COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY

DOCKET NO. DAR _____

APPEALS COURT
DOCKET NO. 2021-P-0824

COMMONWEALTH

V.

ALEXIS MIDDLETON

APPLICATION FOR DIRECT APPELLATE REVIEW

EDWARD B. GAFFNEY

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DEFENDANT

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REQUEST FOR DIRECT APPELLATE REVIEW, AND WHY SUCH REVIEW IS APPROPRIATE

Now comes the defendant, Alexis Middleton,[1] and hereby requests direct appellate review of the denial of his motion for new trial. As set forth more specifically herein, direct appellate review of this case is appropriate because it presents the following novel question of law:

Where the Commonwealth withheld exculpatory evidence which would have had a profound influence on the jury by casting doubt on the reliability of the DNA testing which identified the defendant as the perpetrator, may a judge rely on the failure of the defendant to conduct independent DNA testing (to establish his innocence) to deny the defendant's motion for new trial?

Direct appellate review is also in the public interest because the Commonwealth withheld the following exculpatory evidence:

- **Hilary Griffiths, a state crime lab DNA analyst *who did exemplar work on samples provided by the***

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[1] The defendant has changed his name to Jamal Farrar. To minimize confusion, references to the defendant's name will remain consistent with the trial record.

defendant and his co-defendant, and who generated critical evidence implicating the defendant, **had been suspended from handling evidence at the crime lab for errors made during the time she worked on the defendant's case, in part for mixing up samples;**

- According to Griffiths's supervisors, *during the time she worked on the defendant's case, she was "not able to perform her job functions," specifically, she was* "not capable of performing day to day exemplar work;"

- Griffiths made numerous unreported errors during the time she worked on the defendant's case;

- Years after her work on the defendant's case, Griffiths sent an email to a supervisor in which she wrote, "I thought we weren't supposed to be hiding data any more."

STATEMENT OF PRIOR PROCEEDINGS

On March 23, 2005, the Norfolk County Grand Jury returned indictments against the defendant and his co-defendant, Donnell Nicholson ("Nicholson"), charging them with home invasion (charge 1), aggravated rape (charge 2), armed assault in a dwelling (charge 3), four counts of kidnapping (charges 4-7), two counts of

indecent assault and battery on a person 14 years or older (charges 8-9), two counts of intimidating a witness (charges 10-11), and four counts of assault and battery with a dangerous weapon (charges 12-15). On March 3, 2008, the Commonwealth nol prossed charge 11.

After a six-day jury trial (Sanders, J., presiding) that ended March 10, 2008, the defendant was found guilty on charges 1-9 and 12-15. (The judge allowed the defendant's motion for a required finding of not guilty on charge 10.) On March 14, 2008, the defendant was sentenced as follows: on charges 1 and 3, to concurrent terms of 20-25 years; on charges 5-7 and 13-15, to concurrent terms of 9-10 years to run concurrent with the sentences on charges 1 and 3; and on charges 8 and 9, to concurrent terms of 4-5 years, to run concurrent with the sentences on charges 1 and 3. On charge 2, the defendant was sentenced to 5-7 years, to run on and after the sentences on charges 1 and 3. And on charges 4 and 12, the defendant was sentenced to concurrent 3-year probationary terms, to run after the expiration of his sentences of incarceration.

In his direct appeal, the defendant raised issues that focused on the expert testimony of Cailin Lally Drugan. Drugan was the supervisor of the DNA analyst (Rachel Chow) who wrote the report that identified the defendant as the perpetrator of the rape. Drugan's opinion (that the defendant's DNA matched the DNA found in sperm cells taken from the rape victim's mouth) was based on Chow's report.[2] Chow did not testify.

In October, 2011, the Appeals Court upheld the defendant's convictions in a memorandum and order pursuant to Rule 1:28.

On September 3, 2019, the defendant filed a motion for new trial ("MNT"),[3] raising two issues: 1) that during jury selection, the trial judge failed to properly adhere to the requirements of *Commonwealth v. Soares*, 377 Mass. 461 (1979) and *Batson v. Kentucky*, 476 U.S. 79 (1986), and 2) that the Commonwealth failed to disclose exculpatory evidence in violation

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[2] Chow's report was based in part on the work of another DNA analyst, named Hilary Griffiths. Griffiths did not testify. See *infra*.

[3] The MNT was supported by the defendant's own affidavit, as well as affidavits from the defendant's current attorney, the defendant's trial attorney, and Nicholson's trial attorney.

of its obligations under Massachusetts common law and *Brady v. Maryland*, 373 U.S. 83 (1963).

During the litigation of the MNT, the Commonwealth provided discovery material ("the post-trial discovery") to the defendant. Based on certain portions of the post-trial discovery, the defendant filed a revised motion for new trial, supported by revised affidavits from his current attorney, from his trial attorney, from the attorney who represented him for several months before the trial, and from Nicholson's trial attorney.

After two non-evidentiary hearings, on August 26, 2021, the court issued a memorandum of decision, denying the MNT.[4] The defendant thereafter filed a notice of appeal. The case was entered in the Appeals Court on September 17, 2021.

SHORT STATEMENT OF FACTS

A. Jury Selection

The defendant is Muslim (and he was Muslim at the time of trial). Both he and Nicholson are African

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[4] The court's decision is appended hereto. Also appended are those pages of the Commonwealth's June, 2021 memorandum in opposition to the defendant's MNT, which were relied on by the court in its decision. The court's decision is cited hereinafter as "Dec. at [page number]."

American, and all four victims were white. Jury selection took place over two days. On day one, there were two African Americans and one other person of color in the 75-person jury pool. After asking questions of the pool en masse, the court called jurors up one at a time to ask about the interracial component of the case and the nature of the crimes alleged, after which the parties were given the opportunity to challenge for cause or to exercise peremptory challenges. The first African American person called was not challenged by the Commonwealth, but the defendant used a peremptory challenge. The second African American called was seated. The final person called on the first day was the other person of color, whose name was Sayed Rahman. The Commonwealth used a peremptory challenge on him. The defendant objected, and the court overruled the objection. The judge's ruling was based on her decision that there was no pattern of discrimination solely because the Commonwealth used only one of three opportunities to exercise a peremptory challenge on a person of color.

On the second day of empanelment, there were three individuals identified as African Americans in

the jury pool. (The total number in the pool was not put on the record. By the time jury selection was complete, 34 people had been called for individual questioning on the second day of trial.) The first African American called was dismissed by the judge on the basis of financial hardship. The defendant objected, and the objection was overruled. The second African American (Osman Baana) was called when there was only one more seat left to fill on the jury. The Commonwealth exercised a peremptory challenge. The defendant objected, and the judge overruled the objection, again basing her decision on grounds that there was no pattern of discrimination. The judge explained that she made this determination because: 1) there was a person of color already on the jury, 2) the defendant had exercised a peremptory challenge on one of the two African Americans in the jury pool on day one, and 3) the Commonwealth only challenged one African American.

B. The Commonwealth's Case

1. The Home Invasion

The incidents underlying the charges in this case took place late in the evening of January 11 and in

the early morning hours of January 12, 2005. At approximately midnight, S.M.[5], M.N., K.P., and A.M. entered S.M.'s house. They were immediately confronted by two men who were already in the house, masked and armed with guns. Over the course of the next hour, the assailants demanded money and drugs from the four victims, threatened to kill them, and physically assaulted them in the following manner:

- M.N. was hit in the head with a gun (so severely that he required stitches);

- S.M. was repeatedly and forcefully prodded with the end of a gun, and later repeatedly hit on the head and shoulders by an acoustic guitar with enough force that the guitar was smashed to pieces, leaving him with multiple bruises, cuts and a black eye;

- K.P. and A.M. were prodded in the buttocks by the ends of guns;

- A.M. was forced to perform oral sex on one of the attackers (he ejaculated in her mouth); and

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[5] Because of the nature of certain of the crimes in this case, the victims are referred to herein by initials, only.

- all four victims were forced to take off their clothes, after which the attackers tied their hands behind their backs with speaker wire.

None of the victims could identify the attackers because they were masked. However, a woman named Tia (a mutual acquaintance of the defendant, Nicholson, and S.M.) testified that on the day of the attack, she was in a car with the defendant and Nicholson. There was a handgun in the car. During the car ride, Nicholson also procured a shotgun and bulletproof vest, and then he and the defendant slowly drove past S.M.'s house, observing it. They discussed robbing S.M. of money and marijuana, and contemplated robbing it right then. At one point, Nicholson asked Tia if she would be willing to be their driver. But Tia insisted that they take her to her uncle's house (where she lived), because she wanted nothing to do with a robbery. That night, during the robbery, Tia received a call from Nicholson complaining that there was neither money nor drugs at S.M.'s house. Later that night, Nicholson called Tia again. She asked if during the robbery anything had happened to a girl, and Nicholson laughed, saying that it wasn't him.

2. The DNA Evidence

Cailin Lally Drugan, a DNA analyst from the Massachusetts State Police Crime Lab ("Crime Lab") testified as an expert witness. Drugan described her experience, credentials, and duties as a DNA analyst and a supervisor. She also described the Crime Lab's accreditation, and then explained the quality controls in effect at the Crime Lab with respect to DNA analysts' work (which, as she testified, was "scrutinized at every step of the way").

Although Drugan didn't do any work on the defendant's case, based on documents she reviewed, she described the work done by the two Crime Lab DNA analysts who did -- Hilary Griffiths and Rachel Chow.[6] Griffiths examined a blood sample from A.M., a saliva sample from the defendant, and a saliva sample from Nicholson, and then generated DNA profiles for all three exemplars. Then Chow created a DNA profile of the sperm cell fraction of cellular material found in an oral swab from A.M., and compared it to the DNA profiles of the defendant and Nicholson which had been

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[6] On appeal, the defendant claimed that much of Drugan's testimony was inadmissible hearsay. The Appeals Court rejected the argument.

created by Griffiths. Chow then wrote a report that concluded that the defendant was the overwhelmingly likely source of the DNA found in the sperm cells obtained from A.M.'s oral swab. Drugan used Chow's report as the basis for her opinion that the defendant was the overwhelmingly likely source of the DNA found in the sperm cells obtained from A.M.'s oral swab.

C. Withheld Exculpatory Evidence

Years after the trial, as a result of public record requests and discovery ordered by the trial court in connection with the MNT, the defendant first learned of the following exculpatory evidence:

1. Griffiths

In July, 2006, Griffiths was suspended from handling evidence in the Crime Lab as a result of "DNA discrepancies [she] processed" during the time in which she processed the defendant's and Nicholson's saliva samples. ***The "problematic issues" that led to Griffiths's suspension included sample mixups***. And in the corrective action plan implemented as a result of Griffiths's suspension, Griffiths was to "***[e]mploy specific safeguards to avoid mislabeling, sample switching*** and transcriptional errors."

In 2008, two Crime Lab supervisors[7] made statements about Griffiths that included the following:

- ***During the time Griffiths was working on the defendant's case, she was not able to properly perform her job functions***;

- ***Griffiths*** "was assigned to the Exemplar Group which runs DNA standards but she ***'was not capable of performing' day to day exemplar work until shortly before June 3, 2008;***"[8]

- One of the Crime Lab supervisors and other co-workers had created projects for Griffiths to do in place of job functions that would normally be required of Crime Lab employees assigned to her position because Griffith's was "not a typical analyst" but she was "helpful in other ways;" and

- During a period of months that encompassed the time Griffiths was working on the defendant's case, a

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[7] The statements were made by Kristin Sullivan (who was Griffith's supervisor from 2006 through 2008) and Robert Martin (who was Sullivan's supervisor in 2008).

[8] The work Griffiths performed on the defendant's case was exemplar work -- generating DNA profiles from the exemplars provided by the defendant, Nicholson, and A.M.

supervisor was having Griffiths watch the supervisor's children while working.

And also in 2008, Griffiths reported that during the time period in which she worked on the defendant's case, she made several unreported mistakes in her work at the Crime Lab.

Finally, on April 10, 2013, Griffiths sent a series of three emails to other Crime Lab employees which contained statements implying that Griffiths (and others at the Crime Lab) had hidden Crime Lab data in the past. In the first email, Griffiths wrote, "What is our responsibility as far as not hiding data?" In the second email, she wrote, "I was really flipping out about hiding the fact that I tested them ... I hate that I can't explain why they aren't reported." And in the third email, she wrote, "[A supervisor] wanted me to hide the results from the first time and not acknowledge that they were run anywhere in the file. I didn't think that was right because ***I thought <u>we</u> weren't supposed to be hiding data anymore.***" (Emphasis added.)

2. Chow

In September, 2006, months after her work on the defendant's case, Chow was suspended from handling evidence in the Crime Lab. The memo suspending Chow cited sample mixups and transcription errors as some of her "problematic issues." And although the memorandum states that "DNA testing discrepancies" in Chow's work had taken place starting in June, 2006 (months after Chow had completed her work in the defendant's case), Chow disputed this, stating in 2007 that "[t]he problematic issue of sample mix-ups was brought to my supervisor's attention in March, 2006." (Chow worked on the defendant's case from December, 2005, through March, 2006.)

3. The Crime Lab

Years after the trial, the defendant obtained a copy of an audit of the Crime Lab. This audit raised several issues with the Crime Lab, including "a lack or misuse of corrective actions" which "have resulted in numerous problems," and a lack of "regular, objective audits and reviews." It described the DNA unit as one where "supervisors are not consistent with their interpretations of DNA reports and protocols ...

[and] have given several inconsistent answers to the same protocol or report issues," leaving employees "confused and unsure about the 'correct' procedure or report ... which can lead to continued variants and deviations." It also contained negative commentary on certain procedures of the Crime Lab, including internal criticism of the type of training that Chow and Griffiths were provided with. (Chow and Griffiths were hired in March, 2005, and undertook the criticized training until November, 2005. Chow began work on the defendant's case in December, 2005. Griffiths probably began her work on the defendant's case either in November or December, 2005.) In sum, as the court noted in its order allowing the defendant's motion for discovery, the audit "called into question certain practices at the Crime Lab, stating flatly at one point that the 'current quality management system is badly broken.'"

ISSUES OF LAW

I) WHETHER THE TRIAL JUDGE ABUSED HER DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL WHERE THE COMMONWEALTH WITHHELD EXCULPATORY EVIDENCE WHICH WOULD HAVE HAD A SIGNIFICANT INFLUENCE ON THE JURY BY CASTING DOUBT ON THE DNA EVIDENCE IMPLICATING THE DEFENDANT, WHERE THE CASE AGAINST THE DEFENDANT WITHOUT THE DNA EVIDENCE WAS NOT STRONG, WHERE THE JUDGE USED THE WRONG STANDARD OF REVIEW IN HER DECISION, AND WHERE THE JUDGE RELIED ON THE DEFENDANT'S FAILURE TO CONDUCT INDEPENDENT DNA ANALYSIS TO PROVE HIS INNOCENCE.

