

SUPREME COURT OF THE UNITED STATES

Docket Nos.

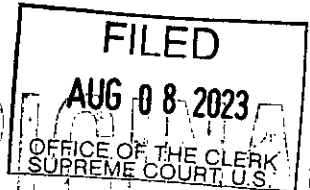
23-5474

PETITION OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Abder Salim Pro se
Petitioner

vs

Stephen Kennedy
Respondent



ORIGINAL

Date: July 24, 2023 8-21-23

ASALIM

Abder Salim Pro se
W38284
Old Colony Correction Center
One Administration Rd
Bridgewater, MA 02324

QUESTIONS PRESENTED:

1.) Given that petitioner is from Palestine, His English has always been poor, his second language is Spanish,, his history with mental health in years leading up to the arrest, his recent diagnosis having profound dementia, Shouldn't his lateness in filing habeas petition based upon the 2005 DNA test of blood under the victim's fingernails be excused- especially since contrary to the prosecution in summation that it was your petitioner's blood, the 2005 test establishes concretely that it was not his DNA?

2.) Based upon his (your petitioner's) established mental impairment, shouldn't his being unaware of his previous habeas petition (from 1989) and thus his helper's failure to properly move the First Circuit for leave to file successive petition be excused? Respondent did not produce the previous petition, and the disposition was not published on the prison law library computer.

When he filed his appeal to First Circuit Court of Appeals he did contemporaneously file motion for leave to file successive petition.

3.) Was it error for the Court of Appeals for the First Circuit to refuse to consider the March 2022 medical report of Dr. Nichole Mushero diagnosing petitioner with dementia for the limited inquiry of tolling the filing time for habeas corpus where respondent (superintendent of prison) and his staff prevented it from being discovered any earlier?

List of All Parties:

Abder Salim Pro se

Inmate Number W38284

Old Colony Correction Center

One Administration Rd

Bridgewater, MA 02324

Petitioner

Stephen Kennedy

Respondent/ Superintendent

Old Colony Correction Center

One Administration Rd

Bridgewater, MA 02324

Todd Blume

Assistant Attorney General for Massachusetts

Counsel for Respondent

Office of the Massachusetts Attorney General

Criminal Bureau

One Ashburton Place

Boston, MA 02108

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Jurisdictional Statment:

The Supreme Court of The United States has primary appellate jurisdiction in all cases under Article III section II of the United States Constitution. Specifically Abder Salim suffered a fatal Due Process violation under the Fourteenth Amendment when the prosecution stressed in summation to the jury that the scratches on Salim's face were caused by the victim in her death throes, and that it was Salim's blood under her fingernails. The Massachusetts Supreme Judicial Court in affirming reiterated this false condemnation Com v Abder Salim 399 Mass 227, 230, 231-233 (1987). DNA analysis was not scientifically possible at time of trial and was financially unavailable until around 1995 or thereabouts. In 2005 the Court allowed Salim's motion to test the DNA under the victim's fingernails, (blood evidence) and the result was no male DNA detected. In other words, the scratches upon Salim's face were not caused by the victim, and that Salim's explanation that in his region of Palestine it is a common expression of bereavement to scratch ones self or otehr self abuse, which, although strange and foreign in this geographical region, not so strange in Salim's native Palestine. (see appendix pgs 73, 74)

As on point for relevant jurisdiction in the instant pleadings, the Commonwealth through counsel has successfully argued that Salim's petition should not be granted because it was untimely, and that it was an unauthorized second petition.

But Salim has provided ample evidence and legitimate excuse why the clock should be tolled- he has documented mental health history dating to before the crime was committed, his language is Arabic, and the second language he learned was Spanish, his English has never been good, his counsel in 2005 when the DNA result was established ADVISED SALIM THAT THE DNA RESULT WAS WORTHLESS BECAUSE IT DID NOT POINT TO AN ALTERNATE SUSPECT. Salim is a person who is significantly impaired and that was what counsel told him. It took many years for Salim to find inmate to help him and find the blunder and fashion coherent pleadings. So specifically to this issue of tolling this Court's jurisdictional inquiry should be under 28 USCS section 2254(e)(2)(A)(ii), "a factual predicate that could not have been previously discovered through the exercise of due diligence..." Please examine Grillette v Warden 372 F3d 765 (5th Cir 2004) where several different grounds for tolling existed and counsel in that case was arrested for using and manufacturing crystal meth and refused to hand over the accused's legal papers.

