SUPREME COURT OF THE UNITED STATES
on Certiorari to The First Circuit Court
of Appeals:
Nos.

Abder Salim pro se

v

Stephen Kennedy,
Respondent superintendent
of Old Colony Correction
Center

APPENDIX OF THE PETITIONER
(table of contents
for appendix in brief)

Abder Salim Pro se
W38284
OCCC
1 Administration Rd
Bridgewater, MA 02324

United States Court of Appeals
For the First Circuit

No. 21-1799
22-1174

ABDER SALIM,

Petitioner - Appellant,

v.

STEPHEN KENNEDY,

Respondent - Appellee.

Before

Kayatta, Lynch and Montecalvo,
Circuit Judges.

JUDGMENT

Entered: March 28, 2023

Pro se petitioner Abder Salim appeals from the district court's dismissal of his habeas petition under 28 U.S.C. § 2254, which the district court concluded was an unauthorized second or successive habeas petition. See Bucci v. United States, 809 F.3d 23, 26 (1st Cir. 2015) ("When faced with a second or successive [habeas] petition that has not been authorized by the court of appeals, a district court must either dismiss the petition or transfer it to the court of appeals."); see also 28 U.S.C. § 2244(b)(3)(A) ("Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."); 28 U.S.C. § 2244(b)(2) (setting forth gatekeeping requirements). The district court granted a certificate of appealability ("COA") as to a single claim, "Ground One--Petitioner's actual innocence claim based on the 2005 DNA report."

We have carefully reviewed the parties' filings and relevant portions of the record. Assuming, without deciding, that de novo review applies, we affirm the dismissal of the certified claim, substantially for the reasons set forth by the district court in its September 10, 2021, order adopting the magistrate judge's August 16, 2021, report and recommendation. See Dorisca v. Marchilli, 941 F.3d 12, 17 (1st Cir. 2019) (standard of review); see also McQuiggin v. Perkins, 569 U.S. 383, 392 (2013) (actual innocence general principles); Schlup v. Delo, 513 U.S. 298,

327-29 (1995) (same); Riva v. Ficco, 803 F.3d 77, 84 (1st Cir. 2015) (same). With his appellate briefing, Petitioner has failed to demonstrate error as to the district court's conclusions that the petition featuring the certified claim qualified as a second or successive § 2254 petition for purposes of § 2244(b)(3)(A), that the certified claim was untimely asserted, and that transfer of the decidedly untimely claim to this court, as opposed to dismissal, would have been futile. See Bucci, 809 F.3d at 26.

Petitioner's renewed request to expand the COA to include Ground Two of his habeas petition is denied for the reasons set forth in this court's August 1, 2022, order denying petitioner's previous requests for an expanded COA.

Affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc:
Abder Salim
Todd Michael Blume
Andrea J. Campbell

United States Court of Appeals
For the First Circuit

No. 21-1799
22-1174

ABDER SALIM,

Petitioner - Appellant,

v.

STEPHEN KENNEDY,

Respondent - Appellee.

ORDER OF COURT

Entered: August 1, 2022

Petitioner's motions to supplement the record, received by this court on June 21, 2022, and July 18, 2022, are denied except to the extent that the court will take judicial notice of any proffered state court documents to the extent they are relevant for purposes of this appeal and to the extent consideration of the documents otherwise would be appropriate. See Fed. R. App. P. 10(e); United States v. Rivera-Rosario, 300 F.3d 1, 9 (1st Cir. 2002) (a motion under Fed. R. App. P. 10(e) "is designed to only supplement the record on appeal so that it accurately reflects what occurred before the district court") (quotation marks omitted). This determination is subject to reconsideration by the panel that decides the appeal.

By the Court:

Maria R. Hamilton, Clerk

cc:
Abder Salim
Todd Michael Blume
Maura Tracy Healey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ABDER SALIM,
Petitioner,

v. CIVIL ACTION NO. 20-11539-PBS[1]

STEPHEN KENNEDY,
Respondent.

REPORT AND RECOMMENDATION ON
RESPONDENT, STEPHEN KENNEDY'S, MOTION TO DISMISS (#17).

KELLEY, U.S.M.J.

Abder Salim has petitioned under 28 U.S.C. § 2254 for habeas corpus relief from his state conviction for first degree murder. (#1.) Respondent has filed a motion to dismiss Salim's petition, arguing that it is a second or successive petition that has not been authorized by the United States Court of Appeals for the First Circuit and that, in any event, it is time-barred. (##17, 18.) For the reasons set forth below, it is RECOMMENDED that respondent's motion to dismiss be ALLOWED.

I. Background.

A. Prior Proceedings in State Court.

In 1978, Salim was indicted in the Essex County, Massachusetts Superior Court for the murder of his wife. A first jury was unable to reach a verdict. A second jury returned a verdict of guilty of murder in the first degree and Salim was sentenced to life in prison – on June 1, 1981.

[1] On January 11, 2021, this case was referred to undersigned for all purposes including Report and Recommendation on dispositive motions. (#25.)

See #17-7 at 1, 4, 5, docket sheet in *Commonwealth v. Salim*, Essex Superior Court No. 7877CR97724. *See also* #17-1 at 2, electronic docket sheet in *Commonwealth v. Salim*, Essex Superior Court No. 7877CR97724.

On direct appeal, the Massachusetts Supreme Judicial Court (SJC) affirmed Salim's conviction. *Commonwealth v. Salim*, 399 Mass. 227, 239 (1987). Salim unsuccessfully challenged the sufficiency of the evidence, *id.* at 228-234; the admission of prior recorded testimony of two prosecution witnesses, *id.* at 234-235; attacks on the credibility of defense witnesses, *id.* at 235-236; the admission of bad character evidence, *id.* at 236-238; the appointment of an interpreter to another prosecution witness, *id.* at 238; and, ineffective assistance as a result of a conflict of interest arising from an alleged contingent fee agreement, *id.* at 238-239. Salim also sought relief under Mass. Gen. Laws ch. 278, § 33E. *Id.* at 239.

In rejecting Salim's challenge to the sufficiency of the evidence, the SJC set forth the facts that the jury could have found at the close of the prosecution's case:

> Certain emergency medical technicians were dispatched to the defendant's home in Lawrence at about 5:10 P.M. on July 28, 1978. They found the defendant crying and kneeling over his wife's body. Her face appeared to have been beaten and there was heavy concentration of coagulated blood on her chest as well as her face. She lay on her back and displayed no signs of life. When the police arrived, they observed multiple puncture wounds about the neck and chest.
>
> After a State police detective extended his sympathy to the defendant, he read him the *Miranda* rights. The defendant, a native of Palestine, had emigrated from Jordan to Lawrence. The defendant later visited Jordan and returned to Lawrence with the victim as his wife. He became reasonably fluent in Spanish as well as in English and was well known in the Spanish-speaking community of the Merrimack Valley. He operated a store which sold furniture and household goods.
>
> The defendant told the detective that he had awakened at 8 A.M. but remained in bed until after his wife left with the children at 8:30 A.M. He drove to the store at 9 A.M. where he met his brother-in-law, Amin Rabah Hamdi. They went to a local bank, returned to the store, and opened for business at about 10 A.M. About noon his bookkeeper arrived and remained until about 2:30 P.M. The defendant told the detective that his brother-in-law had left earlier, returned to the store about 3:30

P.M., left again about 5 P.M., and returned about 5:15 P.M. He received a telephone call from his children's day care center at about 5 P.M., informing him that his wife had not picked up the children. After picking up the children, he returned home with them and discovered his wife's body.

The defendant said that he had worn the same clothing all day and had not returned to his house since leaving at 9 A.M. He said that he had had no marital problems, that he was happily married, and that his wife's death was caused by people in Lawrence "who were out to get him." At this juncture in the story, he pointed to an open window and said that "[t]hese people came in the window and went out the door" which was ajar when he came home.

The detective asked the defendant about the scratches on his face, neck, and collar bone and the defendant explained that he had caused those marks by pulling at his face in lamentation when he discovered the body of his wife. The defendant went to the Lawrence police station where he spoke with other officers and repeated the story of his day's activities substantially as he had related it to the detective at the scene. The detective observed that the house showed little disarray although the victim's pocket book had been opened and the contents dumped on the table. There was no evidence of forced entry or any attempt to remove property.

At the station, he submitted to a series of tests, which revealed the presence of blood on the defendant's left palm, the back of his left hand, the underside of the fingers on his left hand, his left fingertips, as well as on his right palm and the underside of the fingers of that hand. The next day, the defendant again told the detective that there were people who were causing him trouble and that the detective should find out "who they are." He boasted again of his love for his wife. Later that day, the defendant produced a ledger of accounts to police officers indicating which customers came to the store to pay and the type and amount of each payment. He pointed to a list of approximately seven or eight customers that he said had been in the store and did business the previous day. He also recited a number of details concerning their activities.

During the autopsy the medical examiner identified twenty-nine puncture wounds in the left front chest area, sixteen more scattered in the area of the neck, a three-inch scratch across the front of the neck, two abrasions about the forehead and eyebrow, the splitting of both lips on the right side, and bruises and abrasions on the face. He also testified that the injuries had been sustained shortly before death. The entire surface of the neck was bluish and contused, with evidence of internal bruises in the area of the larynx and the hyoid bone at the base of the tongue. This bruising indicated a blunt injury consistent with a squeezing of the neck by a hand or hands, or by an arm. At least six wounds penetrated the heart itself. The medical examiner considered these wounds to be consistent with punctures caused by an icepick or a very thin screwdriver. He also observed that the victim was approximately five months pregnant. He found no evidence of sexual trauma. In his

opinion, death occurred between two and five hours prior to the discovery of the body, that is, between 12:10 P.M. and 3:10 P.M.

An investigation in the neighborhood revealed that one neighbor had seen the defendant's motor vehicle and the victim's motor vehicle parked on the street near the house that morning. When she returned at about 11 A.M., she noticed that both vehicles were gone. At about 11:45 A.M. she noticed a van stop for a moment at the defendant's house but she was only able to get a glimpse of the man who went to the defendant's door and then left. She saw the defendant on this day when she went to the front door to receive the mail from her postman shortly after 1 P.M. She saw the defendant approach his house while rolling up his right shirt sleeve. She saw him entering his house wearing a striped shirt which was familiar to her. The defendant took his mail, said nothing to the postman, looked at this neighbor, and then continued to his door. The postman corroborated this neighbor's testimony.

