

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH
Appellee

v.

BRIAN DONOVAN,
Defendant/Appellant

On Appeal from Judgments, Orders, and Rulings of the Norfolk Superior Court

Appeals Court No. 2025-P-0242

APPLICATION FOR DIRECT APPELLATE REVIEW

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June 10, 2025

REQUEST FOR DIRECT APPELLATE REVIEW

Now comes the Defendant/Appellant, Brian Donovan, and hereby requests, pursuant to Mass. R. App. P. 11(b)(1), direct appellate review of his appeal from his conviction and the denial of his Motion for a New Trial in the Norfolk Superior Court.

INTRODUCTION

Brian Donovan was 39 years old in 2017 when the Norfolk County Juvenile Court held a transfer hearing pursuant to G.L. c. 119, § 72A about whether he should be tried as an adult for allegations that, as a 15-year-old in 1993, he sexually abused a 9-year-old. There is a dearth of law outlining how a transfer hearing should be conducted, and no Massachusetts appellate court has yet ruled on whether a defendant is entitled to the effective assistance of counsel at the hearing. Mr. Donovan was deprived of such assistance; his counsel did not prepare to present evidence on the crucial discretionary question of whether public safety required his adult prosecution, and the court denied her a continuance. As a result, the court did not hear evidence about Mr. Donovan's praiseworthy adult life, or about his risk of recidivism. This case addresses whether Mr. Donovan's right to effective assistance of counsel was violated in that hearing. Because it presents an important issue of first impression on which clear guidance to courts and attorneys

is needed, Mr. Donovan respectfully requests that this Court grant direct appellate review.

The case also presents consequential issues about how the suggestiveness of an identification should be assessed in a case where an accusation is made long after the fact. When the alleged victim went to police in 2016—23 years after the crime—police conducted a photo show-up using an RMV photo of Mr. Donovan as an adult. They used the same identification procedure with his father, the only other witness to interact with the perpetrator of the crime back in 1993. In his Motion for a New Trial, Mr. Donovan alleged that his counsel was ineffective for failing to move to suppress and otherwise challenge his identification. He now asks that this Court grant direct appellate review to address how courts should assess identification issues in the context of late-disclosed allegations.

STATEMENT OF PRIOR PROCEEDINGS IN THE CASE

On May 12, 2017, Mr. Donovan was charged via a complaint in the Norfolk County Juvenile Court, docket no. 17DL0149QU, with four counts of rape of a child with force, in violation of G.L. c. 265, § 22A, and four counts of statutory rape, in violation of G.L. c. 265, § 23. (IRA 75.)¹ The charges alleged that Mr.

¹ References to the Norfolk Superior Court trial transcripts are to “Tr.” References to the transcript of the transfer hearing in the Juvenile Court are to “Transfer Tr.” References to the Record Appendix filed in the Appeals Court on June 4, 2025 are to “RA,” and references to the Impounded Record Appendix filed in the Appeals Court on June 4, 2025 are to “IRA.”

Donovan committed these crimes in 1993, at 15 years old. (*Id.*) On October 18, 2017, the Juvenile Court held a transfer hearing under G.L. c. 119, § 72A. Following hearing, the Juvenile Court transferred the charges to adult court. (*Id.* at 79.) Mr. Donovan was ultimately indicted in Norfolk Superior Court on two counts of rape of a child with force, on February 21, 2018. (RA 19-20.) On December 13, 2022, he was convicted on both counts following a jury trial. (RA 13.) Mr. Donovan filed a notice of appeal of his conviction on December 14, 2022. (RA 106.) On December 22, 2022, he was sentenced to serve three to five years on Count 1, and to three years of probation following release on Count 2; his prison sentence was later amended to three years to three and a day. (RA 13-14.) He filed a supplemental Notice of Appeal on January 18, 2023. (RA 107.)

Mr. Donovan's direct appeal was docketed in the Appeals Court as 2024-P-0114, then stayed. He filed a Motion for a New Trial in the Superior Court on May 17, 2024. (RA 16.)

Because the trial judge had retired, a new judge decided the Motion for a New Trial. On February 11, 2025, the motion judge denied the motion without hearing, issuing a written decision that found no error or ineffective assistance at the transfer hearing and did not address the other issues that Mr. Donovan raised, including issues regarding his identification as the perpetrator. (RA 108-111.) Mr. Donovan filed a timely notice of appeal. (RA 112.) That appeal was consolidated

with Mr. Donovan's direct appeal, as case 2025-P-0242. Mr. Donovan filed his brief in the case on June 4, 2025.

STATEMENT OF FACTS

A. Juvenile Court Transfer Hearing and Related Evidence of Ineffective Assistance

Because Mr. Donovan was alleged to have committed an offense prior to his 18th birthday but was not apprehended until after he turned 19, a transfer hearing was held in the Quincy Juvenile Court prior to his Superior Court prosecution. *See* G.L. c. 119, § 72A. At a transfer hearing, the Juvenile Court must determine two things: whether there is probable cause, and whether, in the court's discretion, the defendant should be discharged or tried in adult court. *Id.*

At the hearing, Judge Linda Sable heard testimony from the alleged victim ("DR"), his father, and a Randolph police detective. DR testified that in the summer of 1993, when he was 9 years old, he was repeatedly raped by an older boy, whom he identified as Mr. Donovan. (Transfer Tr. 11-12.) He stated that Mr. Donovan, who would have been 15 at the time, helped his father with yardwork, and then asked him to play in the woods nearby. (*Id.* 15-18.) In the woods, DR said, Mr. Donovan told him to take his pants down, and began touching him, including by putting his mouth on DR's penis. (*Id.* 18-19.) He then made DR get on his knees and put his penis into DR's mouth. (*Id.* 19-21.) DR testified that he was

very afraid and that Mr. Donovan threatened his family. (*Id.* 21.) He described that these events reoccurred approximately four times during that summer. (*Id.* 22-23.)

In September 2016, DR saw Mr. Donovan on the street, then went to the Randolph Police and reported the 1993 abuse. (*Id.* 29.) Police printed an RMV photo of Mr. Donovan as an adult, and he identified it as his abuser. (*Id.* 30-31.)

At the close of testimony, Judge Sable heard arguments on probable cause, then stated, “I find that there is probable cause, which brings us to part two. I think there is enough here and in the interest of justice I’m going to transfer this matter to the adult court.” (Transfer Tr. 86.)

Mr. Donovan’s appointed counsel (“transfer counsel”), reacted with surprise, indicting that she expected “the second part” of the hearing before the court determined whether to transfer the case, “because I’ve got to be able to provide information that the public is not at risk if it is dismissed and sent to the adult court or the juvenile is discharged. So, there’s one more proceeding that we need. That’s how I’m reading the statute.” (*Id.*) Judge Sable responded that her decision to transfer “is discretionary based upon my reading of whether or not the public would be served and justice would be served if the matter were transferred” but invited counsel to be heard on “part two.” (*Id.* 87.) Transfer counsel explained that she intended to ask for funds for an expert to complete a risk assessment of Mr. Donovan and “wouldn’t be ready immediately.” (*Id.*) Judge Sable refused to

continue the hearing, and transferred the case without the benefit of any further evidence regarding Mr. Donovan's character or risk to the public. (*Id.* 88-89.)

Mr. Donovan's 2024 Motion for New Trial argued that transfer counsel was unprepared and ineffective, and that it was error for the Juvenile Court to refuse a continuance to permit her to fully prepare. Mr. Donovan's appointed counsel for the transfer hearing submitted an affidavit in which she described her lack of preparation for that hearing and the evidence she would have presented if granted a continuance. (RA 20-23.) She stated that she believed that the transfer hearing would be bifurcated, and that at the first hearing, the Juvenile Court would decide only whether there was probable cause, then schedule a second hearing on the discretionary question of whether the case should be transferred. (RA 20-21.) She prepared to examine the alleged victim and other witnesses at the hearing, and to argue the question of probable cause—not to present evidence on the second question. (RA 21.)

If probable cause were found, transfer counsel intended to seek funds for an expert risk assessment to address whether Mr. Donovan currently posed any risk to public safety. (RA 21.) She also would have presented "evidence about Mr. Donovan's life circumstances and good character." (RA 21.) She knew that at the time of the transfer hearing Mr. Donovan was living with and caring for his elderly father. (RA 21.) His girlfriend and her young son also lived with him, and his life

really centered around parenting this child, to whom he was a good father. (RA 21.) He had good relationships with his neighbors, including a former court officer who would help him get to court. (RA 21.) He was successfully employed at Dunkin Donuts and McDonalds. (RA 22.) If she had been granted a second hearing date to present evidence on the discretionary question of whether the case should be transferred, transfer counsel would have sought to show that Mr. Donovan was a “wonderful, empathetic, kind, caring person” through “testimony from his neighbors and people in his life,” many of whom she had spoken to already, and would have “sought proof of Mr. Donovan’s productive employment.” (RA 22.)