Salim has also proferred a late filed exhibit that the First Circuit accepted, a newspaper clipping from 1972 which documented the blood feud between Salim's and his wife's families, and numerous affiants that heard Salim's father admit to having killed the victim along with Hamdi,

The First Circuit erred when it refused to consider a previously unavailable report of Salim's profound dementia. General jurisdiction at Title 28 section 1254(1) USC.

Salim's one and only actual appellate review was on Decided Feb. 17, 1987 (direct appeal) by the Massachusetts Supreme Judicial Court Com v Abder Salim 399 Mass 227 (1987) (appendix 46). The issues of the instant pleading of the DNA under the victim's fingernails was denied by the trial court as his fifth motion for new trial, (even though two of his new trial motions were consolidated) on Sept. 3, 2019, (appendix 40). Your petitioner applied to the Supreme judicial Court pro se in so-called gatekeeper petition, and that was denied July 9, 2020 by Single Justice (appendix 33). United States District Court Magistrate M. Page Kelley made a recommendation to deny petitioner's habeas corpus petition August 16, 2021 which appellant lodged an objection to (appendix pg 7). United States District Court Judge Patti B. Saris adopted Magistrate's opinion in a one sentence handwritten denial dated Sept. 10, 2021 (appendix 5). Petitioner timely appealed to First circuit Court of Appeals. That Court affirmed petitioner's denied habeas corpus March 28, 2023, (appendix 1). (timely notice of appeal to file with the First Circuit Court of Appeals at appendix 4). Petitioner filed timely request for rehearing en banc. Rehearing en banc was denied by the First Circuit June 6, 2023, (appendix 43).

Petition for certiorari was docketed as received by supreme Court of the United States Aug. 15, 2023 and returned to petitioner with instruct to correct missing items from jurisdictional statement and more elaborate financial statement.

OPINIONS BELOW:

Petitioner Abder Salim's wife was murdered by multiple punctures and other bruising injuries on July 28, 1978. Salim was called that evening to the school to pick up his children because it was usually his wife who did so. When he and the children arrived at the family home they discovered Fatima Salim dead on the floor.

The police were called. Lt Duemling and Lt Frechette made lots of notations about Salim scratching his own face. They told him to stop that. Salim was crying. He was indicted for his wife's death shortly after. His first trial ended in mistrial Feb. 12, 1980. At this juncture it is material to note that in Salim's first trial witness Carmelo Montanez testified he was Salim's brother in law's driver (Hamdi) who around the time of the murder ordered Carmelo to pull over a short walking distance from Salim's house at which point he exited the van for an amount of time and returned. At Salim's second trial midway through the proceedings Lt Duemling and Lt Frechette took Carmelo Montanez from the courthouse for "a ride" in an unmarked cruiser and when they returned to court, Carmelo Montanez had changed his testimony to something radically different- he was told to pull over the van a much longer distance away from Salim's home, and also different was that Hamdi only exited the van a couple minutes instead a much longer one depicted in the first trial. Salim was found guilty June 1, 1981.

There were four previous motions for new trial, most pro se, (filed by inmates for Salim) and one counseled. None of them were granted appellate review by the state's highest Court, (FAR denied). The fifth and gravamen of the issues of this instant pleading similarly was not granted further appellate review, and Salim has been pro se from the trial court where his present jailhouse lawyer took him, to the Massachusetts Supreme Judicial Court, (FAR denied) to the United States District Court, then the First Circuit Court of Appeals, then request for rehearing en banc, and now here on the doorstep of The Nation's Highest Court- all pro se. There are no published reports of any of his first four motions for new trial, not in the trial court, and not the SJC. The Commonwealth of Massachusetts made their summary dismissal (FAR denied) in the SJC unpublished.