Amin Rabah Hamdi and David Mocarquer, his bookkeeper, contradicted the defendant's account of his activities on the day of the murder. Hamdi returned to the store about noon and observed the defendant with a guest from New York and with David Mocarquer. The defendant then left the store and returned about 12:30 P.M. Mocarquer recalled that the defendant was not in the store from 1 P.M. until Mocarquer left at 1:45 P.M. Neither he nor Hamdi knew where the defendant had gone. Finally, the defendant, Hamdi, and his chauffeur left about 2 P.M. and spent the next two hours making collections on customer accounts. After his return, Hamdi and the defendant remained at the store until the defendant left to pick up his children at the day care center. Hamdi told the defendant that he wished to take his sister (the victim) shopping. When he mentioned it a second time, the defendant appeared nervous and suggested that they all go together later. When the defendant was leaving to pick up the children, Hamdi asked why the victim had not picked up the children and the defendant replied that she was sick.

Both Hamdi and Mocarquer testified that the defendant had changed shirts between the morning and the afternoon of July 28. Early in the day, the defendant was wearing a striped shirt but by late afternoon he was wearing a green shirt with small flowers on it.

There was evidence that the defendant had threatened to kill his wife and had told certain people about his intention. He persuaded a friend to purchase an icepick which remained in the defendant's van until the day before the murder. He borrowed a leather punching tool the day before the murder. The defendant struck the victim about two months before the murder and called her a whore. On another occasion, the defendant hit his wife and declared, "I will kill you, I will drink your blood, I will make your death the worst." About one month before the murder, the defendant tried to procure a gun in order to kill his wife. This was not his first such attempt and he had not been taken seriously in the past. On this occasion, the defendant demanded the gun as soon as possible and offered to pay $2,000 to have his wife killed. He also offered his former driver $2,000 to kill the victim and

> repeated this request about ten times. He complained about his wife and indicated that he was having trouble with her. He rejected a suggestion to get a divorce by claiming that in his country there was no divorce. The defendant said that the people of his country "have their own way of doing things." The defendant said that his wife should die and that he was going to kill her. He stated that his wife was "a whore and she was pregnant and it wasn't his."

Salim, 399 Mass. at 228-232. As to the sufficiency of the evidence, the SJC reasoned:

> The jury were warranted in concluding from this evidence that the defendant had murdered his wife. While it is true that there were no eyewitnesses to the killing, it is equally true that the Commonwealth need not prove that no one else could have committed the murder....We must look at the evidence as a whole and not examine exhaustively each piece of evidence separately. Here, the defendant within a short period of time before the murder acquired two instruments capable of bringing about the kind of death that the victim suffered. The medical examiner said that the puncture wounds were consistent with the use of these tools. There was testimony placing the defendant at the scene during the time period when death occurred. Both a neighbor and the postman saw him go to his house at a time consistent with Hamdi's estimate of when the defendant left his store, which was only minutes from his home. 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 clamping of her neck with an arm or a hand was consistent with the inference that the murderer seized the victim from behind and drove the weapon into her chest. The jury were not required to believe that the defendant's scratches were the result of his mourning. The jury could infer that the defendant changed his shirt after the murder to conceal the blood that might have been on it before he returned to the store and the jury were warranted in believing that he lied to the police when he said that he did not return home until evening, or did not change his clothes during the day. Taken together, this mosaic of evidence consisting 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, warranted the jury in returning their verdict, and hence there was no error in denying the defendant's motion for a required finding.

Id. at 232-233 (citation and punctuation omitted).

Salim, represented by counsel, filed a first motion for new trial in 1990 and a second motion for new trial in 1991. *See* #17-7 at 7. According to Salim, those motions were based on affidavits in which witnesses claimed that Salim's brother-in-law bribed or attempted to bribe them to lie about Salim's involvement in his wife's killing and were denied because the superior court ruled

that the affidavits were untrustworthy. *See* #1 at 3.[2] The first and second new trial motions were denied by the superior court in 1994. *See* #17-7 at 7.

Salim filed a third motion for new trial, as well as a motion for appointment of counsel, in 2000. The third new trial motion and the motion for appointment of counsel were denied by the superior court in 2000. A motion for reconsideration was denied by the superior court in 2001. *See* #17-1 at 2, 17-7 at 7-8.

Thereafter, the superior court appointed counsel and ordered the prosecution to conduct DNA testing on the victim's fingernail scrapings, if paid for by Salim. The DNA results were received by the superior court on February 16, 2005. *See* #17-1 at 2-4. A "Report of Laboratory Examination" is included in Salim's appendix. *See* #1-1 at 2-3. According to the report, multiple scrapings were combined prior to DNA extraction and testing was discontinued after no male DNA was detected. *Id. See* Memorandum of Decision and Order of the Supreme Judicial Court for Suffolk County (hereinafter the "Single Justice") in *Commonwealth v. Salim*, No. SJ-2019-0439, at 2 (July 9, 2020) (DNA results showed only female DNA).[3]

Salim, represented by counsel, filed a fourth motion for new trial in 2009. *See* #17-1 at 4. According to Salim, that motion was based on affidavits from witnesses stating that Salim's father confessed that he killed Salim's wife and that Salim's brother-in-law also made statements

[2] The parties have not submitted many of the underlying state court pleadings and decisions, including the superior court's decision on the first and second new trial motions. An affidavit of Edwin Mercado Gonzales appears in Salim's appendix. (#1-1 at 23-24.) An affidavit of Jacobo Reyes appears in Salim's appendix. (#1-1 at 31-32.)

[3] A copy of the July 9, 2020 Memorandum of Decision and Order, which this court obtained from the Clerk's Office of the Single Justice, is attached to this Report and Recommendation as Exhibit 1. The copy that is included in Salim's appendix, as scanned into the court's electronic filing system, is missing a page. *See* #1-1 at 77-83.

implicating himself. *See* #1 at 4-5. *But see* Exhibit 1 at 2. Affidavits of Hamzeh Deeb Mustafa Abu-Sabeha, Shafeek Salim Taha Hamdi, Halimah Amin Rabah Hamdi, Imam Amin Rabah Hamdi, Husnia Hussin Ghannam, Carol Barry, William Westgate, Jr., Dr. Imam Tala Y. Eid, Hamed Abusabiha, and Raouf Aly appear in Salim's appendix. (#1-1 at 35-63.) The superior court ruled that Salim's father's confessions were untrustworthy.[4] As set forth in the July 9, 2020 Memorandum of Decision and Order of the Single Justice:

> The motion judge concluded that the elderly father's statements implicating himself in the victim's death were not credible, and that no evidence tied the father to the crime other than these late-made statements.

Exhibit 1 at 2. The superior court denied the fourth new trial motion in 2011. *See* #17-1 at 4.

Following the denial of his fourth new trial motion, the Single Justice allowed Salim, represented by counsel, to file a gatekeeper petition under Mass. Gen. Laws ch. 278, § 33E, late.[5] *See* #17-8 at 1, electronic docket sheet in *Commonwealth v. Salim*, No. SJ-2012-0155. The Single Justice denied the gatekeeper petition in 2012 and a motion for reconsideration in 2014. *Id.*[6]

Salim filed a fifth motion for new trial, as well as a motion for appointment of counsel, on February 26, 2019. *See* #17-1 at 5. The fifth new trial motion and the motion for appointment of counsel were denied by the superior court on September 3, 2019. *Id.*

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[4] The parties have not submitted a copy of the superior court's decision on the fourth new trial motion.

[5] Pursuant to Mass. Gen. Laws ch. 278, § 33E, when a defendant is convicted of first degree murder, he is entitled to plenary review on direct appeal to the SJC. After plenary review, he may file new trial motions in the superior court. However, he is only entitled to review of the denial of such motions if a Single Justice of the SJC allows a "gatekeeper" petition upon a determination that the appeal presents an issue that is both "new" and "substantial," should be resolved by the full court of the SJC, or otherwise involves "a substantial risk of a miscarriage of justice." *Lee v. Corsini*, 777 F.3d 46, 54-55 (1st Cir. 2015) (citations omitted).

[6] The parties have not submitted copies of the Single Justice's decisions in 2012 and 2014.

In its decision on the fifth new trial motion, *see* #1-1 at 74-76, the superior court identified three challenges raised by Salim: (1) DNA testing contradicted the Commonwealth's theory at trial that scratches on his face were caused by his wife in a struggle; (2) the prosecutor improperly invited the jury to conduct an experiment in closing argument; and, (3) the courtroom was improperly closed during voir dire of prospective witnesses. Adopting the Commonwealth's arguments that Salim waived these challenges and failed to present any substantial issues as to the firmly-settled, old conviction that had been subject to plenary review by the SJC, *id.* at 74-75, the superior court observed:

> A 2001 motion for DNA testing was allowed and results disclosed on February 16, 2005. No new trial motion based on the DNA results was filed until the motion currently before the court, which was filed on February 26, 2019, fourteen years after the DNA results were disclosed.

Id. at 74.

On July 9, 2020, the Single Justice denied Salim's pro se gatekeeper petition. Exhibit 1 at 8. The Single Justice determined that Salim's challenge based on the DNA evidence was not "new" within the meaning of Mass. Gen. Laws ch. 278, § 33E. The Single Justice reasoned:

> ...[T]he defendant's 2001 motion for DNA testing of the blood underneath the victim's fingernails (when the defendant was represented by appointed counsel) ultimately was allowed, and testing was conducted, in 2004; the defendant was provided the test results in 2005. The results revealed that the DNA was exclusively female, and therefore could not have belonged to the defendant, as the prosecution had argued vigorously at trial. The results of the DNA tests were disclosed to the defendant on February 16, 2005. Appointed post-conviction counsel apparently believed that the DNA likely was that of the victim herself, and did not pursue the matter further. Rather, the defendant, again represented by counsel, filed his fourth motion for a new trial on November 19, 2009, citing newly-discovered evidence. After an evidentiary hearing, this motion ultimately was denied. The defendant's 2012 gatekeeper petition challenging that denial subsequently was denied by the single justice, as was his motion for reconsideration two years later....
>
> A defendant challenging a conviction of murder in the first degree must present all his or her claims of error at the earliest possible time, and failure to do so precludes relief.... Because the DNA test results were available to the defendant four years

> before he filed his fourth motion for a new trial, and could have been raised in that motion, by the time that he filed his fifth motion for a new trial, ten years after the fourth motion, and fourteen years after receiving the DNA results, the issue was not new within the meaning of G. L. c. 278, § 33E.

Exhibit 1 at 5-6 (citations and punctuation omitted).

The Single Justice also held that Salim's challenge to the prosecutor's closing argument was not "new:"

> It could have been raised at trial or during the defendant's direct appeal. The asserted impropriety in the prosecutor's closing argument was part of the record that was initially considered by the full court in conjunction with the defendant's direct appeal; indeed, the comments were contained in the trial transcript. Legal issues surrounding the propriety of a prosecutor's closing were well-developed at that time, and any challenge could have been made at that point.