II) WHETHER THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHERE HE FAILED TO ARGUE THAT THE THE JUDGE DID NOT PROPERLY ADHERE TO THE HOLDINGS OF *BATSON V KENTUCKY*, 476 U.S. 79 (1986), AND *COMMONWEALTH V. SOARES*, 377 MASS. 461 (1979) DURING JURY SELECTION.

ARGUMENT

I) THE EXCULPATORY EVIDENCE ISSUES

A. The wrong standard of review

In its ruling, the trial court made clear that by failing to provide the defendant with the information about Griffiths and Chow's poor work performance at the Crime Lab, the Commonwealth withheld exculpatory evidence specifically requested by the defendant. Dec. at 11-12. The court then applied the federal test to determine whether, had the withheld evidence been disclosed, there is a reasonable probability that the result of the trial would have been different. Dec. at 12. This was error.

Massachusetts does not follow federal law in cases where the Commonwealth withholds evidence after a specific request by the defendant. *Commonwealth v. Gallarelli*, 399 Mass. 17, 21 n.5 (1987). The test that the trial court should have applied was whether the undisclosed evidence "might have affected the outcome of the trial." *Commonwealth v. Tucceri*, 412 Mass. 401, 405 (1992), quoting *U.S. v. Agurs*, 427 U.S. 97, 104. Further,

> [w]hen a prosecutor receives a specific and relevant request [for exculpatory evidence],

> the failure to make any response is seldom, if ever, excusable. ... In such cases ... "the reviewing judge must set aside the verdict and judgment unless h[er] 'conviction is sure that the error did not influence the jury, or had but very slight effect.'"

Commonwealth v. Ellison, 376 Mass. 1, 24-25 (1978), quoting *Agurs*, *supra*, at 106, 112.

If the appropriate test had been applied to this case, the defendant's MNT should have been allowed. This is because the evidence identifying the defendant as one of the two assailants was provided only by Drugan's testimony (which was based, in significant part, on exemplar work done by Griffiths), and by the testimony of Tia as to the conversation that took place several hours before the attack.

But Tia's credibility was severely undercut by the following: she gave the police multiple versions of the events of the day and night of the attack, she used multiple names, she was a prostitute, she smoked marijuana daily, she testified that she and Nicholson spoke by a Nextel "walkie-talkie" device during the assault (despite the fact that K.P. heard an attacker's phone conversation during the attack and heard a male voice on the other end of the call),

portions of her trial testimony were different from her grand jury testimony, and she lied when she said that she had taken care of an outstanding warrant.

Further, the evidence from Tia (whose credibility was seriously undermined by the above-described impeachment) which related to the defendant was limited to the conversation she said she witnessed hours before the attack -- weak, circumstantial evidence that the defendant was one of the assailants.

The Commonwealth was well aware of the importance of the DNA evidence implicating the defendant, forcefully arguing in its closing that it conclusively identified him. See *McCambridge v. Hall*, 266 F. 3d 12 (1st. Cir. 2001) (closing argument reviewed to assess importance of wrongly withheld evidence).

But if the defendant had had access to the withheld evidence, the Commonwealth's case against him would have been dramatically weakened. See *U.S. v. Martinez-Medina*, 279 F. 3d 105, 106 (1st Cir. 2002) (confidence in the outcome of a trial is particularly doubtful when the withheld evidence impeaches a witness whose testimony is uncorroborated and essential to the conviction). In fact, if the withheld

evidence had been made available to the defendant before trial, the jury would have been presented with more reasons to distrust the Crime Lab's work on the defendant's case than to trust it. ***Not only was a DNA analyst who was acknowledged by supervisors to not be able to perform her job kept in her job for years, but the very job she couldn't perform (exemplar work) was what she did on the defendant's case.*** And not only were supervisors complicit in staffing the Crime Lab with at least one DNA analyst who couldn't perform her job, one supervisor was complicit in failing to report the errors committed by the incompetent DNA analyst.

This stunning evidence of ineptitude and unreliability -- not only of Griffiths, but of her supervisors -- would have made the Commonwealth's burden at trial insurmountable. The foundation of their case against the defendant was DNA evidence. But this evidence was critically dependent on Griffiths's exemplar work, which, according to her supervisors, she could not perform. Therefore the prosecutor would have had to convince the jury that they should conclude, "to the highest degree of certainty possible in human affairs" that the defendant was guilty

because Griffiths ***did*** perform the exemplar work in this case properly, and did not switch the samples of the defendant and Nicholson, despite the fact that her supervisors stated she could ***not*** perform exemplar work properly, and suspended her in part for switching samples. And of course any assurance that had been intended to be created by Drugan's testimony that analysts' work was "scrutinized at every step of the way" would have been thoroughly discredited. The withheld evidence demonstrates that the so-called scrutiny provided to Griffiths's work by her supervisors resulted in Griffiths being kept in a job she couldn't perform, and in a supervisor's complicity in Griffiths's failure to report her mistakes.

This thorough and dramatic impeachment of Drugan's testimony would have provided powerful support for an argument that the defendant was entitled to be acquitted, and conclusively demonstrates that if the Commonwealth had not withheld the above-described exculpatory evidence, such evidence "might have affected the outcome of the trial." *Tucceri*, *supra*.

B. The "Telling" Failure of the Defendant to Conduct Independent DNA Testing to Prove His Innocence

The crux of the defendant's argument was that Griffiths's suspension for sample mixups and mislabeling, her supervisors' opinions that she was incapable of performing exemplar work, and her multiple unreported mistakes all constituted evidence from which one could infer that the DNA testing (exemplar work) Griffiths conducted in this case was unreliable. And the failure to disclose this evidence was prejudicial, at least in part, because without it, the defendant did not have a foundation for cross-examining Drugan "as to the risk of [the defendant's and Nicholson's DNA samples] being mishandled or mislabeled." *Commonwealth v. Barbosa*, 457 Mass. 773, 791 (2010).

But for reasons passing understanding, the motion judge appeared to believe that such argument compelled the defendant to present to her independent DNA testing to prove that Griffiths's test results were wrong. According to the court, absent such test, for the court to draw an inference that Griffiths's work was unreliable would require it "to engage in factually unsupportable speculation." Dec. at 13.

But when bringing a motion for new trial on grounds that the Commonwealth withheld exculpatory evidence, a defendant is not required to provide evidence to the motion judge that he is innocent. Cf. *Commonwealth v. Rosario*, 477 Mass. 69, 81 (2017). The focus is on what impact the *withheld* evidence would have had on the ***jury***, not what impact the absence of *other* evidence has on the judge, and on her personal assessment of the trial record. The motion judge is to determine whether the withheld evidence would have played an important role in the jury's deliberations and conclusions, so as to preserve the defendant's right to the judgment of his peers. *Commonwealth v. Cowels*, 470 Mass. 607, 623 (2015); Commonwealth v. Tucceri, *supra* at 411. The motion judge's failure to do this was error.

II) THE JURY SELECTION ISSUES

Batson v. Kentucky, 476 U.S. 79 (1986) and *Commonwealth v. Soares*, 377 Mass. 461 (1979), hold that the equal protection clause of the U.S. Constitution and art. 12 of the Massachusetts Declaration of Rights are violated when the Commonwealth misuses peremptory challenges "to exclude

jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community." *Soares*, *supra*, at 486. If a defendant objects to a peremptory challenge on grounds that it violates such constitutional provisions, the court must determine whether the "totality of the relevant facts gives rise to an inference of [a] discriminatory purpose" in the challenge. *Commonwealth v. Sanchez*, 485 Mass. 491, 511 (2019). This is a minimal burden, and the objecting party need not show much to satisfy it. *Id.* at 510.

The defendant is an African American, and a Muslim.[9] On day one of jury selection, there were two African Americans and one other person of color in the 74-person jury pool. Each member of the pool was questioned individually. The defendant exercised a peremptory challenge to one African American. The second African American was seated. The final person called on day one was an Arab-American person of color, Sayed Rahman. The Commonwealth used a

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[9] There is no indication that the judge or any of the trial attorneys were aware at trial of the defendant's religion. At the time, the defendant did not know his religion might be relevant to protecting his constitutional rights during jury selection.

peremptory challenge to prevent him from becoming a member of the jury. The defendant's attorney objected, saying, "I would just ask for -- he's a person of color. I would just ask for some kind of race neutral explanation, that's all."

The court overruled the objection, saying, "I think I have to ask only if there's a pattern here, and there's absolutely no pattern since [the prosecutor] did not exercise a peremptory as to either black person on the jury. So I'm not going to ask her to give a reason."

This was error, because the judge did not need to find a pattern of discrimination,[10] as Mr. Rahman was the only Arab-American (and presumably the only Muslim) in the jury pool that day. *Commonwealth v. Harris*, 409 Mass. 461, 465 (1991); *Commonwealth v. Maldonado*, 439 Mass. 460, 463 n. 3 (2003).

The judge further erred by determining that the Commonwealth's actions with respect to the African Americans on the panel were relevant to Mr. Rahman, who was of a different race/ethnicity. *Commonwealth v.*

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[10] The "pattern of discrimination" language in *Soares* was retired by this court in *Sanchez*, because it has led to kind of confusion and erroneous rulings demonstrated by this case. *Sanchez*, *supra* at 510-511.

Sanchez, 79 Mass. App. Ct. 189 (2011); *Commonwealth v. Prunty*, 462 Mass. 295, 307 n. 17 (2012).

And finally, the judge failed to take into account *any* of the required factors when determining whether the Commonwealth's challenge to Mr. Rahman raised an inference of a discriminatory purpose. See *Sanchez*, *supra* at 512-513; *Batson supra* at 96.

The judge repeated her error, and magnified it, on day two, when she overruled the defendant's objection to the Commonwealth's challenge to Osman Baana, the second of two African Americans questioned that day. Again, the judge wrongly based her decision on whether a pattern of discrimination existed. And this error was especially significant because of the interracial sexual aspect of the crime, and because the judge's ruling "reduc[ed] the participation of black jurors in the case to virtual 'impotence.'" *Commonwealth v. Matthews*, 31 Mass. App. Ct. 564, 570 (1991), citing *Soares*, 377 Mass. at 488 n.32.

The failure of the defendant's appellate attorney to raise this issue constituted ineffective assistance of counsel. *Commonwealth v. Aspen*, 85 Mass. App. Ct. 278, 285 (2014).

Respectfully Submitted,

Alexis Middleton
by his attorney

/s/ Edward B. Gaffney

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date signed: October 1, 2021

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 16(K) OF THE MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Edward B. Gaffney, Esq., hereby certify that the foregoing application for direct appellate review complies with the rules of the court that pertain to the filing of such applications, including, but not limited to:

Mass. R. A. P. 20(a).

Compliance with the applicable length limit of Rule 11 was achieved by filing an application for direct appellate review using Courier Font (12 point, 10 characters per inch), generating an argument section comprised of 10 pages of text.

/s/ Edward B. Gaffney

_____

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY

DOCKET NO. DAR _____

APPEALS COURT
DOCKET NO. 2021-P-0824

COMMONWEALTH

V.

ALEXIS MIDDLETON

CERTIFICATE OF SERVICE

The undersigned certifies that on October 1, 2021, he served a copy of Defendant's Application for Direct Appellate Review on:

Stephanie Glennon, ADA
Office of the Norfolk County D.A.

by efiling and/or by email to
stephanie.glennon@state.ma.us.

Respectfully Submitted,

/s/ Edward B. Gaffney

_____

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0582CR00166 Commonwealth vs. Middleton, Alexis

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 03/23/2005
- DCM Track:
- C - Most Complex
- Initiating Action:
- HOME INVASION c265 §18C
- Status Date:
- 03/23/2005
- Case Judge:
-
- Next Event:
-

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth
- Prosecutor

Alias

Party Attorney
- Attorney
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More Party Information

Middleton, Alexis
- Defendant

Alias

Party Attorney
- Attorney

- Gaffney, Esq., Edward B
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- Address
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- Phone Number
- (508)472-9663

More Party Information

Party Charge Information

- **Middleton, Alexis**
- - Defendant
  Charge # 1:
  265/18C/A-0 - Felony HOME INVASION c265 §18C

- Original Charge
- 265/18C/A-0 HOME INVASION c265 §18C (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition
03/10/2007
Guilty Verdict

- **Middleton, Alexis**
- - Defendant
  Charge # 2:
  265/22/B-2 - Felony RAPE, AGGRAVATED c265 §22(a)

- Original Charge
- 265/22/B-2 RAPE, AGGRAVATED c265 §22(a) (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition
03/10/2008
Not Guilty Verdict

- **Middleton, Alexis**
- - Defendant
  Charge # 3:
  265/18A-0 - Felony ASSAULT IN DWELLING, ARMED c265 §18A

- Original Charge
- 265/18A-0 ASSAULT IN DWELLING, ARMED c265 §18A (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition

03/10/2008
Nolle Prosequi

- **Middleton, Alexis**
- - Defendant
  Charge # 4:
  265/26/A-2 - Felony KIDNAPPING c265 §26

- Original Charge
- 265/26/A-2 KIDNAPPING c265 §26 (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition
03/10/2008
Guilty Verdict

- **Middleton, Alexis**
- - Defendant
  Charge # 5:
  265/26/A-2 - Felony KIDNAPPING c265 §26

- Original Charge
- 265/26/A-2 KIDNAPPING c265 §26 (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition
Disposition Date
Disposition
03/10/2008
Guilty Verdict

Load Party Charges 6 through 10 Load All 15 Party Charges

Events

Date	Session	Location	Type	Event Judge	Result
03/29/2005 09:00 AM	Criminal 1		Arraignment		Held as Scheduled
05/03/2005 09:00 AM	Criminal 1		Pre-Trial Conference		Held as Scheduled
08/01/2005 09:00 AM	Criminal 1		Hearing		Not Held
08/11/2005 09:00 AM	Criminal 1		Hearing		Rescheduled
08/12/2005 09:00 AM	Criminal 1		Hearing		Held as Scheduled
09/23/2005 09:00 AM	Criminal 1		Hearing RE: Discovery Motion(s)		Rescheduled
10/03/2005 09:00 AM	Criminal 1		Pre-Trial Hearing		Rescheduled