It is not easy at this stage of the pleadings to parse out the pleading history because Salim did not keep good records. Salim is also given to periods of fugue state where he has cognitive disconnect. Within the past year he was given some previously unavailable evidence- he has profound dementia. The respondent superintendent of the prison Stephen Kennedy and his administration have systematically kept Salim from any medical experts that may wish to treat dementia because Kennedy knows that would be a grounds for medical parole in Massachusetts. A charity legal help organization,

24,

Jose Rosario never came to trial to testify, however the police read ~~the~~ ^{his} statement at both trials that he allegedly gave to them.

The district attorney was allowed to do this because the district attorney told the court that Jose Rosario was unavailable to testify. But that was not true because he was in the House of Correction.

His statement was the same statement as Edwin Marcandp

..Prisoner Legal Services, (50 Federal Street 4th Floor, Boston, MA 02110) sent a doctor to examine him in the non privacy of the prison visiting room, and thats where the previously unavailable evidence that Salim has profound dementia came from, (report of Nichole Mushero, MD appendix ~~66-72~~). This is of course Salim's third question for the Court, whether it was error for the First Circuit to refuse to consider Dr. Mushero's report for the limited inquiry of tolling the clock for Salim's unusually long time to file Federal Habeas Corpus, (the DNA test result was 2005, but his counsel told him its worthless), and to excuse his lapse in failing to first move for leave to file successive petition where he is largely incoherent, there is not report of previous petition for habeas corpus on the prison law library computer, the respondent's counsel did not provide said report, it was only provided by Magistrate Paige Kelly in her lengthy condemnation of Salim's petition for habeas corpus. Magistrate Kelly (who might be judge now) did admit in her condemnation that the respondent did not provide a copy of the disposition of previous petition by Judge Mazzone (1987), (appendix ~~66~~ n.7).

One of the previous motions for new trial raised the issue of first trial witness Edwin Mercado; submitted an affidavit that Salim's brother in law Amin Hamdi, (Salim's doppleganger) and another man offered him money to say Salim killed his wife- Mercado was unavailable at second trial,

and his first trial testimony was admitted over objection, (probable cause hearing testimony from first trial).

Another affiant was also proffered in that first motion for new trial, Jacobo Reyes who never testified at either Salim's first or second trials, but he offered testimony by affidavit that Amin Hamdi and another man offered him money to say Salim killed his wife./ Unlike Mercado he flatly refused, (appendix ~~107-119~~) both affidavits which trial court flatly rejected).

At some point Salim was advised by another jailhouse lawyer to claim denial of Due Process because his attorney failed to have him plead not guilty by insanity, not understanding that is akin to adoptive admission of guilt. That motion flatly denied without hearing.

Another motion for new trial was filed by paid counsel raising the issue of untested DNA under the victim's fingernails and nine affiants whom all had personally heard Amin Hamdi, or Salim's father Bishara, and some both admit having conspired to kill Salim's wife Fatima. These are in the appendix ~~120-149~~

including a plainclothes New Bedford police detective (Westgate) at a barbeque, and a prominent Muslim Imam who was an attache and advisor to United States president Barack Obama. (Please see appendix pgs ~~131 - 141~~).

These are not presented as constitutional issues, but merely to establish the whole trial was thoroughly infected with non harmless constitutional error.

United States Magistrate Paige Kelly who wrote the recommendation to dismiss Salim's habeas petition stated in it that the evidence was overwhelming against Salim, (appendix 11). Yet the trial judge in Salim's first trial commented that this was not an overwhelming case of guilt Tr 4250 (first trial). And the trial judge in Salim's second trial also commented on the underwhelming case of the prosecution, Tr 1389 (second trial). United States Magistrate Paige Kelly also commented that Salim is incapable of drafting coherent pleadings himself, (appendix pg 18 n.9). Yet United States District Court Judge Patti Saris issued a one line ruling saying she agreed with Paige Kelly no other comment given other than COA would issue, which Paige Kelly had opined against.

