolph. Rudolph testified that on April 26, 2003, he and Watkins were both at the Elks Club. He testified that he left the club to pick up his daughter between 9:35 and 9:40 p.m.,[1] and as he drove west on Mill Street, he saw a Lincoln Mark VIII parked away from the curb. (A. 434-37.) Rudolph drove around the Lincoln, and, as he passed it, he heard shots, looked up, and he said that he saw Watkins back away from the

[1] From Trooper Kilnapp's notes, withheld by the Commonwealth until after the trial, the Petitioner learned that Rudolph told the police at his first interview four days after the shooting that he left the Elks Club at "9:15, could have been later, maybe 9:30." (A. 90.) From the Elks Club to the corner of Mills and Cedar is half a block. *See infra* Argument C for this *Brady* issue.

Honda firing into the car. (A. 438-41.) Rudolph immediately slumped down into the driver's seat, lowered the electronic seat, turned right/north onto Cedar Street, and went to his mother's house. (A. 440-42.) Rudolph said that – even though it was dark and foggy, even though the shooter had a hoodie over his head, even though he only had a "side view," and even though he only saw the shooter for two or three seconds – he was able to recognize Watkins because he "saw his face." (A. 444, 449, 507, 177.)

Rudolph's testimony at trial put his car in exactly the same place at exactly the same time as a disinterested witness, Michael Couture's. Couture testified that he was in the intersection of Mill Street when he looked west and saw the shooting. (A. 489) Couture said that he saw a white car go around the Mark VIII, and then continue "straight" down Mill. (A. 448.) In contrast, Rudolph testified that he was driving down Mill Street and took a right onto Cedar Street at exactly the time when he heard shots, looked up, and allegedly saw Watkins shooting. (A. 447-48.) If Rudolph were to be believed, that would have put both Rudolph's car and Couture's truck in the middle of the intersection of Mill and Cedar at exactly the time of the shooting, and both continuing

up Cedar Street at exactly the same time. Rudolph testified that he did not see a truck. (A.53-54, 179, 260-62.)

Defense alibi witness. The only defense witness was Joseph Correira, who testified that Watkins was with him, inside the Elks Club, when Coombs was shot.

Facts presented at the Motion for a New Trial hearing

Vern Rudolph's deposition. Rudolph was deposed in this case even before the grand jury was convened. At his deposition, he testified that when he met with the police about this case, the police told him he was a suspect in this shooting, and they said "if it wasn't you or your brother, then it was Kyle Watkins, wasn't it?"[2] (A. 1082.) Rudolph did not mention Watkins's name until the police gave him that ultimatum.

Two alibi witnesses. Two witnesses testified at the Motion for a New Trial Hearing[3] that at the time of the shooting, Watkins was

[2] Vern Rudolph's pattern through this case was to accuse Kyle Watkins for crimes Watkins did not commit. As will be set out *infra* in *Brady* issue A, another example was the police report of when Rudolph shot himself in the finger.

[3] The Petitioner argued to the SJC and the District Court that defense

inside the Elks Club: Patrick Victor (A. 909, 1664.) and Henry Covey (A. 911, 1372). These defense witnesses were significantly more credible than Rudolph who, in his anger during his testimony at the hearing on the Motion for a New Trial, made an obscene middle finger gesture (A. 1359), name called (A. 1349, 1353, 1367), refused to answer questions, and was rudely sarcastic (A. 1340).

ARGUMENT

This case involves questions of exceptional importance: When a case heavily depends on the testimony of a cooperating witness, the court must be attentive in applying *Brady's* prejudice prong to the ways that impeachment evidence can shift a jury's thinking. *See Flores-Rivera v. United States* (*Flores* II), 16 F.4th 963, 965, 967–69 (1st Cir. 2021); *Flores* I, 787 F.3d 1, 18 (2015). In this case, the Commonwealth repeatedly ignored Court orders to produce *Brady* impeachment evidence, including testimony, deals, and other crucial impeachment evidence against the Commonwealth's only identification

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counsel was ineffective for not interviewing and calling these witnesses at trial.

witness to the Petitioner's harm and irreparable prejudice. As cautioned by the dissent, "[W]e must not construe *Brady's* prejudice prong so strictly that it becomes, in effect, an automatic means of excusing concerning law enforcement practices that remain too frequent." (App. C, 60, *citing United States v. Nejad*, 487 F. Supp. 3d 206, 213-14, 225–26 (S.D.N.Y. 2020)).

The First Circuit Court of Appeals Analysis

The majority analyzed each of Watkins's five *Brady* claims and rejected each. The dissent concentrated only on the undisclosed finger-shot report. Below will be a discussion of (A) the finger-shot report, (B) the other four *Brady* claims, and (C) the cumulative effect of the *Brady* claims.

A. Failure to disclose the finger-shot report

Pre-trial, the Petitioner specifically requested information regarding Rudolph's cooperation, and the Court explicitly ordered the Commonwealth to produce it. In one police report, correctly found by the MNT court not to have been disclosed, Rudolph shot his own finger

on October 29, 2003, and he went to the hospital. In the in an attempt to disguise the fact that he had shot his own finger, Rudolph lied to the police about what happened, then told the police that he had lied because he was a witness to the murder of Paul Coombs and would be testifying against Kyle Watkins. After investigation, the New Bedford police never brought firearms charges against Rudolph on the basis of this incident. The finger shot report provides a basis for inferring the existence of a tacit "deal" between Rudolph and law enforcement that was not otherwise known to the Petitioner.

Sua sponte, the majority opinion rejected two of the *Brady* claims – the finger-shot report and the transcript of Rudolph's dangerousness hearing – on the erroneous conclusion that the evidence would have harmed Watkins more than helped him. (App. C, 25, 36.) The dissent noted that this contention "is not one that the SJC itself advanced, the District Court relied on, or the [Respondent] thought sufficiently strong to be worthy pressing to us in this appeal." (App. C, 55.) The dissent further noted that "it is easy to see why those closest to the case have not thought much of this ground for denying Watkins's *Brady* claim[s]." (App. C, 56.)

The Commonwealth cannot simply withhold evidence and then the First Circuit claims that the defense would not have used it. The Court cannot ascribe value to the impact of withheld evidence, and neither the Court nor the Prosecution can say what the defense strategy would have been had the Commonwealth not violated the Defendant's constitutional right to put on the defense of his own choosing. Because this argument was never made and the First Circuit majority raised it *sua sponte*, the Petitioner had no opportunity to defend against it. The defense at trial was clear: Rudolph was a liar, and he falsely accused Watkins to avoid his own legal jeopardy. This police report strongly bolsters the Petitioner's defense at trial, and any competent attorney would have used it at trial.

Watkins argued that the failure to disclose the finger-shot report denied him the opportunity to cross-examine Rudolph regarding his anticipated testimony against the Petitioner in exchange for expected rewards in his own cases, and it explicitly showed that Rudolph **lied** to the police and falsely accused the Petitioner when he found himself in legal jeopardy. The majority held that failure to disclose the finger-shot report was not prejudicial because it was cumulative and because

it opened the door to the introduction of threats against Rudolph. (App. C, 26, 27, 32) Each of these issues is discussed *infra*.

The dissent pointed out how crucial a witness Rudolph was: he was the only witness to identify Watkins and, because he knew Watkins, that fact "no doubt lent credibility to Rudolph's testimony." (App. C, 44)

The other three witnesses had far better views of the shooting than Rudolph had. And yet, even with their better views, Couture could not even tell if the shooter was a black man, and Ernestina Soares, who also knew Watkins, could not identify him as the shooter, and she was only inches away from his face as they drove by him. When Ernestina was shown a photo array after the incident, she did identify Kyle Watkins's picture as someone she knew, but she did not identify him as the the shooter from the photo array. (A. 895.)

The dissent focused its opinion on the Commonwealth's failure to produce the police report in which Rudolph shot himself in the finger. (App. C, 42) The dissent showed the error in the Respondent's assertion that the SJC ruling was not based solely on its incorrect determination of facts, but on two other reasons as well. (48) The dissent parsed the

language of the SJC: "In using the words 'therefore suffered no prejudice' only after having listed three distinct features of the police report, ... the SJC in no way suggested that its no-prejudice ruling depended on the police report having fewer than all three of those features." (App. C, 48) Therefore the dissent concluded that the SJC necessarily rested its no-prejudice ruling on the singular feature of the police report that "the SJC unreasonably determined existed even though it does not."[4] (App. C, 49)

The dissent also disagreed with the majority's view that the Commonwealth's withholding of the police report was not prejudicial because the record showed that Watkins had other evidence available to him from which a juror could infer that Rudolph implicated Watkins to exonerate himself and his brother from suspicion of this crime. (App. C, 51) However, what the defense lacked was direct evidence that Rudolph fabricated stories about Watkins in order to exonerate himself

[4] The District Court found that the police report constituted clear and convincing evidence that the Motion for a New Trial judge erred in finding, and the SJC erred in affirming, that the officers who investigated this incident did not know that Rudolph intended to serve as a witness against Petitioner. *Watkins vs. Medeiros*, D. Mass., No. 16-CV-10891-ADB (Jan. 7, 2020).

of a crime that he committed. The admittedly withheld and specifically requested report shows exactly that. The dissent found that the withheld police report "would have materially augmented Watkins's effort to impeach Rudolph" and the fact that the defense had some tools to attack a star witness's testimony "'hardly dismisses the potential of different tools as merely cumulative.'" (App. C, 51, *quoting Flores I,* 787 F.3d at 19).

The dissent stated that "the majority fails in highlighting those features of the record to grapple adequately with two ways in which the police report would have materially augmented Watkins's effort to impeach Rudolph..." (App. C, 51) The majority cited the following pieces of evidence as corroborating Rudolph's testimony: "the tension between Watkins and Coombs, the subsequent murder of Coombs, the shooter's physical appearance and vehicle[5], the victim's vehicle, the

[5] Indeed, the majority made a factual error when the opinion placed the shooter near the Lincoln. (App. C, 9) The shooter was not near the Lincoln. The Lincoln was parked on Mill Street, east of Cedar, and the Motion for a New Trial judge correctly found that it was one third of a block from Cedar. Ernestina and Beatriz Soares testified that they approached Mill Street from Cedar, driving north, and when they stopped at the stop sign, the Lincoln signaled them to go. They took a left onto Mill Street. The Honda was parked on the left side of Mill Street, and, as the Motion for a New Trial judge correctly found, it was closer to Ash Street than Cedar. The shooter was standing across the street from the Honda.

time of the shooting, and the general location of the shooting." (App. C, 34) The key question at trial concerned who pulled the trigger, and all but one of the majority's pieces of evidence fail to prove who pulled the trigger. Therefore, there was little corroborating evidence of Rudolph's testimony against Watkins. The dissent stated that it "cannot subscribe to the majority's conclusion that, because of aspects of the record that the majority emphasizes, Watkins has failed to show the requisite prejudice." (App. C, 52) Indeed, the majority credits Rudolph's inculpatory statements contained in the withheld – admittedly false – report while simultaneously discounting exculpatory statements in the same report.

The dissent detailed the reasons why the withheld police report would have been material to Watkins's effort to impeach Rudolph. First, the report provides a basis of an additional "deal" between Rudolph and law enforcement. (App. C, 52.) Second, the police report

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(II/73-100; A. 895-95.) Michael Couture testified that he too was approaching Mill Street by driving north on Cedar, and he, too was flashed by the Lincoln parked on Mill Street. He went straight on Cedar though, and as he went through the intersection, he saw the victim in the parked Honda and the shooter on the north side of Mill Street. (III/54-62)

was material to Watkins's efforts to impeach the only identification witness by showing the jury yet another instance in which Rudolph made **false accusations** implicating Watkins to deflect the police's attention from Rudolph's own criminal conduct.[6] (App. C, 54) The dissent then explained the vital importance of this piece of withheld evidence: "if Rudolph was willing to protect himself by **lying** once about who committed a shooting by implicating Watkins in that offense, wouldn't he be willing to do so again?"[7] (App. C, 54-55, emphasis added.)

Rudolph's allegations of threats

The majority also held that by "opening the door to threats," the withheld finger shot report harmed the Petitioner more than it helped

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[6] Rudolph also made another obviously false statement at the dangerousness hearing, in an another admitted attempt to curry favor with the prosecution, about people shooting at his mother's house. Despite Rudolph's claim, his mother made no report, and the Commonwealth conducted no investigation. There was simply no evidence of anyone shooting at his mother's house.

[7] In his initial police interview, the police coerced Rudolph into naming Watkins as the shooter or the police were going to charge Rudolph and his brother.

him. Pre-trial, the Petitioner filed and **won** a Motion in Limine to Prohibit the Commonwealth from Introducing Evidence of Threats. (A. 796-97.) The parties discussed the issue of threats at the hearing on the Limine Motion, and had Watkins been given this valuable exculpatory police report, the line about threats could certainly have been redacted. Or Rudolph could have been questioned about the police report without introducing the report itself into evidence. The Commonwealth offered no case law or argument to claim that the threats could come in.

Even if not redacted, the finger shot report could not have opened the door to testimony regarding threats because the motion judge allowed the defense's motion to preclude the admission of threats. That ruling became the law of the case. "[W]hatever was before the Court, and is disposed of, is considered as finally settled." *In re Whole Woman's Health*, 142 S. Ct. 701, 702 (2022), *quoting Sibbald v. United States*, 12 Pet. 488, 492 (1838). The issue of threats cannot be raised because it was the law of the case. Pre-trial, the Petitioner gave up his very powerful issue of Rudolph's multiple recantations in exchange for the preclusion of the issue of threats.

In the Motion in Limine, the Petitioner argued that if Rudolph was threatened as he alleged, the Petitioner had no knowledge of it and neither the Petitioner nor anyone else had been charged with intimidation of a witness. (A. 796.) There were never any police reports regarding any kind of threats. At the Motion hearing, **the Commonwealth** told the Court that Rudolph had twice told defense counsel that Watkins was not the shooter. Defense counsel told the Court that the Commonwealth "has indicated it's not intending to put in evidence of threats unless and until the Defendant seeks to impeach Mr. Rudolph with prior inconsistent statements." (A. I./90.) What Watkins had here was different from "prior inconsistent statements" - he had Rudolph's recantations, which were not admitted into evidence. The withheld dangerousness hearing would have shown that Rudolph's true motivation for recanting was to leverage his status as a witness for favorable treatment in his own case. *See infra* at page 18.

The dissent correctly pointed out the error in the majority's rationale that the police report could have opened the door to Rudolph's uncorroborated allegations that Watkins's associates had threatened him for agreeing to testify against Watkins. (App. C, 55.) The majority

misconstrued the record with respect to the issue of allegations of threats against Rudolph. Indeed, the dissent goes so far to say that "the majority arguably has it backwards" in suggesting that Watkins's attorney acted competently in deciding "not to use evidence of Rudolph's prior recantations for fear that using it would open the door to Rudolph's allegations of threats by Watkins's associations." (App. C, 56.) "The police report provides a hitherto unavailable means by which the prejudicial impact of introducing Rudolph's prior recantation could be mitigated, given that the police report contains evidence that tends to undermine the credibility of Rudolph's allegations about the threatening behavior of Watkins's associates in a way that no other evidence in the record does." (App. C, 56.)

The Commonwealth withheld the finger shot report because it hurt its only identification witness. The report explicitly would have told the jury that Rudolph was a liar who blamed the Petitioner when he himself was in trouble. This was the Petitioner's defense at trial, and the finger shot report would have been crucial to his defense.

Prejudice

The withheld police report renders everything Rudolph said suspect at best. It particularly calls into question what he said in the false report. Moreover, it makes the alleged threat from the limine motion far less worrisome from the defense strategy position. The Court cannot find that the Petitioner would not have utilized the withheld report or the recantations with its explicit proof that Rudolph was a **habitual liar**, including fabricating threats. The Petitioner was denied the opportunity to make the strategic decision that the majority now attributes to him. The issue was a pre-trial evidentiary issue that the prosecution had every chance to argue, but instead chose to conceal the evidence. The Commonwealth's cover-up of Rudolph's deceit and manipulation make any claim of a strategic decision unreasonable. The Petitioner clearly would have benefitted from such detailed false allegations since his entire defense at trial, as stated by the majority (App. C, 16), was that Rudolph **repeatedly lied** and repeatedly used Watkins to benefit himself. Indeed, given the lengths that the Commonwealth went to withhold the report, it must have understood the particular evidentiary value of the false police report. *See Flores I*

787 F.3d at 20 (also a case that pivoted entirely on the credibility of witnesses, holding that unproduced *Brady* material would have provided a "uniquely colorful tool" for both attacking the witness's motivation and raising the prospect that witness and prosecutor were hiding something from the jury). "Many members of the public would pause when told that a jury accepted [the witness's] testimony – and convicted [the defendant] – without being shown any of these documents. *Id.* at 9. "Confidence in the outcome is particularly doubtful when the withheld evidence impeaches a witness whose testimony is **uncorroborated and essential** to the conviction." *Id.* at 20 (emphasis added).

The prejudice to the Petitioner cannot be overstated. The Commonwealth cannot be allowed to conceal evidence that goes directly to the point that the defense is trying to prove.

B. The other four *Brady* issues

Failure to disclose Rudolph's dangerousness hearing

The Commonwealth also withheld the requested transcript of Rudolph's hearing after he had been arrested and the Commonwealth

sought to hold him on dangerousness. When the Court ruled that he was to be held, Rudolph blurted out a threat in open court that he if he were held, why should he testify for the Commonwealth against the Petitioner.

The majority held that the dangerousness hearing would have presented a risk to Watkins if introduced at trial because then alleged threats would have been introduced. (App. C, 36.) The issue of the alleged threats was discussed *supra* in Section A.

However, the failure to disclose Rudolph's testimony at the dangerousness hearing denied Watkins the opportunity to cross-examine Rudolph to show the jury that Rudolph **lied again**, involved the Petitioner again in another shooting that simply did not happen, and threatened to recant his testimony against Watkins if the Court held him for dangerousness. In a footnote, the dissent noted that the confidence in the guilty verdict was further undermined by the transcript of Rudolph's dangerousness hearing. The transcript shows that at that hearing, Rudolph had, "in his telling, unsuccessfully 's[ought] not to be held' without bail by claiming that 'the only reason why' he had a firearm was that he was 'involved in a murder case' and

was 'being threatened' as a result." (58) When the Court ordered Rudolph to be incarcerated, he blurted out in open court that if he were held, he would not testify in the Watkins murder trial: "So now what happens when the murder case comes up, am I to come to court bright eyed and bushy tailed and testify against somebody else after this, this is not fair, your Honor, this is not fair." (A. 1242.) In short, Rudolph demanded a deal from the Commonwealth in open court and made another false claim of being attacked that the Court and the prosecutor knew was false. The Prosecutor denied time and again at multiple hearings that Rudolph sought favorable treatment. The Prosecutor's lying on this issue exposes the lengths to which the Commonwealth went to shield their witness from cross-examination.

Failure to disclose the crime scene diagram

The crime scene diagram was certainly a police report that had been requested, but was not produced pre-trial. Watkins argued that failure to disclose the crime scene diagram denied him the opportunity to cross-examine Rudolph on his inability to actually see the murder and identify the Petitioner as the shooter on that dark, rainy night

from the incorrect distance testified to by Rudolph.

The majority held that the crime scene diagram would have a "nominal effect on impeaching Rudolph, if any at all." However, the prejudice is that the crime scene diagram would have again shown that Rudolph was **incorrect** about the placement of all the cars. Even the majority is wrong about the placement of the cars. *See* footnote 2. Rudolph's lack of knowledge of the crime scene and the events leading up to the shooting calls into question whether he was there. Indeed, his trial testimony was at odds with his deposition testimony. He did not see any other vehicles, and Couture's testimony would have put him between Rudolph and the crime at the exact same time. Both the prosecution and the defense thought the placement of the vehicles were critical to the case and based their closing argument largely on this fact.

"When the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility falls within th [e] general rule [of *Brady*]..... A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury....' " *United States v. Bagley*, 473

U.S. 667, 677 (1985), *quoting Giglio v. United States*, 405 U.S. 150, 154 (1972).

Failure to disclose Trooper Kilnap's notes

Police notes were requested pre-trial, and Trooper Kilnap's notes were withheld. The notes were of the Trooper's interview with Rudolph after the murder. They indicated evidence of a third party culprit, and they revealed a significant inconsistency in Rudolph's trial testimony as to the time when Rudolph allegedly saw the shooting.

The majority held that the Petitioner suffered no prejudice from the Commonwealth's failure to disclose Trooper Kilnap's notes. However, the failure to disclose Trooper Kilnapp's notes denied the Petitioner the opportunity to investigate the third party culprit and to cross-examine Rudolph on the issue; denied the Petitioner the opportunity to show the jury that Rudolph never identified Watkins until the police mentioned Watkins, two hours into Rudolph's interview; and denied the Petitioner the opportunity to impeach Rudolph's testimony with respect to his changed story as to when he left the Elks Club and he allegedly saw the shooting. Moreover this is

yet another example of how Rudolph **repeatedly lied**, this time to the investigating officer.

Failure to disclose the parameters of Rudolph's deal

The defense repeatedly requested information as to what the Commonwealth offered Rudolph in exchange for his testimony, and the Prosecutor repeatedly stated that Rudolph was not "getting a deal." The Commonwealth purposefully hid the details of Rudolph's exgensive deal from defense counsel would not know that immediately after Rudolph testified, he was released from incarceration, and that in order to effectuate the release, the Commonwealth **misrepresented** to Rudolph's court that his drug transaction had not taken place in a school zone and so eliminate the minimum mandatory sentence.

The majority opinion made a factual mistake in its discussion of this issue. In footnote 18, the majority pointed out that the Commonwealth submitted a letter from Detective Lieutenant Scott Sylvia of the New Bedford Police Department listing the docket numbers of the cases in which Rudolph was involved. (App. C, 40.) However, these numbers are not docket numbers. In his Memorandum

to the District Court, Watkins stated what the Commonwealth produced, just prior to trial, was a hand-written list of police report numbers purporting to be cases in which Rudolph had been involved. (A. 01150-55; MNT.II/210.) The Commonwealth failed to produce docket numbers and the actual reports which were in the Commonwealth's possession. The list of police report numbers was entirely useless because without the reports themselves or the associated case docket numbers and case names, the Petitioner had no way of knowing what cases the numbers related to or what facts – if any – were contained in the police reports that evidence Rudolph's outright deception.

The failure to disclose the complete parameters of Rudolph's cooperation deal with the Commonwealth in exchange for his testimony against Watkins denied Watkins the opportunity to show the jury that the Superior Court Prosecutor had perpetrated a fraud on the Court when he misrepresented to the District Court that Rudolph's drug offense did not occur in a school zone.

C. The cumulative effect of the *Brady* issues

The majority opinion rests much of its rationale on the conclusion that much of the *Brady* evidence is cumulative. (App. C, 25, 27, 30, 37.) The evidence, however, is not cumulative. Rather, it is pattern of conduct: Rudolph repeatedly made **false accusations and lies** about the Petitioner, and he manipulated the system for his own benefit at the Petitioner's expense.

Moreover in a case of multiple *Brady* issues, as here, the Court considers the combined effect of all of the non-disclosures. Viewing each suppressed item as separate and apart from each other is wrong as a matter of law. "Certainly, the effect of each non-disclosure ... might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial." *King v. Ponte*, 717 F.2d 635, 642 (1st Cir. 1983) (court must "consider the cumulative effect of these suppressions rather than the effect of each statement on its own").

This Court evaluates the strength of the impeachment evidence and the effect of its suppression in the context of the entire record to determine its materiality. *Conleyv. United States*, 415 F.3d 183, 186

(2005); *Bagley*, 473 U.S. at 683. Impeachment evidence is important because "if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. "'The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence[.]'" *Conley*, 415 F.3d at 189, *quoting Napue v. Illinois*, 360 U.S. 264, 269, (1959). As explained by the Court in *Conley,* "[t]hat is why, in the *Brady* context, the Court has repeatedly stressed "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others[.]" *Conley*, 415 F.3d at189, *citing Kyles*, 514 U.S. 419, 445 (1995). Had the impeachment evidence been available at trial, it would have called into question Rudolph's integrity.