10/21/2005 09:00 AM	Criminal 1	Pre-Trial Conference	Held as Scheduled
11/16/2005 09:00 AM	Criminal 1	Hearing	Rescheduled
12/12/2005 09:00 AM	Criminal 1	Pre-Trial Hearing	Rescheduled
01/26/2006 09:00 AM	Criminal 1	Hearing on Compliance	Held as Scheduled
02/08/2006 09:00 AM	Criminal 1	Hearing on Compliance	Held as Scheduled
03/07/2006 09:00 AM	Criminal 1	Status Review	Held as Scheduled
04/06/2006 09:05 AM	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled
05/18/2006 09:00 AM	Criminal 1	Evidentiary Hearing on Suppression	Rescheduled
06/16/2006 09:00 AM	Criminal 1	Evidentiary Hearing on Suppression	Not Held
07/14/2006 09:00 AM	Criminal 1	Evidentiary Hearing on Suppression	Not Held
07/26/2006 09:00 AM	Criminal 1	Evidentiary Hearing on Suppression	Held as Scheduled
08/31/2006 09:00 AM	Criminal 1	Status Review	Held as Scheduled
09/29/2006 09:00 AM	Criminal 1	Hearing	Held as Scheduled
10/27/2006 09:00 AM	Criminal 1	Trial Assignment Conference	Rescheduled
12/07/2006 09:00 AM	Criminal 1	Trial Assignment Conference	Held as Scheduled
01/26/2007 03:00 PM	Criminal 2	Final Pre-Trial Conference	Held as Scheduled
02/07/2007 02:30 PM	Criminal 2	Final Pre-Trial Conference	Held as Scheduled
02/14/2007 11:00 AM	Criminal 2	Final Pre-Trial Conference	Rescheduled
02/14/2007 11:00 AM	Criminal 2	Final Pre-Trial Conference	Rescheduled
02/22/2007 09:00 AM	Criminal 2	Jury Trial	Rescheduled
02/22/2007 09:00 AM	Criminal 2	Status Review	Held as Scheduled
03/20/2007 09:00 AM	Criminal 2	Hearing	Held as Scheduled
04/23/2007 09:00 AM	Criminal 2	Hearing	Not Held

04/26/2007 02:00 PM	Criminal 2	Hearing for Change of Plea		Rescheduled
05/18/2007 09:00 AM	Criminal 2	Hearing for Change of Plea		Rescheduled
05/18/2007 02:00 PM	Criminal 1	Hearing for Change of Plea		Rescheduled
05/30/2007 09:00 AM	Criminal 1	Hearing for Change of Plea		Held as Scheduled
06/11/2007 09:00 AM	Criminal 2	Final Pre-Trial Conference		Held as Scheduled
06/19/2007 09:00 AM	Criminal 2	Jury Trial		Rescheduled
06/20/2007 09:00 AM	Criminal 2	Trial Assignment Conference		Held as Scheduled
07/18/2007 02:00 PM	Criminal 2	Trial Assignment Conference		Held as Scheduled
10/24/2007 09:00 AM	Criminal 2	Status Review		Held as Scheduled
12/06/2007 09:00 AM	Criminal 2	Jury Trial		Rescheduled
02/14/2008 11:00 AM	Criminal 2	Final Pre-Trial Conference		Held as Scheduled
02/20/2008 09:00 AM	Criminal 2	Hearing for Change of Plea		Rescheduled
03/03/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/04/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/05/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/06/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/07/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/10/2008 09:00 AM	Criminal 2	Jury Trial		Held as Scheduled
03/14/2008 11:30 AM	Criminal 2	Hearing for Sentence Imposition		Held as Scheduled
01/15/2020 02:00 PM	Criminal 2	Hearing on Motion for New Trial		Held as Scheduled
10/02/2020 02:00 PM	Criminal 1	Conference to Review Status	Sullivan, Hon. William F	Rescheduled
10/29/2020 11:00 AM	Criminal 1	Conference to Review Status	Cannone, Hon. Beverly J	Held as Scheduled
12/10/2020 02:00 PM	Criminal 1	Scheduling Conference	Cannone, Hon. Beverly J	Held as Scheduled

01/22/2021 03:00 PM	Criminal 1	Motion Hearing		Rescheduled
02/05/2021 03:00 PM	Criminal 1	Motion Hearing	Davis, Hon. Brian A	Held as Scheduled
07/29/2021 02:30 PM	Criminal 2	Hearing on Motion for New Trial	Cosgrove, Hon. Robert C	Held via Video Conference

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	03/29/2005	03/29/2005	0	03/16/2012
Final Pre-Trial Conference	03/29/2005	03/10/2006	346	03/16/2012
Case Disposition	03/29/2005	03/24/2006	360	03/16/2012

Docket Information

Docket Date	*Docket Text*	File Ref Nbr.	*Image Avail.*
03/23/2005	Indictment returned	1	
03/28/2005	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Tuesday March 29, 2005.	2	
03/29/2005	Appearance of Deft's Atty: Daniel O Tracy	3	
03/29/2005	Offense # 1 - Track "C". Deft arraigned before Court. Plea not guilty. Bail $200,000 w/o prej. Bail warning. Atty fee $150.00. Cont'd to 5/3/05 for pre trial conf. & 10/3/05 for pre trial hearing. (Dortch-Okara,J)(clerk.J.McD)(ct rpr. P.Morris.		
03/29/2005	Assigned to track "C" see scheduling order		
03/29/2005	Offense # 2 - 15- Deft arraigned before Court. Plea not guilty. Bial personal. Cont'd to 5/3/05 & 10/3/05. (Dortch-Okara,J)		
03/29/2005	RE Offense 1:Plea of not guilty		
03/29/2005	RE Offense 2:Plea of not guilty		
03/29/2005	RE Offense 3:Plea of not guilty		
03/29/2005	RE Offense 4:Plea of not guilty		
03/29/2005	RE Offense 5:Plea of not guilty		
03/29/2005	RE Offense 6:Plea of not guilty		
03/29/2005	RE Offense 7:Plea of not guilty		
03/29/2005	RE Offense 8:Plea of not guilty		
03/29/2005	RE Offense 9:Plea of not guilty		
03/29/2005	RE Offense 10:Plea of not guilty		
03/29/2005	RE Offense 11:Plea of not guilty		

03/29/2005	RE Offense 12:Plea of not guilty	
03/29/2005	RE Offense 13:Plea of not guilty	
03/29/2005	RE Offense 14:Plea of not guilty	
03/29/2005	RE Offense 15:Plea of not guilty	
03/29/2005	Case Tracking scheduling order Catherine A. White, Associate Justice mailed April 13, 2005	4
03/29/2005	Notice of unpaid counsel fees sent to Dept of Transitional Assistant, Dept of Medical Assistance, Dept of Revenue and Registry of MV on April 13, 2005	
03/29/2005	Commonwealth files statement of the case.	5
05/02/2005	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Tuesday May 3, 2005.	6
05/05/2005	Continued to 6/10/05 Compliance;No Habe, agreed. (Brady,J) att.J.McDermott,ac. DK,crt.rep.	
07/13/2005	Case advanced and continued to 8/1/05 for DNA Motion, agreed. (Borenstein,J) att.J.McDermott,ac	
07/13/2005	Commonwealth files Commonwealth's Motion for Order for Taking of a DNA Sample of the Defendant including Blood,Saliva,and/or Buccal Samples.	7
07/13/2005	Deft files Motion for funds to hire a private investigator- Allowed, not to exceed $1,000 .(Borenstein,J)	8
08/12/2005	Continued 9/23/05 discovery (Fabricant, J) B. Roche, a.c., T. Gibson, ct. rpt.	
08/12/2005	Motion by Commonwealth: for Order for Taking of a DNA Sample of the Defendant Including Blood, Saliva an/ior Buccal Sample -& Memorandum - Allowed (Judith Fabricant, Justice) c/s D.A.	9
09/28/2005	9/23/05: Continued until 10/21/2005 for pretrial conf. & 12/12/05 for pretrial hearing.(Borenstein,J)(clerk.B.Rochect rpr. C.McEllin	
10/19/2005	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Friday October 21, 2005.	10
10/25/2005	10/21/05: Continued until 11/16/2005 for motions, agreed.(Dortch-Okara,j)(clerk,J.McD) ct rpr. C. McEllin	
11/16/2005	Continued to 12/12/05 PTH re: Discovery. (Dortch-Okara,J) att.J.McDermott,ac. CMc,crt.rep.	
12/14/2005	12/12/05: Continued until 1/26/2006 for compliance, agreed.(Dortch-Okara,J)(clerk.J.McD) ct rpr. P.Morris	
01/25/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) fro Thursday January 26, 2006.	11
01/26/2006	Continued to 2/8/06 final compliance, agreed. (Fabricant,J) att.J.McDermott,ac. KC,crt.rep.	
01/30/2006	1/26/06: Deft files Motion to be furnished with statements os promises, rewards or inducements.	12
01/30/2006	1/26/06: Deft files motion to examine & copy photos & videotapes	13
01/30/2006	1/26/06: Deft files motions for list of names of witnesses	14
01/30/2006	1/26/06: Deft files motions for criminal records of witnesses	15

01/30/2006	1/26/06: Deft files motions of deft to be furnished with exculpatory evidence	16
01/30/2006	1/26/06: Deft files motion for statements of the deft	17
01/30/2006	Deft files motion of deft for production of police dept records.	18
01/30/2006	1/26/06: Deft files motion for discovery of physical & expert evidence.	19
01/30/2006	Deft files motion for bill of particulars.	20
01/30/2006	1/26/06: Deft files motion to inspect physical evidence	21
01/30/2006	1/26/06: Deft files motion to file additional discovery motions upon completion of discovery	22
01/30/2006	1/26/06: Deft files motion for information regarding prior & subsequent bad acts.	23
01/30/2006	1/26/06: Deft files motion for inventory of Comm's real evidence.	24
01/30/2006	Defendant 's Motion of Defendant to Inspect Statements of the Witnesses	16.1
02/07/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday February 8, 2006.	25
02/08/2006	Continued until 4/6/2006 @ 9:05 AM for motion to suppress, agreed. & 3/7/06 for status, agreed. Habe to Nashua St at 8:00 AM. Fabricant,J)(clerk.JU) ct rpr. M.Monro	
02/08/2006	Habeas corpus for Deft at Nashua St for 3/7/06.	26
03/07/2006	Continued until 4/6/2006 at 9:05 for motion to suppress, agreed. Habe to Nashua St.(Fabricant,J)(clerk.JU) ct rpr. M.Munro	
03/07/2006	Habeas corpus for Deft at Suffolk Cty ,Nashua St for 4/6/06.	27
04/06/2006	Continued to 5/18/06 motion to suppress agreed.(Dortch-Okara, J.) J. Uguccioni, ac., K. Crandell, ct. rept.	
04/06/2006	Motion to adopt and join in the motionos of co-defendant to suppress evidence derived from wiretap information.	28
04/06/2006	Motion for funds for a DNA expert.	29
04/06/2006	Affidavit in support of motion for funds for a DNA expert.	30
04/06/2006	Motion for discovery(DNA evidence).	31
05/17/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Thursday May 18, 2006.	32
05/19/2006	5/18/06 - Continued 6/16/06 Motion to Suppress, filed by 6/9/06. (Borenstein, J.) B. Roche, a.c. D. Keefer. ct. rpt.	
05/19/2006	5/18/06 - Deft's Motion for Funds for Transcript and affidavit in support of Motion for Funds for a DNA Expert.	33
05/19/2006	5/18/06 - Motion for Funds for Transcript. (P# 33) Allowed (Judge Issac Borenstein) Copies mailed	
05/19/2006	5/18/05 - Motion ((P#29) Allowed (Borenstein, J.) B.Roche, a.c.Copies mailed	
06/20/2006	6/16/06 - HABE Nashua St. ADA on Trial. Continued 7/14/06 Motion to Suppress/Bail Agreed. (Borenstein, J.) J.Uguccioni, a.c. G. Grayson, Ct Rpt.	
07/17/2006	7/14/06: Continued to 7/26/06 Motion to Suppress. ADA not present.	

	HABE Nashua Street. (Connors, J) J. Uguccioni, ac., P. Morris, ct. rpt.	
07/17/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday July 26, 2006.	34
07/17/2006	Deft files Motion to Adopt and Join the Motion of Co-Defendant to Suppress Evidence Seized Pursuant to a Search Warrant (Franks Hearing)	35
07/26/2006	Commonwealth files motion in opposition to deft's motion for a Franks Hearing.	35.1
07/27/2006	7/26/06 - Continued 8/31/06 status agreed. HABE (Connors, J.) J. Uguccioni, a.c., M. Morris, ct rpt.	
07/27/2006	Deft 's Motion for Discovery.	36
07/27/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Thursday August 31, 2006.	37
09/06/2006	7/25/06: Ruling on the deft's motion to suppress statements-DENIED.(Connors,J) c/s atty & ADA	38
09/06/2006	8/31/06: Continued until 9/29/2006 for Odell/McCarthy motions. Habe to Nashua.(Connors,J)(clerk.B.Roche) ct rpr. M.Morris	
09/06/2006	Habeas corpus for Deft at at Suffolk h.C. , Nashua St for 9/29/06	39
09/25/2006	MOTION to Dismiss, Memorandum of Law in Support of Motion to Dismiss, and Affidavit.	40
09/29/2006	RE Offense 11:Nolle prosequi	
10/26/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Friday October 27, 2006.	41
10/30/2006	10/27/06: Continued trial assignment agree. HABE Nashua Street. (Dortch-Okara, J) J. Uguccioni, ac., P. Morris, ct. rpt.	
12/06/2006	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 12/7/06	41.1
01/25/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for friday Janauary 26, 2007.	42
01/26/2007	MOTION by Deft: to Continue Trial Date - No action taken (Grabau, J)	42.1
01/29/2007	1/26/07: FPTC held w/counsel continued to 2/7/07 for further pre trial/status agreed. HABE from Suffolk. Trial already scheduled for 2/22/07. (Grabau, J) JP Hurley, III, ac., G. Grayson, ct. rpt.	
01/29/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday February 7, 2007.	43
01/29/2007	1/26/07: Deft files Motion to Continue Trial. No action taken. (Grabau, J)	
02/08/2007	After hearing, I allow the Defendant's Motions for Additional DNA Discovery regarding the audit. (Charles M. Grabau, J) c/s ADA & Atty.	44
02/14/2007	Deft files Motion for Additional DNA Discovery and Affidavit	45
02/22/2007	Continued to 3/20/07 Motion hearing. Habe Suffolk. Rule 36 waived in open court. (Grabau, J) MT Hulak, ac., G. Grayson, ct. rpt.	
02/22/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Tuesday March 20, 2007.	46
03/10/2007	RE Offense 1:Guilty verdict	