Judge Patti 'Saris' ruling appendix 5, 6 ,(not yet listed on the law library computer at the prison- no cite available).

The Court of Appeals for the First Circuit issued a short brief ruling denying the appeal without referring to any evidence, only Paige Kelly's recommendation, appendix 1, 2 ,(no cite available yet on the prison computer.

Salim timely filed for rehearing en banc which was denied June 6, 2023 without any reference to evidence. (appendix 43).

The sole issue at Bar is the DNA evidence of the blood under the victim's fingernails and the wrong treatment he got.

At some point, (it is unclear from the record, two separate motions for new trial were amalgamated into one motion, and this writer does not know which two) and that is the history of Opinions below. The first habeas corpus petition that made the instant one a successive petition is an unpublished opinion parroting each issue and argument that the direct appeal raised and was rejected by the Massachusetts Supreme Judicial Court, Com v Abder Salim 399 Mass 227 (1987).

Those were seven issues with the main one being that Salim's second trial counsel (counsel for second trial) had an illegal fee arrangement. Salim's appointed appellate counsel Jane White spent (according to her work sheets) most of her energy trying to prove Salim was secretly rich and appointed counsel was inappropriate. Salim will provide the previous habeas disposition that was unreported, his ability to mail large packages is weak. It has the same issues as his direct appeal, (Appendix 54-64).

Statement of The Case:

Salim's wife failed to pick up their two children at ABOK 4:30pm from school on Friday July 28, 1978. Two school teachers at that school called Salim at his store, (he was self employed and had some employees) and requested he pick up their children. The two teachers were Patricia Guymont, and Patricia Meade, (appendix 84, 85). Patricia Meade testified of his appearance and mood just minutes before he

and the children discovered Mrs. Salim, (her name was Fatima) dead on the living room floor of their family home. Patricia Meade testified he was cheerful and there was nothing unusual about him. Don't you think that if Salim had deep scratches on his face and neck that bled for most of the afternoon as the prosecution stressed, that the two teachers would have made a different comment about his appearance just minutes before finding the body?

In Salim's rescript from the Massachusetts Supreme Court, 399 Mass 227, at 233:

"The scratches on the defendant's neck, face, and collar bone were consistent with injuries which may have been inflicted by the victim's last struggle.....The jury were not required to believe that the defendant's scratches were the result of his mourning..."

Here's what the prosecutor stressed in summation at Salim's

(Tr of second trial pgs 2299 to 2301:)

"...the scratches on his face..but it shows the scratches down in this area...the only part you can.. reach would be there...with a person doing this.. and the victim reaching back...and what did the chemist state to you?...that there were small bits of blood underneath the fingernails, and those scratches are perfectly consistent. And remember what the defendant said about those scratches.....And remember this... (Detective) Al Duemling also testified to you that as he scratched the marks went down and then sort of disappeared, but those deeper scratches with little bits of blood, consistent with what was found under the fingernails, those didn't go away.."

In 2005 after much opposition from the Essex County District Attorney the judge allowed bits of blood under Fatima's fingernails to be DNA tested but only if Salim paid for the testing, (\$3,000.). Result? No male DNA detected, (appendix ⁸⁶).

At the very least Salim has established that Fatima did not scratch him on July 28,,1978, so that portion of the SJC mantra and the D.A.'s theory was/is false.

What else did the SJC say in affirming?

"Taken together, this MOSAIC of evidence consisting of of PHYSICAL EVIDENCE, the tools, the physical abuse of the victim by the defendant shortly before the murder, the threats to kill her, the repeated offers of money to others to kill her...."

Id at 233.

There were two witnesses who testified that Salim offered them (separately) \$2,000. to kill his wife.