Mr. Donovan presented additional affidavits from his neighbor and former manager to document the testimony that transfer counsel could have offered. These affidavits spoke to his care for others in his life and community, including his father, for whom he was a full-time caretaker, and his girlfriend’s son with autism; his neighbor’s affidavit concluded that as an adult, Mr. Donovan was “a good person who devotes himself to taking care of the people around him.” (RA 45.). Mr. Donovan’s manager thought so highly of him that despite his conviction in this case, she told him that he could have his job back upon his release. (*Id.*)

Mr. Donovan’s Motion for a New Trial included a risk assessment, as transfer counsel wished to present. (RA 14.) That assessment, by Dr. Frank DiCataldo, found that Mr. Donovan is low risk for future sexual offenses, and “was

low risk at the time of his transfer hearing in 2017.” (RA 35.) Dr. DiCataldo stated that “If a forensic mental health evaluator with expertise in the assessment of risk and treatment needs for sexual offenders, such as myself, had been retained . . . a report, similar to the present report, and testimony could have been provided arguing that Mr. Donovan was low risk to commit a future sexual offense and did not need sex offender treatment to manage his risk in the future.” (*Id.*)

B. Witness Identifications of Mr. Donovan and Trial Counsel’s Actions Related to Identification

DR testified at trial about the assaults he experienced as a child, in testimony similar to his testimony at the transfer hearing. (Tr. 3:47-101.) In his testimony at trial, as at the transfer hearing, he did not describe how he learned the name of the teenager who assaulted him, or how he learned where he lived.

When DR went to the Randolph Police, he first spoke to an Officer Flaherty who had grown up in the neighborhood with him and knew him and Mr. Donovan. He then spoke to Detective Bringardner, who printed out an RMV photo of Mr. Donovan as an adult and showed it to DR, who identified Mr. Donovan as his abuser. (Tr. 3:120, 4:23-24; Ex. 32.) At trial, DR made an in-court identification of Mr. Donovan, without objection. (Tr. 3:44.)

Detective Bringardner also interviewed DR’s father, who corroborated his son’s testimony that a teenager, whose name he didn’t know, had helped him with yardwork; he said that this happened on exactly one occasion. (Tr. 3:173-179.)

Detective Bringardner showed him the same RMV photo of Brian Donovan as an adult, and he identified it as the teenager he hired to help with yardwork. (Tr. 3:185.) The father did not make an in-court identification of Mr. Donovan at trial, but the trial judge did permit him, over objection, to identify the RMV photograph as “the kid that I hired for a few minutes work.” (*Id.*)

Trial counsel did not move to suppress either witness’s identification, or file any motion in limine regarding identification. Neither party called an expert on memory as a witness, and defense counsel did not consult with an expert. (RA 88.)

Mr. Donovan’s Motion for a New Trial was accompanied by a report from Dr. Ayanna Thomas, a psychology professor and Dean of Research for Arts and Sciences at Tufts University. (RA 62.) Dr. Thomas’s affidavit discussed the science of memory, focusing on a phenomenon known as “unconscious transference,” which can occur “when a witness who has incidentally encountered a suspect in an innocuous setting” comes to believe “that the individual seems familiar because the witness/alleged victim encountered him or her at the crime scene.” (RA 53.) The likelihood of unconscious transference “increases as the time between the original event and identification increases,” and “with probable changes to appearance that naturally occur with age.” (*Id.*)

Dr. Thomas’s affidavit also explained how “social contagion” when a memory is shared with others can result in recall of false information. (*Id.*) Parents

often ask children suggestive questions when abuse is suspected. (RA 51.) Dr. Thomas stated in her affidavit, “[I]nitial conversations with family members should be considered as a possible source of social contagion. Both the alleged victim’s memory and the father’s memory may have been altered by the other’s recounts.” (RA 56.) Mr. Donovan’s Motion for a New Trial was also accompanied by an affidavit from his trial counsel, who affirmed that he did not have a strategic reason not to suppress DR’s or his father’s identification or not to consult an expert on memory. (RA 86-88.)

STATEMENT OF ISSUES OF LAW AND PRESERVATION

The issues presented in this appeal are in two categories. First, there are issues regarding the G.L. c. 119, § 72A hearing: whether Mr. Donovan was entitled to and received effective assistance of counsel; and whether the Juvenile Court abused its discretion by denying his unprepared counsel a continuance.

Transfer counsel objected strenuously at the hearing to the denial of a second hearing date (transfer tr. 86-89), and that issue is therefore preserved. *Commonwealth v. Melo*, 472 Mass. 278, 304 (2015). Mr. Donovan alleged ineffective assistance in a Motion for a New Trial, presenting the question of whether transfer counsel’s performance fell “measurably below that which might be expected from an ordinary fallible lawyer.” *See Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). The judge who ruled on the motion was not the trial judge

and did not hold an evidentiary hearing, take testimony, or make holdings about credibility in ruling on the motion. Accordingly, the appellate court is in the same position as the motion judge to assess the evidence, and review of the denial of Mr. Donovan's Motion for a New Trial is *de novo*. See *Commonwealth v. Mazza*, 484 Mass. 539, 547 (2020).

The second set of issues concern possible unexplored challenges to the identification of Mr. Donovan as the perpetrator: whether trial counsel was ineffective in failing to move to suppress the identifications by DR and his father; whether the trial court erred in permitting the father to identify the RMV photo of Mr. Donovan on the stand; and whether trial counsel was ineffective in failing to consult an expert on the science of memory. Trial counsel timely objected to admission of DR's father's in-court identification of the RMV photograph, and so admission of that testimony is subject to review for prejudicial error. See, e.g., *Commonwealth v. Cruz*, 445 Mass. 589, 591 (2005). The issues regarding ineffective assistance of counsel were raised in Mr. Donovan's Motion for a New Trial, and are reviewed under the *Saferian* standard; as stated above, appellate review should be *de novo*.

ARGUMENT

- A. Mr. Donovan's rights were violated by transfer counsel's failure to present evidence that his adult prosecution was not necessary to protect the public, and by the Juvenile Court's refusal to grant her a continuance to adequately prepare.

Mr. Donovan's transfer counsel did not present evidence on the critical question of whether his case should be transferred to adult court. At a G.L. c. 119, § 72A transfer hearing, "If the judge concludes that there is probable cause, the second determination is whether the defendant should be tried as an adult on the criminal charge or be discharged, thereby ending the prosecution." *Matter of A Juvenile*, 485 Mass. 831, 833 (2020). This second determination is discretionary and requires "consideration of the specific crime and the particular defendant." *J.H. v. Commonwealth*, 479 Mass. 285, 290 (2018). The judge can consider factors including "the age of the defendant at the time of the alleged offense," "the age of the defendant when the case would be tried," and evidence of "the defendant's rehabilitation and evolving maturity," as well as the nature of the crime and "the potentially significantly greater penalty the juvenile could face if tried as an adult." *Commonwealth v. Irvin I.*, 100 Mass. App. Ct. 33, 39 (2021) (internal citations omitted). The "determinative issue . . . may not be whether the defendant committed the offense but whether the defendant is unlikely to recommit an offense." *Matter of A Juvenile*, 485 Mass. at 840.

The stakes are enormous; the hearing determines whether the defendant will “face the possibility that he will be found guilty of the crimes charged, sentenced as an adult for crimes that he committed as a juvenile, incarcerated in a State prison, and required to register as a sex offender.” *Id.* at 838-839; *see also Commonwealth v. Nanny*, 462 Mass. 798, 806 (2012) (§ 72A transfer hearing presents the question whether an individual “will be subject to *any* prosecution *at all*”) (emphasis in original).

The right to effective assistance of counsel applies to all ‘critical’ stages of a criminal proceeding, including sentencing. *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Commonwealth v. Lykus*, 406 Mass. 135, 145 (1989). The Supreme Judicial Court has not specifically addressed whether a defendant is entitled to effective assistance at a transfer hearing, but has said that given the hearing’s importance, “a ‘thoughtful presentation by defense counsel directed at both issues is . . . critical.” *Matter of A Juvenile (supra)* (quoting *J.H.*, 479 Mass. at 290).

Transfer counsel did not put on a “thoughtful presentation” on the question of whether Mr. Donovan’s discharge was consistent with protection of the public. *See Matter of A Juvenile (supra)* (quoting *J.H.*, 479 Mass. at 290). This failure was not the result of any strategic decision, or “informed exercise of [her] prerogative to decide on the defense strategy,” but of her mistaken belief that there would be a second hearing on another day. Mr. Donovan was deprived of “an otherwise

available, substantial ground of defense,” *Saferian*, 366 Mass. at 96, because his counsel did not offer evidence on the “critical and complicated discretionary issue whether the court should discharge” Mr. Donovan. *J.H.*, 479 Mass. at 292.

The affidavits presented with Mr. Donovan’s Motion for a New Trial contained extensive important evidence about his character, lifestyle, and risk of recidivism. *See supra* 7-8. Failure to present similar evidence has been held ineffective in the analogous context of sentencing. *See Lykus*, 406 Mass. at 146; *Commonwealth v. Cameron*, 31 Mass. App. Ct. 928, 930 (1991). The Juvenile Court should have heard the story of Mr. Donovan’s adult life and had the opportunity to consider his rehabilitation and mature development before it decided whether to transfer his case. Instead, it knew only that he lacked a criminal record. It had *no* other information about his admirable adult life and the way that he has consistently gone above and beyond to care for others. It also didn’t have the benefit of expert evidence about the likelihood that he would commit another similar offense.

Denial of a continuance to permit Mr. Donovan’s transfer counsel to present this evidence was an abuse of discretion. Whether or not counsel’s belief that there would be a second hearing was reasonable, the Juvenile Court knew of her lack of preparation, and was fully on notice that Mr. Donovan would only have a

meaningful opportunity to be heard about whether his discharge was consistent with protection of the public if granted a continuance.

