No.

SUPREME COURT OF THE UNITED STATES

Philip Ayala

v.

Nelson Alves

Motion for Leave to Proceed *in Forma Pauperis*

The Petitioner asks leave to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Petitioner has previously been granted leave to proceed *in forma pauperis* in the following courts: Commonwealth of Massachusetts, Hamden Superior Court; Massachusetts Supreme Judicial Court; District Court of Massachusetts; and the Court of Appeals for the First Circuit.

Counsel was appointed by the First Circuit Court of appeals to represent the indigent Petitioner pursuant to the Criminal Justice Act.

Philip Ayala
By his attorney,

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Docket No. USAP1 No. 22-1924

Supreme Court of the United States

Philip Ayala
Petitioner

v.

Nelson Alves, Superintendent
Respondent

Petition for Writ of Certiorari

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January, 2024
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2024

QUESTION PRESENTED

When a capital case entirely depends on the testimony of one eyewitness, where there was no physical or forensic evidence to connect the Petitioner to the murder, no relationship between the Petitioner and the victim or the only eyewitness, where the only eyewitness retreated from every aspect of his initial description of the shooter at trial matched the Petitioner, and where the Petitioner was actually innocent, this Court should settle the First Circuit Court of Appeals's mistaken habeas rulings:

> The District Court did not err in concluding that the Supreme Judicial Court's holding that defense counsel would not have used the information in the missing records was unreasonable.
>
> The District Court did not err in finding unreasonable the SJC's conclusions that there was no evidence that suggested Perez's PTSD or drug use affected his ability to perceive the Petitioner the morning of the shooting.
>
> The District Court did not err in finding unreasonable the SJC's conclusions that the substance contained in the missing records was already presented to the jury.

The First Circuit should have affirmed the District Court's decision allowing habeas relief on the Petitioner's claim of ineffective assistance of counsel because trial counsel failed to obtain the mental health records of the Commonwealth's sole percipient witness.

LIST OF PARTIES

The parties are listed in the caption.

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The opinion of the Massachusetts Supreme Judicial Court ["SJC"] appears at Appendix A (here at Appendix page 1), and is reported at *Commonwealth v. Ayala,* 481 Mass. 46 (2018). Judgment entered December 6, 2018.

The Memorandum and Order of the District Court of Massachusetts, which granted habeas corpus relief on April 21, 2022, appears at Appendix B (here at Appendix page 16) and is reported as *Ayala v. Mederos,* 638 F.Supp.3d 38 (D.Mass., 2022). The opinion of the First Circuit Court of Appeals, which vacated the judgment of the District Court on October 25, 2023 appears at Appendix C, (here at Appendix page 70) and is reported as *Ayala v. Alves*, 85 F.4th 36 (1st Cir. 2023).

The Order of the First Circuit Court of Appeals denying Petition for Rehearing En Banc on December 13, 2023 appears at Appendix D (here at Appendix page 127).

STATEMENT OF JURISDICTION

The date on which the First Circuit Court of Appeals decided this case was October 25, 2023. The date on which the Court denied the Petitioner's request for en banc review was decided on December 13, 2023.

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

CONSTITUTIONAL PROVISION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On July 10, 2007, Ayala was indicted on charges of murder and unlawful possession of a firearm and ammunition. On August 12, 2009, prior to trial, defense counsel moved to examine medical and psychological records of Robert Perez, the government's sole eyewitness, from the Veteran's Administration hospital. The motion was allowed and on August 13, 2009, an order was entered to the Hospital But, contrary to the judge's ruling, the August 13, 2009 order was for medical records only, and expressly excluded psychological records. August 14, 2009, a second order was issued to the hospital, which was for both medical and psychological records.

Trial commenced on August 13, 2009, and on August 17, 2009, the Clerk's Office received Perez's Hospital medical records, but not his psychological records.

On August 25, 2009, a jury found Ayala guilty of both counts. He was sentenced to life imprisonment without possibility of parole.

Represented by new counsel, Ayala filed a Motion for New Trial on February 10, 2011, and the appeal was stayed.

On September 14, 2012, the Superior Court ordered an

evidentiary hearing on the following matters: failure to investigate potentially exculpatory eyewitness testimony; failure to sufficiently explore potential flaws in the Commonwealth's firearms expert's conclusions; and failure to investigate or explore at trial potentially significant flaws in the sole percipient witness's identification testimony.

Successor post-conviction counsel discovered that the eyewitness's records received from the Hospital before Ayala was convicted did not include Perez's psychological records. Counsel requested the psychological records be sent to the court.

On November 20, 2015, after a three-day evidentiary hearing, the Court denied the Petitioner's motion for new trial. Ayala filed a timely notice of appeal on November 27, 2015. On December 6, 2018, the Supreme Judicial Court upheld the denial of Ayala's motion for new trial and affirmed his convictions. On December 17, 2018, Ayala filed a Petition for Rehearing in the SJC. On January 24, 2019, the Petitioner's Petition was denied.

The Petitioner filed a Petition for Writ of Habeas Corpus in the District Court on April 21, 2020. The District Court granted habeas

corpus relief on October 27, 2022. The First Circuit Court of Appeals vacated the District Court order on October 25, 2023, and on December 13, 2023, the Court denied rehearing en banc.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The testimony of Robert Perez was **the only evidence** in this case that linked Phillip Ayala to the murder of Clive Ramkissoon. There was no physical evidence to connect Ayala to the shooting, and no other witnesses testified to seeing him shoot Ramkissoon. Nor was there evidence of any connection between Ayala and Ramkissoon, witness Perez, or the woman with them. The shooting occurred in a public area where there were many people who had access and an opportunity to commit the crime. There was no evidence of any threats, hostility, or other type of relationship between Ayala and the victim, and there was no evidence of any prior contact between Ayala and the victim. A witness testified that Ayala had left the area before the time of the shooting.

In Perez's identification testimony, he retreated from almost

every statement he made to the police after the shooting so that his description by the time of trial matched Ayala. Consciously or not, Perez had decided that Ayala must be the shooter, and Perez adjusted his facts to fit Ayala.

The Petitioner raised the following claims of ineffective assistance of counsel which involved evidence that could have contradicted or called into question Perez's credibility and the reliability of his identification. The claims include:

- that counsel had failed to notice that he did not receive Perez's psychological records of his marijuana addiction and his post-traumatic stress disorder ["PTSD"], and so he had not retained a psychologist to explain how those mental health disorders affected Perez's ability to perceive and recall.

- that he should have called experts to testify to the impossibility of Perez's identification of Ayala from the light of the muzzle flash of a .22 caliber pistol, as Perez claimed;

- that he should have called an identification expert to testify about the concept of transference and the possibility that Perez, who had been anxious prior to even entering the party, identified Ayala as the shooter precisely because he had become concerned about Ayala's intentions during the altercation at the party, and not because Ayala had actually been the shooter.

The Supreme Judicial Court's ["SJC"] decision was based on multiple unreasonable determinations of facts in light of the evidence,

and it was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). The District Court's decision granting the Petitioner's writ of habeas corpus was a correct one.

FACTUAL BACKGROUND

Evidence at Trial

On June 10, 2007, victim Clive Ramkissoon, Quadisha Simms, and witness Perez drove together to an after-hours party. One bouncer was stationed at the door searching people as they entered the first floor, and two other bouncers were stationed upstairs where the party was. The party also had a paid disk jockey, Natasha Frazier. (Tr.Exh.17, 8/19/2009: 146, 8/20/2009: 130.)[1] According to one bouncer, there was "Alcohol – the party had everything that you can imagine." (Tr.Exh. 8/19/2009: 146.) That night there were between twenty and fifty people at the party. (Tr.Exh. 15, 8/17/2009; 102; TrExh. 16, 8/18/2009: 85; Tr.Exh. 18, 8/20/2009: 144.)

Upon arrival, Ramkissoon, Perez, and Simms were frisked

[1] The citations are to the First Circuit Court of Appeals record.

downstairs by the bouncer. While he was standing on the stairs, Perez noticed a man [Philip Ayala] come in who did not want to pay or be frisked. (Tr.Exh. 17, 8/19/2009.) Perez was standing in the middle of the stairs, and the man pushed past the bouncer and came up the stairs past him. (Tr.Exh. 17, 8/19/2009: 35.) Perez said that the bouncer at the top of the stairs would not let the man into the party without being pat frisked. The two upstairs bouncers escorted the man back down the stairs and outside. Perez had never seen the man before those "couple of minutes" in the stairwell. (Tr.Exh. 17, 8/19/2009: 35.)

After Ayala was escorted out, Perez and Ramkissoon went outside onto the porch, and they observed the man who had been escorted out walking on the street. When asked how he identified Ayala, Perez was confident that he recognized the man based on his face. (Tr.Exh. 17, 8/19/2009: 34.) When they saw the man walking outside, they decided to wait **until the man was out of view** before leaving. Perez and Ramkissoon got Simms, and the three left the party. (Tr.Exh. 17, 8/19/2009: 39; Tr.Exh. 16, 8/19/2009:85, 86.)

Perez said he heard gunshots and that before hearing the shots, he saw a muzzle flash coming from the sidewalk area. He said that the

muzzle flash "illuminated" the shooter's face, allowing him to identify the shooter as the person he had seen on the staircase. (Tr.Exh. 17, 8/19/2009: 48-50.) Specifically, Perez testified: "When the muzzle flash went off, I was already pointed in that area. It illuminated Mr. Ayala's face." (Tr.Exh. 17, 8/19/2009: 48.)

Perez recalled hearing five to seven shots. (Tr.Exh. 17, 8/19/2009:45-49.) He started running and never looked back. (Tr.Exh. 17, 8/19/2009: 50.) Police arrived at 2:52 a.m. and transported Ramkissoon to the hospital, where he died of his injuries.

Inconsistencies in Perez's identification

At the trial, Perez acknowledged that he initially told the police that the shooter was 6' to 6'1," but he had changed that opinion as to the shooter's height. (Tr.Exh. 17, 8/19/2009: 56-57.) He denied that this change was because someone had told him Ayala was nowhere near 6' to 6'1". He explained the change of testimony because, he said, he had viewed Ayala on the staircase and so could not properly estimate his height. (Tr.Exh. 17, 8/19/2009: 57.) What Perez testified, however, was that Ayala passed him on the stairs when he [Perez] was in the middle

of the staircase. Even though it was on a staircase, Perez and Ayala were on the **same level** on the staircase when they crossed paths.

In the description that he gave the police that night, Perez said Ayala was wearing a **matching coat and pants set**. (Tr.Exh. 17, 8/19/2009: 68; S.A.II/452.) By the time of trial, he had changed that description and said Ayala was wearing "**a white T-shirt or green T-shirt** with a kind of skull on it. That's definitely what I recall that he was wearing and also some **shorts**, but I don't recall the color." (Tr.Exh. 17, 8/19/2009:58.) As Perez acknowledged at trial, his description of Ayala's clothes now matched the clothing Ayala was wearing during his arraignment. (Tr.Exh. 17, 8/19/2009: 93.)

Cross-examination of Perez regarding his medical records

In 2000, Perez was discharged from the army and began using the services of the Veterans Administration to treat his Post Traumatic Stress Disorder ["PTSD"]. He continued treatment of this disorder from 2000 through and up to the time of Ayala's trial. Perez also testified that he learned he had been diagnosed with borderline personality and bipolar disorder. (Tr.Exh. 17, 8/19/2009: 17.) Defense

counsel showed Perez a list of Hospital appointments which indicated that Perez had seen two psychiatrists 161 times between 2000 and 2007, and that he had seen a psychiatrist on **the day after the murder**, June 11, 2007. (Tr.Exh. 17, 8/19/2009: 9-11, 13, 17, 19; S.A.II/008-012.)

When asked directly about the effect PTSD had on him, Perez testified:

> My PTSD does not affect me person – my military PTSD was under control. While I was going to counseling I was working, I was being productive. And so the effect that it had on me was minimal. It's just basically, in an essence, remembering a bad time, a bad dream, a bad situation, and I was already past that point. I had gone through my counseling, I had done the steps that I needed to do to get myself better.

(Tr.Exh. 17, 8/19/2009: 12.)

When asked whether he had ever self-medicated, Perez testified that "there were times when I've used marijuana." (Tr.Exh. 17, 8/19/2009: 19.) When asked why he used marijuana he testified: "I used marijuana whenever I would have a night terror and I was unable to sleep." (Tr.Exh. 17, 8/19/2009:19-20.)

Defense witness

Defense witness, Natasha Frazier, was a paid confidential informant for the federal government for the Western Mass Gang Task Force, which included both state and federal officers. (Tr.Exh. 17, 8/21/2009: 9.) On the night of the shooting, Frazier was working as a D.J. at the after-hours party, and she had known Philip Ayala for years.

She said that at the party, Ayala was upset about his niece who had been shot. Frazier saw that he was crying, and she went to speak with him. (S.A.I/291-92.) She ran downstairs when he kicked the door, and she and others went to him to comfort him. When asked if the Petitioner's demeanor was one of anger, Frazier testified that he expressed "mostly pain." (Tr.Exh. 19, 8/21/2009: 135.) After she and the others spoke to him and hugged him to calm him down, he got into his car, a tan Cherokee, drove down Wilbraham Road and turned left on Suffolk Street. She said that the tan Jeep Cherokee left the vacinity **about thirty to forty-five minutes before the shooting occurred**. (Tr.Exh. 19, 8/21/2009: 143, 154, emphasis added.)

Frazier witnessed the shooting from the second-floor porch, and

she said that after she saw the victim on the side of the road, a heavy set man [not Ayala] climbed into a maroon Ford Taurus which then drove off. S.A.I/292. She testified that by that time Ayala was "long gone." (Tr.Exh. 18, 8/20/2009: 138-39.)

Facts elicited post-trial

After conviction and represented by new counsel, Ayala filed a motion for new trial. Evidence presented to the motion court included all of the psychological records of Perez's treatment for PTSD, bi-polar disorder and marijuana dependence. (Tr.Exh. 24, 11/2/2015: 16.) An affidavit from Dr. Jose Hidalgo, an expert who had reviewed the records, was submitted with the motion for new trial. Additionally, affidavits from trial counsel and three additional experts who testified at the hearing, were submitted into evidence. (Tr.Exh. 22, 10/27/2015: 75, 95, 24, 11/2/2015: 18.)

Perez's mental health records

Hundreds of pages of psychological records – that trial counsel failed to notice he had not received – were entered into evidence at the motion hearing. Among the records was a note dated June 11, 2007, detailing a visit Perez made to his psychologist **the day after the shooting**. The note described Perez's underlying psychological trauma after accidentally shooting and killing a man in Germany in 2000 during a military operation. The note read, in full:

> Walk in – emergency – I had to talk to you – Saturday night we watched the fight and then we went to a strip club – going home we met someone – a girl – than an after-hours party – he had been drinking and I only had two beers all night – **I use marijuana** – he was shot three times – he was laying in the street – I started to get out – his teeth were shattered – like mine in Germany –I tried to call the police – my cell phone was dead – I flagged down a car – the cops took forever to come – I'm angry – I am the primary witness and I identified the shooter – my friend was 32 – they said it was gang related – it was random – I feel guilt I wanted to be able to save him – I can't go to work today – I don't want medication – am I paranoid? I want to get a gun – the girl wouldn't identify him. The police gave me their phone numbers – I really can't have a gun – I have a felony – what would you do? I haven't seen my son – shirt tie tearful at times – borderline – several issues – self-protection, guilt – some flashbacks to an incident in Germany – he knows he cannot get a gun without severe consequences – confused – adjustment disorder – 50 minutes – suggested the focus be his friends family members and after that return for another appointment to discuss other options – p.r.n. –

(S.A.II/170, emphasis added.) The psychological records show the factual similarities between the shooting in Germany and this shooting: both involved close-range shootings, use of a Ruger pistol, the sounds of gunfire, teeth knocked out (Perez's in Germany, the decedent's in this case), bloody mouths, a fatality, Perez getting the victim's blood on him, and his immediate flight on foot after the shootings. (S.A.II/96-97, 148.)

These psychological records also detailed Perez's long history of marijuana abuse, stretching back over seven years time. The records showed Perez tried to quit several times but could not, even when it was causing him problems with probation. One note indicated he smoked up to 3 and one-half grams a day costing him about $200 a week, and it quoted him as saying "I can't give it up." (S.A.II/170.) About five months before the shooting, he told his doctors he did not think he would ever be able to stop taking marijuana. (S.A.II/171.) Additionally, in the notes from Perez's visit to the doctor the day after the shooting, Perez indicated that Ramkissoon "had been drinking and I only had two beers all night – I use marijuana." (S.A.II/170.)

In his affidavit, Dr. Hidalgo reviewed Perez's medical and

psychological records, and he opined that at the time of the shooting, Perez suffered from symptoms from post-traumatic stress disorder, Borderline Personality Disorder, and marijuana use disorder. These problems had the capacity to and may have interfered with Perez's ability to accurately perceive or recollect the events of the shooting. (S.A.II/315.) In particular, Dr. Hidalgo opined that Perez "was suffering from post-traumatic stress symptomss prior to, during, and after the incident of June 10, 2007. Dr. Hidalgo stated that Perez's long history of heavy marijuana use reduced his "ability to accurately perceive and recall past events, and both borderline personality disorder, and the post-traumatic stress involve difficulty relating emotions and dealing with stress. (S.A.II/316.)

Dr. Hidalgo opined that the shooting incident "appears to have overwhelmed Perez's already emotional coping capacities. (S.A.II/316.) He went on to state: "Re-experiencing traumatic events in the form of flashbacks and/or memories increases the level of emotional reactivity and can affecct perception of reality and memory." (S.A.II/316.)

Accordingly to Dr. Hidalgo, any one of the aforementioned issues may interfere with memory and recall. It was Dr. Hidalgo's opinion,

based on the evidence, that Perez's "perception of reality and recall" may have been negatively affected. (S.A.II/316.) Finally Dr. Hidalgo stated that if he had been called to testify in 2009 after reviewing the same materials, his opinions would have been substantially the same. (S.A.II/316.)

Identification expert

Dr. Samuel Sommers, an associate professor of psychology at Tufts University, testified as an expert in eyewitness identification and memory. (Tr.Exh. 22, 10/22/15: 76.) First, Dr. Sommers explained that "memory is not a videotape." (Tr.Exh. 22, 10/22/15: 87.) Instead, "memory functions as a constructive process" that occurs in three stages: encoding, storage, and retrieval. (Tr.Exh. 22, 10/22/15: 87-89.) Encoding is the actual experience and perception of what is happening. Parts of that information is then stored. Retrieval is the process of trying to recall the memory in order to think about it or convey it to someone else.

According to Dr. Sommers, under high stress, the accuracy of witness identification tends to decline. (Tr.Exh. 22, 10/22/15: 84.)

Shorter encoding periods, or time during which the witness actually saw the action or person to be remembered, are associated with worse memory performance. (Tr.Exh. 22, 10/22/15: 86.) Post-event information "has a way of contaminating our original memories to the point where we can't differentiate what we actually saw versus what we now think we saw from information we later learned." (Tr.Exh. 22, 10/22/15: 87.) For instance, being told by an investigator that you have chosen the right subject can influence memory. (Tr.Exh. 22, 10/22/15: 87-88.) Also, whe re a witness has been focused on a particular person before the incident in question, the witness may identify that person as the perpetrator when the reality is that person is someone the witness remembers from the earlier instance. This phenomenon is known as transference. (Tr.Exh. 23, 10/27/15: 36-37.)

Dr. Sommers testified that lay persons' – and jurors' – beliefs about how memory works tend to be wrong. For instance, people tend to believe that seeing something under intense stress "burns a memory into the brain such that it becomes even stronger and more accurate" is untrue, and, in fact, highly stressed persons tend to have less accurate memories of those events. (Tr.Exh. 22, 10/22/15: 82-84.) Jurors also

tend to believe that the apparent confidence a person has in their identification is a strong indicator that the identification is accurate, when there is no correlation between confidence and accuracy. (Tr.Exh. 22, 10/22/15: 79-81.)

The factors described by Dr. Sommers were present in this case: the identifying witness was under high stress, the witness could have experienced transference because he focused on the Petitioner at the party before the shooting and the witness identified that person as the perpetrator when the reality is that the person is someone the witness remember from the earlier instance. Finally, the short period of time the time the witness actually saw the person remembered – on the stairs for a "couple of minutes" – is a factor that contributed to a mistaken identification. (Tr.Exh. 17, 8/19/2009: 35.)

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Physics and firearms experts

Dr. Michael Courtney, a Ph.D. physicist and ballistics expert, testified that the muzzle flash from ammunition used in this shooting lasted less than thirty milliseconds. (Tr.Exh. 22, 10/22/15: 29.) Based on his experience and training and a number of experiments he

performed, Dr. Courtney stated that to a reasonable degree of scientific certainty, a shooter's face cannot be identified in the muzzle flash from a .22 weapon of the type used in this case. (Tr.Exh. 22, 10/22/15: 22.) Dr. Courtney testified that even the muzzle flashes from larger weapons, such as a .9 millimeter or a .40 caliber handgun, "don't illuminate the shooter's face so that it can be identified." (Tr.Exh. 22, 10/22/15: 21.) A high speed photo produced by Dr. Courtney using .22 LR ammunition showed no illumination on the shooter's face. (Tr.Exh. 22, 10/22/15: 26-27; S.A.I/458.)

Greg Danas, a firearms expert, testified similarly. For this case, Danas performed a number of experiments. These confirmed his own prior experience from witnessing approximately 900,000 rounds fired from .22 caliber weapons as an instructor at a gun school, which is that the "illumination [from the muzzle flash of a .22 caliber pistol] is insignificant" and lasts only between one-hundredth to four one hundredths of a second. (Tr.Exh. 24, 11/2/15: 22, 32.) His experiments involved firing .22 caliber guns with varying barrel lengths and, in addition to watching himself from distances of between 9 and 40 feet from the barrel, recording the experiments on videotape. None of the

muzzle flashes illuminated the face of the shooter.

In all his years testing firearms, Danas had never seen muzzle flash illuminate a shooters face. A DVD video prepared by Danas and a videographer showed no illumination on the shooter's face from muzzle flash. Both Dr. Courtney and Danas would have testified substantially to the same effect in 2009. (Tr.Exh. 24, 11/2/15: 33.)

Trial counsel's testimony

In his affidavit, counsel wrote that he "considered Robert Perez' [sic] medical and mental health records from the hospital to be important for me – as defense counsel – to obtain and review prior to trial." (S.A.II/459.) He went on to state: "However, given my focus on other aspects of trial preparation, **I failed to notice** that the records sent to the clerk's office contained only the medical records. The mental health records were not sent. When I recognized, mid-trial, that the mental health records were missing, I did not follow up." (S.A.II/459-60, emphasis added.) Counsel went on: **"Not doing so was not a strategic decision**. I was busy and distracted by other issues. The missing mental health records slid off my radar." At the hearing,

counsel testified that he had "no recollection as to what I actually did relative to the mental health records and examination … Other than trying to ascertain that I knew he had been at the VA, Mr. Perez, whether I really looked at the records, I have absolutely no present recollection. I don't think I was able to." (Tr.Exh.223, 10/27/2015: 107.)

In his affidavit, trial counsel averred that he was "surprised at trial when Perez testified that he had identified Ayala as the shooter, not by his clothes, but by seeing his face in the illumination from the muzzle flash." (S.A.II/460.) He also stated that his failure to request a continuance "in order to evaluate and have an opportunity to develop a rebuttal to the surprise testimony," was not a strategic decision. (S.A.II/460.) "I simply proceeded with the trial without considering the possible value of a continuance." (S.A.II/460.)

Trial counsel provided an affidavit and testified at the motion hearing. In his affidavit he averred:

> At no time prior to or during trial did I consider consulting with or calling an eyewitness identification expert to testify in this case. I did not attempt to identify any matter in which it would be important for an eyewitness ID expert to testify, and I did not consult with any such expert to explore possibilities. I did not discuss the matter with my client or with anyone else. The contested issues needing to be resolved by the jury in this case

> were fact issues that typically were resolved by jurors without expert testimony. There was no strategic decision on my part that consulting with or calling an expert on eyewitness identification issues might be contrary to my client's interests. I simply never considered it.

(S.A.II/461.)

At the motion for new trial hearing, counsel further testified that he never considers obtaining an expert in eyewitness identification, and had not done so in any of the forty-seven murder trials he had tried. (Tr.Exh. 24, 10/27/2015: 113.) Counsel also testified that, in regard to not hiring an expert on eyewitness identification: "It was not a strategic decision. It was the fact that I was drawn to too many other tasks." (Tr.Exh. 24, 10/27/2015: 99.) At the motion hearing he also testified that he did not consider hiring a ballistics expert until post-conviction counsel brought it to his attention. (Tr.Exh. 24, 10/27/2015: 99.)

ARGUMENT

The First Circuit Court of Appeals's should have affirmed the District Court's decision allowing habeas relief on the Petitioner's claim of ineffective assistance of counsel on the basis of trial counsel's failure to obtain the mental health records of the Commonwealth's sole

percipient witness. Trial counsel's failure to obtain the only identification witness's psychological records constituted deficient performance under *Strickland v. Washington,* 466 U.S. 668 *(*1984) and guaranteed by the Sixth Amendment. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. To prevail on a Sixth Amendment claim alleging ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his counsel's deficient performance prejudiced him. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020), *citing Strickland*, 466 U.S. at 688, 694.

In the SJC's determination of the prejudice prong in *Strickland* the SJC made two unreasonable findings of fact within the meaning of 28 U.S.C. §2254(d)(2) and were shown by clear and convincing evidence: that there was evidence that the missing records suggested that the witness's mental health struggles affected his ability to perceive and that the substance of the missing records was before the jury.

The SJC's decision also made an unreasonable application of law under *Strickland* in that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. *See Harrington v. Richter,* 562 U.S. 86, 103 (2011). The testimony of the identification witness was the only evidence that linked the Petitioner to the murder. The identification witness completely changed his description of the shooter from the time of the incident to his trial testimony so that his description matched the description of the Petitioner. Two witnesses testified that the Petition had left the scene prior to the shooting. Without the psychological records, defense counsel had no grounds to effectively argue his motion for expert testimony.

A. The District Court did not err in concluding that the SJC's holding that defense counsel would not have used the information in the missing records was unreasonable.

The First Circuit concluded that defense counsel's "primary trial strategy" was Natasha Frazier's testimony and credibility and not Perez's mental health and drug use. (Appendix at 110.) In his affidavit defense counsel stated that "[p]rior to trial, I considered Robert Perez's medical and mental health records ... to be important to me." Defense counsel just did not notice until mid-trial that he had not obtained those

records.

When defense counsel testified at the MNT hearing that at the time of trial, he believed it would have been a poor tactical choice to attack Perez in front of the jury because Perez was a veteran who was suffering from PTSD, counsel did not have the knowledge of the content of the psychiatric records. At the time of trial, he did not know just how valuable they would have been to impeach Perez.

The psychiatric records would have bolstered defense counsel's strategy of characterizing Perez as an "honest but mistaken" witness. The parallels between the two shootings in Perez's mental health treatment notes would have been invaluable – not for the purpose of attacking Perez – but in showing the jury that Perez was an "honest but mistaken" witness. Defense counsel did not have to attack Perez at all.

B. The District Court did not err in finding unreasonable the SJC's conclusions that there was no evidence that suggested Perez's PTSD or drug use affected his ability to perceive the Petitioner the morning of the shooting.

First, the SJC and the panel are incorrect that there is no evidence that Perez was using marijuana at the time of the shooting. (Appendix

at 5.) The evidence that Perez was using marijuana that night was in the missing records. In the records was a note dated June 11, 2007, detailing the emergency visit Perez made to his psychologist the day after the shooting. The note read, in part:

> Walk in – emergency – I had to talk to you – Saturday night we watched the fight and then we went to a strip club – going home we met someone – a girl – than an after-hours party – he had been drinking and **I only had two beers all night – I use marijuana** –

So, in his emergency session with his psychologist the day after the shooting, Perez explained that he did not have much to drink the night before because he used marijuana. Perez's marijuana use at the time of the incident was proven by his own statement. Also, psychiatric expert, Dr. Jose Hidalgo said that was "suffering from marijuana use disorder prior to, **during**, and after the incident of June 10, 2007."

Dr. Hidalgo also would have testified that Perez's marijuana use at the time of the incident reduced his ability to perceive:

> Marijuana use disorder indicates that use of marijuana has reached a threshold of clinical concern. The use of a mind altering chemical, such as marijuana, becomes a clinical concern.... Mr. Perez has a long history of heavy marijuana use and there is no indication that at the time of the incident of June 10, 2007 he had reduced his marijuana use. Mind altering substances in principle **can reduce the ability to accurately perceive reality and**

> **recall past events**, For example, I have had patients who present to my clinic intoxicated with marijuana and who may say rude and inappropriate things at the time of their visit. In subsequent visits, when sober, they may not remember accurately the nature of their past inappropriate behavior.

Unlike the psychologist's patient who presented at one session intoxicated with marijuana and subsequently did not remember that past behavior, Dr. Hidalgo was not present himself to witness Perez's perception and subsequent memory. He was an expert witness, not a fact witness.

Similarly, with respect to Perez's PTSD and borderline personality disorder, the panel's and the SJC's conclusion that "no evidence in the records established with the necessary certainty that Perez's mental health struggles interfered with his ability to identify as the shooter" ignored the Petitioner's and District Court's argument that there was a wealth of such evidence in the missing records. (Appendix at 58.) *See Brumfield v. Cain*, 576 U.S. 305, 316 (2015); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). The District Court highlighted the stimuli present on the night of the shooting that triggered Perez's PTSD: bloody mouths and injuries to teeth, hypervigilance and concerns about personal safety, gunfire, and the sight of blood. (Appendix at 58.)

Dr. Hidalgo opined that Perez's mental and emotional conditions had the potential to interfere with his ability to accurately perceive or recollect the shooting. Had Dr. Hidalgo been called at trial, he would have testified that Perez's

> borderline personality disorder and post[-]traumatic stress involve difficulty regulating emotions and dealing with stress. The incident of June 10, 2007 appears to have overwhelmed Mr. Perez's already fragile emotional coping capacities. Mr. Perez appears to have made the link between his friend's murder and his own mouth injuries sustained at the time he was in the military service. **Re-experiencing a traumatic event in the form of flashbacks and/or memories increases the level of emotional reactivity and can affect perception of reality and recall**.

Not only did the District Court hold that the SJC's finding that there was no evidence within the missing records that suggest Perez's mental struggles affected his ability to perceive, the District Court stated that that finding "is contradicted by a **wealth of evidence** in the psychological records and, in light of that evidence, is patently unreasonable." (Appendix at 58.)

C. The District Court did not err in finding unreasonable the SJC's conclusions that the substance contained in the missing records was already presented to the jury.

Without Perez's testimony there was no evidence against Ayala

The First Circuit Court of Appeals began by assessing the strength of the prosecution's case and the effectiveness of the defense absent impeachment evidence. (Appendix at 120.) The SJC's finding that the evidence against Ayala was strong enough to support conviction even without Perez's eyewitness testimony was unreasonable. As earlier said, the SJC was wrong when it found that Perez's testimony was corroborated by the bouncer. The bouncer testified that she did not see the shooting, and, in fact, only heard about it from someone. (Appendix at 13, 116).

There was no evidence other than Perez's testimony of Ayala's guilt:

- There were no other eyewitnesses, no forensic evidence, no physical evidence.

- There was no evidence of a any connection between Ayala and the victim, no connection between Ayala and Perez, no prior contact among them, and no evidence of any motive.

- Perez completely changed his description of the shooter from what he told the police just after the incident – that the

shooter's height and that the shooter was wearing a matching coat and pants set. By the time of trial, he said the shooter changed the height description and said that the shooter was wearing a white or green T-shirt with a skull on it and shorts.

- Perez only identified Ayala from the split-second flash of a gun muzzle.

- Defense witness Natasha Frazier watched Ayala get into a tan Cherokee and drive away thirty to forty-five minutes before the shooting. She watched the shooting from the second floor and watched the shooter (who was not Ayala) drive away in a maroon Taurus.

Phillip Ayala is innocent.

The importance of the discrepancies between the missing records and Perez's testimony

The discrepancies between the missing records and Perez's testimony are important because at trial, Perez vastly downplayed his mental health issues.

- That his PTSD did not affect him and that it was under control;

- that his PTSD had only a minimal effect on him;

- that PTSD was merely "remember a bad time, a "bad dream," a bad situation;

- that he had gone to counseling to get better;

- that his counseling sessions were "not necessarily based on PSTD" because he was going through a divorce.