03/20/2007	ORDER Continuing Hearing/Trial Date (Charles M. Grabau, Associate Justice)	47
03/20/2007	Witnesses unavailable for Martin hearing. Continued to April 23, 2007 at 9:00 am for Martin hearing, agreed. Please Habe. FPTC scheduled for 6/11/07 @ 9am, motions in Limine & Voir dire motions due. Trial scheduled for 6/19/07 @ 9 am agreed. Habe all 3 events. (Grabau, J) J.P. Hurley III a.c., D. Keefer, ct. rpt.	
03/21/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 4/23/07	48
03/21/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 6/11/07	49
03/21/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) 6/19/07	50
04/23/2007	Witness unavailable for Martin hearing. Continued until 4/26/2007 at 2PM for change of plea,agreed.Habe.(Dortch-Okara,J)(clerk.J.Hurley. ct rpr. P.Morris	
04/23/2007	Habeas corpus for Deft at Suffolk H.C. Nashua St for 4/26/07	52
04/25/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Thursday April 26, 2007.	51
04/26/2007	Continued 5/18/07 2 pm plea - Habe to Nashua St. (Dortch-Okara, J)	
04/26/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 5/18/07	54
04/27/2007	MOTION by Deft: for Additional Funds for a Private Investiator - Allowed to $989.20 only (Dortch-Okara, J) c/s Atty.	53
05/23/2007	5/18/07 - Continued 5/30/07 Plea Habe Nashua St(Fabricant,J.) B. Roche a.c. P.Morris ct rpt	
05/25/2007	Habeas corpus issued Deft at Suffolk County Jail (Nashua Street) for 5/30/07	55
05/29/2007	MOTION by Deft: to Remove Counsel and for Appointment of New Counsel and Affidavit	56
05/29/2007	MOTION by Deft: for a writ of Habeas Corpus Ad Testific Andum	57
05/31/2007	5/30/07 - Continued 6/11/07 @ 3PM FPTC. HABE Nashua St (Fabaricant, J.) J. Uguccioni a.c M Morris ct rpt	
05/31/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 6/11/07	58
05/31/2007	Re: (P#56) After hearing, Denied (Judith Fabricant, Regional Administrative Justice). Copies mailed After Hearing,	
06/06/2007	MOTION by Deft: to Withdraw	59
06/14/2007	6/11/07 - Atty RIchard Neely appointed to represent deft. Status Conference. 6/20/07 9:00AM (Dortch-Okara, J.) J P. Hurley III a.c M.Morris ct rp	
06/14/2007	MOTION (P#59) After Hearing ALLOWED. (Barbara A. Dortch-Okara, Associate Justice). Copies mailed 6/14/2007	
06/20/2007	Appointment of Counsel Richard E Neely, pursuant to Rule 53	
06/22/2007	6/20/07 - Deft. Not transported. Continued 7/18/07 2:00PM, status & Trial Asst Agreed. (Dortch-Okara, J.) J. P. Hurley III a.c D. Chapin ct rpt	

07/17/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday July 18, 2007.	60
07/20/2007	7/19/07: Continued to 10/24/07 Status. 12/6/07 Trial Rule 36 waived. (Connors, J) J. McDermott, ac., D. Chapin, ct. rpt.	
10/23/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday October 24, 2007. CANCELLED PER ORDER OF RICHARD NEELY	61
10/24/2007	Continued 3/3/08 Trial (ct.25) and 2/14/08 FPTC (ct.25) at request of defense counsel agreed. Habe. (Chernoff, J) J Uguccioni a.c., D Keefer ct. rpt.	
10/24/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) 02/14/2008.	62
10/24/2007	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) 03/03/2008.	63
02/19/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday February 20, 2008.	64
02/20/2008	Continued 3/3/08 Trial (Sanders, J) M Hulak a.c., D Chapin ct. rpt.	
02/21/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) on 03/03/2008.	65
03/03/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Wednesday March 5, 2008	66
03/03/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Thursday March 6, 2008.	67
03/03/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Friday March 7, 2008.	68
03/03/2008	Commonwealth files request for Nolle Prosequi re: count 11	69
03/03/2008	MOTION by Deft: to Sever and Memorandum - Denied (Sanders, J)	70
03/03/2008	MOTION by Commonwealth: in Limine to Admit visual Presentations to Display Evidence and as "Chalks"	71
03/07/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Monday March 10, 2008.	
03/07/2008	MOTION by Deft: for a Required Finding of Not Guilty - See endorsement on defendants motion as to count #3. Motin is also Allowed as to count #11 Intimedate of witness. Denied as to remainder (Janet Sanders, J)	72
03/07/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for 3/10/08	73
03/07/2008	Deft files Request for Jury Instructions	74
03/07/2008	Commonwealth files Request for Jury Instructions	75
03/07/2008	Verdict of guilty - 001	76
03/07/2008	Verdict of guilty - 002	77
03/07/2008	Verdict of guilty - 003	78
03/07/2008	Verdict of guilty - 004	79
03/07/2008	Verdict of guilty- 005	80
03/07/2008	Verdict of guilty - 006	81

03/07/2008	Verdict of guilty - 007	82
03/07/2008	Verdict of guilty - 008	83
03/07/2008	Verdict of guilty - 009	84
03/07/2008	Verdict of guilty - 012	85
03/07/2008	Verdict of guilty - 013	86
03/07/2008	Verdict of guilty -014	87
03/07/2008	Verdict of guilty - 015	88
03/10/2008	RE Offense 2:Guilty verdict	
03/10/2008	RE Offense 3:Guilty verdict	
03/10/2008	RE Offense 4:Guilty verdict	
03/10/2008	RE Offense 5:Guilty verdict	
03/10/2008	RE Offense 6:Guilty verdict	
03/10/2008	RE Offense 7:Guilty verdict	
03/10/2008	RE Offense 8:Guilty verdict	
03/10/2008	RE Offense 9:Guilty verdict	
03/10/2008	RE Offense 12:Guilty verdict	
03/10/2008	RE Offense 13:Guilty verdict	
03/10/2008	RE Offense 14:Guilty verdict	
03/10/2008	RE Offense 15:Guilty verdict	
03/10/2008	RE Offense 10:Not guilty verdict	
03/13/2008	Habeas corpus for Deft at Suffolk County Jail (Nashua Street) for Friday March 14, 2008.	
03/14/2008	re: offense #001 - Sentence imposed: 20 - 25 years MCI Cedar Junction committed. 1142 days credit . $90.00 victim witness fee. (Sanders, J) J. McDermott, ac., D. Chapin, ct.rpt.	
03/14/2008	MOTION by Deft: to Withdraw and for Appointment of Substitute Counsel for Appeal - Allowed refer to CPCS (Sanders, J) J. McDermott, a.c. c/s Judge Sanders	89
03/14/2008	NOTICE of APPEAL FILED by Alexis Middleton his conviction c/s Judge Sanders	90
03/14/2008	re: offense #002 - Defendant sentenced to 5-7 yrs. M.C.I. C.J. on & after committed portion on #001 (Sanders, J) J. McDermott, a.c., D. Chapin, ct. rpt. (Janet L. Sanders, Regional Administrative, Justice)	
03/14/2008	re: offense #003 - Defendant sentenced to 20-25 yrs. M.C.I. C.J. concurrent w/001 (Janet L. Sanders, Regional Administrative, Justice) 1142 days credit	
03/14/2008	re: offense #'s 005, 006, 007, 013, 014, & 015 Defendant sentenced to 9 - 10 years concurrent w/001 (Janet L. Sanders, Regional Administrative, Justice) 1142 days credit	
03/14/2008	re: offense #004 & 012 - Defendant sentenced to 3 yrs. Probation on & after committed portion on #002 (Janet L. Sanders, Regional Administrative, Justice) J. McDermott, a.c.,	
03/14/2008	re: offense #'s 008 & 009 - Defendant sentenced to 4 - 5 yrs. M.C.I.	

	C.J. concurrent w/001 (Janet L. Sanders, Regional Administrative, Justice) - 1142 days credit - J. McDermott, a.c., D. Chapin, ct. rpt. - Mittimus issued	
03/14/2008	Committee for Public Counsel Services appointed, pursuant to Rule 53	
03/18/2008	Defendant files MOTION to revise and revoke & Affidavit in Support	91
03/21/2008	Copy of notice of appeal mailed to Judge Sanders and Varsha Kukalka, ADA	
03/26/2008	Court Reporter Crandell, Kim, Keefer, Debra, Morris, Margaret, Chapin, Dawna & Munro, Mary is hereby notified to prepare one copy of the transcript of the evidence of 3/26/2008.	92
04/02/2008	Victim-witness fee paid as assessed $90.00	
04/22/2008	Appointment of Counsel Edward B Fogarty, pursuant to Rule 53	
04/22/2008	Transcript of testimony received from court reporter, Crandell, Kim dated 9/29/06	
11/03/2008	Transcript of testimony received volumes # I from court reporter, Keefer, Debra dated 3/20/07	
12/08/2008	Appointment of Counsel Brad Paul Bennion, pursuant to Rule 53 for appeal	
12/11/2008	Appearance of Deft's Atty: Brad Paul Bennion	93
12/17/2008	12/10/08 - Motion to Withdraw as Appellate Counsel	94
03/10/2009	Transcript of testimony received volumes # I from court reporter, Chapin, Dawna M. dated 3/3/08	
03/10/2009	Court Reporter Chapin, Dawna M. is hereby notified to prepare one copy of the transcript of the evidence of 03/04/2008	
03/10/2009	Transcript of testimony received volumes # II from court reporter, Chapin, Dawna M. dated 3/4/08	
03/10/2009	Court Reporter Chapin, Dawna M. is hereby notified to prepare one copy of the transcript of the evidence of 03/05/2008	
03/10/2009	Transcript of testimony received volumes # III from court reporter, Chapin, Dawna M. dated 3/5/08	
03/10/2009	Transcript of testimony received volumes # IV from court reporter, Chapin, Dawna M. dated 3/6/08	
03/10/2009	Court Reporter Chapin, Dawna M. is hereby notified to prepare one copy of the transcript of the evidence of 03/10/2008	
03/10/2009	Transcript of testimony received volumes # VI from court reporter, Chapin, Dawna M. dated 3/10/08	
03/10/2009	Court Reporter Chapin, Dawna M. is hereby notified to prepare one copy of the transcript of the evidence of 03/14/2008	
03/10/2009	Transcript of testimony received from court reporter, Chapin, Dawna M. dated 3/14/08	
03/11/2009	Court Reporter Chapin, Dawna M. is hereby notified to prepare one copy of the transcript of the evidence of 03/06/2008	
08/10/2009	Court Reporter Munro, Mary is hereby notified to prepare one copy of the transcript of the evidence of 03/07/2008	
08/10/2009	Transcript of testimony received volumes # V from court reporter,	

	Munro, Mary	
09/02/2009	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.	
09/11/2009	Notice of Entry of appeal received from the Appeals Court #2009-P-1674 see #05-165 for paper #85	
03/09/2010	MOTION by Deft: for Leave to File Motion for New Trial and for Stay of Appellate Proceedings - Appeal is granded leave to file Motion for New Trial in the Trial Court - Status report due on or before 5/3/10 c/s Judge Sanders	95
05/06/2010	MOTION by Deft: for a New Trial, Memorandum, Affidavit and Certificate of Service c/s Judge Sanders	96
05/10/2010	MOTION by Commonwealth: Opposition to Defendant's Motin for New Trial c/s Judge Sanders	97
05/21/2010	MOTION by Deft: for Recusal of Trial Judge on Motion for New Trial, Affidavit & Certificate of Service c/s Judge Sanders	98
06/02/2010	Deft files Supplementary Memorandum in support of Motion for a New Trial and Certificate of Service - c/s Judge Sanders	99
06/11/2010	MOTION (P#96) denied (Janet L. Sanders, Regional Administrative Justice). Copies mailed ADA & Atty.	
06/11/2010	5/24/10 - MOTION (P#98) denied (Janet L. Sanders, Regional Administrative Justice). Copies mailed ADA & Atty.	
06/18/2010	NOTICE of APPEAL FILED by Alexis Middleton - Denial of Motion for New Trial	100
06/18/2010	Copy of notice of appeal mailed to Judge Sanders & Varsha Kukalka, ADA	
07/01/2010	Notice of completion of assembly of record sent to clerk of Appeals Court and attorneys for the Commonwealth and defendant.	
07/21/2010	7/6/10 - Notice of Docket Entry of appeal received from the Appeals Court #2010 - P-1179	101
07/23/2010	Notice of Docket Entry of appeal received from the Appeals Court re: 2009-P-1674 - Re:23: Pursuant to the within, the defendant's (A. Middleton) appeal from the denial of the motion for new trial is hereby consolidated with the within appeal with no further necessity of assembly of the record The trial court is to sent two updated copies of the doket entries to this court forthwith. The stay of appellate proceedings is vacated and the defendants' briefs shall be due on 8/30/10	102
10/04/2010	Re: 2010-P-1179 - Notice ofDocket Entry of appeal received from the Appeals Court - Re: #1 The appeal of 2010 P-1179 isvacated as having been entered in error. Pursuant to the action, dated 7/21/10, on P#23 in docket 09-P-1674, the appeal of the motion for new trial was to be consolidated iwth tha appeal without further need to assemble the record. The appellant's brief on the consolidate appeals remains due 10/14/10.	103
03/16/2012	Rescript received from Appeals Court; judgment AFFIRMED By the Court (Trainor, Brown & Carhart, JJ.) Joseph Stanton, Clerk	104
05/14/2019	Attorney appearance On this date Brad Bennion, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Alexis Middleton	
05/14/2019	Attorney appearance	

	On this date Edward B Gaffney, Esq. added as Appointed - Indigent Defendant for Defendant Alexis Middleton		
09/03/2019	Defendant 's Motion for new trial pursuant to Mass.R.Crim.P.30(b) filed 9/3/2019 - Transcripts in box in vault	105	
09/03/2019	Affidavit of Jamal Farrar (formerly known as Alexis Middleton) - filed 9/3/2019	106	
09/03/2019	Affidavit of Richard E.Neely	107	
09/03/2019	Affidavit of Randall K. Power - filed 9/3/2019	108	
09/03/2019	Affidavit of Edward B. Gaffney - filed 9/3/2019	109	
09/03/2019	Defendant 's Certificate of service - filed 9/3/2019	110	
10/10/2019	ORDER: The Commonwealth shall file any response to Defendant's Motion for New Trial within 30 days. (Parties notified).		
10/10/2019	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Edward B Gaffney, Esq. Attorney: Pamela Lynne Alford, Esq. Attorney: Stephanie Martin Glennon, Esq.		
11/12/2019	Commonwealth 's Motion for Extension of Time to File Response to Defendant's Motion for New Trial filed and Allowed. Sanders, J. (Parties notified).	111	
11/20/2019	Opposition to to the Defendant's Second Motion for New Trial filed by Commonwealth(Copy emailed and sent to Sanders, J. on 11/20/19)	112	
01/15/2020	Defendant not in court. Presence waived. Event Result:: Hearing on Motion for New Trial scheduled on: 01/15/2020 02:00 PM Has been: Held as Scheduled. Motion is taken under advisement. Comments: Held in Suffolk Superior Court, Courtroom 901. FTR - Attest: D. D'Avolio, AC. Hon. Janet L Sanders, Presiding		
01/22/2020	Opposition to to Defendant's Post-Hearing Request for Post-Conviction Discovery of Numerous Third-Party Personnel Files. Copy emailed to Sanders, J. filed by Commonwealth	113	
01/23/2020	Defendant 's Motion for Disclosure of Personnel Files and Other Exculpatory Evidence Pursuant to Mass.R.CrimP. 30(c)(4) filed. Copy emailed to Sanders, J.	114	
02/10/2020	Defendant 's Supplemental, Memorandum in Support of his Motion for New Trial Pursuant to Mass. R. Crim. P. 30(b) (copy emailed to J. Sanders)	115	*Image*
02/10/2020	Defendant 's Certificate of Service	116	*Image*
02/11/2020	Commonwealth 's Response to Defendant's Supplemental Memorandum Following Hearing on Defendant's Second Motion for New Trial filed and copy forwarded to Judge Sanders.	117	
07/22/2020	MEMORANDUM & ORDER: of Decision and Order on Defendant's Motion for Post trial Discovery - This Court concludes that the Motion (entitled "Motion for Disclosure of Personnel Files and other Exculpatory Evidence) must be ALLOWED, although this Court narrows the scope of the information that must be turned over. (Sanders, J.) dated 7/10/2020 Judge: Sanders, Hon. Janet L SEE Memorandum of Decision and Order copies mailed to parties on 7/22/2020- cm	118	*Image*