In *Kyles v. Whitley*, this Court held that

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached... But whether the prosecutor succeeds or fails in

> meeting this obligation ...,the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles, 514 U.S. at 437–38. The Court must assess the evidence collectively rather than item by item. *Id*. at 436. *See also Norton v. Spencer*, 351 F.3d 1, 7 (1st Cir. 2003)(holding that evidence cannot be cumulative when it goes to an issue that was not known at the time of trial).

Each *Brady* violation is independent, and any one would be grounds for reversal, but each *Brady* violation is not just additive, it is multiplicative. Rudolph was a **liar** many times over, and the Commonwealth knew it as they refused to produce evidence that would destroy their key witness. The defense lacked any evidence to argue to the jury that Rudolph was a liar even though the Commonwealth had many examples in its possession. The Commonwealth's many *Brady* violations were a purposeful effort to deny the Petitioner the right to cross-examine the Commonwealth's only identification witness.

CONCLUSION

The majority construed *Brady's* prejudice pong so strictly that it became, in effect, an automatic means for excusing unconstitutional law enforcement practices. The Commonwealth repeatedly ignored discovery requests and explicit Court orders so that its only identification witness could not be cross-examined or impeached Indeed, defense counsel's total cross-examination of the Commonwealth's one identification witness was only twenty-nine transcript pages or approximately fifteen minutes. The deliberate failure to produce discoverable *Brady* materials multiple times rendered the constitutional protections of *Brady* and its progeny meaningless.

For these reasons, the Petitioner, Kyle Watkins, requests that the Court allow his Petition for Writ of Certiorari.

Kyle Watkins
By his attorney,

/Janet Hetherwick Pumphrey
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CERTIFICATE OF SERVICE

I, Janet Hetherwick Pumphrey, certify that I have forwarded the above document to Gabriel Thomas Thornton at gabriel.thornton@state.ma.us today.

/s/ Janet Hetherwick Pumphrey

SJC-09950

COMMONWEALTH vs. KYLE WATKINS.

Bristol. January 9, 2015. - November 24, 2015.

Present: Gants, C.J., Spina, Cordy, Botsford, & Duffly, JJ.

Homicide. Identification. Evidence, Identification, Disclosure of evidence, Exculpatory, Third-party culprit, Hearsay. Due Process of Law, Disclosure of evidence. Practice, Criminal, Capital case, Motion for a required finding, New trial, Disclosure of evidence, Agreement between prosecutor and witness, Prosecutor's conflict of interest, Conduct of prosecutor, Assistance of counsel.

Indictments found and returned in the Superior Court Department on September 25, 2003.

The cases were tried before E. Susan Garsh, J., and a motion for a required finding of not guilty or, in the alternative, for a new trial, filed on March 21, 2011, was heard by her.

Janet H. Pumphrey for the defendant.
Shoshana E. Stern, Assistant District Attorney, for the Commonwealth.

DUFFLY, J. In June, 2005, a Superior Court jury found the defendant guilty of murder in the first degree in the April 26,

2003, shooting death of Paul Coombs on a New Bedford street.[1] The defendant appealed from his convictions and also filed in the Superior Court a motion for a required finding of not guilty, pursuant to Mass. R. Crim. P. 25(b)(2), as amended, 420 Mass. 1502 (1995), or, in the alternative, for a new trial, pursuant to Mass. R. Crim. P. 30(a), as appearing in 435 Mass. 1501 (2001). The defendant's motion for a stay of appeal was allowed so that he could pursue his motion in the Superior Court. After conducting an extensive evidentiary hearing, the motion judge, who had been the trial judge, denied both requests made in the motion. The defendant's appeal from that denial was consolidated with his direct appeal.[2]

The defendant argues, as he did in his motion for a new trial, that there was insufficient evidence to sustain his conviction. He argues further that a new trial is required because the Commonwealth failed to make mandatory disclosures of exculpatory evidence; the judge abused her discretion in allowing the Commonwealth's motion to exclude evidence of a third-party culprit, and in denying the defendant's motion to

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[1] The defendant also was found guilty of unlawful possession of a firearm. G. L. c. 269, § 10 (b).

[2] The defendant appeals also from the denial of his motion for admission of exhibits at the hearing on the motion for new trial, and the denial, in part, of his motion to expand the record at that hearing. We discern no abuse of discretion in the motion judge's evidentiary rulings on these motions.

exclude hearsay testimony; there was prosecutorial misconduct; and his counsel was ineffective. The defendant also asks that we exercise our extraordinary power under G. L. c. 278, § 33E, to reduce the degree of guilt.

We affirm the convictions and the denial of the motion for a new trial, and discern no reason to reduce the degree of guilt pursuant to G. L. c. 278, § 33E.

Facts. We summarize the facts the jury could have found, reserving certain facts for later discussion.

On the evening of April 25, 2003, the defendant was at a private club on Mill Street in New Bedford, where he spent fifteen minutes loudly arguing on his cellular telephone with the victim. Vernon Rudolph, a long-time friend of both the victim and the defendant, was also present at the club. Through a window, Rudolph saw the victim "frisking" people on the sidewalk who were attempting to enter the club, and suggested that the defendant should go outside and engage in a fist fight with the victim, who was much larger than the defendant. The defendant declined, and he did not leave the club until after the victim had left the area.

The following morning, April 26, 2003, the victim told his girl friend that he wanted to "whoop" the defendant. That afternoon, the defendant was again at the club. He seemed upset and told the bartender that he was "tired of people [messing]

with him." The defendant returned to the club that evening, but was now acting "tough" and saying that "[t]hings are going to change around here." He left the club at some point after 9:30 P.M., wearing a black hooded sweatshirt, black jeans, white and black sneakers, and batting gloves. At approximately 9:50 P.M. that evening, the victim and his girl friend were talking by telephone. At the end of the call, the girl friend heard the victim shout, "Why don't you fight me now?" At about the same time, sisters Ernestina and Beatriz Soares[3] were driving on Cedar Street, approaching the intersection with Mill Street. Ernestina, the driver, waited at the intersection, where vehicles moving in their direction encountered a stop sign, because a blue Lincoln Mark VIII automobile was stopped on Mill Street and had the right of way. The Mark VIII flashed its head lights, and Ernestina turned left onto Mill Street. The windows of the Mark VIII were dark, and Ernestina could not see if there was anyone in the vehicle.

As they drove down Mill Street, the sisters saw a man standing next to a Honda Accord automobile parked on the left side of the street, and another man standing on the opposite sidewalk. They described the man on the sidewalk as approximately six feet tall, well built, and African-American.

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[3] Because Ernestina Soares and Beatriz Soares share a last name, we refer to them by their first names.

He was bald or had a receding hairline, and was wearing dark clothing, including a hooded sweatshirt.[4] The man standing by the Honda was "yelling" across the street, "Don't [mess] with me. I'm not the one to be [messed] with." After driving past, Ernestina saw the man who had been standing on the sidewalk approach the Honda and raise his hand; the sisters then heard multiple gunshots. While they proceeded further down Mill Street, Beatriz telephoned 911.

Also at approximately 9:50 P.M. that evening, Michael Couture was driving on Cedar Street approaching the intersection with Mill Street. Like the Soares sisters, he waited at the intersection because a stopped automobile on Mill Street had the right of way. When a white automobile started to swerve around the stopped vehicle, Couture drove through the intersection. He heard a loud noise to his left and saw a man fire multiple shots at a parked vehicle. Couture described the man as an African American, between six feet and six feet two inches tall, with a slim to medium build. The shooter was wearing dark clothes, including a mask, hat or hood.

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[4] Beatriz described the man as being African-American, about six feet tall, 220 or 230 pounds, well built, either bald or with a receding hairline, and dressed in dark clothing, including a hooded sweatshirt. Ernestina described the man as being a light-skinned African-American, possibly Spanish or Cape Verdean, between six feet and six feet two inches tall, 220 or 240 pounds, well built, bald, and dressed in dark clothing, including a hooded sweatshirt.

At approximately the same time, Rudolph, who had left the club at about 9:40 P.M., was driving down Mill Street in his white Nissan Maxima automobile. As he approached the intersection with Cedar Street, he encountered a blue Lincoln Mark VIII with tinted windows blocking his way. He was swerving around the Mark VIII when he saw a man he recognized as the defendant standing in front of a parked vehicle on the other side of the intersection; the defendant was wearing the same clothing he had been wearing at the club. Rudolph saw the defendant step back and fire seven to eight shots at the parked vehicle. Rudolph, who had known the defendant from childhood, recognized the defendant's face when the defendant's hood slipped backwards as he fired. Rudolph also recognized the defendant by his body actions and by the way that he "bounce[d]." Rudolph drove to his mother's house and told her that he had just witnessed a shooting. His mother testified at trial that Rudolph arrived at 10 P.M. that evening, and stated that he had recognized the shooter, but refused to disclose the shooter's identity.

Officer Bryan Safioleas of the New Bedford police department was the first police officer to arrive at the scene of the shooting. Safioleas had been parked approximately one-half block away from the intersection of Mill and Cedar Streets until 9:40 P.M., and had noticed a blue Lincoln Mark VIII with

tinted windows drive around the block a "couple" of times. When Safioleas reached the Honda, the victim was unconscious and was bleeding from multiple gunshot wounds; he and another officer removed the victim from the Honda and attempted to administer CPR. After emergency medical technicians arrived, the victim was transported by ambulance to a local hospital, where he was declared dead.

Although police officers immediately identified the defendant as a suspect, they were unable to locate him for more than three months; the defendant's friends and acquaintances likewise did not see him after the shooting. Officers were able to locate the blue Lincoln Mark VIII. It had been wiped clean so that no fingerprints were identifiable either on the inside or outside of the vehicle. Ultimately, police linked the defendant to the vehicle.[5]

On August 5, 2003, State troopers arrested the defendant in Lynn, after troopers conducting surveillance of the area near a particular address saw the defendant entering a restaurant. When officers approached the defendant, he provided a false name and produced a driver's license in that name. He was unable to

[5] Police learned that the defendant had asked a friend to register the Lincoln Mark VIII in her name, but had paid for the costs of registering and insuring it; the friend never drove the Mark VIII. The victim's girl friend had seen the defendant in the Mark VIII, and the defendant's girl friend's landlord had taken a photograph of the Mark VIII parked in the defendant's girl friend's driveway.

state the date of birth on the license, however, and after admitting his real identity, was placed under arrest. When a New Bedford police officer arrived to transport the defendant back to New Bedford, he noticed that the defendant was unshaven and sweating, was wearing a soiled T-shirt, and had lost weight. When the officer told the defendant that he looked "bad," the defendant responded that he was under a lot of stress. During the drive to New Bedford, the defendant remarked that he was "enjoying the ride." The officer noted that there was not much to see because it was dark and they were driving on a highway, to which the defendant replied that he still was enjoying the ride because it was "going to be the last ride he was going to have for a long time."

The defendant did not testify. He called one alibi witness, Joseph Correia, who testified that he was in the club with the defendant until about 10:45 P.M. on the evening of the shooting.

The theory of defense focused on impeaching Rudolph's credibility. Defense counsel elicited testimony that the weather on the night of the shooting was foggy and rainy, and that Rudolph was almost a block away from the Honda when the shots were fired. Counsel also elicited testimony that Rudolph had not agreed to speak with police until after he learned that police were seeking to speak with him and his brother, and that

Rudolph and the prosecutor had entered into an agreement that resulted in Rudolph's early release from incarceration.

Discussion. The defendant raises a myriad of claims on appeal, all of which were considered and denied by the trial judge, in an exhaustive, detailed, and thoughtful eighty-page memorandum of decision, after an extensive, four-day hearing[6] on the defendant's motion for a required finding under Mass. R. Crim. P. 25, or for a new trial under Mass. R. Crim. P. 30.

The defendant's brief reiterates all of the evidentiary issues that were considered and rejected by the motion judge, who discredited several of the witnesses and found explicitly, contrary to the defendant's repeated assertions, that the prosecutor did not lie, there was no prosecutorial misconduct, and there was no conflict of interest between the prosecutor and the defendant's trial counsel.[7] As to certain claims, the

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[6] Most of the Commonwealth's trial witnesses testified at the hearing. A number of witnesses who had not been part of the original trial either testified or submitted affidavits for the defense, and additional discovery, that the defendant had not received prior to trial, was admitted in evidence. The judge also considered additional documentary evidence and affidavits by witnesses who did not testify at the hearing, which she allowed to be introduced on the defendant's motion to reopen the evidence, more than five months after the hearing.

[7] The only claim in his motion for a new trial which the defendant does not pursue on appeal concerns an assertion that he was denied the right to a public trial because the court room was closed during jury empanelment. As to that claim, the motion judge found that several of the witnesses were not credible; she noted particularly that she was very familiar with the right of public access during jury voir dire, and had been

defendant asserts facts, without comment, directly contrary to what the motion judge found. For instance, the defendant states that his counsel's "complete failure" to impeach the Commonwealth's primary witness requires a new trial, whereas the judge found that defense counsel "thoroughly" impeached the principal witness, and strategically chose to focus the jury's attention on those areas, among the many possible grounds for impeachment, that he deemed the most effective. In some of his other claims, the defendant's brief simply asserts, without explanation, that the motion judge's evidentiary and credibility rulings were clearly erroneous, and then reiterates the arguments made in his motion for a new trial.

Having carefully reviewed all of the defendant's claims, we limit our discussion to those claims which rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). See, e.g., Commonwealth v. Harbin, 435 Mass. 654, 661 (2002). Because many of the issues raised involve credibility determinations which were before the motion judge, we note the deference we accord a motion judge's findings of fact, made after an evidentiary hearing, if supported by the record, Commonwealth v. Walker, 443 Mass. 213, 224 (2005), and the special deference given to the action of a motion judge who,

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"particularly vigilant in ensuring that accommodations were made for the public to attend all phases of the trial, including jury selection."

as here, was also the trial judge. See Commonwealth v. Grace, 397 Mass. 303, 307 (1997), citing Commonwealth v. De Christoforo, 360 Mass. 531, 543 (1971).

1. Sufficiency of the evidence. In reviewing whether the evidence at trial was sufficient to support a conviction, we consider "whether the evidence, in its light most favorable to the Commonwealth, notwithstanding the contrary evidence presented by the defendant, is sufficient . . . to permit the jury to infer the existence of the essential elements of the crime charged" (quotation omitted). Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979). "Additionally, the evidence and the inferences permitted to be drawn therefrom must be of sufficient force to bring minds of ordinary intelligence and sagacity to the persuasion of [guilt] beyond a reasonable doubt" (quotation and citation omitted). Id. at 677. "As long as the inferences are 'reasonable and possible,' the evidence may be wholly circumstantial." Commonwealth v. Forte, 469 Mass. 469, 482 (2014), quoting Commonwealth v. Linton, 456 Mass. 534, 544 (2010).

The focus of the defendant's sufficiency argument is Rudolph's identification of him as the shooter. The defendant contends that it would have been physically impossible for Rudolph to identify him, given that it was dark, foggy, and

rainy,[8] and that Rudolph was almost a block away from a shooting that lasted only for a few seconds. The defendant argues also that police coerced Rudolph's testimony by suggesting that he or his brother might be considered suspects if he did not testify against the defendant, and that the evidence at trial showed that Rudolph lied about the distance between the intersection and the parked Honda where the victim was shot.[9] All of the defendant's arguments, however, concern the weight and credibility of Rudolph's testimony, which is the province of the jury. See Commonwealth v. Fitzgerald, 376 Mass. 402, 411 (1978) ("Credibility is a question for the jury to decide; they may accept or reject, in whole or in part, the testimony presented to them").

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[8] Responding officers testified that, although there was some fog, the fog was "misty" rather than dense, it was more rainy than foggy, and they were able to see from the scene of the shooting to the private club on another block where the defendant and Rudolph had been earlier in the evening. This testimony is supported by photographs of the scene taken shortly after the shooting.

[9] Rudolph testified that the Honda was in front of the fire hydrant near the NAACP building when the shooting took place (the "tail end of [the] car was just about at the fire hydrant"), and rolled slightly to the location where it was found (close to a later-established memorial, on the fence surrounding the NAACP building's parking lot) after the shooting. Other witnesses said that, at the time of the shooting, the vehicle was near the site of the memorial, approximately one hundred feet from the corner (Honda was "a short distance in front of the fire hydrant, maybe a little more up"; "right next to the NAACP building"; and "relatively close" to area of current memorial). When police arrived, the Honda was near the location of the current memorial.

A rational juror could have believed Rudolph's testimony that he saw the defendant shoot the victim. Among other things, this was not a stranger identification. Rudolph testified that he had known the defendant since childhood, they had grown up together, and he recognized the defendant's clothing and movements even before he saw the defendant's profile when his hood slipped. The jury also took a view of the scene, standing at the northeast corner of Mill and Cedar Streets, and then walking a short way down Mill Street. The prosecutor pointed out to them the location of the fire hydrant, the stop sign at the corner, the NAACP building that is the first building on the street, and the location of the next street. The jury were able to decide for themselves what would have been visible from the corner, the distance to the fire hydrant, and the distance to the memorial on the fence surrounding the NAACP building, slightly farther along Mill Street than the fire hydrant. The jury also were able to determine from the crime scene photographs the distance between the location where the green Honda was found and the fire hydrant.

Moreover, and notwithstanding the defendant's statements to the contrary, although Rudolph was the Commonwealth's primary witness, his testimony was far from the only evidence tying the defendant to the shooting. Three bystanders driving past near the time of the shooting provided descriptions of the shooter

and his clothing that were consistent with each other and with the defendant's physical characteristics and the clothing that Rudolph testified the defendant had been wearing. Several witnesses, including the victim's girl friend, were aware that the victim and the defendant had been in an argument and that the defendant wanted to "fight" the victim. The Mark VIII that the defendant had arranged to be registered in a friend's name, and which he drove, matched the description of the vehicle seen at the corner of Mill and Cedar Streets shortly before the shooting, and a Mark VIII, wiped clean of fingerprints and other possible evidence, was located by police early in the investigation. See note 5, supra.

In addition, a rational juror could have inferred that the defendant's actions after the shooting indicated consciousness of guilt. The defendant fled from New Bedford to Lynn after the shooting, where he was living under a false name. He offered a false name to police when they first apprehended him in Lynn, and made several seemingly inculpatory statements during the drive in a police cruiser from Lynn to New Bedford, among them that the drive was "going to be the last ride he was going to have for a long time."

The evidence was sufficient to support the defendant's conviction.

2. Failure to disclose exculpatory evidence. The

defendant argues that the Commonwealth failed to disclose a number of pieces of exculpatory evidence, contrary to the due process requirements of the Fourteenth Amendment to the United States Constitution, art. 12 of the Massachusetts Declaration of Rights, and Mass. R. Crim. P. 14, as appearing in 442 Mass. 1518 (2004). See Brady v. Maryland, 373 U.S. 83, 87 (1963). See also Commonwealth v. Williams, 455 Mass. 706, 714 (2010). Evidence is exculpatory if it "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." Commonwealth v. Daniels, 445 Mass. 392, 401-402 (2005), quoting Commonwealth v. Ellison, 376 Mass. 1, 22 (1978).

To obtain a new trial when exculpatory evidence has been withheld, a defendant "must establish prejudice." Commonwealth v. Murray, 461 Mass. 10, 20-21 (2011). Where a defendant requested specific exculpatory evidence prior to trial, the defendant must demonstrate only the existence of a substantial basis for claiming prejudice. Commonwealth v. Daniels, supra at 404-405. Where, on the other hand, a defendant's pretrial motion was merely a general request for exculpatory evidence, the defendant must show that the withheld evidence "would probably have been a real factor in the jury's deliberations."

See Commonwealth v. Murray, supra at 21, quoting Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011).

a. Crime scene diagram. The defendant argues that the Commonwealth failed to produce a hand-drawn crime scene diagram detailing the distance between the Honda Accord and shell casings found near the vehicle. The diagram shows the Honda as having been located part-way down the block from the intersection of Mill and Cedar Streets. The defendant contends, as he did in his motion for a new trial, that he could have used this diagram to impeach Rudolph's testimony that the shooting occurred near the intersection. The motion judge treated this diagram as having been specifically requested by the defendant prior to trial, but concluded that the defendant had no substantial basis for claiming prejudice resulting from the Commonwealth's failure to disclose. We agree.

The hand-drawn diagram is not to scale. It was drawn by a crime scene investigator primarily to record the distance of each shell casing from the Honda. More importantly, the defendant has not shown that it would have been exculpatory. See Commonwealth v. Bresilla, 470 Mass. 422, 431 (2015), citing Commonwealth v. Williams, supra at 714. Safioleas, the first responding officer, testified at trial concerning the location of the Honda when he arrived at the scene, and his testimony corresponded generally to the location of the vehicle shown on

the diagram. The defendant also was able to impeach Rudolph's testimony regarding the location of the shooting with contradictory testimony from Beatriz and Couture. The diagram would have served only as weak and cumulative impeachment evidence. See Commonwealth v. Vieira, 401 Mass. 828, 838 (1988).

b. Nature of Rudolph's incentive agreement. The defendant contends that the Commonwealth concealed the true nature of the agreement between Rudolph and the prosecutor by not informing the defendant that (1) Rudolph would be released on the day that he testified; (2) Rudolph had asked for favorable treatment at his dangerousness hearing following his December, 2003, arrest (subsequent to his initial statements to police); (3) Rudolph's former girl friend had telephoned the prosecutor asking for preferential treatment concerning her own pending felony drug charges; and (4) Rudolph purportedly received $5,000 from the New Bedford Chamber of Commerce following his testimony. As the defendant argues, evidence of any understanding or agreement between the government and a key witness may be used to impeach that witness and is exculpatory. Commonwealth v. Fisher, 433 Mass. 340, 358 (2001).

The motion judge found after hearing evidence on this issue that the Commonwealth did not conceal the nature of its agreement with Rudolph from the defendant, and the record amply

supports this finding. The prosecutor agreed to support Rudolph's request for early release, knowing that it would result in Rudolph's release from incarceration immediately after he testified, and knowing that Rudolph had an engineer who was prepared to testify that the school zone conviction against Rudolph could not stand because the location of his drug transaction was not within 1,000 feet of a school or park. The prosecutor sent a copy of this agreement to the defendant prior to the start of trial. Thus, there was no basis upon which the defendant legitimately could claim surprise or failure to disclose when Rudolph was released on the day that he testified.

There is likewise no merit in the defendant's remaining claims concerning the incentive agreement. The defendant suffered no prejudice by not learning that Rudolph had asked for favorable treatment at his dangerousness hearing. Rudolph did not receive favorable treatment at the hearing, and the agreement that Rudolph eventually reached with the prosecutor, provided to the defendant, clearly informed the defendant that Rudolph had been seeking an incentive in return for his testimony. The record does not support any favorable treatment of Rudolph's girl friend in her felony drug case, and the motion judge found that there was no indication that the Commonwealth gave preferential treatment to her, or that Rudolph requested such treatment. The motion judge also found that there was no

evidence or suggestion that the New Bedford Chamber of Commerce paid Rudolph $5,000, or any other amount, in return for his testimony. See Commonwealth v. Miranda, 458 Mass. 100, 105 (2010), cert. denied, 132 S. Ct. 548 (2011).

c. Police report on accidental shooting. The defendant asserts that the Commonwealth failed to provide the defendant with a police report detailing an incident in October, 2003, in which Rudolph accidentally shot himself in the finger. No charges were filed against Rudolph as a result of the incident. The motion judge found that, "while the evidence is far from conclusive," the Commonwealth most likely failed to provide the defendant with this report. The defendant argues that Rudolph avoided any charges because he told police that he was the key witness in the Commonwealth's case against the defendant. The judge found, however, that there was no evidence that investigating officers were aware that Rudolph was a Commonwealth witness, no evidence that he either sought or received favorable treatment in that matter, and that his anticipated testimony had no bearing on the decision not to prosecute Rudolph for "shooting himself." The record supports the judge's findings. The defendant therefore suffered no prejudice as a result of the Commonwealth's failure to disclose this police report.

3. Exclusion of third-party culprit evidence. The

defendant argues that the judge abused her discretion in allowing the Commonwealth's motion to exclude third-party culprit evidence. Relatedly, he argues that the Commonwealth failed to disclose certain notes taken by one of the officers during Rudolph's first police interview, and that these notes would have bolstered his opposition to the Commonwealth's motion in limine to exclude.