- that when he was going to counseling, he was working and productive;

- that his counselor was "somewhat of a mentor to him;"

That was all the jury heard, and so they did not know how stimuli present at the shooting were triggers for his PTSD symptoms, including bloody mouths, injuries to teeth, the sight of blood, and hypervigilance and concerns about his own personal safety.

"Reasonable minds" could simply not read the missing records as consistent with Perez's testimony. The missing records show that Perez's diagnoses were bipolar affective disorder, manic, mild degree; Posttraumatic Stress Disorder; and generalized Anxiety Disorder. For these multiple psychiatric disorders, Perez had been prescribed Clonazepam (for bipolar and anxiety disorder), Quetiapine Fumarate (also known as Seroquel, prescribed for schizophrenia, bipolar disorder, and sudden episodes of mania or depression); and Topiramate (prescribed for mood stabilization and nightmares). For Perez to testify that his counseling sessions were "not necessarily based on PSTD" because he was going through a divorce simply did not give the jury an

accurate picture of his years of psychiatric treatment for his multiple serious illnesses and prescriptions.

When the substance of the missing records showing the severity of Perez's mental illnesses are combined with the testimony of the experts that **both** marijuana abuse disorder and PTSD may have caused Perez inaccurately perceive or recollect the shooting, "the [missing] records would have 'alter[ed] the entire evidentiary picture' before the jury, resulting in 'a reasonable probability that . . . at least one juror would have harbored a reasonable doubt' as to [Defendant's] guilt." *York v. Ducart*, 736 F. App'x 628, 630 (9th Cir. 2018) (finding deficient performance under AEDPA where "[n]o conceivable strategic judgment could explain counsel's failure to review [cell phone] records" undercutting credibility of state's key witness).

The substance of the missing records and expert testimony was not already presented to the jury

If the substance of the missing records had been before the jury, they would have understood with real evidence – and not the downplayed evidence from Perez's testimony – the grounds for why he

made such a mistaken identification. As the District Court found, "It was objectively unreasonable for the SJC to conclude that the substance of the **hundreds of pages of detailed psychological and psychiatric records** – describing Mr. Perez's PTSD symptoms, triggers, and repeated parallels between his experience and recollections of the German shooting" and this shooting – would not have added anything to defense counsel's limited inquiry into Mr. Perez's PTSD symptoms on cross-examination." (Appendix at 59.)

With respect to defense counsel's belief that it would have been a poor tactical choice to "attack" Perez, the military veteran suffering from PTSD, counsel made that statement without any knowledge of the contents of the psychological and psychiatric records. Indeed, counsel's "honest but mistaken" strategy was undermined because the limited **thirty-eight pages of non-psychological records** appeared to bolster Perez's competency and reliability by the very absence of psychological detail. Defense counsel did not have to "attack" Perez, but he did need the psychiatric records to present his "honest but mistaken" strategy.

The availability of expert testimony

Both the SJC and the panel are incorrect that the fact that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive the or recollect the [shooting]" was not already before the jury. The Commonwealth's only witnesses were three police officers, the medical examiner, and Perez. None of them testified or were qualified to testify about the potential of mental health issues or mind-altering drugs affecting perception or recollection.

The defense should have called a psychiatrist such as Dr. Hidalgo to make that crucial point to the jury. The Petitioner was denied his Sixth Amendment right to effective assistance of counsel.

CONCLUSION

For the foregoing reasons, Philip Ayala – an innocent man – requests that the Court grant his Petition for Writ of Certiorari.

Philip Ayala
By his attorney,

/Janet Hetherwick Pumphrey
Janet Hetherwick Pumphrey

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CERTIFICATE OF SERVICE

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

/s/ Janet Hetherwick Pumphrey

APPENDIX TABLE OF CONTENTS

481 Mass. 46
Supreme Judicial Court of Massachusetts,
Hampden..

COMMONWEALTH

v.

Phillip AYALA.

SJC-10776
|
Argued September 12, 2018
|
Decided December 6, 2018

Synopsis

Background: Defendant was convicted in the Superior Court Department, Peter A. Velis, J., of first-degree murder on theory of deliberate premeditation. Defendant appealed following denial of his new trial motion in the same court by C. Jeffrey Kinder, J.

Holdings: The Supreme Judicial Court, Kafker, J., held that:

[1] evidence was sufficient to support finding of identity required for conviction;

[2] Commonwealth did not bear discovery burden of securing release, from federal government, of information sought by defendant relating to sole defense witness's status as confidential informant for federal gang task force;

[3] defense counsel's failure to obtain evidence from expert on eyewitness identification was not manifestly unreasonable and, thus, was not ineffective assistance; and

[4] any error on part of trial counsel in failing to notice that psychological records detailing eyewitness's history of mental health struggles and drug use had been mistakenly withheld despite court order compelling their disclosure did not create substantial likelihood of miscarriage of justice and, thus, was not ineffective assistance.

Affirmed.

West Headnotes (12)

[1] **Homicide** Eyewitness identification

Homicide Presence at scene of crime

Evidence was sufficient to support finding of identity required for first-degree murder conviction premised on victim's shooting death; eyewitness testified that he had observed defendant for several minutes earlier in morning and was able to identify defendant as shooter because muzzle flash from gun "illuminated" defendant's face, and even if ordinary, rational juror was unfamiliar with muzzle flashes, there was also evidence that shooting took place near street light, that eyewitness had successfully identified defendant from photographic array at police station after shooting, that defendant had sought entry to house party but was ejected because he refused patdown, and that defendant was seen pacing on street near party just minutes before victim left party and shooting took place.

1 Cases that cite this headnote

[2] **Criminal Law** Construction in favor of government, state, or prosecution

Criminal Law Inferences or deductions from evidence

Criminal Law Reasonable doubt

Criminal Law Circumstantial evidence

When reviewing a challenge to the sufficiency of the evidence, the appellate court considers whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt; the evidence may be direct or circumstantial, and the appellate court draws all reasonable inferences in favor of the Commonwealth.

11 Cases that cite this headnote

[3] **Criminal Law** Degree of proof

A conviction cannot stand if it is based entirely on conjecture or speculation.

3 Cases that cite this headnote

[4] **Criminal Law** Diligence on part of accused; availability of information

Criminal Law Duty to locate information

Commonwealth did not bear discovery burden in murder case of securing release, from federal government, of information sought by defendant relating to sole defense witness's status as confidential informant for federal gang task force; witness's status as informant was not withheld, otherwise hidden from defendant, or contested in any way, information sought by defense was cumulative of witness's uncontested testimony, defendant was given opportunity to depose witness prior to trial and had ample time and opportunity to obtain informant records and substance of sought-after testimony well before trial, having been informed of federal procedure for requesting such information, which Commonwealth would also have been required to follow, and federal government played no role in prosecution.

[5] **Constitutional Law** Evidence

The due process clauses of the federal constitution and the Massachusetts Declaration of Rights require that the Commonwealth disclose material, exculpatory evidence to the defendant; this obligation, however, is limited to that information in the possession of the prosecutor or police. U.S. Const. Amends. 5, 6; Mass. Const. pt. 1, art. 1.

[6] **Criminal Law** Duty to locate information

In determining whether the prosecutor is obligated to seek from federal authorities exculpatory evidence requested by a defendant, the court evaluates (1) the potential unfairness to the defendant; (2) the defendant's lack of access to the evidence; (3) the burden on the prosecutor of obtaining the evidence; and (4) the degree of cooperation between State and Federal authorities, both in general and in the particular case.

[7] **Criminal Law** Effective assistance

Defendant's claim of ineffective assistance of counsel, raised on appeal from first-degree murder conviction, would be reviewed to determine whether there was a substantial likelihood of a miscarriage of justice; under that review, the appellate court would ask whether defense counsel committed an error in the course of the trial and, if there was an error, whether it was likely to have influenced the jury's conclusion. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

2 Cases that cite this headnote

[8] **Criminal Law** Strategy and tactics in general

Where claimed ineffectiveness of counsel is the result of a strategic or tactical decision of trial counsel, the decision must have been "manifestly unreasonable" to be considered an error, under the standard of review requiring a substantial likelihood of a miscarriage of justice; a determination on whether a decision is manifestly unreasonable requires an evaluation of the decision at the time it was made, and only strategic and tactical decisions which lawyers of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

3 Cases that cite this headnote

[9] **Criminal Law** Experts; opinion testimony

Defense counsel's failure to obtain evidence from expert on eyewitness identification was not manifestly unreasonable and, thus, was not ineffective assistance in murder prosecution based largely on eyewitness identification; counsel testified that at time of trial, he believed sole defense witness's testimony that defendant was not at scene at time of shooting, inconsistencies of eyewitness's account, and

eyewitness's mental health struggles would be sufficient to challenge reliability of identification, and counsel attacked eyewitness's identification of defendant and presented evidence that eyewitness suffered from bipolar disorder and PTSD, all of which amounted to reasonable strategy of challenging reliability of identification. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

1 Cases that cite this headnote

[10] **Criminal Law** Experts; opinion testimony

Any error in defense counsel's failure to call ballistics expert to testify that muzzle flash fired from semiautomatic handgun was unlikely to provide sufficient illumination to allow an individual to adequately see the face of the shooter did not create substantial likelihood of miscarriage of justice and, thus, was not ineffective assistance in murder prosecution based largely on eyewitness identification; there was significant amount of independent evidence establishing that crime scene was illuminated at time of shooting, aside from eyewitness's assertion that muzzle flash allowed him to see and identify defendant as shooter. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

[11] **Criminal Law** Discovery

Any error on part of trial counsel in failing to notice that psychological records detailing eyewitness's history of mental health struggles and drug use had been mistakenly withheld despite court order compelling their disclosure did not create substantial likelihood of miscarriage of justice and, thus, was not ineffective assistance in murder prosecution based largely on eyewitness identification; eyewitness's post-traumatic stress disorder (PTSD) and bipolar disorder diagnoses were both brought out on cross-examination at trial, and there was no evidence, either introduced at trial or contained within missing records, that suggested that eyewitness's mental health struggles or drug use affected his ability to perceive defendant on morning of shooting. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

[12] **Criminal Law** Offering instructions

Defense counsel's failure to request "honest but mistaken identification" jury instruction did not create substantial likelihood of miscarriage of justice and, thus, was not ineffective assistance in murder prosecution based largely on eyewitness identification; while facts permitted such an instruction, trial judge described various factors that jury should consider in assessing identification evidence, making clear that jurors needed to be satisfied beyond reasonable doubt of accuracy of identification of defendant before jury could convict, and defense counsel specifically argued mistaken identification in closing argument and cross-examined eyewitness on his ability to accurately perceive shooter. U.S. Const. Amend. 6; Mass. Gen. Laws Ann. ch. 278, § 33E.

****241** Homicide. Evidence, Identification, Ballistician's certificate, Medical record. Identification. Mental Health. Practice, Criminal, Disclosure of evidence in possession of Federal authorities, Assistance of counsel, Capital case, Instructions to jury. Due Process, Disclosure of evidence.

Indictments found and returned in the Superior Court Department on July 10, 2007.

The cases were tried before Peter A. Velis, J., and a motion for a new trial, filed on February 10, 2011, was heard by C. Jeffrey Kinder, J.

Attorneys and Law Firms

Myles D. Jacobson, & Michael J. Fellows, Northampton, for the defendant.

David L. Sheppard-Brick, Assistant District Attorney, for the Commonwealth.

Present: Gants, C.J., Gaziano, Lowy, Budd, & Kafker, JJ.

Opinion

KAFKER, J.

***47** A jury convicted the defendant, **Phillip Ayala**, of murder in the first degree on the theory of deliberate premeditation for the killing of Clive Ramkissoon.[1] The defendant ****242** raises three core issues on appeal. First, he argues that the evidence at trial was insufficient to support his convictions. Second, he argues that his due process rights under the United States Constitution and the Massachusetts Declaration of Rights were violated by (i) the Commonwealth's failure to obtain and turn over discovery related to the sole defense witness's status as a confidential Federal informant, and (ii) the trial judge's decisions declining to compel several law enforcement officers to testify to the defense witness's status as a confidential Federal informant. Third, he argues that his trial counsel was ineffective for (i) failing to retain and call an expert witness on the accuracy of eyewitness identifications, (ii) failing to retain and call an expert witness on ballistics evidence to testify about muzzle flashes, and (iii) failing to ***48** admit further evidence of the mental health issues and drug use of a percipient witness for the Commonwealth.

For the reasons stated below, we conclude that there has been no reversible error. After a thorough review of the record, we also find no reason to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or to reduce or set aside the verdict of murder in the first degree. We therefore affirm the defendant's convictions and the denial of the defendant's motion for a new trial.

Background. We summarize the facts that the jury could have found, reserving certain details for discussion of the legal issues.

In the early morning of June 10, 2007, Robert Perez and his friend, Clive Ramkissoon, attended a house party held on the second floor of a house in Springfield. Upon arriving just before 2 a.m., Perez and Ramkissoon encountered a bouncer on the first floor at the bottom of the stairwell that led to the second floor. The first-floor bouncer was posted there to search guests before letting them upstairs to the party. After being searched, the two men went upstairs to the party. As there were not yet many people at the party, Perez returned to the first floor and began speaking with the first-floor bouncer in the entryway of the stairwell.

Shortly thereafter, as Perez was speaking with the first-floor bouncer, the defendant arrived at the party. As she had done with Perez and Ramkissoon, the bouncer attempted to pat frisk the defendant before allowing him to enter. The defendant refused. After a brief argument related to the search, the defendant aggressively pushed past the bouncer and climbed the stairs to the second floor. A second bouncer intercepted the defendant on the stairs and prevented him from entering the party without having first been pat frisked. The defendant argued with the bouncer and, after yelling and screaming at him, was escorted out of the house. As the defendant was descending the staircase to leave, and just steps away from Perez, the defendant threatened to "come back" and "light th[e] place up."[2] After leaving the house briefly, the defendant returned and kicked in the first-floor door.[3]

****243** Throughout this interaction inside the house, Perez had an ***49** opportunity to observe the defendant closely for several minutes.[4] Concerned by the defendant's threats and behavior, Perez returned upstairs to find Ramkissoon. The two men walked onto the second-floor porch to "assess the situation" and saw the defendant pacing back and forth on the street in front of the house. Rather than leave with the defendant still outside, given his recent threat to "light th[e] place up," Perez and Ramkissoon decided to wait on the porch for a few minutes. After the defendant moved out of sight, Perez, Ramkissoon, and a female friend decided to leave the party.

After leaving the house, Ramkissoon and the woman began walking across the road, while Perez, who had stopped to tie his shoe, trailed slightly behind. As they were crossing the road, the woman stopped in the middle of the road directly in front of the house and began dancing. Perez walked over to where the woman was dancing while Ramkissoon kept moving down the road, to the left of the house, toward the area where his vehicle was parked. As Perez approached the woman to guide her out of the way of oncoming traffic, he heard a gunshot and saw a muzzle flash appear near a street light located on the sidewalk in front of a property adjacent to the house.[5] Perez saw the defendant holding a firearm and testified that he was able to identify the shooter as the defendant because the muzzle flash from the gun illuminated the shooter's face. He then turned and ran away from the shooting as several more gunshots rang out. Perez, who had previously served in the United States Army, testified that he heard between five and seven shots, which he recognized as .22 caliber bullets based on his military experience.

Perez soon circled back to where Ramkissoon's vehicle was parked and discovered Ramkissoon face down on the street. Perez performed rescue breathing on Ramkissoon and telephoned the police. Police officers arrived at the scene by approximately 3 a.m. It was later determined that Ramkissoon died from multiple gunshot wounds.[6] Perez was soon brought to the Springfield police station, where he gave a statement recounting the events of ***50** that morning. At the station, Perez identified the defendant from a set of photographs shown to him by police, stating that he recognized the defendant's photograph as the "same person who [he] had seen in the stairwell not wanting to be pat frisked by the bouncer there, and then firing the gun outside in the street at [the victim]."

The reliability of Perez's identification was vigorously challenged by defense counsel on cross-examination. The defense confronted Perez on his ability to accurately identify the shooter under the lighting conditions at the time of the shooting, his recollection of certain events that morning, ****244** and the discrepancies between Perez's statement to police on the morning of the shooting and his trial testimony regarding the defendant's height and clothing. Additionally, the defense presented evidence showing that Perez suffered from bipolar disorder and posttraumatic stress disorder (PTSD), the latter being a result of his military service.[7] Specifically, evidence showed that he sought psychiatric counselling and used marijuana to cope with the effects of his diagnoses.[8] There was no evidence, however, that Perez was either suffering the effects of these diagnoses or under the influence of marijuana at the time of the shooting.

Following the close of the Commonwealth's case-in-chief, the defense called a sole witness, N.F.,[9] who was the disc jockey at the party. N.F. testified that she knew the defendant and looked up to him, and had seen him multiple times that morning. N.F. also testified that at one point, she was on the second-floor porch and saw the defendant emotional and upset outside after he had been kicked out of the house. She and others attempted to comfort the defendant and suggested that he go home. She testified to then witnessing the defendant leave the party and drive away. N.F. was ***51** adamant that the defendant left approximately thirty to forty-five minutes before the shooting, stating that he was "gone a long time before [the shooting] even went down." In response to further questioning on her certainty that the defendant was not at the scene at the time of the shooting, she testified, "He was not there. Put my kids on it." Although she did not witness the shooting, she testified that she observed a red Taurus motor vehicle "skidding off" from the scene immediately after the shooting.

The jury eventually returned guilty verdicts on all three charges, and the defendant was subsequently sentenced to life in prison without the possibility of parole. The defendant now appeals.

[1] **[2]** **[3]** Discussion. 1. Sufficiency of the evidence. On appeal, the defendant argues that the Commonwealth failed to present sufficient evidence proving that he was the shooter. In reviewing the sufficiency of the evidence, we apply the familiar Latimore standard. See Commonwealth v. Latimore, 378 Mass. 671, 677-678, 393 N.E.2d 370 (1979). We consider whether, after viewing the evidence in the light most favorable to the Commonwealth, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt. Id. The evidence may be direct or circumstantial, and we draw all reasonable inferences in favor of the Commonwealth. Commonwealth v. Rakes, 478 Mass. 22, 32, 82 N.E.3d 403 (2017). A conviction cannot stand, however, if it is based entirely on conjecture or speculation. Id.

At trial, the Commonwealth primarily relied on the eyewitness testimony of Perez to prove that the defendant was the shooter. The defendant argues, however, that this testimony cannot be used to support his convictions because the jury were incapable of assessing its reliability. The defendant's challenge centers on Perez's testimony that he was able to identify the ****245** defendant as the shooter because the muzzle flash from the gun "illuminated" the defendant's face. The defendant argues that because the illuminating capability of a muzzle flash is not within the ordinary, common experience of a reasonable juror, the jury could not have found that the evidence proved beyond a reasonable doubt, without speculation, that the defendant was the shooter.

Even assuming, as the defendant argues, that ordinary jurors are unfamiliar with the illuminating capability of muzzle flashes, there was independent evidence that would permit a rational juror to reasonably infer that the crime scene was sufficiently illuminated at the time of the shooting to provide Perez with the opportunity to identify the defendant as the shooter.

***52** Evidence at trial established that the shooting took place near a street light located on the sidewalk in front of the property adjacent to the house.[10] A police officer testified that the street lights near the location of the shooting and the exterior lights on a nearby building were illuminated when he arrived at the crime scene at approximately 4:30 a.m.[11] Although there was no evidence whether the specific street light near where the shooter was standing was on at the time of the shooting, a juror could reasonably have inferred that if the street lights in the area were on at 4:30 a.m., they would have also been on at the time of the shooting earlier in the morning.[12] Even if an ordinary, rational juror is unfamiliar with muzzle flashes, they are undoubtedly familiar with the illuminating capability of street lights. This common knowledge would have allowed a rational juror to conclude that Perez had an adequate opportunity to identify the defendant as the shooter. Cf. Commonwealth v. Stewart, 450 Mass. 25, 28, 33, 875 N.E.2d 846 (2007) (evidence sufficient to prove defendant was shooter based, in part, on eyewitness seeing defendant shoot while standing in front of street light).

In addition to the presence of the street light, the jury received other evidence that would have allowed them to assess the reliability of Perez's identification. For example, the jury heard testimony that Perez had observed the defendant for several minutes earlier in the morning while he was in the stairwell. They also heard testimony that Perez recognized the defendant walking on the street from the second-floor porch after the defendant was kicked out of the party. Additionally, evidence showed that Perez successfully identified the defendant from a photographic array at the police station after the shooting. This evidence would further have provided a rational juror with an adequate basis to assess the reliability of Perez's identification of the defendant at the time of ***53** the shooting. Cf. Commonwealth v. Richardson, 469 Mass. 248, 249-251 & n.3, 255, 13 N.E.3d 989 (2014) (evidence sufficient ****246** where eyewitness identified defendant fleeing from police from over 200 feet away, selected defendant's photograph from photographic array at police station, and had seen defendant on two prior occasions).

The Commonwealth also presented circumstantial evidence linking the defendant to the shooting. For example, prior to the shooting, the defendant arrived at the party and refused to be searched. He was visibly upset that there was a party taking place at the house, and after being kicked out, he threatened to come back to the party and "light th[e] place up." Soon after, he returned and kicked in the first-floor door with such force that he left a footprint on the door. Additionally, the defendant was seen pacing around on the street in front of the house just a few minutes before Perez and Ramkissoon left the party and the shooting took place. From this evidence, the jury could have reasonably inferred that the defendant did not want to be searched on the morning of June 10 because he was carrying a gun, that he was still near the house when the shooting occurred, and that his anger about the party motivated him to shoot Ramkissoon as he crossed the street. This evidence, when taken together, "formed a mosaic of evidence such that the jury could conclude, beyond a reasonable doubt, that the defendant was the shooter" (quotation and citation omitted). Commonwealth v. Jones, 477 Mass. 307, 317, 77 N.E.3d 278 (2017). Cf. id. at 316-318, 77 N.E.3d 278 (sufficient evidence that defendant was shooter where evidence linking him to shooting was that he generally matched description of person seen fleeing crime scene, he was at park where crime occurred that day, he grew up in area and regularly visited park, and he lied to police about his whereabouts that day).

We therefore conclude that the evidence, when viewed in the light most favorable to the Commonwealth and taken together with the reasonable inferences drawn therefrom, was sufficient to support the jury's verdict that defendant was the one who shot and killed the victim. See Latimore, 378 Mass. at 677-678, 393 N.E.2d 370.

2. Dual sovereignty. The defendant also argues that his due process rights under the Fifth and Sixth Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights were violated by (i) the Commonwealth's failure to obtain and turn over discovery related to the sole defense witness's status as a confidential informant, and (ii) the judge's decisions declining to compel various State and Federal law enforcement ***54** officers to testify to the defense witness's status as a confidential informant. Because we conclude that the informant records and sought-after testimony were not in the possession or control of the Commonwealth and that the Commonwealth did not have the burden to secure the Federal government's cooperation with regard to the disclosure of this information, the judge did not abuse his discretion in denying and quashing the defendant's various motions and subpoenas.

a. Relevant facts. Shortly before the trial was originally scheduled to begin in July 2008, the Commonwealth informed defense counsel that it had recently learned that a witness likely to be called by the defense, N.F., was a confidential

informant for a Federal gang task force operating in Springfield.[13] As a result of this new information, the trial was continued several ****247** times until over one year later in August 2009.

The Commonwealth's disclosure resulted in multiple motions by the defendant to obtain Federal records detailing N.F.'s status as a confidential informant (informant records) and to compel the testimony of Federal agents regarding the same through State court proceedings.[14] The defendant argued that the information was material to his defense because it was necessary to demonstrate N.F.'s credibility as a witness, which the defendant contended was exculpatory information. At various times, the defendant was informed that a successful pursuit of this information ***55** would require that he comply with the procedure set forth by Federal regulations. The federally mandated procedure required the defendant to submit a written request for information describing the informant records and the subject matter of the testimony sought. Federal authorities would then review the sought-after information for privilege, confidentiality, and the likelihood that its disclosure would compromise ongoing investigations. After this review, the Federal authorities would report back to the defendant and either disclose the requested information or explain why it was continuing to be withheld. Despite being made aware of the Federal procedure, the defendant refused to comply and continued to unsuccessfully request that the trial court judge compel Federal authorities to disclose this information.

During the time period of the continuance, and while engaging in the pursuit of the federally held information, the defense had the opportunity to depose N.F. At her deposition, N.F. testified to her status as a confidential informant for the Federal Bureau of Investigation (FBI), including the nature of her work and compensation. She also testified to her observations on the morning of the shooting, which supported the defendant's theory that he was not present at the scene at the time of the shooting. Specifically, N.F. testified that she witnessed the defendant driving away from the scene before the shooting took place, and instead implicated another individual whom she witnessed fleeing the scene. The deposition also revealed that N.F. had telephoned a Federal agent on or about the morning of the shooting and described what had occurred.

On the eve of trial, the defendant filed a motion to dismiss the case based on the Commonwealth's failure to turn over N.F.'s informant records. The motion was eventually denied. The defendant then sought once again to compel the testimony of a member of the Federal gang task ****248** force, but the subpoena was quashed. Subpoenas for several other law enforcement officers and an assistant United States attorney were similarly quashed. After these subpoenas had been quashed and the trial was set to begin, at the suggestion of the trial judge, the defendant finally submitted a request to Federal authorities for the informant records in compliance with the governing Federal regulations described above. Redacted copies of these records were disclosed to the defendant a few days later, before the defense had rested its case. These records effectively confirmed N.F's status as a confidential Federal informant and included a summary of a statement ***56** made by N.F. to a Federal law enforcement officer regarding the shooting. The Federal government also authorized two law enforcement officers to testify on a limited basis.

[4] **[5]** b. Analysis. The due process clauses of the Federal Constitution and the Massachusetts Declaration of Rights require that the Commonwealth disclose material, exculpatory evidence to the defendant.[15] Committee for Pub. Counsel Servs. v. Attorney Gen., 480 Mass. 700, 731, 108 N.E.3d 966 (2018). See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Commonwealth v. Donahue, 396 Mass. 590, 596, 487 N.E.2d 1351 (1986). This obligation, however, is "limited to that [information] in the possession of the prosecutor or police" (citation omitted). Donahue, supra ("The prosecutor cannot be said to suppress that which is not in his possession or subject to his control").

The information related to N.F.'s status as a confidential informant was not in the Commonwealth's possession or control, but rather was in the possession and control of the Federal government. There is no contention, nor is there any evidence, that any member of the Federal government or the Federal gang task force assisted in the investigation or prosecution of the defendant's case. The records held by the task force therefore cannot be said to have been in the possession or control of the Commonwealth. See Commonwealth v. Beal, 429 Mass. 530, 532, 709 N.E.2d 413 (1999). The Commonwealth was therefore under no obligation to turn over this information. See id. ("The prosecutor's duty does not extend beyond information held by agents of the prosecution team"); Donahue, 396 Mass. at 596-597, 487 N.E.2d 1351.

Although we do not charge the Commonwealth with the obligation to disclose exculpatory information that it does

not possess or control, we have recognized that issues of Federal and State sovereignty have the potential to prejudice a defendant being prosecuted in State court by stymying his or her ability to obtain exculpatory information held by Federal authorities. Donahue, 396 Mass. at 598, 487 N.E.2d 1351. See Commonwealth v. Liebman, 379 Mass. 671, 674, 400 N.E.2d 842 (1980), S.C., 388 Mass. 483, 446 N.E.2d 714 (1983). Accordingly, under ***57** certain circumstances we will require the Commonwealth to bear the burden of securing the cooperation of the Federal government with regard to the disclosure of exculpatory information. Donahue, supra. See ****249** Commonwealth v. Lykus, 451 Mass. 310, 327, 885 N.E.2d 769 (2008); Liebman, supra at 675, 400 N.E.2d 842. Imposing this burden serves to guard against any potential unfairness to a defendant that may arise due to the presence of two sovereigns. See Lykus, supra at 328, 885 N.E.2d 769; Liebman, supra at 674, 400 N.E.2d 842.

[6] A determination whether the Commonwealth bears this burden requires us to apply the four-factor analysis set forth in Donahue, 396 Mass. at 599, 487 N.E.2d 1351. We evaluate "[(i)] the potential unfairness to the defendant; [(ii)] the defendant's lack of access to the evidence; [(iii)] the burden on the prosecutor of obtaining the evidence; and [(iv)] the degree of cooperation between State and Federal authorities, both in general and in the particular case." Id. Applying the above analysis to this case, we conclude that each factor weighs against imposing the burden on the Commonwealth to secure the release of information related to N.F.'s status as a confidential Federal informant.

Under the first Donahue factor, we discern no unfairness to the defendant as a result of not receiving this information. Cf. Donahue, 396 Mass. at 599-600, 487 N.E.2d 1351. As a threshold matter, we note that N.F.'s status as an informant was not withheld or otherwise hidden from the defendant in any way. The Commonwealth disclosed her status to the defendant, and defense counsel had the opportunity to depose N.F. to uncover the full nature of her relationship with the FBI. The defendant sought the informant records and corroborative testimony from Federal officers, however, for the sole purpose of establishing N.F.'s credibility as a witness in front of the jury. At trial, the judge permitted the defendant to admit N.F.'s status in evidence through her testimony. That status was not in any way contested. The judge ruled that he would not permit any additional evidence -- whether through documents or additional testimony -- detailing her work as an informant that would amount to vouching for her credibility. See United States v. Piva, 870 F.2d 753, 760 (1st Cir. 1989) (noting inappropriateness of use of government officials to vouch for credibility of their informants because evaluation of informant's credibility is up to jury). On direct examination, N.F. testified that she was indeed an informant and that she had worked as an informant for approximately two years and had been paid by Federal authorities on multiple occasions. N.F. also testified ***58** extensively about her observations on the morning of the shooting and forcefully denied any involvement by the defendant in the shooting. Accordingly, the information the defense sought to use to establish N.F.'s status as an informant was cumulative of her uncontested testimony on this issue. The cumulative nature of the information was confirmed on the last day of trial when a redacted copy of N.F.'s informant records was produced to the defendant. The information contained in the unredacted portions of the records, at most, confirmed N.F.'s status as an informant and revealed a summary of the statement that she gave to a Federal agent concerning the shooting. This information was fully developed during N.F.'s deposition and at trial. Additionally, the officers whose testimony the defendant sought to compel were only authorized to testify on a limited basis and were not permitted to disclose the identities of confidential informants. The only arguably new information contained in the disclosed records included a reference to a separate individual, whom she named, as the shooter. This individual's alleged presence at the scene of the crime, however, was disclosed to the defense over one year earlier when the Commonwealth disclosed to the defendant that N.F. was an informant. The potential involvement ****250** of a third party in the shooting was also revealed by N.F. during her deposition. Despite this knowledge, defense counsel chose not to question N.F. about this individual's involvement during direct examination. The remaining portions of the records were redacted pursuant to Federal guidelines. To the extent that the defendant argues that he was entitled to the disclosure of the unredacted portions of the file, he is mistaken. The defendant has not produced any evidence that the redacted portions of the file contained any relevant, let alone exculpatory, information. See Commonwealth v. Healy, 438 Mass. 672, 679, 783 N.E.2d 428 (2003) ("To prevail on a claim that the prosecution failed to disclose exculpatory evidence, the defendant must first prove that the evidence was, in fact, exculpatory"). The defendant was therefore not prejudiced by his inability to obtain this information before trial. See Commonwealth v. Vieira, 401 Mass. 828, 838, 519 N.E.2d 1320 (1988) (no prejudice where substance of withheld evidence was cumulative of information already known to defendant).

On appeal, the defendant also argues that he was prejudiced by the failure to have this information at trial because it was needed to rehabilitate N.F.'s credibility after she contradicted her own testimony with regard to how long she was an informant. Specifically, ***59** after testifying on direct examination that she was an informant for at least two years and had been paid by the Federal government on multiple occasions, she testified on cross-examination that she had only been paid once.[16] This contradiction did not put her status as a confidential informant in doubt, however, just the length of time that she was an informant and on how many occasions she was paid by Federal authorities -- both issues tangential to the case. We do not believe that the defendant's access to the Federal records and testimony on N.F.'s informant status was therefore necessary to rehabilitate her credibility for these purposes, and instead may have presented other problems for the defense. Indeed, admitting additional evidence on the length of time that she was an informant after her testimony on cross-examination concluded may very well have further undermined her credibility. The fairness concerns present in other cases involving issues of dual sovereignty are therefore not present here. See, e.g., Donahue, 396 Mass. at 599-600, 487 N.E.2d 1351.

