COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk County

Commonwealth, Plaintiff-Appellee; **Daunte Beal**, Defendant-Appellant.	FAR- 2020-P-0551 **Application for Further Appellate Review**

The defendant Daunte Beal seeks further appellate review under Mass. R.A.P. 27.1 of the Superior Court's order denying without a hearing his motion under G.L. c. 278A seeking touch-DNA testing of the gun and shell casings in this case. The Appeals Court affirmed the order in an unpublished decision (Slip Op. at 1, 6-7).[1]

Substantial reasons affecting the interests of justice warrant further appellate review in this case. The Superior Court ruled that a reasonable attorney would not have sought the touch-DNA testing requested because the results might have been inculpatory and undermined Beal's misidentification defense. This ruling conflicts with precedent holding that the possibility that the requested testing "may not produce the desired evidence" should not be "an

[1] The Appeals Court's decision is attached to this application and will be cited as, "Slip Op." *See Commonwealth v. Beal*, 2020-P-0551 (App. Ct. Apr. 29, 2021).

impediment to analysis in the first instance." *Commonwealth v. Clark*, 472 Mass. 120, 135-136 (2015); *Commonwealth v. Lyons*, 89 Mass. App. Ct. 485, 495 (2016). Accordingly, this Court should allow Beal's application to clarify this important issue.

Statement of Prior Proceedings

On November 14, 2008, a Suffolk County grand jury indicted Beal for the following offenses: unlicensed possession of a firearm as a level-two, armed-career criminal (G.L. c. 269, §§ 10[a] & 10G[b]); possession of ammunition without a firearms identification card (G.L. c. 269, § 10[h]); carrying a loaded firearm (G.L. c. 269, § 10[n]); armed assault with intent to murder (G.L. c. 265, § 18[b]); aggravated assault and battery with a dangerous weapon (G.L. c. 265, § 15A[c][1]); and two counts of assault with a dangerous weapon (G.L. c. 265, § 15B(b) (R. 3-26).[2] The charges stemmed from a shooting at a cookout attended by brothers Joao and Ovidio Pereira.[3]

On March 25, 2011, a jury acquitted Beal of armed assault with intent to murder and the lesser included offense of armed assault with intent to kill but convicted him of the remaining charges (R. 11). A few

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[2] Numbers preceded by "R." refer to the pages of the record appendix that Beal filed in the Appeals Court.

[3] Because the brothers have the same last name, this brief will refer to them by their first names.

days later, the same jury convicted Beal of being a level-two armed-career criminal (R. 11).

On April 27, 2011, the trial judge sentenced Beal to concurrent state-prison terms of 14 to 15 years on the conviction for aggravated assault and battery with a dangerous weapon on Joao, 14-15 years on the conviction for possession of a firearm as an armed-career criminal, and 4 to 5 years for the conviction for assault with a dangerous weapon on Joao (R. 12) (Connolly, J.). He imposed concurrent probationary terms of 4 years on the convictions for carrying a loaded firearm and assault with a dangerous weapon on Ovidio, to run from and after the state-prison sentences (R. 12). The conviction for possession of ammunition was placed on file (R. 12).

After allowing Beal's application for direct appellate review, this Court reversed and set aside three of his convictions. *Commonwealth v. Beal*, 474 Mass. 341, 354 (2016).

It reversed his conviction of being an armed-career criminal for lack of sufficient evidence. *Id.* at 351-54. It reversed two other convictions as duplicative: (1) the conviction of assault with a dangerous weapon on Joao was duplicative of the conviction for aggravated assault and battery on the same victim; and (2) the conviction of possession of ammunition was duplicative of the conviction for carrying a loaded firearm. *Id.* at 348-49. It remanded the case for resentencing.

On remand, a different judge—the trial judge having retired—held a resentencing hearings on February 21 (Tochka, J.). He resentenced Beal to an aggregate prison term of 14 to 15 years with no term of probation (R. 14-15).