07/22/2020	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Edward B Gaffney, Esq. Attorney: Pamela Lynne Alford, Esq. Attorney: Stephanie Martin Glennon, Esq. with copy of Memorandum of Decision and Order		
09/24/2020	Other 's EMERGENCY Motion on Behalf of H. K. to Preclude the Department of State Police from Production of Documents that are Protected from Disclosure and to Stay Production Pending Resolution of Issues Raised in this Motion filed by Attorney Jocely Sedney (BBO#552115) with Exhibits (Motion scanned to Judge Sanders) - IMPOUNDED	119	
09/24/2020	Commonwealth 's Assented to Motion for Enlargement of Time in Which Massachusetts State Police May Review Whether Additional Documentary Material is Responsive to Post-Conviction Discovery Order and to Reschedule Status Conference from October 2, 2020 to on or about October 16,2020 - Allowed. Sanders, J. 10/1/2020. Parties notified via email. (Motion scanned to Judge Sanders)	120	*Image*
09/25/2020	Commonwealth 's Notice of Discovery - September 22, 2020	121	*Image*
09/25/2020	Other 's Motion to Impound with Certificate of Service (Scanned to Judge Sanders)	122	
10/01/2020	Event Result:: Conference to Review Status scheduled on: 10/02/2020 02:00 PM Has been: Rescheduled For the following reason: Request of Commonwealth Hon. Janet L Sanders, Presiding		
10/01/2020	Endorsement on Motion to Impound, (#122.0): ALLOWED This Motion is ALLOWED pending further hearing. Accordingly, it is hereby ORDERED that this Motion together with the Emergency Motion to preclude the production of certain records shall be placed under seal but only until such time as this Court has a chance to review the records themselves and has heard from all concerned parties as to whether the impoundment order shall be extended. That hearing shall take place on October 29, 2020 at 11:00 a.m. via zoom. (ADA, Atty and counsel for witness notified via email). Judge: Sanders, Hon. Janet L		
10/05/2020	Commonwealth 's Notice of Discovery and certificate of service - October 1,2020 - filed 10/5/20	123	
10/19/2020	Business Records received from Received from Department of State Police Forensic and Technology Center. Ordered Impounded by Sanders, J.	124	
10/23/2020	Other 's Motion for Opportunity to Review Personal Records Produced by the Department of State Police filed and forwarded to Sanders, J. 10/23/2020 - Allowed: it is ORDERED that the movant be given access to the records described in this motion as soon as possible. (Parties notified via email).	125	
10/26/2020	Defendant 's Motion for disclosure of exculpatory evidence pursuant to Mass.R.Crim. P. 30(c)(4) dated 10/26/20 (second post-conviction) (emailed to Sanders, J)	126	
10/26/2020	Affidavit of Edward B. Gaffney, Esq. dated 10/26/20	127	
10/26/2020	Defendant 's Supplemental memorandum (second) in support of his motion for new trial pursuant to Mass.R.Crim. P. 30(b) (emailed to Sanders, J) filed 10/26/20	128	
10/26/2020	Defendant 's Certificate of service - filed 10/26/20	129	
10/28/2020	Defendant, Commonwealth 's Joint Notice of status report - filed 10/28/20	130	
10/28/2020	Habeas Corpus for defendant issued to MCI - Cedar Junction (at Walpole) returnable for 10/29/2020 11:00 AM Conference to Review Status. https://www.zoomgov.com/j/16189499227?	131	

	pwd=RVRsejBJZnMydGZCQ3BLVWc1eFZ2QT09 Meeting ID: 161 8949 9227 Passcode: 668298 Dial by your location 646 828 7666		
10/29/2020	Event Result:: Conference to Review Status scheduled on: 10/29/2020 11:00 AM Has been: Held as Scheduled Comments: Held via Zoom/FTR in Courtroom 25 Hon. Janet L Sanders, Presiding		
10/29/2020	Endorsement on Motion (Emergency) on behalf of (H.G.) to Preclude the Department of State Police from Production of Documents, (#119.0): DENIED		
10/29/2020	Endorsement on Motion to Impound, (#122.0): Other action taken After further hearing, this Court concludes that the Order of Impoundment should be extended. State police materials which this Court orders to be turned over in unredacted form to counsel in this case shall be placed under seal until further order of this Court. (Parties notified via email).		
10/30/2020	ORDER: Protective regarding further Post-Trial Supplemental Discovery Regarding Defendant Middleton's Motion for New Trial-Commonwealth and Defense in agreement. Copy sent to both parties Judge: Sanders, Hon. Janet L	132	*Image*
12/10/2020	Commonwealth 's Notice of Discovery filed on 12/9/20	133	
12/10/2020	Event Result:: Scheduling Conference scheduled on: 12/10/2020 02:00 PM Has been: Held as Scheduled Comments: Via Zoom in Courtroom25 Hon. Janet L Sanders, Presiding		
01/22/2021	Event Result:: Motion Hearing scheduled on: 01/22/2021 03:00 PM Has been: Rescheduled For the following reason: Court Order Comments: Judge Sanders unavailable. Hon. Janet L Sanders, Presiding		
02/05/2021	Event Result:: Motion Hearing scheduled on: 02/05/2021 03:00 PM Has been: Held as Scheduled Comments: Defendant to file Motion by 3/5; Commonwealth to reply by 4/5 Hon. Janet L Sanders, Presiding		
03/08/2021	Defendant 's Motion (Revised) for New Trial pursuant to MASS. R. CRIM. P. 30(b)-Filed on 3/8/21. Copy mailed to Judge Sanders.	134	
03/08/2021	Defendant 's Memorandum in support of defendant's revised motion for New Trial Pursuant to MASS.R.P.30(b)-Filed on 3/8/21	135	
03/08/2021	Affidavit of Of Edward B. Gaffney Regarding Post Trial Discovery-Filed on 3/8/21	136	
03/08/2021	Affidavit of (Revised) Randall K. Power-Filed on 3/8/21	137	
03/08/2021	Defendant 's Certificate of Service-Filed on 3/8/21	138	
03/10/2021	Docket Note: Copy of 23 page report dated January 2, 2009 from Massachusetts State Police Lieutenant Richard S. Range and 230 Page Transcript of November 20, 2008. Paper number 134, Revised Motion for New Trial Pursuant to Mass. R. CRIM. P. 30(b), Paper #135 Memorandum in support of Defendant's revised motion for New Trial pursuant to MASS. R. CRIM. P. 30(b), Paper #136 , Affidavit of Edward B. Gaffney, Regarding post trial discovery, Paper #137 Revised Affidavit of Randall K. Power, and Paper #138, Certificate of service sent to Judge Sanders at Suffolk Superior Court on 3/10/21		
03/10/2021	Affidavit of Richard Neely (Copy mailed to Judge Sanders).	139	

06/28/2021	Commonwealth 's Motion to File and Substitute Updated Opposition to Defendant's (Revised) Second Motion for New Trial - ALLOWED. Sanders, J.	140	*Image*
06/28/2021	Habeas Corpus for defendant issued to MCI - Cedar Junction (at Walpole) returnable for 07/29/2021 02:30 PM Hearing on Motion for New Trial. ***CANCELLED - D'S PRESENCE WAIVED.	141	
07/19/2021	Defendant 's Request to not Attend Hearing/Waiver of Presence at Hearing filed and ALLOWED without objection. Sanders, J. (Parties notified via email). 7/21/21	142	
07/19/2021	Affidavit of Edward B. Gaffney Re: Attorney Daniel Tracy filed. (Copy forwarded to Sanders, J.)	143	
07/21/2021	Docket Note: Defendant is being held under the name of JAMAL FARRAR. New name has to be on habe.		
07/29/2021	Deft not on zoom. Presence waived. Motion Hearing held before Sanders, J via zoom ctrm 806 in Suffolk After hearing matter taken under advisement Glennon, ADA via zoom Gaffney, Atty via zoom FTR 2:16-3:19 Kristen Zitano, Assistant Clerk for Criminal Business Suffolk Superior Criminal Court Judge: Sanders, Hon. Janet L		
08/26/2021	MEMORANDUM & ORDER: on Defendant's Revised Second Motion for New Trial filed by the Court, Sanders, J. denying defendant's motion. (ADA Glennon & Atty Gaffney notified via email). Judge: Sanders, Hon. Janet L	144	*Image*
09/01/2021	Notice of appeal filed by the defendant Alex Middleton in the above captioned matter and hereby gives notice of his appeal of the court's denial of his Motion for New Trial Pursuant to Mass.R.Crim. P.30(b0, rendered on August 26, 2021. Attorney: Gaffney, Esq., Edward B Applies To: Gaffney, Esq., Edward B (Attorney) on behalf of Middleton, Alexis (Defendant)	145	*Image*
09/01/2021	Edward B Gaffney, Esq.'s Certificate of Service	146	*Image*
09/15/2021	Docket Note: After contact with attorney the appeal is ready to assemble and NO transcripts are ordered to be sent to appeals court.		
09/15/2021	Notice to Clerk of the Appeals Court of Assembly of Record	147	
09/15/2021	Notice of assembly of record sent to Counsel	148	
09/17/2021	Appeal: Statement of the Case on Appeal (Cover Sheet).	149	
09/17/2021	Docket Note: Appeal on the motion sent to Appeals Court on 9/17/21 electronically. Copy sent to parties electronically as well.		

Case Disposition

Disposition	Date	Case Judge
Disposed by Jury Verdict	03/10/2008	

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. **SUPERIOR COURT**
NO. 0582CR00166

COMMONWEALTH

v.

ALEXIS MIDDLETON

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

In March 2008 following a jury trial, the defendant Alexis Middleton [1] and codefendant Donnell Nicholson were each convicted of multiple charges that included home invasion in violation of G.L.c. 265 §18C and aggravated rape in violation of G.L.c. 265 §22(a). The Appeals Court affirmed the convictions as well as the denial of the defendant's first motion for new trial in an unpublished opinion. Commonwealth v. Middleton et al., 80 Mass.App.Ct. 1110 (2011) (Rule 1:28) further appellate review denied (March 5, 2012). Although it determined that certain testimony and reports relating to DNA should not have been admitted, it concluded that the evidence that was properly admitted was "overwhelming" in supporting the convictions of both men. That evidence consisted of wiretap evidence, testimony from a cooperating witness, phone records and the opinion of a supervisor from the State Police Crime Lab that DNA found in the rape victim's mouth matched that of Middleton. The defendant has now filed a second Motion for New Trial, alleging among other things that newly discovered evidence calls into question the evidence relating to the DNA. This Court concludes that the Motion must be **Denied**.

[1] The defendant changed his name after trial to Jamal Farrar. This Court refers to the defendant as Middleton, however, since this is the name that appear in the official records of this matter.

BACKGROUND

The evidence admitted at trial can be summarized as follows.[2] On the evening of January 11, 2005, Sean M., his friend Michael and two female friends, Angela and Kimberly, entered Sean's Braintree house to discover masked intruders inside. The intruders, armed with a pistol and shotgun, repeatedly demanded money and "weed," apparently having already searched the residence for those items without success. All four victims were beaten and ordered to strip. Sean M. was stuck with a guitar and the shotgun, cut with a knife and hit with a hammer. Both intruders touched the women's bodies, then order one of them, Angela, into an adjoining room at gunpoint. The taller of the two intruders (later identified, based on the DNA evidence, to be Middleton) ordered Angela to "suck my dick" and forced his penis into her mouth. His accomplice (whom the Commonwealth alleged to be Middleton's codefendant Nicholson) told Middleton to use a condom and produced one from a pocket. Middleton put it on, but then removed it and after the forced oral sex, had Angela wash out her mouth. The two intruders then threatened to do to the same with the second female victim Kimberly, but after she cried and pleaded with them, they ordered her back on a bed, where all four victims were tied up with stereo wire. The two intruders fled to the basement when someone pulled into the driveway of the home. Michael could hear one of the intruders yelling from the basement, saying "Bitch, you need to come pick us up." Michael had heard both intruders conversing on a Nextel two way device during the assault, and heard someone who sounded like a female on the other end of at least one of those calls. Other than providing general descriptions, the victims were unable to identify their assailants.

[2] Although this Court does have an independent memory of the trial, I have also reviewed the trial transcript.

Police subsequently interviewed a number of people with some connection to Sean M: they included Sean Borden (Borden), Ethyl Watler ("Ellie") and Latia Kendricks ("Tia"). Tia and Ellie were prostitutes who often stayed with Borden, Tia's uncle. Tia was familiar with Sean M., having met him through Borden; she and Ellie had been to his Braintree home. The women knew that Sean M. kept a large amount of marijuana there and also had money on hand. After the incident, Sean M. had called Borden, who came to his house and, upon seeing his injuries, had called police.

Tia was a key witness for the Commonwealth. According to Tia's testimony, Nicholson, whom she described as a long time friend, and Middleton, whom she knew as "Bugsy," picked her up along with Ellie on the evening of January 10, 2005, two nights before the home invasion. The four spent the night together at the Red Roof Inn in Framingham; records from the hotel, including receipts showing Nicholson's name and Dorchester address, were admitted into evidence confirming this. The next morning, all four (including Middleton) took a ride to a house unfamiliar to Tia. Nicholson, who already had a handgun in the car, retrieved a shotgun and a bulletproof vest from the house. Nicholson then got on the phone and called someone looking for a second bulletproof vest. The four then drove to Braintree, stopping at a Mobile gas station where Ellie bought a map. The map, of south suburban Boston, was later recovered in an inventory search of a car that records showed had been rented by Nicholson. After the stop at the gas station, the four (including Middleton) drove to Sean M.'s house in Braintree and there was conversation between Middleton and Nicholson about robbing Sean M. of money and marijuana. Middleton and Nicholson both expressed the view that they should do the robbery right then. Tia told them that she "didn't want nothing to do with it" and asked to go home. She and Ellie were dropped off at Borden's Dorchester apartment.

In the early morning hours of July 12, Nicholson (according to Tia's testimony) called her on his two-way Nextel device "screaming and yelling" that he was inside Sean M.'s home but had found nothing. This was consistent with Sean M.'s memory of hearing one of the intruders talking to a female during the home invasion. Nicholson also talked by phone with Ellie. Tia and Ellie accompanied by Borden later drove to Sean M.'s house after Sean M. had reported the home invasion to police. There, she received a call from the Nicholson who told her to leave because she was a "suspect." She asked him about what had happened with the female victim in the house, and he "laughed and said it wasn't him." The next day, Nicholson picked Tia up in the company of Middleton and another man she did not know. He told her he did not trust her and warned her not to talk. If she did, he said that he would kill her mother, her daughter and her. At one point, Nicholson pulled over on a side street and hit Tia in the face. Tia testified that he had a hard object in his hand -- possibly a gun -- when he struck her. As already indicated, Middleton was in the car.

