

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2026-0065

Hampden Superior Court
No. 0579CR00222

COMMONWEALTH

vs.

DERRICK WASHINGTON.

ORDER PARTIALLY ALLOWING LEAVE TO APPEAL

This matter is before me on the petition pursuant to G. L. c. 278, § 33E, of the defendant, Derrick Washington, seeking leave to appeal a Superior Court judge's (motion judge) denial of his third motion for a new trial. I have reviewed the record and relevant filings, including the motion judge's memorandum of decision, the parties' memoranda and submissions, and the relevant evidentiary hearing and trial transcripts. For the reasons explained below, and as set forth fully in section III of this order, the petition is **allowed in part** and **denied in part**.

I. Background. Following a jury trial, the defendant and each of his two codefendants, Maurice Felder and Aaron Lester, were convicted of, inter alia, two counts of murder in the first

degree for the February 2005 shooting deaths of Tyrone Lewis, Jr., and Adrian White (together "victims"). See Commonwealth v. Washington, 459 Mass. 32, 35 (2011).

a. Trial record. Mark Young, Jr., was the only percipient witness to the shooting, which occurred in his home; his testimony regarding the defendant's participation in the killings, which differed from his initial statements to responding police officers,¹ was central to the prosecution's case. See Washington, 459 Mass. at 33-34. Young testified that he was friends with Felder, and, while distancing himself from Lester, admitted that he had stayed at Lester's home when his own father had kicked him out of his home.²

Unlike the codefendants, no forensic evidence tied the defendant to the scene of the crime. See Washington, 459 Mass. at 35 & n.5. The defendant was arrested after being found, hours after the killings, alongside Lester in a car that had

¹ Young had reported initially that he and the victims had been attacked by two or three unknown men in masks. Following agreement by the prosecution to drop pending charges against him, Young disclosed that the defendant and the codefendants had killed the victims. Washington, 459 Mass. at 34.

² Young did not testify that he and Lester had threatened to kill a victim-witness who had provided information that led to Felder's arrest in an unrelated incident; Young had been charged with witness intimidation as a result of this conduct, but the charge had been dropped in exchange for his cooperation in the defendant's case.

been detained for a civil infraction; neither man wore a seatbelt, and each had outstanding arrest warrants. The defendant had approximately \$6,700 in cash in his pocket. Id. at 34-35.

In addition to relying on Young's testimony, the prosecution argued that the amount of cash found on the defendant when he was arrested hours after the shootings showed his participating with the codefendants because it equaled approximately his one-third share of the \$20,000 that Lewis had given to his assailants in a failed attempt to save his and White's lives. See Washington, 459 Mass. at 34. Lester had approximately \$6,000 on his person. Id. at 35 n.4. Felder, who had been arrested earlier after having presented himself at a hospital with a gunshot wound to his hand, had approximately \$7,000 on his person. Id. at 35 n.3. The cash found on both Lester and Felder were bound in the idiosyncratic manner that Lewis had bound his cash; by contrast, the defendant's cash was not so maintained.

At trial, the defendant presented an alibi witness who placed him at her home watching the "Super Bowl" with her son at the time of the killings. See Washington, 459 Mass. at 33.

b. Prior proceedings. The defendant filed a motion for a new trial, which was denied, and the denial of that motion was

consolidated with his direct appeal. The full court affirmed the order denying the motion for a new trial and the convictions. See Washington, supra. The defendant filed a second motion for a new trial in 2011, which was denied. The defendant filed an application for leave to appeal pursuant to G. L. c. 278, § 33E, which was denied by a single justice of this court.

c. Third motion for new trial. Relevant to the present petition, in December 2023, the defendant filed a third motion for a new trial,³ arguing he was entitled to a new trial on several grounds.

i. Failure to disclose exculpatory documents. First, the defendant argued that the Commonwealth failed to disclose two documents relating to the criminal association between the Commonwealth's key witness, Young, and the codefendants in violation of its obligations pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Commonwealth v. Tucceri, 412 Mass. 401, 403-404 (1992). In particular, through a post-conviction public records request, the defendant learned that the prosecution team

³ The defendant additionally moved for resentencing pursuant to this court's opinion in Commonwealth v. Mattis, 493 Mass. 216 (2024). On December 16, 2024, a Superior Court judge ordered the defendant resentenced to concurrent sentences of life with the possibility of parole after fifteen years. He is eligible for parole in 2035.

had in its possession two police reports regarding Young dated approximately eleven months prior to the shootings: (1) a mid-March 2004 police report, which led to Young's arrest and described that, following Felder's arrest for shooting a victim-witness in an unrelated matter, Young and Lester threatened to kill the victim-witness to intimidate him to drop the charges against Felder (intimidation report),⁴ and (2) a March 2004 statement to police by Kevin Watson, who generally described acts of organized violence committed by both codefendants and others, including a man who "looked like [Young]," against Watson, his cousin Vernon Cobham, and others (Watson statement). The Commonwealth conceded the documents were in the possession of the prosecution team.