The second Donahue factor considers the defendant's lack of access to the sought-after evidence. Here, we conclude that this factor weighs heavily against imposing the burden on the Commonwealth to secure the disclosure of this information. The defendant was given an opportunity to depose N.F prior to trial. The record makes clear that the defendant ****251** also had ample time and opportunity to obtain the informant records and the substance of the sought-after testimony well before trial. Approximately eleven months before trial took place, the defendant was advised that obtaining this information from Federal authorities would require that he pursue it in accordance with Federal regulations. ***60** Indeed, he was reminded of the federally mandated procedure described several times, including by this court. See Ayala v. Commonwealth, 454 Mass. 1015, 1015 n.2, 910 N.E.2d 365 (2009) (noting that defendant "may have other means at his disposal to obtain the information he seeks. The Federal agencies have indicated that they would consider a request submitted by the defendant pursuant to [Federal regulations]"). See also United States ex rel. Touhy v. Ragen, 340 U.S. 462, 468, 71 S.Ct. 416, 95 L.Ed. 417 (1951) (upholding Federal regulation restricting ability of Federal authorities to disclose subpoenaed information). He did not, however, avail himself of the opportunity to obtain this information through the Federal procedure. Instead, he engaged in a year-long campaign to compel this information through State proceedings. The defendant had a full and fair opportunity to retrieve this evidence months before trial, but chose not to. Indeed, when he finally did comply with the Federal procedures at the start of the trial, he received a redacted copy of N.F.'s informant records and a notice authorizing the testimony of two Federal officers a few days later.

The third Donahue factor requires us to evaluate the burden on the prosecutor in obtaining the withheld information. Under this factor, we consider whether the prosecutor has a means of access to the information held by Federal authorities that the defendant does not. See Donahue, 396 Mass. at 600, 487 N.E.2d 1351. Here, the prosecutor would have been required to comply with the Federal procedure as well.[17] This case is therefore distinguishable from cases where the burden on the prosecution to retrieve the withheld information was minimal compared to the defendant. See id. (noting that while exculpatory information could not be obtained by defendant, it "may well have been available to the prosecutor on request"). There is no evidence in this case that a request from the Commonwealth, rather than from the defendant, would have precipitated the disclosure of the evidence. In fact, the record reveals the opposite. In response to discovery requests issued by the defendant that sought to determine whether other individuals at the party were also Federal informants, the prosecutor submitted requests for information related to these individuals in compliance with the Federal regulations. Rather than disclose this information, the FBI curtly informed the prosecutor that it "decline[d] either to confirm or deny whether [an individual] is or ***61** was an informant for the FBI." The burden on the prosecution was thus comparable to that on the defendant.

The fourth and final Donahue factor considers the degree of cooperation between State and Federal authorities, both in general and in the particular case. Where the cooperation between the two sovereigns is particularly strong, such as in a joint investigation of a defendant, we have determined that fairness dictates that the burden of securing the disclosure of the information held by Federal authorities falls squarely on the Commonwealth. See ****252** Lykus, 451 Mass. at 328, 885 N.E.2d 769. Here, however, there is no evidence of any cooperation between State and Federal authorities in the investigation or prosecution of the defendant's case. Although there was evidence that several Springfield police officers were deputized as Federal officers for the purposes

of operating within the Federal gang task force, there was nothing to suggest that these officers played any role in the defendant's case. Because this case did not fall within the umbrella of matters under investigation by the task force, it cannot be said that the FBI "functioned as [an] agent[ ]" of the Commonwealth in this case. Donahue, 396 Mass. at 599, 487 N.E.2d 1351.

After weighing these factors, we conclude that the Commonwealth was not required to bear the burden of securing the release of the information concerning N.F.'s status as an informant from Federal authorities. The defendant was not prejudiced by the nondisclosure, the defendant had ample opportunity to depose the informant and retrieve this information on his own, the Commonwealth would have been required to follow the same Federal procedures as the defendant to access the information, and the Federal government played no role in the investigation or prosecution of the defendant's case. See Lykus, 451 Mass. at 328, 885 N.E.2d 769; Donahue, 396 Mass. at 598, 487 N.E.2d 1351; Liebman, 379 Mass. at 675, 400 N.E.2d 842. The trial judge therefore did not abuse his discretion in declining to require the Commonwealth to secure N.F.'s informant records from Federal authorities and in declining to compel the testimony of Federal law enforcement officers.

3. Ineffective assistance of counsel. Following his convictions, the defendant filed a motion for a new trial, arguing that his trial counsel had been ineffective. The motion advanced a litany of errors alleged to have been made by trial counsel. Relevant to this appeal, the motion judge, who was not the trial judge, allowed an evidentiary hearing on trial counsel's failure to retain and call experts on eyewitness identification and ballistics. The motion ***62** judge did not allow an evidentiary hearing, however, on trial counsel's failure to notice the absence of Perez's psychological records that were subject to disclosure after finding that the defendant had not raised a substantial issue warranting further hearing. Following the evidentiary hearing, the motion judge denied the defendant's motion for a new trial.

On appeal, the defendant argues that the motion judge erred in denying his motion with respect to his arguments that his trial counsel was ineffective for (i) failing to retain and call an expert witness on the accuracy of eyewitness identifications, (ii) failing to retain and call an expert witness on ballistics evidence to testify about muzzle flashes, and (iii) failing to notice the absence of medical records that provided further insight into Perez's mental health issues and drug use.

[7] Because the defendant was convicted of murder in the first degree, we do not evaluate his ineffective assistance claim under the traditional standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 (1974).[18] See Commonwealth v. Seino, 479 Mass. 463, 472, 96 N.E.3d 149 (2018); Commonwealth v. Kolenovic, 478 Mass. 189, 192-193, 84 N.E.3d 781 (2017). Instead, we apply the more favorable standard of G. L. c. 278, § 33E, and review his claim to determine whether ****253** there was a substantial likelihood of a miscarriage of justice. Seino, supra. Under this review, we first ask whether defense counsel committed an error in the course of the trial. Id. If there was an error, we ask whether it was likely to have influenced the jury's conclusion. Id. at 472-473, 96 N.E.3d 149.

[8] Where the claimed ineffectiveness is the result of a strategic or tactical decision of trial counsel, the decision must have been "manifestly unreasonable" to be considered an error. Kolenovic, 478 Mass. at 193, 84 N.E.3d 781. Commonwealth v. Holland, 476 Mass. 801, 812, 73 N.E.3d 276 (2017). A determination on whether a decision is manifestly unreasonable requires an evaluation of the "decision at the time it was made" (citation omitted). Holland, supra. Only strategic and tactical decisions "which lawyers of ordinary training and skill in criminal law would not consider competent are manifestly unreasonable" (citation omitted). Id.

We conclude that any errors by the defendant's trial counsel did not create a substantial likelihood of a miscarriage of justice. The ***63** defendant's motion for a new trial was therefore properly denied. We address each of the defendant's arguments in turn.

[9] a. Eyewitness identification expert. The defendant's motion for a new trial relied heavily on trial counsel's failure to obtain evidence from an expert on eyewitness identification. Had an expert been called, the defendant argues, the jury would have heard evidence on the variables that affect eyewitness identifications and would have had "further reason to doubt the reliability of Perez's identification." Specifically, the defendant claims that an eyewitness identification expert would have testified to the theory of "transference," which suggests that Perez identified the defendant as the shooter only because of his earlier observations of the defendant during his altercation with the bouncers. Additionally, the defendant contends that the expert would have testified to "the negative effects

on accuracy of heightened stress and post-identification feedback," the "weak correlation of confidence to accuracy" of the identification, and the "chance of error by a single eyewitness."

The decision to call, or not to call, an expert witness fits squarely within the realm of strategic or tactical decisions. See, e.g., Commonwealth v. Facella, 478 Mass. 393, 413, 85 N.E.3d 665 (2017) (decision not to call psychiatric expert reasonable strategic decision); Commonwealth v. Hensley, 454 Mass. 721, 739, 913 N.E.2d 339 (2009) (decision not to call expert strategic). Accordingly, we evaluate whether the decision was "manifestly unreasonable" at the time it was made.[19] Holland, 476 Mass. at 812, 73 N.E.3d 276.

We cannot say that trial counsel's decision not to call an expert on eyewitness ****254** identification was manifestly unreasonable when it was made. At the evidentiary hearing, trial counsel testified that at the time of trial, he believed that N.F's testimony that the ***64** defendant was not at the scene at the time of the shooting, the inconsistencies of Perez's eyewitness account, and Perez's mental health struggles would be sufficient to challenge the reliability of Perez's identification. To that end, trial counsel attacked Perez's identification of the defendant as the shooter, both on cross-examination and during closing argument. On cross-examination, trial counsel confronted Perez on his ability to accurately identify the shooter under the lighting conditions at the time of the shooting, his recollection of certain events that morning, and the discrepancies between Perez's statement to police on the morning of the shooting and his trial testimony regarding the defendant's height and clothing worn. Additionally, the defense presented evidence that Perez suffered from PTSD as a result of his military service and bipolar disorder. Specifically, trial counsel introduced evidence that Perez had sought counselling for his mental health struggles approximately 161 times over an eight-year period and that he began taking medication for these issues a few months after the shooting. Finally, during closing argument, trial counsel argued that Perez's identification was unreliable. He argued that in light of Perez's mental health struggles, the "collective experience" of the jurors could lead them to conclude that "those are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." He also argued that Perez had made a mistaken identification.

The reliability of Perez's identification was vigorously challenged through this strategy.[20] Cf. Commonwealth v. Watson, 455 Mass. 246, 257-259, 915 N.E.2d 1052 (2009) (decision not to seek funds for expert on eyewitness identification not manifestly unreasonable where ***65** reliability of identification challenged on cross-examination and in closing argument). Accordingly, we cannot say that trial counsel's decision not to call an expert on eyewitness identification was one that "lawyers of ordinary training and skill in criminal law would not consider competent" (citation omitted). Holland, 476 Mass. at 812, 73 N.E.3d 276. See Commonwealth v. Kolenovic, 471 Mass. 664, 674, 32 N.E.3d 302 (2015), S.C., 478 Mass. 189, 84 N.E.3d 781 (2017) ("[R]easonableness does not demand perfection.... Nor is reasonableness informed by what hindsight may reveal as a superior or better strategy"). Accordingly, the decision was not manifestly unreasonable at the time it was made.

****255** **[10]** b. Ballistics expert. The defendant also argues that his trial counsel was ineffective for failing to call a ballistics expert who would testify that a muzzle flash fired from a semiautomatic handgun was unlikely to provide sufficient illumination to allow an individual to adequately see the face of the shooter. We need not decide whether the decision not to call a ballistics expert was a manifestly unreasonable one because, even assuming that it was, we conclude that it was not likely to have influenced the jury's conclusion. See Seino, 479 Mass. at 472-473, 96 N.E.3d 149.

As we discussed in depth supra, there was a significant amount of independent evidence establishing that the crime scene was illuminated at the time of the shooting. For example, a police officer testified that the street lights near the location of the shooting and the exterior lights on a nearby building were illuminated when he arrived at the crime scene at approximately 4:30 a.m. -- only approximately one and one-half to two hours after the shooting occurred. Additionally, the jury heard evidence that suggested the area in front of the home was illuminated enough to permit N.F. and Perez to independently identify the defendant from the porch on the second floor while the defendant was standing on the street outside. Even assuming that an expert would have testified that Perez was unlikely to have been able to see the shooter solely from the muzzle flash, the jury were not likely to have been influenced by this testimony in light of the other evidence that the crime scene was lit at the time of the shooting. Accordingly, we conclude that any error in failing to call a ballistics expert did not create a substantial likelihood of a miscarriage of justice.

[11] c. Evidence of mental health struggles and drug use. Finally, the defendant argues that his trial counsel was ineffective for failing to notice that certain psychological records detailing Perez's ***66** history of mental health struggles and drug use mistakenly had been withheld despite a court order compelling their disclosure. Without these records, the defendant argues, trial counsel was unable to explore the full extent of how Perez's mental health and drug use could have affected his "ability to accurately perceive and identify the shooter." The motion judge denied the defendant's motion for a new trial without conducting an evidentiary hearing on this argument. He concluded that because these issues were sufficiently before the jury, the additional records would not have "added to the information already at [trial counsel's] disposal and used in cross-examination at trial." We agree.

As discussed supra, Perez's PTSD and bipolar disorder diagnoses were both brought out on cross-examination at trial. Specifically, Perez testified that he had been diagnosed with PTSD and bipolar disorder, that he received counselling and medication to treat the diagnoses, and that he had had a counselling session on the day after the murder. He further testified that over the period of approximately eight years following his discharge from the military, he had sought counselling for his PTSD 161 times and that he suffered from "night terror[s]" and sleeplessness as a result of his PTSD.[21] Additionally, he testified ****256** that he used marijuana to cope with the effects of his PTSD diagnosis.

Notably, there was no evidence -- either introduced at trial or contained within the missing records -- that suggests that Perez's mental health struggles or drug use affected his ability to perceive the defendant on the morning of the shooting. For example, a defense expert's proffered testimony only acknowledged that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]." Trial counsel argued this point specifically during closing, stating that Perez's diagnoses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." Additionally, although the missing records suggested that Perez was more dependent on marijuana ***67** than his testimony let on, there was no evidence that he was under the influence of marijuana on the morning of the shooting. The defendant's proffered expert on this point would not have materially added to the defense, as he was prepared only to testify that individuals have a reduced ability to accurately perceive reality and recall past events while under the influence of mind-altering substances. Because the substance of the missing records and proffered expert testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was not likely to influence the jury's conclusion. See Commonwealth v. Williams, 453 Mass. 203, 212-213, 900 N.E.2d 871 (2009) (rejecting ineffective assistance of counsel claim based on counsel's failure to introduce records where substance of records was already before the jury). The motion judge therefore did not err in denying the defendant's motion for a new trial.

4. Review under G. L. c. 278, § 33E. After a thorough review of the record, we find no reason to exercise our authority under G. L. c. 278, § 33E, to grant a new trial or to reduce or set aside the verdict of murder in the first degree. Pursuant to this duty, however, we deem it necessary to address one of the arguments raised by the defendant during the motion for a new trial, but not raised on appeal.

[12] In his motion for a new trial, the defendant argued that his trial counsel's failure to request an "honest but mistaken identification" jury instruction constituted ineffective assistance of counsel. This instruction arose from our decision in Commonwealth v. Pressley, 390 Mass. 617, 620, 457 N.E.2d 1119 (1983), wherein we declared that "[f]airness to a defendant compels the trial judge to give an instruction on the possibility of an honest but mistaken identification" where identification was "crucial to the Commonwealth's case." We held that this instruction must be given "when the facts permit it and when the defendant requests it." Id. Here, the facts permitted such an instruction. The defendant did not, however, request it. We therefore review to determine if this error produced a substantial likelihood of a miscarriage of justice. Commonwealth v. Penn, 472 Mass. 610, 625-626, 36 N.E.3d 552 (2015). We conclude that it did not.

As the motion judge concluded, the trial judge described various factors that the jury should consider in assessing the identification evidence and "made clear that the jurors must be satisfied beyond a reasonable doubt of the accuracy of the identification of [the defendant] before they ****257** could convict him." Moreover, the ***68** defendant's trial counsel specifically argued mistaken identification in closing and cross-examined Perez on his ability to accurately perceive the shooter. Accordingly, "we are substantially confident that, if the error had not been made, the jury verdict would have been the same" (citation omitted). Penn, 472 Mass. at 626, 36

N.E.3d 552. Cf. id. at 625-626, 36 N.E.3d 552 (no likelihood of substantial miscarriage of justice where honest mistake was focus of defendant's cross-examination of eyewitness and closing argument). We therefore conclude that trial counsel's failure to request the "honest but mistaken identification" instruction did not create a substantial likelihood of a miscarriage of justice.

Conclusion. For these reasons, we affirm the defendant's convictions and the denial of the defendant's motion for a new trial.

So ordered.

All Citations

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Footnotes

1 The jury also convicted the defendant of the related charges of unlawful possession of a firearm without a license and unlawful possession of ammunition without a firearm identification card.

2 At trial, a witness who had attended the party testified that the defendant was upset because he felt that hosting a party at the house was disrespectful to his niece, who had recently been killed at a nearby location.

3 The door was kicked in with such force that police were later able to take a footprint impression from the door and confirm that it matched the defendant's shoe.

4 Robert Perez's account of the defendant's actions was substantially corroborated at trial by the testimony of the first-floor bouncer.

5 Perez testified that he saw the muzzle flash came from "the sidewalk area under the light," but later noted that he could not be certain whether the street light was on at the time of the shooting.

6 The police recovered five spent shell casings from the scene of the shooting. The medical examiner also recovered two spent projectiles from Ramkissoon's body. At trial, a police officer with special knowledge of ballistics testified that he performed a microscopic examination of the shell casings and the spent projectiles. Based on the examination, he concluded that all five casings came from a .22 caliber gun. He further concluded that both projectiles extracted from Ramkissoon's body came from the same weapon. The police never located the gun that was used to kill Ramkissoon.

7 The trial judge ordered Perez to undergo a competency examination by an independent doctor to determine whether these diagnoses would have an impact on his ability to testify. Following the examination, Perez was declared competent to testify.

8 We discuss the importance of Perez's mental health struggles and drug use to this case in more detail, infra.

9 Because the records concerning the witness's identity are subject to an order of impoundment, we use the pseudonym "N.F." to refer to her.

10 The police recovered five spent shell casings from the scene of the shooting. Each casing was located near the street light in front of the property adjacent to the house that Perez identified as the light under which the shooter was standing. The shell casings were located to the right of the street light. A police officer testified that, generally, shell casings discharged from a handgun eject to the right of the gun, indicating that the shooter was standing even closer to the street light than where the shell casings landed.

11 The officer further testified that on arriving at the scene, he observed that "[t]he street was illuminated."

12 This inference is further supported by the fact that Perez recognized the defendant while he was outside on the street and Perez was on the second-floor porch earlier in the morning.

13 The task force included several State police officers who were deputized as "Special Federal Officers" for the purposes of participating in the task force.

14 The defendant filed a motion for the production of exculpatory evidence related to N.F.'s status as an informant. The Commonwealth opposed the motion, arguing that it did not have possession or control of the requested information. The motion judge agreed with the Commonwealth and denied the defendant's motion to the extent that it requested that the Commonwealth produce records that were not in the Commonwealth's possession or control. The motion judge further suggested that the defendant attempt to subpoena the Federal authorities for that purpose.
The defendant next filed a motion to examine N.F.'s records pursuant to Mass. R. Crim. P. 17 (a) (2), 378 Mass. 885 (1979). The motion judge allowed the defendant's motion under rule 17, and summonses to various Federal agencies were issued. The Federal government then filed a motion to quash the summonses sent to Federal authorities. The motion judge allowed the motion to quash, concluding that the defendant was instead required to follow the established

Federal regulations to obtain records from a Federal agency. The defendant eventually petitioned for relief to a single justice of this court, which was denied. The defendant's subsequent appeal to the full court was also denied. Ayala v. Commonwealth, 454 Mass. 1015, 1015, 910 N.E.2d 365 (2009).

15 For the purposes of our analysis, we assume, without in any way deciding, that the information that would confirm N.F.'s status as an informant falls within the scope of what is considered exculpatory information. See Commonwealth v. Williams, 455 Mass. 706, 714 n.6, 919 N.E.2d 685 (2010) ("[E]xculpatory is not a technical term meaning alibi or other complete proof of innocence, but simply imports evidence which tends to negate the guilt of the accused ... or, stated affirmatively, supporting the innocence of the defendant" [quotations omitted]); Commonwealth v. Pisa, 372 Mass. 590, 595, 363 N.E.2d 245 (1977), cert. denied, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977).

16 The defendant argued that the change in her testimony was the result of intimidation on the part of the Federal government and moved for a mistrial on that basis. The motion was denied. There was no evidence that Federal officers intimidated N.F. into lying or otherwise changing her testimony at trial. The only evidence presented was that N.F. was told that a Federal officer was upset with her participation in the defendant's case, that she would not be paid again until after the trial ended, and that she was not to detail her payments or the information that she had given Federal officers in the past. This is not sufficient to show that she was intimidated into altering her testimony. Indeed, the defendant's theory of intimidation is belied by the fact that the purported intimidation allegedly occurred before N.F. testified in the case. Had she been intimidated as the defendant argues, one would not have expected her to testify to being an informant for approximately two years and receiving payments as she did on direct examination. Accordingly, this theory does not support the defendant's contention that he was prejudiced by the failure to obtain the federally held information of N.F.'s status as an informant.

17 During argument before the start of trial, defense counsel conceded that the prosecutor in this case "ha[d] done whatever she could to procure evidence that is of exculpatory nature."

18 Under Commonwealth v. Saferian, 366 Mass. 89, 96–97, 315 N.E.2d 878 (1974), the standard is whether an attorney's performance fell "measurably below that which might be expected from an ordinary fallible lawyer" and, if so, whether such ineffectiveness has "likely deprived the defendant of an otherwise available, substantial ground" of defense.

19 The defendant contends on appeal that the motion judge incorrectly found that the failure to call an expert was a strategic decision. The defendant's trial counsel offered contradictory testimony on this point at the evidentiary hearing. In his affidavit, and on direct examination, trial counsel claimed that the failure to call an expert was not a strategic decision. Trial counsel testified that, rather, he simply never considered whether to call one. On cross-examination, however, he testified that he made the determination that an identification expert was not relevant to the case. Given this conflicting testimony, we see no reason to disturb the motion judge's conclusion that not calling an expert on eyewitness identification was a part of the larger strategic decision to focus the defense on the testimony of N.F. and the cross-examination of Perez. Commonwealth v. Perkins, 450 Mass. 834, 845, 883 N.E.2d 230 (2008) ("[W]e defer to [the motion] judge's assessment of the credibility of witnesses at the hearing on the new trial motion" [citation omitted]).

20 We also note that, as the motion judge concluded, at the time of trial in 2009, the retention of experts on eyewitness identification was not as prevalent as it is today. See Commonwealth v. Holland, 476 Mass. 801, 812, 73 N.E.3d 276 (2017) ("[We] make every effort ... to eliminate the distorting effects of hindsight" in evaluating whether decision is manifestly unreasonable [quotation and citation omitted]). Indeed, trial counsel testified that he had never retained an expert on eyewitness identification, despite having decades of experience as an attorney and having tried over forty murder cases. At the time of trial, counsel had the benefit of neither the Report and Recommendations of the Supreme Judicial Court Study Group on Eyewitness Evidence (July 25, 2013) nor our decision in Commonwealth v. Gomes, 470 Mass. 352, 354, 363-364, 22 N.E.3d 897 (2015), that highlighted the preference for expert testimony or, in the absence of such testimony, specific jury instructions regarding the reliability of eyewitness identifications. Finally, Perez clearly identified the defendant correctly as the person who threatened to come back and "light" the party "up" when he was removed. The primary issue of identification related to the transference theory.

21 At the evidentiary hearing on the defendant's motion for a new trial, trial counsel testified that, at the time of the trial, he believed it would have been a poor tactical choice to "attack" Perez in front of the jury, given that Perez was a veteran suffering from posttraumatic stress disorder (PTSD). Therefore, it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if counsel had them. See Commonwealth v. Duran, 435 Mass. 97, 106, 755 N.E.2d 260 (2001) (rejecting claim that counsel was ineffective for failing to "attempt to use every conceivable method" to impeach sympathetic witness).

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PHILIP AYALA, Petitioner, v. SUPERINTENDENT SEAN MEDEIROS, Respondent.	Civil Action No. 20-30059-MGM

MEMORANDUM AND ORDER REGARDING
PETTTION FOR WRIT OF HABEAS CORPUS
(Dkt. No. 1, 23)

October 27, 2022

MASTROIANNI, U.S.D.J.

I. OVERVIEW

Philip Ayala ("Petitioner") was convicted of first-degree murder based on the testimony of one eyewitness, Robert Perez. Mr. Perez identified Petitioner as the individual who shot and killed Clive Ramkissoon outside an illegal, after-hours Springfield house party on June 10, 2007. The Commonwealth introduced no other direct evidence but did present circumstantial evidence that Petitioner attended the same party, was not allowed in because he refused to be searched or pay the cover charge, said he would "light this place up" or "shut the party down," kicked in the front door, and was distressed and angry that the party was occurring close to the scene where his young niece had recently been shot and killed. The case turned on the testimony and credibility of Mr. Perez, whom the Commonwealth described, in exchanges with the trial court preceding Mr. Perez's testimony, as "the only Commonwealth witness" and "the key Commonwealth witness." (Assistant District Attorney: "Mr. Perez is it.")

Defense trial counsel knew Mr. Perez's identification of Petitioner was essential to the Commonwealth's case. Defense counsel also knew generally, from the Commonwealth's discovery produced some time after January 24, 2008, that Mr. Perez had been diagnosed with post-traumatic stress disorder which he treated with regular therapy sessions at the Northampton Veterans Affairs Medical Clinic ("Veteran's Hospital") between 2000 and 2008. However, defense trial counsel failed to request that the court subpoena Mr. Perez's mental health treatment records from the Veteran's Hospital until the first day of Petitioner's trial. The Veteran's Hospital responded to an incorrect subpoena request and produced a very short 38-page file of medical (but not mental health) records. The produced material showed Mr. Perez's medical lab results, complaints of asthma, and requests to use the exercise facilities, without any progress notes for his therapy sessions, evaluations from his psychiatric hospitalization, or psychological assessments. Defense trial counsel realized the production had erroneously excluded Mr. Perez's psychological and psychiatric records but did nothing to correct the omission. Petitioner's appellate counsel later obtained the omitted mental health records after the trial.

The omitted psychological and psychiatric records, which amounted to hundreds of pages, portray Mr. Perez as suffering from PTSD symptoms—including paranoia, flashbacks, hypervigilance, and intrusive thoughts—for the seven years preceding the shooting, within hours of witnessing the shooting, and for years following the shooting. The omitted psychological and psychiatric records also describe the source of Mr. Perez's original trauma—an accidental shooting in which Mr. Perez killed a man in Germany during military service. The psychological records show Mr. Perez recounting numerous factual similarities between his memories of the German shooting incident and his memories of Mr. Ramkissoon's shooting death. Progress notes from an "emergency" visit to his therapist the day after Mr. Ramkissoon's shooting document Mr. Perez suffering flashbacks and show him already connecting his memories of Mr. Ramkissoon's shooting and the German shooting.

Records from Mr. Perez's psychiatric hospitalization in 2007 show how Mr. Perez's memories of the Army shooting and Mr. Ramkissoon's shooting triggered severe PTSD symptoms, including symptoms that could have affected his percipient abilities, and ability to accurately recall. A psychiatric expert who reviewed, post-conviction, Mr. Perez's psychological records testified: "Mr. Perez was suffering from post[-]traumatic stress symptoms prior to, during, and after" witnessing Mr. Ramkissoon's shooting and "these mental health or emotional conditions had the potential to and may have interfered with Mr. Perez's ability to accurately perceive and recollect" the shooting. The psychiatric expert also testified Mr. Perez "link[ed]" the German shooting and Mr. Ramkissoon's shooting and "[r]e-experiencing a traumatic event in the form of a flashback and/or memories increases the level of emotional reactivity and can affect perception of reality and recall."

The jury in Petitioner's trial, however, knew none of this context when considering Mr. Perez's testimony because of defense trial counsel's failure to obtain the psychological and psychiatric records, despite recognizing their omission from Mr. Perez's Veteran's Hospital file. The jury was also deprived of the benefit of expert testimony from a psychiatrist as to how Mr. Perez's PTSD symptoms may have influenced, distorted, or affected his perception and recollection of Mr. Ramkissoon's shooting. Without reference to details from the psychological and psychiatric records to support his motion for an expert, defense trial counsel could not convince the trial court that such testimony was even relevant. The jury relied on Mr. Perez's testimony that he saw Petitioner's face illuminated in the muzzle flash from the gun as it was fired at Mr. Ramkissoon. On this basis, the jury convicted Petitioner of first-degree murder.

The Supreme Judicial Court ("SJC"), on direct appeal, denied Mr. Ayala's ineffective assistance of counsel claim for trial counsel's failure to obtain the psychological records. The SJC held: "Because the substance of the missing records and proffered [psychological] expert testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was

not likely to influence the jury's conclusion." *Commonwealth v. Ayala*, 112 N.E.3d 239, 256 (Mass. 2018). But the substance of the missing psychological records clearly was not presented to the jury, and those critical records were not available for any pretrial purposes including review by Petitioner's proffered psychological expert, the trial court, or the trial court's own designated examiner.

This court holds the state court's adjudication of Petitioner's ineffective assistance of counsel claim on the basis of the missing psychological records was "based on unreasonable findings of facts" under 28 U.S.C. § 2254(d)(2) and, furthermore, adjudication of this claim "resulted from an unreasonable application of clearly established federal law" under the Sixth Amendment to the U.S. Constitution and *Strickland v. Washington*, 466 U.S. 668 (1984). *See* § 2254(d)(1). Defense counsel's failure to obtain the psychological records and consequential failure to introduce expert testimony as to any effect Mr. Perez's PTSD may have had on his percipient and recall abilities amounted to unconstitutionally deficient performance "sufficient to undermine [this court's] confidence in the outcome" of Petitioner's trial. *Strickland*, 466 U.S. at 694. This court therefore grants Petitioner habeas relief "on the ground that [he] is in custody in violation of the Constitution . . . of the United States." *See Shoop v. Twyford*, -- U.S. --, 142 S. Ct. 2037, 2043 (2022) (quoting 28 U.S.C. § 2254(a)).

The court further holds, however, that the SJC's determination on the sufficiency of the evidence actually presented at trial was not unreasonable, and, therefore, Petitioner may be retried without running afoul of the Double Jeopardy Clause. *See Burks v. United States*, 437 U.S. 1, 18 (1978) (holding Double Jeopardy Clause requires judgment of acquittal where reviewing court finds evidence legally insufficient). The court declines to reach the habeas petition's remaining grounds (*see* Dkt. No. 23 at 1-4), as "any relief [Petitioner] could obtain on th[ose] claim[s] would be cumulative." *Banks v. Dretke*, 540 U.S. 668, 689 n.10 (2004) (granting habeas on *Brady v. Maryland* claim and declining to reach ineffective assistance claim).

The writ shall conditionally issue. The court orders Petitioner released if the Commonwealth

does not retry him within 120 days from the date of this decision.

II. FACTUAL BACKGROUND

The facts underlying Petitioner's conviction are drawn from the SJC's decision, *Commonwealth v. Ayala*, 112 N.E.3d 239 (Mass. 2018), and supplemented with other, consistent record facts, all of which were presented to the state court.[1] *See Healy v. Spencer*, 453 F.3d 21, 22 n.1 (1st Cir. 2006) ("[O]ur precedent makes clear that we may at least consider other facts from the record consistent with the state court's findings . . . and furthermore here the SJC said explicitly it had considered the entire trial record." (internal citation omitted)). The court recognizes the deference owed the state court findings, but the brevity of the SJC's decision and the importance of many omitted record facts have made extensive supplementation necessary.

A. THE SHOOTING

Early on the morning of June 10, 2007, Robert Perez and Clive Ramkissoon attended an after-hours house party at a duplex at 334 Wilbraham Road in Springfield, Massachusetts. Mr. Perez and Mr. Ramkissoon, friends from work, had been hanging out that evening at another friend's house and a bar. Around 1:30 a.m., Mr. Ramkissoon and Mr. Perez met a woman on the street who invited them to a party. The woman, Quadishia Simms, got into Mr. Ramkissoon's truck and directed Mr. Ramkissoon and Mr. Perez to 334 Wilbraham Road. (R.A. 16-16 at 75–76; 16-17 at 21–24.) As they approached the house, Mr. Perez twice expressed concern about the safety of the neighborhood and suggested they turn around. (R.A. 16-16 at 79.) His companions ignored him, and Mr. Perez, Mr. Ramkissoon, and Ms. Simms arrived at the Wilbraham house party at about 2:00 a.m. They were

[1] In this decision, the "Record Appendix" are the transcripts filed by Respondent as Response/Answer to Habeas Corpus Petition at Dkt. No. 16 and are referred to as "R.A. 16-1," "R.A. 16-2," *etc.* "Supplemental Appendix I" ("S.A.I") refers to the document filed by Respondent at Dkt. No. 20, and "Supplemental Appendix II" ("S.A.II") refers to the document filed by Respondent under seal at Dkt. No. 22. The court uses the pagination automatically generated in the document header by the electronic CM/ECF database.

searched by a female bouncer at the front door of the house then directed to the second floor where a second bouncer collected a $5 entry fee. Mr. Ramkissoon bought Mr. Perez a beer. (R.A. 16-17 at 27–28.) There were few attendees at that hour, and Mr. Perez returned downstairs to speak to the bouncer at the front door. Petitioner Philip Ayala arrived at the party soon after, and he refused to be searched by the female bouncer. Petitioner argued with the bouncer, pushed past her, and continued up the stairs, past Mr. Perez, to the second floor. This was the first time Mr. Perez ever saw Petitioner. The second-floor bouncer, however, would not let Petitioner in without being searched and paying the entry fee. Petitioner refused and was sent back downstairs, passing Mr. Perez in the stairwell a second time. Mr. Perez heard Petitioner shout that he was going to "be back" and "light this party up" before he left the house. (R.A. 16-17 at 34–36, 38.) (The first-floor bouncer testified that Petitioner "said he was going to shut the party down." (R.A. 16-17 at 143.)) Shortly after leaving, Petitioner returned to the front door and kicked it, leaving a shoeprint, and then departed a second time.