Exhibit 1 at 6-7. Inferentially, the Single Justice also held that Salim's challenge to the courtroom closures was not "new" or "substantial" within the meaning of § 33E:

> Unlike questions of jury voir dire, the law concerning court room closure during voir dire of witnesses also was well developed at the time of the defendant's trial, and, although the defendant did not object to the closures at trial, any claim on that ground could have been made as part of his direct appeal.
>
> Even had he raised the issue in a timely manner, however, the defendant could not have shown prejudice from the closures. The courtroom was closed on the judge's order during testimony of nine potential witnesses to the defendant's statements, after counsel for the newspaper the Eagle Tribune informed the court that he could not guarantee the voir dire testimony would not be printed by the press. The judge ordered the courtroom closed to representatives of the media in order to avoid having potential members of the venire from being exposed to the witnesses' statements before trial, where it was possible that the defendant would move successfully prior to trial to have the statements suppressed. For evident reasons, trial counsel did not object to any of these closures.

Exhibit 1 at 7-8.

B. Prior Proceedings in Federal Court.

1. The earlier habeas petitions.

The following history is largely drawn from District Judge Mazzone's March 7, 1989 Memorandum and Order in *Salim v. Amaral*, No. 88-1602-MA – Exhibit 3.[7]

In 1987, Salim filed a petition for habeas corpus relief raising the same grounds that he had raised on direct appeal plus additional grounds that he had not raised on direct appeal. On April 13, 1988, the petition was dismissed without prejudice for the failure to exhaust state remedies. Exhibit 3 at 1.

On June 22, 1988, Salim, acting pro se, filed another petition for habeas corpus relief. Exhibit 3 at 1-2. Respondent moved to dismiss, arguing that the petition included both exhausted and unexhausted claims. *Id.* at 2. Although he believed that respondent's argument had some merit, Judge Mazzone did not accept it; instead, he proceeded to address Salim's claims. *Id.* at 3-4.[8]

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[7] This discussion is based on the court's review of records obtained by the court. Neither party submitted Judge Mazzone's Memorandum and Order, although respondent submitted a copy of the electronic docket sheet in No. 88-1602-MA (#17-5) and a copy of a motion by Salim requesting a photocopy of the habeas petition in 2014. (#17-6.)

The docket sheet in No. 88-1602-MA, is attached as Exhibit 2 hereto. District Judge Mazzone's Memorandum and Order is attached as Exhibit 3 hereto. Judge Mazzone's Order of Dismissal is attached as Exhibit 4 hereto.

[8] Judge Mazzone reasoned:

> ...[A] dismissal would only delay further a review on the merits. Federal review should be delayed only when the petitioner clearly failed to exhaust his state remedies. In light of the salient issues presented here, namely, the competence of counsel and the overall fairness of the entire case, addressing the claims now without further examination of the potential procedural defaults will save substantial time and effort.

Exhibit 3 at 3-4.

Judge Mazzone found no basis to depart from the deference owed to state court fact findings and determined that a rational jury could have found the essential elements of first degree murder beyond a reasonable doubt, thus rejecting Salim's challenge to the sufficiency of the evidence. Exhibit 3 at 14-15.

Rejecting Salim's challenge to the admission of prior recorded testimony, Judge Mazzone reasoned that the superior court properly ruled that the two prosecution witnesses were unavailable. Moreover, they had been subject to cross-examination previously. Exhibit 3 at 11-12.

In rejecting Salim's challenges to the attack on the credibility of defense witnesses and to the admission of prior bad act evidence, Judge Mazzone invoked the contemporaneous objection rule and determined that Salim failed to show cause and prejudice. As to Salim's challenge to the admission of prior bad act evidence, Judge Mazzone added that federal habeas review typically does not extend to state court rulings on the admissibility of evidence and, moreover, allowing the jury to hear the evidence was not reversible, constitutional error. Exhibit 3 at 7-9, 10-11.

Rejecting Salim's challenge to the appointment of an interpreter to the prosecution witness, Judge Mazzone noted that Salim did not object at trial. He also found no abuse of discretion by the superior court. Exhibit 3 at 12-13.

As to Salim's claim of ineffective assistance based on an alleged conflict of interest, Judge Mazzone found that no contingency fee agreement existed. Exhibit 3 at 9-10.

Salim's final challenge combined a claim that the prosecutor's closing argument urged inferences not supported by the record and was unfairly prejudicial and that the verdict was against the weight of the evidence. Exhibit 3 at 2, 15. Judge Mazzone found nothing in the prosecutor's conduct to support the former claim. *Id.* at 15. Judge Mazzone also rejected the latter claim, where the record "clearly" showed "ample evidence...." *Id.* at 15-16.

On March 9, 1989, Judge Mazzone summarily dismissed Salim's petition. *See* Exhibit 4. Salim filed a notice of appeal. His appeal was subsequently dismissed for want of prosecution. *See* Exhibit 2 at 2.

2. The instant petition.

On August 13, 2020, Salim[9] filed the instant petition, together with an appendix. (##1, 1-1.) He also moved to proceed in forma pauperis and for appointment of counsel. (#2, 3.) The motion for appointment of counsel was denied without prejudice. (#5.)

In his petition, Salim raises three challenges to his first degree murder conviction, which are substantially the same as the challenges raised in his fifth new trial motion and latest gatekeeper petition. In Ground One, he argues: "DNA evidence disproves almost all the prosecution theory of guilt." (#1 at 5.) He adds, in part: "Petitioner had DNA results in 2005. His English comprehension is poor and his appointed counsel saw no value in the DNA result." *Id.*

Next, Salim argues that, in summation, the prosecutor invited the jury to conduct an experiment; namely, to pretend that they were being stabbed from behind and to reach over their shoulders to determine where their fingertips contacted the attacker. (#1 at 7.) In explaining why Ground Two was not raised on direct appeal, he asserts: "It was not a live issue in 1981 because...DNA technology was unknown." *Id.*

Finally, Salim argues that, during voir dire of prospective witnesses, the courtroom was closed. (#1 at 8). In explaining why Ground Three was not raised on direct appeal, Salim asserts:

[9] The court does not imply that Salim himself prepared the petition, or any other pleading. One of his arguments in favor of the appointment of counsel is that he has had to seek help of other prisoners. *See* #28 at 1-2. *See also* #26 (letter from non-party). "Salim" is used for ease of reference. The court notes that the petition is neither dated nor signed. (#1 at 15.) *See* Rule 2(c)(5) of the Rules Governing 2254 Cases in the United States District Courts (petition must be signed under penalty of perjury by petitioner or authorized person).

"My tongue is Arabic. When I emigrated to Lawrence, Massachusetts I learned Spanish, not English. I relied on attorneys who neglected me." *Id.* at 9.

As for the timeliness of his petition, Salim invokes the doctrine of "equitable tolling," noting his language impediment and mental health issues. Based on the DNA evidence, he asserts "actual innocence." (#1 at 13.)

Salim's appendix includes psychiatric records from 1972 and 1978-1980. *See* #1-1 at 6-22. For instance, the appendix includes a competency evaluation by an assistant medical director at Bridgewater State Hospital dated November 6, 1978 in which the assistant medical director suggested, *inter alia*, that Salim's "current disorders of thinking would make it markedly difficult for him to participate meaningfully in the courtroom proceedings or assist his attorney in adequately preparing a defense" and recommended that he be not found competent to stand trial.[10] The assistant medical director noted evidence that Salim "is mentally ill, best described as a paranoid episode with elements of depression" and recommended further evaluation for the presence of a neurological disorder. *Id.* at 14.

The appendix also includes a letter by a consulting psychologist dated October 11, 1979 wherein the consulting psychologist suggested, *inter alia*, that Salim was "a schizo-affective schizophrenic with paranoid and excitable features, together with religious preoccupation, paranoid suspiciousness, rapid mood variability, and possibly auditory hallucinations." *Id.* at 20.[11]

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[10] The docket sheet in *Commonwealth v. Salim*, Essex Superior Court No. 7877CR97724, indicates that the prosecution moved for an examination and Salim was ordered committed to Bridgewater State Hospital under Mass. Gen. Laws ch. 123, § 15(b), at least from October 1978 to November 1979. (#17-7 at 1-4.) In August 1979, Salim was found competent to stand trial. *Id.* at 4. Before his second trial, he was ordered released on bail. *Id.* at 5.

[11] In the months after he filed the instant petition, Salim submitted two sets of exhibits. (##10, 15.) Respondent's counsel has represented that he has been unable to access these sets of exhibits through the court's electronic filing system. (#18 at 4-5 & n. 6.) The court has reviewed these sets

On November 23, 2020, respondent moved to dismiss Salim's petition. Respondent argues that Salim's petition is "second or successive" and he did not move for authorization in the United States Court of Appeals for the First Circuit, thus depriving the district court of jurisdiction. (##17 at 1, 18 at 6-9.) In the alternative, respondent argues that Salim's petition is time-barred. (##17 at 1, 18 at 10-13.)

On March 8, 2021, Salim filed an opposition to respondent's motion to dismiss. (#28.) In addition to renewing his request for appointment of counsel, *id.* at 1, 3, 8-9, 10, Salim addresses respondent's arguments. Salim argues that respondent has not established that his petition is second or successive. *Id.* at 9-10.

Salim also argues that he has made a showing of actual innocence, thereby excusing the late-filing. *Id.* at 3-9. In support of his claim of actual innocence, Salim relies primarily on the DNA evidence; the prosecutor's use of the blood under Salim's wife's fingernails and scratches on his face in closing argument (as well as the prosecutor's invitation to the jury to conduct the experiment); the SJC's use of the blood and scratches on direct appeal; and, the post-conviction affidavits. *Id.* at 4, 6-7. Salim reiterates his claim that his language impediment and mental health issues excuse the late-filing. *Id.* at 2, 5-6.

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of exhibits. Factually, they do not alter its recommendation that respondent's motion to dismiss be allowed. *Cf.* Rule 7(a), (c) of the Rules Governing Section 2254 Cases in the United States District Courts (if petition is not dismissed, judge may direct parties to expand record and must give opposing party against whom additional materials are offered opportunity to admit or deny their correctness).

To the extent that Salim adds grounds for relief through these sets of exhibits, the court rejects them. *See, e.g.*, #15 at 29 (apparently arguing that District Attorney and trial judge had no right to use his statements to police because of his mental health issues). The petition must set forth the grounds for relief. *See* Rule 2(c)(1) of the Rules Governing Section 2254 Cases in the United States District Courts.

On the same date that he filed his opposition, Salim moved to augment his appendix to include, among other things, prison psychiatric records. He argues that the records support his claim that he could not have filed his petition sooner and underscore his need for appointed counsel. (#29 at 1.) The records are dated in 1995, 2001, 2010, and 2012-2018. (#29-1 at 2-25.) They are discussed in more detail below.

In response to the motion to augment, respondent argues that the court lacks jurisdiction over the unauthorized second or successive petition and that, in any event, the prison psychiatric records do not establish actual innocence or warrant equitable tolling. (#33 at 1-3 & n. 2.)