Several days later, police contacted Tia. After initially refusing to cooperate, she ultimately told them that both Middleton and Nicholson had committed the Braintree home invasion and identified them in photos supplied by police. On the morning of January 28, 2005, police obtained arrest warrants for both men. In an effort to lure the two to a location where police could apprehend them, Detective Brian Cohoon of the Braintree Police Department obtained a Blood warrant authorizing Tia (who was cooperating at that point with police) to wear a wire so that authorities could listen in on her conversations with Nicholson by cell phone and on the two-way Nextel device. In these conversations, Tia arranged to meet Nicholson at the Natick commuter rail station where he was arrested. A call over the Nextel phone found on Nicholson's person was then made to Middleton, who was told that a Nextel phone was found at

the T station. Middleton replied: "That's my boy's" and arranged to meet the caller to pick it up. When Middleton appeared at the arranged meeting place, he too was arrested.

At the time of his arrest, Middleton had in his possession one of the Nextel phones that was under Nicholson's name. Telephone carrier records showed multiple contacts during the time frame and in the area of the January 12, 2005 home invasion between that phone, a second Nextel phone in Nicholson's name, and Tia's phone number. The police also had DNA evidence. Criminologist Carol Courtright had been able to collect sperm samples from an oral swab collected from the rape victim. State police Trooper Bruce Tobin subsequently obtained buccal swabs from both Middleton and Nicholson in the presence of their counsel. These samples were obtained in different locations on different dates, and were separately sealed and stored before being sent to the Crime Lab. At some point, the rape victim provided a blood sample so that her DNA profile could be generated. The known samples were then compared to the DNA profile generated from the oral swab taken from the rape victim. The male DNA profile from the oral swab matched the DNA profile generated from the buccal swab taken from Middleton. [3]

This DNA evidence came in through Cailin Drugan, the supervisor of the DNA unit. Drugan did not herself perform the work done on the various DNA samples: instead, that was performed by analysts Rachel Chow and Hillary Griffiths. Griffiths analyzed the samples that were taken from the known sources (the rape victim, Middleton, and Nicholson) and generated DNA profiles from each. The exemplars from which these profiles were generated arrived at the Crime Lab already sealed and labeled with their sources' names. Chow, who worked in a

[3] More specifically, Drugan testified that the "probability of a randomly selected unrelated individual having a DNA profile matching that obtained from this item [the oral swab taken from the victim] is approximately one in one hundred seventy-two quadrillion of the Caucasian population [and] one in twenty four quadrillion of the African American population. " TR. IV-166.

separate unit, analyzed the DNA found in the rape victim's oral swab and generated a male profile derived from sperm cells found on that swab. It was Chow who then compared this DNA profile to the known profiles of Middleton and Nicholson. Drugan testified that she independently evaluated the work of both Chow and Griffiths; she confirmed the results of their analysis. Drugan's testimony as a substitute analyst was the focus of Middleton's appeal from his conviction and his first motion for new trial. [4]

This DNA testimony -- and what defense counsel did and did not have before trial to prepare a defense to it – is now the focal point for Middleton's Second Motion for New Trial. With regard to the discovery that took place before trial, the record shows that defense counsel not only requested but received substantial amounts of material in connection with the DNA work that was done. This was provided not only as part of discretionary discovery in the case but also in response to a motion filed in July 2006 that focused more specifically on the DNA evidence. The record shows that the defense was satisfied with what he received well before trial began. In particular, Middleton's first counsel Daniel Tracy (who has not submitted an affidavit in support of this motion) confirmed to the court on at least one occasion that he had received the entire laboratory case file relating to the DNA testing and expressed no issues with the production that the Commonwealth made. The materials that were provided included proficiency examination results for all personnel involved in the DNA testing together with their resumes. More important, defense counsel obtained funds to hire his own DNA expert to review the findings and even to conduct his own testing, since the testing performed by the

[4] Although the Appeals Court concluded that it was error to permit Drugan to recite verbatim the reports of Griffiths and Chow -- in particular, Chow's conclusion that there was a match --- the Appeals Court concluded that Drugan's independent opinion regarding those results was admissible. In light of other evidence of Middleton's guilt (described as "overwhelming"), the error was held to be harmless.

Crime Lab was non-exhaustive. This expert was not called as a defense witness at trial to challenge any of the results, nor has he submitted any affidavit to support the instant Motion.

On September 3, 2019, eleven years after the trial and eight years after the Appeals Court affirmed the defendant's conviction and this Court's denial of his first motion for new trial, Middleton filed the motion now before the Court, raising (among other issues) the alleged incompleteness of the DNA discovery. In support of this position, he cited information that he had received through a Freedom of Information Act request showing that Chow had been suspended from her job in September 2006 for transcription errors and sample mix-ups (the Chow Memorandum). [5] He also cited a June 2007 audit report of the Crime Lab which discussed certain deficiencies.

The parties appeared before this Court on January 15, 2020 for legal arguments on this second new trial motion. At that hearing, defense counsel for the first time stated that he needed additional discovery and followed that up with a written motion filed on January 23, 2020. The Commonwealth opposed the request, in part because (in the Commonwealth's view) the alleged deficiencies in Chow's performance did not in any way suggest that her work comparing DNA profiles was also deficient. In a written opinion dated July 10, 2020, this Court allowed the motion in substantial part, requiring that the Commonwealth produce personnel files not only for Chow but also for others involved in the DNA analysis, including Hillary Griffiths and Carol Courtright.

As a result of the material turned over in response to this most recent discovery motion, the defendant learned for the first time that both Courtright and Griffiths had also been suspended. With regard to Griffiths, the reason for that suspension was set forth in a letter dated

[5] The Chow Memorandum is attached as Exhibit 1 to the Gaffney Affidavit dated August 31, 2019.

July 31, 2006. [6] Like Chow, she was cited for what was described as "DNA testing discrepancies" and was advised that she needed to develop a "skill set to focus on tasks without sample mixups, as aliquots are not placed in appropriate tubes/row." The letter set forth two corrective actions to be taken. The first was to "discuss methods/techniques to ensure administrative and technical accuracy while processing evidentiary samples." The second was to "employ specific safeguards to avoid mislabeling, sample switching and transcription errors." The letter also refers to a "personal/emotional" relationship that Griffiths had with a supervisor which was interfering with Griffiths' performance on the job. Other materials relating to Griffiths suggest that she made several unreported mistakes in her work in 2008 (after trial of this case) and was "not capable of performing day to day exemplar work until shortly before June 3, 2008." There is nothing in these materials, however, that suggests that any mistakes occurred in the work that Griffiths performed in the instant case.

Finally, the material also included information relating to Courtright, the criminologist who had found sperm cells in the oral swab from the rape victim. In a memo dated January 4, 2006, she was advised that she was being suspended from handling open containers of evidence because she had contaminated certain samples with her own DNA. [7] Courtright did not generate any DNA profiles from the material she handled, much less make any comparisons. The reason for the suspension thus appears to have no relevance to this case.

[6] This letter is attached to the Second Affidavit of Edward Gaffney dated March 4, 2021.
[7] This memo is attached to Gaffney's second affidavit as Exhibit 3.

DISCUSSION

The defendant's second Motion for New Trial is based on three arguments.[8] The first concerns jury selection and the defendant's contention that this Court erred in permitting the Commonwealth to use preemptory challenges against persons of color, one of whom appeared (based on his name) to be of Arab or Muslim descent. As to this argument, the Court adopts the reasons set forth by the Commonwealth in its Memorandum docketed June 28, 2021 (the June 2021 Memorandum) at pages 34 through 46. The second argument asserted in support of the new trial motion is that the prosecutor misstated the evidence regarding the Nextel phones in her closing argument. This Court finds this argument to be without merit, for the reasons set forth by the Commonwealth in its June 2021 Memorandum at pages 46-49. The third argument concerns the defendant's contention that the Commonwealth failed to provide important exculpatory evidence regarding the Crime Lab's DNA unit---more specifically, regarding Griffiths and Chow, both of whom were suspended from their work as DNA analysts in or around the time they did work on the instant case. The defendant argues that he made a request that should have led to the production of this information but it was not produced. Had trial counsel received this information and been able to present it to the jury, then (it is argued) there is a "reasonable probability" that the result of the trial would have been different. United States v. Flores Rivera, 78 F.3d 1, 15-16 (1st Cir. 2015). This Court examines each category of information at issue against that legal standard.

[8] This Motion has been extensively briefed, with each party submitting at least three separate memoranda of law addressing the issues, together with various affidavits and Addenda. The most recent filings are the defendant's Memorandum in support of his Revised Motion docketed in March 2021 and the Commonwealth's Memorandum in Opposition docketed on June 28, 2021 (updating and substituting for an earlier memorandum filed in April 2021).

A. The 2007 Audit Report

The original version of the defendant's second new trial motion relied in part on a 2007 audit report which he claimed that he should have received before trial but did not. [9] That report was prepared by an external commission and was published in June 2007 (the Vance Report), well before trial of this case. The defendant argues that, had trial counsel been provided with that report, it could have been used to impeach Drugan. [10] This Court concludes that whether or not trial counsel had the Vance Report, it would not support ordering a new trial, for several reasons.

First, as the Commonwealth points out, this report was publicly available to all parties well before trial. Cf. Commonwealth v. Shuman, 445 Mass. 268, 272-275 (2005) (study containing information publicly known before trial cannot be considered "newly discovered"). Second, to the extent the report relied on information not publicly available, this was not information that could be regarded as within the possession, custody or control of the Commonwealth. See Rule 14, Mass.R.Crim.P. By definition, this was a report by an independent body charged with auditing the Crime Lab, commissioned through the Executive Office of Public Safety. Third, there is some indication in the record that trial counsel was in fact aware of this report, since there was some discussion before a judge handling the case pretrial about ongoing independent "audits/investigations." The motion judge denied defendant's request to obtain nonpublic information relating to those investigations; if that was error, then it could have been raised by the defendant's first motion for new trial and/or in the appeal.

Finally and perhaps most important, the Vance Report does not contain any information which would call into question the accuracy of the DNA results here. The report did raise

[9] This Report is attached as Exhibit 2 to the Affidavit of Edward Gaffney dated August 31, 2019.
[10] Trial counsel submitted an affidavit stating that he had no memory of having received it.

certain issues regarding how the Crime Lab was run, noting that there was a lack of "regular objective audits and reviews" within the lab, a "lack or misuse of corrective actions" and management practices which left employees "confused and unsure about the 'correct' procedure or report...which can lead to continued variants and deviations." As to the DNA unit in particular, its primary problem was a substantial backlog. This backlog was attributed to inefficient management practices and also to practices that actually exceeded national standards, thus causing unnecessary delay. As to the quality of the scientific work performed at the Crime Lab, the report identified no deficiencies. As stated in the first sentence of Executive Summary of the Vance Report: "[t]he scientific methodologies being employed at the Massachusetts Laboratory are scientifically sound" and " conform to generally accepted practices in the forensic science community...consistent with national best practices." Indeed, efforts to use the Vance Report to support a claim that a new trial was warranted have failed in at least two other cases. See e.g. Commonwealth v. McCowen, 458 Mass. 461, 490 (2010); see also Commonwealth v. Guy, 454 Mass. 440, 446-447 & n. 1 (2009). This Court reaches the same conclusion here.

B. Personnel Files of Chow and Griffiths

The Commonwealth's failure to turn over certain information in the personnel files of Chow and Griffiths is more troubling.[11] Although trial counsel did not specifically request these files, a defense motion dated July 14, 2006 did ask for all "background information about each person involved in same collection and conducting or reviewing DNA testing in this case, including his/her current resume, job description and a summary of proficiency test results." The

[11] Although the motion also relies on information regarding Courtright, her suspension was for contaminating samples with her own DNA – an error which would have no bearing on her work in this case. Any failure to produce this information does little to support defendant's argument that a new trial is warranted.

proficiency test results and resumes were turned over: information that both Chow and Griffiths had been suspended was not. Although there is no indication that the Commonwealth intentionally withheld this information, the Commonwealth should have inquired of the Crime Lab to determine if personnel involved in the instant case had been disciplined or otherwise the subject of corrective action. Because this material related to job performance, it fell within the scope of the July 2006 request.

The issue is therefore whether, had this information been disclosed, there is a "reasonable probability" that the result of the trial would have been different. Unites States v. Flores Rivera, 787 F.3d 1, 15-16 (1st Cir. 2015). The key question is whether the unproduced evidence "could be reasonably taken to put the whole case in such a different light as to undermine confidence in the verdict." United States v. Aviles-Colon, 536 F.3d 1, 19 (1st Cir. 2008). Analyzing the withheld evidence in the context of the entire record, this Court concludes that, applying this legal standard, a new trial is not warranted.

In the defendant's initial memorandum in support of his motion, he focused on the Chow Memorandum and argued that it raised the possibility that Chow mixed up the DNA profiles and mistakenly identified the defendant – instead of Nicholson—as the individual whose DNA matched the sperm DNA in the swab taken from the rape victim. The Commonwealth pointed out, however, that Middleton's and Nicholson's DNA profiles were not generated by Chow: that was work done by Griffiths. Chow herself did not collect, handle or analyze the known exemplars of Middleton and Nicholson and therefore could not have mixed them up. Chow was instead the person who compared the DNA profiles that Griffiths generated from these exemplars to the DNA profile that Chow generated from the sperm cells found on the oral swab taken from the rape victim. Neither the Chow Memorandum – nor any of the other materials

produced as a result of this Court's January 2020 order --support the conclusion that the work that Chow performed in making that comparison was somehow deficient.

In the defendant's supplemental memoranda, he has switched his focus from Chow to Griffiths and in particular cites the letter dated July 31, 2006 suspending Griffiths. That letter noted "DNA testing discrepancies" and required her to undertake certain corrective actions to protect against "mislabeling, sample switching and transcription errors." The defendant argues that there is therefore a basis to infer that Griffiths (not Chow) mixed up the samples she received from Courtright and that she generated a DNA profile from Nicholson's sample and mislabeled it as the DNA profile of Middleton. This Court agrees with the Commonwealth that this would require the Court to engage in factually unsupportable speculation. Indeed, the buccal swabs provided by Middleton and Nicholson came to Griffiths already labeled, making it even less likely that Griffiths would mix them up.

Perhaps more important, defense counsel had hired his own expert to assist him with the DNA evidence in this case. This expert had all the materials necessary not only to review the work that had been done but also to conduct his own testing. The defendant argues that if the samples had indeed been switched by Griffiths, then a simple review of Chow's work would not detect any problem. But defendant's expert had (and still has) the ability to get his/her own DNA sample from the defendant and independently compare it to the DNA profile that Chow used as belonging to Middleton. To date, no independent DNA testing of any biological sample has ever been sought in this case. That is telling.