Mr. Perez, primed by his concern about the neighborhood's safety, was so startled by the sound of the door being kicked in that he decided at once to leave. Mr. Perez did not see who kicked in the door, but he believed it was Petitioner. Mr. Perez went upstairs to find Mr. Ramkissoon. Mr. Perez and Mr. Ramkissoon stepped onto the second-floor balcony to look for Petitioner, whom Mr. Perez saw pacing outside. (R.A. 16-17 at 34–35, 38–39.) It was based on these two passings in the stairwell, Mr. Perez testified, that he was able to sufficiently recall Petitioner's facial features to identify him from the distance of a two-story balcony to the ground at night and later illuminated in the muzzle flash from a firearm during the shooting incident. (R.A. 16-17 at 35–37.) Mr. Perez could not "exactly recall" what Petitioner wore that night, and his description of Petitioner's clothing changed several times.[2] (R.A. 16-17 at 34.)

[2] Mr. Perez's June 10, 2007 police statement describes Petitioner as wearing "a matching coat and pants set" of unspecified color or description; Mr. Perez also states the shooter "was wearing the same exact outfit as the guy from the stairwell" without explaining what that outfit was. (S.A.II 455, 457.)

Mr. Perez and Mr. Ramkissoon decided to wait for a few minutes to avoid the agitated person they had seen from the balcony. Ms. Simms was also ready to leave; she had been kicked out of the party for her apparently drunken behavior of undressing and dancing provocatively. (R.A. 16-17 at 32.) Mr. Perez, Mr. Ramkissoon, and Ms. Simms exited 334 Wilbraham Road and began walking across Wilbraham Road toward Mr. Ramkissoon's truck.

Mr. Ramkissoon had parked on Bristol Street east of 334 Wilbraham Road, close to Bristol's intersection with Wilbraham Road. (R.A. 16-17 at 25, 40–42.) The house at 334 Wilbraham abutted Colonial Avenue to the west and another residence, 338 Wilbraham, to the east. (R.A. 16-17 at 152, 159.) Across from 334 Wilbraham was a church and a parking lot, and across from 338 Wilbraham was a market/deli occupying the corner of Wilbraham and Bristol. (S.A.I 384.) Mr. Perez bent down to tie his shoelace, and Ms. Simms and Mr. Ramkissoon kept walking, leaving a gap between them and Mr. Perez. (R.A. 16-17 at 40.) Ms. Simms stopped on the double yellow lines dividing Wilbraham Road and began dancing while cars drove around her. (R.A. 16-17 at 42.) Mr. Perez tried to escort Ms. Simms out of the road. While Mr. Perez stood in the middle of Wilbraham Road, he heard gunshots coming from the direction of the house east of 334 Wilbraham Road. (R.A. 16-16 at 88–89.) Mr. Perez saw muzzle flash from a gun being discharged, and in the illumination from the flash, Mr. Perez saw Petitioner's face. (R.A. 16-16 at 89–90.) Petitioner was standing under an aluminum pole street lamp near 338 Wilbraham's easternmost property line. According to testimony from a police officer, the street lamp was illuminated when the officer arrived at the scene about 4:30 a.m. (R.A. 16-17 at 162–

Sometime between January 25, 2008 and June 16, 2009 while he was incarcerated, Mr. Perez wrote to the ADA that the shirt Petitioner wore to his arraignment (which Mr. Perez apparently attended) was the same shirt Petitioner wore on the night of the shooting, although Mr. Perez did not provide any description of the shirt to explain how he made the connection. (S.A.II 493; R.A. 16-17 at 78.) At trial on August 19, 2009, Mr. Perez gave two different descriptions of Petitioner's clothing: "a white T-shirt and a matching shorts" (R.A. 16-17 at 34) and "a white T-shirt or a green T-shirt with kind of a skull on it . . . and also some shorts, but I don't recall the color . . . it seemed to be a matching set" (*Id.* at 58).

63.) Mr. Perez could not recall whether the street light was illuminated at the time of the shooting but he indicated he was certain he saw Petitioner's face lit by the firearm's muzzle flash. Mr. Perez identified the weapon being fired as a .22 caliber firearm based on his familiarity with the sound. He did not specify the number of muzzle flashes he observed. (R.A. 16-16 at 89–90; R.A. 16-17 at 45.) Mr. Perez heard a total of five to seven shots and took off running, leaving Ms. Simms in the street. (R.A. 16-17 at 47–50.) Mr. Perez ran across Wilbraham Road and jumped over a tall fence surrounding the church toward the church's parking lot. (R.A. 16-17 at 50.) Mr. Perez then returned to Bristol Street near the intersection with Wilbraham Road, where he saw Mr. Ramkissoon shot and lying on the ground. (R.A. 16-17 at 50–51; S.A.I 384.) Mr. Ramkissoon was bleeding and had broken his teeth when he fell to the concrete. (R.A. 16-17 at 51–52.) Mr. Perez tried to clear Mr. Ramkissoon's airway, then flagged down a car to call 911. (*Id.*) Paramedics arrived at approximately 3:00 a.m. and transported Mr. Ramkissoon to the hospital where he was pronounced dead from multiple gunshot wounds.

Mr. Perez was taken to the Springfield police station where he gave a statement describing "a tall light[-]skinned black male, possibly Hispanic but I think he was black, about 6'0" to 6'1" wearing a matching coat and pants set with a short faded haircut. He was about 20-30 years old and he was kind of muscular about 180-200 lbs. He may have had a diamond stud in his ear and a thin goatee." (S.A.II 455; R.A. 16-17 at 68–69.) Mr. Perez's statement continued, "I got a brief glimpse at this male subject as he fired the gun and he was wearing the same exact outfit as the guy from the stairwell. I was also able to quickly see his face but he was a little bit away from me, but I am sure it was the same guy who had been in the stairwell and had the problem about being frisked. In my mind, it was the same guy, I am positive." (S.A.II 457.) Mr. Perez also identified Petitioner from a photographic line-up as the person who had not wanted to be searched by the first-floor bouncer at the party and who had shot Mr. Ramkissoon. (Upon identifying Petitioner's photograph, "Det[ective] Prior told [Mr. Perez] that the person who[m he] picked out from photo #3 is actually identified as a Philip Ayala,

D[O]B 6/28/72 SS#[redacted] from 75 Sherman St. Springfield Ma." (S.A.II 458.)) On July 10, 2007, Mr. Perez testified before a grand jury and amended his description of the shooter as closer to 5 feet 10 inches but otherwise endorsed his police statement, which the Assistant District Attorney read into the record. (R.A. 16-17 at 56–57; S.A.I 347.)

B. THE TRIAL

At trial, Petitioner was represented by assigned defense counsel Gregory Schubert ("defense counsel"). On the first day of jury selection, August 12, 2009, the Assistant District Attorney (the "ADA") told the court and defense counsel that Mr. Perez had been served his trial testimony subpoena at the Veteran's Hospital in Leeds, Massachusetts. (R.A. 16-13 at 4–5.) Defense counsel expressed concern that he needed time to subpoena and review any psychological records for Mr. Perez before conducting cross-examination "to avoid an IAC [ineffective assistance of counsel claim] . . . since [Mr. Perez] has a documented history, and I assume he's back at Leeds for his PTSD relative to his being the only eyewitness that places my client at the scene of the shooting." (R.A. 16-13 at 5–6.) Defense counsel moved for an order subpoenaing Mr. Perez's psychological and psychiatric records, which the Commonwealth did not oppose. Defense counsel had known from discovery produced by the ADA sometime after January 24, 2008 that Mr. Perez had received psychological counseling for PTSD at the Veteran's Hospital regularly since April 14, 2000. (S.A.II 10–15; R.A. 16-15 at 26; R.A. 16-16 at 100.)

Defense counsel and the trial court also considered the psychological records pertinent to the question of Mr. Perez's competency to testify.

> Defense counsel: [W]e don't know whether he's delusional at this point in time.
>
> Trial court: We have to find out. These records have to be – I'm going to allow the motion. No objection by the Commonwealth.

(R.A. 16-13 at 138–39.)

The District Attorney's office prepared a proposed order for defense counsel's motion, which the trial court signed on August 13, 2009. The order erroneously excluded all psychological and psychiatric records from the demanded production and requested only medical information. It stated, in full:

> It is hereby ordered that KEEPER OF THE RECORDS at Veteran's Hospital, 421 North Main Street, Leeds, MA, release to the SUPERIOR COURT CLERK'S OFFICE, any and all medical records regarding the treatment of Robert Perez, treated on or about 2009. This order does not include psychiatric, psychological or social worker records.
>
> It is further ordered that the Superior Court Clerk's Office release copies of said records to all counsel of record upon receipt. The person on whom medical records are being requested is the witness in a criminal case. This order does not authorize the release of psychiatric or mental health records.

(S.A.I 327.) After the subpoena was served, on August 14, 2009, the ADA brought the error to the court's attention and presented a revised order, which the trial court also signed. (R.A. 16-15 at 24–25.) The revised order read, in full:

> It is hereby ordered that the KEEPER OF THE RECORDS at Veteran's Hospital, 21 North Main Street, Leeds, MA release to the SUPERIOR COURT CLERK'S OFFICE, any and all medical, psychiatric, psychological or social worker records regarding the treatment of Robert Perez, treated on or about 2009.
>
> It is further ordered that the Superior Court Clerk's Office release copies of said records to all counsel of record upon receipt. The person on whom the medical, psychiatric, psychological or social worker records are being requested is the witness in a criminal case.

(S.A.I 328.) The revised order was signed on August 14, 2009 according to the trial court docket in Petitioner's case, but responsive psychological and psychiatric records were never produced to the clerk's office during Petitioner's trial. (S.A.I 134.) It appears records responsive to the revised order were not received in the clerk's office until February 11, 2014, after post-conviction defense counsel re-served the trial court's August 14, 2009 order. (S.A.I 37, 39, 139.)

On August 17, 2009, the trial court declined a joint request to delay the trial until the records had been received and reviewed. (R.A. 16-15 at 28 ("I don't see anything that's going to prejudice

anyone at this juncture to start the trial.").) Defense counsel notified the court he intended to move for a competency evaluation based on Mr. Perez's diagnosis of PTSD and his current residence at the Veteran's Hospital. (R.A. 16-15 at 26 ("I know for sure that it would be ineffective assistance of counsel if I didn't demand some kind of hearing or evaluation to find out whether or not he's even competent to give testimony in this case.").) The trial judge echoed defense counsel's suggestion: "When the records are revealed to all of us, I may sua sponte [issue] a decision respecting his testimony." (R.A. 16-15 at 28.)

While both sides waited for the Veteran's Hospital to produce Mr. Perez's records, the Commonwealth presented testimony from Sergeant David Martin, Springfield Police Department, who responded to a report of gunfire on Wilbraham Road and found Mr. Ramkissoon lying on Bristol Street. (R.A. 16-15 at 91–92.) Next the Commonwealth called Joann Richmond, a forensic pathologist/medical examiner, to testify as to Mr. Ramkissoon's autopsy. Dr. Richmond testified Mr. Ramkissoon died of multiple gunshot wounds, "particularly the one that went through the lung and the heart which caused bleeding," which had entered Mr. Ramkissoon's body through the back of his left arm. (R.A. 16-15 at 125.) After Dr. Richmond testified, the trial court released the jury for the day about thirty minutes early and informed the parties that Mr. Perez's records from the Veteran's Hospital had arrived and could be examined only in the court clerk's office. (R.A. 16-15 at 131, 136, 138.) (However, these were incomplete, as they did not include any psychological or mental health records. (S.A.I at 37.)) The trial court stated it planned to ask the jury to return at 9:30 a.m. the following day, rather than 9:00 a.m., to allow the parties extra time to review the records. (R.A. 16-15 at 131.) The trial court held off deciding whether to order Mr. Perez, who was scheduled to testify next, to undergo a competency exam "depend[ing] on the requests or my own motion that there should be an examin[ation]." (R.A. 16-15 at 138.)

The 38-page file of Mr. Perez's medical records actually produced in response to the erroneous subpoena and relied upon at trial did not include any psychological or psychiatric records. On August 18, 2009, the trial court began with a sidebar discussion about the Veteran's Hospital records and defense counsel's motion for Mr. Perez to undergo a competency exam. Defense counsel knew the 38-page file produced on August 17 did not contain psychological counseling notes corresponding to the list of over one hundred counseling appointments produced by the ADA in discovery. In fact, defense counsel told the trial court "those records cannot in any way, any possible fashion, shape or form be complete." (R.A. 16-16 at 59; *see also* R.A. 16-16 at 51 (noting lack of psychological reports or testing supporting Mr. Perez's diagnoses).) But defense counsel did not petition the court for any type of action to confirm whether the records were complete, move for a continuance to obtain the omitted records, or do anything else to "follow up," because, as he explained in an affidavit several years after the trial, "I was busy and distracted by other matters. The missing mental health records slid off my radar." (S.A.I 463–64). The trial court and the prosecution inaccurately inferred that the lack of psychological entries or information in the 38-page file demonstrated Mr. Perez's lack of mental health problems. The ADA said, "I really didn't see anything that jumped out at me that suggested that he was not competent." (R.A. 16-16 at 8.) The ADA continued, "It appears that the biggest thing that he has going there is the exercise program that they want him to participate in . . . ." (R.A. 16-16 at 8–9.) The trial court stated, "I read the records page by page. . . . There's nothing salient about that record that told me he is incompetent to testify." (R.A. 16-16 at 9.) Defense counsel moved for a competency exam based on the fact Mr. Perez "is bipolar with manic expressions thereof and . . . there's nothing that says what [medication] he's taking relative to his bipolar situation" in the 38-page file of medical-only records. (R.A. 16-16 at 5.) Between August 17 and 18, 2009, defense counsel had consulted briefly with a potential psychological expert, Dr. Ebert, who "explained to me that a person that is manic obviously is wired high and if he's not on his medications, obviously he doesn't believe he would be

competent to testify." (R.A. 16-16 at 5.) The trial court allowed defense counsel's motion for a competency examination "[b]ased on a medical record that has a regime of medication" and Mr. Perez's diagnoses of PTSD and bipolar disorder. (R.A. 16-16 at 10.)

The trial court's reasoning and its intended purpose for the court-ordered competency examination are, at times, complicated to follow. The trial court recognized the importance of determining both Mr. Perez's competency to testify and his percipient abilities at the time of the shooting. (R.A. 16-16 at 9–12.). The trial court combined the two inquiries and attempted to use the competency examination for both purposes. What is clear from the record, however, is the substance of Mr. Perez's 38-page Veteran's Hospital file—which did not include psychological notes or psychiatric hospitalization records—influenced the trial court's decision and defense trial counsel's motion for an expert witness. (*See, e.g.,* R.A. 16-16 at 60–64.) The trial court stated:

> [W]hat we need to determine . . . is, one, is he competent to express to this jury the percipient facets of his mind that he was able to use in making observations, allegedly, that Mr. Ayala is the person who shot that gun. Now that level of competency is critical.

(R.A. 16-16 at 10.) The trial court then implied the competency examiner was qualified and able to answer both the question of Perez's present competency to testify and any effect his mental illnesses had on his percipient abilities on the day of the shooting. (R.A. 16-16 at 10–12, 15 (seemingly interchangeably discussing both issues); *see also* R.A. 16-16 at 23 (trial court: "[The competency examiner] knows what a competency exam is and he'll be inquiring about whether or not [Mr. Perez] knows the difference between truth and falsity, and whether or not this doctor can cognitively determine whether there's a percipient problem . . . .").) The trial court further stated: "The real issue here is whether or not his percipient abilities are affected by a condition he has and were affected by it at the time that he made these alleged observations." (R.A. 16-16 at 12.) But a few moments later, the trial court opined: "What this really redounds to . . . is simply[,] is he competent to testify." (R.A.

16-16 at 15.) Clearly, the trial court was struggling, under the circumstances it was presented with, to fashion a fair approach to the issues of competency and percipient ability.

The competency examiner, Dr. Burke, concluded Mr. Perez was competent to testify. (R.A. 16-16 at 45 ("To clarify, I did an evaluation . . . for competency to testify.").) The trial court also asked whether Dr. Burke "inquire[d] what [Mr. Perez's] condition was" in June 2007, at the time of the shooting. Dr Burke responded:

> The Court was interested in that. I briefly asked him about that. . . . And he told me at that time he was not on any medications . . . and he was feeling, prior to the incident, okay. He was with friends and he wasn't suffering from symptoms of a mental illness at that time.

(R.A. 16-16 at 47.) Dr. Burke appears to have relied entirely on Mr. Perez's self-report in his "brief[]" inquiry on the issue of Mr. Perez's percipient abilities on the date of the shooting (lacking access, as did the trial court and defense counsel, to Mr. Perez's psychological records).

Defense counsel then moved for permission to introduce testimony from an expert psychologist. In arguing for expert testimony, defense counsel simply opined that the 38-page Veteran's Hospital file could not possibly be complete since it lacked any evaluations or supporting psychological notes for Mr. Perez's diagnosed mental illnesses. (R.A. 16-16 at 51, 59.) The trial court reserved ruling on the motion for expert testimony until after Mr. Perez's testimony, but expressed serious doubt. (R.A. 16-16 at 48–68.) The lack of documented psychological symptoms and illness in Mr. Perez's file—what the trial court refers to as "foundation"—was critical to the trial court's reluctance to allow expert testimony and its ultimate ruling denying it. (R.A. 16-16 at 64 ("No evidence in the medical records or anything else.").) The absence of psychological data in Mr. Perez's Veteran's Hospital medical file had the perverse effect of obscuring, for the trial court, the need for psychological

expert testimony to explore any effect Mr. Perez's PTSD symptoms had on his percipient, recollection, and recall capabilities. This percipient ability is the very issue the trial court had noted.[3]

Defense co-counsel pressed for expert testimony from a psychiatrist:

> [T]o boost the defense's position about what [Mr. Perez's] mental condition was more likely than not, or probably, on June 10, 2007, based on the circumstances that we already heard put into testimony—his physical position next to the deceased, the officers coming upon the scene, that they see physical vomiting, etc.—all of that can only be done . . . with both the adequate cross-examination setting the stage for that and then the psychiatrist . . . being able to tell a jury based on his professional credentials what his opinion would be.

(R.A. 16-16 at 53.) The trial court commented at length on this issue. (*See, e.g.,* R.A. 16-16 at 10–11, 13–14, 53–55.) Of particular relevance, the trial court stated:

> I don't think it r[ises] to the level of just bringing in an expert now and testifying as to what he would opine regarding how [Mr. Perez] conducted himself or what his percipient qualities were on that particular day if there's no foundation laid that he was suffering from that disease on that day.

(R.A. 16-16 at 55.) The court continued:

> [Mr. Perez] can be cross-examined about what his mental state was on that particular day. That does not give rise to a doctor coming in here, in my view, and opining that's not what his mental state was on that day because it not only would be speculative, it would be based on close to zero foundation other than the jury getting some benefit of knowing the definition of bipolar disease.

(R.A. 16-16 at 58.)

The trial court expressly connected the lack of documented mental health symptoms in the 38-page file to its analysis:

> It comes down to this person, albeit not manifested today, allegedly suffering from a mental disorder known as bipolar disorder, whether or not that particular disorder affected his percipient capacity so he can testify with whatever degree of accuracy this jury needs to know about.
>
> Now, you want an expert to come in here and opine that he could not do that or might not . . . in the case most favorable to the defendant, you want an expert to come in

[3] The ADA also recognized the potential importance of the psychological records to evaluating Mr. Perez's percipient abilities. (R.A. 16-13 at 138 (Referring to Mr. Perez's diagnosis of PTSD, the ADA said, "[C]learly it's the type[] of thing[] that affect[s] the ability to perceive or possibly could do so.").)

> and opine that based on the bipolar disease, . . . that this individual could not possibly have perceived the events that it just testified to occurred.
>
> [H]ow, is the doctor going to possibly do that, unless for some reason he's going to say that bipolar disease affected your ability to see certain things because you [en]vision things of this nature.
>
> Even if he says that, where's the evidence that any of those visions or things were seen, and you're not going to hear anything in that regard unless Mr. Perez tells me that's what he saw [on cross-examination].

(R.A. 16-16 at 66–67.) The trial court noted non-mental-health problems were far more prevalent in the 38-page file than mental-health problems:

> You could have [*sic*] rhinosinusitis that [Mr. Perez] had that might have affected his abilities more than bipolar. He might have had blurred vision. . . . That's more prevalent on these records, more salient than bipolar disease. . . . I find it a quantum leap for me to have an expert come in here and say: This is the way [Mr. Perez] was thinking and this is the way he was percipient on that June date. . . . You're not going to get that. No evidence in the medical records or anything else.

(R.A. 16-16 at 61–62, 64.) Defense counsel could not effectively argue for expert psychological testimony since he could not, without the missing psychological records, address or correct the trial court's conclusion that there was "[n]o evidence in the medical records" of Mr. Perez suffering from PTSD symptoms at the time of the shooting. (R.A. 16-16 at 64.) Very simply, the trial court's analysis was not informed by the mental health records that the prosecution, the defense, and the trial court had indicated were necessary documents to review. The trial court stated:

> [T]he mental state . . . of Mr. Perez is not on trial. His percipient capacities are on trial. Rhinosinusitis may affect percipient capacities more than bipolar disease and post[-]traumatic stress disorder. . . . Are we to get an expert on pulmonary diseases?

(R.A. 16-16 at 67–68.)

Right before Mr. Perez testified, the Commonwealth raised an issue about Mr. Perez's military duties—the significance of which would have been clear had defense counsel obtained Mr. Perez's psychological records, but in their absence, was not. The ADA stated Mr. Perez's military duties had

been classified, and Mr. Perez was not able to discuss them.[4] (R.A. 16-16 at 68–69 (referring to S.A.II at 42).) The actual mental health records make clear why the military interaction needed to be discussed in the setting of a fair trial. Defense counsel's exchange with the trial judge regarding the classified issue illuminates the problems attributable to a lack of complete records. Specifically, defense counsel noted that in the incomplete 38-page file from the Veteran's Hospital, "[Mr. Perez] refuses to divulge . . . what his military history is. [The proposed defense expert] says that it's very, very confusing because frequently people that are bipolar and manic see themselves in a reality that does not exist. [Mr. Perez] may believe he's James Bond and it appears he may see realities that we don't see. . . [H]e says that he's in the Army, [and] he says [it's] classified. We don't know." (R.A. 16-16 at 5–6.) The trial court gleaned no import to the point: "The record respecting his military duties is silent with the exception of the fact that it[] . . . simply say[s] 'not disclosed' or 'classified,' I think was the word that was used. . . . As to whether or not it's relevant to this case, this is a percipient witness. Am I not getting my point across?" (R.A. 16-16 at 10, 69). Again, the trial court's reasoning was not informed by the very mental health records necessary to ensure its soundness.

Testimony of Robert Perez

On August 18, 2009, Mr. Perez testified he had served in the Army for two years before being honorably discharged "under hardship conditions," which he testified referred to his mother's poor health. (R.A. 16-17 at 8.) He made no mention of the details of his Army service, which were key to assessing his credibility and percipient ability. Those details and the effect of Mr. Perez's service on his mental health were contained in the psychological records from the Veteran's Hospital and,

[4] The issue about classified information—and the accuracy and source of that categorization—was not developed at trial or in the appeal. No government motion was filed to claim any applicable relief or privilege or to state any basis for counsels' belief the service was indeed "classified." It is not clear how much of the military service detail the ADA, defense counsel, and the trial court were actually aware of.

therefore, never produced to the trial court, prosecutor, or defense trial counsel during trial and unknown at the time of Mr. Perez's testimony. He had criminal convictions for unarmed robbery, larceny, and violation of probation and had recently been released from prison. (R.A. 16-16 at 73–74.) Mr. Perez then described the night of June 9 and early morning of June 10, 2007. At the conclusion of Mr. Perez's direct testimony, the trial court dismissed the jury for the day and addressed defense counsel's motions (1) for a continuance to cross-examine Mr. Perez, (2) for funds to consult a psychological expert, and (3) to introduce expert psychological testimony. The trial court denied defense counsel's motion for expert testimony based on its own impression of Mr. Perez's credibility:

> The Court has listened to the direct testimony only, obviously, of this particular witness and as a result of my hearing and observations, I find that the subject issue respecting any imperfections mentally or otherwise is being made somewhat more clear in that I easily discerned from my observations and my hearing that there was no[t] one scintilla of vagueness, lack of clarity, anything incomprehensible or anything other than detailed testimony which helps me resolve part of the issue . . . that I've been presented with [by defense counsel].
>
> In that regard, the first request was that I allow [defense counsel] to have time to digest the testimony based on previously referenced dialogue the Court has had as well as previous issues so that he be able to prepare himself for cross-examination tomorrow. It's obvious to anyone in this courtroom that I allowed that request.
>
> The second request is really coupled with . . . a third request. The second was . . . a motion for a psychological expert which is for [defense counsel to] be[] able to . . . acquire[] certain funding so that he might be able to be assisted in his cross-examination.
>
> In support of that motion, [defense counsel] presented to this Court that he was not cognizant of what, if any, imperfections[,] mental instabilities, mental diseases, or anything of that nature that is alleged to pertain to the witness until most recently by virtue of documents that he examined which bore out certain things, and by virtue of, frankly, information being provided to him by the district attorney . . . .
>
> The second level of that second request is that he would ask this Court to consider expert testimony in the medical discipline that's been the subject of our concern.
>
> Let me start at the end. Unless something countervailing and compelling in cross-examination emerges, this Court will not be allowing an expert to testify in the v[ein] requested by the defense.

> This Court is, however, going to allow the motion for funds to [defense counsel] to be able to consult this evening, or whenever he so desires, prior to commencement of cross-examination tomorrow morning and for those purposes only.[5]

(R.A. 16-16 at 98–101.) Although the trial court did not, as part of its oral ruling, address the lack of support in Mr. Perez's Veteran's Hospital file for significant psychological or psychiatric symptoms, it is obvious that the paucity of Mr. Perez's 38-page medical file played a significant role in the trial court's decision to deny expert testimony. The missing psychological records did, in any event, hamstring trial defense counsel from effectively arguing for admission of expert psychological testimony, and following the trial court's oral ruling, defense counsel did not even try to do so. The missing records put the trial judge in the unknowing position of ruling on motions without having correct and full contextual information.

The next morning, August 19, 2009, defense counsel cross-examined Mr. Perez. The trial court, sua sponte, constrained defense counsel's questioning related to Mr. Perez's PTSD: "I'll permit him to answer what his own understanding [of PTSD is], and then we're moving on." (R.A. 16-17 at 10.) This ruling essentially designated Mr. Perez to evaluate himself and left the jury without the benefit of contradictory information contained in Mr. Perez's psychological records, which he did not mention in his self-assessment. Mr. Perez testified:

> Post-traumatic stress disorder is when you are in an environment with combat or a traumatic experience and that experience stays with you and either you can have different types of symptoms such as night terrors, anxiety, hypervigilance, and it's just a re[-]occurring situation.

(R.A. 16-17 at 11.) When asked how PTSD affected him "personally," Mr. Perez testified:

> My PTSD does not affect me person-- . . . my military PTSD was under control. While I was going to counseling, I was working; I was being productive. And so the effect that it had on me was minimal. It's just basically, in an essence, remembering a bad

[5] Defense counsel's expert, of course, based any advice he gave on his review of Mr. Perez's 38-page medical file, which did not include any psychological records.

> time, a bad dream, a bad situation, and I was already past that point. I had gone through my counseling; I had done the steps that I needed to do to get myself better.

(R.A. 16-17 at 11–12.) Defense counsel asked Mr. Perez about the frequency and regularity of his counseling sessions, referring him to a list of 161 counseling appointments[6] at the Veteran's Hospital between April 14, 2000 and January 18, 2008, which had been produced by the Commonwealth during discovery, sometime after January 25, 2008. (R.A. 16-17 at 13; S.A.II 10–15.) In response, Mr. Perez downplayed the sessions' importance, testifying: "It was just a matter of when I wanted to go talk to [the therapist]. He was somewhat of a mentor to me." (R.A. 16-17 at 12–13.) Mr. Perez also characterized the nature of his counseling sessions as not "necessarily all based on PTSD"; "I went through a divorce . . . and it's a positive outlet that I learned to use." (R.A. 16-17 at 14.)

When defense counsel asked Mr. Perez whether he had been diagnosed with any other mental health conditions, the trial court sustained an objection and called the parties to side bar. The trial court instructed defense counsel to "confine this to . . . any mental conditions you feel you should be entitled to cross examine him on that would affect his percipient abilities." (R.A. 16-17 at 15.) Defense counsel, having failed to obtain the psychological progress notes for the counseling sessions and records of Mr. Perez's psychiatric hospitalization, had no basis to refute Mr. Perez's testimony or probe issues relevant to his percipient abilities on the night of the shooting. Defense counsel's failure to secure the psychological records also prevented him from obtaining meaningful expert help with the issue of percipient ability and identification, in, as defense co-counsel put it to the trial court, "[a]n identification case." (R.A. 16-16 at 66.) The trial court warned defense counsel that Mr. Perez's therapy for divorce was not relevant; what was relevant was "how [PTSD] would affect his percipient abilities." (R.A. 16-17 at 15.) The trial court continued: "If you tie [questions about Mr. Perez's PTSD symptoms]

[6] The exhibit defense counsel used to refresh Mr. Perez's memory as to his counseling appointments actually shows approximately 110 counseling appointments because the list includes non-psychological medical appointments such as "physical therapy" and "audiology." (S.A.II 10–15.)

into his mental capacity . . . you can have it. I haven't heard any objections. I just may sua sponte begin to assert myself." (R.A. 16-17 at 15.)

Defense counsel asked Mr. Perez whether he had taken prescription medication for PTSD between 2000 and 2006, and Mr. Perez testified he had not. (R.A. 16-17 at 17.) After 2007, Mr. Perez testified, he was diagnosed with borderline personality disorder and "bipolar disorder, mild manic," and he began taking medications for those conditions. (R.A. 16-17 at 17–18.) Mr. Perez also testified "there were times" between 2000 and 2007 when he "used marijuana whenever [he] would have a night terror and [he] was unable to sleep." (R.A. 16-17 at 19–20.)

Defense counsel then questioned Mr. Perez about Mr. Ramkissoon's shooting. Mr. Perez's testimony about arriving at the party largely repeated his direct testimony up to the point when Mr. Perez and Mr. Ramkissoon stood on the second-floor balcony and saw Petitioner standing on the street below. Defense counsel asked Mr. Perez what clothing Petitioner was wearing. Mr. Perez testified: "I don't exactly recall what he was wearing. I recall just his mannerisms as he was walking around. I believe it was a white T-shirt and a matching shorts to that." (R.A. 16-17 at 34.) Defense counsel asked whether Mr. Perez identified Petitioner based on his clothing, which Mr. Perez denied:

> Q: And did you make the connection . . . that when you were out on the balcony you saw Mr. Ayala and you based that upon what? Wasn't it what he was allegedly wearing?
>
> A: No. It was based on his face.
>
> Q: So if I understand your testimony, from the balcony you looked down and you saw a person which you recognized his face as being Mr. Ayala, is that correct?
>
> A: Correct.

(R.A. 16-17 at 34–35.) Defense counsel asked whether Mr. Perez noticed what Petitioner was wearing as Petitioner passed him twice in the stairwell, and Mr. Perez testified, "I didn't exactly notice what he was wearing, no." (R.A. 16-17 at 36.)