They were Edwin Mercado, and Jesus Rosario. Rosario only testified at Salim's probable cause hearing where he was available to cross examination. Edwin Mercado testified at Salim's first trial which ended in mistrial, and was missing and declared unavailable for second trial- Both missing witnesses testimony was allowed in recorded form over objection to be recited to the jury at second trial. In 1995 Mercado recanted his testimony and executed and affidavit in Spanish and English that the police came to California to get him and told they would get his charges dismissed if he would testify against Salim and lie about him offering him \$2,000. to kill his wife. Although he maintained Salim had asked him for a gun, Salim did not say what he wanted it for (appendix 107-114).

Although Jesus Rosario never showed up for trial his similar lie carried the day when his testimony was recited

to the jury of the second trial. Interesting also in 1995 a certain Jacobo Reyes who never testified at any trial, or hearing against Salim, provided an affidavit that he was approached by Salim's brother in law Amin Hamdi July 29, 1978 at Jacobo Reyes' home along with another man, According to his affidavit, Amin Hamdi urged Reyes to lie and testify against Salim and say that he asked him to kill his wife for him. Hamdi offered him money and a job. "I threw him and the other man out of my house and notified a Spanish speaking officer Walter Soriano.. "Despite this ugly beginning to a working relationship Hamdi nonetheless offered me a job. I worked for him three years." (appendix 115-119)

This indicates that there was credible evidence over the years since the conviction that some major dishonesty went into Salim's conviction. These affidavits were the substance of one of Salim's new trial motions.

They are not offered here as constitutional issues, but exemplar of a trial that was infected with nonharmless constitutional errors. When there is police misconduct in fashioning false evidence, Due Process rights under the 14th Amendment is triggered by appellate courts of any jurisdiction.

In Salim's first trial two of his brother's testified that Salim's father Bishara forbid any of the brothers to visit Salim and his wife because she was non traditional, Tr of first trial pgs 2029,30 appendix 76,77)..

This evidence for some unknown reason was not introduced at Salim'sst second trial. It was Salim's contention all along that Bishara and Hamdi killed Fatima because the families of Fatima and Salim had been in a blood feud for decades. That defense theory never gained traction until Salim kept sending bundles of papers stapled together piggybacked to what this writer gave him to send to the court on these issues. Although they were not specifically mentioned in the certificates of service the First Circuit Court of Appeals did rule them admissible as they bear the United States District Court time stamp- but then they considered them not at all.

One of these papers Salim kept sending without explaining why to anyone, (he is not articulate) was a 1972 Logan Airport News article (appendix 75) with the headline, "Romeo and Juliet Lebanese style" Dec. 12, 1972

Please take the time to read this as it chronicles the arrival in United States of Fatima freshly married to Salim and it memorializes how she doused herself with gasoline and threatened to kill herself if the two families would not let them marry, and how Salim's father Bishara kidnapped Fatima from the airport when her feet had not been on American soil longer than five minutes leaving Salim, crying "My wife! My wife!"

Palestinian customs are strange to Americans. But both Salim's and Fatima's families were outraged that Fatima

not only entered a beauty contest, but also posed for photographs in a bathing suit. Tame stuff for an American. Not so for traditional Islamic families in and from Palestine.

Numerous people submitted affidavits around 2005 that they heard Bishara and Hamdi admitted to conspiring to kill Fatima, and efforts to frame Salim. One affiant was an off duty plainclothes New Bedford Massachusetts Police detective at a barbeque. Another was a prominent Imam and member of a President's council, (appendix 120-149). Judge Welch gave up on Salim's case when all of Judge Welch's efforts to bring two exculpatory witnesses from Jordan who were percipient to Bishara and Hamdi admitting they killed Fatima wound up scuttled by U.S. officials who stated that an American citizen was afraid of the two witnesses. Thus they were blocked from entering the country. That un-named person has since died, and Salim's chances of reconnecting with people in the Old Country that knew both Bishara and Hamdi are slim now that Salim's mother has died.