"A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it," Commonwealth v. Morgan, 460 Mass. 277, 291 (2011), quoting Commonwealth v. Lawrence, 404 Mass. 378, 387 (1989), and "[i]f the evidence is of 'substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility.'" Commonwealth v. Morgan, supra at 291, quoting Commonwealth v. Conkey, 443 Mass. 60, 66 (2004), S.C., 452 Mass. 1022 (2008). See Commonwealth v. Silva-Santiago, 453 Mass. 782, 801 (2009), and cases cited.

The introduction of such evidence, however, is not without limit. The proffered evidence must have "a rational tendency to prove the issue the defense raises, and the evidence cannot be too remote or speculative" (quotation omitted). Commonwealth v. Smith, 461 Mass. 435, 445-446 (2012). In addition, because the evidence is "offered for the truth of the matter asserted,"

e.g., "that a third party is the true culprit," where third-party culprit evidence is hearsay that does not fall within a hearsay exception, it is admissible, in the judge's discretion, only if it is otherwise relevant and will not tend to prejudice or confuse the jury, and if there are "other substantial connecting links" between the proffered third-party culprit and the crime. Commonwealth v. Smith, supra.

Here, the defendant sought to introduce evidence that the victim had been convicted of manslaughter for the death of Zachary Suoto, and therefore that Barry Suoto,[10] Zachary's brother, had a motive to kill the victim on Zachary's birthday, April 26. The defendant argues that the judge abused her discretion in granting the Commonwealth's motion to exclude this evidence. He maintains that if he had had access to the notes of Rudolph's first interview with the police, he would have been successful in arguing against the Commonwealth's motion to exclude.

While another person's motive to commit the crime properly may be considered in determining whether third-party culprit evidence is admissible, it is far from the "sole factor." Commonwealth v. Morgan, 460 Mass. at 292. The defendant offered nothing in his opposition, nor does he offer anything on appeal,

[10] Because Zachary Suoto and Barry Suoto share a last name, we refer to them by their first names.

to indicate that Barry, who had been released from incarceration more than a year before the victim's death, had a then-present intent to kill the victim, or was even present in the same city at the time of the shooting. The defendant also did not proffer any witnesses, affidavits, or other evidence that might have connected Barry to the killing. See Commonwealth v. O'Brien, 432 Mass. 578, 589 (2000). There was no abuse of discretion in the judge's conclusion that, in the absence of any such evidence, the admission of evidence that Barry might have had a motive to kill the victim on the date that the victim died was overly speculative and of little probative value, and would tend to prejudice and confuse the jury.

The notes of the police interview would have added little to suggest the judge should have reached a different conclusion and, to the contrary, tended to support her decision to exclude the proffered motive. The notes state that Rudolph had spoken with Barry a few weeks prior to the shooting, and that Barry had told Rudolph that "it was behind him." Barry also told Rudolph that he was afraid of the victim, and that "he did not hire a hitman." The judge determined that the notes were not exculpatory because they did not support the defendant's theory that Barry killed the victim. Rather, they supported the opposite inference. We conclude that there was no substantial basis to support the defendant's claim of prejudice due to the

Commonwealth's failure to provide him with these notes. The notes would not have changed the judge's decision to allow the Commonwealth's motion to exclude the proposed third-party culprit evidence, where there were no substantial connections linking Barry to the crime. See Commonwealth v. Smith, 461 Mass. at 445-446.

4. Conflict of interest. The defendant argues that a new trial is required because the prosecutor had represented him on several previous occasions. The defendant made the same argument in his motion for a new trial, in which the judge found, after hearing testimony from the prosecutor and examining records of the defendant's prior cases, that there was no conflict.

A defendant who demonstrates an actual conflict of interest is entitled to a new trial, under both Federal and State Constitutions, unless he or she knowingly and voluntarily waived the conflict. See Commonwealth v. Holliday, 450 Mass. 794, 806, cert. denied, 555 U.S. 947 (2008). An actual conflict of interest arises if a prosecutor has formerly represented a defendant in a matter that is substantially related to the pending case. See Mass. R. Prof. C. 1.9(a), 426 Mass. 1342 (1998). If a defendant establishes only a potential or tenuous conflict of interest, however, the conviction will not be set aside unless the defendant demonstrates that the conflict

resulted in actual prejudice. See Commonwealth v. Holliday, supra.

The prosecutor represented the defendant as a public defender in a 1986 probation surrender matter, a 1988 robbery charge, and a 1989 charge of receiving stolen property and possession of controlled substances. None of these cases, each of which ended many years before the current matter, is substantially related to the murder case. Contrary to the defendant's argument, the fact that the stolen property matter involved a nine millimeter handgun, the same caliber that was used to kill the victim, does not make that case, more than twenty years before the shooting, substantially related to the current case, nor does it show that the prosecutor was exposed to confidential information. Indeed, the judge found that the prosecutor's representation of the defendant had been "distant and fleeting . . . on substantially unrelated matters" and that he "acquired no facts upon which the prosecution of the defendant was predicated." Moreover, the record does not indicate that the defendant ever informed his trial counsel, either before or during trial, of a potential conflict of interest by the prosecutor. Nor did the defendant seek to have the prosecutor disqualified on the ground of a potential conflict. In the absence of an actual conflict of interest, the defendant must establish that the conflict resulted in actual

prejudice. See id. The defendant has not done so.[11]

5. Prosecutorial misconduct. The defendant raises numerous claims regarding the prosecutor's purportedly improper statements and arguments at trial, as well as the prosecutor's conduct outside the court room. We address the following three claims, and discern no reason to address the remainder of the claims, which were considered and rejected by the motion judge.

First, the defendant argues that the prosecutor knowingly presented false testimony to the jury regarding the location of the Honda at the time of the shooting. See Commonwealth v. Jewett, 442 Mass. 356, 362-363 (2004). The defendant did not object to this testimony at trial, and his claim is unavailing. The basis of the claim rests on the fact that there was somewhat differing trial testimony regarding the location of the Honda at the time of the shooting. Rudolph testified that the vehicle was close to the fire hydrant located near the intersection, while Beatriz stated that the Honda was a "little bit more up" than a short distance in front of the hydrant. That Rudolph's testimony was to some extent contradicted does not establish that it was false, or that the prosecutor knowingly and

[11] Although we conclude that there was no actual conflict of interest in these circumstances, and no potential conflict resulting in any actual prejudice, we emphasize that the better practice for the prosecutor would have been to avoid the risk of reversal of a conviction, following a later determination that there was a conflict of interest, by simply choosing not to prosecute a former client.

intentionally suborned false testimony, as the defendant contends.

Nor was the testimony about the location of the Honda significantly contradictory; Beatriz's testimony that the vehicle was a little farther up than the hydrant did not establish that Rudolph would have been unable to see the vehicle, and both he and a responding officer testified that they were able to see farther up the street, past the NAACP building and its parking lot beyond the fire hydrant.

Second, the defendant argues that the prosecutor committed "fraud on the court" by, inter alia, supporting the incentive agreement with Rudolph that had the effect of releasing him from incarceration immediately following his testimony. This claim is without merit. See Rockdale Mgt. Co. v. Shawmut Bank, N.A., 418 Mass. 596, 598 (1994), quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). A prosecutor does not commit "fraud on the court" by facilitating the government's entry into a plea agreement with a key witness, properly disclosed to the defendant, and permissibly may argue that the witness's testimony is truthful, so long as he does not express a personal belief in the witness's credibility. See Commonwealth v. Caldwell, 459 Mass. 271, 280-281 (2011), and

cases cited.[12]

Third, the defendant argues that the prosecutor disregarded a pretrial order that precluded the Commonwealth from introducing evidence of an alleged threat to Rudolph as substantive evidence of the defendant's consciousness of guilt. In explaining in his closing argument why he had supported Rudolph's release from prison, the prosecutor stated: "Folks, what do you think Mr. Rudolph's life would be worth in prison after testifying?" Defense counsel objected, and the judge ordered the comment struck, instructing the jury to disregard the statement. "We presume that the jury followed the judge's instruction." Commonwealth v. Pillai, 445 Mass. 175, 190 (2005). Beyond the single passing comment in closing, the prosecutor made no mention of the threats against Rudolph's life that had been made by, among others, the defendant's brother, and that Rudolph had testified to in earlier proceedings.

6. Introduction of hearsay statements by victim's girl friend. The defendant argues that the judge erred in denying his motion in limine to exclude testimony from the victim's girl

[12] The defendant continues to argue on appeal that the prosecutor "knew" that Rudolph committed his drug offense within a school zone, and should not have agreed to an early release on that charge, notwithstanding the judge's finding that the prosecutor was aware that Rudolph had an engineer who intended to testify that Rudolph's drug offense had taken place close to, but outside, the 1,000-foot school zone. The defendant has not established by this argument that the prosecutor committed fraud on the court.

friend that, when she was speaking with him by telephone at approximately 9:50 P.M. on the evening of the shooting, she heard him say, "Why don't you fight me now?" The motion was considered at a hearing prior to opening statements but after the jury had been empanelled, and then again immediately before the girl friend testified, at which the parties and the judge reviewed and discussed each challenged statement. Trial counsel did not object as the statements were considered, and did not seek an ongoing objection at the end of the hearing, nor did he object when the statement was introduced.

"The broad rule on hearsay evidence interdicts the admission of a statement made out of court which is offered to prove the truth of what it asserted, [but] the state of mind or intent of a person, whenever material, may be shown by his declarations out of court" (quotations omitted). Commonwealth v. Qualls, 425 Mass. 163, 167 (1997), S.C., 440 Mass. 576 (2003). See Mass. G. Evid. § 803(3)(B)(i) (2015) ("Statements of a person as to his or her present friendliness, hostility, intent, knowledge, or other mental condition are admissible to prove such mental condition"). "The state-of-mind exception to the hearsay rule calls for admission of evidence of a murder victim's state of mind as proof of the defendant's motive to kill the victim when and only when there also is evidence that the defendant was aware of that state of mind at the time of the

crime and would be likely to respond to it." Commonwealth v. Qualls, supra.

Here, there was evidence that the defendant was aware that the victim wanted to engage in a fight with him. On the evening before the shooting, Rudolph and the defendant saw the victim waiting outside the entrance to the club, and Rudolph suggested that the defendant should go outside and fight the victim without weapons. There was also evidence that the defendant responded to the possibility of a fight with the victim by killing him. The Soares sisters testified that, immediately before the victim was shot, he had been yelling at a man across the street, and Rudolph testified that the defendant was that man. There was no error in the judge's decision to allow this statement to be introduced to establish the defendant's motive to kill the victim.

7. Ineffective assistance of counsel. The defendant argues that his trial counsel's performance was constitutionally deficient in numerous respects. He asserts that counsel was ineffective for, among other things, inadequate efforts to impeach Rudolph, failure to develop evidence of the crime scene, and failure to interview and call additional alibi witnesses.[13]

[13] The defendant also argues that he was denied the effective assistance of counsel because his trial counsel previously had represented Rudolph, and had a conflict of interest. This claim is unavailing. The defendant's trial

When addressing ineffective assistance of counsel claims, we "consider whether there was an error in the course of trial, and if so, whether such error was likely to have influenced the jury's conclusion." Commonwealth v. Freeman, 442 Mass. 779, 791 (2004). "A strategic decision by an attorney . . . constitutes error 'only if it was manifestly unreasonable when made.'" Commonwealth v. Jenkins, 458 Mass. 791, 804-805 (2011), quoting Commonwealth v. Coonan, 428 Mass. 823, 827 (1999). In considering ineffective assistance claims in a case of murder in the first degree, we review under the standard of a substantial likelihood of a miscarriage of justice, "as it is more favorable to the defendant." Commonwealth v. Freeman, supra. We conclude that none of the asserted failures shows any inadequacy in trial counsel's performance.

a. Impeachment of Rudolph. We apply "a stringent standard of review to claims of ineffective assistance because of failure to impeach a witness." Commonwealth v. Jenkins, supra at 805. The defendant claims that trial counsel failed to impeach Rudolph with his prior convictions. "[F]ailure to introduce the

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counsel represented Rudolph in 1988, in a case involving the malicious destruction of property. Rudolph received probation in that case; his term of probation ended in 1993. The motion judge found after an evidentiary hearing that counsel had no memory of having represented Rudolph, and the two cases, more than ten years apart, were not related. Furthermore, the judge found that the defendant's trial counsel "conducted a vigorous cross-examination of Rudolph," which was not impacted by his prior representation.

criminal record of a witness for impeachment purposes generally does not constitute ineffective assistance of counsel." Commonwealth v. Martinez, 437 Mass. 84, 93 (2002). Here, counsel testified at the hearing on the motion for a new trial that he made a strategic decision to focus on other methods of impeachment. His decision to do so was not manifestly unreasonable. Indeed, the motion judge found that counsel's cross-examination of Rudolph had been "vigorous" and effective.

The defendant claims also that trial counsel failed to impeach Rudolph with his recantations, prior to trial, of his identification of the defendant. In response to a motion in limine, however, the judge had ruled that if counsel impeached Rudolph with his recantations, Rudolph would be permitted to testify that the recantations were as a result of threats that he had received, including from the defendant's brother. See part 5, supra. Counsel's strategic decision to avoid this line of impeachment was not manifestly unreasonable.

The defendant argues that counsel should have impeached Rudolph with evidence that he was a heavy drug user in 2003. There was, however, no evidence that Rudolph had been using drugs on the night of the shooting. Counsel's decision to forgo this line of impeachment for other, more powerful grounds of impeachment was not manifestly unreasonable. Contrast Commonwealth v. Sena, 429 Mass. 590, 595 (1999), S.C., 441 Mass.

822 (2004).

b. Introduction of crime scene evidence. The defendant claims that counsel was ineffective for failing to introduce evidence that would have proved conclusively that the shooting took place farther away from the intersection than where Rudolph testified it occurred. Specifically, the defendant contends that trial counsel should have introduced photographs showing where the responding officers parked when they arrived at the scene, and should have argued that the location where the shell casings landed proves that the Honda was parked farther down the street from the intersection when the shooting occurred. Throughout the trial, however, counsel effectively elicited testimony that the shooting occurred farther down the street, and not directly at the intersection. In his closing argument, counsel also emphasized that Rudolph's testimony concerning the location of the shooting differed from the testimony of the other witnesses. Counsel was not constitutionally ineffective for failing to introduce cumulative evidence concerning the location of the Honda that would have added little to support the defendant's vigorous attack on Rudolph's credibility as to the location of the vehicle at the time of the shooting.

c. Additional alibi witnesses. The defendant argues that counsel was ineffective because he should have called additional alibi witnesses. To establish ineffective assistance of counsel

based on a failure to call additional witnesses, a defendant "must show that the purported testimony would have been relevant or helpful." Commonwealth v. Ortega, 441 Mass. 170, 178 (2004). The defendant has not done so. Prior to trial, his investigator interviewed five potential alibi witnesses. Four did not have memories that would have been helpful, and the fifth was called to testify. In his motion for a new trial, the defendant submitted an affidavit from a potential alibi witness that stated that the witness ran into the club following the shooting and saw the defendant watching basketball on television. During the hearing on the motion for a new trial, however, that potential witness contradicted the statements in his affidavit.

The defendant also challenges numerous "other defense counsel failings." As did the motion judge, we conclude that trial counsel's conduct did not result in a substantial likelihood of a miscarriage of justice.

Relief under G. L. c. 278, § 33E. Having reviewed the entire record pursuant to our duty under G. L. c. 278, § 33E, we discern no reason to exercise our extraordinary power to reduce the degree of guilt or to grant a new trial.

Conclusion. The judgments of conviction on the indictments charging murder in the first degree and unlawful possession of a firearm are affirmed. The order denying the motion for a required finding of not guilty or, in the

alternative, for a new trial is also affirmed.

So ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KYLE WATKINS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	
	*	Civil Action No. 16-cv-10891-ADB
SEAN MEDEIROS,	*	
	*	
Defendant.	*	
	*	
	*	

MEMORANDUM AND ORDER

BURROUGHS, D.J.

On June 2, 2005, following a jury trial in the Bristol County Superior Court, Petitioner Kyle Watkins ("Petitioner") was convicted of murder in the first degree in violation of Mass. Gen. Laws ch. 265, § 1 and unlawful possession of a firearm in violation of Mass. Gen. Laws ch. 269, § 10(b). Petitioner was sentenced to life in prison for the murder conviction with a concurrent term of four to five years on the firearm conviction.

Before the Court is Petitioner's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 ("the Petition"). [ECF No. 1]. Petitioner raises a number of constitutional arguments in support of the Petition and alleges that the decision of the Massachusetts Supreme Judicial Court ("SJC") affirming his conviction was unreasonable and contrary to clearly established federal law and based on unreasonable determinations of facts. For the reasons stated herein, the Petition, [ECF No. 1], is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

In Commonwealth v. Watkins, 41 N.E.3d 10 (Mass. 2015), the SJC described the facts of this case, which are summarized in relevant part below and "supplemented with other record

facts consistent with the SJC's findings." Yeboah-Sefah v. Ficco, 556 F.3d 53, 62 (1st Cir. 2009) (quoting Healy v. Spencer, 453 F.3d 21, 22 (1st Cir. 2006)).[1]

Petitioner spent the evening of April 25, 2003, at the New Bedford Elks Lodge, a private club located on Mill Street in New Bedford, Massachusetts. [Respondent's Supplemental Answer ("S.A.") Vol. I at 121]. Vernon Rudolph ("Rudolph"), a long-time friend of both Petitioner and Paul Coombs ("the victim"), was also present at the club that night. Watkins, 41 N.E.3d at 15. According to Rudolph, Petitioner spent a portion of the evening arguing loudly with the victim over the phone. [S.A. Vol. I at 121]. After Petitioner ended the call, Rudolph looked out of a window in the club and noticed that the victim was standing on the sidewalk outside of the club "frisking" people who attempted to enter. [Id.]; Watkins, 41 N.E.3d at 15. Rudolph suggested to Petitioner that he should go outside and fight the victim, but Petitioner refused and stayed at the club until after the victim had left. [S.A. Vol. I at 121]; Watkins, 41 N.E.3d at 15. The next morning, the victim told his girlfriend that he wanted to fight Petitioner, saying he would like to "whoop" him. Watkins, 41 N.E.3d at 15.

On April 26, 2003, the day of the shooting, Petitioner was seen at the Elks Lodge at least twice, first by the club's bartender and then by Rudolph. The bartender spotted Petitioner in the bathroom between 2:30 and 3:30 PM and testified that he looked upset and said he was "tired of people [messing] with him." Watkins, 41 N.E.3d at 15 (alteration in original). Rudolph saw Petitioner after he returned to the club sometime after 8:30 p.m. [S.A. Vol. I at 121]. At the time Rudolph saw him, Petitioner was wearing a black hoodie, black jeans, white and black sneakers, and batting gloves. Watkins, 41 N.E.3d at 16. Rudolph reported that Petitioner's attitude was

[1] In a habeas case, state court "factual findings are entitled to a presumption of correctness that can be rebutted only by clear and convincing evidence to the contrary." Rashad v. Walsh, 300 F.3d 27, 35 (1st Cir. 2002) (internal quotations omitted).

noticeably changed from his dejected appearance the day before, that he was acting "tough" and was overheard saying, "things are going to change around here." Id. at 15; [S.A. Vol. I at 121]. Petitioner left the club sometime around 9:30 p.m. [S.A. Vol I. at 143]. At about 9:50 p.m., the victim abruptly ended a phone call with his girlfriend after calling out, "Why don't you fight me now?" to an unidentified individual. Watkins, 41 N.E.3d at 16. He was shot shortly thereafter.

Mill Street, on which the victim was standing at the time of the shooting, runs perpendicular to Cedar Street, which is a one-way street. [ECF No. 24-3 at 42–43, 75–76]. There is a stop sign on Cedar Street at the intersection of the two streets. See [id.; id. at 20, 108]. Four witnesses—Ernestina Soares ("Ernestina"), Beatriz Soares ("Beatriz"), Michael Couture ("Couture"), and Rudolph—testified that they drove through this intersection at around 9:50 p.m. on April 26, 2003, and either heard the incident or saw a young African-American man shoot the victim.[2] Watkins, 41 N.E.3d at 16–17. All four witnesses also said that when they approached the intersection, they noticed a blue Lincoln Mark VIII automobile stopped on Mill Street. Id. This car was later connected to Petitioner when police learned that he had asked a friend to register the car in the friend's name but paid for the costs of registering and insuring the car himself. Id. at 17 n.5.

Ernestina and Beatriz reported that after they turned left onto Mill Street, they drove past the victim and saw him standing on the left side of the street, next to a parked Honda Accord with its driver's side door open. [S.A. Vol. I at 149]. The victim appeared to be involved in a verbal altercation with a man who was standing on the opposite side of the street. Watkins, 41 N.E.3d at 16. Both Ernestina and Beatriz described this second man as African American,

[2] The women are being identified by their first names because they share the same last name.

approximately six feet tall, well-built, and wearing dark clothing including a hooded sweatshirt.[3] Id. at 16 n.4. Ernestina and Beatriz reported that the victim cried out to this man, "Don't [mess] with me. I'm not the one to be [messed] with." Id. at 16 (alteration in original). After they drove past the men and the Honda, Ernestina saw the second man walk towards the Honda and raise his hand. Id. Moments later, both sisters heard gunshots. Id. The pair drove away from the scene and called 911. Id.

At about the same time, Couture, who was driving on Cedar Street, crossed through the intersection of Cedar and Mill Streets. Watkins, 41 N.E.3d at 16. While in the middle of the intersection, he heard a loud noise to his left and saw a flash out of the corner of his eye. [S.A. Vol. I at 144]. He reported that the entire event lasted only a few seconds, but that he saw an African-American man between six feet and six feet two inches tall with a slim to medium build, dressed in dark clothing, wearing either a mask, hat, or hood, fire multiple shots into the parked Honda Accord. Watkins, 41 N.E.3d at 16. Couture saw the shooter flee the scene, [S.A. Vol. I at 144], and then reversed his car down Cedar and turned left onto Mill Street in order to pull up alongside the Honda Accord that had been parked on Mill Street, [id.]. Upon seeing the victim inside the car, he called 911. [Id.].

Also at about this same time, Rudolph approached the intersection of Cedar Street and Mill Street while driving down Mill Street and had to swerve to avoid the parked Lincoln Mark VIII. Watkins, 41 N.E.3d at 16. He noticed Petitioner standing next to a parked vehicle on the

[3] "Beatriz described the man as being African-American, about six feet tall, 220 or 230 pounds, well built, either bald or with a receding hairline, and dressed in dark clothing, including a hooded sweatshirt. Ernestina described the man as being a light-skinned African-American, possibly Spanish or Cape Verdean, between six feet and six feet two inches tall, 220 or 240 pounds, well built, bald, and dressed in dark clothing, including a hooded sweatshirt." Watkins, 41 N.E.3d at 16 n.4.

opposite side of the intersection with Cedar Street, wearing the same clothing he had seen him wearing earlier that evening. Id. Rudolph indicated that he was able to identify Petitioner from afar based on his clothing, his mannerisms, and a glimpse he caught of Petitioner's face when his hood slipped backwards as he fired seven to eight shots at the parked vehicle.[4] Id. at 16–17. Rudolph drove directly from the crime scene to his mother's house, where he told her that he had just witnessed a shooting, although he did not immediately share the shooter's identity with her. Id. at 17.

Officer Bryan Safioleas of the New Bedford Police Department was the first to arrive at the crime scene. Watkins, 41 N.E.3d at 17. Just before the shooting, he had been stationed in the area and had noticed a Lincoln Mark VIII, possibly the one connected to Petitioner, drive around the block "a 'couple' of times." Id. Officer Safioleas found the victim seated in the Honda Accord, unconscious and bleeding from multiple gunshot wounds. Id. Emergency medical technicians arrived and transported the victim to a nearby hospital, where he was declared dead. Id. Police identified Petitioner as a suspect in the days after the shooting but were unable to locate him for several months. Id. It was during this time that police discovered that Petitioner had paid to register and insure the Lincoln Mark VIII car but had asked a friend to register it in her name. Id. at 17 n.5. Two sources, including Petitioner's girlfriend, indicated that they had seen Petitioner in the car in the past, and one had a photo of the vehicle parked in the driveway of Petitioner's girlfriend. Id.