But at some point after the hearing, outside the presence of the parties, the judge revoked the sentences and order a second resentencing hearing on June 14 (R. 15). At that hearing, he imposed an aggregate state-prison term of 14 to 15 years and concurrent probationary terms of 4 years, to run from and after the state-prison term (R. 15).

The Appeals Court affirmed the sentences imposed at the June 14 resentencing, *Commonwealth v. Beal*, 2018-P-0291 (App. Ct. Mar. 7, 2019), and this Court denied Beal's application for further appellate review. *Commonwealth v. Beal*, 481 Mass. 1101 (2019).

Beal moved under G.L. c. 278A for testing of the gun and shell casings for touch DNA, arguing that the testing could potentially produce evidence relevant to the shooter's identity (R. 27-52). On March 9, 2020, a third judge denied the motion, ruling that Beal had failed to establish that a reasonable attorney would have sought the testing, as required by G.L. c. 278A, 3(b)(5)(iv) (Roach, J.) (R. 64). Beal timely filed a notice of appeal from the order (R. 18, 66-68).

On April 29, 2021, the Appeals Court affirmed the order denying Beal's motion for postconviction forensic testing (Slip Op. at 1, 6-7). *See Commonwealth v. Beal*, 2020-P-0551 (App. Ct. Apr. 29, 2021).

Statement of Facts[4]

1. The Commonwealth's case.

On July 14, 2008, brothers Joao and Ovidio Pereira attended a cookout at 170 Howard Avenue in Dorchester, a duplex. 474 Mass. at 343.

At about 11:30 p.m., while the brothers were on the front porch, a man walking by provoked one of the guests. *Id.* The man later returned with another unknown man, who provoked Joao. *Id.* After the argument, the men proceeded down the street but stopped to talk to the two occupants of a Toyota Corolla heading in the opposite direction, toward the party. *Id.*

The Toyota continued a short distance past 170 Howard Avenue, made a u-turn, and then pulled up in front of the party. *Id.* As the car idled, the driver got into an argument with Joao (4: 228, 260). *Id.* The cookout guests began yelling and some, including Joao, threw beer bottles at the car, breaking a rear window. *Id.*

The driver got out of the car, pulled out a gun, and fired two shots (2: 17-18, 18-19). A neighbor watching from his third-floor apartment across the street described the shooter as a dark-skinned

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[4] The statement of facts is based on this Court's decision in *Commonwealth v. Beal*, 474 Mass. 341 (2016), supplemented with the trial transcript, which will be cited as, "([Volume]: [page])."

male wearing a white t-shirt that hung below his waist, a dark baseball cap, dark shorts, and black and white sneakers (2: 30, 50-51, 66-68).

The guests scattered, with Joao and Ovidio running to the rear of the house, the shooter following. *Id.* After trying to enter the rear door, Joao and Ovidio ran back to the front of the house and up the porch steps. *Id.* They tried to open the front door, but it too was locked. *Id.*

By this point, the assailant was on the steps of the front porch. *Id.* He fired three shots, one striking Joao in the back. *Id.* The shooter ran to the Toyota and dove into an open passenger's window as it fled the scene. *Id.*

Not long after the shooting, the police located the Toyota in the rear parking lot of 392 Columbia Avenue, an apartment building (2: 159-60, 161-62). *Id.* at 345 n.5. On the floorboard of the front passenger's seat was a .357 caliber Ruger revolver with blood on its butt and five shell casings inside its chamber (2: 170-71; 3: 275, 383). A trail of blood led from the car to the living-room floor of an apartment inside the building (2: 260, 262, 264, 271; 3: 114, 118-20, 154).

The police also went to Beal's home, pulling behind a just arriving car in which Beal and his mother were passengers (2: 205, 296-97). *Id.* at 344. Beal's mother gave the police the key to the Toyota, which was registered to her, stating that Beal had given her the key (3: 168). *Id.*

Beal's head was bleeding, and blood was on his blue t-shirt with yellow lettering (2: 304-05, 328; 3: 209-11). Paramedics removed a beer-bottle shard from his head (2: 211, 328; 3: 106-08).