A judge should grant a continuance only when justice so requires, “balancing the requesting party’s need for additional time against concerns about inconvenience, cost, potential prejudice, and the burden of the delay on both the parties and the judicial system.” *Melo*, 472 Mass. at 305 (quoting *Commonwealth v. Ray*, 467 Mass. 115, 128 (2014)). A trial judge cannot exercise her discretion to deny a continuance “in such a way as to impair the constitutional right to have counsel who has had reasonable opportunity to prepare a defense.” *Commonwealth v. Cavanaugh*, 371 Mass. 46, 50-51 (1976). Section 72A “minimally require[s]” that the Juvenile Court conduct a hearing at which “both sides ha[ve] the opportunity to present evidence addressing probable cause and whether [the defendant’s] discharge [i]s consistent with protection of the public or whether the interests of the public required adult prosecution rather than discharge.” *Commonwealth v. Davis*, 56 Mass. App. Ct. 410, 416 (2002). Mr. Donovan did not have that opportunity.

There were no meaningful countervailing concerns about delay. The case concerned 20-year-old events, and more than a year had passed since DR went to police. The Commonwealth would not have been prejudiced by a further delay, and holding a single further hearing would not have been a burden. Denial of a

second hearing was an abuse of discretion that violated Mr. Donovan's rights to due process and the effective assistance of counsel.

B. Trial Counsel's failure to move to suppress or object to unnecessarily suggestive identifications, and failure to consult an expert on memory, neglected a defense based on misidentification.

DR and his father each identified a single RMV photo showing Mr. Donovan as an adult in 2016 as the teenager that they had encountered in 1993. (Tr. 3:120; *see also* IRA 43.) These photo show-ups were "unnecessarily suggestive and conducive to irreparable mistaken identification" and their admission deprived Mr. Donovan of his right to due process. *Commonwealth v. Crayton*, 470 Mass. 228, 234 (2014) (quoting *Commonwealth v. Walker*, 460 Mass. 590, 599 (2011)). "For constitutional purposes, a one-photograph identification is the equivalent of an in-person, one-on-one identification." *Commonwealth v. Carlson*, 92 Mass. App. Ct. 710, 712 (2018) (citing *Commonwealth v. Nolin*, 373 Mass. 45, 51 (1977); *Commonwealth v. Forte*, 469 Mass. 469, 477 (2014)).

Because the procedures were unnecessarily suggestive and conducive to mistaken identification, the identifications were inadmissible unless there was "good reason" for the show-up procedure. *Crayton*, 470 Mass. at 235. "Good cause" is examined in light of "the nature of the crime involved and corresponding concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and the usefulness of prompt confirmation of the

accuracy of investigatory information, which, if in error, will release the police quickly to follow another track.” *See Commonwealth v. Austin*, 421 Mass. 357, 362 (1995). The “‘good reason’ that justifies most out-of-court showups . . . depends on the short duration of time between the crime and the showup.” *Crayton*, 470 Mass. at 242. Where none of these factors supports use of a show-up procedure, the resulting identification must be suppressed. *See Carlson*, 92 Mass. App. Ct. at 713.

Here, the crime occurred 23 years before and there was no immediate threat to public safety. Although DR claimed to have recently seen Mr. Donovan, this was not a case in which police were rushing to apprehend an at-large suspect. Compare *Commonwealth v. Walker*, 421 Mass. 90, 95 (1995); *Commonwealth v. Pearson*, 87 Mass. App. Ct. 720, 724-725 (2015). Police did not proceed to the location where DR had allegedly seen Mr. Donovan, or even speak to Mr. Donovan until almost six months later. (*See* Tr. 4:30.)

That the alleged victim provided the name of the defendant himself does not negate the identification’s suggestiveness. DR was a child at the time of the events, and expressed uncertainty about whether “Brian Donovan” was the correct name. (IRA 43.) The photo show-up could have cemented a mis-identification between Mr. Donovan, who undisputedly resided in DR’s neighborhood as a teenager, and DR’s real assailant. (*See* RA 53.)

DR also made an in-court identification of Mr. Donovan. Because the only prior out-of-court identification was unduly suggestive, the identification should have been permitted only if there was “good reason.” *Crayton*, 470 Mass. at 241-242. Good reason may exist where a witness has “extensive and intensive opportunity to observe the defendant.” *Commonwealth v. Fielding*, 94 Mass. App. Ct. 718, 723 (2019). Here, if DR had such an opportunity, it was in 1993—almost 30 years before trial. The risk of misidentification, and whether there was good reason to permit in-court identification, must be assessed in light of his youth at the time of the assaults, the passage of time between their occurrence and his identification of Mr. Donovan in court in 2022, and changes in Mr. Donovan’s appearance during that time.

Failure to move to suppress or object to these identifications “likely deprived [Mr. Donovan] of an otherwise available, substantial ground of defense” by bolstering the prosecution’s case that he was the person who abused DR. *Saferian*, 366 Mass. at 96. DR’s confident and repeated identification of Mr. Donovan, and the corroboration from his father that Mr. Donovan was the person he hired to do yardwork, were extremely powerful evidence at trial.

Without having made a prior non-suggestive identification, the father should not have been permitted to make any in-court identification of Mr. Donovan, even via photograph. *See Crayton*, 470 Mass. at 241-242. The in-court identification

was even more suggestive than the prior photo show-up, because Mr. Donovan was present at counsel table, and his name was printed below the photo he identified in court. (RA 89.) The father's original interaction with the perpetrator was brief, non-memorable, and long ago; there was no good reason to permit in-court identification.

As the trial judge noted, identification was a “live issue” in the case (tr. 3:191)—but the science of memory remained largely unexplored at trial. DR claimed that he had seen Mr. Donovan in the neighborhood after the assaults and knew him as the perpetrator, but had never seen him before the day of the first assault. (Transfer Tr. 12.) DR never explained when or how he learned his abuser's name or where he lived. There is a possibility that he fixated on Mr. Donovan as the perpetrator of the crime through encountering him in the neighborhood after the abuse. If an expert on memory such as Dr. Thomas had testified at trial about the concept of transference, in which an individual encountered in an innocuous setting is confused with the perpetrator encountered at a crime scene (*see supra* 10), the jury would have been alerted to this possibility. Absent such testimony, the possibility of unconscious transference remained unexplored.

The science of memory is not well-known or well-understood by laypeople. The reality that DR could have sincerely believed that Mr. Donovan was the perpetrator of terrible crimes against him, and yet been wrong, was not adequately

explained to jurors. Counsel’s failure to advance evidence that could support Mr. Donovan’s defense on this “central disputed issue” in the case was manifestly unreasonable and likely deprived him of a substantial ground of defense.

Commonwealth v. Labrie, 473 Mass. 754, 773-774 (2016); *see also*

Commonwealth v. Epps, 474 Mass. 743, 766-67 (2016).

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS
APPROPRIATE.

This case presents issues of first impression. This Court has not yet held whether a defendant is entitled to the effective assistance of counsel at a transfer hearing under either the United States Constitution or the Declaration of Rights. The Juvenile Court, at a transfer hearing, must determine whether “discharge is consistent with the protection of the public,” or “the interests of the public require” that the defendant be tried. G.L. c. 119, § 72A. That determination is a difficult one; it is potentially very fact-intensive, and it involves evaluating the allegations, the person accused, and the interests of the public. Direct appellate review by the Supreme Judicial Court would provide courts and attorneys handling these hearings with essential guidance about what representation is required before a defendant is exposed to adult prosecution for an offense committed as a child.

The extreme lapse of time between the crime and Mr. Donovan’s prosecution affected the reliability of his identification as the perpetrator. This case offers an opportunity for the Court to provide guidance on how “good reason” for

use of a suggestive procedure, or for a courtroom identification following that procedure, should be assessed in light of DR's youth at the time of the crime and the passage of time.

Respectfully submitted,
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June 10, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R.A.P. 11(b), I hereby certify that, to the best of my knowledge, the foregoing brief complies with the rules of this Court and the Massachusetts Rules of Appellate Procedure governing the content, form, and format of applications for direct appellate review. The brief is in a proportionally spaced font (Times New Roman 14 pt.) and the argument section contains less than 2,000 words (1965 words), as determined by the "Word Count" in Microsoft Word.



Ruth O'Meara-Costello

CERTIFICATE OF SERVICE

I certify that on this date, June 10, 2025, I served one copy of the foregoing brief in PDF form via the Electronic Filing System on: Pamela Alford and Meagen K. Monahan, Appeals Unit, Norfolk County District Attorney's Office, counsel of record for the Commonwealth.

A handwritten signature in black ink, reading "Ruth O'Meara-Costello". The signature is written in a cursive style with a horizontal line extending from the end.