These are not brought as constitutional issues, but only to establish that the entire trial was infected with non-harmless constitutional error. In the interests of justice for an old man that has been in prison since 1978 with the exception of a few months on (\$1,000. bail- he could have taken off with his passport and not come back. He believed in the American justice system- he says he is American citizen). Through the prism of the DNA evidence the Court should

look at all the Due Process violations, and excuse Salim's tardiness in filing when the evidence came in 2005.

Salim has excusable neglect. The clock should be tolled under several different theories. The lapse Salim displayed in failing to file motion with the First Circuit Court of Appeals on time for leave to file successive petition is excusable neglect.

Seemingly lost to the sands of time is the major sea change in testimony of witness Carmelo Montanez who was Amin Hamdi's van driver, (Amin Hamdi had no driver license). At Salim's first trial, Carmelo Montanez said that Hamdi asked him to pull van over and park a short walking distance from Salim's house in the middle of the afternoon. That trial had hung jury. Midway through the second trial, Police Detectives Frechette and Duemling took Carmelo Montanez from the courthouse in an unmarked police cruiser for a ride, and when they returned Carmelo Montanez had dramatically changed his testimony now stating that Hamdi had him pull the van over a much longer walking distance away from Salim's house and unlike the first trial in which he said that Hamdi exited the van and was gone a significant amount of time, he now said that Hamdi was gone only a couple minutes. All this over defense counsel's objection.

(Tr. 367, 368 voir dire of Frechette)

The point is that Salim's second trial was infected from start to finish with nonharmless constitutional error, and therefore the late discovered, late filed should be fully

considered as properly filed nunc pro tunc.

Procedural errors by a pro se inmate who never fully grasped written or verbal English, who was misled by his counsel in 2005 as to the worth of the DNA evidence, and who at some point in time developed dementia that was not discovered earlier because respondent Stephen Kennedy and his subordinates effectively shut him out from discovering, or treating his dementia, should not be the last word in this case.

Legal Argument With Authorities:

The Court of Appeals for the First Circuit refused to consider Salim's plea for equitable tolling de novo despite the fact that Salim proffered DNA evidence not available at his trial in 1981 nor for his direct appeal by the Massachusetts Supreme Judicial Court in 1987, Com v Salim, 399 Mass 227, and disproves the larger portion of the prosecution's calculus and theory of guilt. This was error of law, House v Bell 547 US 518, 539, 540 (2006); McQuiggin v Perkins 185 LEd 2d 1019, 1027 (2013). Instead, they relied upon the recommendation of then Magistrate for United States District Court Paige Kelly even though Salim proffered excellent examples of where the Magistrate contradicted herself in her scathing opinion, (appendix 11; 18, n.9; 16, n.7)..

Salim's post conviction pleadings fall into three categories: One, are those which he prepared himself. They are typically typed crudely in all capital letters, with gross misspellings, and are generally incoherent. Two, being those also pro se pleadings which Salim managed to pay an inmate to prepare for him. These tend to be typed, but seldom have a proper basis in law or fact. Three, being the few times when Salim had benefit of counsel.

Salim has extremely poor grasp of legal concepts. Exemplar of this is his insistence on repeatedly mailing photocopies of cancelled checks from over forty years ago which he addresses to the courts in hopes that this somehow will change the minds of the courts to release him because someone mistakenly told him a long time ago that if he had to pay his own money to an attorney at the same time when that attorney is an appointed by the court attorney because of his indigency, then somehow thats a magic ticket out of prison. Its been explained that there was no illegal fee arrangement. There was a contingency explained to him that if he's acquitted and collects the victim's life insurance policy only then will he have to reimburse the state for what they spent on his appointed counsel, AND that it is acceptable to entrust small cash to appointed counsel to hire expert or experts.

The point being that Salim's understanding is weak.