Beal said that he had been struck with a beer bottle during a fight (2: 213, 307). During a second interview at the police station a few hours later, he said that someone had thrown a beer bottle at him (2: 233-34).

Beal's hands were swabbed for gun shot residue, with negative results (4: 55-56, 62-63; 4: 54-57). The revolver, bullet, shell casings, and two beer bottles were tested for latent fingerprints, but none had sufficient detail for comparison (5: 19-20).

At trial, an expert testified that Beal was possibly the source of the DNA profiles extracted from swabs taken from the butt of the gun, the pavement in front of 170 Howard Avenue, and the living room floor of the Columbia Avenue apartment (4: 45, 154-55).[5] *Id.*

A ballistics expert testified that the bullet removed from the doorframe of 170 Howard Avenue was consistent with being a .38 or .357 caliber bullet and shared the same class characteristics as those test-fired from the revolver (4: 107-11). But the bullet's markings were insufficient to prove that it had been fired from the revolver (4: 111-13).

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[5] She testified that the probability that a randomly selected person would have the same profile was "1 in 110 quintillion Caucasians, 1 in 120 quintillion African–Americans, and 1 in 1.6 quintillion Southeastern Hispanics" (4: 43-44). *Id.* at 345 n.6.

2. The defense case.

The defense was misidentification, and Beal testified on his own behalf.

Beal admitted that he had been in his mother's car on the night of the shooting but maintained that he had been the passenger and that J.R., the driver, had been the shooter (5: 42, 46-49, 64, 66). That evening Beal and was wearing a light blue shirt, jeans, and yellow sneakers, and J.R. was wearing a white t-shirt, a black baseball cap with an "A" on it, and black jeans (5: 46, 57, 79).

On their way to a liquor store, J.R. stopped the car in front of 170 Howard Avenue and got into an argument with a group of people standing there (5: 44-45). Someone in the group threw a beer bottle at the car, breaking a rear window (5: 45). A glass shard lodged in Beal's head, which started bleeding (5: 45, 47-48).

J.R. got out of the car and removed a gun from his waistband (5: 42, 46-47, 61-63, 65). *Id.* Beal got out and grabbed J.R., telling him to "chill" and "leave it alone" (5: 47, 62-63, 65-66). J.R. said that he was just going to "scare" people and then told Beal, "[F]all back" (5: 47, 63-64, 66). Beal returned to the front passenger's seat, where he grabbed a towel and used it to try to staunch the bleeding from his head (5: 47-48, 63-65, 66, 68, 70, 78-79).

Beal heard shots fired and then people screaming (5: 48, 64, 66, 68-69). When J.R. returned to the driver's seat, Beal tried to remove

the key from the ignition, but J.R. struck him in the head with the gun, causing his head to bleed even more (5: 48, 49, 67-72).

J.R. drove away, at some point picking up Arthur Lamberg, also known as "A.C." (5: 50, 73-74). A.C. got into the driver's seat, J.R. got into the backseat, and A.C. drove to the parking lot at the rear of 392 Columbia Road (5: 50-51, 73-74, 76-77, 78). A.C. and J.R. left the building, while Beal went to his friends' mother's apartment to call his parents (5: 51-53, 78, 79-81, 83-84).

A few minutes later, an acquaintance of Beal's mother arrived with his mother and picked him up in front of the apartment building (5: 53-54, 85-86). When they returned to Beal's home, the police pulled up (5: 54-55, 8, 897).

Beal testified that he had not touched the gun (5: 59-60).

Statement of the Point With Respect to Which Further Appellate Review is Sought.

A defendant is entitled to a hearing on his motion for postconviction forensic testing when he shows that the testing could potentially produce evidence material to the perpetrator's identity and that a reasonable attorney would have sought the testing. Here, the gun and shell casings allegedly involved in the shooting were not tested for touch DNA and the Commonwealth's evidence implicated a third party. Did the motion judge erroneously deny his motion seeking postconviction testing of the gun and shell casings for touch DNA?