Mr. Perez testified that he, Mr. Ramkissoon, and Ms. Simms left the party, consistent with his testimony on direct. (R.A. 16-17 at 39–40.) Mr. Perez's testimony of witnessing the shooting, however, diverged in one key regard from his direct testimony: On cross-examination, Mr. Perez added that he saw muzzle flash from the shooter's weapon, and this muzzle flash sufficiently illuminated the shooter's face for him to identify the shooter by his facial features. (R.A. 16-17 at 47–48.) Mr. Perez testified he did not know whether the street lamp under which the shooter stood was illuminated at the time of Mr. Ramkissoon's shooting. (R.A. 16-17 at 95.)

Defense counsel questioned Mr. Perez about an inconsistency as to his recollection of the shooter's height and clothing. (R.A. 16-17 at 56–59.) Defense counsel also questioned Mr. Perez about his description, in his police statement, of the shooter as wearing a diamond stud earring, being between 20 and 30 years old, having a "faded short hair cut," and having a goatee. (R.A. 16-17 at 68–69.) (Although defense counsel argued in closing that Petitioner's lineup photo did not show a goatee, he did not confront Mr. Perez with any inconsistencies between the lineup photo and Mr. Perez's police report description of the shooter.)

The remainder of the Commonwealth's case included testimony from a shoeprint expert working for the Massachusetts State Police; the first-floor bouncer at the 334 Wilbraham Road party; Sergeant Mark Rolland, who arrived at the scene of the shooting at approximately 4:30 a.m.; and a ballistics expert. The shoeprint expert testified, to a reasonable degree of scientific certainty, Petitioner's sneaker recovered by the Springfield police department made the footprint impression left when someone kicked the front door of 334 Wilbraham Road. (R.A. 16-17 at 129–30.) The first-floor bouncer testified Petitioner did not want to pay the cover charge or be searched. "He just said he wanted to look around, that was it." (R.A. 16-17 at 140–41.) The first-floor bouncer testified that Petitioner was denied entry by the second-floor bouncer and "escorted . . . outside." (R.A. 16-17 at 141–42.) Once outside, Petitioner "said he was going to shut the party down," but the bouncer could

not recall his exact words. (R.A. 16-17 at 143, 144–45.) The first-floor bouncer testified she saw Petitioner kick in the front door. (R.A. 16-17 at 145.)

There was no evidence as to the lighting conditions at the time of the shooting, a little before 3:00 a.m.[7] Sergeant Rolland testified there was "[a] flood lamp fixture" "right below the second floor porch" of 338 Wilbraham Road, but he did not testify as to whether it was illuminated when he arrived at the scene at approximately 4:30 a.m. (R.A. 16-17 at 163–64.) Sergeant Rolland testified that several other street lights in the area were lit when he arrived. (R.A. 16-17 at 161–63.)

The ballistics expert testified two .22 caliber spent projectiles were recovered from Mr. Ramkissoon's body and five .22 caliber discharged cartridge casings were found in the vicinity of 338 Wilbraham Road on the morning of June 10, 2007. (R.A. 16-18 at 54–55, 57–58; S.A.I 383.) The expert further testified the spent projectiles and cartridge casings were discharged from the same semiautomatic pistol. (R.A. 16-18 at 55, 57–58; S.A.I 413–14.) The semiautomatic pistol used to shoot Mr. Ramkissoon was never recovered. On cross-examination, the ballistics expert testified the cartridge casings belonged to ".22 long rifle" ammunition, rather than ".22 short" ammunition. (R.A. 16-18 at 68.) Defense counsel then asked about muzzle flash:

> Q: [T]he muzzle flash from a .22 long rifle chambered in a semiautomatic weapon with a barrel length of less than six inches . . . . can you give the ladies and gentlemen of the jury an estimation of what the muzzle flash of that particular gun would be in the daytime first; would you be able to see it[?]
>
> A: Would you be able to see it—probably, with difficulty in the daylight . . . [i]n a sunny area.
>
> . . . .
>
> Q: At night?

[7] In closing argument, defense counsel argued to the jury the street lamp was on, likely to imply the street lamp illumination prevented muzzle flash from creating enough light sufficient to see a face, but thereby suggesting or conceding a well-lit scene. This was a difficult trial tactic but without Mr. Perez's psychological records to undermine his testimony, defense counsel had little to support his cross-examination of the key Commonwealth witness.

> A: At night, you would be able to see it. It's dark.
>
> Q: Whether you would be able to see it would be affected by the lighting conditions that were available next to where the weapon was being fired, wouldn't that be fair to say?
>
> A: Perhaps, for example, if it was a well-lighted area, yes, that might impact it.

(R.A. 16-18 at 69–70.) Defense counsel did not inquire of the ballistics expert whether the muzzle flash from firing a .22 semiautomatic pistol would be sufficient to illuminate the face of the shooter for identification or the duration of muzzle flash from such a weapon.

Defense counsel called one witness, Natasha Frazier, who, at the time of the shooting, was a paid confidential informant for the FBI/Western Mass Gang Task Force and working as a D.J. at the 334 Wilbraham Road party. (R.A. 16-18 at 129–30.) After in camera examination of Ms. Frazier, the trial court ordered she testify from behind a screen allowing the court, jury, and counsel to see her, but not the public courtroom, based on her expressed concerns for her safety as a confidential informant.[8] (R.A. 16-18 at 104.) Ms. Frazier testified to knowing Petitioner because her cousin and Petitioner's late brother were "best friends."[9] (R.A. 16-18 at 132.) Ms. Frazier also testified that a week before Mr. Ramkissoon's shooting, close to 334 Wilbraham Road, "a little girl . . . got shot over there, shot down on the porch. Her name was Din[ah]. She was [Petitioner's] niece." (R.A. 16-18 at 132.) Ms. Frazier testified she noticed Petitioner outside 334 Wilbraham Road about 2:20 a.m. (R.A. 16-18 at 133.) Ms. Frazier testified:

> I put on a CD and I went downstairs to go see why he was crying. He told me he was crying because it wasn't fair that these people were throwing a party right next door to where his niece got killed at. She hadn't laid herself down in the ground yet and this is crazy.

[8] Defense counsel advised Petitioner to waive his right to confront Ms. Frazier, which he did, and Ms. Frazier testified out of Petitioner's line of vision. (R.A. 16-18 at 79–80.)

[9] Ms. Frazier also testified, "[A] couple years ago [Petitioner's] brother shot my cousin which in return back [*sic*] to my cousin getting accused of shooting his brother and doing a murder trial." (R.A. 16-19 at 51.)

(R.A. 16-18 at 133.) After Petitioner was denied entry to the party and kicked in the door to the house, Ms. Frazier testified, she along with other friends gave Petitioner a "group hug" and Ms. Frazier "walked him to his car and stood on the corner until he drove all the way down because [she] wanted to make sure he was alright because he was pretty upset." (R.A. 16-18 at 135.) She further explained that she "watched him go down the street because [she] didn't want him to come back around and end up beating the guy up that didn't want to let him in the party[.]" (R.A. 16-18 at 134.) When asked whether Petitioner's demeanor was one of anger, Ms. Frazier testified Petitioner expressed "[m]ostly pain." (R.A. 16-18 at 135.) Ms. Frazier testified Petitioner was driving a tan Jeep Cherokee and she estimated he left the vicinity of 334 Wilbraham about thirty to forty-five minutes before the shooting occurred. (R.A. 16-18 at 143, 154.) Ms. Frazier also testified to witnessing the shooting from the second-floor porch:

> I seen the lights from the porch and I went in instantly, turned the music off, said: Somebody just got shot. So [I] quickly ran downstairs and when I ran downstairs and ran to the corner, I seen a guy laid down on the side like on the sidewalk and like a red/maroon Taurus taking off, skidding off.

(R.A. 16-18 at 139.) Whether the source of the "lights" Ms. Frazier testified to seeing was car headlights, street lamps, muzzle flashes, or something else was not developed. Defense counsel attempted to call a law enforcement witness to bolster Ms. Frazier's credibility by confirming her status as a paid confidential informant, which the trial court denied. (R.A. 16-19 at 31; R.A.16-20 at 24–28, 45–47.)

During closing arguments, defense counsel attempted to portray Mr. Perez as an honest but unreliable witness who had mistakenly identified Petitioner. (R.A. 16-20 at 54–59.) Had defense counsel obtained the omitted psychological and psychiatric records from the Veteran's Hospital, he could have sought to develop specific evidence of this theory. Without the psychological records, defense counsel was forced to rely on incomplete medical records as well as inconsistencies between

Mr. Perez's description of the shooter's height and clothing in his police report, grand jury testimony, and trial testimony. (R.A. 16-20 at 54–56.)

Defense counsel then argued to the jury that Mr. Perez, contrary to his testimony, would not have been able to see any muzzle flash from the .22 firearm. (R.A. 16-20 at 56–57.) Defense counsel stated:

> Well, in your collective experience, I suggest to you that somebody on the street has some experience with [the] muzzle flash there would be with a .22 rifle and semiautomatic [weapon]. I further suggest to you[,] if you apply the common experience, the darker it is, the more you see [the muzzle flash]. But as the ballistics expert explained, it's a small amount of flash [compared] to a larger caliber gun, and it wouldn't be affected by how much light there is.
>
> So if you analyze [Mr. Perez's] testimony, I believe he testified that . . . he came from the right side of the house in that particular area and they were near the street. When he saw the flash, he turned and he saw a person that was the assailant. I suggest to you that in that period of time, from his testimony, [he] had to [have had only] a [matter] of seconds [to] ma[k]e that identification.

(R.A. 16-20 at 56–57.)

Defense counsel continued: "We have to analyze that [identification] [in light] of the fact that Mr. Perez suffers from . . . PTSD. [H]e was in the military. . . . And also[,] . . . he was bipolar." (R.A. 16-20 at 58.) Counsel then appealed to the jury's presumed expert knowledge of bipolar disorder and PTSD and how those conditions may impact percipient and recall ability: "In your collective experience, I believe you can arrive at the conclusion those are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." (R.A. 16-20 at 58–59.) Defense counsel reminded the jury Mr. Perez had therapy appointments on a near-weekly basis between 2000 and 2008, but without the accompanying psychological progress notes for the appointments, he had no way to refute Mr. Perez's characterization of the appointments as merely providing mentorship, divorce support, and a "positive outlet" in addition to sometimes addressing his PTSD symptoms. (R.A. 16-20 at 58–59; *see also* R.A. 16-17 at 14.) Defense counsel concluded:

> So I say to you, ladies and gentlemen, in this particular case it boils down to very basically a misidentification. That misidentification occurred primarily because the only person that Mr. Perez ever saw after being in a very excitable circumstance demonstrated by the fact that he allegedly jumped over a six-foot fence, heard five or six shots, suffered from PTSD and bipolar[,] was that he identified a photograph of Phil[]ip Ayala and then told the police that Phil[]ip Ayala was the person who was the shooter that evening.

(R.A. 16-20 at 63–64.)

In the Commonwealth's closing argument, the ADA acknowledged Mr. Perez's post-traumatic stress disorder but asked the jury to separate his diagnosis from his apparent percipient abilities:

> [W]hen you talk about [Mr. Perez's] military service and you talk about his post[-]traumatic stress and that he availed himself to counseling because he thought that was the healthiest thing to do, bear in mind the detail this man was able to recount to you.
>
> . . .
>
> Robert Perez has issues. He told you as a result of military duty, he suffers from post[-]traumatic stress. I ask you, however, to focus in on his opportunity to see the person, the shooter. His opportunity, the distance or closeness that he was to the shooter. You saw him testify. You had an opportunity to review how he testified, his memory, the attention to detail.

(R.A. 16-20 at 66, 71.) Uncontradicted and uninformed by the psychological records showing Mr. Perez's severe PTSD symptoms and the connection between his symptoms and military experience, the ADA actually argued that Mr. Perez's military experience strengthened his percipient abilities:

> He's paying attention. He's alert. He's using perhaps his military background. He turns and he sees the person that he recognizes as the same guy who caused the problem. That's why he wanted to leave the party. He said he went up to get Clive because he thought that he should go. He focuses on Mr. Ayala up the stairs, down the stairs from the front porch that you saw. He was looking at him in his agitated state. Twenty minutes later he recognizes him firing a gun that ultimately killed his friend.
>
> You have to listen and be cognizant of the detail that this man was able to provide. His senses, his memory, he recognizes the person as the same guy. That's why they were leaving the party is because of this man's actions.

(R.A. 16-20 at 68–69.)

The jury convicted Mr. Ayala of first-degree murder, unlawful possession of a firearm, and unlawful possession of ammunition without an identification card. (R.A. 16-20 at 115–16.) Mr. Ayala was sentenced to life without parole. (R.A. 16-21 at 9.)

C. PROCEDURAL POSTURE

Petitioner entered an appeal in the SJC and filed a motion for a new trial based on ineffective assistance of counsel on the following grounds: failure to investigate potentially exculpatory eyewitness testimony that other individuals were seen running from the scene of the shooting; failure to sufficiently explore flaws in the Commonwealth's firearms expert's conclusions; and a failure to investigate potentially significant flaws in Mr. Perez's testimony identifying Mr. Ayala as the shooter. (S.A.I 100.) The trial court judge granted Petitioner a hearing on the motion in September 2012, but retired before the hearing was held. (S.A.II 452–53.)

In February 2014—almost five years after Petitioner's criminal trial—post-conviction counsel re-served the trial court's second subpoena for Mr. Perez's psychological, psychiatric, and social worker records on the Veterans Hospital and obtained hundreds of pages in response. (S.A.II 54–310.).

1. <u>The omitted psychological and psychiatric records for Robert Perez</u>

Mr. Perez's psychological records totaled hundreds of pages of psychological counseling notes, psychiatric hospitalization records, and psychiatric medication lists. (S.A.II 54–310.) Mr. Perez's psychological counseling notes and psychiatric hospitalization records, in particular, portrayed Mr. Perez as suffering from serious PTSD symptoms, including paranoia and intrusive thoughts, before, after, and immediately following Mr. Ramkissoon's shooting. The psychological counseling notes also explained Mr. Perez's underlying trauma—a homicide in or about 2000 in Germany wherein Mr. Perez accidentally shot and killed a man during a military operation.

Mr. Perez's psychological records show factual similarities between the German shooting and Mr. Ramkissoon's shooting: both involved close-range shootings, use of a Ruger pistol, sounds of pistol gunfire, teeth being knocked out (Mr. Perez's in Germany and the decedent's in this case), bloody mouths, a fatality, Mr. Perez getting the victim's blood on his person, and Mr. Perez's immediate flight on foot following the shootings. (*See, e.g.,* S.A.II 96–97, 148.) The missing psychological records also show how the German shooting and Mr. Ramkissoon's shooting triggered PTSD symptoms in Mr. Perez, including flashbacks, paranoia, insomnia, anger, anxiety, and hypervigilance.[10] The missing records also indicate Mr. Perez suffered serious symptoms from PTSD for years prior to Mr. Ramkissoon's shooting continuing through the date of his trial testimony, directly contradicting Mr. Perez's testimony to the jury and to the doctor conducting his competency evaluation. (*Compare* R.A. 16-16 at 47 (Dr. Burke: "[Mr. Perez] told me at that time [of Mr. Ramkissoon's shooting] he was not on any medications at the time and he was feeling, prior to the incident, okay. . . . [H]e wasn't suffering from symptoms of a mental illness at that time."); *with* S.A.II 170 (Nov. 2, 2007 inpatient psychiatric hospitalization admission). None of these details were available to the jury or the trial court when it denied Petitioner's motion for psychological expert testimony.

The day after Mr. Ramkissoon's shooting, Mr. Perez made an unscheduled, "emergency" visit to his therapist, who wrote the following notes:

[10] (*See, e.g.,* S.A.II 202 ("[A]fter that I was unable to sleep and I always carried my weapon. I still cannot go in public bathrooms . . . . I can't get over this. There was blood and tissue on me."); S.A.II 197 ("I have trouble sleeping and my mouth aches when I wake up—I know it's connected to the incident in Germany."); S.A.II 179 (reporting an injury to his mouth triggering PTSD flashback: "when [my mouth] started bleeding I went backwards—to the incident I told you about"); S.A.II 148 ("I never adjusted after the military."); S.A.II 97 ("He began to develop symptoms of PTSD immediately following the [German shooting] incident. He had nightmares, difficulty being around people, hypervigilance. He . . . would get up at night with his weapon and 'clear the house.' He even got a German Shepherd to guard the house. He reports frequent intrusive thoughts and has had flashbacks. He recently got a cut on his head that bled a lot and flashed back to the incident when he had to kill someone and had his mouth injured. He started speaking German and frightened his girlfriend with his behavior.").

> Walk-in – emergency – I had to talk to you – Saturday night we watched the fight and then we went to a strip club – going home we met someone – a girl – then an after-hours party – he had been drinking and I only had two beers all night – I use marijuana – he was shot three times – he was laying [*sic*] in the street – I started to get out – his teeth were shattered – like mine in Germany – I tried to call the police – my cell phone was dead – I flagged down a car – the cops took forever to come – I'm angry – I am the primary witness and I identified the shooter – my friend was 32 – they said it was gang related – it was random – I feel guilt I wanted to be able to save him – I can't go to work today – I don't want medication – am I paranoid? I want to get a gun – the girl wouldn't identify him. The police gave me their phone numbers – I really can't have a gun – I have a felony – what would you do? I haven't seen my son – [wearing a] shirt tie tearful at times – borderline – several issues – self protection, guilt – some flashbacks to an incident in Germany – he knows he cannot get a gun without severe consequences – confused – adjustment disorder – 50 minutes . . . .

(S.A.II 173.)

Between October 7 and October 12, 2007, Mr. Perez was hospitalized for breathing trouble and panic attacks related to his anxiety and PTSD. (S.A.II 169, 172.) Mr. Perez was admitted to the psychiatric ward at the Veteran's Hospital for PTSD from November 2 to November 5, 2007 because his mother worried he would "continue to self[-]destruct." (S.A.II 154, 170.) During his therapeutic counseling sessions and inpatient hospitalization, Mr. Perez directly connected his memory of witnessing Mr. Ramkissoon's shooting with his memory of shooting a man in Germany. (*See, e.g.,* S.A.II 169 ("Vet says that a couple of months ago he witnessed his friend being shot . . . . Had witnessed a similar incident while in the Army in Germany back in 2000. Now is having PTSD symptoms: nightmares, night sweats, paranoia, flashbacks, ang[er] and hypervigilance."); S.A.II 154 ("Around June he witnessed a friend killed in Springfield and this triggered intrusive thoughts about [the shooting in Germany]"); S.A.II 148 ("[Mr. Ramkissoon's] bloody mouth reminded me of my mouth injury in [the German shooting incident]"); S.A.II 118 ("Veteran also notes ongoing physical concerns, anxiety, and PTSD symptoms that were related to military experience that were re-triggered when he was present for the shooting death of a close friend."); S.A.II 119 ("About two years ago a friend of his was shot while they were walking in Springfield. Veteran attempted to provide mouth to mouth that re-triggered reported combat related PTSD symptoms."); S.A.II 102 ("P[atient] also

complaining of intrusive memories and nightmares worse since 2007."); S.A.II 163 ("He stated that around this time of the year, he begins to lose control of his PTSD [due to] the fact of event that happened to him in Germany where he lost his upper teeth."); S.A.II 147 ("Vet reports witnessing his friend being shot and killed recently and that a similar incident happen[ed] to him in 2000 while in the Army in Germany. He now admits to symptoms of PTSD, nightmares, night sweats, paranoia and flashbacks.").)

Based on Mr. Perez's psychological and psychiatric records, Petitioner sought to amend his motion for a new trial in 2014 to include an ineffective assistance of counsel claim for failure to obtain these records at the time of trial. As additional support, post-conviction counsel submitted an independent medical evaluation and expert opinion from psychiatrist Dr. Jose Hidalgo. (S.A.II 311–319.) Dr. Hidalgo based his opinion on Mr. Perez's trial and grand jury testimony, the Veteran's Hospital psychological records produced to the clerk's office in 2014,[11] Mr. Perez's letters to the ADA, and other documentation. (S.A.II 313–14.) Dr. Hidalgo gave the following opinions to a reasonable degree of scientific certainty:

> It is also my opinion that Mr. Perez was suffering from post[-]traumatic stress symptoms prior to, during, and after the incident of June 10, 2007. Post[-]traumatic stress disorder refers to an emotional condition that can occur as a result of exposure to life threatening or extremely traumatic events. A key aspect of post[-]traumatic stress disorder is that following a traumatic event a person may become emotionally very reactive to reminders of the original trauma. For example, reminder cues such as smells, sounds, and images of the original traumatic event can elicit strong emotional reactions and a person may feel as if he is back in the original traumatic event, even though the event itself may have occurred in the distant past. This is often referred to as a flashback. Other aspects of post[-]traumatic stress disorder include intrusive memories, attempts to avoid thoughts and feelings of the traumatic event, high anxiety and fear, sleep problems, and nightmares.
>
> . . . .

[11] Although Dr. Hidalgo reviewed Mr. Perez's psychological records for the period 2000-2012, he stated: "The opinions I expressed in this report would have been the same had Mr. Perez's mental health records ended in July 2009 [before Mr. Ayala's August 2009 trial]." (S.A.II 319.)

> [I]t is also my opinion that these mental and emotional conditions had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the events of June 10, 2007. My opinion is based on the following: . . . .
>
> - Both borderline personality disorder and post[-]traumatic stress involve difficulty regulating emotions and dealing with stress. The incident of June 10, 2007 appears to have overwhelmed Mr. Perez's already fragile emotional coping capacities. Mr. Perez appears to have made the link between his friend's murder and his own mouth injuries[12] sustained at the time he was in the military service. Re-experiencing a traumatic event in the form of flashbacks and/or memories increases the level of emotional reactivity and can affect perception of reality and recall.
>
> - On June 11, 2007, during a visit to his long time therapist, Mr. Perez continued to be fearful and stressed and Dr. Lenchitz documents that Mr. Perez was having flashbacks.

(S.A.II 318–19.)

2. Motions for new trial and direct appeal

On June 30, 2015, Judge C. Jeffrey Kinder, who was reassigned to the case, denied Petitioner's amended motion for a new trial as to the ineffective assistance claim for failure to obtain the psychological records and denied Petitioner's request for an evidentiary hearing on that claim. (S.A.I 102–03.) The trial court's explanation for denying both an evidentiary hearing and Petitioner's amended motion is reproduced below, in full:

> As to defendant's claim that trial counsel was ineffective for failing to notice the absence of some of the eyewitness's psychological records, I conclude that he has failed to raise a substantial issue warranting further hearing. I find, essentially for the reasons set forth in the Commonwealth's opposition, that trial counsel was aware of the diagnoses contained in those records, including the eyewitness's marijuana use, hired an expert to assist in the analysis of those records and cross-examined the eyewitness on those issues at trial. Under these circumstances, I am not persuaded that trial counsel rendered ineffective assistance by failing to obtain and introduce additional expert testimony on the eyewitness's mental condition, particularly in light of the trial judge's rulings that such expert testimony would be limited to opinions about the eyewitness's percipient abilities at the time of the shooting. In my judgment, even if trial counsel had the complete set of records and had additional expert

[12] Mr. Perez described seeing Mr. Ramkissoon bleeding from the mouth after he was shot and hit his head on the concrete. Mr. Perez had his own teeth knocked out during the shooting incident that caused him to experience PTSD symptoms.

> assistance in analyzing those records, they would not have added to the information already at his disposal and used in cross-examination at trial. Accordingly, as to this issue, no further hearing is necessary and the motion for a new trial is denied.

(S.A.I 102–03) (internal alteration omitted).)

The trial court held a three-day evidentiary hearing on the three grounds raised in Petitioner's first motion for a new trial. (S.A.I 583–594.) On November 18, 2015, the court issued a memorandum and order denying Mr. Ayala's first motion for a new trial. (*See* S.A.I 583–594 (*Commonwealth v. Ayala*, No. 07-863 (Nov. 18, 2015)).)

The SJC consolidated the direct appeal of Petitioner's convictions and the collateral appeal of the denials of his motions for a new trial, upholding the convictions and affirming the latter. *See Ayala*, 112 N.E.3d at 257. This court now recounts only those findings relevant to the Petitioner's claims for (1) ineffective assistance based on trial counsel's failure to obtain Mr. Perez's psychological records; and (2) insufficiency of the evidence.

Because Petitioner was convicted of first-degree murder, the SJC analyzed Mr. Ayala's ineffective assistance of counsel claims under "the more favorable standard of [Mass.] G. L. c. 278, § 33E . . . to determine whether there was a substantial likelihood of a miscarriage of justice." *Ayala*, 112 N.E.3d at 252–53. "Under this review, we first ask whether defense counsel committed an error in the course of the trial. If there was an error, we ask whether it was likely to have influenced the jury's conclusion." *Id.* at 253 (internal citations omitted). The relevant portion of the SJC's analysis is produced below, in full:

> Finally, the defendant argues that his trial counsel was ineffective for failing to notice that certain psychological records detailing Perez's history of mental health struggles and drug use mistakenly had been withheld despite a court order compelling their disclosure. Without these records, the defendant argues, trial counsel was unable to explore the full extent of how Perez's mental health and drug use could have affected his "ability to accurately perceive and identify the shooter." The motion judge denied the defendant's motion for a new trial without conducting an evidentiary hearing on this argument. He concluded that because these issues were sufficiently before the jury, the additional records would not have "added to the information already at [trial counsel's] disposal and used in cross-examination at trial." We agree.

> As discussed *supra*, Perez's PTSD and bipolar disorder diagnoses were both brought out on cross-examination at trial. Specifically, Perez testified that he had been diagnosed with PTSD and bipolar disorder, that he received counselling and medication to treat the diagnoses, and that he had a counselling session on the day after the murder. He further testified that over the period of approximately eight years following his discharge from the military, he had sought counselling for his PTSD 161 times and that he suffered from "night terror[s]" and sleeplessness as a result of his PTSD. Additionally, he testified that he used marijuana to cope with the effects of his PTSD diagnosis.
>
> Notably, there was no evidence—either introduced at trial or contained within the missing records—that suggests that Perez's mental health struggles or drug use affected his ability to perceive the defendant on the morning of the shooting. For example, a defense expert's proffered testimony only acknowledged that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]." Trial counsel argued this point specifically during closing, stating that Perez's diagnoses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." Additionally, although the missing records suggest that Perez was more dependent on marijuana than his testimony let on, there was no evidence that he was under the influence of marijuana on the morning of the shooting. The defendant's proffered expert on this point would not have materially added to the defense, as he was prepared only to testify that individuals have a reduced ability to accurately perceive reality and recall past events while under the influence of mind-altering substances. Because the substance of the missing records and proffered expert testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was not likely to influence the jury's conclusion. *See Commonwealth v. Williams*, 453 Mass. 203, 212–213, 900 N.E.2d 871 (2009) (rejecting ineffective assistance of counsel claim based on counsel's failure to introduce records where substance of records was already before the jury). The motion judge therefore did not err in denying the defendant's motion for a new trial.

Ayala, 112 N.E.2d at 255–56 (internal footnote omitted). As explained in further detail below, the court holds the state court's decision on this ineffective assistance claim involved an unreasonable application of clearly established federal law and was based upon unreasonable findings of fact.

Petitioner also argued the evidence was insufficient to support his convictions "because the illuminating capability of a muzzle flash is not within the ordinary, common experience of a reasonable juror, [so] the jury could not have found the evidence proved beyond a reasonable doubt, without speculation, that the defendant was the shooter." *Id.* at 245. The SJC "draw[ing] all reasonable inferences in favor of the Commonwealth," concluded that "any rational trier of fact could have found

the essential elements of the crimes beyond a reasonable doubt." *Id.* at 244. "Although there was no evidence whether the specific street light near where the shooter was standing was on at the time of the shooting, a juror could reasonably have inferred that if the street lights in the area were on at 4:30 A.M. [as a Springfield detective testified], they would have also been on at the time of the shooting earlier in the morning." *Id.* at 245. Moreover, the jury heard evidence about Mr. Perez's multiple opportunities to see Petitioner's face when they passed in the stairwell and Mr. Perez's identification of Petitioner as the shooter from a photo array. The SJC further cited the Commonwealth's "circumstantial evidence linking the defendant to the shooting," including testimony that he appeared upset at the house party, refused to be searched, threatened to return to "light th[e] place up," kicked in the front door, and was seen pacing on the street in front of the house shortly before Perez and Ramkissoon left the party. *Id.* at 246 (alteration in original). "From this evidence, the jury could have reasonably inferred that the defendant did not want to be searched on the morning of June 10 because he was carrying a gun, that he was still near the house when the shooting occurred, and that his anger about the party motivated him to shoot Ramkissoon as he crossed the street." *Id.*

On April 21, 2020, Petitioner filed this Petition for a Writ of Habeas Corpus and amended it with the court's permission on September 2, 2020. The court heard oral argument on May 4, 2022.

III. HABEAS STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "demands that a federal habeas court measure a state court's decision on the merits against a series of 'peculiarly deferential standards.'" *Porter v. Coyne-Fague*, 35 F.4th 68, 74 (1st Cir. 2022) (quoting *Cronin v. Comm'r of Prob.*, 783 F.3d 47, 50 (1st Cir. 2015)). "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). AEDPA provides that habeas relief

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

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

28 U.S.C. § 2254(d).

Petitioner has two ways to satisfy the first path to habeas relief under § 2254(d)(1). *Porter*, 35 F.4th at 74. First, Petitioner may show the state court's decision is "contrary to" clearly established federal law if the state court applied a legal rule that contradicts the rule established by Supreme Court precedent or if it "reache[d] a different result on facts materially indistinguishable from those of a controlling Supreme Court precedent." *Malone v. Clark*, 536 F.3d 54, 62 (1st Cir. 2008) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). Second, Petitioner may show the state court's decision involves an "unreasonable application" of federal law "if the court . . . 'identifies the correct governing legal rule . . . but unreasonably applies it to the facts of a particular state prisoner's case.'" *Dagley v. Russo*, 540 F.3d 8, 13 (1st Cir. 2008) (quoting *Williams*, 529 U.S. at 407). "Federal habeas relief only 'provides a remedy for instances in which a state court unreasonably applies [the Supreme] Court's precedent; it does not require state courts to extend that precedent or license federal courts to treat the failure to do so as error.'" *Bebo v. Medeiros*, 906 F.3d 129, 134 (1st Cir. 2018) (quoting *White v. Woodall*, 572 U.S. 415, 426 (2014) (alteration in original and emphasis omitted)). "Importantly, an *unreasonable* application of federal law is different from an *incorrect* application of federal law. If fair[-]minded jurists could disagree on the correctness of the state court's decision, there was no unreasonable application of federal law." *Hollis v. Magnusson*, 32 F.4th 1, 8 (1st Cir. 2022) (quoting *Scott v. Gelb*, 810 F.3d 94, 101 (1st Cir. 2016) (internal quotation marks and citations omitted)).

The second path to habeas relief, § 2254(d)(2), requires Petitioner to show the state court's decision on the merits "was based on an unreasonable determination of the facts in light of the

evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Section 2254(e)(1) states "a determination of a factual issue made by a State court shall be presumed to be correct" unless rebutted "by clear and convincing evidence." *Id.* § 2254(e)(1). These two provisions of AEDPA, both of which "seem to address essentially the same scenario," have caused confusion. *See Porter*, 35 F.4th at 79 (noting Supreme Court and First Circuit have left open the question of how to resolve the "tension" between § 2254(d)(2) and (e)(1)). "[T]his circuit has routinely held petitioners to the § 2254(e)(1) clear and convincing standard—although we have never done so in a case in which resolving the fit between the two sections would appear to have made any difference." *Id.* (quoting *Smith v. Dickhaut*, 836 F.3d 97, 101 (1st Cir. 2016) (internal quotation marks omitted)). In the present case, "all roads lead to Rome: the outcome of our inquiry would be the same whether a habeas petitioner only has to show that the state court decision 'was based on an unreasonable determination of the facts,' 28 U.S.C. § 2254(d)(2), or whether he also has to satisfy subsection (e)(1)'s 'clear and convincing' standard." *Id.* (assuming, without deciding, "more stringent" clear and convincing evidence standard under (e)(1) applied and remanding with order to grant habeas relief). This court, therefore, follows Supreme Court and First Circuit precedent in declining to resolve the "tension" between § 2254(d)(2) and (e)(1) and—as it makes no difference to the outcome of this case—holds Petitioner to the more exacting standard under (e)(1). *Id.* Once a petitioner satisfies either path to habeas relief, the federal court discards the deferential lens of AEDPA and reviews his claim de novo. *Id.* at 82.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

An ineffective assistance of counsel claim is analyzed under *Strickland v. Washington*, 466 U.S. 668. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. First, Petitioner must show his counsel's performance was constitutionally deficient, meaning that, "in light of all the circumstances, the identified acts or

omissions were outside the wide range of professionally competent assistance" under the Sixth Amendment. *Id.* at 690. Second, Petitioner must show counsel's deficient performance caused him "prejudice," meaning "counsel's errors were so serious as to deprive [Petitioner] of a fair trial, a trial whose result was reliable." *Id.* at 687. A showing of prejudice requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "To succeed on the prejudice prong, it is not enough for [Petitioner] 'to show that the errors had some conceivable effect on the outcome,' but he is also not required to 'prove that the errors were more likely than not to have affected the verdict.'" *Rivera v. Thompson*, 879 F.3d 7, 12 (1st Cir. 2018) (quoting *Gonzalez-Soberal v. United States*, 244 F.3d 273, 278 (1st Cir. 2001) (quoting *Strickland*, 466 U.S. at 693) (internal quotation marks omitted)). "Instead '[a] reasonable probability is one sufficient to undermine confidence in the outcome.' In essence, the prejudice inquiry is focused on 'the fundamental fairness of the proceeding.'" *Id.* (internal quotation marks and citations omitted).