II. Discussion.

A. The court denies Salim's renewed request for appointment of counsel.

There is no constitutional right to counsel in a habeas proceeding. *Bucci v. United States*, 662 F.3d 18, 34 (1st Cir. 2011) (*citing Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). *See Ellis v. United States*, 313 F.3d 636, 652 (1st Cir. 2002). 18 U.S.C. § 3006A(a)(2)(B) allows the court to appoint counsel in a habeas proceeding upon a determination that the "interests of justice so require." *Id. See* 28 U.S.C. § 2254(h). In making this determination, the court views the totality of the circumstances, including the merits of the petition, the complexity of the factual and legal issues, and the petitioner's ability to represent himself. *See United States v. Mala*, 7 F.3d 1058, 1063-1064 (1st Cir. 2003). *See also Civitarese v. Marchilli*, No. 16-CV-40129-TSH, 2017 WL 2957932, at *1 (D. Mass. July 11, 2017). Habeas proceedings in which counsel should be appointed are "few and far between." *Ellis*, 313 F.3d at 653.[12]

[12] If an evidentiary hearing is warranted, the court must appoint counsel. *See* Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts. An evidentiary hearing is not warranted here.

The court declines to exercise its discretion to appoint counsel. *See* #28 (renewed requests for appointment of counsel). The dispositive issues are not complex. Salim's petition is an unauthorized second or successive petition and is time-barred.

B. The court allows Salim's motion to augment his appendix.

The court allows Salim's motion to augment his appendix (#29) and has considered the prison psychiatric records (#29-1), among other materials. As discussed below, the prison psychiatric records do not alter the court's recommendation that respondent's motion to dismiss be allowed.

C. The court recommends that respondent's motion to dismiss be allowed.

1. Relevant law.

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b) imposes three requirements on a so-called "second or successive" petition under 28 U.S.C. § 2254. *Gonzalez v. Crosby*, 545 U.S. 524, 529-530 (2005). First, a claim that has already been adjudicated on the merits in an earlier petition must be dismissed. *Id.* (citing § 2244(b)(1)). Second, a claim that has not already been adjudicated on the merits in an earlier petition must be dismissed unless it relies on a new, retroactive rule of constitutional law or on new facts showing a high probability of actual innocence. *Id.* at 530 (citing § 2244(b)(2)).[13] Third, before the district

[13] Specifically, § 2244(b)(2) provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

court accepts a second or successive petition for filing, the court of appeals must determine that it raises claims not previously raised that are sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence thresholds. *Id.* (citing § 2244(b)(3)). Stated succinctly, under AEDPA, "a state prisoner always gets one chance to bring a federal habeas challenge to his conviction.... But after that, the road gets rockier." *Banister v. Davis*, --- U.S. ---, 140 S.Ct. 1698, 1704 (2020) (citation omitted).

28 U.S.C. § 2244(b)'s three requirements for a second or successive habeas petition are triggered even if petitioner filed an earlier petition before AEDPA's effective date of April 24, 1996. *Libby v. Magnusson*, 177 F.3d 43, 46-47 (1st Cir. 1999) (rejecting ex post facto argument and applying *Pratt v. United States*, 129 F.3d 54 (1st Cir. 1997)).

While "second or successive" is a term of art that does not refer to each and every petition filed later-in-time to an earlier petition, *see Banister*, 140 S.Ct. at 1705, generally, 28 U.S.C. § 2244(b)'s three requirements are triggered when an earlier petition was adjudicated by the district court on the merits,[14] where "on the merits" includes a determination that a claim was procedurally

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> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

[14] Precedent carves out exceptions whereby certain later-in-time petitions will not be deemed "second or successive" petitions and thus will not trigger § 2244(b)'s three requirements. *See Banister*, 140 S.Ct. at 1705 & n. 3 (collecting examples and authorities). Suffice it to say that while Salim's petition in 1987 that was dismissed without prejudice for the failure to exhaust remedies would satisfy an exception, *see Slack v. McDaniel*, 529 U.S. 473, 486-487 (2000), his 1988 petition, adjudicated on the merits, would not. *See Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam) (where petition raises unexhausted and exhausted claims, petitioner "may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles") (*quoting Rose v. Lundy*, 455 U.S. 509, 520-521 (1982) (plurality opinion).

defaulted in state court and petitioner has not shown cause or prejudice. *See Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005); *Graham v. Costello*, 299 F.3d 129, 133 (2d Cir. 2002); *Harvey v. Horan*, 278 F.3d 370, 379-380 (4th Cir. 2000), *overruled on other grounds*, *Skinner v. Switzer*, 562 U.S. 521 (2011); *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000); *Carter v. United States*, 150 F.3d 202, 205-206 (2d Cir. 1998) (per curiam). *See also Wiltse v. Winn*, 537 F. Supp. 2d 266, 268 (D. Mass. 2008). *Accord Murray v. Greiner*, 394 F.3d 78, 80-81 (2d Cir. 2005). If an earlier petition was adjudicated by the district court on the merits, a later-in-time petition will be deemed "second or successive" and trigger § 2244(b)'s three requirements even if it raises claims that were not, in fact, raised previously. *See Gautier v. Wall*, 620 F.3d 58, 60 (1st Cir. 2010). *Cf. Bucci v. United States*, 809 F.3d 23, 26-27 (1st Cir. 2015); *United States v. Barrett*, 178 F.3d 34, 42-45 (1st Cir. 1999).

28 U.S.C. § 2244(b)'s third and final requirement – that the petitioner seek and obtain authorization from the court of appeals – is jurisdictional. *Bucci*, 809 F.3d at 26. *See Dutcher v. Mici*, No. 19-CV-12580-PBS, 2020 WL 8679638, at *2 (D. Mass. Aug. 3, 2020). When confronted with an unauthorized second or successive petition, the district court has two choices: dismiss it or transfer it. *Bucci*, 809 F.3d at 26; *Dutcher*, 2020 WL 8679638, at *2. Thus, 1st Cir. L. R. 22.1(e) provides that if a second or successive petition is filed without authorization, the district court "will transfer the petition to the court of appeals pursuant to 28 U.S.C. § 1631 or dismiss the petition." *Id. See also* Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts. 28 U.S.C. § 1631, in turn, provides that "[w]henever a civil action is filed in a court...and that courts finds that there is want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court....in which the action or appeal could have been brought at the time it was filed or noticed...." *Id.*

The district court may dismiss an unauthorized second or successive petition if transfer would be futile. Dismissal, rather than transfer, is appropriate if the claims in the second or successive petition must, in any event, be dismissed under 28 U.S.C. § 2244(b)(1) because they were already adjudicated on the merits in an earlier petition or under 28 U.S.C. § 2244(b)(2) because they do not satisfy the new-rule or actual-innocence thresholds. *See, e.g., Ericson v. Mitchell*, No. 20-CV-11688-RGS, 2020 WL 6785947, at *3-4 (D. Mass. Nov. 2, 2020), *report and recommendation adopted sub nom. Ericson v. Massachusetts*, No. 20-CV-11688-RGS, 2020 WL 6781962 (D. Mass. Nov. 18, 2020); *Rankins v. O'Brien*, No. 15-CR-12890-RGS, 2016 WL 4487897, at *5 (D. Mass. Aug. 11, 2016), *report and recommendation adopted sub nom. Rankins v. Ryan*, No. 15-CV-12890-RGS, 2016 WL 4487833, at *1 (D. Mass. Aug. 24, 2016). *Cf., e.g., Jahagirdar v. United States*, No. 07-CV-10923-MLW, 2010 WL 2595564, at *3 (D. Mass. June 24, 2010) (under 28 U.S.C. § 2255(h)).

Dismissal, rather than transfer, is appropriate if the unauthorized second or successive petition is time-barred under 28 U.S.C. § 2244(d)(1). *See, e.g., James v. Goguen*, No. 18-CV-11960-TSH, 2019 WL 6130669, at *11 (D. Mass. Sept. 30, 2019), *report and recommendation adopted,* No. 18-CV-11960-TSH, 2019 WL 6130672, at *1 (D. Mass. Oct. 24, 2019), *certificate of appealability denied*, 424 F. Supp. 3d 154, 158 (D. Mass. 2019), *certificate of appealability denied sub nom. James v. Divris*, No. 19-2215 (1st Cir. June 8, 2021) (unreported).

As amended, 28 U.S.C. § 2244(d)(1) imposes a one-year period of limitation on habeas petitions which "shall run from the latest of –"

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. A statutory tolling provision, 28 U.S.C. § 2244(d)(2), provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* This provision temporarily stops the one-year period of limitation; it does not revive a one-year period of limitation that has already expired. *Cordle v. Guarino*, 428 F.3d 46, 48 n. 4 (1st Cir. 2005). *See Delaney v. Matesanz*, 264 F.3d 7, 11 (1st Cir. 2001).

AEDPA's one-year period of limitation can be subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). Yet, for that doctrine to apply, the petitioner must show that he has been pursuing his rights diligently and that some extraordinary circumstance prevented timely filing. *Id.* at 649. *See Blue v. Medeiros*, 913 F.3d 1, 8-9 (1st Cir. 2019). *See also Delaney*, 264 F.3d at 14. Equitable tolling is applied infrequently and at the court's discretion. *Blue*, 913 F.3d at 9.

Ignorance of the law, even for incarcerated pro se petitioners, does not warrant equitable tolling. *Lattimore v. Dubois*, 311 F.3d 46, 55 (1st Cir. 2002). In contrast, petitioner's mental illness may warrant equitable tolling. *Riva v. Ficco*, 615 F.3d 35, 39-40 (1st Cir. 2010). Petitioner must show that, "during the relevant time frame, he suffered from a mental illness or impairment that so severely impaired his ability either effectively to pursue legal relief to his own behoof or, if represented, effectively to assist and communicate with counsel." *Id. See Riva v. Ficco*, 803 F.3d 77, 80-84 (1st Cir. 2015).

There is some authority to suggest that a language deficiency may warrant equitable tolling. *Diaz v. Kelly*, 515 F.3d 149, 154 (2d Cir. 2008); *Mendoza v. Carey*, 449 F.3d 1065, 1069-1070 (9th Cir. 2006). *See United States v. Aguilar-Alvarez*, No. 08-CV-10123-DJC, 2015 WL 8082369, at *6 & n. 1 (D. Mass. Dec. 7, 2015) (collecting cases). *But see Yang v. Archuleta*, 525 F.3d 925, 929-930 (10th Cir. 2008). Yet "the diligence requirement of equitable tolling imposes on [petitioner] a substantial obligation to make all reasonable efforts to obtain assistance to mitigate his language deficiency." *Diaz*, 515 F.3d at 154.