Argument

Beal is entitled to a hearing on his motion for postconviction forensic testing of the gun and shell casings because his motion met the preliminary requirements of G.L. c. 278A, § 3(b).

In reviewing the denial of G.L. 278A motion by a judge who is not the trial judge, an appellate court considers claims of error de novo since it is equally positioned to assess the record. *Commonwealth v. Linton*, 483 Mass. 227, 233 (2019). It should remain mindful that G.L. c. 278A's stated purpose is to provide "prompt access to scientific and forensic testing in order to remedy wrongful convictions." *Id*. at 234.

Reviewed under this standard, the motion judge erred in denying without a hearing Beal's motion for touch-DNA testing of the gun and shell casings because it contained information satisfying the threshold requirements of G.L. c. 278A, § 3(b). *See Commonwealth v. Clark*, 472 Mass. 120, 132 (2015).

1. To obtain a hearing on a motion for postconviction forensic analysis, the defendant's motion must contain information meeting the requirements of G.L. c. 278, § 3(b).

Section 3(b) lists five categories of information that a defendant must provide to obtain an evidentiary hearing under G.L. c. 278, §§ 6 and 7.[6] *Commonwealth v. Williams*, 481 Mass. 799, 801 (2019). The

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[6] Section 3(b) provides:

b) The motion shall include the following information, and when relevant, shall include specific references to the record in the

underlying case or to affidavits that are filed in support of the motion that are signed by a person with personal knowledge of the factual basis of the motion:

1) the name and a description of the requested forensic or scientific analysis;
2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth;
3) a description of the evidence or biological material that the moving party seeks to have analyzed or tested, including its location and chain of custody if known;
4) information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; and
5) information demonstrating that the evidence or biological material has not been subjected to the requested analysis because:
    i. the requested analysis had not yet been developed at the time of the conviction;
    ii. the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction;
    iii. the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction;
    iv. the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving

defendant's burden under § 3(b) is modest—he need only "point to the existence of specific information that satisfies the statutory requirements." *Commonwealth v. Clark*, 472 Mass. 120, 130 (2015).

Two of § 3(b)'s categories are relevant to Beal's case. The first is § 3(b)(4), which requires a showing that the requested testing could potentially produce evidence relevant to the perpetrator's identity. *See Commonwealth v. Wade*, 467 Mass. 496, 506-10 (2014). The likelihood of the defendant obtaining that result is not relevant to the analysis. *Commonwealth v. Clark*, 472 Mass. 120, 133 (2015).

The second is under § 3(b)(5), which requires a showing that the evidence was not subjected to the requested testing for one of five enumerated reasons. *See* G.L. c. 278A, § 3(b)(5). One of the reasons is that trial counsel did not seek the testing and that "a reasonably effective attorney" would have sought it. G.L. c. 278, § 3(b)(5)(iv). *See Wade*, 467 Mass. at 510. The defendant need not show that "*every* reasonably effective attorney" would have sought testing because that requirement would import the more onerous ineffective-assistance standard to G.L. c. 278A and frustrate the statute's goal of "promoting access to DNA testing regardless of the presence of overwhelming

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party's attorney failed to seek the analysis or the judge denied the report; or

v. the evidence or biological material was otherwise unavailable at the time of the conviction.

evidence of guilt in the underlying trial." *Id.* at 511 (emphasis in original).

Here, Beal's motion contained information satisfying both §§ 3(b)(4) and 3(b)(5)(iv).

2. Beal showed that touch-DNA testing of the gun and shell casings had the potential to produce evidence material to the shooter's identity.

According to the Commonwealth's witnesses, a Toyota with two occupants pulled up in front of the cookout, and the driver got out and fired shots after guests had thrown beer bottles at the car, breaking its rear window. *Commonwealth v. Beal*, 474 Mass. 341, 343-44 n.4 (2016). "[T]he identity of the driver was vigorously contested at trial," and not one of the Commonwealth's witnesses identified Beal as the driver. *Id.* at 341, 343 n.4.