"When combined with *Strickland*'s already highly deferential standard for a trial attorney's conduct, the AEDPA standard is doubly so, requiring the court to ask whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* at 12 (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citation omitted)). However, where, as here, the state court addressed only one of *Strickland*'s prongs on the merits, this court reviews the other prong de novo. *See id.* at 12–13 (citing *Rompilla v. Beard*, 545 U.S. 374, 390 (2005)). The state court did not reach the merits of the performance prong, and this court reviews de novo whether defense counsel's performance was constitutionally deficient.

The state court used the following standard for Petitioner's ineffective assistance claims: "[W]e first ask whether defense counsel committed an error in the course of the trial. If there was an error, we ask whether it was likely to have influenced the jury's conclusion." *Ayala,* 112 N.E.3d at 253 (internal citations omitted). The First Circuit has recognized this state law standard "is at least as

generous to the defendant as the federal ineffective assistance of counsel standard." *See Horton v. Allen*, 370 F.3d 75, 86 (1st Cir. 2004). This court, therefore, "will presume the federal law adjudication to be subsumed within the state law adjudication" and considers the state court's prejudice analysis as having been decided on the merits. *Sleeper v. Spencer*, 510 F.3d 32, 39 (1st Cir. 2007) (internal quotation marks omitted). Because the state court reached the merits of the prejudice prong, the state court's decision on that prong is entitled to AEDPA deference unless Petitioner shows the decision involved an unreasonable application of law under § 2254(d)(1) or was based upon an unreasonable determination of fact(s) under § 2254(d)(2) and (e)(1).[13]

A. DEFICIENT PERFORMANCE UNDER *STRICKLAND*: COUNSEL'S FAILURE TO OBTAIN PSYCHOLOGICAL RECORDS

Because the SJC did not decide the first prong of *Strickland*—whether trial counsel's performance was deficient—on the merits, this court reviews it de novo. *See Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001) (holding preserved federal constitutional claims "never addressed by the state courts" are reviewed de novo on habeas). The court holds defense counsel's performance fell well below the standard of a reasonably competent attorney. *See Brown v. Smith*, 551 F.3d 424, 431 (6th Cir. 2008) (finding deficient performance on de novo review where trial counsel failed to obtain psychological counseling records for witness where state's "entire case hinged on [her] credibility"). "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 688). Petitioner has amply met his burden.

[13] Respondent does not develop any argument that § 2254(d)(1) provides the exclusive means of analyzing ineffective assistance claims, and the First Circuit has used both § 2254(d)(1) and (d)(2) when considering ineffective assistance claims. *See, e.g., Smith*, 836 F.3d at 106 (denying habeas relief where petitioner did not show SJC's decision on ineffective assistance was an unreasonable application of law under (d)(1) or based upon unreasonable factual findings under (d)(2)).

At the start of the case, defense counsel knew Mr. Perez was the sole witness identifying Petitioner as the shooter; that Mr. Perez had been diagnosed with PTSD; and that undermining Mr. Perez's percipient abilities and credibility was of utmost importance to defense counsel's chosen strategy. Upon receiving discovery from the Commonwealth sometime after January 25, 2008, defense counsel also knew Mr. Perez had been treated by a psychologist at the Veteran's Hospital in regular, near-weekly sessions between 2000 and 2008. Yet, defense counsel did not seek an order subpoenaing Mr. Perez's psychological and psychiatric records from the Veteran's Hospital until the first day of trial. And when the court allowed the motion, defense counsel did not review the subpoena that the Commonwealth drafted, which explicitly excluded the very mental health documents defense counsel sought. Most egregiously, when the Veteran's Hospital produced a 38-page file for Mr. Perez, which was conspicuously missing Mr. Perez's psychological counseling notes, psychological evaluations, and psychiatric in-patient hospitalization records, defense counsel realized the omission—telling the trial court, "those records cannot in any way, any possible fashion, shape or form be complete"—but did nothing to correct it because it "slid off [his] radar."[14] (S.A.I 463–64; R.A. 16-16 at 59.)

In a July 21, 2014 affidavit, defense counsel admitted:

> I failed to notice that the records sent to the Clerk's Office contained only the medical records. The mental health records were not sent. When I recognized, mid-trial, that the mental health records were missing, I did not follow up. Even when I sent out the medical records for review mid-trial, I did not follow up and obtain the missing mental health records. Not doing so was not a strategic decision. I was busy and distracted by other matters. The missing mental health records slid off my radar.

[14] Defense counsel even recognized, ex ante, that failing to review Mr. Perez's mental health records prior to Mr. Perez's testimony would amount to ineffective assistance of counsel. (R.A. 16-13 at 5–6 (Defense counsel: "[T]o avoid an IAC [ineffective assistance of counsel violation], I believe that I should file a motion to get the medical records since [Mr. Perez] has a documented history, and I assume he's back at Leeds for his PTSD relative to his being the only eyewitness that places my client at the scene of the shooting."); R.A. 16-13 at 137 (Defense counsel: "I believe it would be IAC [to conduct] cross-examination without examining why [Perez is] at Leeds, for example, since it's the Commonwealth's only percipient witness").)

(S.A.I 463–64). "The record . . . underscores the unreasonableness of counsel's conduct by suggesting that [his] failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

The *Strickland* Court held, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. The Court continued: "[S]trategic choices made after thorough investigation . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690–91. Here, no "reasonable professional judgments" supported defense counsel's failure to obtain the psychological records of the Commonwealth's key witness in an identification case. *See Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). "The consequences of inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness." *Dunn v. Jess*, 981 F.3d 582, 591 (7th Cir. 2020) (citation and quotation marks omitted) (finding deficient performance due to trial counsel's "inattention"); *see also Anderson v. Johnson*, 338 F.3d 382, 393 (5th Cir. 2003) ("Counsel's failure to investigate [by not interviewing eyewitness] was not part of a calculated trial strategy but is likely the result of either indolence or incompetence." (internal quotation marks and footnote omitted)).

Under these circumstances, the court holds defense counsel's performance in this case fell below an objective standard of reasonableness. *See York v. Ducart*, 736 F. App'x 628, 630 (9th Cir. 2018) (finding deficient performance under AEDPA where "[n]o conceivable strategic judgment could explain counsel's failure to review [cell phone] records" undercutting credibility of state's key witness); *Commonwealth v. Field*, 79 N.E.3d 1037, 1041–42 (Mass. 2017) (finding deficient performance where counsel failed to consult psychological expert despite knowing defendant's mental state was

central to his strategy and obtaining funds for the purpose); *Gersten v. Senkowski*, 426 F.3d 588, 605–06 (2d Cir. 2005) (finding deficient performance where "evidence that counsel failed to discover would have been entirely consistent with his chosen defense theory").

B. PREJUDICE PRONG UNDER *STRICKLAND*

The SJC decided the second prong of *Strickland* on the merits, and this court therefore applies AEDPA's "doubly deferential" lens. *See Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). Habeas relief may not be granted unless the state court's decision: (1) involved an unreasonable application of federal law under § 2254(d)(1); or (2) was based upon an unreasonable finding of fact shown by clear and convincing evidence under § 2254(d)(2), (e)(1). *See Brumfield v. Cain*, 576 U.S. 305, 312 (2015) (holding state court's decision was based upon two unreasonable findings of fact and, therefore, declining to decide whether decision was also an unreasonable application of federal law). This court holds that the state court's analysis of prejudice under *Strickland* involved an unreasonable application of federal law and was based upon unreasonable findings of fact.

1. Unreasonable findings of fact

This court holds two factual findings upon which the state court premised its decision were unreasonable within the meaning of § 2254(d)(2), as shown by "clear and convincing evidence":

- "[T]here was no evidence . . . contained within the missing records . . . that suggests that Perez's mental health struggles . . . affected his ability to perceive the defendant on the morning of the shooting." *Ayala*, 112 N.E.3d at 256.

- "Because the substance of the missing records and proffered expert testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was not likely to influence the jury's conclusion." *Id.*

Section 2254(d)(2) "requires that we accord the state trial court substantial deference. If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination." *Brumfield*, 576 U.S. at 314 (internal

quotation marks and alteration omitted) (reversing denial of writ and remanding where "our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable"). For the reasons described below, the court holds that, as to the above two factual findings by the SJC regarding the contents of Mr. Perez's psychological records and the adequacy of their presentation to the jury—when none were actually presented or even known to defense counsel—no reasonable person reviewing the record could agree with these two findings of the state court. Petitioner has met his burden under § 2254(e)(1) of rebutting "the presumption of correctness of [the] state court's factual findings by clear and convincing evidence." *Burgess v. Comm'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1315 (11th Cir. 2013) (internal quotation marks and alterations omitted).

The SJC's finding that "there was no evidence . . . contained within the missing records . . . that suggests that Perez's mental health struggles . . . affected his ability to perceive the defendant on the morning of the shooting" is contradicted by a wealth of evidence in the psychological records and, in light of that evidence, is patently unreasonable. *Ayala*, 112 N.E.3d at 256; *see Brumfield*, 576 U.S. at 316 (holding state court finding regarding petitioner's intellectual functioning "an unreasonable determination of the facts"); *Wiggins*, 539 U.S. at 528 (quoting § 2254(e)(1) in determining state court's factual finding about the substance of certain records was unreasonable because a review of the records revealed the opposite of what the state court stated in its decision). Counseling notes describe how certain stimuli present on the night of Mr. Ramkissoon's shooting were either triggers for or associated with Mr. Perez's PTSD symptoms, including bloody mouths and injuries to teeth (*see, e.g.,* S.A.II 97, 119, 148, 173, 179, 197); hypervigilance and concerns about physical safety (*see, e.g.,* S.A.II 97, 173); gunfire/shootings (*see, e.g.,* S.A.II 128, 147, 154, 169); and the sight of blood (*see, e.g.,* S.A.II 83, 97, 202). The psychological records also indicate that, on numerous occasions, Mr. Perez described how witnessing Mr. Ramkissoon's shooting caused him to remember, recall, or flash back to the

German shooting. (*See, e.g.,* S.A.II 173 (counseling notes from "emergency" appointment the day after the shooting in which therapist documented "some flashbacks to [the shooting] in Germany" and Mr. Perez's own statements describing his paranoia and connecting his memories of the two shootings); S.A.II 169 (Mr. Perez described Mr. Ramkissoon's shooting as "similar" to the Germany incident and stated he is now "having PTSD symptoms"); S.A.II 153 (same); S.A.II 154 ("Around June he witnessed a friend killed in Springfield and this triggered intrusive thoughts about [the shooting in Germany]."); S.A.II 118 ("Veteran also notes ongoing physical concerns, anxiety, and PTSD symptoms that were related to military experience[s] that were re-triggered when he was present for the shooting death of a close friend."); S.A.II 119 ("Veteran attempted to provide mouth to mouth [to Mr. Ramkissoon] that re-triggered reported combat related PTSD symptoms.").)

The state court's finding that "the substance of the missing records and proffered expert testimony was already presented to the jury" and "the additional records would not have added to the information already at trial counsel's disposal and used in cross-examination" is also unreasonable within the meaning of § 2254(d)(2). *Ayala*, 112 N.E.3d at 255–56. It was objectively unreasonable for the SJC to conclude that the substance of the hundreds of pages of detailed psychological and psychiatric records—describing Mr. Perez's PTSD symptoms, triggers, and repeated parallels between his experiences and recollections of the German shooting and Mr. Ramkissoon's shooting—"would not have added" anything to defense counsel's limited inquiry into Mr. Perez's PTSD symptoms on cross-examination. *See Hughes v. Vannoy*, 7 F.4th 380, 392 (5th Cir. 2021) (finding "no fair[-]minded jurist could conclude that the failure to introduce . . . testimony [impeaching credibility of the state's key witness] would not have undermined confidence in the outcome" (internal quotation marks, alteration, and footnote omitted)). The trial court limited defense counsel's questioning to Mr. Perez's "own understanding" of his symptoms and whether he still suffered from PTSD or suffered from PTSD at the time of Mr. Ramkissoon's shooting.

The SJC wrote:

> Perez's PTSD and bipolar disorder diagnoses were both brought out on cross-examination at trial. Specifically, Perez testified that he had been diagnosed with PTSD and bipolar disorder, that he received counselling and medication to treat the diagnoses, and that he had had a counselling session on the day after the murder. He further testified that over the period of approximately eight years following his discharge from the military, he had sought counselling for his PTSD 161 times and that he suffered from 'night terror[s]' and sleeplessness as a result of his PTSD. Additionally, he testified that he used marijuana to cope with the effects of his PTSD diagnosis.

Ayala, 112 N.E.3d at 255–56 (internal footnote omitted). After reviewing the detailed psychological records, the SJC treated Petitioner's PTSD and bipolar disorder as generic, commonly understood, and uncomplicated mental health issues for which expert evidence was unnecessary.

Neither the psychiatrist examining Mr. Perez for competency, nor the judge denying Petitioner's motion for expert testimony, nor the jury assessing Mr. Perez's credibility, eyewitness competency, and percipient abilities, knew about the overlapping details between the two shootings, or that both shootings triggered PTSD in Mr. Perez, or that Mr. Perez continued to struggle with PTSD symptoms before and immediately after Mr. Ramkissoon's shooting as well as at the time he testified. The judge and the jury, in fact, heard the opposite from Mr. Perez, who testified his PTSD was "under control"; that for him,"[i]t's just basically . . . remembering a bad time" and he "had done the steps that [he] needed to do to get [him]self better"; and the effect it had on him at the time of Mr. Ramkissoon's shooting was "minimal." (R.A. 16-17 at 11–12.) This court holds it was objectively unreasonable for the SJC to conclude Mr. Perez's mental health issues, as they related to his "ability to accurately perceive and identify the shooter . . . [,] were sufficiently before the jury" or that "the additional records would not have added to the information already at trial counsel's disposal." *Ayala*, 112 N.E.3d at 255 (internal quotation marks and alterations omitted).

To the extent the SJC relied on trial counsel's closing argument as an adequate substitute for expert psychiatric evidence, that finding, too, was unreasonable. *See* 28 U.S.C. § 2254(d)(2).

Defendant's proffered expert, Dr. Hidalgo, swore he would have testified that, in his expert opinion, "Mr. Perez was suffering from post[-]traumatic stress symptoms prior to, during, and after the incident of June 10, 2007. . . . [I]t is also my opinion that these mental and emotional conditions had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the events of June 10, 2007." (S.A.II 318–19.) Dr. Hidalgo would have further testified that Mr. Perez's

> borderline personality disorder and post[-]traumatic stress involve difficulty regulating emotions and dealing with stress. The incident of June 10, 2007 appears to have overwhelmed Mr. Perez's already fragile emotional coping capacities. Mr. Perez appears to have made the link between his friend's murder and his own mouth injuries sustained at the time he was in the military service. Re-experiencing a traumatic event in the form of flashbacks and/or memories increases the level of emotional reactivity and can affect perception of reality and recall.

(S.A.II 319.)

The SJC wrote:

> [A] defense expert's proffered testimony only acknowledged that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]." Trial counsel argued this point specifically during closing, stating that Perez's diagnoses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening."

Ayala, 112 N.E.3d at 256 (second alteration in original). The jury, however, was correctly informed that closing arguments were not evidence, and obviously defense counsel was not a qualified psychological expert. Defense counsel's generalized statement about Mr. Perez's "difficult illnesses" did not come close to putting the contents of the missing psychological records before the jury or obviating the need for expert testimony. *See Showers v. Beard*, 635 F.3d 625, 633–34 (3d Cir. 2011) (state court unreasonably applied *Strickland* in finding trial counsel's "closing argument sufficiently exploited gaps in the Commonwealth's evidence[,]" eliminating need for expert testimony). To make matters even worse for Petitioner, the ADA argued in closing that it was Mr. Perez's military background—without acknowledging or apparently even knowing the extent of Mr. Perez's military-related mental health issues—which made his identification of Petitioner more reliable.

The SJC's finding that "it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if counsel had them" is fundamentally flawed and does not support its factual finding as to the value of the psychological records. *Ayala*, 112 N.E.3d at 255 n.21. The SJC credited defense counsel's testimony at the evidentiary hearing on Petitioner's motion for a new trial, "that, at the time of the trial, he believed it would have been a poor tactical choice to 'attack' Perez in front of the jury, given that Perez was a veteran suffering from [PTSD]." *Id.* The SJC did not recognize the fact that trial counsel made this statement without any knowledge of the actual contents of the psychological and psychiatric records. *See Wiggins*, 539 U.S. at 536 (noting defense counsel were unable to make "a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable" in its limitation); *Koon v. Cain*, 277 F. App'x 381, 386 (5th Cir. 2008) (per curiam) ("[W]e recognize the distinction between strategic judgment calls and plain omissions[.]"). In fact, the psychological records bolstered one of defense counsel's chosen strategies of characterizing Mr. Perez as an "honest but mistaken" witness. Had defense counsel had the resource of hundreds of psychological records supporting his theory, he could have used them to explore the effect of Mr. Perez's PTSD symptoms on his percipient abilities and opened a fruitful area for expert testimony consistent with defense counsel's statement that he would not "attack" a veteran witness with PTSD. Given the parallels between the two shootings and the interconnectedness of both events in Mr. Perez's mental health treatment notes, it was unreasonable for the SJC to conclude defense counsel would not have used the records to pursue the very strategy he had selected—honest but mistaken identification.

Having found the state court's decision, by clear and convincing evidence, was based on an unreasonable determination of the facts under § 2254(d)(2), this court need not analyze whether the state court's decision also involved an unreasonable application of federal law under § 2254(d)(1). *See Porter*, 35 F.4th at 77 ("[T]he state court decision—depending on how it is read—either unreasonably

applies *Batson*'s second step or is premised on an unreasonable determination of the facts. And there is no need to identify which of these roads the state court traveled because both of them lead to the same destination. Either way, the state supreme court's decision is not entitled to deference under AEDPA."). The court does so, however, because of the interconnectedness of both paths to habeas relief presented in this case. *See Wiggins*, 539 U.S. at 528 (holding state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision").

2. Unreasonable application of law

Habeas relief under § 2254(d)(1) is warranted only if "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair[-]minded disagreement." *Richter*, 562 U.S. at 103. As discussed *supra*, the unreasonable factual findings supporting the SJC's *Strickland* analysis have direct bearing on the reasonableness of the SJC's application of law as governed by § 2254(d)(1).

> If the petitioner can show that the state court determined the underlying factual issue against the clear and convincing weight of the evidence, the petitioner has not only established that the court committed error in reaching a decision based on that faulty factual premise, but has also gone a long way towards proving that it committed unreasonable error. A state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable.

Ward v. Sternes, 334 F.3d 696, 704 (7th Cir. 2003) (internal quotation marks omitted); *id.* at 705 (holding state court's adjudication "unreasonable whether evaluated under the strictures of § 2254(d)(1) or § 2254(d)(2) and (e)(1)"); *see also Wiggins*, 539 U.S. at 528 (holding state court's "partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision"); *Hall v. Dir. of Corr.*, 343 F.3d 976, 983 (9th Cir. 2003) (per curiam) (holding state court's due process analysis unreasonable where court "proceeded from an incorrect premise"); Brian R. Means, Fed. Habeas Manual § 3:66 (May 2022 update) (collecting cases).

Bearing in mind the deference owed to the state court's adjudication, this court nonetheless holds the SJC's determination of the prejudice prong of *Strickland* as to the omitted psychological records was an unreasonable application of Supreme Court law under § 2254(d)(1). Petitioner has met his burden of showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In determining prejudice, the court must consider "the totality of the evidence before the judge or jury." *Id.* at 695. A case in which the "verdict or conclusion [is] only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. There is no dispute that Mr. Perez's identification of Petitioner was critical to the Commonwealth's case. *See Hughes*, 7 F.4th at 392 (holding "no fair[-]minded jurist could conclude" no prejudice arose from trial counsel's failure to obtain and introduce impeachment testimony for state's key witness); *York*, 736 F. App'x at 630 (applying AEDPA deference and finding prejudice where trial counsel did not obtain cell phone records "discrediting" state's key witness). "Had counsel located and introduced them, the [missing] records would have 'alter[ed] the entire evidentiary picture' before the jury, resulting in 'a reasonable probability that . . . at least one juror would have harbored a reasonable doubt' as to [defendant's] guilt." *York*, 736 F. App'x at 630 (alterations in original; internal citations omitted). The other evidence presented linking Petitioner to the shooting was testimony about his presence at the party, his refusal to be searched by the bouncer, his threat to "light th[e] place up" (or, as another witness testified, "shut the party down"), and his kicking in the front door, leaving a shoeprint. There was also testimony from another witness that Petitioner had left the scene before the shooting and it was not his car that sped away from the scene. *Cf. York*, 736 F. App'x at 632 ("The state's case rested on [one witness's] testimony; the evidence that trial counsel failed to locate and introduce would have undone that testimony. While there was other testimony in the record

supporting [defendant's] involvement, all of it was either equivocal or its credibility or reliability was subject to significant challenge. Under those circumstances, no fair[-]minded jurist could fail to acknowledge at least a reasonable probability of a different outcome." (internal quotation marks omitted)); *see also Gersten*, 426 F.3d at 611 (applying § 2254(d)(1) and finding prejudice where trial counsel failed to review records undermining credibility of witness forming "prosecution's entire case").

Without the psychological records, defense counsel had no grounds to effectively argue his motion for psychological expert testimony, which the trial court denied as being without "foundation," seeing "[n]o evidence in the medical records" that Mr. Perez's mental illnesses affected his percipient abilities or memory. (R.A. 16-16 at 55, 64.) The trial court's decisions regarding Mr. Perez's competency, comments on percipient ability, and the defendant's motion for expert testimony cannot be untangled from defense counsel's error in failing to pursue the complete and accurate psychological records. Moreover, defense counsel's "honest but mistaken" strategy was undermined because the limited 38-pages of non-psychological medical records, carefully reviewed by the trial court, appeared to bolster Mr. Perez's competency and reliability by the very absence of psychiatric and psychological details.

Absent Mr. Perez's identification of Petitioner as the shooter, Petitioner perhaps would have been of some level of investigative interest, but only one more attendee at an after-hours house party. Ms. Frazier testified Petitioner had completely left the scene before the shooting. And Mr. Perez testified he identified Petitioner solely on seeing Petitioner's face and he "d[idn't] exactly recall" what Petitioner was wearing on the night of the shooting. It was unreasonable for the SJC to conclude the missing psychological records—which showed Mr. Perez's PTSD symptoms, triggers, and the factual similarities between Mr. Perez's trauma and Mr. Ramkissoon's shooting—did not raise the "reasonable probability" that at least one juror would have harbored reasonable doubt as to Mr. Perez's

identification of Petitioner as the shooter and that they did not support trial counsel's theory of Mr. Perez's "honest but mistaken identification." *See Strickland*, 466 U.S. at 694. The trial court, without any of the highly relevant details of Mr. Perez's psychological records, foreshadowed the significance of those facts to evaluating Mr. Perez's percipient witness abilities:

> The record respecting his military duties is silent with the exception of the fact that it[] . . . simply say[s] "not disclosed" or "classified," I think was the word that was used.[15]
>
> So I don't know how all that plays in terms of relevance to what we need to determine, and that is, one, is he competent to express to this jury the percipient facets of his mind that he was able to use in making observations, allegedly, that Mr. Ayala is the person who shot that gun.

(R.A. 16-16 at 10.)

It was equally unreasonable under § 2254(d)(1) for the SJC to conclude Petitioner was not prejudiced by the lack of psychological expert testimony because defense counsel's statement during closing—"[those diagnoses] are difficult illnesses and they may impact [Mr. Perez's] ability to see and conceptualize what was actually happening"—was an adequate substitute for expert testimony interpreting the missing records. *Ayala*, 112 N.E.3d at 256. The trial court based its decision to deny expert testimony, in part, on its mistaken belief that the 38-page Veteran's Hospital file represented Mr. Perez's complete psychological and psychiatric file. The trial court stated: "[R]hinosinusitis that [Mr. Perez] had . . . might have affected his abilities more than bipolar. He might have blurred vision. . . . That's more prevalent on these records, more salient than bipolar disease." (R.A. 16-16 at 61–62.) The trial court found "[n]o evidence in the medical records or anything else" indicating Mr. Perez's percipient abilities were affected by his PTSD symptoms because none of the records containing Mr. Perez's mental health progress notes and psychiatric hospitalization were in trial counsel's or the

[15] The trial court's reference to "classified" military service comes from Mr. Perez's own characterization of his military service to his general practitioner during a primary care appointment. (S.A.II 42.)

court's possession. (R.A. 16-16 at 64.) Because defense counsel provided no "foundation" connecting Mr. Perez's mental illnesses and his abilities to perceive and recall the shooting, the trial court denied Petitioner's motion for psychiatric expert testimony that, had it been introduced, could reasonably be expected to introduce reasonable doubt into the jurors' minds as to Mr. Perez's credibility and competency. *See Hughes*, 7 F.4th at 392; *York*, 736 F. App'x at 632. It was unreasonable for the SJC to conclude otherwise. *See Hughes*, 7 F.4th at 392 (affirming grant of writ and stating, "AEDPA sets a high bar but not an insurmountable one."). As the trial court noted, psychological symptoms may impact a witness's immediate ability to perceive, recall, and then accurately describe a particular event. (R.A. 16-16 at 66–67.) In this case, the issue is particularly important given the factual similarity between Mr. Ramkissoon's shooting and the genesis of Mr. Perez's post-traumatic stress disorder as well as his interconnected memories of the two events.

Having concluded the state court's decision as to ineffective assistance of counsel is not entitled to AEDPA deference, this court must determine whether the writ shall issue. "A habeas petitioner ultimately must show that he 'is in custody in violation of the Constitution or laws or treaties of the United States.'" *Porter*, 35 F.4th at 82 (quoting § 2254(a)). For the reasons discussed at length above, this court holds Petitioner has shown he was denied effective assistance of counsel under the Sixth Amendment "sufficient to undermine confidence in the outcome" of his trial. *See Strickland*, 466 U.S. at 694.

V. SUFFICIENCY OF THE EVIDENCE

Having decided in Petitioner's favor on his ineffective assistance claim, this court must address Petitioner's argument as to the sufficiency of the evidence in order to determine the appropriate relief. *See Burks*, 437 U.S. at 18 (holding reversal of conviction for insufficiency of evidence is tantamount to acquittal and precludes retrial); *see also* 2 Fed. Habeas Corpus Prac. & Proc. § 33.3 (2021) (addressing differing forms of relief and collecting cases).

Under *Jackson v. Virginia*, 443 U.S. 307 (1979), this court asks "[w]hether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319 (emphasis in original). *Jackson* "also unambiguously instructs that a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.'" *Cavazos v. Smith*, 565 U.S. 1, 7 (2011) (quoting *Jackson*, 443 U.S. at 326).

The SJC analyzed Petitioner's sufficiency claim using a state analog to *Jackson*. *See Ayala*, 112 N.E.3d at 244–46 (applying *Commonwealth v. Latimore*, 378 Mass. 671, 677–78 (1979)). The SJC wrote:

> Although there was no evidence whether the specific street light near where the shooter was standing was on at the time of the shooting, a juror could reasonably have inferred that if the street lights in the area were on at 4:30 A.M., they would have also been on at the time of the shooting earlier in the morning. Even if an ordinary, rational juror is unfamiliar with muzzle flashes, they are undoubtedly familiar with the illuminating capability of street lights. This common knowledge would have allowed a rational juror to conclude that Perez had an adequate opportunity to identify the defendant as the shooter.

Ayala, 112 N.E.3d at 245 (footnote omitted).

It is important to emphasize that the focus of this court's review as to Petitioner's ineffective assistance claim is what evidence was *not* presented at trial, whereas this court's review as to Petitioner's insufficiency claim is based only upon the evidence presented at trial. On habeas review, this court cannot find unreasonable the SJC's conclusion that "*any* rational juror," drawing all inferences in the prosecution's favor, could have found that the evidence presented was sufficient to establish that Petitioner was the shooter. *See Linton v. Saba*, 812 F.3d 112, 123 (1st Cir. 2016) (applying *Jackson* standard to sufficiency claim).[16] The court therefore denies Petitioner's sufficiency of the evidence claim under § 2254(d).

[16] The court notes its *Jackson* analysis is not inconsistent with its conclusion the SJC unreasonably applied *Strickland*'s prejudice prong. While *Jackson* asks whether "*any* rational trier of fact could have

VI. CONCLUSION

Habeas relief is a "guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *See Richter*, 562 U.S. at 102–103 (quoting *Jackson*, 443 U.S. at 332 n.5 (Stevens, J., concurring in judgment) (internal quotation marks omitted)). Finding such "extreme malfunction[]" in the present case, this court is compelled to issue the writ. *Id.*

For the reasons set forth above, Petitioner is entitled to relief on his claim for ineffective assistance of counsel on the basis of trial counsel's failure to obtain the mental health records of the Commonwealth's sole percipient witness. The court denies relief on Petitioner's claim as to the sufficiency of the evidence and declines to reach his remaining claims. Mr. Ayala's Amended Petition for Writ of Habeas Corpus by a Person in State Custody (Dkt. Nos. 1, 23) is conditionally GRANTED. The clerk is directed to enter judgment for Petitioner. The case is remanded to the state Superior Court to retry Petitioner within 120 days or release him from custody.

It is So Ordered.

/s/ Mark G. Mastroianni
MARK G. MASTROIANNI
United States District Judge

found the essential elements of the crime beyond a reasonable doubt," *Strickland*'s prejudice prong asks whether, but for trial counsel's errors, there is a reasonable probability of a different outcome, *i.e.*, that one juror would have decided differently. *Compare* 443 U.S. at 319, *with* 466 U.S. at 694. The requirement of jury unanimity means a defendant may logically both lose an insufficiency claim (based on any one juror's supported guilty verdict) and win an ineffective assistance claim (based on the probability that any other one juror might have cast a not guilty vote). Moreover, Petitioner's sufficiency claim is necessarily limited to the evidence introduced at trial, whereas his ineffective assistance claim requires the court to consider the impact of the missing records, which the jury would have had but for trial counsel's unprofessional error.

United States Court of Appeals
For the First Circuit

No. 22-1924

PHILLIP AYALA,

Petitioner, Appellee,

v.

NELSON ALVES, Superintendent, MCI-Norfolk,

Respondent, Appellant.

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

[Hon. Mark G. Mastroianni, U.S. District Judge]

Before

Montecalvo, Selya, and Lynch, Circuit Judges.

Gabriel Thornton, Assistant Attorney General, Criminal Bureau, with whom Andrea Joy Campbell, Attorney General, was on brief, for appellant.
Janet Heatherwick Pumphrey for appellee.

October 25, 2023

LYNCH, Circuit Judge. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code), and Supreme Court precedent, federal habeas courts must give deference to a state court's findings of fact and application of law. White v. Woodall, 572 U.S. 415, 419-20 (2014). In addition, when a habeas petitioner asserts a claim of ineffective assistance of counsel, federal habeas corpus review must be doubly deferential. Burt v. Titlow, 571 U.S. 12, 15 (2013).

Petitioner Phillip Ayala was convicted, in 2007 after a jury trial, of first-degree murder, unlawful possession of a firearm, and unlawful possession of ammunition. His conviction and the denial by the trial court of his motion for a new trial were affirmed by the Massachusetts Supreme Judicial Court ("SJC") in a carefully reasoned, unanimous, nineteen-page decision. Commonwealth v. Ayala ("Ayala"), 112 N.E.3d 239, 241-42 (Mass. 2018).