Ruth O'Meara-Costello

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1882CR00054 Commonwealth vs. Donovan, Brian

- Case Type:
- Indictment
- Case Status
- Open
- File Date
- 02/21/2018
- DCM Track
- C Most Complex
- Initiating Action:
- RAPE OF CHILD WITH FORCE c265 §22A
- Status Date
- 03/02/2018
- Case Judge:
-
- Next Event
-

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

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Party Charge Information

- **Donovan, Brian**
- Defendant
- Charge # 1:

265/22A/A-0 - Felony RAPE OF CHILD WITH FORCE c265 §22A

- Original Charge
- 265/22A/A-0 RAPE OF CHILD WITH FORCE c265 §22A (Felony)
- Indicted Charge
- Amended Charge

Charge Disposition

Disposition Date
Disposition
12/13/2022
Guilty Verdict

- **Donovan, Brian**
- Defendant
- Charge # 2:
265/22A/A-0 - Felony RAPE OF CHILD WITH FORCE c265 §22A

- Original Charge
- 265/22A/A 0 RAPE OF CHILD WITH FORCE c265 §22A (Felony)
- Indicted Charge
- Amended Charge

Charge Disposition

Disposition Date
Disposition
12/13/2022
Guilty Verdict

Events



<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
03/02/2018 02:00 PM	Criminal 1		Arraignment	Wilson, Hon. Paul D	Held as Scheduled
04/17/2018 02:00 PM	Criminal 1		Pre Trial Conference		Held as Scheduled
06/11/2018 02:00 PM	Criminal 1		Pre-Trial Hearing		Not Held
06/12/2018 02:00 PM	Criminal 1		Conference to Review Status	Cosgrove, Hon Robert C	Held as Scheduled
07/16/2018 02:00 PM	Criminal 1		Motion Hearing	Cosgrove, Hon. Robert C	Rescheduled
10/02/2018 02:00 PM	Criminal 1		Non Evidentiary Hearing to Dismiss		Rescheduled
10/02/2018 02:00 PM	Criminal 2		Non-Evidentiary Hearing to Dismiss		Rescheduled
10/30/2018 02:00 PM	Criminal 1		Non Evidentiary Hearing to Dismiss		Not Held
11/27/2018 02:00 PM	Criminal 1		Non-Evidentiary Hearing to Dismiss	Fishman, Hon. Kenneth J	Held - Under advisement
01/08/2019 02:00 PM	Criminal 1		Motion Hearing		Rescheduled
02/13/2019 02:00 PM	Criminal 1		Motion Hearing	Kirpalani, Hon. Maynard	Held as Scheduled
03/29/2019 02:00 PM	Criminal 1		Hearing RE Discovery Motion(s)	Kirpalani, Hon Maynard	Held as Scheduled
06/05/2019 02:00 PM	Criminal 1		Final Pre-Trial Conference		Not Held
06/11/2019 09:00 AM	Criminal 1		Jury Trial		Rescheduled
09/17/2019 02:00 PM	Criminal 1		Final Pre-Trial Conference		Not Held
09/24/2019 09:00 AM	Criminal 1		Jury Trial		Not Held
01/06/2020 02:00 PM	Criminal 1		Final Pre-Trial Conference		Rescheduled
01/07/2020 09:00 AM	Criminal 1		Jury Trial		Rescheduled
03/04/2020 02:00 PM	Criminal 1		Final Pre-Trial Conference		Held as Scheduled
03/13/2020 09:00 AM	Criminal 1		Final Pre Trial Conference	Hallal, Hon Mark A	Held as Scheduled
03/17/2020 09:00 AM	Criminal 1		Jury Trial	Hallal, Hon. Mark A	Rescheduled
03/24/2020 09:00 AM	Criminal 1		Jury Trial		Rescheduled
05/20/2020 02:00 PM	Criminal 1		Final Pre-Trial Conference	Fishman, Hon. Kenneth J	Rescheduled
06/09/2020 09:00 AM	Criminal 1		Jury Trial	Fishman, Hon Kenneth J	Rescheduled
03/04/2021 02:00 PM	Criminal 1		Conference to Review Status		Rescheduled
03/24/2021 02:00 PM	Criminal 1		Conference to Review Status	Davis, Hon Brian A	Held as Scheduled
06/08/2021 02:00 PM	Criminal 1		Trial Assignment Conference	Kirpalani, Hon. Maynard	Rescheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
08/17/2021 02:00 PM	Criminal 2		Trial Assignment Conference	Cosgrove, Hon. Robert C	Rescheduled
10/07/2021 02 00 PM	Criminal 2		Trial Assignment Conference	Wilkins, Hon Douglas H	Held as Scheduled
05/16/2022 02:00 PM	Criminal 1		Final Pre-Trial Conference		Rescheduled
05/24/2022 09 00 AM	Criminal 1		Jury Trial		Rescheduled
11/29/2022 02:00 PM	Criminal 2		Final Pre-Trial Conference	Wilkins, Hon. Douglas H	Held as Scheduled
11/29/2022 02 00 PM	Criminal 1		Final Pre Trial Conference	Cannone, Hon Beverly J	Rescheduled
12/06/2022 09:00 AM	Criminal 1		Jury Trial	Cannone, Hon. Beverly J	Rescheduled
12/06/2022 09 00 AM	Criminal 2		Jury Trial	Wilkins, Hon Douglas H	Held as Scheduled
12/07/2022 09:00 AM	Criminal 2		Jury Trial	Wilkins, Hon. Douglas H	Held as Scheduled
12/08/2022 09 00 AM	Criminal 2		Jury Trial	Wilkins, Hon Douglas H	Held as Scheduled
12/12/2022 09:00 AM	Criminal 2		Jury Trial	Wilkins, Hon. Douglas H	Held as Scheduled
12/13/2022 09 00 AM	Criminal 2		Jury Trial	Wilkins, Hon Douglas H	Held as Scheduled
12/14/2022 09:00 AM	Criminal 2		Jury Trial	Wilkins, Hon. Douglas H	Canceled
12/22/2022 02 00 PM	Criminal 2		Hearing for Sentence Imposition	Wilkins, Hon Douglas H	Held as scheduled


Ticklers







<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre Trial Hearing	02/21/2018	08/20/2018	180	03/04/2020
Final Pre-Trial Conference	02/21/2018	02/01/2019	345	03/04/2020
Case Disposition	02/21/2018	02/15/2019	359	12/14/2022











Docket Information





<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/21/2018	Case assigned to DCM Track C Most Complex was added on 02/21/2018		
02/21/2018	Indictment(s) returned	1	
03/02/2018	Attorney appearance On this date Valerie J Semensi, Esq. added as Appointed - Indigent Defendant for Defendant Brian Donovan Appointment made for the purpose of Case in Chief by Judge Hon. William F Sullivan.		
03/02/2018	Event Result Judge Sullivan, Hon William F The following event Arraignment scheduled for 03/02/2018 02 00 PM has been resulted as follows Result Held as Scheduled		
03/02/2018	Defendant arraigned before Court. Judge: Sullivan, Hon. William F		
03/02/2018	Defendant waives reading of indictment Judge Sullivan, Hon William F		
03/02/2018	Plea of not guilty entered on all charges. Judge: Sullivan, Hon. William F		
03/02/2018	Released on Personal Recognizance with the following conditions Stay away from alleged Victim Judge Sullivan, Hon William F		
03/02/2018	Commonwealth 's Statement of The Case	2	
03/02/2018	Commonwealth 's Notice of Discovery I	3	
03/02/2018	Commonwealth 's Certificate of Service from Danielle Piccarini, ADA	4	
03/21/2018	Commonwealth 's Notice of Discovery II (3/19/18)	5	
03/21/2018	Commonwealth 's Certificate of service from Danielle Piccarini, Ada (3/19/18)	6	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
04/17/2018	Event Result: Judge: Cosgrove, Hon. Robert C The following event: Pre-Trial Conference scheduled for 04/17/2018 02:00 PM has been resulted as follows: Result: Held as Scheduled Appeared: Prosecutor Norfolk County District Attorney Defendant Donovan, Brian Attorney Semensi, Esq., Valerie J Attorney Piccarini, Esq., Danielle Ct Rep: D Chapin Clerk: S Irwin Judge: Cosgrove, Hon. Robert C		
04/17/2018	Pre trial conference report filed	7	
06/11/2018	Defendant 's EX PARTE Motion For Funds For An Expert	8	
06/11/2018	Event Result Pre Trial Hearing scheduled on 06/11/2018 02 00 PM Has been Not Held For the following reason Defendant defaulted Comments Process held for 24 hours Ct Rep FTR RM 20 approx start 3 11 03 and end approx 3 14 44 pm Hon Robert C Cosgrove, Presiding Clerk S Irwin Judge Cosgrove, Hon Robert C		
06/11/2018	Defendant 's Motion For Bill of Particulars	9	
06/12/2018	Event Result Conference to Review Status scheduled on 06/12/2018 02 00 PM Has been Held as Scheduled Hon Robert C Cosgrove, Presiding Appeared Staff		
07/09/2018	Defendant 's Motion to dismiss (IMPOUNDED) filed 7/6/2018	10	
07/09/2018	Brian Donovan's Memorandum in support of Defendant's motion to dismiss filed 7/6/2018 (IMPOUNDED)	11	
07/09/2018	Affidavit filed by Defendant Brian Donovan in support of motion to dismiss and certificate of service - filed 7/6/2018 (IMPOUNDED)	12	
07/11/2018	Event Result Motion Hearing scheduled on 07/16/2018 02 00 PM Has been Rescheduled For the following reason Request of Defendant Hon Robert C Cosgrove, Presiding Appeared Staff		
07/18/2018	Defendant 's Motion to impound (IMPOUNDED)	13	
07/18/2018	Affidavit of Valerie J Semensi, Esq in support of motion to impound and certificate of service (IMPOUNDED)	14	
07/30/2018	Endorsement on , (#13.0): ALLOWED w/o opposition (Cosgrove, J) J. McDermott, a.c. Judge: Cosgrove, Hon. Robert C		
09/04/2018	Opposition to on Motion for Bill of Particulars filed by Norfolk County District Attorney and Certificate of Service	15	
09/25/2018	Defendant 's Motion to dismiss I - filed 9/21/2018	16	
09/25/2018	Affidavit of Valerie J Semensi in support of motion to dismiss and certificate of service filed 9/21/2018	17	
09/25/2018	Brian Donovan's Memorandum in support of motion to dismiss - filed 9/21/2018	18	
09/25/2018	Defendant 's Motion to Dismiss II filed 9/21/2018	19	
09/25/2018	Affidavit of Valerie J. Semensi, Esq. in support of motion to dismiss and certificate of service - filed 9/21/2018	20	
09/28/2018	Event Result Non Evidentiary Hearing to Dismiss scheduled on 10/02/2018 02 00 PM Has been Rescheduled For the following reason Transferred to another session		