State troopers located and arrested Petitioner nearly three months after the shooting, on August 3, 2003, when they spotted him entering a restaurant in Lynn, Massachusetts. Watkins,

[4] According to Rudolph, the shooter "bounce[d]" in a way that he knew to be characteristic of Petitioner. Watkins, 41 N.E.3d at 16–17.

41 N.E.3d at 17. When approached by the state troopers, Petitioner initially gave them a fake name and fake driver's license. Id. A New Bedford police officer who knew Petitioner transported him back to New Bedford and observed that Petitioner was "unshaven and sweating, wearing a dirty white t-shirt and baggy jeans, and appeared to have lost a lot of weight." [S.A. Vol. I at 220]. A state trooper who was also in the car during Petitioner's transport back to New Bedford remarked to Petitioner that he looked "bad," to which Petitioner replied that he was under a lot of stress. Watkins, 41 N.E.3d at 17. Petitioner told the trooper that he was enjoying the car ride because it was "going to be the last ride he was going to have for a long time." Id.

Petitioner was charged with murder and a firearm violation in September 2003, [S.A. Vol. I at 30], and tried in front of a jury from May 24 to June 2, 2005, [id. at 3; ECF No. 38 at 4]. The jury returned a guilty verdict, and Petitioner was sentenced to a term of natural life for homicide and a concurrent term of four to five years for unlawful possession of a firearm. [S.A. Vol. I at 6; ECF No. 24-8 at 7]. Petitioner then moved for entry of a verdict of not guilty pursuant to Massachusetts Rule of Criminal Procedure 25(b)(2), or in the alternative, a new trial pursuant to Massachusetts Rule of Criminal Procedure 30(b) ("MNT"). [S.A. Vol. II at 313]. In August 2012, the Superior Court held a four-day evidentiary hearing on the MNT, during which most of the Commonwealth's trial witnesses and a number of additional witnesses that had not been part of the original trial testified. Watkins, 41 N.E.3d at 18 n.6; [S.A. Vol. I at 12]. The MNT was denied, [S.A. Vol. I at 105], and Petitioner appealed the denial and his conviction to the SJC, [S.A. Vol. I at 19]. The SJC affirmed both, Watkins, 41 N.E.3d at 28, and on May 16, 2016, Petitioner filed the instant Petition, [ECF No. 1].

II. LEGAL STANDARD

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a claim has previously been adjudicated on the merits by a state court, a petitioner may only obtain habeas relief if that adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established Supreme Court precedent if: "(1) the state court arrives at a conclusion opposite that reached by [the Supreme Court] on a question of law"; or (2) the state court decides a case differently from a decision of the Supreme Court on a materially indistinguishable set of facts. Williams v. Taylor, 529 U.S. 362, 405, 413 (2000). A state court unreasonably applies federal law when it "correctly identifies the governing legal principles, but (i) applies those principles to the facts of the case in an objectively unreasonable manner; (ii) unreasonably extends clearly established legal principles to a new context where they should not apply; or (iii) unreasonably refuses to extend established principles to a new context where they should apply." Gomes v. Brady, 564 F.3d 532, 537 (1st Cir. 2009) (citation omitted). An unreasonable application requires "some increment of incorrectness beyond error." Norton v. Spencer, 351 F.3d 1, 8 (1st Cir. 2003) (citation omitted). A petitioner must show that the state court decision applied clearly established law in a way that was "objectively unreasonable." Sanchez v. Roden, 753 F.3d 279, 299 (1st Cir. 2014) (citation omitted).

Thus, to obtain habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error

well understood and comprehended in existing law beyond any possibility for fair minded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011). "The petitioner carries the burden of proof." Cullen v. Pinholster, 563 U.S. 170, 181 (2011). "In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991). Furthermore, "[e]rrors based on violations of state law are not within the reach of federal habeas petitions unless there is a federal constitutional claim raised." Kater v. Maloney, 459 F.3d 56, 61 (1st Cir. 2006) (citing Estelle, 502 U.S. at 67–68). "'[T]he gap between erroneous state court decisions and unreasonable ones is narrow,' and 'it will be the rare case that will fall into this gap.'" O'Laughlin v. O'Brien, 568 F.3d 287, 299 (1st Cir. 2009) (first quoting Evans v. Thompson, 518 F.3d 1, 6 (1st Cir. 2008), then quoting Williams, 529 U.S. at 388).

A federal court cannot grant habeas relief to a state prisoner unless the prisoner has first exhausted his federal constitutional claims in state court. 28 U.S.C. § 2254(b)(1)(A). "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). A claim for habeas relief is exhausted if it has been "fairly and recognizably" presented in state court. Sanchez, 753 F.3d at 294 (quoting Casella v. Clemons, 207 F.3d 18, 20 (1st Cir. 2000)). In other words, "a petitioner must have tendered his federal claim [in state court] in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question." Id. (internal quotation marks and citations omitted).

III. DISCUSSION

Petitioner raises seven bases for relief, which are consolidated into four grounds in his memorandum in support of the Petition. [ECF No. 28]. Petitioner argues that decisions of the

SJC and the findings of the MNT judge were based on objectively unreasonable applications of Supreme Court law and unreasonable determinations of fact with respect to (1) evidence withheld by the Commonwealth before trial ("Ground One"), (2) alleged instances of prosecutorial misconduct ("Ground Two"), (3) alleged instances of ineffective assistance of counsel ("Ground Three"), and (4) the sufficiency of the evidence against Petitioner ("Ground Four"). [ECF No. 1 at 12–20]. In support of these claims, Petitioner raises many of the same arguments he presented to the state courts and argues that decisions contrary to his legal arguments were unreasonable given the strength of these arguments. Respondent Sean Medeiros ("Respondent") opposes the Petition and asserts that habeas relief should be denied because each of Petitioner's claims were properly decided by the SJC. [ECF No. 38 at 4].

A. Ground One: Brady Violations

In Ground One of the Petition, Petitioner claims that the SJC's "decision with respect to the Petitioner's Brady issues was an unreasonable application of clearly established Supreme Court law, and it was based on multiple unreasonable determinations of facts in light of the evidence presented." [ECF No. 28 at 18]. In support of this claim, Petitioner alleges that the Commonwealth withheld evidence of Rudolph's prior contacts with the police and current cooperation with the government, a crime scene diagram, and notes taken by the police during their interrogation of Rudolph in violation of Brady v. Maryland, 373 U.S. 83 (1963). [ECF No. 28 at 19, 32, 35, 39]. While the SJC agreed with Petitioner that this evidence had likely been withheld, it declined to conclude that there had been any Brady violation because Petitioner did not prove prejudice. Watkins, 41 N.E.3d at 20–23. Petitioner contends that this conclusion was

improper because the individual and cumulative value of the suppressed evidence was sufficiently prejudicial to rise to the level of a Brady violation. [ECF No. 28 at 43].

1. Legal Standard

Under Brady, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The government has an affirmative duty to disclose such evidence even if the defense does not request it. Kyles v. Whitley, 514 U.S. 419, 433 (1995). To prevail on a Brady claim in a habeas petition, a petitioner must demonstrate: "(1) the evidence at issue is favorable to him because it is exculpatory or impeaching; (2) the Government suppressed the evidence; and (3) prejudice ensued from the suppression (i.e. the suppressed evidence was material to guilt or punishment)." Conley v. United States, 415 F.3d 183, 188 (1st Cir. 2005). "[E]vidence is 'material' when a reasonable probability exists 'that the result of the trial would have been different if the suppressed documents had been disclosed to the defense.'" Id. (citing Strickler v. Greene, 527 U.S. 263, 289 (2006)).

2. Rudolph's Prior Contacts with the Police

Petitioner's defense team filed a number of pre-trial motions requesting exculpatory information from the Commonwealth regarding Rudolph's history of contacts or cooperation with the police or the government. [ECF No. 28 at 19]; see [S.A. Vol. I at 4–5]. Petitioner argues that at least two such reports were withheld to his detriment, including (a) a report from Rudolph's dangerousness hearing for unrelated charges that indicates that Rudolph had requested special treatment in that matter in exchange for his testimony against Petitioner and (b) a police report from an incident where Rudolph had accidentally shot himself with an illegal firearm but

was not charged with a crime. [ECF No. 28 at 25, 28]. Petitioner claims that the SJC unreasonably applied Brady in concluding that no prejudice resulted from the withholding of this evidence because, without access to these reports, he could not fully cross-examine Rudolph about his potential bias. [ECF No. 28 at 28].

a. Dangerousness Hearing

At the relevant dangerousness hearing for an unrelated drug and firearm charge, Rudolph called out to the court, "So what happens when the murder case comes up? Am I to come to court bright eyed and bushy tailed and testify against somebody else after this? That's not fair, your Honor, it's not fair." [S.A. Vol. II at 989]. Petitioner argued to the SJC that the report from this hearing is evidence that Rudolph had requested a benefit in exchange for testifying against him. [S.A. Vol. I at 44–45]. The SJC agreed, but found that Petitioner did not suffer any prejudice from the non-disclosure of this report because "the agreement that Rudolph eventually reached with the prosecutor, provided to [Petitioner], clearly informed [Petitioner] that Rudolph had been seeking an incentive in return for his testimony." Watkins, 41 N.E.3d at 21–22; see [S.A. Vol. II at 510–11]. Given that Petitioner admits elsewhere in his brief that he received the details of Rudolph's cooperation with the Commonwealth via fax two days before trial, [ECF No. 28 at 39], his argument that the withholding of this report deprived him of this line of cross-examination and caused him prejudice fails to meet the Brady standard.

b. Police Report of Accidental Shooting

In October 2003, Rudolph was hospitalized after accidentally shooting himself with what Petitioner believes was an illegal firearm. [S.A. Vol. II at 507]; see [ECF No. 28 at 28–31]. "The motion judge found that, 'while the evidence is far from conclusive,' the Commonwealth most likely failed to provide the Petitioner with" the police report about this incident, but that

there was "no evidence that investigating officers were aware that Rudolph was a Commonwealth witness . . . ." Watkins, 41 N.E.3d at 22. The SJC held that the record supported the MNT judge's findings. Id.

Both parties agree that Rudolph informed the officers that he was a Commonwealth witness but disagree about the effect of the failure to provide Petitioner with the police report on a Brady calculus. See [ECF No. 28 at 29–31; ECF No. 38 at 16; S.A. Vol. I at 229–30]. Petitioner believes the report is material because it evidences a pattern of Rudolph seeking rewards for his testimony and that withholding the report was tantamount to depriving him of a powerful impeachment tool. [ECF No. 28 at 29–31]. Respondent supports the SJC's conclusion that Petitioner was not prejudiced by the suppression of the report "where Petitioner failed to show that Rudolph's anticipated testimony had any bearing on the decision not to prosecute him for shooting himself." [ECF No. 38 at 16].

The AEDPA provides that a state court's determinations of fact "shall be presumed to be correct" unless rebutted by a habeas petitioner by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). According to the report in question, Rudolph immediately disclosed his role as a witness against Petitioner to the responding officers:

> RUDOLPH stated that he had been receiving threats on his life since he became a witness in the murder investigation of one PAUL COOMBS. RUDOLPH witnessed the murder by firearm and gave statements to the police implicating one KYLE WATKINS. WATKINS was later apprehended and incarcerated.
>
> RUDOLPH originally stated that he parked his vehicle outside of the Elks Club at Cottage St. and Mill St. and was going to enter the club. He claimed that he saw a male wearing dark clothing approach and he became nervous. He tried to retreat to his car when this male produced a gun and pointed it at him. A brief struggle then ensued and the gun fired once striking him in the finger. Rudolph stated that he then ran northerly on Cottage St. and the male suspect ran in the other direction.
>
> After several minutes and more specific questioning he eventually admitted that he fabricated the story . . . .

> RUDOLPH stated that he had hoped to be treated and released without the hospital having to contact the police. He apologized for creating the story and for wasting our time, but he felt he had no choice. He stated that he has in fact been receiving threats from WATKINS' friends, but did not want to name anyone or document any of the incidents.

[S.A. Vol. II at 508]. The above excerpts from the October 29, 2003 police report constitute clear and convincing evidence that the MNT judge erred in finding, and the SJC erred in affirming, that the officers who investigated this incident did not know that Rudolph intended to serve as a witness against Petitioner. This error, however, does not entitle Petitioner to habeas relief.

In order to warrant habeas relief, a state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. The SJC's conclusion that "the defendant suffered no prejudice as a result of the Commonwealth's failure to disclose this police report," Watkins, 41 N.E.3d at 22, remains justifiable in light of the details of this report. Petitioner believes this report shows that Rudolph should have been charged as a felon in possession of a firearm and argues that because Rudolph was not charged as such, Rudolph received a material benefit in exchange for his testimony against Petitioner. [ECF No. 28 at 31]. Petitioner asserts that more conclusive proof of such an agreement "would be impossible" but that "the facts, however, speak for themselves." [Id.]. The police report, however, does not support this claim. It shows no evidence that the responding officers considered charging Rudolph as a felon-in-possession and, correspondingly, no evidence that they decided not to do so as a benefit in exchange for Rudolph's testimony. See [S.A. Vol. II at 508]. In any event, Petitioner knew that Rudolph had received a benefit and had the opportunity to cross-examine

him on this subject. Therefore, contrary to Petitioner's assertion, the SJC properly determined that withholding this report was not prejudicial.

3. Crime Scene Diagram

Petitioner next argues that he should have received a copy of a diagram drawn of the crime scene on the night of the victim's death. [ECF No. 28 at 32]. The diagram was hand-drawn on lined paper by a responding officer and, according to the MNT judge, was intended to indicate the distance between shell casings found on Mill Street and the Honda Accord in which the victim was found.[5] [S.A. Vol. II at 1178–79; S.A. Vol. I at 146]. Petitioner believes that this crime scene diagram is valuable to his case because it contradicts Rudolph's testimony and "render[s] his identification of Watkins utterly impossible." [ECF No. 28 at 33]. As discussed supra in Section I, Rudolph testified that he saw Petitioner shoot the victim near the intersection of Mill and Cedar Streets, but all the other witnesses and the physical evidence indicated that the victim and his Honda Accord had been positioned closer to the middle of the block.

The MNT judge agreed that the crime scene diagram was wrongfully withheld but found that Petitioner could not prove that he had suffered prejudice. [S.A. Vol. I at 146]. The MNT judge determined that, contrary to Petitioner's assertions, the diagram could not be used to pinpoint the "exact location" where the victim's body was found because it was not drawn to scale. [Id.]. The SJC affirmed, reasoning that the diagram would have "served only as weak and cumulative impeachment evidence" if it had been introduced at trial. Watkins, 41 N.E.3d at 21.

[5] The diagram is a rough rendering of the Mill Street location where the Honda Accord and the victim were found. [S.A. Vol. II at 1178–79]. The Honda Accord is indicated by a small rectangle positioned on the left side of Mill Street, fourteen lines from the label "Cedar." Id. Several small dots indicate the approximate location where shell casings were found. Each dot is numbered or otherwise annotated. Id. A number of measurements are printed on the back side of the paper. Id. The diagram is not drawn to scale and it does not indicate the distance between the Honda Accord and the intersection. Id.

Both courts noted that the crime scene evidence was cumulative and not material because several witnesses and crime scene photographs were introduced to show the relative location of the Honda Accord to the intersection. [S.A. Vol. I at 146]; Watkins, 41 N.E.3d at 21.

Evidence is cumulative when it is "repetitive" or "only marginally relevant," and "[t]he unavailability of cumulative evidence does not deprive [a] defendant of due process." Crane v. Kentucky, 476 U.S. 683, 689 (quoting Delaware v. Van Arsdall, 475, U.S. 673, 679 (1986)); Conley, 415 F.3d at 188 (quoting Moreno-Morales v. United States, 334 F.3d 140, 147–48 (1st Cir. 2003)); see United States v. Sanchez, 917 F.2d 607, 618 (1st Cir. 1990). Several other witnesses specifically testified that they saw the victim's Honda Accord farther down Mill Street than indicated by Rudolph, see [ECF No. 24-3 at 64, 81–82, 110; ECF No. 24-4 at 77], and Petitioner's trial counsel highlighted this discrepancy in his closing statement, see [ECF No. 24-7 at 74]. The jury was also afforded the opportunity to view photographs of the crime scene and could have concluded that the location of the memorial to the victim appeared to contradict Rudolph's testimony. [S.A. Vol. I at 146]. In addition, as the MNT judge found, even conclusive evidence that the Honda Accord had been parked more towards the center of the block would not have negated Rudolph's testimony because he claimed he saw the victim's Honda Accord roll to the center of the block after the victim had been shot. [S.A. Vol. I at 147]; see Moore v. Illinois, 408 U.S. 786 (1972) (no Brady violation when undisclosed police diagram did not contradict witness testimony).

In light of the wealth of evidence on this same point, and the relatively low probative value of the crime scene diagram given that it was cumulative, Petitioner could not show that he suffered prejudice. The SJC's decision with respect to this evidence was, therefore, not unreasonable.

4. Notes from Interview with Rudolph

In his fourth Brady claim, Petitioner argues that it was unreasonable for the SJC to conclude that notes taken by the New Bedford police officer who questioned Rudolph were not material. [ECF No. 28 at 35]; see [S.A. Vol. II at 1379–82]. Petitioner argues here, as in his brief to the SJC, that access to these notes would have changed the outcome of the Commonwealth's motion *in limine* to preclude third-party culprit evidence regarding Barry Souto ("Barry"). [ECF No. 28 at 38; S.A. Vol. I at 51–53]. The SJC held that "[t]he notes would not have changed the judge's decision to allow the Commonwealth's motion to exclude the proposed third-party culprit evidence, where there were no substantial connections linking [the proposed third-party culprit] to the crime." Watkins, 41 N.E.3d at 23.

In the early 1990s, the victim was arrested, charged, and convicted of the manslaughter of Zachary Souto ("Zachary"). See [S.A. Vol. II at 644]. When Rudolph spoke with police about the victim's murder, he revealed that he had recently seen Zachary's brother Barry, who had indicated that although he was afraid of the victim, Barry had not hired a hitman to kill him. [S.A. Vol. I at 52]. Petitioner places great weight on the mention of a hitman and construes this reference as evidence that Barry had considered killing the victim, which he argues constitutes important third-party culprit information. [ECF No. 28 at 36]. Petitioner asks the Court to narrow in on this reference, but the broader context of the notes cannot be ignored. The notes do not suggest that Barry hired a hitman to kill the victim, rather they explicitly state that he did not. [S.A. Vol. II at 1380 ("Barry told Vern he did not hire [a] hitman")]. The notes further indicate that Barry had moved on from Zachary's killing and that he had spoken personally with the victim to clear the air between them. [Id. ("Last spoke w/ V last month discussed Barry Souto + V's history, Barry told Vern it was behind him re: Zach (few weeks ago) . . . Barry talked to Paul

– to clear it up . . . Barry scared of Paul Coombs" (emphasis in original))]. The notes do not suggest that there was an ongoing feud between Barry and the victim, and they lend no support to Petitioner's third-party culprit argument. It is unlikely that this evidence would have changed either the outcome of Petitioner's motion *in limine* or the outcome of his trial and, therefore, the SJC's determination that Petitioner did not suffer any prejudice in this instance was neither unreasonable in light of the facts nor in contravention of federal precedent.

5. Rudolph's Agreement with the Commonwealth

Rudolph was arrested and charged with three counts of drug trafficking related charges in December of 2003. See [S.A. Vol. II at 510–11]. He pled guilty to these charges and received a combined sentence of three years and one day in a Massachusetts house of correction. [Id.]. At the time of Petitioner's trial in June of 2005, Rudolph had served eighteen months of this sentence. [Id.]. The Commonwealth agreed to re-sentence Rudolph to time served and to release him in exchange for his testimony against Petitioner. See [id.]. As a result, Rudolph was released from incarceration on the same day that he testified at Petitioner's trial. See [id.; ECF No. 28 at 40–41].

Petitioner's claim that the Commonwealth purposefully concealed the extent of this cooperation from Petitioner's trial counsel is counter-factual. [ECF No. 28 at 39–40]. The state prosecutor faxed a copy of the letter outlining the Commonwealth's agreement with Rudolph to Petitioner's trial counsel two days before trial. [S.A. Vol. II at 510–11]. Petitioner admits that he received this fax but alleges that the fax did not notify him that Rudolph would be released so soon after testifying. [ECF No. 28 at 39]. According to this letter, the state prosecutor intended to dismiss one of Rudolph's charges and to suspend the unserved portion of his sentence after he testified against Petitioner. [Id.]. "[T]he net effect of these motions, should they be allowed" the

letter reads, "will be to release Mr. Rudolph from further incarceration and place him under probation supervision for three years." [Id. at 39–40; S.A. Vol. II at 511]. The SJC's determination that "there was no basis upon which the defendant legitimately could claim surprise or failure to disclose when Rudolph was released on the day that he testified," is reasonable given this evidence. Watkins, 41 N.E.3d at 21.

Because the SJC's conclusions on each of Petitioner's Brady claims are supported by the record and comport with clearly established federal law, the Court does not find that the SJC's factual findings were erroneous or that its legal conclusions were an unreasonable application of federal law. Therefore, Petitioner is not entitled to relief on Ground One.

B. Ground Two: Prosecutorial Misconduct

In Ground Two of his Petition, Petitioner asserts that the state prosecutor violated his Fifth, Sixth, and Fourteenth Amendment rights and that the SJC's decision with respect to these claims was contrary to federal law under Donnelly v. DeChristoforo, 416 U.S. 637 (1974). [ECF No. 28 at 44].[6] Petitioner alleges that fraud on the court, improper presentation of crime scene evidence, improper closing statements, and an un-waivable conflict of interest, "so 'poisoned the well' as to be violative of [his] federal and state due process rights." [Id. (quoting United States v. Manning, 23 F.3d 570, 574 (1st Cir. 1994))]. Respondent broadly rejects these claims and asserts that none of the alleged prosecutorial errors amounted to a due process violation under state or federal law. [ECF No. 38 at 19].

[6] Although Petitioner claims a violation of his Sixth Amendment rights, he advances no arguments in support of this claim. See [ECF No. 28 at 44–69]. For this reason, the Court focuses on his Due Process allegations.

2. Legal Standard

Prosecutorial conduct that infringes on a defendant's constitutional rights is plainly improper. In the event no particular constitutional right is implicated by a prosecutor's actions, his or her conduct can still amount to a constitutional violation when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." DeChristoforo, 416 U.S. at 643. "In other words, even if a prosecutor's misconduct does not infringe upon a specific constitutional right, it can still violate the Due Process Clause of the United States Constitution by rendering the underlying trial 'fundamentally unfair.'" Pagano v. Allard, 218 F. Supp. 2d 26, 33–34 (D. Mass. 2002) (citing Darden v. Wainwright, 477 U.S. 168, 182–83 (1986)).

3. Closing Arguments

Not all "undesirable" or even "universally condemned" statements made by a prosecutor amount to a due process violation under DeChristoforo. Darden, 477 U.S. at 181. For example, when a habeas petitioner requests review of closing arguments made by a state court prosecutor, the statements must be more than merely false or prejudicial in order to justify the intervention of a federal court. See Pagano, 218 F. Supp. at 35–37. A court must consider whether a statement fundamentally impacted the trial such that it likely influenced a jury's guilty verdict. Darden, 477 U.S. at 182–83. In making this determination, a court should avoid "giving too much weight to stray remarks in the course of a closing argument" and should not assume "that the jury will interpret each and every statement in the most damaging manner possible." Dagley v. Russo, 540 F.3d 8, 17 (1st Cir. 2008). "Moreover, the appropriate standard for review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power.'" Darden, 477 U.S. at 181 (quoting DeChristoforo, 416 U.S. at 637).

Before trial, the Superior Court judge allowed Petitioner's motion *in limine* to preclude the Commonwealth from introducing evidence that Rudolph had been threatened not to testify. [S.A. Vol. II at 485; ECF No. 38 at 22]. The motion was allowed, however, with the condition that Petitioner could not seek to impeach Rudolph with prior inconsistent statements. [ECF No. 38 at 22]. According to Petitioner, he refrained from introducing evidence of Rudolph's wavering and recanting, but the prosecutor nevertheless alluded to the threats Rudolph received in his closing argument when he suggested that Rudolph was going to be released from prison for his own protection.[7] [ECF No. 28 at 60]. Petitioner's defense counsel immediately objected to this insinuation, the Superior Court judge ordered the comment stricken from the record, and the jury was instructed to disregard the statement. Watkins, 41 N.E.3d at 25.