This Court does agree with the defendant that this information about Chow and Griffiths could have been used to impeach the testimony of Drugan, particularly where Drugan testified to the Crime Lab's qualifications and protocols, explaining not only that it was accredited but also

that every DNA analyst's work was "scrutinized every step of the way." Although Chow's and Griffiths' suspensions suggest that in fact their work was closely scrutinized, this information also shows that their supervisors questioned their ability to perform the tasks assigned to them in a manner that complied with protocols. This is therefore impeachment material. As to how significant that material would be, the fact remains that Drugan independently reviewed the work that was performed in this case and agreed with the conclusions that were reached. Defense counsel was certainly free to question Drugan regarding her own credentials and her own experience and to probe exactly what her independent review entailed. Moreover, the defense at the time of trial did appear to have some information about Chow and Griffiths and their relative lack of experience: that is, the record shows that counsel prior to trial received proficiency examination results for all personnel involved in the DNA testing together with their resumes.

With this in mind, this Court concludes that, although the withheld information could have assisted counsel in his cross examination of Drugan, a new trial is not warranted. "Newly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial." Commonwealth v. Barry, 481 Mass. 388, 400 (2019), quoting Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017). Moreover, the DNA evidence was not the only evidence implicating Middleton: Tia's testimony, corroborated by other evidence in the case, amply supported the jury's conclusion that Middleton acted together with Nicholson in committing the home invasion, even without the DNA evidence. "A strong policy of finality limits the grant of new trial options to exceptional situations, and such motions should not be allowed lightly." Commonwealth v. Gordon, 82 Mass.App.Ct. 389, 394 (2012). Because of that principle of finality, the law imposes the burden on the defendant to convince the trial court

that "justice may not have been done." Rule 30, Mass.R.Crim.P. As the judge presiding in this trial, this Court remains unconvinced that justice was not done in this case.

CONCLUSION AND ORDER

For all the foregoing reasons, together with other reasons set forth in the comprehensive Memoranda submitted by the Commonwealth in Opposition to this motion, the defendant's Motion for New Trial is **DENIED**.

Janet L. Sanders /mes

Janet L. Sanders
Justice of the Superior Court

Dated: August 26, 2021

much less that it "probably," or even possibly, could "have been a real factor in the jury's deliberations," "create[d] a reasonable doubt that did not otherwise exist," or "cast[] real doubt on the justice of [his] conviction[s]."Commonwealth v, Brescia, 471 Mass. 381, 389 & no. 10 (2015); Commonwealth v. Murray, 461 Mass.10, 21 (2011)(where evidence not specifically requested before trial, standard of prejudice same used as to newly discoverable evidence, whether if admissible and admitted there is "a substantial risk that the jury would have reached a different conclusion"); see Commonwealth v. Sullivan, 478 Mass. at 382; Commonwealth v. Laguer, 448 Mass. 585, 594-596 (2007).

II. The defendant does not support his waived and factually unsupported claim that his counsel on direct appeal was constitutionally ineffective for not having argued that this Court violated his Constitutional rights during jury empanelment in March 2008 by excluding classes of venirepersons.

The defendant's second motion for new trial claims that one of his post-conviction counsel was ineffective for not arguing in his direct appeal that this Court violated his rights during empanelment in March 2008, based on factual assertions which lack support by any persons present in the courtroom, such as that the supposed "skin color and Arabic-sounding name" of the 77th venireperson this Court examined on March 3, 2008, "surely alerted all to the fact that [the juror] was of Arabic ethnicity" (Def. MNT II at n. 37). He now suggests that this Court was commanded to conduct a *sua-sponte* Batson-Soares inquiry trial counsel did not seek (and do not even now suggest they wanted), into venirepersons' possible "Arab" origins and religious beliefs**.**

The defendant has supplied this Court with three affidavits from persons present in the courtroom, including both trial counsel; none supports his current motion's claims factual claims about such matters of first-hand knowledge as the apparent "ethnic" or religious

composition of the venire. If indeed any citizen's "skin color" settled "Arabic ethnicity," then trial counsel, whose conduct of empanelment the defendant does not fault, just as certainly affirmatively chose *not* to ask this Court for any inquiry based on any such purported group membership.

The defendant has not submitted any sworn affidavits of relevant personal knowledge, factual or strategic, about the process of the jury empanelment, after which both defendants' trial counsel pronounced them content with the jurors. It would be particularly unfair and unreasonable, and indeed impossible, to reconstruct a factual record thirteen years later, and where no person present avers any memory of the voir dire process. The defendant's March 2021 motion is accompanied by affidavits from both his and Nicholson' trial counsel, neither of which refers to the voir dire process. Nicholson's trial counsel thereafter filed an affidavit in concert with Nicholson's separate April 2021 (third) motion for new trial (No. 0582CR00165), in which he makes it explicit that he has "no memory as to why [he] objected or did not object to potential jurors at side bar and rest[s] upon the transcript on these questions" (Nicholson MNT III, March 2021 Power Aff. ¶5).

Thus the defendant's claim proceeds only the 2008 trial record available to his trial counsel, whose effectiveness he does not challenge, and cannot therefore cannot claim any fault lay with his appellate counsel. On this2008 trial record, counsel on direct appeal cannot plausibly be faulted for not having made such factual claims on a 2008 trial record that does not support them. See, e.g., Commonwealth v. Wells, 360 Mass. 846 (1971)(no improper denial of Sixth Amendment right to public trial where no request on subject to trial judge, counsel and defendant acquiesced, and claim first raised in new trial motion); Commonwealth v. Lacoy, 90 Mass. App. Ct. 427, 432-435 (2016)(defendant waived claim

that trial judge erred in responding to Commonwealth's exercise of peremptory challenge to African-American juror, and could not in any event show substantial risk of miscarriage of justice in absence of preserved factual record of particular composition of jury panel at trial).

The defendant offers no explanation for having waited more than a decade after his direct appeal's resolution to first claim his post-conviction counsel at that time should have raised any claim concerning empanelment. His claim is unaccompanied by any affidavit from his counsel on direct appeal, whose strategic conduct of his appeal he solely criticizes, nor an account of the absence of any such affidavit. See, e.g., Commonwealth v. Goodreau, 442 Mass. at 354 (counsel's "failure to confirm" post-conviction motion's claims "speaks volumes"); see also, e.g., Commonwealth v. Thurston, 53 Mass. App. Ct. at 553-554 Commonwealth v. Williams, 71 Mass. App. Ct. 348, 352 (2008)(claim of ineffective assistance "'conspicuously marred' by" failure to file affidavit from attorney or indicate it was sought). See also Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 11-12 (2006); Commonwealth v. Duest, 30 Mass. App. Ct. 623, 628 (1991).

The defendant nonetheless asserts his claim of ineffective assistance of counsel on direct appeal should be reviewed for structural error (Def. Rev. MNT II at 41). However, even structural error "is subject to the doctrine of waiver." Commonwealth v. Alebord, 467 Mass. 106, 112 (2014); Commonwealth v. Lacoy, 90 Mass. App. Ct.. at 435 (defendant waived *Batson* claim to strike of African-American juror during empanelment); see, e.g., Commonwealth v. Rogers, 459 Mass. 249, 263 (2011)(considering whether defendant timely raised empanelment issue in timely manner because right to public trial, like other structural rights, can be waived); Commonwealth v. Dyer, 460 Mass. 728, 735 & n. 7 (2011)(defendant waived heightened level of review accorded preserved claims of structural error on direct

consolidated review of first-degree murder conviction and denial of new trial motion). See also, e.g., Davis v. United States, 411 U.S. 233, 245 (1973) (when not raised until post-conviction motion, defendant cannot assert presumption of prejudice associated with claim of racial discrimination in grand jury composition).

The rule of waiver recognizes the Commonwealth's "valid interest in seeking a visible end to the criminal process" where, as here, successive post-conviction motions "unfairly consume public resources without any corresponding benefit to the administration of justice." Id. at 142; see also, e.g., Commonwealth v. Wells, 360 Mass. 846 (1971)(no improper denial of Sixth Amendment right to public trial where no request on subject to trial judge, counsel and defendant acquiesced, and claim first raised in new trial motion). Those interests underlying the rule of waiver are particularly pronounced here, where the defendant has waited until, on his own counsels' accounts, his trial counsel avers no relevant memory of the 2008 empanelment process, and even now none of them makes any claim of personal knowledge of facts the defendant understandably never sought to suggest to this Court during empanelment—such as that any prospective juror was, by appearance, of "Arab" origin or could have been assumed to have practiced a certain faith (See Def. Rev. MNT II at 33-41). See Commonwealth v. Lacoy, 90 Mass. App. Ct. at 434-435 (defendant cannot show substantial risk of miscarriage of justice on appeal in absence of adequate factual record on Batson claim).

Further, the defendant does not support the proposition that citizens of “Arabic” descent who are “likely Muslim” would have comprised a cognizable class under Batson, 476 U.S. at 97. See, e.g., United States v. Escobar-de Jesus, 187 F.3d 148, 164-165 (1st Cir. 1999). Cf. Commonwealth v. Sanchez, 79 Mass. App. Ct. 189, 193 (2011)(although Hispanic

jurors and African-American jurors each comprise discrete aggregate group, trial judge not required to hypothesize combination thereof would possess "the definable quality, common thread of attitudes or experiences, or community of interests essential to recognition as a 'group'"), quoting Gray v. Brady, 592 F.3d 296, 306 (1st Cir.), *cert. denied*, 130 S. Ct. 3478 (2010). See also, e.g., Murchu v. United States, 926 F.2d 50, 54 (1st Cir. 1991); United States v. Girouard, 521 F.3d 110, 112 (2008)(trial judge did not err by declining to demand "nondiscriminatory reason" for striking second self-identified Jewish venire member: "We have never held that *Batson* applies to cases of religious discrimination in jury selection"; even if it did, defendant bears burden contemporaneously to establish prima facie case of discriminatory impetus for particular peremptory challenge).

There are at least two additional reasons the newly-made claim must be deemed independently waived. First, the defendant's trial counsel, whose strategic conduct of empanelment he has never challenged, did not make the complaints he now makes, much less preserve any factual record thereof. G.L. c. 234A, §74 provides in relevant part:

> [A]ny irregularity in . . . impaneling . . . jurors . . . or any defect in any procedure performed under this chapter shall not be sufficient to . . . set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby.

It would be particularly unfair, and indeed impossible, to expect this Court to recall both unobservable and unobservable details as to each venireperson who appeared before this Court for pre-trial examination thirteen years ago. See Commonwealth v. Lacoy, 90 Mass. App. Ct. at 34-35. Second, the claim is waived for failing to raise it in the defendant's first motion for new trial.

The defendant has neither met his burden to show that his appellate counsel was constitutionally substandard in not arguing this claim on direct appeal, wmore than a decade ago, or that it was reasonably probable such an argument would have prevailed either on this record or under then controlling law. See, e.g., Commonwealth v Boria , 460 Mass. 249, 251-253 (2011)(appellate counsel not ineffective for not raising preserved objection at trial to admissibility of drug certificate, a strategic decision on appeal that was not shown to be "manifestly unreasonable" when made, and for not seeking stay of appeal while Melendez-Diaz was pending in Supreme Court), quoting Commonwealth v. Watson, 45 Mass. 246, 256 (2009); see also Massachusetts v. Weaver, 582 U.S. (2017), 137 S. Ct. 1899, 1903-1904 (2017)(where constitutional error claimed during jury selection but not raised on direct appeal and defendant later seeks to raise as ineffective assistance of trial counsel, defendant has to not only show objectively constitutionally "deficient performance" at trial but also "that the [trial] attorney's error 'prejudiced the defense '"and at very least must show either a reasonable probability of a different outcome that objectively deficient performance by counsel "rendered the trial fundamentally unfair"), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In March 2008 this Court properly conducted voir dire precisely as the defendant strategically requested, including a panel-wide inquiry which trial counsel requested be confined to the differing races of the defendants and victims; he did *not* ask this Court to probe venire members' possible ethnicities, countries of origin, or religious beliefs. Conspicuously absent from the 2021 affidavits of both defendants' trial counsel is any claim that this Court erred in so doing. Indeed, neither trial counsel's affidavit even mentions the exhaustive two-day empanelment process that yielded jurors whom the defendant does not

even now suggest were other than fair and impartial. Requesting—and *not* requesting—particular inquiry of potential jurors, especially into such intrusive matters as religious faith, quintessentially is entrusted to counsel as a matter of trial strategy. See, e.g., Commonwealth v. Koonce, 418 Mass. 367, 375-376 (1994)(trial counsels' weighing of costs and benefits of seeking additional voir dire questions, even where applicable to facts of case, such as possible racial bias, is matter of trial strategy).[24]

Here the Commonwealth was always first called upon to exercise any of its peremptory challenges (Tr. I:10). The Commonwealth did not challenge the first African-American juror seated; the defendant challenged that juror (MNT II:21). The Commonwealth did not challenge the second African-American juror, who was seated and remained on the jury (MNT II:21). After the Commonwealth challenged the day's 77th and final juror, trial counsel did not reference any cognizable ethnicity, nationality, or religion, but the juror's being "a person of color" for whom he "would just ask for some kind of race neutral explanation, that's all" (Tr. I:251). See Chakouian v. Moran, 975 F.2d 931, 934 (1st Cir. 1992)(defendant failed to establish prima facie case calling for explanation of challenge where he relied on nothing more than "the objection he asserted" as to juror's race).

This Court did not err by responding to the defense reference to a "race neutral explanation" on its plain terms, under extant law in 2008, finding "there's absolutely no pattern since [the prosecutor] did not exercise a peremptory as to either black person on the jury" (Tr. I:251). See Sanchez v. Roden, 808 F.3d 85, 97 n. 1 (2015)(trial record's reference

[24] See Tr. I:58, 64-65, 69-70, 74, 80, 82, 84, 95, 97, 101, 107, 112-114, 116, 119-120, 122-123, 129, 135-136-137, 140-141, 146, 151, 158, 160-161, 165-166, 170, 176-177, 182, 186-187, 189, 196, 200, 204, 206-207, 209-210, 211-213, 215-216, 220, 224 227-228, 235, 239, 247-248, 250; Tr. II:29, 35-36, 38, 45, 51, 53-54, 55-56, 60, 62, 66, 72, 74, 84, 87, 91, 95-96, 98-99,100-101, 103, 105-106, 108-109).

to "person of color" considered juror among black jurors for purpose of Batson analysis); Commonwealth v. Lopes, 478 Mass. 593, 599 (2018)(trial judge properly found no pattern of discriminatory challenges and was not required to request explanation from prosecutor, to whom no burden shifted even upon preserved defense objection to repeated peremptory strikes of identified categories of venirepersons). Both in 2008, and thereafter, a peremptory challenge was "presumed to be proper."[25] Commonwealth v. Maldonado, 439 Mass. 460, 463 (2003). See Commonwealth v. Issa, 466 Mass. 1, 8 (2013). A party who challenges the exercise of a peremptory challenge was required to show both "a pattern of excluding members of a discrete group" and that "it is likely that individuals are being excluded solely on the basis of their membership" in that discrete protected group. Id., quoting Commonwealth v. Garrey, 436 Mass. 422, 428 (2002). See Batson v. Kentucky, 476 U.S. 79 (1986); Commonwealth v. Soares, 377 Mass. 461, 486-488 (1979).