<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Comments: due to court congestion Hon. Robert C Cosgrove, Presiding Appeared: Staff:		
09/28/2018	Event Result Non Evidentiary Hearing to Dismiss scheduled on 10/02/2018 02 00 PM Has been Rescheduled For the following reason By Court prior to date Hon Robert C Cosgrove, Presiding Appeared Staff		
10/26/2018	Opposition to to Defendant's Motion to Dismiss filed by	21	
10/26/2018	Commonwealth 's Certificate of Service	22	
10/30/2018	Event Result:: Non-Evidentiary Hearing to Dismiss scheduled on: 10/30/2018 02:00 PM Has been: Not Held For the following reason: Not reached by Court Hon. Kenneth J Fishman, Presiding Appeared: Staff:		
10/31/2018	Defendant 's Motion for protective order and certificate of service filed 10/30/2018	23	
10/31/2018	Commonwealth 's Certificate of compliance - filed 10/30/2018	24	
10/31/2018	Commonwealth 's Certificate of service filed 10/30/2018	25	
11/23/2018	Defendant 's Motion to file documents late and to Impound-Filed on 11/23/18	26	
11/23/2018	Affidavit of and Certificate in support of Motion to file document late Filed on 11/23/18	27	
11/27/2018	Matter taken under advisement: Non-Evidentiary Hearing to Dismiss scheduled on: 11/27/2018 02:00 PM Has been: Held - Under advisement Hon. Kenneth J Fishman, Presiding Appeared: Staff:		
11/29/2018	Endorsement on Motion to Dismiss, (#19 0) DENIED After hearing, DENIED The Commonwealth has not violated any discovery order dated 11/28/2018 Copies mailed to ADA and Defense Judge Fishman, Hon Kenneth J		
11/29/2018	Endorsement on Motion to Dismiss I, (#16.0): DENIED After hearing, and upon review and consideration, the motion to dismiss is DENIED. The Commonwealth presented both the live testimony of the alleged victim and the investigating detective to the grand jury, and any inconsistencies in the victims' testimony were disclosed by the detectives testimony. The victims use of the word "command" before the grand jury, as the context of all the evidence did not give a distorted picture of the protective force of the evidence. dated 11/28/2018. Copies mailed to ADA and Defense Judge: Fishman, Hon. Kenneth J		 Image
11/29/2018	Endorsement on Motion for protective order, (#23 0) ALLOWED dated 11/27/2018 Copies mailed to ADA and Defense Judge Fishman, Hon Kenneth J		
11/29/2018	Endorsement on Motion for funds for an expert - ex parte, (#8.0): ALLOWED at CPCS approved rates. Copy mailed to Defense counsel - dated 11/22/2018 Judge: Fishman, Hon. Kenneth J		
01/07/2019	Event Result Motion Hearing scheduled on 01/08/2019 02 00 PM Has been Rescheduled For the following reason By Court prior to date Hon Maynard Kirpalani, Presiding Appeared Staff		
02/13/2019	Event Result:: Motion Hearing scheduled on: 02/13/2019 02:00 PM Has been: Held as Scheduled Hon. Maynard Kirpalani, Presiding Appeared: Staff:		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/19/2019	Endorsement on Motion for bill of particulars, (#9.0): DENIED after hearing for the reasons stated in open court - dated 2/13/2019 Copies mailed to ADA and Defense		
02/19/2019	Defendant 's Notice of pretrial discovery filed 2/13/2019	28	
03/29/2019	Event Result:: Hearing RE: Discovery Motion(s) scheduled on: 03/29/2019 02:00 PM Has been: Held as Scheduled Hon. Maynard Kirpalani, Presiding Appeared: Staff:		
03/29/2019	Endorsement on , (#11 0) ALLOWED except as to #5 (Kirpalani, J) c/s ADA & Atty Judge Kirpalani, Hon Maynard		
06/03/2019	Event Result:: Final Pre-Trial Conference scheduled on: 06/05/2019 02:00 PM Has been: Not Held For the following reason: Not reached by Court Hon. Robert C Cosgrove, Presiding		
06/03/2019	Event Result Jury Trial scheduled on 06/11/2019 09 00 AM Has been Rescheduled For the following reason Not reached by Court Hon Robert C Cosgrove, Presiding		
09/16/2019	Defendant 's Request for Individual Jury Voir Dire of Prospective Jurors (Received 9/9/2019)	29	
09/17/2019	Event Result Final Pre Trial Conference scheduled on 09/17/2019 02 00 PM Has been Not Held For the following reason Not reached by Court Hon Robert C Cosgrove, Presiding		
09/24/2019	Event Result:: Jury Trial scheduled on: 09/24/2019 09:00 AM Has been: Not Held For the following reason: Not reached by Court Hon. Robert C Cosgrove, Presiding		
11/27/2019	Event Result Jury Trial scheduled on 01/07/2020 09 00 AM Has been Rescheduled For the following reason Joint request of parties Hon Kenneth J Fishman, Presiding		
11/27/2019	Event Result:: Final Pre-Trial Conference scheduled on: 01/06/2020 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Kenneth J Fishman, Presiding		
11/27/2019	Commonwealth 's Assented to Motion to Continue ALLOWED in so much as trial is continued to Tuesday March 24, 2020; FPTC continued to March 4, 2020 (Fishman, J) B G ROCHE, a c c/s ADA & Atty	30	
03/04/2020	Event Result:: Final Pre-Trial Conference scheduled on: 03/04/2020 02:00 PM Has been: Held as Scheduled Hon. Mark A Hallal, Presiding		
03/06/2020	Joint Pre Trial Memorandum filed (rec'd 3/4/2020)	31	 Image
03/06/2020	Commonwealth 's Motion in limine to Sequester Witnesses - ALLOWED, (Wilkins,J.) dated 11/29/2022	32	 Image
03/06/2020	Commonwealth 's Motion in limine Regarding Demonstrative Maps, Charts, Diagrams, and Photographs ALLOWED (Wilkins, J) dated 12/5/22	33	 Image
03/06/2020	Commonwealth 's Motion in limine to preclude reference to any alleged sexual activity of the victim with individuals other than the defendant - ALLOWED ,(Wilkins, J.) dated 11/29/2022	34	 Image
03/06/2020	Commonwealth 's Motion for Individual Voir Dire	35	 Image
03/06/2020	Commonwealth 's Motion in limine and memorandum of law in support of introduction of expert testimony regarding delayed disclosure & memory	36	 Image












<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/06/2020	Commonwealth 's Motion in limine to exclude evidence relative to defendant's self-serving statements - 12/13/22 - Allowed to the extent reflected on the record. Wilkins, J.	37	 Image
03/06/2020	Commonwealth 's Motion to allow a substitute complaint to testify as the first complaint SEE # 57 (Wilkins, J) dated 12/5/22	38	 Image
03/06/2020	Defendant 's Motion in limine to exclude first complaint and/or substitute first complaint testimony - SEE #57 (Wilkins, J.) dated 12/5/22	39	 Image
03/06/2020	Affidavit of Valerie Semensi in support of defendant's motion in Limine	40	 Image
03/06/2020	Defendant 's EX PARTE Motion for funds for an expert DENIED as moot (Wilkins, J) dated 11/29 2022	41	 Image
03/06/2020	Affidavit of in support of exparte motion for funds	42	 Image
03/06/2020	Commonwealth 's Motion in limine to admit photograph of victim at tie of sexual offense - ALLOWED as to one photograph, (Wilkins, J.) dated 12/5/2022	43	 Image
03/06/2020	Commonwealth 's Motion for Judicial inquiry into Criminal History records of potential trial jurors ALLOWED, (Wilkins, J) dated 12/5/22	44	 Image
03/13/2020	Event Result:: Final Pre-Trial Conference scheduled on: 03/13/2020 09:00 AM Has been: Held as Scheduled Hon. Mark A Hallal, Presiding		
03/13/2020	Event Result Jury Trial scheduled on 03/24/2020 09 00 AM Has been Canceled For the following reason Court Order Hon Mark A Hallal, Presiding		
03/13/2020	Event Result:: Jury Trial scheduled on: 03/17/2020 09:00 AM Has been: Rescheduled For the following reason: Court Order Hon. Mark A Hallal, Presiding		
03/13/2020	Defendant 's Motion in limine to exclude judicial inquiry into criminal records of potential jurors or to seek information for the purpose of jury empanelment filed 3/13/20	45	
03/13/2020	Defendant 's Motion in limine to exclude first complaint and/or substitute first complaint testimony - 12/13/22 - Denied. Wilkins, J. filed 3/13/20	46	
03/13/2020	Defendant 's Motion in limine to exclude delayed disclosure expert testimony filed 3/13/20 DENIED Wilkins, J 12/13/22	47	
03/13/2020	Defendant 's Motion in limine to allow the Defendant's self-serving statements filed 3/13/20	48	
03/13/2020	Defendant 's Motion in limine to allow the Defendant's rape shield evidence filed 3/13/20 DENIED, (Wilkins, J) dated 12/5/22	49	 Image
03/13/2020	Defendant 's Motion in limine to exclude the Commonwealth from introducing a photograph of D.R. at the time of alleged assault filed 3/13/20	50	
03/13/2020	Defendant 's Motion in limine to limit the Commonwealth from introducing photographs of the neighborhood except for photographs that have already been used at juvenile court and/or at the grand jury filed 3/13/20 SEE #43 (Wilkins, J) dated 12/5/22	51	 Image
03/13/2020	Defendant 's Motion in limine to exclude the Commonwealth from using a new and updated police report - filed 3/13/20 - SEE Endorsement of 12/5/22	52	
03/13/2020	Defendant 's Motion in limine to exclude the Commonwealth from using "new" witnesses filed 3/13/20 SEE Endorsement of 12/5/22	53	
03/13/2020	Affidavit of Valerie Semensi, Esq in support of Defendant's motion in limine and certificate of service - filed 3/13/20	54	
05/19/2020	Event Result Final Pre Trial Conference scheduled on 05/20/2020 02 00 PM Has been Rescheduled For the following reason By Court due to Covid 19 Hon William F Sullivan, Presiding		











Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/19/2020	Event Result:: Jury Trial scheduled on: 06/09/2020 09:00 AM Has been: Rescheduled For the following reason: By Court due to Covid-19 Hon. William F Sullivan, Presiding		
12/10/2020	Attorney appearance On this date Valerie J Semensi, Esq dismissed/withdrawn as Appointed Indigent Defendant for Defendant Brian Donovan		
12/10/2020	Attorney appearance On this date Scott P Murphy, Esq. added as Appointed - Indigent Defendant for Defendant Brian Donovan Appointment made for the purpose of Case in Chief by Judge Hon. Beverly J Cannone.		
03/03/2021	Event Result Conference to Review Status scheduled on: 03/04/2021 02 00 PM Has been Rescheduled For the following reason Request of Defendant Comments due to illness With assent of Commonwealth Hon Robert C Cosgrove, Presiding		
03/05/2021	Commonwealth 's Notice of Discovery III	55	
03/24/2021	Event Result:: Conference to Review Status scheduled on: 03/24/2021 02:00 PM Has been: Held as Scheduled Hon. Brian A Davis, Presiding		Image
06/07/2021	Event Result Trial Assignment Conference scheduled on: 06/08/2021 02 00 PM Has been Rescheduled For the following reason Request of Defendant Hon Maynard Kirpalani, Presiding		
08/17/2021	Event Result:: Trial Assignment Conference scheduled on: 08/17/2021 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Robert C Cosgrove, Presiding		
10/07/2021	Comes into court Event Result Trial Assignment Conference scheduled on: 10/07/2021 02 00 PM Has been Held as Scheduled Hon Douglas H Wilkins, Presiding Applies To Donovan, Brian (Defendant); Murphy, Esq , Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq , Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge Wilkins, Hon Douglas H FTR (S Rothman) Attest Margaret H Sanel, AC		
10/07/2021	Scheduled: Event: Jury Trial Date: 05/24/2022 Time: 09:00 AM Result: Rescheduled		
05/13/2022	Event Result Final Pre Trial Conference scheduled on: 05/16/2022 02 00 PM Has been Rescheduled For the following reason By Court prior to date Hon Beverly J Cannone, Presiding		
05/16/2022	Event Result:: Jury Trial scheduled on: 05/24/2022 09:00 AM Has been: Rescheduled For the following reason: By Court prior to date Hon. Beverly J Cannone, Presiding		
05/16/2022	Scheduled Event Jury Trial Date 11/29/2022 Time 02 00 PM		
05/16/2022	Scheduled: Event: Jury Trial Date: 12/06/2022 Time: 09:00 AM Result: Rescheduled		
11/29/2022	Defendant 's Motion to be Furnished with Criminal Records ENDORSED ALLOWED (Wilkins, J) 11/29/2022 Motion impounded per order Judge Wilkins	56	
11/29/2022	Defendant 's Motion in limine to Limit Proposed " First Complaint" Testimony and Request for Limiting Instruction - ALLOWED as to voir dire of the witness. (Wilkins, J.) dated 12/5/22	57	 Image
11/29/2022	Defendant 's Motion in limine to Preclude the Commonwealth from Introducing Evidence of Prior or Subsequent Bad Acts ALLOWED (Wilkins, J) dated 11/29/2022	58	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/29/2022	Defendant 's Motion to Sequester - ALLOWED, (Wilkins, J.) dated 12/5/22	59	
11/29/2022	Defendant 's Motion to Preclude Reference to Complainant as " Victim" - ALLOWED, witnesses shall be instructed to use the person's name or the words "alleged victim" complainant or equivalent. (Wilkins, J.) dated 12/5/2022	60	 
11/29/2022	Defendant Brian Donovan's proposed juror Voir Dire questions filed Applies To Murphy, Esq , Scott P (Attorney) on behalf of Donovan, Brian (Defendant)	61	 
11/29/2022	Event Result:: Final Pre-Trial Conference scheduled on: 11/29/2022 02:00 PM Has been: Rescheduled For the following reason: Transferred to another session Hon. Beverly J Cannone, Presiding		
11/29/2022	Event Result Final Pre Trial Conference scheduled on 11/29/2022 02 00 PM Has been Held as Scheduled Comments and Lobby conference conducted; FTR RM 25 D O'Sullivan; Clerk S Irwin a/c Hon Douglas H Wilkins, Presiding Appeared Prosecutor Norfolk County District Attorney Adam C Lally, Esq , Attorney for the Commonwealth Defendant Brian Donovan Scott P Murphy, Esq , Appointed Indigent Defendant		
11/29/2022	Event Result:: Jury Trial scheduled on: 12/06/2022 09:00 AM Has been: Rescheduled For the following reason: Transferred to another session Hon. Beverly J Cannone, Presiding		
12/05/2022	Endorsement on Motion in limine to Exclude Commonwealth from Using a New and Updated Police Report, (#52 0) DENIED if such a report is admissible (Wilkins, J) dated 12/5/22		 
12/06/2022	Comes into court. Case called for trial. Parties answer ready. The Commonwealth moves for trial. The Court, Wilkins, J. orders jury of fourteen members impaneled for trial. Event Result:: Jury Trial scheduled on: 12/06/2022 09:00 AM Has been: Held as Scheduled in the Main Session and Courtroom 25. Hon. Douglas H Wilkins, Presiding Applies To: Donovan, Brian (Defendant); Murphy, Esq., Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq., Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge: Wilkins, Hon. Douglas H. - FTR (D. O'Sullivan) - Attest: Margaret H. Sanel, AC.		
12/07/2022	Comes into court Impanelment continues before Wilkins, J Jury of fourteen members impaneled but NOT sworn Jury Trial scheduled on 12/07/2022 09 00 AM Has been Held as Scheduled in the Main Session and Courtroom 25 Hon Douglas H Wilkins, Presiding Applies To Donovan, Brian (Defendant); Murphy, Esq , Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq , Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge Wilkins, Hon Douglas H FTR (D O'Sullivan) Attest Margaret H Sanel, AC		
12/08/2022	Comes into court. Trial begins with jury of fourteen members before Wilkins, J. Jury sworn. Indictments read. Event Result:: Jury Trial scheduled on: 12/08/2022 09:00 AM Has been: Held as Scheduled Hon. Douglas H Wilkins, Presiding Applies To: Donovan, Brian (Defendant); Murphy, Esq., Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq., Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge: Wilkins, Hon. Douglas H. - FTR (D. O'Sullivan) - Attest: Margaret H. Sanel, AC.		
12/12/2022	Comes into court Trial continues before Wilkins, J with jury of fourteen members Commonwealth rests Colloquy held with defendant regarding right to testify Event Result Jury Trial scheduled on 12/12/2022 09 00 AM Has been Held as Scheduled Hon Douglas H Wilkins, Presiding Applies To Donovan, Brian (Defendant); Murphy, Esq , Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq , Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge Wilkins, Hon Douglas H FTR (S Rothman) Attest Margaret H Sanel, AC		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
12/12/2022	Defendant 's Motion for Required Finding of Not Guilty filed and denied. Wilkins, J.	62	
12/13/2022	Comes into court Trial continues before Wilkins, J with jury of fourteen members Defendant rests The Court orders jury reduced to twelve members Jurors #56 & #235 were drawn and designated as alternate jurors Jury deliberations commence Event Result Jury Trial scheduled on 12/13/2022 09 00 AM Has been Held as Scheduled Hon Douglas H Wilkins, Presiding Applies To Donovan, Brian (Defendant); Murphy, Esq , Scott P (Attorney) on behalf of Donovan, Brian (Defendant); Lally, Esq , Adam C (Attorney) on behalf of Norfolk County District Attorney (Prosecutor); Event Judge Wilkins, Hon Douglas H FTR (D O'Sullivan) Attest Margaret H Sanel, AC		
12/13/2022	Defendant 's Motion for Required Finding of Not Guilty filed and denied. Wilkins, J.	63	
12/13/2022	The defendant\petitioner is committed without bail for the following reason Per Order of the Court Awaiting sentencing Judge Wilkins, Hon Douglas H	64	
12/13/2022	Offense Disposition:: Charge #1 RAPE OF CHILD WITH FORCE c265 §22A On: 12/13/2022 Judge: Hon. Douglas H Wilkins By: Jury Trial Guilty Verdict Charge #2 RAPE OF CHILD WITH FORCE c265 §22A On: 12/13/2022 Judge: Hon. Douglas H Wilkins By: Jury Trial Guilty Verdict		
12/13/2022	Habeas Corpus for defendant issued to Norfolk County Correctional Center returnable for 12/22/2022 02 00 PM Hearing for Sentence Imposition	65	
12/13/2022	Verdict affirmed, verdict slip filed Offense 001	66	
12/13/2022	Verdict affirmed, verdict slip filed Offense 002	67	
12/13/2022	Defendant 's Motion for Required Finding of Not Guilty after Jury Verdict filed.	68	
12/14/2022	Defendant 's Notice of Appeal filed	69	
12/15/2022	ORDER of Impoundment Alleged Victim's Name on Supplemental Juror Questionnaire filed by the Court, Wilkins, J (Copy emailed to parties) Judge Wilkins, Hon Douglas H	70	Image
12/15/2022	Court Reporter DEFENSE ATTORNEY IS REQUIRED TO ORDER ALL TRANSCRIPTS is hereby notified to prepare one copy of the transcript of the evidence of 11/29/2022 02:00 PM Final Pre-Trial Conference, 12/06/2022 09:00 AM Jury Trial, 12/07/2022 09:00 AM Jury Trial, 12/08/2022 09:00 AM Jury Trial, 12/12/2022 09:00 AM Jury Trial, 12/13/2022 09:00 AM Jury Trial, 12/22/2022 02:00 PM Hearing for Sentence Imposition	71	
12/16/2022	Docket Note Sent appeal checklist along with order for transcript of the proceedings, transcript order form, and appeal referral form to Attorney Murphy on 12/16/2022 via email and USPS		
12/20/2022	Defendant 's Sentencing Memorandum	72	
12/22/2022	Commonwealth 's Sentencing Memorandum	73	
12/22/2022	Defendant 's Motion To Be Relieved of the Obligation to Register with the Sex Offender Registry Board if Sentenced to Probation	74	
12/22/2022	Event Result Hearing for Sentence Imposition scheduled on 12/22/2022 02 00 PM Has been Held as scheduled Comments D and counsel present in court; FTR RM 25 approx start time 2 14 3 pm; Clerk S Irwin a/c Hon Douglas H Wilkins, Presiding Appeared Prosecutor Norfolk County District Attorney Adam C Lally, Esq , Attorney for the Commonwealth Defendant Brian Donovan Scott P Murphy, Esq , Appointed Indigent Defendant		
12/22/2022	Defendant sentenced:: Sentence Date: 12/22/2022 Judge: Hon. Douglas H Wilkins Charge #: 1 RAPE OF CHILD WITH FORCE c265 §22A		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	<p>State Prison Sentence Not Less Than: 3 Years, 0 Months, 0 Days Not More Than: 5 Years, 0 Months, 0 Days</p> <p>Committed to Souza Baranowski Correctional Center Credits 10 Days</p> <p>Financials:</p>		