A Massachusetts federal district court nonetheless granted Ayala's petition for a federal writ of habeas corpus on his argument that his state court trial counsel was ineffective. See Ayala v. Medeiros ("Medeiros"), 638 F. Supp. 3d 38, 46 (D. Mass. 2022). Arguing on appeal that the grant of Ayala's petition was improper, the Commonwealth of Massachusetts seeks to vacate

that order. We vacate, as the district court erred in applying the AEDPA standard. Under that standard Ayala's petition must be denied.[1]

I. Facts

A. The Underlying Crimes of First-Degree Murder, Unlawful Possession of a Firearm, and Unlawful Possession of Ammunition

On this habeas review of an ineffective assistance of counsel claim, "[w]e take the facts largely as recounted by the [SJC] decision affirming [Ayala's] conviction, 'supplemented with other record facts consistent with the SJC's findings.'" Field v. Hallett, 37 F.4th 8, 12 (1st Cir. 2022) (second alteration in original) (quoting Yeboah-Sefah v. Ficco, 556 F.3d 53, 62 (1st Cir. 2009)). The SJC found the facts as follows:

> In the early morning of June 10, 2007, Robert Perez and his friend, Clive Ramkissoon, attended a house party held on the second floor of a house in Springfield. Upon arriving just before 2 A.M., Perez and Ramkissoon encountered a bouncer on the first floor at the bottom of the stairwell that led to the second floor. The first-floor bouncer was posted there to search guests before letting them upstairs to the party. After being searched, the two men went upstairs to the party. As there were not yet many people at the party, Perez returned to the first floor and began speaking with the first-floor bouncer in the entryway of the stairwell.
>
> Shortly thereafter, as Perez was speaking with the first-floor bouncer, the defendant arrived

[1] We do not consider Ayala's other arguments, which are not before us on appeal.

at the party. As she had done with Perez and Ramkissoon, the bouncer attempted to pat frisk the defendant before allowing him to enter. The defendant refused. After a brief argument related to the search, the defendant aggressively pushed past the bouncer and climbed the stairs to the second floor. A second bouncer intercepted the defendant on the stairs and prevented him from entering the party without having first been pat frisked. The defendant argued with the bouncer and, after yelling and screaming at him, was escorted out of the house. As the defendant was descending the staircase to leave, and just steps away from Perez, the defendant threatened to "come back" and "light the place up." [FN 2] After leaving the house briefly, the defendant returned and kicked in the first-floor door. [FN 3]

> [FN 2] At trial, a witness who had attended the party testified that the defendant was upset because he felt that hosting a party at the house was disrespectful to his niece, who had recently been killed at a nearby location.
>
> [FN 3] The door was kicked in with such force that police were later able to take a footprint impression from the door and confirm that it matched the defendant's shoe.

Throughout this interaction inside the house, Perez had an opportunity to observe the defendant closely for several minutes. [FN 4] Concerned by the defendant's threats and behavior, Perez returned upstairs to find Ramkissoon. The two men walked onto the second-floor porch to "assess the situation" and saw the defendant pacing back and forth on the street in front of the house. Rather than leave with the defendant still outside, given his recent threat to "light the place up," Perez and Ramkissoon decided to wait on the porch for a few minutes. After the defendant

moved out of sight, Perez, Ramkissoon, and a female friend decided to leave the party.

> [FN 4] Robert Perez's account of the defendant's actions was substantially corroborated at trial by the testimony of the first-floor bouncer.

After leaving the house, Ramkissoon and the woman began walking across the road, while Perez, who had stopped to tie his shoe, trailed slightly behind. As they were crossing the road, the woman stopped in the middle of the road directly in front of the house and began dancing. Perez walked over to where the woman was dancing while Ramkissoon kept moving down the road, to the left of the house, toward the area where his vehicle was parked. As Perez approached the woman to guide her out of the way of oncoming traffic, he heard a gunshot and saw a muzzle flash appear near a street light located on the sidewalk in front of a property adjacent to the house. [FN 5] Perez saw the defendant holding a firearm and testified that he was able to identify the shooter as the defendant because the muzzle flash from the gun illuminated the shooter's face. He then turned and ran away from the shooting as several more gunshots rang out. Perez, who had previously served in the United States Army, testified that he heard between five and seven shots, which he recognized as .22 caliber bullets based on his military experience.

> [FN 5] Perez testified that he saw the muzzle flash came from "the sidewalk area under the light," but later noted that he could not be certain whether the street light was on at the time of the shooting.

Perez soon circled back to where Ramkissoon's vehicle was parked and discovered Ramkissoon face down on the street. Perez performed rescue breathing on Ramkissoon and telephoned the police. Police officers arrived at the scene by approximately 3 A.M. It was later

> determined that Ramkissoon died from multiple gunshot wounds. [FN 6] Perez was soon brought to the Springfield police station, where he gave a statement recounting the events of that morning. At the station, Perez identified the defendant from a set of photographs shown to him by police, stating that he recognized the defendant's photograph as the "same person who he had seen in the stairwell not wanting to be pat frisked by the bouncer there, and then firing the gun outside in the street at the victim."
>
> > [FN 6] The police recovered five spent shell casings from the scene of the shooting. The medical examiner also recovered two spent projectiles from Ramkissoon's body. At trial, a police officer with special knowledge of ballistics testified that he performed a microscopic examination of the shell casings and the spent projectiles. Based on the examination, he concluded that all five casings came from a .22 caliber gun. He further concluded that both projectiles extracted from Ramkissoon's body came from the same weapon. The police never located the gun that was used to kill Ramkissoon.

Ayala, 112 N.E.3d at 242-43 (cleaned up).

B. Ayala's State Criminal Trial

In January 2008 as part of discovery from the Commonwealth in his criminal prosecution, counsel for Ayala received a copy of a letter from the Northampton VA Medical Center which stated that Perez, the Commonwealth's lead witness, "ha[d] been in treatment for Post Traumatic Stress Disorder ["PTSD"] at th[at] VA Medical Center since 4/14/2000 . . . with Dr. Kenneth Lenchitz, PhD., . . . Nina A. Pinger, APRN, BC, CNS, and Lillian

R. Struckus, MSW, LICSW . . . ." A list was attached of all of Perez's appointments at the VA Medical Center from April 14, 2000, to January 18, 2008, which defense counsel described as totaling 161 appointments.[2]

At trial two key eyewitnesses testified: Natasha Frazier, the D.J. at the party who said Ayala could not have been the shooter, and Perez, who identified Ayala as the shooter. The defense called Frazier as its eyewitness. As the judge who heard Ayala's 2014 motion for a new trial later found, the defense counsel's "primary trial strategy" was to secure and support Frazier's testimony that Ayala was not in the area when the shooting occurred. As stated by the SJC:

> Shortly before the trial was originally scheduled to begin in July 2008, the Commonwealth informed defense counsel that it had recently learned that a witness likely to be called by the defense, [Frazier], was a confidential informant for a Federal gang task force operating in Springfield. As a result of this new information, the trial was continued several times until over one year later in August 2009.
>
> The Commonwealth's disclosure resulted in multiple motions by the defendant to obtain Federal records detailing [Frazier]'s status as a confidential informant (informant records) and to compel the testimony of Federal agents regarding the same through State court proceedings. The defendant argued

[2] As noted by the SJC, at trial Perez admitted that this document established that he had "161 appointments with mental health experts at the Veterans Administration." Ayala, 112 N.E.3d at 255.

that the information was material to his defense because it was necessary to demonstrate [Frazier]'s credibility as a witness, which the defendant contended was exculpatory information. At various times, the defendant was informed that a successful pursuit of this information would require that he comply with the procedure set forth by Federal regulations. The federally mandated procedure required the defendant to submit a written request for information describing the informant records and the subject matter of the testimony sought. Federal authorities would then review the sought-after information for privilege, confidentiality, and the likelihood that its disclosure would compromise ongoing investigations. After this review, the Federal authorities would report back to the defendant and either disclose the requested information or explain why it was continuing to be withheld. Despite being made aware of the Federal procedure, the defendant refused to comply and continued to unsuccessfully request that the trial court judge compel Federal authorities to disclose this information.

During the time period of the continuance, and while engaging in the pursuit of the federally held information, the defense had the opportunity to depose [Frazier]. At her deposition, [Frazier] testified to her status as a confidential informant for the Federal Bureau of Investigation (FBI), including the nature of her work and compensation. She also testified to her observations on the morning of the shooting, which supported the defendant's theory that he was not present at the scene at the time of the shooting. Specifically, [Frazier] testified that she witnessed the defendant driving away from the scene before the shooting took place, and instead implicated another individual whom she witnessed fleeing the scene. The deposition also revealed that [Frazier] had telephoned a Federal agent on or about the morning of the shooting and described what had occurred.

> On the eve of trial, the defendant filed a motion to dismiss the case based on the Commonwealth's failure to turn over [Frazier]'s informant records. The motion was eventually denied. The defendant then sought once again to compel the testimony of a member of the Federal gang task force, but the subpoena was quashed. Subpoenas for several other law enforcement officers and an assistant United States attorney were similarly quashed. After these subpoenas had been quashed and the trial was set to begin, at the suggestion of the trial judge, the defendant finally submitted a request to Federal authorities for the informant records in compliance with the governing Federal regulations described above.

Id. at 246-48 (footnotes omitted).

On August 12, 2009, before trial began, defense counsel moved for a subpoena for all of Perez's treatment records beyond what he had received in January 2008 from the VA Medical Center. The order, which the court issued on August 13, 2009, mistakenly read:

> It is hereby ordered that KEEPER OF THE RECORDS at Veteran's Hospital, 421 North Main Street, Leeds, MA, release to the SUPERIOR COURT CLERK'S OFFICE, any and all medical records regarding the treatment of Robert Perez, treated on or about 2009. This order does not include psychiatric, psychological, or social worker records.

(Emphasis added.) The court corrected the error and issued a revised order on August 14, 2009, which read:

> It is hereby ordered that KEEPER OF THE RECORDS at Veteran's Hospital, 421 North Main Street, Leeds, MA, release to the SUPERIOR COURT CLERK'S OFFICE, any and all medical,

> psychiatric, psychological, or social worker records regarding the treatment of Robert Perez, treated on or about 2009.

Trial was scheduled to begin on the morning of August 17, 2009. That morning, defense counsel moved for a continuance because he had not yet received a response to his request for Frazier's confidential informant records. As to Perez, defense counsel told the court he did not know "how [he was] supposed to open if [he] d[id]n't know what to say about the . . . percipient witness" and that "there's an issue of competence relative to this witness," a reference to Perez. Both counsel then made a joint motion "to have [the court] order the records be sent overnight," which the court allowed. The court told the parties they would "have the records at the very latest tomorrow morning. . . . You can review the records. If an issue stares this Court in the face regarding mental competency right up to the time [Perez] is called to testify, then I'll take the appropriate steps." The court denied a continuance.

Trial began later that day, August 17, 2009, with the jury, judge, and parties first traveling to the site of the shooting for "a view of the subject premises" before opening statements. After that view the court dismissed the jury for lunch and told counsel that "there[] [was] a courier . . . in the process of returning from the [VA Medical Center] with the necessary documents."

The prosecutor told the court she expected to call three witnesses that afternoon -- first, Sergeant David Martin of the Springfield Police Department; second, Dr. Joann Richmond, a state forensic pathologist; and third, Perez. Defense counsel objected to Perez being called that day because he "ha[d]n't seen the records." The court said it would end the day's proceedings after Dr. Richmond's testimony so the parties could review the records and the court could "have ready, if necessary, someone to conduct an examination" of Perez's competency.

The prosecutor then gave the Commonwealth's opening statement. As part of that statement she told the jury that

> Mr. Perez and Mr. Ramkissoon were on their way to drop Mr. Perez off at his home in his apartment in Springfield when they encountered a young lady . . . who appeared to be going to some type of a party.
>
> . . . .
>
> They gave her a ride [and] . . . parked on Bristol Street. You all had the opportunity to see Bristol Street where it[]s relationship is to this house that you went in.
>
> . . . .
>
> They entered into the party. They were there for a period of time. Then I expect that you'll hear at some point the defendant, Mr. Ayala, arrived at the party, . . . and there was an issue about his coming in or being agreeable to come in.
>
> As a result, he was asked to leave. You'll then hear . . . that Mr. Ayala came back and he kicked in that door.

> . . . .
>
> Now, all around this time Mr. Perez is deciding it's probably not a good idea for them to stay at this party. They are getting ready, they are leaving. I believe the testimony is going to be that Mr. Perez and Mr. Ramkissoon and [the young woman] were walking out of the party.
>
> . . . .
>
> I expect Mr. Perez will tell you that he heard shots . . . and he looked. . . . He stood there in the middle of the road where the double yellow line is. Then he saw a man with a gun firing, and he ran and he looked at the guy.
>
> . . . .
>
> Mr. Perez will tell you that when he looked up and he saw the man with the gun, he looked at him. It was the same guy who caused the commotion at the party. It was the same guy who kicked in the door. It was the same guy.
>
> . . . .
>
> Now Mr. Perez, I'm sure you're going to hear, as a result of military service to his country suffers from posttraumatic stress. There are issues that he's had. He was on probation. He was violated. He's been incarcerated. You're going to hear a lot about him and his tale of woe.
>
> But what you're going to hear is that when he turned to see the gunshots in the middle of that road . . . it was the same guy that caused the commotion at the party. The same guy that was kick[ed] out. The same guy that kicked in the door.

The prosecutor did not mention Frazier or her testimony in the Commonwealth's opening statement.

Defense counsel told the jury his opening statement was his "opportunity to tell you what the defense believes the evidence will be in this particular case." Defense counsel described the expected testimony of Frazier, a

> paid confidential informant . . . [who was at the party to] report confidential information of gang activities, on guns, and on drugs at that particular location to her handlers.
>
> . . . .
>
> [Frazier] actually saw Mr. Ayala here, who she knew, come in and . . . create a ruckus . . . because of the fact that he felt he was being disrespected, that he was known in the community, that he had a very close relative . . . [who] was shot at the location right at the house next door . . . . As a result of him being disrespected, he kicked in the door.

Defense counsel stated that

> [t]he evidence w[ould] establish that when the shooting occurred, the confidential paid federal informant was standing on the porch that you visited today and that she saw what took place downstairs where the shooting took place . . . [and that] upon being debriefed of the situation [by her handlers] said that she knew that Mr. Ayala could not have done this particular crime because she saw him leaving and he was not in the area of where the crime took place and he was not the shooter. And that she saw a particular automobile . . . that exited the area contemporaneously, or right after, the shooting took place.

As for Perez, defense counsel stated that the prosecution had

> pointed out to you that Mr. Perez had service in the armed services, that he suffers from PTSD, and I believe the evidence will

> establish for you that he's presently residing at [a VA Medical Center] in Northampton.
>
> I believe the evidence will further establish for you that at the time of this particular incident when he gave the police a statement relative to Mr. Ayala's participation in this particular event, he had outstanding charges pending against him relative to unarmed robbery and that eventually he was incarcerated relative to violating the terms of probation. That during the time that he was incarcerated at the state facilities here in Massachusetts, he wrote certain letters to the office of the district attorney, and I believe that the evidence will establish for you that he sought to have certain considerations relative to the testimony that he intended to give in this particular case.

Thus defense counsel established as a major theme that Perez, after being in the armed services, "suffers [present tense] from PTSD" and resided at the VA Medical Center in Northampton.

The prosecutor presented two witnesses on August 17, 2009: Sergeant Martin, an officer who responded to the scene that morning, and Dr. Richmond, who testified that Ramkissoon died as a result of his gunshot wounds. After Dr. Richmond's testimony, at sidebar, the court told counsel that the clerk had received Perez's records from the VA Medical Center and that counsel could review them in the clerk's office. The court then adjourned at 3:39 pm with plans to return the following day, August 18, 2009.

Defense counsel reviewed the 38-page set of records that arrived on August 17, 2009. As it turned out, this 38-page set of records was an incomplete set of Perez's VA Medical Center records.

This 38-page set, which defense counsel received and reviewed, reinforced that as of July 30, 2009, Perez had been diagnosed with "Posttraumatic Stress Disorder"; "Bipolar affective disorder, manic, mild degree"; and "Generalized Anxiety Disorder", and that, as of that date, he was taking three medications to treat those conditions. The 38-page set, however, did not include the notes taken during Perez's counseling sessions with the VA Medical Center.

On August 18, 2009, defense counsel filed motions for a competency evaluation of Perez and for payment authorization for the defense to retain a psychological expert, Dr. Ronald Ebert, both to consult on defense counsel's cross-examination of Perez and then to testify for the defense. When trial resumed that morning, defense counsel's motions were the first point of discussion. With respect to Perez's competency, defense counsel told the court that Dr. Ebert would testify that "a person that is manic obviously is wired high and if he's not on his medications, obviously [Dr. Ebert] doesn't believe [Perez] would be competent to testify."

The court ordered a competency evaluation of Perez by an independent psychologist and reserved judgment on the defense's motion for payment for an expert psychologist until after that evaluation. The court specifically asked the doctor, Dr. Andrew

Bourke,[3] to examine both "today whether [Perez] is competent to testify based on whatever treatment he . . . is receiving at [a VA Medical Center], but also what medication or treatment he may or may not have been receiving on June 10, 2007[.]"

Dr. Bourke conducted a competency evaluation of Perez that day. Dr. Bourke also "review[ed] the . . . [38-page set of] records." As to Perez's competence to testify, Dr. Bourke concluded that Perez was "able to provide a recollection of the alleged incident that [was] very close to what [the doctor] was able to review . . . [from] previous testimony [Perez] had given." Dr. Bourke also concluded that Perez was "entirely alert and oriented," "demonstrated intact memory functioning," and "[t]here were no symptoms of major mental illness evident during [the doctor's] interview with [Perez]." The doctor also "didn't see any evidence [that day] of symptoms of bipolar disorder . . . ." As to Perez's competence to perceive the shooter on June 10, 2007, Dr. Bourke testified that Perez "told [him] that at that time he was not on any medications . . . and he was feeling, prior to the incident, okay. He was with friends and he wasn't suffering from symptoms of a mental illness at that time." As the SJC noted, "[f]ollowing the examination, Perez was declared competent to testify." Id. at 244 n.7.

[3] No party has raised any issue as to Dr. Bourke's impartiality or qualifications at any stage in these proceedings.

Before the prosecution offered Perez's direct testimony, defense counsel repeated his request that Dr. Ebert at least have "an[] opportunity to advise [defense counsel] as to how [he] should conduct [his] cross-examination [of Perez] relative to well-defined mental illness that is verified on the record." Defense counsel also described the testimony Dr. Ebert would offer if the court authorized payment, specifically "that anyone who suffered from a bipolar situation that was manic in its nature, that was not on medication, would be adversely affected in their ability to either perceive or encounter and recounter events that would occur." In response, the court asked how "the psychiatrist, without being totally speculative, [was] going to be able to testify how [Perez] acted on that night when [the doctor] wasn't there?" The court also stated,

> I can understand why you're asking to [consult an expert] so you might be able to cross-examine, but I don't think it r[]ises to the level of just bringing in an expert now and testifying as to what he would opine regarding how he conducted himself or what his percipient qualities were on that particular day if there's no foundation laid that he was suffering from that disease on that day.

The court reserved judgment on counsel's motion for payment for an expert until after Perez's direct testimony, but ultimately granted authorization for payment related to consultation on defense counsel's cross-examination of Perez.

The prosecution presented Perez's direct testimony that afternoon, August 18, 2009. The SJC's description of Perez's testimony is supported by the record. Specifically with respect to his identification of Ayala as the shooter, Perez testified as follows:

> Q. . . . [Y]ou looked towards where the shots were coming from; correct?
>
> A. Right.
>
> Q. And could you see a firearm?
>
> A. Yes.
>
> Q. And could you see someone with a firearm?
>
> A. Yes.
>
> . . . .
>
> Q. . . . So when you looked back, the shots were coming from -- did you see the person holding a gun?
>
> A. Yes.
>
> . . . .
>
> Q. . . . Did you recognize the shooter?
>
> A. Yes.
>
> Q. Who did you recognize the shooter as?
>
> A. Mr. Phillip Ayala, the person who came and said he would light the party up.

The court then dismissed the jury for the day and addressed defense counsel's pending motion for funds for an expert psychologist. The court first stated that it "discerned from [its] observations and . . . hearing [of Perez's direct testimony] that

there was no[t] one scintilla of vagueness, lack of clarity, anything incomprehensible or anything other than detailed testimony . . . ." For that reason the court told defense counsel it "w[ould] not be allowing an expert to testify in the v[e]in requested by the defense" unless "something countervailing and compelling in cross-examination emerge[d]." (Emphasis added.) The court did, however, "allow the motion for funds for [defense counsel] . . . to consult [an expert psychologist] . . . prior to commencement of cross-examination [scheduled to take place the next day] . . . and for those purposes only." Defense counsel did in fact consult with Dr. Ebert, who also had access to the 38-page set of records, to prepare his cross.

As to the cross-examination of Perez the next morning after defense counsel had consulted with his expert, the SJC found:

> The reliability of Perez's identification was vigorously challenged by defense counsel on cross-examination. The defense confronted Perez on his ability to accurately identify the shooter under the lighting conditions at the time of the shooting, his recollection of certain events that morning, and the discrepancies between Perez's statement to police on the morning of the shooting and his trial testimony regarding the defendant's height and clothing. Additionally, the defense presented evidence showing that Perez suffered from bipolar disorder and posttraumatic stress disorder (PTSD), the latter being a result of his military service. Specifically, evidence showed that he sought psychiatric counselling and used marijuana to cope with the effects of his diagnoses. There was no evidence, however, that Perez was

> either suffering the effects of these diagnoses or under the influence of marijuana at the time of the shooting.

Id. at 243-44 (footnotes omitted). Defense counsel drew admissions from Perez that he "went from unscheduled [as-needed counseling] appointments to [regularly] scheduled [counseling] appointments" after the shooting, "was hospitalized" for his mental health in the fall of 2007, "start[ed] taking . . . [prescription] drugs" to treat his mental health conditions "[a]fter October of 2007," was "diagnosed with borderline personality disorder and also bipolar disorder, mild manic after 2007," and "had a counseling session on June 11th" of 2007, the day after the shooting. Perez stated the effect of his PTSD on him "was minimal. It's just basically . . . remembering a bad time, a bad dream, a bad situation . . . ." Perez stated that his "appointments weren't necessarily all based on PTSD" and that he also "went through a divorce" between 2000 and 2008 which caused him emotional distress for which he also sought counseling.

The prosecution then offered the testimony of four more witnesses: Detective Lieutenant Kenneth F. Martin of the Massachusetts State Police who specialized in footwear impression analysis and identification; Equilla Haines, the first-floor bouncer the night of the shooting; Sergeant Mark Rolland of the Springfield Police Department, who had responded to the scene of the shooting that morning; and Sergeant John Crane, a ballistician

with the Massachusetts State Police who analyzed the shell casings and projectiles recovered from the shooting.

The prosecution rested after Sergeant Crane's testimony. Defense counsel then moved for a directed verdict because "the defendant was never identified" in court, which motion the court denied.

The defense called its witness, Natasha Frazier. The SJC found and the record supports that

> the defense called a sole witness, [Natasha Frazier], who was the disc jockey at the party. [Frazier] testified that she knew the defendant and looked up to him, and had seen him multiple times that morning. [Frazier] also testified that at one point, she was on the second-floor porch and saw the defendant emotional and upset outside after he had been kicked out of the house. She and others attempted to comfort the defendant and suggested that he go home. She testified to then witnessing the defendant leave the party and drive away. [Frazier] was adamant that the defendant left approximately thirty to forty-five minutes before the shooting, stating that he was "gone a long time before the shooting even went down." In response to further questioning on her certainty that the defendant was not at the scene at the time of the shooting, she testified, "He was not there. Put my kids on it." Although she did not witness the shooting, she testified that she observed a red Taurus motor vehicle "skidding off" from the scene immediately after the shooting.

Id. at 244 (footnote omitted). Frazier's testimony stretched into August 21, 2009.[4]

After Frazier's testimony, defense counsel made an offer of proof as to an additional witness. Defense counsel offered the testimony of Richard Williams, an individual he had "direct[ed] to . . . provide security for [Frazier]" after Frazier expressed "safety concerns" arising out of her role as a witness. The court did not allow Williams's testimony, concluding that Frazier "didn't express any concern for [her safety]" in her testimony, making Williams's testimony irrelevant. The court then dismissed the jury for the weekend, with the defense formally leaving its case open over the weekend in the hope that the federal government would respond to its request for records related to Frazier's confidential informant status before the trial resumed on Monday morning.

By the morning of Monday, August 24, 2009, those records as to Frazier had arrived. Based on the content of those records, defense counsel made an offer of proof in an effort to call one of Frazier's handling officers to support her credibility. The court rejected that offer of testimony and the defense rested. Defense

[4] On August 21, 2009, the court also heard argument on defense counsel's motion for a mistrial. The defense argued that Frazier's federal agent handlers engaged in improper "intimidation" and sought to both discourage Frazier from testifying and to influence the substance of her testimony. The court denied this motion.

counsel moved for a required finding of not guilty, which motion the court denied.

Both sides gave closing statements that day, August 24, 2009. In his closing argument defense counsel argued that there were "basically two witnesses that . . . testif[ied] to contradictory conclusions." Defense counsel stated that Perez's mental illnesses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." Defense counsel contrasted Perez's identification testimony with Frazier's testimony, who "says she knew that it wasn't Phillip Ayala. He had left. She saw he was nowhere in the location at the time of the shooting." For that reason, defense counsel argued, "this particular case . . . boil[ed] down to very basically a misidentification."

In closing statements for the Commonwealth, the prosecutor responded that "the detail [Perez] was able to recount to [the jury]" about the events of June 10, 2007, supported his identification of Ayala as the shooter. She argued, "[h]e's paying attention. He's alert. He's using perhaps his military background. He turns and he sees the person that he recognizes as [Ayala]." She also argued that Frazier "didn't see the shooting . . . [b]ut her friend[,] . . . the person that she looked up to, . . . she said that he wasn't anywhere to be found." Finally, she

acknowledged that "Perez has issues. He told you as a result of military duty, he suffers from [PTSD]."

The jury convicted Ayala on all three counts on August 24, 2009; he was sentenced to life without parole. He sought state post-conviction relief.

C. Ayala's State New Trial Motion and Appeal to SJC

Ayala filed a motion for a new trial on February 10, 2011. Id. at 241. Ayala's post-trial counsel received a complete set of Perez's VA Medical Center records in February 2014, including approximately 100 half-page "Progress Notes" recorded by Perez's therapists during his counseling sessions from April 17, 2000, to July 24, 2009, which had been missing earlier at trial.[5] Ayala then amended his motion for a new trial. As amended, Ayala argued that his trial counsel was ineffective for (1) failing to retain and call an expert witness on eyewitness identification, (2) failing to retain and call an expert witness on ballistics to testify about the characteristics of a muzzle flash, and (3) failing to notice the absence of Perez's psychological records.

[5] The February 2014 production, which included all of Ayala's medical records through February 8, 2014, totaled 513 pages. Although the district court and Ayala refer to "[h]undreds of pages of psychological records" in that production, many of the records in the February 2014 production were related to treatment Perez received after Ayala's trial in August 2009, duplicative of the records that defense counsel received during trial, and/or irrelevant to Perez's mental health.

In support of his argument that defense counsel was ineffective for failing to notice the missing records, Ayala submitted Perez's complete medical records and offered an affidavit from a psychiatrist, Dr. Jose Hidalgo, whom he argued he could have offered as an expert if counsel had noticed and corrected the absence of the records. Dr. Hidalgo's affidavit stated his opinion that Perez's "mental and emotional conditions had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the events of June 10, 2007" and that "[m]ind altering substances" like marijuana "in principle can reduce the ability to accurately perceive and recall past events." (Emphasis added.)

> [T]he motion judge, who was not the trial judge, allowed an evidentiary hearing on trial counsel's failure to retain and call experts on eyewitness identification and ballistics. The motion judge did not allow an evidentiary hearing, however, on trial counsel's failure to notice the absence of Perez's psychological records that were subject to disclosure after finding that the defendant had not raised a substantial issue [on that argument] warranting further hearing.

Id. at 252.

Defense counsel testified at Ayala's evidentiary hearing that his "primary . . . strategy at [trial] was to prese[nt] the testimony of [Frazier] which . . . posited that Mr. Ayala was not the shooter, that she saw the event from a place where she had a vantage point and that she named other individuals as the actual

shooters involved." He testified that it was "a fair representation" to say that he did "not pursu[e] obtaining the mental health records . . . because [he was] focus[]ed on other aspects of the case that [he] deemed essential and more important."

Defense counsel further testified that he "felt with Natasha Fra[z]ier's testimony and [his] cross-examination of Mr. Perez, that the case would be adequately put before the jury," and that he "believe[d] it was tactically the correct thing not to attack [Perez] as a veteran with PTSD."

The new trial motion judge denied the motion and summarized his findings as follows:

> Ayala was represented at trial by Attorney Greg Schubert, a criminal defense attorney with over thirty-five years' experience in defending allegations of first degree murder. He has tried forty-seven first degree murder cases. . . . [Schubert's] primary trial strategy was to secure the trial testimony of [Frazier] who was the disc jockey at the party. . . . Schubert believed that Frazier's testimony, coupled with his cross-examination of [Perez] regarding his mental state and the inconsistencies in his statements to the police, was sufficient to raise a reasonable doubt regarding [Perez]'s identification of Ayala as the shooter.
>
> . . . .
>
> [T]here was evidence that Perez was familiar with Ayala from interacting with him earlier in the evening. He had ample opportunity to view Ayala prior to the shooting in a non-stressful environment. Ayala walked within inches of Perez twice when he ascended and then descended the stairs which provided

> access to the party on the second floor. Perez took note of Ayala's facial features as he shouted threats when he was being thrown out of the party. Perez saw Ayala a third time when he observed him standing in the front yard as he looked down from the balcony. In addition, other witnesses corroborated [Perez]'s testimony that Ayala was the individual who made a scene at the party, threatening to return and "light this place up."
>
> . . . .
>
> On cross-examination trial counsel emphasized that Perez observed the shooter for only a matter of seconds, that his physical description of the shooter was inconsistent, and that he suffered from [PTSD]. Similarly, trial counsel thoroughly argued misidentification in closing.

With respect to the eyewitness identification expert, the motion judge concluded that trial defense counsel's "decision to [challenge Perez's identification of Ayala] without an expert was not manifestly unreasonable when made and the absence of an expert did not deprive Ayala of an otherwise available substantial ground of defense." The motion judge denied Ayala's new trial motion in full and did not specifically address Ayala's argument with respect to the missing records.[6]

Ayala's appeal of the denial of his new trial motion was combined with his merits appeal before the SJC. Id. at 242. Ayala

[6] The motion judge also concluded that, with respect to a ballistics expert, he "[could not] conclude that, but for counsel's failure [to secure an expert on muzzle flash], the outcome of the case would have been different."

challenged the merits of his conviction on two grounds. First, he argued that the evidence before the jury was insufficient to support a conviction because "Perez[] testi[fied] that he was able to identify [Ayala] as the shooter because the muzzle flash from the gun 'illuminated' [Ayala]'s face [and] the illuminating capacity of a muzzle flash is not within the ordinary, common experience of a reasonable juror . . . ." Id. at 244-45. The SJC rejected this argument because it found that "there was independent evidence that would permit a rational juror to reasonably infer that the crime scene was sufficiently illuminated at the time of the shooting to provide Perez with the opportunity to identify [Ayala] as the shooter" -- specifically, a police officer's testimony that "the street lights near the location of the shooting and the exterior lights on a nearby building were illuminated when he arrived at the crime scene at approximately 4:30 A.M." Id. at 245.

Second, as the SJC described it, Ayala argued that

> his due process rights under the Fifth and Sixth Amendments to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights were violated by (i) the Commonwealth's failure to obtain and turn over discovery related to the sole defense witness's status as a confidential informant, and (ii) the judge's decisions declining to compel various State and Federal law enforcement officers to testify to the defense witness's status as a confidential informant.

Id. at 246. The SJC rejected this argument because it concluded that "[t]he information related to [Frazier]'s status as a confidential informant was not in the Commonwealth's possession or control, but rather was in the possession and control of the Federal government." Id. at 248. It also concluded that although "under certain circumstances [the SJC] will require the Commonwealth to bear the burden of securing the cooperation of the Federal government with regard to the disclosure of exculpatory information[,] . . . [a]fter weighing [the applicable] factors, . . . the Commonwealth was not required to bear the burden of securing the release of the information" in this case. Id. at 248, 252.