Only in March 2022 did it finally be proven that Salim has profound dementia, (appendix ~~66~~-72). Even before the onset of this often age-related illness, Salim had significant mental impairment, (appendix ~~90~~-107). His English has always been poor, and he has NEVER understood written legal concepts. His second language is Spanish. Although he did a moderate business in Lawrence Massachusetts as keeper of his own shop, this does little to shed light on his abilities to understand law to effectuate his own pleadings. U.S. Magistrate Paige Kelly in condemning Salim's petition for habeas corpus admitted partway that Salim probably is incapable of drafting effective pleadings, (Report and Recommendation appendix ~~18~~ n.9).

The DNA test in 2005 which Massachusetts trial court insisted Salim pay for, (Around \$3,000.) was won by appointed counsel and as quickly abandoned by same counsel telling Salim the result was worthless. That counsel instead proffered numerous affidavits who heard Salim's father Bishara and Salim's brother in law Amin Hamdi admit to conspiring to kill Fatima Salim. Did this make sense? No. The affidavits were good evidence, but adding the DNA test result would have only strengthened Salim's position, (appendix ~~120~~-149) produced the affidavits, and pg 16 of this brief for excerpts of trial record and rescript indicating prosecution reliance

on the scratches upon Salim's neck and face coupled with blood under the victim's fingernails before DNA test proved it was not Salim's blood.

But the entire trial was infected with non harmless constitutional error; the tuft of hair stuck to victim's wrist belonging to neither Salim nor the victim, (appendix ~~81~~ 81). The green textile fiber under one of the victim's nails, where the prosecution insisted Salim wore a white and brown striped shirt to murder the victim, while changing afterwards to a green shirt to hide the blood, (appendix ~~81, 88, 89~~ 81, 88, 89). The late presented gateway evidence of the Logan Airport News December 12, 1972 captioned "Romeo and Juliet-Lebaanese Style" which corroborates Salim's insistence that his own family did this as there had been a blood feud, (appendix ~~75~~ 75) also two of Salim's brothers testified at Salim's first trial, but not at his second trial. Excerpt of the first trial testimony of those two brothers indicated that Salim's father was enforcing an ostracisation of Salim for crossing feud lines to marry Fatima, (appendix ~~76, 77~~ 76, 77).

Salim's late filed DNA evidence does not, could not, go stale after the results had solidified. The prosecution can point to no prejudice from Salim's understandable and excusable delay. This Court has held that unjustified delay does not automatically foreclose appellate review of DNA.

"...in a Federal Habeas Court, faced with an actual innocence gateway claim, should count unjustified delay NOT as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown..."

McQuiggin v Perkins 185 LEd 2d 1019, 1027 (2013)

"...presents evidence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non harmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims..."

Schlup v Delo 513 US 298, 316 (1995)

This Court also held in McQuiggin supra that the AEDPA statute of limitations, instead of being tolled equitably incorporates an equitable exception for showings of actual innocence, 133 S. Ct. 1924, 1931 (2013)

Salim has not had a fair shake in Court ever. For one thing he's Palestinian. At the time of trial he was lumped into same category as terrorists and hostage takers despite the fact he says he is an American citizen and had an American passport and he believed in the American justice system and did not flee when on only \$1,000. bail when first trial ended in mistrial the judge released him on bail.

Think about the scratches on Salim's face. Two school teachers minutes before Salim returned home to find his wife's body testified there was nothing unusual about him. (appendix 84,85).

Think about Salim's myriad of mental impairment factors.

"We do not doubt that a physical illness or other health issue could also justify equitable tolling if that issue was severe enough to actually prevent timely filing..."

Riva v Ficco 615 F3d 35, 39,40 (1st Cir 2010); Holland

v Florida 560 US 631, 649 (2012); McQuiggin, supra, generally.

Question Two:

Similar in legal theory why Salim should be excused for failing to move the Court of Appeals First Circuit for leave to file successive petition. U.S. Magistrate Paige Kelly admits in her condemnation that the respondent never served upon Salim, nor upon the Court a copy of the previous habeas petition disposition. There was an order of a judge ordering the clerk to serve Salim a copy of the previous petition which never took place. (see appendix ~~16~~ ^{n.7} where Magistrate Kelly admits Salim was not served). The disposition of that previous petition was never published on the prison law computer, (we have zero lawbooks in prison, its all electronic).