A credible showing of actual innocence may serve as a "gateway" to federal habeas review despite the expiration of a one-year period of limitation. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 392 (2013). *See Riva*, 803 F.3d at 84. "Actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

To make a credible gateway showing, petitioner must satisfy the standard of *Schlup v. Delo*, 513 U.S. 298 (1995). *McQuiggin*, 569 U.S. at 386. *See Riva*, 803 F.3d at 85. He must show that it is "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt – or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). *See Schlup*, 513 U.S. at 327. *See also McQuiggin*, 569 U.S. at 386; *Riva*, 803 F.3d at 84.[15]

[15] *Schlup*'s "more likely than not" standard is lower than § 2244(b)(2)(B)(ii)'s "clear and convincing" standard for second or successive petitions. *House*, 547 U.S. at 539. *See Schlup*, 513 U.S. at 327. The "clear and convincing" standard does not govern the gateway analysis. *Id.* Conversely, the "more likely than not" standard does not govern the second or successive analysis. *Gage v. Chappell*, 793 F.3d 1159, 1169 (9th Cir. 2015); *Jordan v. Secretary, Dept. of Corrections*, 485 F.3d 1351, 1359 (11th Cir. 2007).

A credible gateway showing requires "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 324). Timing of the petition is a factor bearing on the reliability of new evidence. *McQuiggin*, 569 U.S. at 386-387, 399. *See Schlup*, 513 U.S. at 332.

From the total record, the court makes a "probabilistic determination about what reasonable, properly instructed jurors would do." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). The *Schlup* standard does not require absolute certainty about petitioner's guilt or innocence; however, it is "demanding" and satisfied only in the "extraordinary" case. *Id.* (quoting *Schlup*, 513 U.S. at 329). "The gateway should open only when a petition presents 'evidence of innocence 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 nonharmless constitutional error." *McQuiggin*, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316).

2. Application.

Salim's petition is successive. In 1988, he filed a petition for writ of habeas corpus challenging his first degree murder conviction. In 1989, Judge Mazzone adjudicated that petition on the merits. *See* Exhibits 2-4. Salim does not claim to have sought and obtained authorization from the United States Court of Appeals for the First Circuit Accordingly, the court must choose between transfer and dismissal. The court recommends dismissal. Transfer would be futile.

First, the Court of Appeals would not authorize review of Ground Two (prosecutor's closing argument) or Ground Three (courtroom closures) under 28 U.S.C. § 2244(b)(2). Salim does not identify a new, retroactive constitutional rule. Both grounds rely on the record of Salim's

second trial, not fresh evidence. *See* Exhibit 1 at 7. Anyway, neither ground has anything to do with guilt or innocence.

While Ground One (DNA) relies on fresher evidence, transfer would also be futile. Salim's petition is time-barred. His conviction became final decades ago. AEDPA was enacted decades ago. He received the DNA results decades ago. *See* #1 at 5.[16]

Salim recognizes that his petition is time-barred and asserts actual innocence. (##1 at 13, 28 at 3-9.) But, he has not made a credible gateway showing. As a threshold matter, with regard to Salim's reliance on the post-conviction affidavits, *see, e.g.*, #28 at 4, 6, the court is constrained by 28 U.S.C. § 2254(e), which provides that the state court's determination of a factual issue must be presumed correct unless petitioner rebuts that presumption by clear and convincing evidence.

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[16] For purposes of § 2244(d)(1)(A), a conviction becomes final when the time for pursuing the next level of direct review expires. *Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012). If a conviction became final before the enactment of AEDPA, a one-year grace period applies, with a start date of April 24, 1996. *Gaskins v. Duval*, 183 F.3d 8, 9 (1st Cir. 1999). As noted, Salim does not identify a new, retroactive constitutional rule. So, § 2244(d)(1)(C) does not provide alternate start date. Salim also does identify an impediment by state action. So, § 2244(d)(1)(B) does not provide an alternate start date. Using "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), *id.*, the one-year period of limitation expired on or about February 16, 2006, the superior court having received the DNA results on February 16, 2005. *See* #17-1 at 4.

The statutory tolling provision is not implicated here because Salim did not file a new trial motion in state court before the expiration of any conceivable one-year period of limitation, and § 2244(d)(2) does not revive expired periods of limitation. *Cordle*, 428 F.3d at 48 n. 4; *Delaney*, 264 F.3d at 11. *See* ##17-1 at 1, 17-7 at 7 (reflecting denial of first and second new trial motions in 1994 and no docket activity between 1995 and 2000, when third new trial motion was filed and denied); #17-1 at 2 (reflecting no docket activity between 2005, when DNA results were received, and 2009, when fourth new trial motion was filed). Most significantly, Salim did not file his uncounseled fifth new trial motion – which raised the DNA issue – for nearly 5 years after his counseled fourth new trial motion – which did not raise the DNA issue – had completely run its course through the state courts. *See* #17-8 at 2 (motion for reconsideration denied on April 11, 2014), #17-1 at 5 (fifth new trial motion filed February 26, 2019).

The DNA results do not constitute new reliable evidence of actual innocence. That the blood underneath the victim's fingernails was female and thus could not have belonged to him does not exonerate Salim. *E.g.*, *Elliott v. Smith*, No. 18-CV-92-REW, 2018 WL 3431929, at *5 (E. D. Ky. July 15, 2018) (rejecting gateway actual innocence claim based on DNA tests showing that blood was victim's, results which were "at most, neutral relative to the identity of the killer" and "hardly suggest[ed] that 'no juror, acting reasonably, would have voted to find [Elliot] guilty beyond a reasonable doubt'") (citations to *McQuiggin* and *Schlup* omitted), *certificate of appealability denied sub nom. Elliott v. Mazza*, No. 18-6106, 2019 WL 1810920 (6th Cir. Jan. 8, 2019) (unreported). *Contrast House*, 547 U.S. at 540 (DNA evidence showed that blood and semen samples collected from victim came from her husband, not petitioner).[17]

The DNA testing was conducted almost three decades after the crime. During the fourth new trial motion proceedings, when Salim was represented by counsel, the DNA issue was not raised. For almost 5 years after those proceedings ended, the DNA issue still was not raised. While

[17] As further evidence of actual innocence, Salim draws the court's attention to a police report of an interview with a school social worker, which he seems to suggest corroborates the trial testimony of a school teacher and that the report and testimony together establish that he did not have scratches on his face, thus "contradicting the police version that Salim had not inflicted the scratches as a form of lamentation." (#28 at 6.) *See* #1-1 at 1 (table of contents), 72 (page of trial transcript), 73 (police report). Neither the page of trial transcript nor the police report establishes that Salim did not have scratches on his face. *See* #1-1 at 72 ("Q And Mr. Salim appeared cheerful and composed and relaxed? A I didn't notice anything unusual, no"), 73 ("Pat stated that when she called Mr. Salim answered the phone and he said he thought Mrs Salim was going to pick the children up but he would be right down. He arrived and went inside and talked to the children and appeared to be in a very good mood").

Salim also asserts that a tuft of hair found on the victim's wrist was tested and determined not to belong to either of them. (#28 at 4, 6.) The page of the appendix to which Salim draws the court's attention is not a page from a transcript. It is a page of notes of unknown origin and accuracy. (#1-1 at 71.)

Salim's bald assertions of bias and other improprieties, *see* #26 at 6, do not merit discussion as they do not constitute new reliable evidence.

not determinative, this delay is relevant. *McQuiggin*, 569 U.S. at 386-387, 399. *See Schlup*, 569 U.S. at 332. For all of the reasons above, Salim's showing falls far short of *Schlup*'s demanding standard.[18]

Salim also asserts that his language deficiency and mental health issues warrant equitable tolling. (##1 at 13, 28 at 2.) The court disagrees. Setting aside whether Salim has shown that he diligently pursued his rights (he has not), the court is not persuaded that he has any language deficiency, let alone one that prevents him from understanding his rights and pursuing them.[19] Regardless, he has failed to explain the steps that he took to mitigate his alleged language deficiency, either in the roughly 4 years between the receipt of the DNA results and the filing of the fourth new trial motion not raising the DNA issue or in the roughly 5 years between the end of the proceedings on the fourth new trial motion and the filing of the fifth new trial motion raising the DNA issue. *See Diaz*, 515 F.3d at 154.

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[18] For the same reasons, the Court of Appeals would not authorize review of Ground One (DNA) under § 2244(b)(B)(ii)'s "clear and convincing" standard, which is higher than *Schlup*'s "more likely than not" standard.

[19] The SJC recounted in its 1987 decision evidence that Salim "became reasonably fluent in Spanish as well as in English...." *Salim*, 399 Mass. at 229. In his appendix, Salim includes a 1972 newspaper article that quotes him in English. (#1-1 at 85.) With his motion to augment, he includes recent prison psychiatric records that quote him in English. *See, e.g.*, #29-1 at 12 (from 2018: "Mr. Salim reported that his mother was elderly so her death was 'common sense'.... Mr. Salim stated that 'it is the way of the world'...."), 15 (from 2016: "This writer then met with client who reports that he is doing 'totally fine' and has no emergent MH concerns stating 'I'm not going to hurt myself or anyone else'..."), at 20 (from 2014: "Inmate reported that he was just sharing recent events with the nurse 'because she asked', and stated 'everyone gets sad once in a while.'"), 25 (from 2014: "Client reports that he 'kind of expected it' after self-report of being incarcerated for 34 years- 'I'm in prison, what do I expect?'..."). One such record describes his speech as "clear and coherent but with a slight accent." (#29-1 at 12.) Another psychiatric record – from 1972 – states: "...The patient speaks good English...." (#1-1 at 22.) Among the two sets of exhibits not viewed by respondent's counsel, Salim includes letters written by prior counsel, in English, and apparently sent to him. *See, e.g.*, ##15 at 6 (in 2003), 10 at 17 (in 2005).

Nor do the psychiatric records and other documents submitted by Salim show that, "during the relevant time frame, he suffered from a mental illness or impairment that so severely impaired his ability either effectively to pursue legal relief to his own behoof or, if represented, effectively to assist and communicate with counsel." *Riva*, 615 F.3d at 40.[20] Certainly, that he was committed to Bridgewater State Hospital prior to his first trial; that the assistant medical director recommended that he not be found competent to stand trial; and, that a consulting psychologist suggested that he was schizophrenic and paranoid suggests that Salim has a history of mental illness. *See* #1-1 at 14, 20.[21] However, Salim ultimately was found competent to stand trial; stood trial; and, was ordered release on bail prior to his second trial. *See* #17-7 at 1-5. Moreover, the more recent psychiatric records and other documents do not establish that Salim could not assist or communicate with counsel between 2005 when the DNA results were received and 2009 when the fourth new trial motion was filed or that he could not pursue legal relief on his own behalf between 2014 when the motion for reconsideration was denied and 2019 when the fifth new trial motion was filed.[22]

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[20] The court does not agree with respondent, *see* #33 at 2, that the appropriate time frame is the grace period, 1996-1997, which expired before the new factual predicate for Ground One (DNA) was even discovered. A more appropriate time frame would be 2005-2006, the one year from the receipt of the DNA results within which Salim had to file a new trial motion in state court for purposes of statutory tolling. 28 U.S.C. §§ 2244(d)(1)(D), 2244(d)(2). *See Riva*, 615 F.3d at 41. In any event, the court does not need to decide on the most appropriate time frame. The psychiatric records do not show a sufficiently debilitating mental illness or impairment at any time.