It is an "almost invariable assumption of the law that jurors follow their instructions . . . ." Richardson v. Marsh, 481 U.S. 200, 206 (1987). It is unlikely that this one comment, made in passing during closing argument and immediately struck, influenced the jury's decision to convict Petitioner. See Darden, 477 U.S. at 182–83.

Petitioner next argues that the jury's verdict was impacted in contravention of DeChristoforo by "pronounced and persistent" misrepresentations of the evidence made in the prosecutor's closing statements. [ECF No. 28 at 66–69 (quoting Berger v. United States, 295 U.S. 78, 89 (1935))]. The SJC "discern[ed] no reason to address" these remaining arguments about the impropriety of the prosecutor's closing statements because each argument was "considered and rejected by the [MNT] judge." Watkins, 41 N.E.3d at 24. The MNT judge carefully considered and rejected each of Petitioner's claims, holding that the prosecutor had

[7] "In explaining in his closing argument why he had supported [Rudolph's] release from prison, the prosecutor stated: 'Folks, what do you think Mr. Rudolph's life would be worth in prison after testifying?'" Watkins, 41 N.E.3d at 25.

properly stated the evidence, and where he had not, the trial court had stricken his misstatement from the record with a reminder to the jury that closing arguments are not evidence. [S.A. Vol. I at 155–61]. This Court agrees. Proper statements of the evidence and statements "followed by specific disapproving instructions" do not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process," DeChristoforo, 416 U.S. at 643. There is no evidence that the MNT judge's determinations were improper, and Petitioner does not prove that the SJC acted in contravention of DeChristoforo in adopting them.

4. Rudolph's Testimony

Petitioner next claims that because of purported inaccuracies in Rudolph's testimony, the prosecutor knowingly presented false testimony when he called Rudolph to testify. [ECF No. 28 at 50]. The SJC held that even though "Rudolph's testimony was to some extent contradicted does not establish that it was false, or that the prosecutor knowingly and intentionally suborned false testimony . . . ." Watkins, 41 N.E.3d at 24–25. Petitioner claims throughout his brief that Rudolph's testimony regarding the Honda Accord's location made him an implausible and even impossible witness, but the SJC found that the testimony about the location of the car was not "significantly contradictory." Id. at 26. The SJC reasoned:

> Beatriz's testimony that the vehicle was a little farther up [Mill Street] than [where Rudolph indicated it had been] did not establish that Rudolph would have been unable to see the vehicle, and both he and a responding officer testified that they were able to see farther up the street, past the NAACP building and its parking lot beyond the fire hydrant.

Id.

Discrepancies in witness testimony do not constitute perjury, and prosecutors are not barred from calling witnesses who will present conflicting testimony. United States v. Casas, 425 F.3d 23, 45 (1st Cir. 2005); United States v. Doherty, 867 F.2d 47, 70 (1st Cir. 1989); see also United States v. Frazier, 429 Fed. App'x 730, 734 (10th Cir. 2011) ("Discrepancies in

testimony are common and can generally be explained as resulting from human failings short of intentional lying."). Admitting Rudolph's testimony did not "so infect" the trial with unfairness as to constitute a violation of Petitioner's due process rights under DeChristoforo. The SJC properly decided this claim, and its factual determinations are supported by the record.

5. Rudolph's Agreement with the Commonwealth

Rudolph's December 2003 sentence included one count of distributing cocaine within 1,000 feet of a school, which was dropped as part of his cooperation agreement with the Commonwealth. See [S.A. Vol. II at 510–13; S.A. Vol. I at 120]. Petitioner suggests the Commonwealth dropped this charge intentionally and fraudulently in order to immediately release Rudolph in return for his testimony against Petitioner. [ECF No. 28 at 45]. The school-zone charge carried a mandatory minimum sentence of two years, of which Rudolph had only served eighteen months. See [ECF No. 24-5 at 33–34]. Had the school-zone sentence remained, Rudolph would have been required to serve six more months to meet this mandatory sentence before he could have been released. Petitioner claims that Rudolph's drug transaction had, in fact, taken place in a school zone, and the prosecutor committed fraud on the court when he represented that it did not, in violation of Petitioner's due process rights.[8] [ECF No. 28 at 45].

Petitioner's uncle, Benjamin Watkins, a retired assistant city planner, testified at the MNT hearing that Rudolph's crime had actually occurred within a school zone based on a map of school zones he himself had created for the city in the 1980s. [ECF No. 24-10 at 156–76]; see [S.A. Vol. II at 544–48]. The MNT judge found that the distances indicated on this map were drawn by a compass without consulting the relevant drug laws, that the distances were never

[8] The Court does not address Petitioner's underlying state law arguments. Estelle, 502 U.S. at 67–68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state law questions.").

confirmed by on-the-ground measurements, and that the map was outdated. [S.A. Vol. I at 134–35]; see [S.A. Vol. II at 546–48]. The SJC deferred to these factual findings and determined that "[a] prosecutor does not commit 'fraud on the court' by facilitating the government's entry into a plea agreement with a key witness, properly disclosed to the defendant, and permissibly may argue that the witness's testimony is truthful, so long as he does not express a personal belief in the witness's credibility." Watkins, 41 N.E.3d at 25 (citation omitted).

A federal court performing a habeas review must presume that the state court's findings of fact, including its witness credibility determinations, are correct. See Sleeper v. Spencer, 510 F.3d 32, 38 (1st Cir. 2007); see also Marshall v. Lonberger, 459 U.S. 422, 434 (1983) ("28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them."). The petitioner bears the burden of disproving this presumption by clear and convincing evidence. Sleeper, 510 F.3d at 38 (citing 28 U.S.C. § 2254(e)(1)). Petitioner argues against the MNT judge's finding that the map was outdated by claiming that it had been current at the time of Benjamin Watkins' retirement and argues that it was unreasonable to determine that this map was not based on field measurements when it was "created by an engineer for the City of New Bedford who testified to its authenticity and accuracy." [ECF No. 28 at 48].

Neither of these assertions are supported by the record. Benjamin Watkins himself testified that he created the map in question in 1988, [ECF No. 24-10 at 161], that it had never been updated, [id. at 168, 170], and that he did not know if it had been in use at the time that he retired in 2002, [id. at 162]. He also testified that the map was not based on field measurements but was instead created using a compass on an existing map. [Id. at 171–75]. Petitioner thus has not shown by clear and convincing evidence that the MNT judge's credibility findings were

erroneous. Given the required deference to these factual findings, Petitioner's claim that the SJC's conclusion regarding fraud on the court was contrary to DeChristoforo must fail.

6. Conflict of Interest

The state prosecutor had formerly served as Petitioner's attorney for a handful of criminal matters during his time as a public defender in the 1980s. See [ECF No. 24-9 at 126–30]. Petitioner has argued through each level of his case that this prior representation violated his attorney-client privilege and unfairly prejudiced his trial. [S.A. Vol. II at 402–08; S.A. Vol. I at 163–68; ECF No. 28 at 63]. Petitioner's argument is rooted primarily in state law, and he does not cite any federal precedent that supports his assertion that a prosecutor's conflict of interest amounts to a due process violation. See [ECF No. 28 at 64 (citing only state law in support)]. Nor does the Court find that the SJC's decision on this matter is contrary to the standard set forth in DeChristoforo or based on an unreasonable determination of facts in light of the evidence.

The MNT judge found that the prosecutor's representation of Petitioner was "distant and fleeting . . . on substantially unrelated matters," [S.A. Vol. I at 168], and the SJC affirmed, holding that the fact that both matters involved a nine millimeter handgun was not enough of a connection to make them "substantially related" for the purposes of a conflict of interest, Watkins, 41 N.E.3d at 24.[9] The record supports these findings. The prosecutor testified at the MNT hearing that he recalled representing Petitioner on a 1989 charge for receipt of stolen property, but that he could not recall representing him on any of the probation matters discussed at trial. [ECF No. 24-9 at 126–31]. Further, although for the sake of transparency he sent

[9] The SJC noted in a footnote: "Although we conclude that there was no actual conflict of interest in these circumstances, and no potential conflict resulting in any actual prejudice, we emphasize that the better practice for the prosecutor would have been to avoid the risk of reversal of a conviction, following a later determination that there was a conflict of interest, by simply choosing not to prosecute a former client." Watkins, 41 N.E.3d at 24 n.11.

Petitioner's first attorney a letter explaining that he had previously represented Petitioner, [id. at 137–39], there is no evidence that his prior representation was in any way related to his prosecution of Petitioner. Petitioner has therefore not proven that the SJC's determination that there was no conflict of interest was unreasonable or contrary to DeChristoforo.

Thus, because the Court does not find the SJC's factual findings on any of Petitioner's prosecutorial misconduct claims to be erroneous or its legal conclusions to be an unreasonable application of federal law, Petitioner is not entitled to relief on any of his Ground Two claims.

C. Ground Three: Ineffective Assistance of Counsel

For his third ground for relief, Petitioner alleges that the SJC's decisions with respect to his ineffective assistance of counsel claims were contrary to and involved an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984). [ECF No. 28 at 69]. Petitioner first claims that because his defense counsel had previously represented Rudolph, his representation was limited by an inextricable conflict of interest. [Id. at 70–72]. He additionally argues that his counsel's cross-examination of Rudolph was so ineffective as to render it essentially non-existent, [id. at 73], that his counsel failed to realize or raise potentially exculpatory concerns about the crime scene, [id. at 79], and that he "failed to adequately investigate and interview alibi witnesses," [id. at 80], among numerous other failures, [id. 82–83]. In response to substantially the same claims, the SJC held that "none of the asserted failures shows any inadequacy in trial counsel's performance." Watkins, 41 N.E.3d at 26. Respondent agrees with the SJC and argues that the SJC's decision should be upheld because the court considered these claims under the "substantial likelihood of a miscarriage of justice" standard,

which is more favorable to defendants than Strickland. [ECF No. 38 at 25]; see Gomes, 564 F.3d at 541 n.6; Wright v. Spencer, 447 F.3d 6, 15 (1st Cir. 2006).

1. Legal Standard

Inherent in the Sixth Amendment right to counsel is the right to effective assistance of counsel. Missouri v. Frye, 566 U.S. 134, 138 (2012) (citing Strickland, 466 U.S. at 686). Trial counsel is constitutionally ineffective if his or her representation falls below an objective standard of reasonableness and thereby prejudices the defendant. Strickland, 466 U.S. at 688, 693. To show prejudice, a Petitioner must show that "but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different." Sleeper, 510 F.3d at 39. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 694). There is a strong presumption that counsel's representation was reasonable, and great deference is given to their strategic trial decisions. Strickland, 466 U.S. at 689–90. A petitioner claiming ineffective assistance of counsel as a ground for habeas relief "bears a doubly heavy burden," because they must contend with both the deferential Strickland standard and the deferential standard required by Section 2254. Yeboah-Sefah, 556 F.3d at 70.

With respect to conflicts of interest, "[a] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." United States v. Soldevila-Lopez, 17 F.3d 480, 486 (1st Cir. 1994) (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)). When a conflict of interest "so affront[s] the right to effective assistance of counsel as to constitute a *per se* violation of the Sixth Amendment," a defendant is not required to prove prejudice. Id. (citing United States v. Aiello, 900 F.2d 528, 531 (2d Cir. 1990)). To show an actual conflict of interest, a habeas petitioner "must demonstrate that '(1)

the lawyer could have pursued a plausible alternative defense strategy or tactic and (2) the alternative strategy or tactic was inherently in conflict or not undertaken due to the attorney's other interests or loyalties . . . ." Deering v. United States, 219 F. Supp. 3d 283, 290 (D.P.R. 2016) (quoting Soldevila-Lopez, 17 F.3d at 486). In other words, a petitioner must prove that the conflict of interest diminished their counsel's ability to vigorously advocate on their behalf. See Cuyler, 446 U.S. at 348–49 (finding actual conflict of interest when an attorney represented co-defendants in a criminal matter with adverse interests).

2. Conflict of Interest

Petitioner's trial counsel acted as the defense attorney for Rudolph in a 1988 assault and battery and malicious destruction case. [S.A. Vol. I at 124–25]. The MNT judge found that Petitioner's counsel was not aware at the start of the trial that he had previously represented Rudolph and only became aware when reviewing Rudolph's criminal history during a trial recess. [S.A. Vol. I at 124]. The MNT judge further found that the attorney immediately disclosed this information to Petitioner and that Petitioner made no objections. [S.A. Vol. I at 124]. The MNT judge, deciding this issue based on state law, found that the facts did not establish an actual conflict of interest and determined that "[a]t most, this is a case of successive representation involving a potential conflict of interest." [S.A. Vol. I at 169–70].

The MNT judge's findings are supported by the record, and its conclusions are reasonable determinations of fact in light of the evidence.[10] Because Petitioner raised no objection to this successive representation at trial, he is required to prove an actual conflict of

[10] Petitioner raises both state and federal conflict of interest concerns pertaining to his trial counsel's prior representation of Rudolph. [ECF No. 28 at 69–79]. This Court addresses only the question of ineffective assistance of counsel under federal law. See Estelle, 502 U.S. at 67–68.

interest. Soldevila-Lopez, 17 F.3d at 486 (quoting Cuyler, 446 U.S. at 348). Petitioner argues that there was an actual conflict of interest because his lawyer's "loyalties were divided," which prevented him from "vigorously" cross-examining Rudolph. [ECF No. 28 at 72]. Petitioner, however, is not able to demonstrate that his attorney had a loyalty to Rudolph, or that his prior representation of Rudolph prevented him from seeking alternative defense strategies. See Deering, 219 F. Supp. 3d at 290. The Court does not agree that Petitioner's cross-examination of Rudolph was inadequate, as discussed infra. Because Petitioner cannot prove an actual conflict of interest, this ineffective assistance of counsel claim must fail.

3. Cross-Examination of Rudolph

Petitioner next claims that his trial attorney was constitutionally ineffective because he inadequately cross-examined Rudolph. [ECF No. 28 at 73]. The SJC applied a "stringent standard of review" to this claim and affirmed the MNT judge's ruling that the cross-examination of Rudolph was "vigorous and effective." Watkins, 41 N.E.3d at 26–27. Petitioner argues that this determination was objectively unreasonable because evidence suggests that his attorney inadequately implemented his chosen cross-examination strategy and failed to pursue "multiple obviously powerful forms of impeachment." [ECF No. 28 at 73].

For example, Petitioner argues that it was unreasonable to determine that his trial counsel made a "strategic decision to focus on other methods of impeachment," Watkins, 41 N.E.3d at 27, because his counsel "completely failed" to pursue these stated impeachment methods, [ECF No. 28 at 74]. Petitioner claims that after his counsel cross-examined Rudolph, the "jury knew nothing about" his agreement with the Commonwealth to testify against Petitioner in exchange for his own release, [ECF No. 28 at 74], but this assertion is contrary to the factual record of the case. The circumstances of Rudolph's cooperation with the Commonwealth were extensively

disclosed to the jury on direct examination. [ECF No. 38 at 28; ECF No. 24-5 at 32–36]. Rudolph informed the jury that he was serving a mandatory minimum sentence, [ECF No. 24-5 at 33–34], that he was only eighteen months into that sentence, [id. at 34], and that he expected to be released from that sentence after testifying against Petitioner, [id. at 36]. In addition, Petitioner's trial attorney raised the subject of Rudolph's cooperation during cross-examination, [id. at 130], again during re-cross, [id. at 149], and again during his closing argument, [ECF No. 24-7 at 67].

Petitioner also argues that the strategic decision to pursue a particular cross-examination strategy should not have barred his trial attorney from also seeking other viable cross-examination methods when the methods were not mutually exclusive. [ECF No. 28 at 74]. The MNT judge and the SJC held that the decision of Petitioner's counsel to forego eliciting testimony about Rudolph's drug use or criminal history in favor of other "more powerful grounds of impeachment was not manifestly unreasonable," and this Court agrees. Watkins, 41 N.E.3d at 27. In support of this determination, the SJC noted that there was no evidence to suggest that Rudolph had been on drugs on the night in question and, given that Rudolph admitted on the stand that he was currently incarcerated, further inquiry into his criminal record would not have been so damaging to his credibility as a witness that its exclusion undermines the outcome of his trial. [Id.]. This determination is objectively reasonable and supported by the record. Furthermore, the availability of additional, possibly effective methods of cross-examination does not render the chosen strategy ineffective. See Stephens v. Hall, 294 F.3d 210, 225–26 (1st Cir. 2002) (holding that failure to impeach with criminal record did not result in prejudice where alternative methods of cross-examination were available).

Petitioner's argument that his counsel should have elicited testimony from Rudolph about times when he recanted his identification of Petitioner is likewise unavailing. [ECF No. 28 at 75–76]. Petitioner's counsel made a reasonable strategic decision to forego this line of questioning given the trial court's decision on his own motion *in limine* to exclude evidence of threats against Rudolph. [S.A. Vol. II at 485]; see [S.A. Vol. I at 5]. Had Petitioner's counsel asked Rudolph about his wavering identification, the Commonwealth would have been free to respond with evidence that someone close to Petitioner had threatened Rudolph to intimidate him into not testifying. [S.A. Vol. II at 485]; see [S.A. Vol. I at 5]. The decision to forego a line of questioning in order to prevent the Commonwealth from introducing potentially damaging evidence was "clearly a tactical decision that 'falls within the wide range of reasonable professional assistance . . . which might be considered sound trial strategy.'" Cohen v. United States, 996 F. Supp. 110, 116 (D. Mass. 1998) (quoting Strickland, 466 U.S. at 689). The SJC's holding with respect to all aspects of the cross-examination of Rudolph is supported by the record and not an unreasonable application of federal law.

4. Crime Scene Evidence

Petitioner again raises questions about the truthfulness of Rudolph's testimony in connection with his assertion that his defense counsel should have introduced more evidence to contradict Rudolph's statement about the precise location of the victim's Honda Accord at the time of the shooting. [ECF No. 28 at 79–80]. The SJC found that this cumulative evidence "would have added little to support [Petitioner's] vigorous attack on Rudolph's credibility as to the location of the vehicle at the time of shooting." Watkins, 41 N.E.3d at 27. Petitioner argues that this was an "unreasonable determination in light of the fact that the jury believed Rudolph and they convicted" Petitioner despite what he believes was Rudolph's false testimony. [ECF

No. 28 at 80]. Inconsistencies between the testimony of two witnesses do not mean that their testimonies are false, Doherty, 867 F.2d at 70, and a federal habeas court may not "redetermine [the] credibility of witnesses" who testified only at the state court level, Lonberger, 459 U.S. at 434. Petitioner's argument that this evidence would have been outcome-determinative is not borne out by the record, nor was the SJC's finding that the evidence was cumulative an unreasonable determination of fact.

5. Additional Alibi Witnesses

As an additional Strickland claim, Petitioner asserts that his counsel was constitutionally ineffective when he failed to call as trial witnesses additional alibi witnesses. [ECF No. 28 at 80]. Failure to call an alibi witness can undermine the outcome of a case, especially when, as in the instant case, eyewitness testimony is the strongest evidence against a defendant. See Griffin v. Warden, 970 F.2d 1355, 1359 (4th Cir. 1992) ("Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man . . . . Moreover, it is precisely the sort of evidence that an alibi defense refutes best."). Yet, the SJC reasonably determined that defense counsel did not err in failing to call the potential witnesses because they would not have been "relevant or helpful" to his case. Watkins, 41 N.E.3d at 27.

Citing Avery v. Prelesnik, 548 F.3d 434, 439 (6th Cir. 2008), Petitioner argues that it was unreasonable for the SJC to rely on the credibility findings of the MNT judge because credibility determinations are the province of the jury. [ECF No. 28 at 81]. That case in inapposite. The state court in Avery had attempted to evaluate the credibility of individual witnesses in order to determine if the petitioner had been harmed by his defense counsel's failure to investigate potential witnesses identified to him before the trial. 548 F.3d at 438. In the instant case, the

relevant inquiry is not whether the remaining witnesses were credible, but whether the attorney's decision not to call them was "manifestly reasonable." [S.A. Vol. I at 178]. The MNT judge found that an investigator for the defense interviewed five potential alibi witnesses before the trial but determined that only one, who was called at trial, had a memory helpful to the case. [Id. at 136–37]. The MNT judge's inquiry into the credibility of these witnesses was proper.

6. Remaining Arguments

Petitioner's remaining ineffective assistance of counsel arguments were summarily rejected by the SJC. Watkins, 41 N.E.3d at 28 ("The defendant also challenges numerous 'other defense counsel failings.' As did the motion judge, we conclude that trial counsel's conduct did not result in a substantial likelihood of a miscarriage of justice."). Petitioner's brief restates in bullet point form the same arguments made to the SJC and, without elaborating, claims that they are worthy of reconsideration. Compare [ECF No. 28 at 82–83], with [S.A. Vol. I at 95–96]. The MNT judge's legal rulings on these issues, [S.A. Vol. I at 68–75], were in-depth and supported by the factual record of the case, and the SJC did not act unreasonably by deferring to these findings, see Spencer, 510 F.3d at 38.

Petitioner's defense counsel was not constitutionally ineffective, and the state courts' determinations on this ground were neither unreasonable in light of the evidence nor were they contrary to the clearly established federal law articulated in Strickland v. Washington.

D. Ground Four: Sufficiency of the Evidence

As the basis for his final ground for relief, Petitioner claims that there was insufficient evidence to support his conviction in contravention of Jackson v. Virginia, 443 U.S. 307 (1979). [ECF No. 28 at 84]. Petitioner challenges the veracity of Rudolph's testimony and argues that a conviction based primarily on this testimony amounted to a denial of Due Process. [Id.].

Respondent in turn contends that the SJC's decision on the question of the sufficiency of the evidence supporting Petitioner's conviction was a reasonable application of Supreme Court precedent. [ECF No. 38 at 31].

1. Legal Standard

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). Under Jackson, a state prisoner is entitled to a writ of habeas corpus if there is insufficient proof to support their conviction. Jackson, 443 U.S. at 316. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319. This principle does not bar conviction on the basis of circumstantial evidence alone. Magraw v. Roden, 743 F.3d 1, 6 (1st Cir. 2014); Stewart v. Coalter, 48 F.3d 610, 614 (1st Cir. 1995). "Guilt beyond a reasonable doubt cannot be premised on pure conjecture. But a conjecture consistent with the evidence becomes less and less a conjecture, and moves gradually toward proof, as alternative innocent explanations are discarded or made less likely." Stewart, 48 F.3d at 615–16.

If a federal court reviewing the decision of a state court encounters a record that "supports conflicting inferences," the court "must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 326. Federal courts performing this review are beholden to a "twice-deferential standard," because they must consider whether the state court's decision was "objectively unreasonable" and whether the jury "could have found the essential elements of the crime beyond a reasonable doubt." Linton v. Saba, 812 F.3d 112, 123

(1st Cir. 2016) (internal citations omitted). Jury verdicts are given great deference but are still subject to the same scrutiny and "evidence may sometimes be insufficient to sustain a jury verdict of guilt beyond a reasonable doubt." O'Laughlin, 568 F.3d at 301.

2. Analysis

Petitioner contends that the Commonwealth failed to prove all elements of the crime charged because he was convicted primarily on the testimony of Rudolph, which he believes was "literally, physically impossible." [ECF No. 28 at 84]. Petitioner alleges that "Vern Rudolph[ ] lied, was highly unreliable, was coerced by the police, and was motivated by self-preservation and an immediate 'get-out-of-jail-free card.'" [Id. at 85]. This argument minimizes the strength of the evidence presented against Petitioner and, as the SJC reasonably determined, "concern[s] the weight and credibility of Rudolph's testimony, which is the province of the jury." Watkins, 41 N.E.3d at 19.

Although Rudolph was the Commonwealth's primary witness, his testimony was not the only evidence presented. The SJC found that:

> Three bystanders driving past near the time of the shooting provided descriptions of the shooter and his clothing that were consistent with each other and with the defendant's physical characteristics and the clothing that Rudolph testified the defendant had been wearing. Several witnesses, including the victim's girl friend, were aware that the victim and the defendant had been in an argument and that the defendant wanted to "fight" the victim. The Mark VIII that the defendant had arranged to be registered in a friend's name, and which he drove, matched the description of the vehicle seen at the corner of Mill and Cedar Streets shortly before the shooting, and a Mark VIII, wiped clean of fingerprints and other possible evidence, was located by police early in the investigation. . . .
>
> In addition, a rational juror could have inferred that the defendant's actions after the shooting indicated consciousness of guilt. The defendant fled from New Bedford to Lynn after the shooting, where he was living under a false name. He offered a false name to police when they first apprehended him in Lynn, and made several seemingly inculpatory statements during the drive in a police cruiser from Lynn to New Bedford, among them that the drive was "going to be the last ride he was going to have for a long time."