Salim's helper, this writer simply deduced from these elements that the previous petition was never disposed of upon the merits therefore no successive petition.

Salim keeps messy records. Extremely messy. Yet even though extremely messy there was no copy of the previous petition which was disposed of by Judge Mazzone. This writer looked through four photocopy paper crates full of papers and no previous petition was extant. No disposition.

This is a case where a confluence of extremely bad events none of which were Salim's fault combined to deprive Salim of Due Process under the Fourteenth Amendment to the United States Constitution.

This is a case where all Salim's counsel failed him in egregious ways, and Salim is not of the extraordinary mindset that A Palestinian born shopkeeper could figure out the legal maze and force justice to gain entry. There are several different grounds here for tolling the clock, and these same grounds also are grounds for excusing Salim's failure to timely file for leave to file successive petition. The first look Salim and this writer had at the previous habeas petition and its disposition by Judge Mazzone was when Magistrate Paige Kelly appended it to her scathing report and recommendation, admitting she had personal clerks search the courthouse archives to produce a copy.

Salim should similarly be granted leave late to file successive petition nunc pro tunc (he filed said motion contemporaneously with his appellant brief at the First Circuit, see generally Grillette v Warden 372 F3d 765 (5th Cir 2004)).

It should be granted nunc pro tunc.

Question Three:

The Court of Appeals for the First Circuit erred when they refused to consider for the limited inquiry of tolling

the report of Dr. Nichole Mushero which was completely unavailable to Salim until March 2022. Salim's brief was due and timely docketed October 5, 2021. So Dr. Mushero's report (appendix ~~66-72~~) was unavailable before that time because respondent Stephen Kennedy as superintendent of the prison and his whole entourage prevented Salim from being evaluated for dementia because that's a ground for medical parole in Massachusetts. It was not until a charity group heard about Salim and paid for a physician to examine him in the prison visiting room that Dr. Mushero got her hands and ears on Salim and made her findings. The evidence was therefore unavailable and it was error to exclude it for the limited purpose of tolling. It was, hopefully, reversible error, Griffin v Johnson, 350 F3d 956, 963 (9th Cir 2003). Most of the Circuits will consider evidence that's merely "newly presented" rather than actually new, like Griffin Id and Gomez v Jaimet, 350 F3d 673, 679 (7th Cir 2003). Why make evidence of actual innocence out of reach when it's only because of mental impairment the evidence was not presented sooner?

Conclusion:

The Court should grant petition for certiorari and appoint counsel to gain Salim's release as soon as possible. In parting comments it is fair to say that chief witness

for the prosecution Amin Hamdi, who figures large in sworn statements given by neighbors and family members as having admitted participation in the murder along with Bishara, also figured large in the calculus of affirming Salim's conviction, his statement repeated twice by Supreme Judicial Court of Massachusetts, "...the defendant hit hit his wife and declared, "I will kill you, I will drink your blood, I will make your death the worst." and "The defendant hit his wife two months before the murder and called her a whore." Com v Salim 399 Mass 227, 232, 236 (1987) was only declared as coming from Salim by Amin Hamdi. Hamdi reaped a financial windfall by Salim's incarceration. So eager was he to nail Salim that he testified before the Grand Jury that Salim had changed his shirt and had bleeding fresh scratches on his face and neck at 10:30 am the day of the murder, (appendix ~~82, 83~~). Yet when he testified at first trial and he related this, he was repudiated by the fact that two disinterested witnesses in Salim's immediate neighborhood gave statements to police that they saw the victim, Fatima Salim sitting on the steps between Salim's house and the neighboring house- one at 2:45 pm and the other at 2:00pm to 2:30pm when they drove home from work, (appendix ~~78 - 80~~).

As for self scratching in bereavement, its common in Palestine, (see article from US News and World Report July 6, 1987 pg 34 "Islam: Seeking the FUTURE in the Past" (appendix ~~73, 74~~)).