Additional exculpatory evidence included the lack of correspondence between the description of the shooter's clothing and Beal's clothing, the absence of gunshot residue on his hands, and the inconclusive results of the latent fingerprint testing of the gun and shell casings (4:55-56, 62-63; 4:54-57). *Id.* Given the Commonwealth's evidence, testing of the ballistics evidence for touch DNA had the

potential to produce a third-party profile, and Beal met § 3(b)(4)'s requirement (R. 44).[7] *See Clark*, 472 Mass. at 133.

1. A reasonable attorney would have sought touch-DNA testing of the gun and shell casings in this case.

The Commonwealth presented expert DNA evidence that Beal could not be excluded as a source of the blood found at the scene, on the living-room floor of an apartment outside of which the Toyota was found, and on the butt of the gun (4: 45, 154-55). *Beal*, 474 Mass. at 344 & n.6.

Beal maintained that he had been the Toyota's passenger, not the driver (5: 45, 47-48). He testified that when party guests had thrown beer bottles at the Toyota, breaking one of its rear windows, a shard of a broken beer bottle had lodged in his head, causing it to bleed profusely (5: 45, 47-48). When the driver got out the car, he remained inside; when the driver returned following the shooting, he struck Beal on the head with the gun (5: 48, 49, 67-72).

Contrary to the motion judge's findings, a reasonable attorney would have sought DNA testing of the gun and five shell casings found inside of it. Testing might have revealed the identity of the third party, who was never apprehended. While this testing might have also produced inculpatory results, it was a risk that a reasonable attorney

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[7] The Appeals Court assumed without deciding that Beal had § 3(b)(4)'s requirement (Op. at 5).

might have assumed given Beal's testimony that the driver had struck him on his already bleeding head with the gun (5: 45, 47-48, 49, 67-72). *See Wade*, 467 Mass. at 510-11 (a reasonable attorney would have sought pretrial DNA testing of seminal fluid in rape case when serological tests revealed the presence of a third party and the defendant's theory was consent). *See also Commonwealth v. Lyons*, 89 Mass. App. Ct. 485, 495 (2016) (testing of hairs found clutched in victim's hands had the potential to produce evidence material to the perpetrator's identity).

The Appeals Court ruled that Beal had not established that a reasonable attorney would have sought the analysis. It acknowledged that detection of a third party's touch DNA on the gun would have added "some value" to Beal's case (Op. at 6). It also acknowledged that detection of Beal's own touch DNA on the gun would not have undermined his defense because it was consistent with his testimony that the car's driver had struck him on the head with the gun (Op. at 6). But it concluded that detection of a Beal's DNA on the shell casings "stood to eviscerate his defense" because it would have negated his assertion that he had not touched the gun and undermined his defense (Op. at 6-7).

But the possibility that the testing might produce unfavorable results does not diminish the "potential" for the testing to produce evidence material to the perpetrator's identity. *See Clark*, 472 Mass. at

136-37; *Commonwealth v. Lyons*, 89 Mass. App. Ct. 485, 495 (2016). A contrary ruling—like the one in this case—would require a defendant to prove that the failure to seek the testing resulted in a substantial miscarriage of justice, a standard that this Court has rejected as inconsistent with the Legislature's intent in enacting G.L. c. 278A. *See Clark*, 472 Mass. at 136.

Accordingly, a reasonable attorney would have sought pretrial DNA testing of the gun and shell casings, and Beal has met the requirements of G.L. c. 278A, § 3(b)(5)(iv).

Conclusion

For these reasons, this Court should allow Beal's application for further appellate review.

May 20, 2021

Respectfully submitted,

Daunte Beal

By his attorney,

Valerie A. DePalma

Valerie A. DePalma
BBO 639890
1167 Massachusetts Ave.
Arlington, MA 02476
(781) 648-4518
depalmalaw@gmail.com

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-551

COMMONWEALTH

vs.