On this trial record, not only has the defendant failed to show any ordinarily fallible appellate counsel was obliged to have raised a claim that this Court violated his rights during empanelment, but even had counsel raised the matter on direct appeal, on this record he

[25]Only in 2020, more than twelve years after the defendant's convictions, in a case in which the defendant had preserved a factual claim that young male African-Americans were improperly stricken from the jury, did the Supreme Judicial Court reconcile a partial divergence between *Batson* and *Soares*. Commonwealth v. Sanchez, 485 Mass. 491, 492, 500-503 (2020)(prospectively "retiring" *Soares* language governing application of first-step challenge to exercise of peremptory strike); see Commonwelath v. Boria, 460 Mass. at 251-253, and cases cited. The first prong of the *Seferian* standard for constitutionally adequate representation is one of "reasonably effective assistance," and the reasonableness of appellate counsel's conduct in a particular case must be "viewed as of the time of counsel's conduct." Id. at 690. Strickland v. Washington, 466 U.S. at 687, 690. More than a decade earlier, ordinarily fallible appellate counsel would have been required on this trial record either to presage that change in the law; nor could appellate counsel have deduced the necessary factual predicate for it on this record (2021 MNT II at 34).

cannot show that there was any possibility he would have prevailed, or that the Appeals Court would not have deferred to this Court's assessment of what was transpiring in her courtroom as she examined panel members: because a "trial judge is in the best position to decide if a peremptory challenge appears improper and requires an explanation by the party exercising it," the Appeals Court would not have "substitute[d] [its] judgment . . . for [hers] if there is support for it on the record.' " Commonwealth v. LeClair, 429 Mass. 313, 321 (1999), quoting from Commonwealth v. Colon, 408 Mass. 419, 440 (1990).

On the second day of empanelment, March 4, 2008, the Commonwealth peremptorily challenged a juror from a new panel; trial counsel did not make any specific objection under extant law, or even suggest that race had been *any* impetus for that challenge: where two African-American jurors remained in the pool, trial counsel instead merely identified the venireperson as one of three African-Americans he observed in the room: he "object[ed] for the record because he's one of the only three African-Americans in the jury pool today" (Tr. II:107). Cf., e.g., Sanchez v. Roden, 808 F.3d at 93 (prosecutor not required to provide race-neutral explanation even for challenge that resulted in exclusion of all young black male jurors "until one was requested of" him). Again, no reference or claim was made related to religion, ethnicity, or national origin, and again this Court appropriately determined that no burden had shifted to the Commonwealth to provide a rationale for the challenge, in which trial counsel had not alleged that venireperson's race played any role.

No ordinarily competent counsel on direct appeal could possibly have divined from the trial record any good faith factual basis to have claimed that a single peremptory challenge sought to exclude any "Arabs, and also, by extension, Muslims," an assertion trial counsel, whose conduct of empanelment the defendant does not fault, never made (Def.

MNT II at 36-37). Venirepersons' names cannot now and could not then be reliably used, as the defendant now does, to infer race or ethnicity, much less religious beliefs, even where (unlike here) the defense strategically seeks such inquiry. See, e.g., Commonwealth v. Calderon, 431 Mass. 21, 25 n. 2 (2000)(usual tools to measure ethnicity, primarily name and appearance often deceptive; even self-identification not determinative); Commonwealth v. Fryar, 425 Mass. 237, 239, 242 n. 3 (1997)(judge ruled analysis of jurors surnames unreliable as indication of race and denied request to contact jurors to ascertain their race); Commonwealth v. Arriaga, 438 Mass. 556, 563 (2003)("[r]eliance on surname analysis alone to identify Hispanic jurors is invalid evidence of underrepresentation"); Commonwealth v. Peters, 372 Mass. 319, 322 (1977)(list and short catchphrases about each member of venire insufficient to draw reliable inferences about panel composition for claim that venire not representative); Commonwealth v. Suarez, 59 Mass. App. Ct. 111, 114 (2003)(juror's surname—Lugo—insufficient information from which to infer ethnicity); U.S. v. Campione, 942 F.2d 429, 433 (7th Cir. 1991) (spelling of surname standing alone insufficient to show that juror belongs to particular ethnic group); Murchu v. United States, 926 F. 2d at 54 (court unable to determine whether prospective jurors with Irish-sounding surnames were Irish-American).

Because trial counsel never purported to identify any potential juror as "Arab" or as an adherent of any faith, much less claim any peremptory challenge was based on a juror's being "Arab" or Muslim, necessarily this Court was not required to demand any responsive explanation from the prosecutor to a claim trial counsel did not make.[26] See Batson v.

[26] During the two-day empanelment, a lone reference to religious affiliation was spontaneously volunteered by a single venire member who indicated that as a member of the "Christian Brethren" he was unable to take an oath and had difficulty passing judgment on

Kentucky, 476 U.S. at 97-98; Commonwealth v. Soares, 377 Mass. at 491; Commonwealth v. Ortega, 480 Mass. 603, 606 (2018)(defendant's burden to make timely prima facie showing to trial judge); Commonwealth v. Lopes, 478 Mass. 593, 598 (2018). Moreover, counsel on direct appeal cannot be faulted as constitutionally ineffective for not arguing on direct appeal a factually and legally untenable claim that this Court should *sua sponte* have upended trial counsels' tactical decisions for them, and probed such matters as venirepersons' religious beliefs, practices, and "heritage," even though trial counsel, whose empanelment strategy the defendant does not purport even now to criticize, had not asked this Court to do so. Accordingly, by the time the jury was sworn on March 4, 2008, after trial counsel pronounced themselves content, the defendant had waived any claim that this Court "failed to follow the proper procedure" during empanelment and purportedly excluded Arabic-Muslim jurors (Def. MNT II at 30). See also, e.g., Commonwealth v. Peteta-bella, 459 Mass. 177, 186, 186 n. 9 (2011)(defendant waived appellate claim female jurors improperly excluded).

Had it not been repeatedly waived, the claim would still fail. The defendant has failed to support a claim that the Commonwealth excluded a single "Arab" or "Muslim" juror, let alone for that reason, much less that the "Commonwealth had ensured that 100% of all Arabs and/or Muslims were excluded" or that he could claim any harm entitling him to a new trial thirteen years later as result (MNT II at 38).[27] As the defendant's motion acknowledges,

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others; he was excused without objection (Tr. II:81-83). Cf. United States v. Girouard, 521 F. 3d at 115 & n. 6 (where two venire members self-identified as Jewish at sidebar, defendant failed to make even contemporaneous record suggesting all members of religious group had been struck; "[c]ompared to race and gender, religious affiliation is relatively hard to discern from appearances"; "other venirepersons might have been Jewish as well" but not mentioned their religious affiliation or beliefs).

[27] A defendant is required not only to "show[] that his attorney's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer,'" but also "that he suffered prejudice because of his attorney's unprofessional errors." Commonwealth

nothing in the record, including his own surname of "Middleton," alerted the Court or the Commonwealth to the defendant's own professed Muslim faith. (Rev. MNT 40). Likewise, he does not point to any portion of the record that would have alerted anyone else present to any prospective juror's religious beliefs, or rendered them of any significance to his empanelment strategy. The defendant's first motion for new trial did not advance any claim that there were defects in empanelment, independently waiving the point. Prior to sidebar examination of this *77th member* of the first day's panel, seven jurors had been seated and 69 discharged, without any defense request to commemorate the apparent ethnicities, nationalities, or religious practices. See Sanchez v. Roden, 808 F.3d 85, 93 (2015)(Thompson, J., concurring)(noting, even in limited hearing not involving recalling jurors, the "difficulties in making a Batson determination on a cold record many years following the original jury selection").

Were a first-instance claim that counsel on direct appeal alone was ineffective properly now raised, the defendant does not support it. His attorney's task on direct appeal was to select and argue articulate the most relatively meritorious issues and not to raise less compelling or frivolous ones. See, e.g., Smith v. Robbins, 528 U.S. 259, 285-286, 287-288 (2000)(same two-part test defendant must satisfy to establish constitutionally ineffective assistance by trial counsel, and defendant raising such a claim must prove that both trial and appellate counsel engaged in objectively unreasonable conduct and that "but for counsel's

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v. Lavrinenko, 473 Mass. 42, 51 (2015), quoting Commonwealth v. Clarke, 460 Mass. at 45. He has not postulated any "otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. at 96; see, e.g., Commonwealth v. Mahar, 442 Mass. 11, 15 (2004); Commonwealth v. Healy, 438 Mass. 672, 677 (2003). Nor has he demonstrated that "better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977); see Commonwealth v. Phinney, 446 Mass. 155, 162 (2006).

unprofessional errors, the result of the [relevant] proceeding would have been different."). Even had the defendant not waived his claim that this Court deprived him of his constitutional rights during a 2008 empanelment, the defendant has failed to support his claim that an ordinarily fallible counsel on direct appeal was required to forego or dilute preserved and more relatively meritorious arguments by making an unpreserved and meritless argument that this Court should have upended trial counsels' still-unfaulted strategic conduct of empanelment, based on factual claims which lack support in the trial record. Indeed, " '[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail . . . is the hallmark of effective appellate advocacy." Commonwealth v. Sowell, 34 Mass. App. Ct. at 233, quoting Smith v. Murray, 477 U.S. 527, 536 (1986).

III. The prosecutor fleetingly and properly referred, without objection, to evidence that amply supported the reasonable inference that Nextel telephone devices found on both defendants' persons upon their arrests were two of Nicholson's Nextel devices.

A claim of error in a 2008 closing argument was available to the defendant at trial, at his first motion for new trial, and in his previous appeal. Claims not raised at the at the earliest possible time are waived; issues are not "new" where they could have been addressed in the trial court or "during a previous appeal." Commonwealth v. Wright, 469 Mass. 447,456-461 & n. 22 (2014); see Commonwealth v. Watson, 409 Mass. at 110; Commonwealth v. Balliro, 437 Mass. at 166; Commonwealth v. Ambers, 397 Mass. at 707 n.2; Reporter's Notes to Mass. R. Crim. P. 30 (rule "intended to establish finality of convictions and to eliminate 'piecemeal litigation'").

Had the claim not been waived, no error occurred. The prosecutor fleetingly and properly referred to the supported inference that Nextel telephones found on both defendants's persons when they were arrested on January 28, 2005, bringing to a conclusion

the concealment phase of the crimes in which they charged as joint venturers, were two of Nicholson's three Nextel phones. See, e.g., Commonwealth v. Keown, 478 Mass. 232, 248 (2017); Commonwealth v. Kozec, 399 Mass. 514, 516 (1987)("We have never criticized a prosecutor for arguing forcefully for a conviction based on the evidence and on inferences that may reasonably be drawn from the evidence.").

That the defendant's trial counsel did not object reinforces the propriety of the prosecutor anodyne reference. See, e.g., Commonwealth v. Toro, 395 Mass. 354, 360 (1985)(absence of contemporaneous response from experienced defense counsel to prosecutor's remarks in closing "is some indication that the tone, manner, and substance of the now challenged aspects of the prosecutor's argument were not unfairly prejudicial"). It was supported by the evidence, including evidence that the defendant did not have any Nextel account in his own name, but Nicholson "had three phones under his Nextel account as of January, 2005," and telephone carrier records to which both defendants stipulated (Exh. 40; see Tr. IV: 232-236; Tr. V:18).

Telephone records showed multiple contacts within the time frame and in the vicinity of the Braintree offenses between two of Nicholson's Nextel telephone devices, as well as with a Nextel phone device Kendricks was using (Tr. IV: 232-236; Tr. V:18; Exhibit 40). Both the victims and Kendricks identified the Nextel devices as having been used to communicate during the planning, commission, and concealment phases of the crimes. As the crimes against the four victims continued over the course of an hour or more inside S.M.'s Braintree home into the early morning of January 12, 2005, the victims saw and heard both intruders using Nextel two-way phones, and one victim also heard a female voice on the other end of a telephone interaction with one of the two intruders (Tr. III:53-54, 56, 134-136,

139, 150, 172, 204-206, 218-220, 223-225, 236-240, 254-255). After one intruder's Nextel phone was paged, a victim heard a voice at the other end say, "Are you finished? Hurry up"; the intruders responded, "We're almost off this" (Tr. III:205).

While the two masked intruders attacked the victims, *two* of those Nextel telephones had made outgoing calls that connected to the same, closest available cell tower to the Braintree crime scene: one outgoing call was made from one of Nicholson's Nextel numbers at 10:45 p.m. on the night of January 11, 2005, and one was made from another of his Nextel phones at 1:09 a.m. on January 12th, 2005 (Tr. IV:232-240; Exh. 40; see Tr. III:56-57, 136-137, 208, 253-255).

Upon his arrest at the train station at the conclusion of his ongoing telephone contacts with Kendricks on January 28, 2005, Nicholson had only one of his three Nextel phones on his person; this defendant, who did not have any Nextel account of his own, arrived at the same train station and also was arrested after a call to him was placed from the Nextel phone on Nicholson's person to the lone Nextel phone on the defendant's person when he too was then arrested (Tr. II:218,252-258; Tr. IV:38-43, 211-225, 232-240; Exh. 40; see Tr. III:56-57,136-137, 208, 253-255). These were two of the same three Nextel phones of Nicholson's which Cell Site Location Information indicated were made in the vicinity of S.M.'s home during the early morning hours of January 12, 2005, when the four victims testified they were brutally assaulted while their assailants used Nextel phones to communicate with someone outside the home whose voice they heard; Kendricks' phone was listed on the same records (Tr. IV: 232-236; Tr. V:18; Exh. 40).

The evidence thus not only reasonably, but overwhelmingly supported the reasonable inference that the Nextel phone on the defendant's person was Nicholson's. The defendant's

first-instance 2021 criticism of the prosecutor's 2008 closing argument is both waived and meritless.

CONCLUSION

For the foregoing reasons, even had the defendant not waived these claims long before his second motion for new trial, he has not met his burden to show that justice was not done. Mass. R. Crim. P. 30(b), as appearing in 435 Mass. 1501.

The Commonwealth respectfully requests that the defendant's motion for new trial be denied.

Respectfully submitted,

ON BEHALF OF THE COMMONWEALTH,

/s/ Stephanie Glennon

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Certificate of Service

I certify that I this day, June 27, 2021, served by electronic mail the within Commonwealth's Opposition to the defendant's second motion for new trial and Commonwealth's documentary addendum thereto (comprising a separate electronic PDF file) to the defendant's counsel, Edward Gaffney, Esq., Box 1272, Framingham, MA 01701.

/s/ Stephanie Glennon

Stephanie M. Glennon, Esq.