Watkins, 41 N.E.3d at 20 (citation omitted). The SJC's "rational juror" standard of review is the same as the "rational trier of fact" requirement of Jackson, and the SJC's decision under this standard was not objectively unreasonable under 28 U.S.C. § 2254.

Even in the absence of Rudolph's eye-witness identification, a rational trier of fact could have found that there was sufficient evidence, including circumstantial evidence, to find Petitioner guilty beyond a reasonable doubt. United States v. Brown, 603 F.2d 1022, 1025 (1st Cir. 1979) ("The prosecution may prove its case by circumstantial evidence and it need not exclude every reasonable hypothesis of innocence so long as the total evidence permits a conclusion of guilt beyond a reasonable doubt." (quoting United States v. Gabriner, 571 F.2d 48, 50 (1st Cir. 1978))).

Petitioner presents a version of events that, while plausible, is contrary to the factual determinations made by the state courts and his arguments fail to show that these determinations were unreasonable. See Torres v. Dennehy, 615 F.3d 1, 5 (1st Cir. 2010) (holding that arguing a different "interpretation of the facts" was insufficient to warrant habeas relief). Given the required deference to jury findings and the twice-deferential standard of a Jackson review, this Court finds that the evidence was sufficient to convict Petitioner. The SJC's conclusion regarding the sufficiency of the evidence against Petitioner was not contrary to or an unreasonable application of Jackson, nor was it based on an unreasonable determination of facts in light of the evidence. Petitioner, therefore, is not entitled to habeas relief on Ground Four.

IV. CONCLUSION

For the foregoing reasons, Petitioner's petition for a writ of habeas corpus, [ECF No. 1], is DENIED. "The district court must issue or deny a certificate of appealability when it enters a

final order adverse to" a habeas petitioner. Rules Governing Section 2254 Cases, R. 11(a). The Court will grant a certificate of appealability in this instance.

SO ORDERED.

January 7, 2020

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

Nos. 20-1108
20-1194

KYLE WATKINS,

Petitioner, Appellant,

v.

SEAN MEDEIROS, Superintendent,

Respondent, Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison D. Burroughs, U.S. District Judge]

Before

Barron, Chief Judge,
Lynch and Gelpí, Circuit Judges.

Janet Hetherwick Pumphrey for appellant.
Susanne Reardon, Assistant Attorney General, with whom Maura Healey, Attorney General, was on brief, for appellee.

June 10, 2022

LYNCH, Circuit Judge. Petitioner Kyle Watkins was convicted in Massachusetts state court on June 2, 2005 after a jury trial of first-degree murder for the shooting of Paul Coombs on April 26, 2003. The Supreme Judicial Court ("SJC") affirmed his conviction. Commonwealth v. Watkins, 41 N.E.3d 10, 28 (Mass. 2015). His federal habeas petition was denied by the U.S. District Court. Watkins v. Medeiros, No. 16-cv-10891, 2020 WL 68245, at *1 (D. Mass. Jan. 7, 2020). Watkins timely appealed.

This case is unusual because the state courts made an error of fact in their decisions. We hold that whether we are bound by the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, or whether we engage in de novo review, the conclusion is the same. Watkins has not shown prejudice arising from the error or with respect to any of the other claims he makes. Nothing in the arguments presented in the habeas petition undermines our confidence in the jury's verdict of guilt. Accordingly, we affirm the denial of habeas relief.

I.

A. Procedural History

Paul Coombs, who knew Watkins, was shot and killed at approximately 9:50 p.m. on April 26, 2003. Watkins, petitioner here, was charged with the murder on September 25, 2003. A jury trial was held in Bristol County Superior Court between May 24 and

June 2, 2005. The Commonwealth presented many witnesses. Vern Rudolph, a prosecution witness who identified Watkins as the shooter, knew both Watkins and Coombs. After the conviction, the state trial court sentenced Watkins to a term of life imprisonment.

On March 11, 2011, Watkins moved under Mass. R. Crim. P. 25(b)(2), as amended, 420 Mass. 1502 (1995), for the entry of a not guilty verdict or, in the alternative, a new trial under Mass. R. Crim. P. 30(b), as appearing in 435 Mass. 1501 (2001).[1] Watkins argued, among other things, that his trial counsel was ineffective for failing to introduce evidence that allegedly would have impeached Rudolph's credibility; and that the Commonwealth violated Brady v. Maryland, 373 U.S. 83 (1963), for withholding several other pieces of so-called impeachment evidence, the nondisclosure of which allegedly deprived Watkins's counsel of the opportunity to cross-examine Rudolph effectively. A four-day evidentiary hearing on the motion for a new trial was held in August 2012, after which the motion was denied. Watkins appealed the denial, together with his conviction, to the SJC, and the SJC

[1] Mass. R. Crim. P. 25(b)(2) provides that "[i]f a verdict of guilty is returned [by a jury], the judge may on motion [filed within five days of the verdict] set aside the verdict and order a new trial, or order the entry of a finding of not guilty" based on insufficiency of the evidence. Mass. R. Crim. P. 30(b) states that "[t]he trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law."

affirmed both on November 24, 2015. Watkins, 41 N.E.3d at 15. The SJC rejected the ineffective assistance of counsel claim, observing that trial counsel's cross-examination of Rudolph was "vigorous" and "effective." On the Brady issues, the SJC found the undisclosed evidence cumulative and/or of little probative value, so its nondisclosure caused Watkins no prejudice.

On May 16, 2016, Watkins filed in the U.S. District Court for the District of Massachusetts a petition for a writ of habeas corpus. He argued the SJC's decision, among other things, was contrary to and an unreasonable application of Brady and was based on an unreasonable determination of the facts.[2] The district court denied the petition on January 7, 2020, Watkins, 2020 WL 68245, at *1, and granted a certificate of appealability as to only the Brady claims on April 2, 2020. Before this court, Watkins has divided the alleged Brady violations into four categories:

> - withheld exculpatory evidence of the only identification witness's (Vern Rudolph) extensive police contacts, cooperation, and lies even after the Court ordered the evidence to be produced;

[2] Watkins also brought before the district court claims of prosecutorial misconduct, ineffective assistance of counsel, and insufficiency of the evidence. Those claims are not now at issue, as the district court rejected them and both the district court and this court declined to extend the certificate of appealability ("COA") to them. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003) ("[A] prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" (quoting 28 U.S.C. § 2253(c)(2))).

- the crime scene diagram created by police which discredited the testimony of the only eyewitness;

- a trooper's exculpatory notes of the witness's pre-interview with the police prior to its tape recording; and

- evidence of the extensive rewards and inducements requested by and given to the witness in exchange for his testimony.

Watkins's first claim centers on a withheld police report from October 29, 2003 (the "finger-shot report") which was not disclosed to Watkins. The state courts' rejection of this Brady claim rested upon the factual error that the report did not show the investigating officers were aware that Rudolph was a witness against Watkins. Watkins, 41 N.E.3d at 22. We provide the text of the finger-shot report later, but this factual determination by the motion for a new trial judge (the "motion judge") and the SJC was clearly incorrect.

We hold, as the parties here agree, that the state courts made an error of fact. The parties disagree as to the effect of this error on this habeas petition and on the issue of deference to the SJC's Brady analysis.

B. Facts Presented at Trial

Save the state courts' erroneous conclusion that police were unaware at the time Rudolph shot his finger that he was a witness against Watkins, "[w]e describe the facts as they were found by the SJC, supplemented with other record facts consistent

with the SJC's findings." Healy v. Spencer, 453 F.3d 21, 22 (1st Cir. 2006). However, because of that error, we provide, as is necessary, the following lengthy description of the facts as presented at trial. We describe Rudolph's testimony as to his identification of Watkins and his cross-examination after describing the testimony of the other witnesses.

i. Events Leading Up to the Shooting

Watkins owned a blue Lincoln Mark VIII and frequented the Elks Lodge, a private club on Mill Street in New Bedford, Massachusetts.[3] Watkins, Coombs, and Rudolph were all at the Elks Lodge on April 25, 2003. Watkins, who was inside the Lodge, was heard loudly arguing on the phone with Coombs, who was seen outside the club "frisking" people who were attempting to enter. Rudolph, who was also inside the club at the time, suggested to Watkins that he should go outside and fight Coombs. Watkins declined and stayed inside the Elks Lodge until Coombs left for the night.

The jury heard the testimony of Coombs's then-girlfriend, Jessica Bronson, that the next morning, April 26, 2003,

[3] Officer Brian Safioleas of the New Bedford Police testified he had seen Watkins driving a blue Lincoln Mark VIII prior to the evening of April 26, 2003; Erin Depina testified that she had registered a blue Lincoln Mark VIII in her name for Watkins and that the car belonged to him; and Paul Tomasik, the landlord of Watkins's girlfriend, testified that he had taken a picture the morning of April 26, 2003 of a Lincoln Mark VIII parked in the girlfriends' driveway.

Coombs told Bronson he wanted to "whoop [Watkins's] ass." That afternoon, Watkins returned to the Elks Lodge. The then-bartender testified that Watkins seemed upset and told the bartender he was "tired of people F'ing with him." Watkins went back to the Elks Lodge that evening, that time acting "tough" and saying to Rudolph that "[t]hings are going to change around here." John Gilbert, a doorman at the Elks Lodge in April 2003, testified that he saw Watkins leave the club sometime after 9:30 p.m., and after that, Gilbert saw police lights in the area. Gilbert stated that Watkins was wearing dark clothing that night.

Bronson testified that Coombs had called her at approximately 9:45 or 9:47 p.m. on April 26, to tell her he was on his way home. At the end of the call, Bronson heard Coombs shout to a third party, "Why don't you fight me now?" Bronson heard nothing from Coombs after that, and learned fifteen to twenty minutes later that Coombs had been shot.

The jury also heard the testimony of New Bedford Police Officer Bryan Safioleas, who was on duty from 3:30 to 11:30 p.m. on April 26, 2003. Officer Safioleas had been parked near the intersection of Mill and Cedar Streets -- just one block west of the Elks Lodge -- until approximately 9:40 p.m. that night.[4] He

[4] "Mill Street, on which the victim was standing at the time of the shooting, runs perpendicular to Cedar Street, which is a one-way street . . . . There is a stop sign on Cedar Street at

testified that it was a "very rainy night." In the ten minutes before he left the area, he had observed a blue Lincoln Mark VIII drive past him "on a couple of occasions." Officer Safioleas testified that he had seen that vehicle prior to April 26 in the Elks Lodge parking lot with Watkins inside it. The jury would later hear further testimony that Watkins drove a blue Lincoln Mark VIII.

The officer testified that he began to head westbound down Mill Street at around 9:40 p.m. but he was quickly called back to his post at approximately 9:53 p.m. due to a call "for units to respond to Kempton and Cedar Street for reported shots fired."[5] The dispatch instructed Officer Safioleas to look for a "dark-colored Lincoln Mark VIII."[6]

ii. The Shooting

We describe first the testimony of several witnesses other than Rudolph who were near the shooting when it happened. Beatriz and Ernestina Soares each testified that they were driving down Cedar Street towards Mill Street at about 9:48 p.m. on April

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the intersection of the two streets." Watkins, 2020 WL 68245, at *2.

[5] Kempton Street runs parallel to Mill Street, just one block south.

[6] Officer Safioleas's police report noted that the subject car was a blue Lincoln Mark VII, not VIII, but the officer explained that he merely had made a typographical error.

26, 2003. As they approached the stop sign at the intersection, they saw a blue Lincoln Mark VIII parked on right side of Mill Street. Although the Lincoln had the right of way, it flashed its lights to tell the Soares sisters they could proceed. As the sisters turned left onto Mill Street, they saw two men arguing near a Honda Accord which was parked on the left side of Mill Street. They stated that one man was inside the Honda Accord and the other man was across the street on the sidewalk, closer to the blue Lincoln. The sisters both described the man near the Lincoln as approximately six feet tall, well-built and around 220 pounds, black, bald or having a receding hair line, and wearing dark clothing, including a hooded sweatshirt.

The sisters testified that they also overheard the man inside the Honda yelling at the other man: "Don't fuck [with] me. I'm not the one to be fucked with." Ernestina then saw the man by the Lincoln cross the street towards the Honda "and put up his arm." The sisters continued to drive, and when they were about a half-block away from the two men, Beatriz testified she heard between eight and twelve gunshots and Ernestina heard "[a]t least five." Beatriz called 911 to report the shooting, and she gave a description of the Lincoln Mark VIII she observed.

On cross-examination, defense counsel questioned Beatriz about the misty weather (which Beatriz could not recall); Beatriz's ambivalence as to whether the shooter was bald or had a receding

hairline; the statement of the victim that Beatriz overheard: "I'm not the one"; and a prior statement by Beatriz that the blue vehicle opposite the Honda may have been a Marquis, rather than a Mark VIII. The prosecutor on redirect played a portion of Beatriz's 911 call, which confirmed that Beatriz contemporaneously identified to the police that the blue car was a Mark VIII.[7] Defense counsel asked Ernestina only whether she heard the man by the Honda also yell "You don't know who I am." Ernestina could not recall.

The jury heard the testimony of Michael Couture, a resident of New Bedford who was driving through the intersection of Cedar and Mill Streets near the time of the shooting. He, too, had waited at the stop sign on Cedar Street because of the stopped blue vehicle on Mill Street that had the right of way. Once a white automobile started to swerve around the blue vehicle on Mill, Couture drove through the intersection. As Couture did, he heard a loud noise and saw a flash out of the corner of his eye. Couture looked up and saw the firing of several shots into a Honda by a man who "appeared . . . about six-foot to six-two, slim to medium build. [Couture] would say he looked like a black man . . . . He

[7] Beatriz had testified eight months after the shooting in another proceeding that the car may have been a Marquis; she clarified later in that proceeding that the car she observed was a Lincoln Mark VIII.

had dark clothes on." Couture proceeded to call 911 and wait for police to arrive at the scene.

Defense counsel asked Couture several questions on cross-examination. He first asked whether April 26 was a misty, rainy night, to which Couture responded "[i]t may have been overcast. I don't recollect." Couture explained that, despite the weather and although the incident "happened very rapidly," he still was able to see the shooter fire his gun with two hands and then "run across the field after the shooting." When cross-examined about his description of the shooter, Couture reiterated that the man he saw was around six feet tall, slender (around 175 pounds), possibly black, and wearing dark clothing. Couture also was questioned by the defense about where the white and blue vehicles went after the shooting. Couture testified that he lost sight of both after he crossed Mill Street because his attention was focused on the shooting.

Officer Safioleas was the first officer to arrive at the scene. He testified at trial that, there, he saw a green Honda Accord parked on the side of Mill Street, about eighty feet west of Cedar Street near where a memorial of the shooting now is located, with its brake lights on. As he approached the vehicle, he saw the operator slumped over at the wheel, bleeding and not conscious. The man had no pulse and was not breathing. He had holes in his jacket and five to seven wounds on his chest. The

man was identified as Paul Coombs. Coombs was declared dead at a local hospital.

iii. Watkins's Arrest

Watkins was identified as a suspect early on in the police investigation into the shooting. Yet police were unable to locate Watkins for more than three months after the shooting. Many of Watkins's friends and acquaintances testified at trial that they likewise did not see him after April 26, 2003. Law enforcement officers testified that the Lincoln Mark VIII was found unattended in May 2003, and had been "wiped clean" of all fingerprints.

The trial testimony concerning Watkins's eventual arrest is as follows. On August 5, 2003, Officer Michael Smith and other law enforcement officers "observed a male matching the description of Kyle Watkins walk out of the area of 19 Lafayette Park" in Lynn, Massachusetts. The officers approached the male, identified themselves as police officers, and asked him for his name. The male responded that his name was Leland Brooks and produced a Texas driver's license in that name. The officers then asked the male for his date of birth, but the male could not remember the date. After further questioning, the man admitted he actually was Kyle Watkins. Watkins was placed under arrest at that time and taken to the Lynn Police Station.

Officer Leonard Baillargeon met Watkins at the police station. The officer, who knew Watkins, testified that Watkins "was unshaven. He was sweating. He was wearing a white tee shirt . . . that was soiled. He was wearing a pair of baggy blue jeans and white high top sneakers." Officer Baillargeon testified that "[h]e appeared to . . . have lost a lot of weight." The officer made a comment to Watkins about his weight loss, to which Watkins responded he "was down to 180 pounds. He had lost weight because he was under a lot of stress." When Officer Baillargeon transported Watkins back to New Bedford, Watkins remarked he was "enjoying the ride" because it was going to be "the last ride he was going to have for a long time."

Defense counsel cross-examined Officer Baillargeon on only one issue: Watkins's weight. The officer testified that Watkins previously weighed "[b]etween 200 and 220, maybe 225," the same weight estimated by the Soares sisters of the shooter on the night of the murder.

iv. The Testimony of Vern Rudolph for the Prosecution

Vern Rudolph was the Commonwealth's primary identification witness, although he was by no means the only prosecution witness against Watkins, and the other witnesses corroborated key parts of Rudolph's testimony. Before discussing the shooting, the prosecution first questioned Rudolph about his arrest on December 3, 2003 for selling cocaine in a school zone

and unlawfully possessing a firearm, his guilty plea and three-year prison sentence, and the benefit the prosecutor promised Rudolph in exchange for his testimony. Rudolph testified that he understood the prosecutor to promise in a letter that Rudolph would not have to serve the second half of his three-year sentence because he was testifying against Watkins. The letter, which was disclosed to defense counsel prior to trial and admitted by the prosecution as an exhibit, stated:

> Mr. Rudolph has been incarcerated since his arrest [on December 3, 2003]. On or about July 30, 2004 Mr. Rudolph pled guilty to offenses in the District Court [including count 6, distribution of cocaine within 1000 feet of a school] and received sentences to the house of correction totaling three years and one day . . . .
>
> As of June 2, 2005 Mr. Rudolph will have served 18 months of his sentence.
>
> I understand that you will file a motion for a new trial and to dismiss count 6 and a motion to re-sentence Mr. Rudolph . . . [and] that the remaining un-served portion of this sentence be suspended and he be placed on probation for three years with appropriate court imposed conditions of probation.
>
> The net effect of these motions, should they be allowed, will be to release Mr. Rudolph from further incarceration and place him under probation supervision for three years.

Rudolph then testified to what he saw on the evening of April 26. Rudolph stated, inter alia, that he was at the Elks Lodge at around 8:30 p.m. that evening and he saw Watkins there

wearing a black hoodie and black jeans,[8] and acting "tough." Rudolph told the jury that after Watkins had said to him that "[t]hings are going to change," Rudolph responded, "I don't have [a] disagreement with you. You have an agreement or disagreement with Paul, take that up with him." Rudolph testified he did not see Watkins at the Elks Lodge after that and did not know when Watkins left, but stated he himself left the club sometime around 9:30 p.m. to pick up his daughter.

Rudolph testified that he was driving down Mill Street in his white Nissan Maxima when he saw the Lincoln Mark VIII parked on the side of the road by Cedar Street. Rudolph stated that he slowly began to swerve around the Lincoln towards the intersection when he saw Kyle Watkins shooting at a Honda Accord. Rudolph then turned down Cedar Street and sped away. He admitted that "[i]t was a foggy night. It wasn't too bad. It was, you know -- it wasn't a good night. That's for sure."

Rudolph testified that, thereafter, he told his mother what he had witnessed,[9] and he spoke with police about the shooting

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[8] Rudolph later testified he was not "aware of the description that [the Soares sisters and Couture] had given of the person who fired the shots at the time [he] went to the police station."

[9] Just before Rudolph testified, the jury heard the testimony of his mother, Patricia Rose. She testified that at around 10:00 p.m. on April 26, Rudolph knocked on her door, walked into her house, and stated that "on the way to the mall to pick up his daughter, . . . he witnessed someone getting shot" and "he saw who did it." Thereafter, Rose drove to the location identified by

on April 30, 2003, testified before the grand jury on September 9, 2003, and testified at a deposition later in September 2003. His trial testimony was consistent with those prior statements and testimony.

v. Defense Strategy and Cross-Examination of Rudolph

Watkins's primary defense strategy at trial was to attack the veracity of Rudolph's testimony, impeach Rudolph's credibility, and ultimately try to discredit Rudolph's identification of Watkins as the shooter. Indeed, defense counsel had highlighted during his closing argument that Rudolph had incentives to lie -- Rudolph and his brother initially were suspected of Coombs's murder and Rudolph was promised in exchange for his testimony an "agreement to get out of jail" for an unrelated offense. Defense counsel implied that Rudolph did in fact lie. Defense counsel questioned Rudolph's timeline, the visibility that night, and the location Rudolph placed the Honda at the time of the shooting, i.e., near the intersection of Cedar and Mill Streets rather than on Mill Street eighty-or-so feet west of Cedar, which is where the memorial is and where the other witnesses and physical evidence placed the Honda.[10]

Rudolph as the scene of the shooting and saw "[t]hey were still working on the body." Rose was not cross-examined.

[10] Trial counsel also was aware of and chose not to introduce on cross-examination Rudolph's various pre-trial

Defense counsel engaged in an extensive cross-examination of Rudolph which covers more than twenty pages of the trial transcript. Defense counsel had the following exchanges with Rudolph, among others, in front of the jury:

> Q: The first shot that goes off, is that simultaneous with the person you identify as Kyle Watkins and they happen to go off?
>
> A: Just about, yes.
>
> Q: Could you agree with me, all of what you saw in terms of the shooting and the person simultaneously firing the shots occurred in a matter of two or three seconds?
>
> A: Fair to say, yes.
> . . . .
>
> Q: And April 26th, at least until April 30th, you hadn't told anybody that the person you saw shooting was Kyle Watkins; is that fair to say?
>
> A: Yes.
> . . . .
>
> Q: And the police -- you actually make a call to the police station [on April 30, 2003]?
>
> A: Yeah.
>
> Q: And that's because you had heard that they may be looking for your brother?

"recantations" of his identification of Watkins to Watkins's family and private investigator, discussed infra. The motion for new trial judge found that trial counsel had made a reasonable tactical decision "in order to prevent the Commonwealth from introducing evidence of . . . threats" to Rudolph, which were made by Watkins's family after Rudolph began cooperating. It is settled law in this case that these strategic tactical decisions by trial counsel did not constitute ineffective assistance of counsel.

A: Yes.

Q: And your brother is what, a suspect in this case?

A: Yes.

Q: When you get this call, you don't identify yourself. This is April 30th, right?

A: I believe so.
. . . .

Q: When you make the call, it's because you hear that the police may be looking for your brother because he's a suspect in this shooting of Paul Coombs[?] . . .

A: Yes.

Q: So when you make this call, you don't identify yourself. The conversation goes back and forth; is that correct?

A: Yes.

Q: And at some point in time your name comes up as a result of the conversation that you're having. It's by police personnel, as a result of making that call, right?

A: Yes.
. . . .

Q: And it's at that point in time you then identify yourself?

A: Only after they say my name.

Q: That's when you identify yourself?

A: Yes.
. . . .

Q: And [you go to the police station for an interview and] at some point, the police say to you, "Well, if it's not you and it's not

> your brother, then it must be Kyle Watkins," isn't that right?
> . . . .
>
> A: Somewhat, yeah.
>
> Q: And words to the effect that if you don't tell us that it's Kyle Watkins, you're going to remain -- you and your brother are going to remain the main suspects in this case. That come up?
>
> A: Yeah.

Defense counsel also questioned Rudolph about what counsel characterized as inconsistencies in Rudolph's testimony. He cross-examined Rudolph about the time he left the Elks Lodge, as the shooting took place at around 9:50 p.m., just one block from the club. Defense counsel implied that it would take minutes, not a third of an hour, for Rudolph to drive from the Elks Lodge to where the shooting took place.