12/22/2022	<p>Issued on this date</p> <p>Mittimus for Sentence (All Charges) Sent On 12/22/2022 14 47 22</p>	75	
12/22/2022	<p>Defendant sentenced:: Sentence Date: 12/22/2022 Judge: Hon. Douglas H Wilkins</p> <p>3 Years Supervised Probation To Run From and After Committed Sentence on Count 001 with Special Terms and Conditions</p> <p>Charge #: 2 RAPE OF CHILD WITH FORCE c265 §22A Served Consecutively</p> <p>SPECIAL TERMS AND CONDITIONS</p> <p>1. Stay away no contact directly, indirectly or thru 3rd parties with victim; 2. No unsupervised contact with children under 16 years of age; 3. Register with Sex Offender Registry Board and comply with all SORB requirements 4. \$90 victim witness fee **ALL STANDARD TERMS OF PROBATION APPLY**</p> <p>Probation: Risk / Need Supervision Duration: 3 Years, 0 Months, 0 Days</p>		
12/22/2022	<p>Defendant sentenced Revision Date 12/22/2022 Judge Hon Douglas H Wilkins</p> <p>Charge # 1 RAPE OF CHILD WITH FORCE c265 §22A State Prison Sentence Not Less Than 3 Years, 0 Months, 0 Days Not More Than 3 Years, 0 Months, 1 Days</p> <p>Committed to Souza Baranowski Correctional Center Credits 10 Days</p>		
01/06/2023	<p>Certification/Copy of Letter of transcript ordered from Court Reporter 11/29/2022 02:00 PM Final Pre-Trial Conference, 12/06/2022 09:00 AM Jury Trial, 12/07/2022 09:00 AM Jury Trial, 12/08/2022 09:00 AM Jury Trial, 12/12/2022 09:00 AM Jury Trial, 12/13/2022 09:00 AM Jury Trial, 12/22/2022 02:00 PM Hearing for Sentence Imposition (rec'd 1/5/2023)</p>	76	
01/06/2023	Docket Note Received copy of appeal referral form submitted to CPCS		
01/18/2023	<p>Notice of appeal dated 1/17/23 filed - aggrieved by certain opinions, rulings, directions and judgments of the Court. (previous notice of appeal dated 12/14/22 filed - P#69)</p> <p>(rec'd 1/17/2023)</p> <p>Applies To: Murphy, Esq., Scott P (Attorney) on behalf of Donovan, Brian (Defendant)</p>	77	
01/20/2023	Defendant 's Motion to Revise and Revoke	78	
02/13/2023	<p>ORDER of the Court under Mass R Crim P 29 to revise or revoke sentence See attached order dated 2/13/2023</p> <p>Judge Wilkins, Hon Douglas H</p>	79	
02/13/2023	's Notice to counsel of prospective juror comment - dated 2/13/23	80	
02/27/2023	<p>Brian Donovan's Memorandum Pursuant to the Court's Order to Revise and Revoke Sentence with Attachment</p> <p>ENDORSEMENT: After review, the Court reduces the "not more than" component from 5 years to three years and a day. It was not the court's intention for the defendant to serve five years without an opportunity for reduction through good time credits. Moreover, there was a real prospect of release at age 18, if the matter had come to light immediately. The Court revises its sentence and instead imposes a state sentence of 3 years to three years and one day. See Mass R. Crim. P. 29 and this court's order of February 13, 2023. (Wilkins, J) 03/31/2023</p>	81	
03/08/2023	Commonwealth 's Response to Order of the Court Under Mass R Crim 29 to Revise or Revoke Sentence	82	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/31/2023	Issued on this date: REVISED MITT Mittimus for Sentence (All Charges) Sent On: 03/31/2023 16:27:58	83	 Image
04/10/2023	Attorney appearance On this date Ruth O'Meara Costello, Esq added for Defendant Brian Donovan		
04/10/2023	Attorney appearance On this date Scott P Murphy, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Brian Donovan		
05/02/2023	Transcript received 11/29/2022 12/6/2022 12/7/2022 12/8/2022 12/12/2022 12/13/2022 12/22/2022		
05/02/2023	Docket Note: Email sent to Atty. O'Meara-Costello to confirm receipt of transcripts and inquire if case is ready for assembly.		
05/04/2023	Docket Note Email correspondence with Atty O'Meara Costello hold off on assembling until further notice		
05/17/2023	Transcript received 3/2/2018 11/27/2018 2/13/2019 3/29/2019 3/4/2020 3/13/2020		
07/11/2023	Defendant 's Motion To Permit Counsel To View and Copy Impounded Exhibits and Filings Endorsed ALLOWED (Leighton, J) 07/12/2023 copy sent via email to counsel	84	 Image
10/17/2023	Defendant 's Motion for funds to hire an investigator.	85	 Image
10/17/2023	Defendant 's Motion for funds for memory and eyewitness identification expert with memorandum of support and affidavit of counsel.	86	 Image
10/17/2023	Defendant 's Motion for funds for Psychologist expert on recidivism with memorandum in support and affidavit of counsel	87	 Image
10/17/2023	Endorsement on Motion for funds to hire an investigator, (#85.0): ALLOWED in the amount up to \$2500 at CPCS approved dates. (Krupp,J)ns		 Image
10/17/2023	Endorsement on Motion for funds for memory and eyewitness identification expert, (#86.0) ALLOWED in amount up to \$3000 at CPCS approved rates (Krupp,J)ns		 Image
10/17/2023	Endorsement on Motion for funds for Psychologist expert on recidivism, (#87.0): ALLOWED in amount up to \$5,000 at CPCS approved rates. (Krupp,J)ns		 Image
01/25/2024	Defendant 's Motion to Supplement Appellate Record	88	 Image
01/25/2024	Endorsement on Motion to Supplement Appellate Record, (#88.0) ALLOWED (Cannone, RAJ dated 1/25/24)		 Image
01/25/2024	Docket Note: Notified all counsel the Motion to Supplement Appellate Record was allowed. Inquired if case is ready for assembly or if waiting on more motions.		
01/26/2024	Docket Note Received email from Atty Costello confirming appeal is ready for assembly		
02/01/2024	Notice to Clerk of the Appeals Court of Assembly of Record	89	
02/01/2024	Notice of assembly of record sent to Counsel	90	
02/01/2024	Appeal: Statement of the Case on Appeal (Cover Sheet).	91	
02/01/2024	Docket Note Assembly or record sent to Appeals Court and Attorneys of record		
02/12/2024	Appeal entered in Appeals Court on 02/02/2024 docket number No. 2024-P-0114	92	
04/03/2024	Notice of docket entry received from Appeals Court a copy of the docket sheet requesting a copy of the docket sheet to be forwarded to Appeals Court Docket sheet sent via email	93	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
05/17/2024	Defendant 's Motion for New Trial with Certificate of Service	94	
05/17/2024	Brian Donovan's Memorandum in support of Motion for New Trial with Certificate of Service	95	
05/17/2024	Defendant 's List of Exhibits to Motion for New Trial	96	
05/17/2024	Defendant 's Exhibits to Motion for New Trial (IMPOUNDED)	97	
06/17/2024	Commonwealth 's Notice of Anticipated Briefing Schedule, with Certificate of Service	98	
06/17/2024	ORDER: The Commonwealth shall file its response to the Defendant's Motion for New Trial by September 17, 2024. Cannone, RAJ. (Parties notified via email).		
09/03/2024	Commonwealth 's Motion for Enlargement of Time to File Written Opposition to Defendant's New Trial Motion with Certificate of Service *** ALLOWED (Cannone, RAJ) Dated 9/3/24 (copy msent to counsel mg)	99	
11/04/2024	Commonwealth 's Motion for Enlargement of Time to File Written Opposition to Defendant's New Trial Motion - with Certificate of Service - *** ALLOWED (Cannon, RAJ) Dated 11/4/24 (Counsel Notified by email)	100	
12/05/2024	Commonwealth 's Motion to File Opposition to Defendant's Motion for New Trial and Accompanying Appendix Under Seal	101	
12/05/2024	Commonwealth 's Opposition to Defendant's Motion for New Trial	102	
12/05/2024	Commonwealth 's Appendix Submit with its Opposition to Defendant's Motion for New Trial	103	
12/10/2024	Defendant 's Motion for Leave to File Reply in Support of Motion for New Trial, By January 10, 2025 12/12/24 - Allowed. Cannone, RAJ. Attest: Margaret H. Sanel, AC. (Parties notified).	104	
01/09/2025	Defendant 's Reply to Commonwealth's Opposition to Defendant's Motion for a New Trial with Certificate of Service and Exhibit R File forwarded to Doolin, RAJ 1/9/25	105	
02/11/2025	MEMORANDUM & ORDER: and Decision on Defendant's Motion for a New Trial and Commonwealth's Opposition to Defendant's Motion for a New Trial. Judge: Doolin, Hon. Michael	106	
02/19/2025	Notice of appeal filed from the Court's February 11, 2025 denial of Motion for a New Trial Applies To O'Meara Costello, Esq , Ruth (Attorney) on behalf of Donovan, Brian (Defendant)	107	
02/19/2025	Court Reporter Defense Attorney to order all transcripts needed for Appeal is hereby notified to prepare one copy of the transcript of the evidence of 12/22/2022 02:00 PM Hearing for Sentence Imposition	108	
03/03/2025	Docket Note per Atty Costello no transcripts are to be ordered for Appeal		
03/03/2025	Notice to Clerk of the Appeals Court of Assembly of Record	109	
03/03/2025	Notice of assembly of record sent to Counsel	110	
03/03/2025	Appeal: Statement of the Case on Appeal (Cover Sheet).	111	
03/05/2025	Notice of docket entry received from Appeals Court case entered into Appeals Court on 3/3/2025 No 2025 P 0242	112	
03/17/2025	Notice of docket entry received from Appeals Court RE#4: Allowed. The appeals in 2024-P-0114 and 2025-P-0242 are hereby consolidated for briefing and decision. The appeal in 2024-P-0114 is now closed. The assembly of the record package (paper #1), docketing statement(s), briefs, appendices, and transcripts, if any, in 2024-P-0114 shall be transferred to 2025-P-0242. All future filings shall relate to 2025-P-0242 only. The stay of appellate proceedings previously ordered in 2024-P-0114 is hereby vacated. Appellant's brief and record appendix in the consolidated appeal are now due on or before 4/16/25.	113	
03/17/2025	Notice of docket entry received from Appeals Court ORDER (RE#13) The appeals in 2024 P 0114 and 2025 P 0242 are hereby consolidated for briefing and decision The appeal in 2024 P 0114 is now closed The assembly of the record package (paper #1), docketing statement(s), briefs, appendices, and transcripts, if any, in 2024 P 0114 shall be transferred to 2025 P 0242 All future filings shall relate to 2025 P 0242 only The stay of appellate proceedings previously ordered in 2024 P 0114 is hereby vacated Appellant's brief and record appendix in the consolidated appeal are now due on or before 4/16/25	114	