[21] Salim appears to also emphasize records of a head injury and intermittent seizures since childhood, perhaps the result of physical abuse by his father. *See* #29-1 at 1, 11, 14. *See also* #1-1 at 21-22. On this record, the court cannot find that he was unable to effectively assist or communicate with counsel or pursue legal relief on his own because of this or some other physical issue.

[22] Some of the records suggest that Salim assisted and communicated with counsel. *See* #29-1 at 7 (2010; indicating that Salim was seeking list of mental health medications from 1978-present "for legal purposes"), 25 (2014; "future-oriented going to the library/talking on the phone with

III. Recommendations.

For the reasons set forth above, Salim's renewed request for appointment of counsel (#28) is denied. Salim's motion to augment (#29) is allowed. The court recommends that respondent's motion to dismiss (#17) be allowed. Because "reasonable jurists" could not debate whether Salim's petition was timely filed, *see Slack*, 529 U.S. at 484, the court further recommends that no certificate of appealability be issued.

IV. Review by District Judge.

The parties are hereby advised that any party who objects to this Report and Recommendation must file a specific written objection thereto with the Clerk of this Court within fourteen days of service of this Report and Recommendation. The written objections must specifically identify the portion of the Report and Recommendation to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for the First Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) shall preclude further appellate review. *See Keating v. Sec'y of Health & Human Servs.*, 848 F.2d 271 (1st Cir. 1988); *U.S. v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *U.S. v. Vega*, 678 F.2d 376, 378–79 (1st Cir. 1982); *Park Manor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

August 16, 2021

/s/ M. PAGE KELLEY
M. Page Kelley
Chief United States Magistrate Judge

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lawyer/talking on the phone with family supports"). Many suggest that he denied or minimized mental health concerns. *E.g.*, #29-1 at 6 (2003), 20 (2004), 16 (2014), 15 (2016). In 2017, when questioned about a report that he said he had "given up," Salim denied making the statement, reported that he had been and would continue taking his medications; and, when asked about self-harm, laughed and said: "I'm not that sick." (#29-1 at 13.)

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO: SJ-2019-0439

SUPERIOR COURT DEPARTMENT
ESSEX SUPERIOR COURT
Docket No. 7877CR97724

COMMONWEALTH

vs.

ABDER SALIM

MEMORANDUM OF DECISION AND ORDER

The matter came before the court, Lenk, J., on the pro-se defendant's petition for relief pursuant to G. L. c. 278, § 33E, from the denial of his fifth motion for a new trial. The Commonwealth has submitted a brief letter stating that it opposes the petition, but will not be filing anything further unless ordered to do so by the court.

1. Background. In June, 1981, after his first, nineteen-day trial ended in a mistrial because the jury were unable to reach a verdict, the defendant was convicted at a second trial of murder in the first degree in the stabbing death of his wife. The conviction was affirmed by the full court in 1987. See

EXHIBIT 1

Commonwealth v. Salim, 399 Mass. 227, 239 (1987). Represented by new appellate counsel, the defendant moved for a new trial in 1990 and 1991; both motions were denied. In 2000, the defendant again filed a motion for a new trial. Following the denial of the defendant's third motion for a new trial in 2001, his motion for post-conviction deoxyribonucleic acid (DNA) testing was allowed later that year. Testing took place in 2004, and the test results eventually were made available to the defendant in 2005. The defendant than filed a fourth motion for a new trial in 2009, without reference to the new DNA results; that motion, arguing newly discovered evidence in statements by the defendant's father, was denied after an evidentiary hearing, as was a gatekeeper petition challenging the denial (in April, 2012), and a motion for reconsideration (in April, 2014). The motion judge concluded that the elderly father's statements implicating himself in the victim's death were not credible, and that no evidence tied the father to the crime other than these late-made statements.

In 2019, the defendant ultimately filed his fifth motion for a new trial, this time, inter alia, on the basis of the DNA results, which showed only female, and no male, DNA under the victim's fingernails. (The Commonwealth's theory at trial had been that the scratches on the defendant's face and neck when police arrived at the scene had been made by the victim

scratching him as she struggled for her life. The defense theory was one of mistaken identification; the defendant argued that the scratches on his face were self-inflicted in lamentation when he found his wife's body, and his brother-in-law, whom he strongly resembled, was the culprit). The motion judge ordered the Commonwealth to submit a brief in opposition to the defendant's fifth motion for a new trial, and thereafter denied the motion in a two-page decision setting forth the history of the defendant's prior post-conviction motions, and then citing the Commonwealth's brief as explaining the reasons for the denial.

2. Discussion. As he did in his fifth motion for a new trial, in his gatekeeper petition, the defendant presents three issues which he contends require a new trial. First, he argues that the 2004 DNA testing of blood under the victim's fingernails that showed only female DNA excluded him as the source of the blood under the fingernails, and thus disproves the Commonwealth's theory at trial that the victim had scratched him during the final confrontation before she was killed. Second, the defendant argues that the prosecutor impermissibly asked the jury to conduct an experiment in the jury room when he urged them to see if they could scratch their faces and necks in the way that the defendant claimed that he had scratched his own . Third, the defendant claims that nine instances of courtroom

closure to the press during voir dire of certain witnesses prejudiced him.

When, as here, a defendant has been convicted of murder in the first degree, the full court has affirmed the conviction after consideration of the defendant's direct appeal, and a subsequent motion for a new trial has been denied, before any further appeals will be heard by the full court, the defendant first must file a gatekeeper petition pursuant to G. L. c. 278, § 33E, in the county court. The single justice, acting as "gatekeeper," then must decide whether the appeal presents a new and substantial question that should be reviewed by the full court. Id. Only if the single justice determines that the issue is both new and substantial will the matter be referred to the full court for disposition. The decision of the justice in this regard is final and unreviewable. See Commonwealth v. Nassar, 454 Mass. 1008, 1009 (2009), quoting Commonwealth v. Herbert, 445 Mass. 1018, 1018 (2005).

An issue is not new within the meaning of the statute when it could have been raised by the defendant at trial or on direct review. Commonwealth v. Ambers, 397 Mass. 705, 707 (1986); Commonwealth v. Johnson, 461 Mass. 1, 2 (2011). An issue is considered new if evidence that was not previously available comes to light after the trial, or if the law was not sufficiently developed at the time of trial. Commonwealth v.

Gunter, 459 Mass. 480, 488 (2011). Even if the issue could have been raised at the time of trial, it still may be considered new if the law surrounding it was not fully developed at the time of trial or at the time of the defendant's direct appeal. See id. This requirement serves justice by ensuring that there is finality to criminal judgments, and also preserves judicial resources, while at the same time allowing meritorious subsequent appeals to proceed. See Commonwealth v. Valliere, 437 Mass. 366, 371 (2002).

a. Whether issues are "new" and "substantial". I. DNA testing. As stated, the defendant's 2001 motion for DNA testing of the blood underneath the victim's fingernails (when the defendant was represented by appointed counsel) ultimately was allowed, and testing was conducted, in 2004; the defendant was provided the test results in 2005. The results revealed that the DNA was exclusively female, and therefore could not have belonged to the defendant, as the prosecution had argued vigorously at trial. The results of the DNA tests were disclosed to the defendant on February 16, 2005. Appointed post-conviction counsel apparently believed that the DNA likely was that of the victim herself, and did not pursue the matter further. Rather, the defendant, again represented by counsel, filed his fourth motion for a new trial on November 19, 2009, citing newly-discovered evidence. After an evidentiary hearing,

this motion ultimately was denied. The defendant's 2012 gatekeeper petition challenging that denial subsequently was denied by the single justice, as was his motion for reconsideration two years later. See Commonwealth vs. Abder Salem, Docket No. SJ-2012-0155.

A defendant challenging a conviction of murder in the first degree must "present all his [or her] claims of error at the earliest possible time, and failure to do so precludes relief." Commonwealth v. Ambers, 397 Mass. 705, 707 (1986), quoting Commonwealth v. Pisa, 384 Mass. 263, 365-366 (1981). See G. L. c. 278, § 33E. Because the DNA test results were available to the defendant four years before he filed his fourth motion for a new trial, and could have been raised in that motion, by the time that he filed his fifth motion for a new trial, ten years after the fourth motion, and fourteen years after receiving the DNA results, the issue was not new within the meaning of G. L. c. 278, § 33E.

II. Closing argument. The defendant's argument concerning improprieties in the prosecutor's closing, in which the prosecutor urged the jury to experiment for themselves to see if they would be able to scratch their faces in mourning as the defendant asserted that he had, also is not new within the meaning of the statute. It could have been raised at trial or during the defendant's direct appeal. The asserted impropriety

in the prosecutor's closing argument was part of the record that was initially considered by the full court in conjunction with the defendant's direct appeal; indeed, the comments were contained in the trial transcript. Legal issues surrounding the propriety of a prosecutor's closing were well-developed at that time, and any challenge could have been made at that point.

III. Courtroom closures. Unlike questions of jury voir dire, the law concerning court room closure during voir dire of witnesses also was well developed at the time of the defendant's trial, and, although the defendant did not object to the closures at trial, any claim on that ground could have been made as part of his direct appeal.

Even had he raised the issue in a timely manner, however, the defendant could not have shown prejudice from the closures. The courtroom was closed on the judge's order during testimony of nine potential witnesses to the defendant's statements, after counsel for the newspaper the Eagle Tribune informed the court that he would not guarantee the voir dire testimony would not be printed by the press. The judge ordered the courtroom closed to representatives of the media in order to avoid having potential members of the venire from being exposed to the witnesses' statements before trial, where it was possible that the defendant would move successfully prior to trial to have the

statements suppressed. For evident reasons, trial counsel did not object to any of these closures.

Upon consideration, because the defendant has not raised any issue that is new and substantial within the meaning of G. L. c. 278, § 33E, it is ORDERED that the petition for leave to pursue an appeal to the full court from the denial of the defendant's fifth motion for a new trial shall be, and hereby is, DENIED.