Defense counsel asked Rudolph about where he placed the shooting, and how far from it he placed himself. Rudolph stated he was on Mill Street, just east of the intersection of Cedar and Mill Streets, and the shooting took place by the Honda which was just a few feet west of the intersection. Rudolph explained that, at the time of the shooting, the Honda was not as far down Mill Street as where the memorial is now. Defense counsel observed that Rudolph's account "would lessen the distance of [Rudolph's] view from where [he was] . . . as opposed to the Honda being up near where the memorial is." Officer Safioleas and Michael Couture

had testified that the memorial is located where the Honda was on April 26.[11]

Defense counsel then briefly cross-examined Rudolph about his "deal" with the Commonwealth, asking, "so now we're at the period that you're testifying here and the district attorney has made an agreement to let you out of jail; is that right? . . . For your testimony?" Rudolph responded in the affirmative. The court later instructed in its charge that the jury may "take into consideration the Commonwealth's agreement regarding a sentence currently being served by a witness in assessing his credibility. The testimony of such a witness should be scrutinized with particular care."

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[11] Defense counsel highlighted other inconsistencies in Rudolph's testimony, including which hand Watkins fired his gun with:

> Q: What hand [did Watkins fire with]?
>
> A: Right hand.
>
> Q: Last time you talked to somebody, you told them it was the left hand, when you spoke to the police. Remember that? Or you don't remember that either?
> . . . .
>
> Q: You never told anybody that shooter was holding the gun with two hands; is that right? You never told anybody that?
>
> A: No.

Couture had testified that the shooter was using two hands.

After considering all of this evidence, the jury found Watkins guilty of murder. Watkins argues the outcome could have been different had the Commonwealth produced additional evidence to impeach Rudolph, particularly the finger-shot report.

II.

A. Standard of Review

Our review of a district court's denial of a petition for habeas corpus is de novo. Norton v. Spencer, 351 F.3d 1, 4 (1st Cir. 2003). Our review of the SJC's decision is governed by AEDPA, and typically is "highly circumscribed" and must be "based solely on the state-court record." Shinn v. Martinez Ramirez, No. 20-1009, 2022 U.S. LEXIS 2557, at *18–19 (S. Ct. May 23, 2022).

"The writ of habeas corpus is an extraordinary remedy that guards only against extreme malfunctions in the state criminal justice systems." Id. at *17–18 (quotation marks omitted) (quoting Harrington v. Richter, 562 U.S. 86, 102 (2011)). Under AEDPA, a federal court "shall not" grant habeas relief for a claim adjudicated on the merits in state court, unless the final state adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see Brown v. Davenport, 142 S. Ct. 1510, 1520, 1523 (2022). When there is no final state adjudication of the claim on the merits, our review of the SJC's decision is de novo. Healy, 453 F.3d at 25.

A prisoner "is never entitled to habeas relief." Shinn, 2022 U.S. LEXIS 2557, at *18. "[E]ven a petitioner who prevails under AEDPA must still today persuade a federal habeas court that 'law and justice require' relief." Brown, 142 S. Ct. at 1524 (quoting 28 U.S.C. § 2243). Thus, even when a state court "employ[s] faulty reasoning" in its decision, a petitioner cannot obtain habeas relief unless he also demonstrates that he "is in custody in violation of the Constitution or laws or treaties of the United States." Aspen v. Bissonnette, 480 F.3d 571, 576 (1st Cir. 2007) (second quoting 28 U.S.C. § 2254). Indeed, "habeas relief is available only if the petitioner demonstrates that 'Supreme Court precedent requires an outcome contrary to that reached by the relevant state court.'" Id. (quoting O'Brien v. Dubois, 145 F.3d 16, 24-25 (1st Cir. 1998), abrogated on other grounds by McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002) (en banc)). Watkins has not made such a demonstration in this case.

The relevant federal law here is the rule announced in Brady v. Maryland, where the Supreme Court stated: "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt

or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; see U.S. Const. amend. XIV. This court has stated that a habeas petitioner seeking to establish a Brady violation must demonstrate: "(1) the evidence at issue is favorable to him because it is exculpatory or impeaching; (2) the Government suppressed the evidence; and (3) prejudice ensued from the suppression (i.e., the suppressed evidence was material to guilt or punishment)." Conley v. United States, 415 F.3d 183, 188 (1st Cir. 2005). The nondisclosure of impeachment evidence is prejudicial only if there is a reasonable probability "that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Id. (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999)). The undisclosed evidence must "undermine[] confidence in the verdict." Id. (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

The strength of the impeachment evidence and the effect of its nondisclosure must be evaluated in the context of the entire record. Conley, 415 F.3d at 189 (citing United States v. Bagley, 473 U.S. 667, 683 (1985); United States v. Agurs, 427 U.S. 97, 112 (1976)). "Suppressed impeachment evidence, if cumulative of similar impeachment evidence used at trial (or available to the petitioner but not used) is superfluous and therefore has little, if any, probative value." Id.; see also United States v. González-González, 258 F.3d 16, 25 (1st Cir. 2001) (finding the

nondisclosure of impeachment evidence not prejudicial where the evidence was cumulative of similar disclosed impeachment evidence).

The SJC in this case determined that Watkins was not prejudiced by the Commonwealth's failure to produce several pieces of impeachment evidence. This determination was based, in part, on a factual error. Following oral argument, we asked the parties to address what standard of review applies in this habeas case to the SJC's prejudice determination under such circumstances. The government cited to Teti v. Bender, in which this court observed that AEDPA sets forth two different standards "which [both] apply to state court fact determinations" and "ha[ve] caused some confusion." 507 F.3d 50, 57 (1st Cir. 2007). Under 28 U.S.C. § 2254(d)(2), factual determinations are reviewed for reasonableness, and under § 2254(e)(1), factual findings are presumed to be correct. Teti, 507 F.3d at 57. In Teti, this court explained that "[t]he Supreme Court has suggested that § 2254(e)(1) applies to 'determinations of factual issues, rather than decisions,' while § 2254(d)(2) 'applies to the granting of habeas relief' itself." Id. (emphasis added) (citing Miller-El v. Cockrell, 537 U.S. 322, 341–42 (2003)). This court acknowledged, however, that neither it nor the Supreme Court has definitively resolved the question as to how these two provisions interact. Id. at 58; see also Brumfield v. Cain, 576 U.S. 305, 323 (2015)

(comparing when the Court required federal habeas courts to defer to state courts and when it reviewed habeas claims de novo). Further, it is not clear whether the presumption of correctness disappears only as to the precise factual error or whether it means that no portion of the factual determination by the state court is entitled to AEDPA deference. Out of an abundance of caution, we take the approach favorable to the petitioner of applying de novo review for all four categories of Watkins's Brady claim. We hold that Watkins has not satisfied his burden under Brady of showing the requisite prejudice.

B. Failure to Disclose Finger-Shot Report and Error in the State Courts' Factual Determinations

We begin with Watkins's arguments concerning the failure to disclose the October 29, 2003 finger-shot report. It is clear the SJC made an erroneous factual determination when it stated that the report does not show the police knew, at the time, that Rudolph was a witness against Watkins. This error, on de novo review, cannot carry the day for Watkins.[12] The finger-shot was cumulative of other impeachment evidence introduced at trial. Further, the report -- a copy of which Watkins had at the state court motion for new trial hearing -- objectively would have harmed Watkins more than it helped him, and, in any event, Watkins put in

[12] We disagree with the dissent's reliance on what it says the SJC "did not dispute [or hold]." In addition, the dissent's line of reasoning is irrelevant, as we engage in de novo review.

no evidence at the post-trial motion hearing that competent counsel would, in fact, have used the information in the report, especially when viewed in its entirety.[13] See Shinn, 2022 U.S. LEXIS 2557, at *17–19 (restricting federal habeas review to the state-court record).

The finger-shot report states:

> Sir,
>
> The undersigned, while assigned to Unit #13C with Off.[ ]D.[ ]Amaral, was sent to 101 Page St. (St.[ ]Lukes Hospital) on a male that had been shot in the hand.
>
> Upon arrival we were directed to the victim identified as, [sic] VERNON RUDOLPH JR. (1/23/67). RUDOLPH had the tip of the index finger on his right hand wrapped in a gauze bandage. He removed the bandage and showed the undersigned what appeared to be a graze from a bullet on the outer tip of his finger near the fingernail.
>
> RUDOLPH stated that he has been receiving threats on his life since he became a witness in the murder investigation of one PAUL COOMBS. RUDOLPH witnessed the murder by firearm and gave statements to the police implicating one KYLE WATKINS. WATKINS was later apprehended and incarcerated.
>
> RUDOLPH originally stated that he parked his vehicle outside of the Elks Club at Cottage St. and Mill St. and was going to enter the club. He claimed he saw a male wearing dark clothing approach and he became nervous. He tried to retreat to his car when this male produced a gun and pointed it at him. A brief struggle then ensued and the gun fired once striking him in the finger. RUDOLPH stated he then ran northerly on Cottage St. and the male suspect ran in the other direction.

[13] To the extent the dissent argues that we are holding Watkins had to introduce expert testimony, that misreads our analysis.

> After several minutes and more specific questioning he eventually admitted that he fabricated the story. He indicated that he had shot himself accidentally with a gun that belonged to a friend. He stated that he does not carry a gun and knows very little about them. He said that he did not know that the safety was off. RUDOLPH did not want to elaborate on where this took place and did not want to implicate his friend as it was not his fault.
>
> RUDOLPH stated that he had hoped to be treated and released without the hospital having to contact the police. He apologized for creating the story and wasting our time, but he felt he had no choice. He stated that he has in fact been receiving threats from WATKINS' friends, but did not want to name anyone or document any of the incidents.
>
> A nurse explained that stitches were not required and that the wound would heal on its own. RUDOLPH was then given Percocet for pain and released from hospital care.

(emphasis added).

Watkins argues in his federal habeas case that the use of the report would permit a jury to draw the inference that Rudolph had received another, undisclosed benefit from the Commonwealth because he was not prosecuted for unlawful possession of a firearm or lying to a police officer. He also argues that the report shows a pattern of Rudolph implicating Watkins and seeking rewards for his testimony against Watkins, and that Watkins was unable to show this pattern at trial. Neither argument satisfies his burden to show prejudice under Brady.

The failure to produce the report was not prejudicial because it was cumulative, even if the inference attempted to be

drawn was plausible. The record does not show such an inference is plausible. Moreover, there was far stronger evidence produced and introduced at trial of an actual, considerable benefit Rudolph was promised to receive from the Commonwealth in exchange for his testimony: a letter showing the prosecutor promised that he would ask that Rudolph's term of imprisonment for the more serious criminal law violation of drug distribution near a school zone (in addition to unlawful possession) to be reduced in half and for Rudolph to be released from prison. Defense counsel in fact effectively used, and the jury had a copy of, this letter at trial, which defense counsel called "an agreement to get out of jail."

Furthermore, the purported inference of an undisclosed deal on which Watkins's argument rests is not supported by the record. Watkins has provided no evidence that Rudolph and the Commonwealth discussed any deal concerning the finger-shot incident, nor that his testimony against Watkins had any bearing on the Commonwealth's decision not to prosecute him. That police wrote an incident report about a shooting for which they were called, without more, is insufficient to permit the inference that the Commonwealth would have charged Rudolph absent his testimony in this case. As the report shows, Rudolph already had given his statement to police about Coombs's murder before this incident. Further, any inference of a deal was refuted, as Rudolph testified at the motion for new trial hearing that he had no deal with the

Commonwealth regarding the finger-shot incident and the prosecutor testified at that hearing that he had no recollection of any such deal.

Watkins also argues, and the dissent adopts the argument, that Watkins was deprived of an opportunity to cross-examine Rudolph about a purported tendency to "fabricate[] stories involving" Watkins to protect himself. But there was no such deprivation of opportunity. At trial, defense counsel engaged in the following cross-examination of Rudolph:

> Q: And the police -- you actually make a call to the police station [on April 30, 2003]?
>
> A: Yeah.
>
> Q: And that's because you had heard that they may be looking for your brother?
>
> A: Yes.
>
> Q: And your brother is what, a suspect in this case [for Coombs's murder]?
>
> A: Yes.

Defense counsel also cross-examined Rudolph about the fact that Rudolph did not go to the police station until after he learned that he himself was named a suspect, and that, during that initial police interview, he was asked: "Well, if it's not you and it's not your brother, then it must be Kyle Watkins[?]" This and other impeachment evidence amply, as argued by defense counsel repeatedly, permitted the jury to draw the inference that Rudolph

implicated Watkins in order to exonerate himself and his brother and, so, Rudolph was not credible.[14]

Watkins's argument to us of prejudice does not take into account the risks to him of his opening the door to the introduction of the finger-shot report. Further, Watkins failed to introduce testimony at the motion for new trial hearing in the state court that competent trial counsel, or indeed his own trial counsel, would have chosen to use the report. In fact, as to his habeas argument based on a theory of Rudolph recanting, the finger-shot report objectively is weaker than other evidence which his trial counsel had as a matter of trial strategy chosen not to use.[15] Defense counsel had evidence that Rudolph had earlier "recanted" his identification of Watkins to Watkins's family, friends, attorney, and private investigator, although Watkins does

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[14] The dissent argues that the nondisclosure of the finger-shot report was prejudicial because the report shows Rudolph would have been "especially" willing to implicate Watkins to protect himself because that implication "would spare [Rudolph] from being subjected to a new felony conviction and yet more time in prison than he already knew that he might have to serve[.]" In addition to being cumulative, this argument ignores the timing of the relevant events. At the time of the finger-shot incident, Rudolph did not know that he later would be incarcerated. In fact, no charges were pending against him at the time; Rudolph was not arrested on the drug distribution charge until December 3, 2003, and he did not plead guilty to that charge until July 30, 2004.

[15] We take an objective view of what competent counsel would do, and this view happens to be the same realistic view as the one trial counsel in fact took in weighing whether the benefits of using so-called impeachment evidence, cumulative at best, outweighed the considerable costs of using it.

not point to any instance in which Rudolph recanted his identification to the police. The evidence that Watkins's counsel had and chose not to use included Rudolph's statement to the private investigator that he "couldn't really identify the shooter," and his comment to Watkins's brother, basically, to "[t]ell Kyle he has nothing to worry about. The [police] . . . tripped me up, I didn't see anything, nobody could see anything. Tell Kyle he has nothing to worry about."

Watkins's trial counsel testified at the motion for new trial hearing as to why he chose not to use this evidence of Rudolph "recanting" his identification of Watkins. Counsel stated that "if the[recantations] were brought in, then the government could bring in evidence of any threats" made against Rudolph, which are thought to have been made after Rudolph spoke with the police and before he "recanted" privately to those associated with Watkins. The motion for new trial judge held that trial counsel's tactical decision was reasonable, and the SJC affirmed. Watkins, 41 N.E.3d at 26–27. The district court agreed, conclusively ruling that "[t]he decision to forego [this] line of questioning in order to prevent the Commonwealth from introducing potentially damaging evidence was 'clearly a tactical decision that "falls within the wide range of reasonable professional assistance[.]"'" Watkins, 2020 WL 68245, at *14 (quoting Cohen v. United States, 996 F. Supp. 110, 116 (D. Mass. 1998)). We do not revisit the ruling, as any

ineffective assistance of counsel claim is outside the scope of the COA. See Blue v. Medeiros, 913 F.3d 1, 5 n.9 (1st Cir. 2019) (stating the general rule that, in a habeas proceeding, this court should not consider the merits of an issue unless a COA has been obtained for that issue).

Rudolph had testified at his pre-trial deposition that Watkins's cousin had threatened Rudolph after he spoke to the police. According to Rudolph, Watkins's cousin threatened that if Rudolph testified against Watkins, Rudolph would be "assassinate[d]."

The undisclosed finger-shot report similarly shows that Rudolph identified Watkins to the police and that he was afraid of Watkins and felt threatened by Watkins's friends and family in the aftermath. Objectively, competent defense counsel would not have chosen to introduce the finger-shot report to the jury, just as defense counsel chose not to introduce the private recantation evidence, which the state courts have held was a permissible tactical decision.

Further, Rudolph did not recant his identification of Watkins to the police and, if anything, the October 29, 2003 finger-shot report cannot be prejudicial because it reinforced Rudolph's identification. Rudolph told police during the finger-shot incident that he was a witness against Watkins, and the version of events Rudolph gave to law enforcement before and after

the incident was the same. On April 30, 2003, Rudolph called the police and informed them that he had witnessed Watkins shoot Coombs; on September 9, 2003, he testified before the grand jury to what he saw; later in September, he testified at a deposition to the same; as did he in 2005 at Watkins's trial. The finger-shot incident took place weeks after Rudolph already essentially had committed to being a witness against Watkins, and his testimony did not change after that.

For all these reasons, the impeachment evidence in the finger-shot report presents no new tool to attack Rudolph's testimony. Cf. United States v. Flores-Rivera ("Flores I"), 787 F.3d 1, 19 (1st Cir. 2015), overruled by statute on other grounds as stated in United States v. Smith, 954 F.3d 446, 448 (1st Cir. 2020).

The dissent's reliance on Flores I, 787 F.3d 1, and Flores-Rivera v. United States ("Flores II"), 16 F.4th 963 (1st Cir. 2021) is misplaced, as the facts and circumstances are dissimilar to the instant appeal. In those cases, the defendants' primary trial strategy was to impeach the three main witnesses against them "by suggesting [the witnesses] engaged in a coordinated effort to fabricate their testimony." Flores I, 787 F.3d at 10; Flores II, 16 F.4th at 965 ("Our opinion in Flores I describes at length the relevant factual background for this collateral appeal."). The witnesses' testimony had been "both

essential to the convictions and uncorroborated by any significant independent evidence." Flores I, 787 F.3d at 18. All three witnesses at trial "flatly and firmly denied discussing anything involving the . . . case" prior to testifying. Id. at 10. In Flores I, it was discovered after trial that the government had failed to disclose, among other things, notes which showed that the witnesses had, in fact, discussed their testimonies beforehand. Id. at 18. This nondisclosure (when combined with other undisclosed evidence) violated Brady because the prosecution "pivoted entirely on the credibility of [the witnesses]" and "there was no other document or recording tending to prove that the witnesses were lying when they denied discussing their testimony with one another." Id. at 19–20. This case, by contrast, is not one of a sole witness to whom there was no impeachment evidence introduced at trial. Rather, there was testimony and evidence that corroborated key parts of Rudolph's testimony -- e.g., the tension between Watkins and Coombs, the subsequent murder of Coombs, the shooter's physical appearance and vehicle, the victim's vehicle, the time of the shooting, and the general location of the shooting.[16] And, as just described, evidence of Rudolph's potential bias was covered extensively at trial.

[16] This corroboration of Rudolph's narrative of Coombs's murder is much greater than the single video of alleged drug trafficking transaction introduced in Flores II showing the

C. Rudolph's Dangerousness Hearing To Determine Whether He Should Be Released

In December 2003, Rudolph was arrested for and charged with distributing cocaine to a police informant in a school zone and unlawfully possessing a firearm. Rudolph initially was held without bail pursuant to Mass. Gen. Laws ch. 276, § 58A, which at the time permitted the Commonwealth to move "for an order of pretrial detention" based on dangerousness, for any felony "that, by its nature, involves a substantial risk that physical force against the person of another may result." Rudolph petitioned for bail, and a dangerousness hearing was held before the Bristol County Superior Court on December 10, 2003. Rudolph stated at the hearing that his gun possession was for protection, in response to threats he was receiving for his cooperation in Coombs's murder investigation: "I'm not a dangerous person. I'm not. I'm just worried about my well-being. You can't bring a rock to a gun fight. . . . They're making threats against my life." The superior court judge denied Rudolph's petition and ordered him detained. In response, Rudolph stated: "So, now what happens when the murder case comes up? Am I to come to court bright eyed and bushy tailed and testify against somebody else after this? That's not fair, your Honor. It's not fair."

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defendant "hand something to someone and receive something in return." 16 F.4th at 968–69.

Watkins argues the Commonwealth was required under Brady to produce the statement Rudolph made at the end of his dangerousness hearing, but this argument also falls short. On de novo review, we conclude this statement does not support the inference Watkins wants to draw from it, i.e., that "Watkins was denied the opportunity to cross-examine Rudolph on bias." Further, there was at trial extensive examination of bias, and the failure to add onto any such evidence hardly would be prejudicial. Rudolph's motivation for reaching out to the police and the agreement that Rudolph later reached with the Commonwealth were discussed at trial and clearly informed Watkins and the jury that Rudolph sought an incentive in return for his cooperation and testimony. Rudolph's statements at his dangerousness hearing, as with his "recantations" and the finger-shot report, also show that Rudolph was threatened for testifying by Watkins's family and friends, and therefore would present substantial risks to Watkins if introduced at trial.

D. The Crime Scene Diagram

Watkins's contention that the Commonwealth's failure to produce a hand-drawn crime scene diagram detailing the distance between the Honda Accord and shell casings found near the vehicle violated Brady similarly is unpersuasive. The diagram depicts the Honda Accord part-way down the block from the intersection of Mill and Cedar Streets, which differs from Rudolph's testimony that the

shooting occurred near the intersection. The Commonwealth's failure to produce this diagram was not prejudicial, as its impeachment of Rudolph's testimony, at most, would have been cumulative of the other evidence introduced at trial. Watkins highlighted all the purported discrepancies in Rudolph's testimony to the jury, including his placement of the Honda near the intersection, and the jury found Watkins guilty nonetheless.

Officer Safioleas testified, contrary to Rudolph's testimony, that the Honda was located near the memorial, which has been placed approximately eighty feet west of the Cedar and Mill Streets' intersection. This location corresponds generally to the location of the Honda as shown in the diagram. Mr. Couture similarly placed the Honda near the memorial. So, too, did photographs taken of the scene the night of the shooting, which were admitted as exhibits. Defense counsel argued this point to the jury in closing. The crime scene diagram, which is a rough, hand-written sketch that is not drawn to scale, would have a nominal effect on impeaching Rudolph, if any at all.

E. Undisclosed Pre-Interview Notes

Watkins's challenge under Brady to the Commonwealth's failure to disclose the handwritten notes taken by Trooper Kilnapp fails. After calling the police on April 30, 2003 to report the shooting, Rudolph drove himself and his brother to the station for an in-person interview. At the station, Rudolph spoke with law

enforcement for approximately two hours before the police began recording his interview (the "pre-interview"). Trooper Kilnapp apparently took handwritten notes of the pre-interview which were not disclosed before trial because "they were not discovered until after the trial."

Watkins argues these notes, if introduced at trial, would have permitted the inference that the perpetrator was not Watkins, but a third party: Barry Souto.[17] The strands of the argument are simply not supported by the record. Watkins first contends that the notes show Rudolph did not implicate Watkins as the shooter until the recorded interview, when police threatened

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[17] Watkins further argues the nondisclosure of these notes deprived him of the ability to cross-examine Rudolph on the discrepancies in his timeline, namely, when he left the Elks Lodge, because the notes indicate he left "at least after 9:15, could have been later. Maybe 9:30." This argument is belied by the record, which clearly shows defense counsel did cross-examine Rudolph about such discrepancies:

> Q: Now, can you tell us whether it was closer to 8:00 or 8:30 that you went into the [Lodge]?
>
> A: I would say about 8:30, 8:35 -- 8:30, yeah.
>
> Q: If you were in there for twenty minutes, then you're out of there about five past nine?
>
> A: Times, like I said, it's two years gone by.
>
> . . . .
>
> Q: And once you made -- if you came out of there at 9:30, is it fair to say that would be less than a minute for you to get to the point where the blue or black car was on Mill Street?

to charge him instead. The record says otherwise. The record shows that Rudolph named Watkins as the shooter when he first called the police, before heading to the station for an interview. The notes of this phone call, taken by Officer Oliveira, specifically state that Rudolph told police: "he observed KYLE WATKINS shooting a firearm into the Honda Accord parked on Mill Street just west of Cedar Street."

Trooper Kilnapp's notes also do not implicate Barry Souto as a third-party suspect. The notes first state: "Friday 4/25 @ Elks . . . Kyle Watkins in bathroom arguing w/ Paul Coombs on cell phone." They then state: "Barry [Souto] told Vern it was behind him re: Zach (few weeks ago) . . . Barry talked to Paul -- to clear it up. Barry told Vern he didn't hire hitman. Barry scared of Paul Coombs." Barry is the brother of Zachary Souto; Zachary was killed by Coombs several years prior, and Coombs was killed on Zachary's birthday. These notes do not support Watkins's theory that Barry killed Coombs out of revenge. Quite the opposite. The only plausible inference that can be drawn from the notes is that Barry had no intention of killing Coombs. Watkins has pointed to no evidence otherwise connecting Barry to the crime. He suffered no prejudice from the Commonwealth's failure to disclose.