Case DispositionDispositionDateCase Judge

Disposed by Jury Verdict

12/14/2022

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT
No. 1882CR00054

COMMONWEALTH

v.

BRIAN DONOVAN

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A
NEW TRIAL AND COMMONWEALTH'S OPPOSITION TO DEFENDANTS MOTION
FOR A NEW TRIAL:**

This is an action for judicial review, pursuant to M.G.L. c. 119, §72A, in which the defendant, Brian Donovan, moves for a new trial. Mr. Donovan asserts that a new trial is warranted on the grounds that his counsel's performance at the §72A hearing was ineffective and that the Judge erred in refusing to grant a continuance to give counsel a chance to present mitigating evidence.

BACKGROUND

During the summer of 1992, [REDACTED] was nine years old and was about to enter the fourth grade. The defendant, Mr. Donovan, was fifteen years old. During the summer, Mr. Donovan came to Mr. [REDACTED]'s home and did yard work at the request of Mr. [REDACTED]'s father. During his first encounter with Mr. Donovan, he asked Mr. [REDACTED] to go into the woods with him, located across the street from his house. Mr. Donovan then touched Mr. [REDACTED]'s genitals and had Mr. [REDACTED] touch his and requested and received oral sex from Mr. [REDACTED]. Mr. [REDACTED] later testified that Mr. Donovan threatened to hurt him and his family if he told anyone what happened. This happened on three additional occasions, and the same series of events took place on each occasion. On September 30, 2006, Mr. [REDACTED] drove through the town of Braintree and saw Mr.

Donovan on the street. Mr. [REDACTED] immediately recognized Mr. Donovan and drove to Randolph police station and reported that Mr. Donovan had raped him.

On May 12, 2017, a delinquency complaint issued from the Quincy Juvenile Court charged Mr. Donovan with four counts of rape of a child with force in violation of G.L. c. 265, §22A and four counts of statutory rape in violation of G.L. c. 265, §23. On October 18, 2017, the Juvenile Court held an evidentiary transfer hearing pursuant to G.L. c. 119, §72A with Linda Sable, J. presiding, who found probable cause to believe the defendant committed the charged offenses and said the interests of the public require that Mr. Donovan be tried as an adult for the offenses. The delinquency complaint was dismissed, and a criminal complaint was issued pursuant to M.G.L. c. 119, §72A. On February 21, 2018, a Norfolk County grand jury indicted Mr. Donovan on two counts of rape of a child with force in violation of G.L. c. 265, §22A. On March 2, 2018, Mr. Donovan was arraigned in Norfolk Superior Court. On December 13, 2022, the jury found Mr. Donovan guilty of two counts of rape of a child by force in violation of G.L. c. 265, §22A. On May 17, 2024, Mr. Donovan filed his motion for a new trial.

DISCUSSION

A judge considering a motion for a new trial must apply the standards set forth in Mass. R. Crim. P. 30(b) rigorously and only grant such motion if it appears that justice may not have been done. *Commonwealth v Kolenovic*, 471 Mass. 664, 672 (2015). A judge should grant the motion only if the defendant meets their burden of proof by presenting a credible reason that outweighs the risk of prejudice to the Commonwealth. *Commonwealth v Wheeler*, 52 Mass. App. Ct. 631, 637 (2001).

After a review of the record, Mr. Donovan has failed to meet his burden of proof to justify granting a new trial as he does not raise substantial issues or demonstrate any injustice.


Ineffective Assistance of Counsel:

Where a new trial is based on claims of ineffective assistance of counsel, the defendant must show that there has been behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer and if found, that it has likely deprived the defendant of an otherwise available substantial ground of defense.” *Commonwealth v Saferian*, 366 Mass. 89, 96 (1974). Although defense counsel requested a second hearing to provide evidence showing the public was not at risk, she effectively argued at the §72A hearing that Mr. Donovan did not present a risk to the public. She emphasized that the matter was twenty-three years old, and Mr. Donovan’s CORI showed that this is the only allegation of a sexual nature. These arguments directly addressed the question of public safety.

Denial of Motion to Continue Hearing:

Under the second part of the G.L. c. §72A inquiry, a judge must decide whether it would be proper to discharge the alleged offender or whether the interests of the public require that he be bound over for trial as an adult. *Commonwealth v Bousquet*, 407 Mass. 854, 858 (1990). A judge’s decision to discharge or transfer the matter is entirely discretionary. *Matter of Juvenile*, 485 Mass. 831, 833 (2020) quoting *JH v Commonwealth*, 479 Mass. 285, 290 (2018). Here, the judge was within her discretion when she found there was an interest to protect the public and that the matter should be transferred. She considered all relevant factors, including the severity of the alleged offense.

For the foregoing reasons, the Plaintiff’s Motion for a New Trial is hereby **DENIED**.



Michael P. Doolin
Justice of the Superior Court

Date: February 11, 2025.