By the court,

Barbara A. Lenk
Associate Justice

Entered: July 9, 2020

EXHIBIT 1

DISTRICT	OFF.	DOCKET NO. YR.	NUMBER	OR	FILING DATE MO.	DAY	YR.	J	NATURE SUIT	DIV.		R 23	$ IN MAND THOUSANDS	JUDGE	MAG.	COUNTY	JURY DEM.	DOCKET YR.	NUMBER
101	1	88	1602	3	7	11	88	3	530					0117		25023		88	1602MA

PLAINTIFFS

Abder Salim

DEFENDANTS

Related To: 87-2818-Ma
Ronald W. Amaral

3/13/89
CLOSED
NOT TRIED
ON APPEAL
3/20/89

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

MANDATE
8/3/89

28 U.S.C., Sc 2254

ATTORNEYS

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☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET — DC-111 (Rev. 8/87)

EXHIBIT 2

DATE	NR.	PROCEEDINGS
		88-1602-MA
1988		
June 30	01	Application to proceed in forma pauperis & Financial Affidavit. FILED.
"		**COHEN, U.S.M.: Re: #01. ALLOWED.** cc/cl.
"	02	Petition for a writ of habeas corpus. FILED.
"	03	P's mtn for the Appointment of counsel. FILED.
July 12	04	P's marking mtn to schedule a hearing for P's mtn for appointment of counsel. FILED. cs.
Jul 1	05	Appearance of Judy G. Zeprun, FILED. cs
1	06	Respondent's **ANSWER**, FILED. cs
15		**MAZZONE, D.J.**, Re: #3 DENIED. cc/cl
Sep 2	07	Respondent's **MOTION** to Dismiss, FILED. cs
2	08	Memorandum in support of Motion to Dismiss, FILED. cs
8	09	Petitioner's **MOTION** for Reconsideration of the Court's Denial of his motion for appointment of counsel, FILED. cs
14	10	Petitioner's **MOTION** for leave to file a Motion and memorandum of law in opposition to respondent's Motion to dismiss, FILED. cs
15	11	**MAZZONE, D.J.**, Re: #10 ALLOWED. Memorandum to be filed on or before October 11, 1988. cc/cl
Oct 11	12	Petitioner's memorandum of law in support of his opposition to respondent's motion to dismiss, FILED. cs
Nov 17		**MAZZONE, D.J.**, Re: #9 DENIED. As stated earlier, the complaint is clearly stated and the issues clearly presented. cc/cl
1989		
Mar 7	13	**MAZZONE, D.J., MEMO** AND ORDER, In accordance with the foregoing, this petition must be denied, SO ORDERED, entered, cc/cl.
9	14	**ORDER OF DISMISSAL**, entered, cc/cl.
20	15	Notice of appeal, FILED.
20		Certified copy of docket, order and notice of appeal forwarded to ct. of appeals.
Apr 3		Certified copy of docket and original pleadings certified this date to Court of Appeals
11		**MAZZONE, D.J.**, Re: #15 Treated as a request for certificate of probabl cause and ALLOWED. cc/cl
14		Certified copy of docket & original pleadings forwarded to court of appeals.
Aug 3	16	**USCA**, Order of the Court, entered July 12, 1989. The appellant having remained in default, it is ordered that the appeal herein be dismissed for want of prosecution. Mandate issued.

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ABDER SALIM, Petitioner

Vs.

RONALD W. AMARAL, Respondent

Civil Action
88-1602-MA

MEMORANDUM AND ORDER

Mazzone, D.J. March 7, 1989

This pro se habeas corpus petitioner was tried and convicted of first degree murder in the Superior Court of Essex County on June 1, 1981.[1] He appealed his conviction to the Massachusetts Supreme Judicial Court, alleging seven grounds as the basis for his appeal. The court affirmed the conviction after thoroughly reviewing the entire trial transcript and record in accordance with Mass. Gen. L. ch. 278, § 33E. See Commonwealth v. Salim, 399 Mass. 227 (1987). The petitioner then filed his first petition for habeas relief in this court, raising the same seven grounds and adding several issues not presented to the state court. The court dismissed the petition without prejudice due to petitioner's failure to exhaust his state remedies on those additional grounds. Salim v. Amaral, C.A. No. 87-2818-MA (April 13, 1988). This petition, filed on June 22, 1988, raises only

[1]A first trial ended in a mistrial on February 12, 1980.

the seven grounds alleged in petitioner's original appeal to the Supreme Judicial Court. They are as follows:

> (1) the prosecutor's improper attack on the credibility of crucial defense witnesses;
>
> (2) the "Contingent Fee" of defense counsel which created a conflict of interest and deprived the defendant of effective assistance of counsel exercising independent professional judgment;
>
> (3) the improper admission of evidence of the defendant's purported bad character and criminal propensity;
>
> (4) the improper admission of prior recorded testimony of two witnesses in violation of his constitutional right to confrontation;
>
> (5) the use of an interpreter without establishing the need for, the competency of, and the impartiality of the interpreter which diminished the defendant's right to confrontation;
>
> (6) the insufficient evidence to support the verdict;
>
> (7) the improper argument by the prosecutor which urged inferences not supported by the record, and verdict against the weight of the evidence.

I.

The respondent has moved to dismiss, asserting that the petition contains both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 510 (1982). The petitioner opposes dismissal, asserting that he has fairly presented to the state courts the substance of his federal habeas claim, and thus exhausted his state court remedies. Anderson v. Harless, 459 U.S. 4, 6 (1982); See also Kines v. Butterworth, 669 F.2d 6, 12 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982). In the First Circuit, a petitioner may satisfy the exhaustion requirement by

any of the following methods: (1) citing a specific provision of the Constitution, (2) presenting the substance of a federal constitutional claim in such manner that it likely alerted the state court to the claim's federal nature, (3) reliance on federal constitutional precedents, and (4) claiming a particular right specifically guaranteed by the Constitution. Gagne v. Fair, 835 F.2d 6, 7 (1st Cir. 1987). Employing these standards, I conclude the petitioner has presented his claims to the Massachusetts Supreme Judicial Court in a manner which would have "likely alerted" the state court to the federal constitutional nature of the claims.[2] Again, the Massachusetts Supreme Judicial Court need not specifically address the claims on a constitutional basis as long as the petitioner has likely alerted it to their constitutional nature. While I believe the respondent's position has some merit, particularly with respect to ground one, I am also mindful that the petitioner is proceeding pro se, and is entitled to a more relaxed reading of the pleadings. Haines v. Kerner, 404 U.S. 519, 520 (1972).

Moreover, a dismissal would only delay further a review on the merits. Federal review should be delayed only when the petitioner clearly failed to exhaust his state remedies. In

[2]The respondent acknowledges that petitioner has exhausted his state remedies with respect to grounds four, five and six. Furthermore, the Massachusetts Supreme Judicial Court did not indicate the law underlying its denial of petitioner's grounds three and seven. Accordingly, I cannot fairly rule that the court did not consider federal constitutional law in addressing those grounds. Thus, I find the petitioner has sufficiently exhausted his state remedies for grounds two through seven.

light of the salient issues presented here, namely, the competence of counsel and the overall fairness of the entire case, addressing the claims now without further examination of the potential procedural defaults will save substantial time and effort.

II.

I turn now to lay out the facts of this case. I have relied heavily on the factual record which was established by the Massachusetts Supreme Judicial Court in the petitioner's direct appeal. A federal court in habeas corpus proceedings must presume that state court findings of fact are correct except when one of seven specified factors is present or the federal court determines that the state-court findings of fact are not supported by the record. Sumner v. Mata, 455 U.S. 591, 592 (1981) (per curiam).[3] Examining the entire record with those seven factors in mind, I find no basis for departing from the high measure of deference that is owed to the state-court factfindings. See Commonwealth v. Salim, 399 Mass. 227 (1987).

[3]28 U.S.C. § 2254(d) describes those seven factors as follows: (1) that the merits of the factual dispute were not resolved in the State court hearing; (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; (3) that the material facts were not adequately developed at the State court hearing; (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding; (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding; (6) that the applicant did not receive a full, fair, and adequate hearing in the State court; or (7) that the applicant was otherwise denied due process of law in the State court proceeding.

On July 28, 1978, at about 5:10 p.m., emergency medical technicians were dispatched to the defendant's home. They found the defendant crying and kneeling over his wife's badly beaten body. An autopsy revealed multiple puncture wounds about the left chest and neck area; six wounds penetrated her heart. These wounds were consistent with those caused by an ice pick or a very slim screwdriver. The victim was about five months pregnant. In the medical examiner's opinion, death occurred two to five hours prior to the discovery of the body, or between 12:10 p.m. and 3:10 p.m. on July 28, 1978.

After a state police detective read the petitioner his Miranda rights, the petitioner told the police he had left the house at 9:00 a.m. that day. He received a call from his children's day care center at about 5:00 p.m. informing him that his wife had not picked up the children. He picked them up, returned home and discovered his wife's body. He stated he was happily married and blamed his wife's death on people in Lawrence "who were out to get him." When asked about scratches on his face, neck and collar bone, the defendant explained he had caused those marks by pulling at his face in his grief and distress at finding his wife's body. At the police station, he submitted to a series of tests which revealed the presence of blood on his hands.

During the investigation, a neighbor said that she had seen the defendant approaching his house at about 1:00 p.m. on the day of the murder wearing a striped shirt. He picked up his mail

from the postman and continued to his door. The postman corroborated the neighbor's testimony.

The petitioner's brother-in-law and his bookkeeper also contradicted the petitioner's account of his activities on that day. His brother-in-law testified that the petitioner had left the store where they worked at about noon and returned at 12:30 p.m. The bookkeeper testified that the petitioner was not in the store from 1:00 p.m. to at least 1:45 p.m. From 2:00 p.m. on, the petitioner and his brother-in-law were together, until the petitioner left to pick up his children at the day care center. When the brother-in-law asked why the victim had not picked up the children, the petitioner replied that she was sick. Both of these witnesses testified that the petitioner had changed from a striped shirt he wore early in the day to a flowered green shirt late in the afternoon.

The detective observed that the house showed little disarray although the victim's pocket book had been opened and the contents dumped on the table. The scene showed no evidence of forced entry or any attempt to remove property. The defendant claimed that the murderer came in through the open window and left through the door which was ajar when he came home.

Finally, witnesses testified that the petitioner had threatened to kill his wife on several occasions and had told others of his intentions to kill her. He had offered his former driver $2,000 to kill her and repeated this offer about ten times. He asked a friend to purchase an ice pick which was in

his van the day before the murder. He also borrowed a leather punching tool the day before the murder. The petitioner, an immigrant from Jordan, rejected a suggestion that he get a divorce, stating that his people "have their own way of doing things." He stated that his wife was "a whore and she was pregnant and it wasn't his." He stated his wife should die and he was going to kill her.

On the foregoing summary, I now turn to each of the seven grounds asserted by the petitioner, seriatim.

III.