F. Rudolph's Promise From the Commonwealth

Watkins's argument concerning the alleged incompleteness of the Commonwealth's disclosures of its promise to Rudolph lacks merit.[18] The record refutes Watkins's argument that the Commonwealth concealed the true nature of this promise. The prosecutor sent a copy of the letter setting forth the promise to Watkins prior to the start of trial and entered the letter into evidence. The letter clearly provided that Rudolph would be released from prison if he testified against Watkins, which he did. Contrary to Watkins's argument, the letter states, inter alia, that Rudolph's attorney intended to move to dismiss the distribution in a school zone charge and for resentencing and Rudolph's immediate release, and the prosecutor in Watkins's case intended to ask Rudolph's sentencing judge to allow the motions if Rudolph testified truthfully against Watkins. In light of this disclosed promise, the trial judge specifically instructed the jury to "scrutinize[] [Rudolph's testimony] with particular care."

[18] Watkins's additional argument that the Commonwealth failed to produce other requested evidence of Rudolph's cooperation is unsupported by the record. The trial court had ordered the government to file ex parte information concerning Rudolph's cooperation, and on March 31, 2005, the Commonwealth submitted a letter from Detective Lieutenant Scott Sylvia of the New Bedford Police Department listing the docket numbers of the cases in which Rudolph was involved. The letter also stated that Rudolph was a victim or witness in several prior cases, but he did not act as an informant. Watkins has pointed to no evidence to the contrary.

That the letter did not state that Rudolph would be released the same day of his testimony is immaterial.

III.

Even had Watkins overcome the obstacles to habeas relief (he has not), he still has not persuaded us that "law and justice" require the petition to be granted. Shinn, 2022 U.S. LEXIS 2557, at *18 (quoting Brown, 142 S. Ct. at 1524). The judgment of the district court denying habeas relief is affirmed.

- DISSENTING OPINION FOLLOWS -

BARRON, Chief Judge, dissenting. Kyle Watkins seeks to overturn his Massachusetts-law conviction for first-degree murder pursuant to his federal constitutional right to due process under Brady v. Maryland, 373 U.S. 83 (1963). He contends that he was convicted in violation of this right because the prosecution failed to provide his counsel with exculpatory evidence in advance of the trial that would have been material to his defense. Among that evidence is a police report that Watkins contends would have significantly aided his efforts to impeach what turned out to be the state's key witness against him. It is this aspect of Watkins's Brady challenge that is my focus.

The majority does not dispute that the police report constitutes exculpatory evidence. It nonetheless holds that Watkins's federal habeas petition must be denied because Watkins has not shown the prejudice under Brady that is required to establish that the police report was "material." See Brady, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Zuluaga v. Spencer, 585 F.3d 27, 30 (1st Cir. 2009) ("To prevail on a federal Brady claim, 'a habeas petitioner must demonstrate: . . . [that] prejudice ensued from the suppression (i.e., the suppressed evidence was material to guilt or punishment).'"

(quoting Conley v. United States, 415 F.3d 183, 188 (1st Cir. 2005))).

The Supreme Judicial Court of Massachusetts ("SJC") reached the same result in rejecting Watkins's Brady challenge on direct review. Commonwealth v. Watkins, 41 N.E.3d 10, 20-23 (Mass. 2015). But, although a federal court reviewing a habeas petition ordinarily must defer to such a state court ruling, see, e.g., Teti v. Bender, 507 F.3d 50, 55 (1st Cir. 2007), we need not do so here, because, as I will explain, the SJC's ruling rests on a clear mistake of fact. See 28 U.S.C. § 2254(d)(2). Moreover, as I will also explain, a de novo review of the record leads me to conclude that Watkins has shown the prejudice from having been denied access to the police report that Brady requires him to show. Accordingly, I conclude that Watkins is entitled to federal habeas relief on the ground that he was convicted of murder in violation of his federal constitutional right to due process under Brady. See Brown v. Davenport, 142 S. Ct. 1510, 1517 (2022) ("When a state court has ruled on the merits of a state prisoner's claim, a federal court cannot grant relief without first applying both the test this Court outlined in Brecht [v. Abrahamson, 507 U.S. 619 (1993)] and the one Congress prescribed in [the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)]."); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (explaining that a showing of prejudice that

satisfies Brady "cannot subsequently be found harmless under Brecht").

I.

The key question at trial concerned who pulled the trigger in the murder of Paul Coombs in New Bedford, Massachusetts on the night of April 26, 2003. Watkins, 41 N.E.3d at 15. Some of the witnesses for the state who testified at the trial had driven past the site of the shooting either as it happened or immediately beforehand. Id. at 16. But, only one of them -- Vernon Rudolph -- claimed both to have been able to see the person shooting Coombs on the night in question and to have been able to identify that person as Watkins. See id. at 16-17.

In other words, Rudolph was no ordinary witness for the prosecution. He was the crucial one. He was also an acquaintance of Watkins, which meant that Rudolph knew what Watkins looked like. Id. That fact no doubt lent credibility to Rudolph's testimony that he saw Watkins pull the trigger.

At the same time, Rudolph was vulnerable to impeachment. The jury was informed both that he was incarcerated for unrelated felonies at the time that he was testifying against Watkins and that he had agreed to testify against Watkins in return for a prosecutor's promise to ask the judge who had sentenced him to a three-year-and-one-day term of imprisonment for his convictions to grant his motions for release from prison 18 months early. Id. at

21. The record also shows that Watkins knew at the time of trial both that Rudolph had gone to the police station for an interview about the murder of Coombs only after having learned that Rudolph and Rudolph's brother were themselves suspects in that murder and that Rudolph had recanted to Watkins's private investigator prior to the trial the account that Rudolph then gave against Watkins at the trial.

But, as strong as Watkins's grounds for impeaching Rudolph's trial testimony were, Watkins contends that they would have been even stronger if he had known at the time of trial some other things about Rudolph that he did not know but that the prosecution did. Most especially, Watkins did not know -- as the prosecution did -- about a police report that described an encounter that Rudolph had with the police prior to Watkins's trial.

The police report shows that on October 29, 2003, officers from the New Bedford Police Department were dispatched to a hospital to investigate a man who had been hospitalized for a bullet wound. The officers were directed to the victim, whom they identified as Rudolph and whose finger had been grazed by a bullet.

According to the report, "RUDOLPH stated that he has been receiving threats on his life since he became a witness in the murder investigation of one PAUL COOMBS. RUDOLPH witnessed the murder by firearm and gave statements to the police implicating

one KYLE WATKINS." The report next explains that "RUDOLPH originally stated that," while he was outside of the Elks Club,

> he saw a male wearing dark clothing approach and he became nervous. He tried to retreat to his car when this male produced a gun and pointed it at him. A brief struggle ensued and the gun fired once striking him in the finger. RUDOLPH stated he then ran northerly . . . and the male suspect ran in the other direction.

But, according to the report, the story Rudolph told the officers quickly changed:

> After several minutes and more specific questioning he eventually admitted that he fabricated the story. He indicated that he had shot himself accidentally with a gun that belonged to a friend. He stated that he does not carry a gun and knows very little about them. He said that he did not know that the safety was off. RUDOLPH did not want to elaborate on where this took place and did not want to implicate his friend as it was not his fault.
>
> RUDOLPH stated that he had hoped to be treated and released without the hospital having to contact the police. He apologized for creating the story and wasting our time, but he felt he had no choice. He stated that he has in fact been receiving threats from WATKINS' friends, but did not want to name anyone or document any of the incidents.

II.

Watkins relied in part on the prosecution's failure to turn over the police report to him prior to trial in pressing his Brady challenge to his murder conviction to the SJC. But, the SJC determined that the police report did not itself show that "Rudolph

avoided any charges because he told police that he was the key witness in the Commonwealth's case against [Watkins]," and, on that basis, it ruled that Watkins's Brady challenge was without merit insofar as that challenge was premised on the withholding of the police report because Watkins had failed to show that the withholding of that report prejudiced him. Watkins, 41 N.E.3d at 22.

As I have noted, in reviewing a federal habeas petition that seeks to overturn a state law conviction, we ordinarily must give substantial deference to the state court ruling that affirms the conviction. But, that is not so when the state court ruling is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2) (emphasis added); see Harris v. Sharp, 941 F.3d 962, 978 & n.12, 987 (10th Cir. 2019) (determining that a state court's decision on the prejudice prong of an ineffective assistance of counsel argument "was based on an unreasonable factual determination," reviewing the claim de novo, and remanding for an evidentiary hearing on disputed facts). And, here, the SJC's ruling is "based on" a factual error of that kind.

Indeed, the state does not dispute that the SJC made an "unreasonable determination of the facts" in addressing the portion of Watkins's Brady claim that concerns the withholding of the police report. The SJC stated in that regard that the judge

at Watkins's motion-for-a-new-trial hearing found that "there was no evidence that investigating officers" to whom Rudolph confessed to having shot himself in the finger "were aware that Rudolph was a Commonwealth witness," and the SJC concluded that "[t]he record supports the judge's findings." Watkins, 41 N.E.3d at 22. But, the third paragraph of the police report's one-page narrative recounts that, after the police encountered Rudolph at the hospital, "RUDOLPH stated that he has been receiving threats on his life since he became a witness in the murder investigation of one PAUL COOMBS. RUDOLPH witnessed the murder by firearm and gave statements to the police implicating one KYLE WATKINS." (emphasis added). Thus, the state -- admirably -- concedes that the record "directly contradict[s]" the SJC's statement about what the record shows regarding whether the police officers who investigated Rudolph's injury "were aware that [he] was a Commonwealth witness," Watkins, 41 N.E.3d at 22.

To be sure, things are not quite so straightforward when it comes to the question of whether the SJC's ruling rejecting Watkins's Brady challenge is "based on" this unreasonable factual determination about what the police report shows. As to that question, the state asserts that the SJC's ruling is not so "based" because "the incorrect fact was just one of three reasons on which the SJC relied" in finding that no prejudice flowed from the prosecution's failure to disclose the police report.

The SJC's opinion, however, refutes any such notion. The opinion states in relevant part:

> The judge [presiding over the hearing concerning Watkins's motion for a new trial] found, however, that there was no evidence that investigating officers were aware that Rudolph was a Commonwealth witness, no evidence that he either sought or received favorable treatment in that matter, and that his anticipated testimony had no bearing on the decision not to prosecute Rudolph for "shooting himself." The record supports the judge's findings. The defendant therefore suffered no prejudice as a result of the Commonwealth's failure to disclose this police report.

Id.

In using the words "therefore suffered no prejudice" only after having listed three distinct features of the police report, id. (emphasis added), the SJC in no way suggested that its no-prejudice ruling depended on the police report having fewer than all three of those features. So, taking the SJC at its word, I conclude that the SJC necessarily rested its no-prejudice ruling on a feature of the police report that, as we have seen, the SJC unreasonably determined existed even though it does not.

The majority does not, in the end, disagree with me on this point. It rests its judgment that the portion of Watkins's Brady claim that concerns the withholding of the police report provides no basis for granting his habeas petition solely on the way that it resolves the next question that I will take up, which concerns whether the record, on de novo review, supports Watkins's

contention that he met his burden to show that the withholding of the police report caused him the prejudice that Brady requires him to show.[19]

III.

To make the required showing of prejudice under Brady, Watkins must demonstrate that "a reasonable probability exists 'that the result of the trial would have been different if the suppressed [evidence] had been disclosed to the defense.'" Conley, 415 F.3d at 188 (quoting Strickler v. Greene, 527 U.S. 263, 289 (1999)). That does not mean that Watkins must prove that the trial certainly would have come out in his favor if he had been given access to the exculpatory evidence that was withheld from him. It means that he must show only that "the Government's evidentiary suppression undermines confidence in the verdict." Id. (citing Kyles, 514 U.S. at 434). The majority concludes, however, that Watkins has failed to make even that showing.

[19] I note, additionally, that undertaking de novo review under these circumstances is not inconsistent with this Court's past application of § 2254(d)(1) deference to a mixed question of law and fact. See Teti, 507 F.3d at 57; cf. also Conley, 415 F.3d at 188 n.3. While Teti's analysis focused on whether the state court had "unreasonabl[y] appl[ied] . . . clearly established [f]ederal law," 507 F.3d at 57 (citation omitted), the petitioner in that case had not refuted the state court's factual findings and so the question on appeal was whether the legal conclusion that flowed from those facts was unreasonable, id. at 60–63. By contrast, in Watkins's case, the SJC has not in fact made a determination concerning prejudice that is not based on the clear factual error that it made about the police report.

The majority rests that conclusion in part on the fact that the record shows that Watkins knew before trial that Rudolph had received a benefit in exchange for his testimony through Rudolph's deal with the Commonwealth, in which the Commonwealth had promised to advocate for Rudolph's early release from the prison sentence that he was then serving for having been convicted of dealing drugs in a school zone and unlawfully possessing a firearm. Relatedly, the majority points out that the record shows that Watkins also had other evidence available to him before trial from which a juror could draw the possible "inference that Rudolph implicated Watkins" in Coombs's murder "in order to exonerate himself and his brother" from suspicion for that same crime. Maj. Op. at 29–30.

In my view, however, the majority fails in highlighting those features of the record to grapple adequately with two ways in which the police report would have materially augmented Watkins's effort to impeach Rudolph, the crucial witness against him, notwithstanding the impeachment evidence that Watkins already had in hand by the time of the trial. See United States v. Flores-Rivera (Flores I), 787 F.3d 1, 19 (1st Cir. 2015) ("[T]he fact that the defense had some tools to attack [a star witness's] testimony hardly dismisses the potential of different tools as merely cumulative."), superseded by statute on other grounds as stated in United States v. Smith, 954 F.3d 446, 448 (1st Cir.

2020). I thus cannot subscribe to the majority's conclusion that, because of the aspects of the record that the majority emphasizes, Watkins has failed to show the requisite prejudice.

First, the police report is material to Watkins's effort to impeach Rudolph, notwithstanding the evidence that Watkins did have on hand at the time of trial, because that report provides a basis for inferring the existence of a tacit "deal" between Rudolph and law enforcement regarding Rudolph's testimony against Watkins at trial that pertained to the confession that Rudolph made regarding the finger-shooting incident that was not otherwise known to Watkins. For, while the majority is right that Watkins knew before trial about the actual deal between Rudolph and law enforcement regarding Rudolph's testimony against Watkins at trial that could help spare Rudolph from having to serve some prison time for the crimes for which he had already been convicted and sentenced, this unknown tacit deal would have helped Rudolph in a very different way, by ensuring that he would not have to go back to prison after he had served his time for those prior crimes.

Notably, the SJC did not dispute that the police report showed that Rudolph confessed to law enforcement to having engaged in criminal conduct in connection with the finger-shooting incident that potentially gave rise to serious new charges -- unlawful possession of a firearm and intentionally making a false report of a crime to the investigating officers, see, e.g.,

Commonwealth v. Fortuna, 951 N.E.2d 687, 693 (Mass. App. Ct. 2011) (affirming conviction of making false report of a crime for defendant who, after being hospitalized for a close-range and possibly self-inflicted gunshot wound, told responding officers that he had been shot from afar by an unknown assailant) -- and thus potentially to additional prison time beyond that which he already had been sentenced to serve. Nor did the SJC hold that the police report provided merely cumulative impeachment evidence insofar as it supported the reasonable inference that Rudolph was motivated to testify against Watkins out of a concern that he otherwise might face such serious new charges due to the confession that he had made to law enforcement in relation to the finger shooting. Instead, the SJC held only that the police report provided no support for such an inference, because nothing in the police report indicated that the law enforcement officers to whom Rudolph confessed to having shot himself even knew that Rudolph (to use the police report's phrasing) "became a witness" against Watkins.

But, of course, the SJC's factual determination about what the law enforcement authorities to whom Rudolph confessed knew about Rudolph's relation to the case against Watkins was plainly wrong. And, thus, the SJC, in finding the police report to be merely cumulative of the evidence that Watkins already had at the time of trial, did so only based on a misapprehension about

what that report shows. Moreover, it is clear to me that, once this misapprehension is corrected, the police report could support a reasonable inference that Rudolph was testifying against Watkins in part to stave off additional prison time that his formal deal did not encompass, given that the police report shows that Rudolph knew that he had confessed to additional crimes to law enforcement authorities who he knew were aware that he had become a witness against Watkins. For, in the face of evidence showing as much, it would certainly be reasonable for a juror to infer that Rudolph was of the view that his decision to go forward with his testimony against Watkins would help him avoid being charged for those new crimes.

Second, the police report is material to Watkins's effort to impeach Rudolph by revealing an instance in which Rudolph made false accusations that implicated Watkins (as they implied that Watkins's associates had gone after Rudolph violently because Rudolph was a potential witness against Watkins) to deflect the police's attention from Rudolph's own, possibly criminal, conduct -- namely, unlawfully possessing a firearm during the finger-shooting incident. The police report further reveals that, when pressed, Rudolph conceded that those accusations were false. The police report thus raises the following new question that no other evidence that Watkins had before trial did: if Rudolph was willing to protect himself by lying once about who committed a shooting by

implicating Watkins in that offense, wouldn't he be willing to do it again? And, the police report also raises one additional new question that is closely related: wouldn't Rudolph be especially willing to do just that if doing so would spare him from being subjected to a new felony conviction and yet more time in prison than he already knew that he might have to serve for the crimes for which he already had been convicted?

Perhaps aware of these difficulties with deeming the police report to be merely "cumulative" of the impeachment evidence that Watkins did have access to before trial, the majority does also assert that his Brady challenge to the report's non-disclosure fails for an independent reason. Here, the majority contends that, even if the police report were not merely cumulative of the other evidence that Watkins had in hand prior to trial, "competent defense counsel would not have chosen to introduce the finger-shot report to the jury" due to that report's potential to prejudice Watkins's own case by "opening the door" to the uncorroborated allegations that Rudolph had made about Watkins's associates having threatened him for agreeing to testify against Watkins. Maj. Op. at 30, 32.

This contention, however, is not one that the SJC itself advanced, the District Court relied on, or the Commonwealth thought sufficiently strong to be worth pressing to us in this appeal.

And, it is easy to see why those closest to the case have not thought much of this ground for denying Watkins's Brady claim.

The police report does state that Rudolph maintained to the police that he had been receiving threats, and the record does also show that Rudolph, in his deposition testimony, had referenced threats having been made against him by someone connected to Watkins. So, it is true that the use of the police report did present some risks. But, at the same time, the police report reveals an instance in which Rudolph sought to protect himself by lying about the nature and extent of threats connected to Watkins by inventing a story about a gun-wielding attacker to explain his gunshot wound. Thus, the majority arguably has it backwards in reasoning that, because Watkins's trial counsel acted competently in deciding not to use the evidence of Rudolph's prior recantation for fear that using it would open the door to Rudolph's allegations of threats by Watkins's associates, "competent defense counsel would not have chosen to introduce the finger-shot report to the jury." Maj. Op. at 32. And that is because the police report provides a hitherto unavailable means by which the prejudicial impact of introducing Rudolph's prior recantation could be mitigated, given that the police report contains evidence that tends to undermine the credibility of Rudolph's allegations about the threatening behavior of Watkins's associates in a way that no other evidence in the record does.

In making this observation, I am not suggesting that we may weigh the potential for the police report to bring Rudolph's private, pre-trial recantation back into play in assessing the prejudicial impact of the police report's non-disclosure. I am suggesting that the very fact that the police report might have that effect illustrates the problem with speculating that because Watkins's counsel made the permissible strategic choice not to use the evidence of the prior recantation, a reasonably effective defense counsel necessarily would not use the withheld police report. After all, the question that we are trying to answer is whether Watkins can show that "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles, 514 U.S. at 441 (emphases added). And, although the majority purports to "take an objective view of what competent counsel would do" in reaching the apparent conclusion that no competent counsel would have introduced the withheld police report, Maj. Op. at 30 n.15, the fact that Watkins's counsel was deemed competent in choosing not to introduce entirely different evidence hardly shows, objectively, any such thing. See Strickland v. Washington, 466 U.S. 668, 689 (1984) ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."). Thus, while it is true that no direct evidence definitively establishes that

Watkins's trial counsel would have used the police report, what matters is that -- as I have explained -- there is good reason to think that a competent defense counsel would have done so.[20]

IV.

In sum, after reviewing Watkins's Brady challenge de novo, I am convinced that the fact that the police report was withheld does undermine confidence in the guilty verdict that the jury rendered.[21] Rudolph's testimony identifying Watkins as the shooter was the key evidence for the state at trial and that testimony was hardly rock solid. Thus, it does not stretch the imagination to think that the police report would have been the straw that would have broken the camel's back, when that withheld evidence would have enabled Watkins to develop a plausible and

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[20] To the extent that the majority is suggesting that to show prejudice Watkins was required to introduce expert testimony showing that competent counsel would have used the withheld police report at his trial, it offers no authority to support such a requirement, nor does the state itself advance any such argument. Maj. Op. at 25–26.

[21] Although my analysis has focused on the prejudicial impact of the prosecution's withholding of the police report, I note that this conclusion is only reinforced by the evidence contained in the transcript of Rudolph's dangerousness hearing -- also the subject of a Brady claim by Watkins. That transcript shows that at that hearing, Rudolph had, in his telling, unsuccessfully "s[ought] not to be held" without bail by claiming that "the only reason why" he had a firearm was that he was "involved in a murder case" and was "being threatened" as a result. Upon being denied bail, Rudolph remarked to the judge, "[s]o, now what happens when the murder case comes up? Am I to come to court bright eyed and bushy tailed and testify against somebody else after this? That's not fair, your Honor. It's not fair."

coherent account of why Rudolph was not to be believed that Watkins otherwise could not make.[22]

That is not to say that we may lightly find that a failure to disclose evidence in a timely manner is prejudicial for Brady purposes. It is to say that we must not construe Brady's prejudice prong so strictly that it becomes, in effect, an automatic means of excusing concerning law enforcement practices that remain too frequent. See, e.g., United States v. Nejad, 487 F. Supp. 3d 206, 213-14, 225-26 (S.D.N.Y. 2020).

We recently recognized the need to be attentive in applying Brady's prejudice prong to the ways that impeachment evidence can shift a jury's thinking in a case that heavily depends on the testimony of a cooperating witness. See Flores-Rivera v. United States (Flores II), 16 F.4th 963, 965, 967-69 (1st Cir. 2021); Flores I, 787 F.3d at 18.[23] If we are just as attentive to

[22] I note that the state makes no contention that the other evidence on the record against Watkins was in and of itself so overwhelming that he cannot show the requisite prejudice for that reason alone. See Smith v. Cain, 565 U.S. 73, 76 (2012) ("[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."); Wood v. Bartholomew, 516 U.S. 1, 8 (1995); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (observing that arguments not developed on appeal are deemed waived).

[23] The majority suggests that Flores II and Watkins's case are worlds apart due to the evidence in the record here that corroborated a key witness's account against Watkins. Maj. Op. at 33-35. But, even though the record in Flores II contained video evidence that could have inculpated the defendant there, we still found that the defendant had shown the requisite prejudice from being denied access to evidence she was entitled to see because of

the possible power of impeachment evidence to undermine confidence in a verdict here, then I am convinced that -- given that in this case, too, a single cooperating witness's testimony looms large -- we must conclude that Watkins has proved the prejudice that Brady requires. For that reason, I am convinced that "law and justice" require that we grant his federal habeas petition. Shinn v. Martinez Ramirez, No. 20-1009, 2022 U.S. LEXIS 2557, at *18 (U.S. May 23, 2022) (quoting Brown, 142 S. Ct. at 1524).

I therefore respectfully dissent.

how much the case hinged on the testimony of cooperating witnesses. 16 F.4th at 968-69.

United States Court of Appeals
For the First Circuit

Nos. 20-1108
20-1194

KYLE WATKINS

Petitioner - Appellant

v.

SEAN MEDEIROS, Superintendent

Respondent - Appellee

Before

Barron, Chief Judge,
Lynch, Thompson, Kayatta and Gelpí, Circuit Judges.

ORDER OF COURT

Entered: August 4, 2022

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Janet Hetherwick Pumphrey
Kyle Watkins
Susanne G. Reardon