DAUNTE BEAL.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

A District Court jury convicted the defendant, Daunte Beal, of unlawful possession of a firearm, G. L. c. 269, § 10 (a); carrying a loaded firearm without a license, G. L. c. 269, § 10 (n); assault and battery by means of a dangerous weapon causing serious bodily injury, G. L. c. 265, § 15A; and assault by means of a dangerous weapon, G. L. c. 265, § 15B (b). His convictions were affirmed on appeal. Commonwealth v. Beal, 474 Mass. 341 (2016). Thereafter he sought postconviction forensic deoxyribonucleic acid (DNA) testing to detect skin cells on the gun and shell casings. See G. L. c. 278A, § 3. The motion was denied without a hearing. He appeals, contending that a gun and five shell casings should be tested for "touch" or "skin cell" DNA. We affirm.

Background. We reference the facts at trial as summarized by the Supreme Judicial Court. See Beal, 474 Mass. at 343-344. On July 14, 2008, two brothers, Joao and Ovidio Pereira, attended a cookout at a house on Howard Avenue in the Dorchester section of Boston.[1] A Toyota Corolla stopped in front of the house where the cookout was taking place. After a heated exchange, Joao and another guest threw beer bottles at the Toyota. One bottle hit the driver of the Toyota in the head and another bottle broke the rear side window on the driver's side. The driver got out of the car and fired two shots at the group. While the guests scattered, Joao and Ovidio ran to the back of the house as the driver chased after them. Unable to get inside, Joao and Ovidio ran back to the front porch where the driver stood on the first step and fired several more shots. One bullet struck Joao in the lower back. The driver ran back to the Toyota and jumped in the passenger side and the car sped away.

A neighbor who saw the incident from his bedroom window called 911. See Beal, supra at 344. The Toyota was recovered. It was registered to the defendant's mother; she provided police officers with the key to the car that the defendant gave her. Investigating officers found a gun on the floor of the car. See

[1] Because the brothers share the same last name, we refer to them by their first names.

id. at 344. The gun was a .357 caliber Ruger revolver with blood on its butt and five shell casings inside its chamber. A criminalist "swabbed the defendant's hands for gunshot residue," within four hours of the shooting and the swabs were negative.

At the time of his arrest, the defendant was bleeding from the side of his head; there was dried blood on his hands and face. Swabs of blood were collected from the firearm, the sidewalk in front of the Howard Avenue house, and the floor of an apartment the defendant had visited shortly before his arrest. DNA tests performed on the blood recovered from these locations included the defendant as a possible contributor to the blood samples. See id. The revolver, bullet, shell casings, and two beer bottles recovered from the scene were tested for latent fingerprints, but none had sufficient detail for comparison.

The defense at trial was misidentification. The defendant testified that he was a passenger in the car but that a man named J.R. was the shooter. See Beal, 474 Mass. at 343 n.4. The neighbor testified that he saw the shooter wearing a white T-shirt, dark baseball hat with an "A" on it, and black jeans. Beal claimed he wore a light blue T-shirt with yellow lettering, jeans, and yellow sneakers. He argued to the jury that there was no fingerprint or gunshot residue evidence to tie him to the gun, and that he did not fit the description of the shooter.

Beal accounted for the blood in the car, in front of the house, and in the apartment as follows. When the beer bottles were thrown at the car, a bottle hit the defendant, and a glass shard lodged in his head. He bled as he sat in the passenger seat of the car. Beal tried to stop the shooter; he got out of the car, grabbed J.R., and told him to "chill" and "leave it alone." Unsuccessful, "Beal returned to the front passenger's seat" and used a towel to stop the bleeding. After the shooting, as J.R. returned to the driver's seat, "Beal tried to remove the key from the ignition, but J.R. struck him in the head with the gun, causing his head to bleed even more." They drove off. Beal testified that he did not touch the gun.

After his conviction and appeal, Beal moved pursuant to G. L. c. 278A for skin cell DNA testing of the gun and the shell casings. A judge of the Superior Court denied the motion without a hearing, ruling that "[f]ollowing full review of the file, motion denied for failure to meet the requirements of [G. L. c. 278A, § 3 (5) (iv)]."