> The SJC then described Ayala's arguments that
>
> the motion judge erred in denying his motion [for a new trial] with respect to his arguments that his trial counsel was ineffective for (i) failing to retain and call an expert witness on the accuracy of eyewitness identifications, (ii) failing to retain and call an expert witness on ballistics evidence to testify about muzzle flashes, and (iii) failing to notice the absence of medical records that provided further insight into Perez's mental health issues and drug use.

Id. at 252.[7] The SJC concluded that the failure to call an eyewitness identification expert was not "manifestly unreasonable

[7] The SJC considered Ayala's ineffective assistance claim under Massachusetts's state law standard specific to ineffective assistance claims arising out of certain types of criminal

when it was made" and that the failure to call a ballistics expert "was not likely to have influenced the jury's conclusion." Id. at 253, 255.

With respect to the missing records, the SJC found that

> Perez testified that he had been diagnosed with PTSD and bipolar disorder, that he received counselling and medication to treat the diagnoses, and that he had had a counselling session on the day after the murder. He further testified that over the period of approximately eight years following his discharge from the military, he had sought counselling for his PTSD 161 times and that he suffered from "night terror[s]" and sleeplessness as a result of his PTSD. [FN 21] Additionally, he testified that he used marijuana to cope with the effects of his PTSD diagnosis.
>
> > [FN 21] At the evidentiary hearing on the defendant's motion for a new trial, trial counsel testified that, at the time of the trial, he believed it would have been a poor tactical choice to "attack" Perez in front of the jury, given that Perez was a veteran suffering from [PTSD]. Therefore, it is unlikely that trial counsel would have used the information

convictions, including those for first-degree murder, not the federal standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Ayala, 112 N.E.3d at 252-53 ("[W]e apply the more favorable standard of G.L. c. 278, § 33E and review [Ayala's] claim to determine whether there was a substantial likelihood of a miscarriage of justice. Under this review, we first ask whether defense counsel committed an error in the course of the trial. If there was an error, we ask whether it was likely to have influenced the jury's conclusion." (citations omitted)). We have recognized that this standard is "at least as generous to the defendant as [the Strickland standard]." Horton v. Allen, 370 F.3d 75, 86 (1st Cir. 2004). We consider the SJC's conclusion under this more generous standard to incorporate the conclusion that Ayala had failed to demonstrate prejudice under Strickland.

> in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if counsel had them.
>
> Notably, there was no evidence -- either introduced at trial or contained within the missing records -- that suggests that Perez's mental health struggles or drug use affected his ability to perceive the defendant on the morning of the shooting. For example, a defense expert's proffered testimony only acknowledged that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]." Trial counsel argued this point specifically during closing, stating that Perez's diagnoses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." Additionally, although the missing records suggested that Perez was more dependent on marijuana than his testimony let on, there was no evidence that he was under the influence of marijuana on the morning of the shooting. The defendant's proffered expert on this point would not have materially added to the defense, as he was prepared only to testify that individuals have a reduced ability to accurately perceive reality and recall past events while under the influence of mind-altering substances. Because the substance of the missing records and proffered expert testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was not likely to influence the jury's conclusion. The motion judge therefore did not err in denying the defendant's motion for a new trial.

Id. at 255-56 (citations omitted and emphasis added). The SJC affirmed Ayala's convictions and the denial of his motion for a new trial, rejecting Ayala's claim that defense counsel was

constitutionally ineffective for not obtaining the actual treatment session notes of the doctors' sessions with Perez from April 2000 to July 2009. Id. at 257.

D. Ayala's Petition for Federal Habeas Corpus

The appeal before us arises out of the grant by the district court of Ayala's petition for federal habeas relief on the ineffective assistance of counsel claim rejected by the SJC. Ayala filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts on April 21, 2020, which he amended with the court's permission on September 2, 2020. Medeiros, 638 F. Supp. 3d at 66. His petition set forth three broad arguments for federal habeas relief: that the SJC's decisions on (1) his insufficiency of the evidence argument, (2) his due process argument, and (3) his ineffective assistance of counsel arguments were each contrary to, and an unreasonable application of, the law and also based on an unreasonable determination of the facts. Ayala identified three elements of his counsel's performance that, in his view, it was unreasonable for the SJC to conclude were not deficient: counsel's failure to (1) "retain an expert on eyewitness identification," (2) "retain a firearms expert," and (3) "notice that he had not received [Perez's] psychological records."

The district court issued a writ of habeas corpus based on Ayala's argument that his counsel was ineffective for failing

to notice that Perez's records were incomplete. Id. at 46. The district court concluded that the SJC's decision that Ayala failed to show prejudice was both based on an unreasonable determination of the facts and amounted to an unreasonable application of the law. Id. at 66. First, the district court held that

> [t]he SJC's finding that "it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if counsel had them" is fundamentally flawed and does not support its factual finding as to the value of the psychological records.

Id. at 74. Second, the district court held that

> [t]he SJC's finding that "there was no evidence . . . contained within the missing records . . . that suggests that Perez's mental health struggles . . . affected his ability to perceive the defendant on the morning of the shooting" is contradicted by a wealth of evidence in the psychological records and, in light of that evidence, is patently unreasonable.

Id. at 72 (omissions in original). Finally, the district court held that

> [t]he state court's finding that "the substance of the missing records and proffered expert testimony was already presented to the jury" and "the additional records would not have added to the information already at trial counsel's disposal and used in cross-examination" is also unreasonable . . . .

Id.[8]

[8] Because we conclude that the district court erred in its federal habeas review of the SJC's prejudice determination under

This timely appeal followed.

II. Standard of Review

Strickland's test for ineffective assistance interacts with AEDPA's limitations on federal habeas review of state court decisions to create a "doubly deferential" lens through which both we and the district court must view the state court's decision. See Burt, 571 U.S. at 15.

This court is "effectively in the same position as the district court vis-à-vis the state court record and ha[s] the ability to review that record from the same vantage point" and thus reviews the district court's decision de novo. Pike v. Guarino, 492 F.3d 61, 68 (1st Cir. 2007). Here, although the district court determined that "extensive supplementation [of the SJC's recitation of the facts was] necessary," Medeiros, 638 F. Supp. 3d at 46, its supplementary facts were drawn entirely from the record before the state court, not from independent factfinding such as an evidentiary hearing. We review its decision de novo and give its reading of the state court record no deference.

AEDPA "demands that a federal habeas court measure a state court's decision on the merits against a series of 'peculiarly deferential standards.'" Porter v. Coyne-Fague, 35

Strickland and AEDPA, and that resolves this case, we do not consider other aspects of its decision.

F.4th 68, 74 (1st Cir. 2022) (quoting Cronin v. Comm'r of Prob., 783 F.3d 47, 50 (1st Cir. 2015)). Specifically, 28 U.S.C. § 2254(d) provides that "a writ of habeas corpus . . . shall not be granted . . . unless" the state court decision either

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

(Emphasis added.); see also Field, 37 F.4th at 16-17 (discussing this provision).

Subsection (d)(1) further divides into two clauses that address the state court's legal analysis. Subsection (d)(1)'s "'contrary to' clause applies when 'the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.'" Porter, 35 F.4th at 74 (alterations in original) (quoting Williams v. Taylor, 529 U.S. 362, 412-13 (2000)). The district court did not evaluate Ayala's habeas petition under this "contrary to" prong, nor does Ayala defend the writ on these "contrary to" grounds.

Subsection (d)(1)'s "unreasonable application" clause "applies when 'the state court identifies the correct governing

legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the [petitioner]'s case.'" Id. (first alteration in original) (quoting Williams, 529 U.S. at 413). "[T]he 'unreasonable application' clause applies 'if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no "fairminded disagreement" on the question.'" Id. at 75 (quoting White, 572 U.S. at 427). "[T]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Id. (internal quotation marks omitted) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

Relief under subsection (d)(2) requires "a showing that the state court decision 'was based on an unreasonable determination of the facts' on the record before that court." Id. (quoting 28 U.S.C. § 2254(d)(2)). "This demanding showing cannot be made when '"[r]easonable minds reviewing the record might disagree" about the finding in question.'" Id. (alteration in original) (quoting Brumfield v. Cain, 576 U.S. 305, 314 (2015)). And "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301 (2010).[9]

[9] AEDPA further provides that "a determination of a factual issue made by a State court shall be presumed to be correct

A. Ineffective Assistance of Counsel Standard Under Strickland Even Before Applying Deference to State Court

To succeed on an underlying Strickland claim of ineffective assistance of counsel in either state or federal court, Ayala "must show both deficient performance by counsel and resulting prejudice." Thompson v. United States, 64 F.4th 412, 421 (1st Cir. 2023) (internal quotation marks omitted) (quoting Tevlin v. Spencer, 621 F.3d 59, 66 (1st Cir. 2010)); see also Strickland, 466 U.S. at 687.

To establish deficient performance, Ayala must "establish that his 'counsel's representation fell below an objective standard of reasonableness.'" Thompson, 64 F.4th at 421 (internal quotation marks omitted) (quoting Tevlin, 621 F.3d at 66). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (quoting Strickland, 466 U.S. at 689).

To show prejudice, Ayala "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the

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[unless] rebutt[ed] . . . by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "The Supreme Court has carefully left . . . open" the question of how subsections (d)(2) and (e)(1) fit together, and "the question remains open in this circuit" as well. Porter, 35 F.4th at 79. As we explain below, we need not resolve the question to decide this case.

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (internal quotation marks omitted) (quoting Strickland, 466 U.S. at 694). "[S]how[ing] that the errors had some conceivable effect on the outcome of the proceeding" is insufficient; instead, Ayala must establish that the errors were "so serious as to [have] deprive[d] [him] of a fair trial, a trial whose result is reliable." Id. (quoting Strickland, 466 U.S. at 687, 693). "And if it turns out that the investigation would not have led to any information that counsel would have used at trial, then his dereliction can hardly have caused prejudice." Lang v. DeMoura, 15 F.4th 63, 69 (1st Cir. 2021).

B. Deferential Review Under AEDPA of Ineffective Assistance Claim

"Since an ineffective assistance of counsel claim is a mixed question of law and fact, [on habeas review] it is evaluated under the 'unreasonable application' clause of § 2254(d)." Ficco, 556 F.3d at 70 (citations omitted). "'Surmounting Strickland's high bar is never an easy task,' . . . [and] [e]stablishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult." Harrington, 562 U.S. at 105 (quoting Padilla v. Kentucky, 559 U.S. 356, 371 (2010)). "The standards created by Strickland and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly'

so." Id. (citations omitted) (first quoting both Strickland, 466 U.S. at 689, and Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997); and then quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)).

To satisfy the prejudice requirement under Strickland on a habeas petition governed by AEDPA, Ayala must show not just that "it is 'reasonably likely' the result would have been different," id. at 111 (quoting Strickland, 466 U.S. at 696), but also that it was unreasonable for the state court to conclude otherwise, cf. id. at 112; see also Smith v. Thompson, 329 Fed. App'x 291, 294 (1st Cir. 2009) ("[B]ecause this case reaches us on habeas review, we . . . evaluate . . . only whether the Appeals Court reached an unreasonable conclusion on the prejudice question."). We may grant habeas relief "if, and only if, . . . there could be no fairminded disagreement on the question." Porter, 35 F.4th at 75 (internal quotation marks omitted) (quoting White, 572 U.S. at 427).

III. Application of These Standards to SJC Decision

The district court held three of the SJC's factual findings regarding prejudice were unreasonable under subsection (d)(2).[10] First, the district court determined "[t]he SJC's finding that 'it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's

[10] The district court expressly declared two of the SJC's factual findings unreasonable. It called a third finding "fundamentally flawed", which we take to mean the district court considered the finding to fail under 28 U.S.C. § 2254(d)(2).

ability to perceive the shooter due to his PTSD diagnosis even if he had them' [was] fundamentally flawed . . . ." Medeiros, 638 F. Supp. 3d at 74.

Second, the district court held that "[t]he SJC's finding that 'there was no evidence . . . contained within the missing records . . . that suggests that Perez's mental health struggles . . . affected his ability to perceive the defendant on the morning of the shooting' . . . [was] patently unreasonable." Id. at 72 (first three omissions in original) (quoting Ayala, 112 N.E.3d at 256).

Third, the district court held that "[t]he state court's finding that 'the substance of the missing records and proffered expert testimony was already presented to the jury' and 'the additional records would not have added to the information already at trial counsel's disposal and used in cross-examination' [was] also unreasonable . . . ." Id.

Relying in large part on its conclusion that the SJC made what in its view were unreasonable factual determinations, the district court separately held that the SJC's decision was an unreasonable application of the law under subsection (d)(1).[11] Id.

[11] The district court separately discussed distinct rationales for granting relief under subsections (d)(1) and (d)(2). As discussed above, Ayala's ineffective assistance of counsel claim is a "mixed question of law and fact" which we "evaluate[] under the 'unreasonable application' clause of § 2254(d)." Ficco, 556 F.3d at 70. To the extent the reasonableness

at 75-77. We hold that (1) Ayala has not met his burden to show the SJC's factual determinations were unreasonable, no matter which standard applies, and (2) the SJC's decision was not an unreasonable application of the law.

A. The District Court Erred in Concluding That the SJC's Holding That Defense Counsel Would Not Have Used the Information in the Missing Records Was Unreasonable

The district court called "[t]he SJC's finding that 'it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if he had them' . . . fundamentally flawed." Id. at 74. The district court and Ayala on appeal argue that this finding by the SJC was unreasonable because trial counsel "could have used [these records] to explore the effect of Mr. Perez's PTSD symptoms on his percipient abilities and opened a fruitful area for expert testimony . . . ." Id.

Our careful review of the state trial records supports the SJC's conclusion and certainly precludes any finding the conclusion was unreasonable. First, Natasha Frazier's testimony and credibility -- not Perez's mental health and drug use -- was defense counsel's "primary trial strategy." Trial defense counsel testified that it was "a fair representation" to say that he did

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of the SJC's factual determinations bears on the reasonableness of its application of the law, we incorporate review of those determinations in our analysis under the unreasonable application clause as discussed below.

"not pursu[e] obtaining the mental health records . . . because [he was] focused on other aspects of the case that [he] deemed essential and more important." These choices were a reasonable trial strategy consistent with defense counsel's strategy that it was "tactically the correct thing not to attack [Perez] as a veteran with PTSD."

Furthermore, Ayala's trial counsel did not gloss over Perez's mental health struggles. In his cross-examination of Perez, Ayala's trial counsel established that Perez "went from unscheduled [as-needed counseling] appointments to [regularly] scheduled [counseling] appointments" after the shooting, "was hospitalized" for his mental health in the fall of 2007, "start[ed] taking . . . [prescription] drugs" to treat his mental health conditions "[a]fter October of 2007", was "diagnosed with borderline personality disorder and also bipolar disorder, mild manic after 2007," and "had a counseling session on June 11th" of 2007, the day after the shooting.

As the SJC found, counsel established these facts through questioning while also pursuing his general strategy of avoiding attacking Perez on account of his PTSD. It was reasonable for the SJC to conclude that this strategy would be undercut were defense counsel to probe into the individual sessions with

providers. That strategy was reasonable[12] and defense counsel's questioning was consistent with it. Even if it were accurate that defense counsel "could have used [these individual session records] to explore the effect of Mr. Perez's PTSD symptoms on his percipient abilities," id. at 74, that possibility is far from enough to make unreasonable the SJC's conclusion that defense counsel likely would not have done so.

It was not unreasonable for the SJC to conclude the absence of missing information that would not have been used at trial cannot have been prejudicial to Ayala. See, e.g., Lang, 15 F.4th at 69. Here, "fairminded" jurists and "reasonable minds" at best could disagree as to whether defense counsel would have used the records. Cf. Porter, 35 F.4th at 75 (first quoting White, 572 U.S. at 427 and then quoting Brumfield, 576 U.S. at 314). In such a circumstance, we cannot conclude that the SJC's application of the law was unreasonable under 28 U.S.C. § 2254(d)(1) nor can we say that the SJC's factual determinations were unreasonable under 28 U.S.C. § 2254(d)(2). For the same reason, Ayala has not shown the factual determinations to be erroneous "by clear and convincing

[12] As part of their analysis of the deficiency of defense counsel's performance, the district court and Ayala on appeal argue that defense counsel's failure to pursue the missing records during trial was not and could not be consistent with a strategic choice. Medeiros, 538 F. Supp. 3d at 69-71. That argument fails for the reasons stated above.

evidence." 28 U.S.C. § 2254(e)(1). AEDPA forbids the grant of habeas relief.

B. The District Court Erred in Finding Unreasonable the SJC's Conclusions that There Was No Evidence that Suggested Perez's PTSD or Drug Use Affected his Ability to Perceive the Defendant the Morning of the Shooting

The district court held that "[t]he SJC's finding that 'there was no evidence . . . contained within the missing records . . . that suggests that Perez's mental health struggles . . . affected his ability to perceive the defendant on the morning of the shooting' . . . [was] patently unreasonable." Medeiros, 638 F. Supp. 3d at 72 (first three omissions in original) (quoting Ayala, 112 N.E.3d at 256). According to the district court and Ayala on appeal, "[c]ounseling notes [in the missing records] describe how certain stimuli present on the night of Mr. Ramkissoon's shooting were either triggers for or associated with Mr. Perez's PTSD symptoms . . . ." Id. They argue that the SJC could not reasonably conclude there was no "suggest[ion]" in the records that Perez's mental health interfered with his ability to identify Ayala as the shooter. Id. We disagree.

The district court erred by focusing on the SJC's use of the single word "suggests" in this sentence. Our "highly deferential standard for evaluating state court rulings" requires that we read the SJC's opinion in such a way as to give its choice of language "the benefit of the doubt." Woodford v. Visciotti,

537 U.S. 19, 24 (2002); see also Bell v. Cone, 543 U.S. 447, 455 (2005) (per curiam) (applying this logic and reviewing the full context of a Tennessee Supreme Court decision to determine that the state court implicitly addressed an issue despite not explicitly saying it was doing so). We thus must examine the context in which the SJC used the word to determine what the SJC meant. The SJC's use of the word "suggests" that the district court found unreasonable appeared as part of the topic sentence of a paragraph in the SJC's opinion which reads, in full:

> Notably, there was no evidence -- either introduced at trial or contained within the missing records -- that suggests that Perez's mental health struggles or drug use affected his ability to perceive the defendant on the morning of the shooting. For example, a defense expert's proffered testimony only acknowledged that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]." Trial counsel argued this point specifically during closing, stating that Perez's diagnoses "are difficult illnesses and they may impact his ability to see and conceptualize what was actually happening." Additionally, although the missing records suggest that Perez was more dependent on marijuana than his testimony let on, there was no evidence that he was under the influence of marijuana on the morning of the shooting. The defendant's proffered expert on this point would not have materially added to the defense, as he was prepared only to testify that individuals have a reduced ability to accurately perceive reality and recall past events while under the influence of mind-altering substances. Because the substance of the missing records and proffered expert

> testimony was already presented to the jury, any error on the part of trial counsel in failing to notice the missing records was not likely to influence the jury's conclusion. The motion judge therefore did not err in denying the defendant's motion for a new trial.

Ayala, 112 N.E.3d at 256 (citations omitted).

Read in that context, it is clear the SJC used the phrase "no evidence . . . suggests" to mean "no evidence necessarily suggests." The district court's different reading would directly contradict the SJC's statement in the very next sentence that the defense's proffered expert would testify "that Perez's mental health struggles 'had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting].'" Id. This paragraph of the SJC's opinion read as a whole in fact concludes that no evidence in the records established with the necessary certainty that Perez's mental health struggles interfered with his ability to identify Ayala as the shooter. Even Dr. Hidalgo, whose affidavit was submitted in support of Ayala's new trial motion after he reviewed the missing records, merely stated no more than that Perez's conditions "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the events of June 10, 2007." (Emphasis added.) As to Perez's marijuana usage, Dr. Hidalgo stated only that "mind altering substances" like marijuana "in principle can reduce the ability to accurately perceive and recall past events."

(Emphasis added.) And defense counsel himself, during closing statements, repeatedly stressed that Perez's identification of Ayala as the shooter may have been mistaken.

Nothing in the missing records makes this conclusion by the SJC unreasonable. Ayala focuses on the missing records of Perez's counseling sessions after the shooting. Those missing records contain approximately ten entries after the shooting but before Ayala's trial in which counselors record Perez stating various versions of the fact that mouth injuries sometimes "triggered" Perez's PTSD and that seeing the victim's "shattered" teeth and "bloody mouth" as well as "attempt[ing] to provide mouth to mouth to [the murder victim] . . . retriggered" his PTSD at some point after the shooting, causing him to "flashback[]." These records undoubtedly show that Perez suffered from PTSD at some point after the shooting. Crucially, they do not render unreasonable the SJC's determination that there was no evidence that Perez was necessarily suffering from PTSD at the time of the shooting or at the time he identified the shooter.

Even if Perez's observation of Ramkissoon's injuries and attempt to provide mouth to mouth immediately retriggered Perez's PTSD, those potential triggers occurred after -- not while -- Perez observed the shooter. Perez's recollection was, as the SJC observed, "substantially corroborated at trial by the testimony of the first-floor bouncer." Id. at 243 n.4.

The district court omitted the phrase "or drug use" in declaring this conclusion by the SJC unreasonable. See Medeiros, 638 F. Supp. 3d at 72. On appeal Ayala argues that the SJC's determination that there was "no evidence . . . that Perez's . . . drug use affected his ability to perceive Ayala on the morning of the shooting," Ayala, 112 N.E.3d at 256 (emphasis added), was unreasonable because "Dr. Hidalgo stated that Perez's long history of heavy marijuana use reduced his 'ability to accurately perceive and recall past events . . . .'" This is an inaccurate characterization of Dr. Hidalgo's proffered testimony. The paragraph of Dr. Hidalgo's affidavit that Ayala quotes in his brief reads, in full, as follows:

> Mr. Perez has a long history of heavy marijuana use and there is no indication that at the time of the incident on June 10, 2007[,] he had reduced his marijuana use. Mind altering substances in principle can reduce the ability to accurately perceive reality and recall past events. For example, I have had patients who present to my clinic intoxicated with marijuana and who may say rude and inappropriate things at the time of their visit. In subsequent visits, when sober, they may not remember accurately the nature of their past inappropriate behavior.

(Emphasis added.) In other words, as the SJC found,

> [t]he defendant's proffered expert . . . was prepared only to testify that individuals have a reduced ability to accurately perceive reality and recall past events while under the influence of mind-altering substances.

Id. The SJC reasoned that the missing records and this proffered testimony did not necessarily suggest that Perez's drug use interfered with his ability to identify Ayala as the shooter because

> although the missing records suggested that Perez was more dependent on marijuana than his testimony let on, there was no evidence that he was under the influence of marijuana on the morning of the shooting.

Id. Nothing in the missing records makes this conclusion by the SJC unreasonable either.

At the least, "fairminded" jurists and "reasonable minds" could disagree, see Porter, 35 F.4th at 75, as to whether there was any evidence in the missing records "that suggests that Perez's mental health struggles or drug use affected his ability to perceive the defendant on the morning of the shooting," Ayala, 112 N.E.3d at 256. And so habeas relief is improper under AEDPA because the SJC's conclusion was not unreasonable under 28 U.S.C. § 2254(d)(1), nor were its factual determinations unreasonable under 28 U.S.C. § 2254(d)(2). For the same reason, Ayala has not shown the factual determinations to be erroneous "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). AEDPA makes habeas relief inappropriate.

C. The District Court Erred in Finding Unreasonable the SJC's Conclusions that the Substance Contained in the Missing Records was Already Presented to the Jury

The district court also concluded that it was unreasonable for the SJC to conclude that "'the substance of the missing records and proffered expert testimony was already presented to the jury' and 'the additional records would not have added to the information already at trial counsel's disposal and used in cross-examination . . . .'" Medeiros, 638 F. Supp. 3d at 72.

The SJC reasonably determined that the key elements of Ayala's argument were presented to the jury. Much of the evidence in the missing records is consistent with and cumulative of the evidence the jury heard at trial. Cumulative evidence generally "offer[s] an insignificant benefit, if any at all" for purposes of a Strickland claim. Wong v. Belmontes, 558 U.S. 15, 23 (2009). To the extent the missing records were cumulative of evidence heard at trial, the SJC's conclusion that the records' absence did not cause Ayala prejudice was not unreasonable. Cf. United States v. Abdelaziz, 68 F.4th 1, 71 (1st Cir. 2023) (explaining, in context of harmless error review, that exclusion of evidence likely did not affect result because similar evidence was already before jury); Stephens v. Hall, 294 F.3d 210, 225-26 (1st Cir. 2002) (concluding that state court's decision that failure to offer impeachment evidence did not prejudice defendant was not

objectively unreasonable where the evidence arguably "added nothing new"). The district court identified two ways in which it concluded the missing records contained information that was not otherwise available to the jury. We address each in turn.

1. Purported Discrepancies Between the Missing Records and Perez's Testimony

The district court and Ayala on appeal argue that, on their reading of the record, the SJC's conclusion must be unreasonable because the counseling session notes contradict Perez's testimony that at the time of the shooting "his PTSD was 'under control'; that for him, '[i]t's just basically . . . remembering a bad time' and he 'had done the steps that [he] needed to do to get [him]self better' and the effect it had on him at the time of Mr. Ramkissoon's shooting was 'minimal.'" Medeiros, 638 F. Supp. 3d at 73 (alterations and omissions in original). That the shooting itself may have triggered in its aftermath more intense PTSD does not necessarily contradict this testimony.

Beyond this, "where [as here] the relevant error is failure to impeach a government witness, we begin [the prejudice analysis] by assessing the strength of the prosecution's case, and the effectiveness of the defense absent the impeachment evidence." Malone v. Clarke, 536 F.3d 54, 64 (1st Cir. 2008) (internal quotation marks omitted) (quoting Stephens, 294 F.3d at 218). With that context in mind, we must "then consider the potential

impeachment value of the evidence in undermining the credibility of the witness's testimony." Id. (internal quotation marks omitted) (quoting Stephens, 294 F.3d at 218).

As to the strength of the prosecution's evidence, the SJC characterized that evidence as strong enough to support a conviction even without Perez's eyewitness testimony, and Ayala develops no argument on appeal that that conclusion was unreasonable:

> The Commonwealth also presented circumstantial evidence linking the defendant to the shooting. For example, prior to the shooting, the defendant arrived at the party and refused to be searched. He was visibly upset that there was a party taking place at the house, and after being kicked out, he threatened to come back to the party and "light the place up." Soon after, he returned and kicked in the first-floor door with such force that he left a footprint on the door. Additionally, the defendant was seen pacing around on the street in front of the house just a few minutes before Perez and Ramkissoon left the party and the shooting took place. From this evidence, the jury could have reasonably inferred that the defendant did not want to be searched on the morning of June 10 because he was carrying a gun, that he was still near the house when the shooting occurred, and that his anger about the party motivated him to shoot Ramkissoon as he crossed the street. This evidence, when taken together, "formed a mosaic of evidence such that the jury could conclude, beyond a reasonable doubt, that the defendant was the shooter[.]"

Ayala, 112 N.E.3d at 246 (cleaned up) (quoting Commonwealth v. Jones, 77 N.E.3d 278, 289 (Mass. 2017)).

Nor does Ayala account for the strategic decision not to increase the jury's sympathy for a veteran with honorable service by dwelling too much on the particulars of Perez's after-the-event PTSD, nor for counsel's strategic decision to address Perez as an honest witness who made a mistake as to identification in the stress and shock of the event. There is no difference between the effectiveness of the defense with or without the missing records if, as the SJC found, "it is unlikely that trial counsel would have used the information in the missing records to further attack Perez's ability to perceive the shooter due to his PTSD diagnosis even if counsel had them." Id. at 255 n.21.

Further, reasonable minds could read the missing records as consistent with Perez's trial testimony. See Porter, 35 F.4th at 75. Beginning in mid-2003, Perez's treatment providers were often annotating Perez's counseling notes with "P.R.N.," a medical abbreviation for pro re nata which meant Perez's therapist expected to see him only as needed. See PRN, Stedman's Medical Dictionary (2014). On June 10, 2007, when Ramkissoon was killed, Perez had not requested a session with his therapist since February 2007, four months earlier, and had apparently not mentioned his PTSD symptoms in therapy since August 2005, almost two years earlier.

In fact, Perez screened negative for PTSD during a medical visit at the VA Medical Center on September 8, 2006.[13]

2. Availability of Expert Testimony

The district court misread the record when it concluded the SJC was unreasonable to conclude that the substance of the proffered expert testimony was before the jury. According to the district court, "the SJC relied on trial counsel's closing argument as an adequate substitute for expert psychiatric evidence." Medeiros, 638 F. Supp. 3d at 73.

To the contrary, the SJC did not hold that trial counsel's closing argument was "an adequate substitute for expert psychiatric evidence." Id. Rather, the SJC recognized that the specific point that Ayala proffered an expert to make -- that Perez's mental health struggles "had the potential to and may have interfered with Mr. Perez's abilities to accurately perceive or recollect the [shooting]" -- was already before the jury and had been highlighted in trial counsel's closing argument. Ayala, 112 N.E.3d at 256 (alteration in original).

Ayala and the district court state that Ayala was prejudiced because "[d]efense counsel could not effectively argue

[13] Because a reasonable person could read these records as supporting -- rather than calling into question -- Perez's testimony about his management of his mental health conditions, they also support the reasonableness of the SJC's finding that defense counsel likely would not have used them.

for expert psychological testimony . . . without the missing psychological records . . . ." Medeiros, 638 F. Supp. 3d at 53. However, it is reasonable to conclude that the trial court would not have allowed his motion for funds for expert testimony even if he had possessed the full set of records at the time of trial. At trial, defense counsel sought to offer Dr. Ebert's opinion "that anyone who suffered from a bipolar situation that was manic in its nature, that was not on medication, would be adversely affected in their ability to either perceive or encounter and recounter events that would occur." In addressing defense counsel's motion for funds to offer that expert testimony at trial, the court stated its view that "the psychiatrist, without being totally speculative, [was not] going to be able to testify how [Perez] acted on that night when [the doctor] wasn't there . . . ." The court eventually denied that motion for funds because "there's no foundation laid that he was suffering from that disease on that day."

It is certainly possible, as the SJC must have concluded, that the missing records would not have changed the trial court's perspective on these issues at all. This is particularly so given the SJC's finding that there was no evidence that Perez was necessarily suffering from PTSD at the time of the shooting or at the time he identified the shooter, meaning the SJC concluded that these records would not have laid the necessary foundation for

expert testimony. And even with the missing records, the psychiatrist's opinion about what happened on the night of the shooting would still have been "speculative," as the missing records do not change the fact that "[the doctor] wasn't there" on the night of the shooting, nor do they describe with certainty exactly when Perez's PTSD symptoms began. Even if it were possible that the missing records could have made the proposed expert testimony seem less speculative to the trial judge and offered defense counsel a stronger argument that there was a "foundation laid that he" was possibly suffering from PTSD on the day in question, that possibility is far from enough to justify habeas relief. Even accounting for those possibilities, Ayala has shown, at most, that "fairminded" jurists and "reasonable minds" could disagree. See Porter, 35 F.4th at 75. And so habeas relief is improper under AEDPA.

The SJC also stated that the "defense expert's proffered testimony only acknowledged that Perez's mental health struggles 'had the potential to and may have interfered with [his percipient abilities],'" Ayala, 112 N.E.3d at 256 (emphasis added), not that there was any certainty of interference. That theme of potential interference was certainly before the jury. Habeas relief under AEDPA is improper. See Porter, 35 F.4th at 75.

IV. Conclusion

Under AEDPA and Strickland's doubly deferential standard, we conclude that the district court erred in granting relief. We vacate and order that Ayala's petition for a writ of habeas corpus on his ineffective assistance of counsel claim for failure to notice the missing records be denied.

22-1924 Ayala v. Alves "Court Order"

1 message

CA01NoticeDocketActivity@ca1.uscourts.gov <CA01NoticeDocketActivity@ca1.uscourts.gov> Wed, Dec 13, 2023 at 9:29 AM
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United States Court of Appeals for the First Circuit

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Case Name:	Ayala v. Alves
Case Number:	22-1924
Document(s):	Document(s)

Docket Text:
ORDER entered by David J. Barron, Chief Appellate Judge; Bruce M. Selya, Appellate Judge; Sandra L. Lynch, Appellate Judge; William J. Kayatta, Jr., Appellate Judge; Gustavo A. Gelpí, Jr., Appellate Judge; Lara E. Montecalvo, Appellate Judge and Julie Rikelman, Appellate Judge. Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied. [22-1924] (GB)

Notice will be electronically mailed to:

Maria Granik
Janet Hetherwick Pumphrey
Gabriel Thomas Thornton

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