1. The prosecutor's attack on the credibility of defense witnesses.

Petitioner claims that the prosecutor's cross-examination of key defense witnesses at the petitioner's second trial was improper because it elicited testimony about the witnesses' failure to testify at petitioner's first trial. At the second trial, the defendant produced five witnesses who testified that they had seen the victim between 12:30 p.m. and 2:00 p.m. on the day of the murder. They testified that the victim came to their homes to collect money due on their accounts. Six other witnesses testified that they saw the defendant in the store on that day between 2:30 p.m. and 5:00 p.m. On cross-examination, the prosecutor elicited from each of these witnesses that they did not testify at the first trial although they had known the defendant and the victim for a considerable period of time. The petitioner failed to object to this evidence at trial.

The basis of the petitioner's objection is that the prosecutor failed to establish a proper foundation for that line of questioning. The type of foundation required was set out in Commonwealth v. Brown, 11 Mass. App. Ct. 288, 296-97 (1981), which states that the prosecutor must first establish that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both, did not ask the witness to refrain from doing so.

Since the petitioner did not raise this issue at trial, it is subject to the contemporaneous objection rule requiring that the petitioner show cause for the procedural error and actual prejudice. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Moreover, the trial errors must have worked to the petitioner's actual and substantial disadvantage resulting in an unfair trial. United States v. Frady, 456 U.S. 152, 170 (1982).

The petitioner's allegation, even if true, does not result in an "error of constitutional dimensions." Frady, 456 U.S. at 170. Furthermore, this record does not reveal a substantial risk of a miscarriage of justice. Wainwright, 433 U.S. at 91. The cross-examination was aimed properly at the credibility of witnesses who professed to know the victim and defendant well, and who testified as to events which took place almost three years earlier. The jury had the ability to view the witnesses

EXHIBIT 3

and assess their credibility under fair circumstances. Thus, the petitioner has failed to show the cause for the procedural error as well as the necessary level of prejudice to his case to warrant reversal on this ground.

2. The "Contingent Fee" of counsel

The petitioner claims that the existence of a $75,000 insurance policy on the victim's life, payable to the defendant upon his acquittal, created a contingency fee arrangement in violation of S.J.C. Rule 3:05(3), as amended, 382 Mass. 762 (1981). Petitioner further alleges that this contingency fee created a conflict of interest and deprived petitioner of effective assistance of counsel exercising independent professional judgement. The Supreme Judicial Court concluded there was no contingency fee agreement, and did not reach the merits of the claim. However, the court recognized the claim was for a denial of effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984).

The court had appointed trial counsel for the defendant before discovering the insurance policy. After discovery of the policy, the trial judge indicated that counsel would be paid from the life insurance proceeds only if the petitioner were aquitted as the defendant would then be ineligible to receive public funds.

These circumstances present no violation of S.J.C. Rule 3:05(3) which prohibits a fee agreement contingent upon a favorable disposition of a criminal charge. The trial court

simply advised the petitioner that if he became able to pay reasonable counsel fees, he would be called upon to do so. Only the source of payment of the counsel's fee was ever in question. As no contingency fee existed, petitioner fails on this ground.

3. The evidence of the defendant's purported bad character and criminal propensity.

The petitioner claims that the admission of evidence of his purported bad character and criminal propensity was prejudicial error. At trial, various witnesses testified to the defendant's abusive treatment of the victim prior to the murder and his violent reaction when the victim objected to his striking his child in the presence of others. Other witnesses testified that the defendant threatened to kill the victim on other occasions. Witnesses also testified that the defendant tried to pay his bookkeeper a salary "under the table," and that he had declared bankruptcy.

First, petitioner failed to object to the testimony of these witnesses at trial. Thus, as previously discussed, this claim is also subject to the contemporaneous objection rule. See Wainwright, 433 U.S. at 87. See also Frady, 456 U.S. at 170.

Secondly, habeas corpus review does not ordinarily extend to state court rulings on the admissibility of evidence. Lisenba v. California, 314 U.S. 219, 228 (1941); Puleio v. Vose, 830 F.2d 1197, 1204 (1st Cir. 1987), cert. denied, 108 S. Ct. 1297 (1988). In the First Circuit, a federal court will review a state court's evidentiary ruling only if the alleged error is of constitutional

magnitude, so infusing the trial with inflammatory prejudice as to render a fair trial impossible. Allen v. Snow, 489 F. Supp. 668, 673 (D. Mass. 1980), aff'd. 635 F.2d 12 (1st Cir. 1980), cert. denied, 451 U.S. 910 (1981). In light of this heightened standard and the total evidence presented at trial, allowing the jury to hear this evidence was not a constitutional error calling for reversal on this ground. Furthermore, the petitioner has failed to show the cause for his failure to object to the offer of the testimony, as well as the necessary level of prejudice to his cause to warrant reversal on this ground.

4. The admission of prior recorded testimony.

The petitioner asserts that the admission of prior recorded testimony of two men, who claimed to have been solicited by the defendant to kill his wife, violated his constitutional right to confrontation. Edwin Mercado testified at the petitioner's first trial, and Jesus Rosario testified at the probable cause hearing. Both witnesses testified that the defendant had offered each of them $2,000 to kill the petitioner's wife. The authorities were unable to locate either Mercado or Rosario at the time of the petitioner's second trial.

The sixth amendment right of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). For prior recorded testimony to be admissible, the witness must be unavailable at the time of the trial. Fed. R. Evid. 804(b). Also, the party seeking

introduction of the testimony must have made a good faith effort to produce the witness. Barber v. Page, 390 U.S. 719, 724-25 (1968); U.S. v. Mann, 590 F.2d 361, 367 (1st Cir. 1978). Finally, the petitioner must have had a meaningful opportunity to cross-examine the witness at the time of the prior testimony. Davis v. Alaska, 415 U.S. 308, 315-16 (1974).

The record shows that the trial judge properly ruled that both witnesses were unavailable at the time of the second trial. See Mann, 590 F.2d at 367. The respondent made a genuine, bona-fide search for the witnessses using reasonable diligence and care.[4] More importantly, the record shows that experienced counsel represented the client at the probable cause hearing and cross-examined Rosario extensively. Similarly, the petitioner's counsel cross-examined Mercado at the petitioner's first trial. Accordingly, admission of this prior recorded testimony did not deny defendant the right of confrontation. Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400, 403 (1965).

5. The use of an interpreter.

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[4]Lieutenant Joseph Golden, of the Lawrence police department, conducted the searches for both Mercado and Rosario. The search for Mercado entailed inquiries of Mercado's family as to his whereabouts, inquiries of police officers in the town where Mercado's family members thought Mercado was living, and inquiries with the office of the division of employment security in Lawrence. The search for Rosario entailed a review of the local division of employment security records, death records, voting records, police records, probation department records, Social Security records and Registry of Motor Vehicles records. Golden also questioned local businessmen known to hire Hispanics and searched various clubs which Hispanics frequent in his search for Rosario.

The petitioner claims the trial court failed to establish the need for, and the competency and impartiality of the interpreter, resulting in a diminution of his right to confrontation. At trial, one witness indicated to the trial judge that he understood limited amounts of English, and that he thought an interpreter would aide in communicating his answers to the jury. Accordingly, the trial judge appointed an interpreter. The qualifications and impartiality of the interpreter, as well as the need for one, fall within the sound discretion of the trial judge. United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974). Therefore, absent a showing of abuse of this discretion, the trial judge's decision must stand. See Carrion, 488 F.2d at 14.

The record substantiates that the trial judge was within his realm of discretion in appointing the interpreter. The record indicates that the interpreter was fluent in Arabic and could understand the witness's answers in that language. Furthermore, the interpreter's academic background and experience were impressive. Despite the interpeter's conversations with the petitioner prior to trial, the interpreter acknowledged his duty to act as an impartial interpreter throughout the trial. Finally, the defendant did not object to the appointment of the interpreter at trial and had ample opportunity to cross-examine the witness through use of the interpreter. Accordingly, the petitioner fails on this ground.

EXHIBIT 3

6. Insufficient evidence to support the verdict.

The petitioner alleges that the evidence was insufficient to support the verdict of guilty. A federal court must reverse a state conviction if, after viewing the evidence in the light most favorable to the prosecution, a court finds that no rational trier of fact could have found, beyond a reasonable doubt, sufficient evidence of the crime of which the defendant was convicted. Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Joseph v. Fair, 763 F.2d 9, 10 (1st Cir. 1985).

As previously discussed, I find that there is no basis to depart from the deference owed state court factfindings. They are entitled to a presumption that they are correct. Sumner v. Mata, 455 U.S. 591 (1981)(per curiam). On this record, a rational trier of fact could have found the essential elements beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319 (1979); Joseph v. Fair, 763 F.2d 9, 10 (1st Cir. 1985). Although the record does not reveal any direct evidence of the petitioners involvement in the murder, the circumstantial evidence clearly supports the jury's verdict. The record provides evidence of the petitioner's belief that his wife was pregnant with another man's child, and thus had a possible motive to kill the victim. Several witnesses testified that the petitioner, on various occasions, had offered them money in exchange for killing the victim. The petitioner incurred scratches in the face, neck and collarbone area on the day of the murder. Tests at the police station on the day of the murder

revealed traces of blood on the petitioner's hands. Witnesses saw the petitioner enter the scene of the murder at the estimated time of the crime, and noticed that the petitioner had changed clothes following the estimated time of the murder. The petitioner had acquired an ice pick and borrowed a leather punching tool the day prior to the murder. Finally, the defendant had threatened to kill the victim himself prior to the crime. Based on this record, a rational trier of fact could have found, beyond a reasonable doubt, sufficient evidence to support the verdict of guilty. Jackson, 443 U.S. at 318-19. Accordingly, the petitioner fails on this ground.

7. The prosecutor's argument.

The petitioner combines a claim that the prosecutor's argument was unfairly prejudicial with a general claim that the verdict was against the weight of the evidence. In order for this court to reverse the state court conviction on this ground, the prosecutor's comments must have been so prejudicial as to have infected the entire trial process and denied the defendant due process. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Therrien v. Vose, 782 F.2d 1, 4 (1st Cir. 1986), cert. denied, 476 U.S. 1162 (1986). Although a prosecutor may not manipulate or misrepresent evidence, he has the responsiblity to organize the evidence in his closing argument in a manner that will prove the government's case. Therrien, 728 F.2d at 6.

I find nothing in the conduct of the prosecutor which supports the claim. Furthermore, as discussed in ground six, the

record clearly shows ample evidence to support the verdict.

In accordance with the foregoing, this petition must be denied.

SO ORDERED.

A. David Mazzone
United States District Judge

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ABDER SALIM, Petitioner

vs.

Civil Action
88-1602-MA

RONALD W. AMARAL, Respondent

DOCKETED

ORDER OF DISMISSAL

MAZZONE, D.J.,

In accordance with the Court's memorandum and order dated March 7, 1989, summarily dismissing this petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody, it is hereby ordered that the above entitled action be and hereby is dismissed.

By the Court,

March 9, 1989

Deputy Clerk

EXHIBIT 4

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Additional material from this filing is available in the Clerk's Office.