Discussion. "[T]he procedure for requesting DNA testing under G. L. c. 278A is a two-step process, the first step of which requires a judge to make a threshold determination whether a motion meets the requirements of § 3, and to notify the parties 'as to whether the motion is sufficient to proceed under [G. L. c. 278A] or is dismissed.'" Commonwealth v. Clark, 472

Mass. 120, 130 (2015), quoting G. L. c. 278A, § 3 (e). Because the threshold inquiry under § 3 does not require a judge "to make credibility determinations, or to consider the relative weight of the evidence or the strength of the case presented against the moving party at trial," Commonwealth v. Wade, 467 Mass. 496, 505-506 (2014), but, rather, is based on documentary evidence (the motion and any response that may be provided by the Commonwealth), we stand in the same position as the judge in determining whether the information presented in the motion meets the requirements of § 3. Accordingly, we review the judge's ruling de novo. See id. See also Commonwealth v. Linton, 483 Mass. 227, 233 (2019); Commonwealth v. Moffat, 478 Mass. 292, 298 (2017).

"[A]t the motion stage, the movant's burden is low." Commonwealth v. Williams, 481 Mass. 799, 804 (2019). Although the Commonwealth contests the point, we assume without deciding that the defendant provided "information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime." G. L. c. 278A, § 3 (b) (4).[2] We therefore turn to the ground upon which the motion judge relied, namely whether "a reasonably effective attorney would have sought the

[2] Beal submitted an affidavit that otherwise satisfied the requirements of § 3 (b) (1-3).

analysis." G. L. c. 278A, § 3 (b) (5) (iv). We apply an objective standard to assess whether a reasonably effective attorney would have sought the "touch" or trace DNA tests. See Moffat, 478 Mass. at 302. The statute requires only that "a reasonably effective attorney would have sought the requested analysis, not that every reasonably effective attorney would have done so." Id., quoting Wade II, 467 Mass. 496, 511 (2014). See Linton, 483 Mass. at 237.

The defendant had a carefully constructed defense designed to explain the presence of his blood on the gun, the area in front of the Howard Street house, and the apartment. The defense hinged on his claim that he had never touched the gun, and that the police had arrested the wrong man. The gun had already been tested for blood DNA and the defendant fell within the sample. If Beale's skin cell DNA was found on the gun, its presence could arguably be explained by his claim that J.R. hit him on the head with the gun. If a third party's skin cell DNA were found, that evidence would add some value to the defendant's case, but the test would not show how or when that person touched the gun. Testing of the shell casings, however, stood to eviscerate his defense. As the evidence stood at trial, the defense was able to argue that his fingerprints were not on the gun or the casings. If his touch DNA were found on the casings, however, he would have been unable to argue that he

had not touched the gun, and his defense would have collapsed. Further forensic testing, if the results were adverse, would have fatally undermined the defense. A reasonably effective attorney, armed with a misidentification defense and the absence of fingerprint or gunshot residue evidence linking the defendant to the gun, would not have risked the defense by requesting additional DNA testing. See Linton, 483 Mass. at 237. There was no error.

Order denying motion for postconviction forensic DNA testing affirmed.

By the Court (Sullivan, Desmond & Singh, JJ.[3]),

Joseph F. Stanton

Clerk.

Entered: April 29, 2021.

[3] The panelists are listed in order of seniority.

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Suffolk County

Commonwealth, Plaintiff; **Daunte Beal**, Defendant.	SUCR2008-11074 **Certificate of Service**

I certify under the penalties of perjury that on May 20, 2021, I electronically served a copy of the defendant's application for further appellate review of the Commonwealth's attorney of record:

Houston Armstrong
Assistant District Attorney
Suffolk County District Attorney's Office
One Bullfinch Place
Boston, MA 02114
houston.armstrong@state.ma.us

Valerie A. DePalma

Valerie A. DePalma
BBO 639890
1167 Massachusetts Ave.
Arlington, MA 02476
(781) 648-4518
depalmalaw@gmail.com