The defendant contended that, had these two documents been disclosed, they would have been used, *inter alia*, to undermine Young's credibility further; to mount a stronger third-party culprit defense that Young (not the defendant) was the third assailant alongside the codefendants; to challenge the adequacy of the police investigation; and to conduct a more fulsome

⁴ The record at trial showed that Young agreed to testify against the defendant and the codefendants after the prosecution dropped pending charges for witness intimidation. This benefit to Young was used at trial to undermine Young's credibility; however, the defendant asserts that the intimidation report, which formed the basis of the charge and showed a criminal nexus between Young and the codefendants, was not disclosed.

investigation into the criminal associations between Young and his neighborhood friends, including Felder and Lester. See Commonwealth v. Bowden, 379 Mass. 472, 486 (1980). Further, the defendant asserted that, had the prosecutor properly disclosed the Watson statement, he would have conducted an investigation that would have led him to interview another witness, Cobham, who knew the defendant to be a drug dealer but did not know him to be affiliated with the codefendants. Cobham also largely confirmed the contents of the Watson statement and generally testified that Young engaged in criminal activities with Felder and Lester, inclusive of having witnessed the three men steal a gold car.⁵

In the alternative, the defendant, relying on the same argument that the documents were undisclosed by the prosecution, contended that the documents, inclusive of the testimony by Cobham, comprised newly discovered evidence for purposes of a new trial motion.⁶

⁵ The motion judge did not credit much of Cobham's testimony about other specific crimes allegedly committed by Young and the codefendants in the early 2000s, finding that the testimony was not properly disclosed to the Commonwealth in advance of the evidentiary hearing and that, insofar as his testimony was stated in general terms, it was not reliable.

⁶ In his third motion for a new trial, the defendant contended that witness testimony by Kaneisha Smith also was newly discovered evidence. In his petition, the defendant does

ii. Prosecutorial misconduct. Next, the defendant alleged that, in light of the information disclosed in the two documents, the prosecutor committed prosecutorial misconduct when she failed to correct testimony by Young that she knew materially misrepresented the nature of his relationship with the codefendants. As discussed supra, Young testified that he was friends with Felder, and that he had stayed in Lester's home. The defendant contended that Young's testimony was substantially misleading, and that the prosecutor's failure to correct Young's testimony violated her obligation under Napue v. Illinois, 360 U.S. 264, 269 (1959) (prosecutor may not elicit or use false testimony from witness to obtain conviction, inclusive of when false testimony bears on credibility).

iii. Ineffective assistance. Third, the defendant argued two distinct claims of ineffective assistance, namely, that (i) trial counsel essentially waited too long to hire a private investigator, thereby allowing an alibi witness's memory to become impaired and weakening his alibi defense at trial, and that (ii) first appellate counsel should have pursued a claim pursuant to Commonwealth v. Lora, 451 Mass. 425 (2008) (defendants may utilize statistical evidence of disparate treatment of arrestees based on race to demonstrate that

not revive his argument with respect to Smith's testimony but continues to press the claim with respect to Cobham.

arresting officers engaged in impermissible racial profiling), to show that the police officer, who stopped the automobile in which the defendant was travelling when he was arrested, engaged in racial profiling, and that, as a result, the evidence collected against the defendant during that arrest -- including importantly the approximately \$6,700 in cash he had on his person -- should have been suppressed.⁷

iv. Confluence of factors. Last, the defendant argued that the evidence presented in connection with his third motion for a new trial, coupled with the confluence of factors, necessitated a new trial.

d. Motion judge's memorandum of decision. The motion judge, who was not the trial judge, determined that the defendant had raised a substantial issue necessitating an evidentiary hearing. See Mass. R. Crim. P. 30 (c) (3), as

⁷ In his gatekeeper application, the defendant no longer presses his claim that trial counsel was ineffective for failing to investigate more promptly his alibi defense. Instead, the defendant presses an alternative ineffective assistance claim, raised in his supplement to his third motion for a new trial, see Mass. R. Crim. P. 30 (c) (2), that trial counsel, to the extent he possessed or was aware of the intimidation report and/or Watson statement, was constitutionally deficient for "not investigating them or using them at trial." Pet. at 71-72. For his part, the motion judge discussed neither the claim nor its viability in his memorandum. See generally Mem. of Decision.

appearing in 435 Mass. 1501 (2001). Accordingly, a three-day evidentiary hearing was held.

Relevant to the instant petition, the defendant offered an affidavit from trial counsel as well as testimony by first appellate counsel; the former averred to not having received the two documents "as part of the discovery in [] Washington['s] case," while the latter attested to having no recollection of receiving the two documents. The defendant additionally presented testimony from Cobham,⁸ who testified, *inter alia*, that Young was friends with both of the codefendants (not just Felder, as Young had testified at trial); that they engaged in criminal activities together in the early 2000s; that Young, Felder, and Lester stole a gold car; that Young was known for "playing both sides" when it came to law enforcement and his criminal accomplices; that the defendant did not have a violent reputation in the community; and that Cobham did not know the defendant to associate with Felder, Lester, or Young.

The Commonwealth, for its part, did not call any witnesses, nor did it dispute that the prosecution maintained the documents in its care at the time of the defendant's trial. Instead, the Commonwealth proffered evidence that the Watson statement had in

⁸ Watson was deceased at the time of the evidentiary hearing.

fact been disclosed to trial counsel as part of discovery in a different, contemporaneous case, wherein trial counsel represented Lester's brother. By contrast, the Commonwealth did not provide any contemporaneous documents showing that the intimidation report had been disclosed; instead, the Commonwealth posited that the report likely was disclosed to trial counsel concurrent with the prosecution informing the defense that all charges against Young had been resolved via a nolle prosequi.

In a comprehensive memorandum of decision, the motion judge denied the defendant's third motion for a new trial. As regards the defendant's Brady-Tucceri claim, the motion judge acknowledged the Commonwealth's concession that the documents had been in the prosecutor's possession. The judge assumed without deciding that the documents had not been disclosed to the defendant given, what he framed as, "the evidentiary gaps on both sides." However, the judge determined that the documents were not exculpatory because: (i) the documents did not establish a gang affiliation or other criminal association between Young and the codefendants, and did not establish a link to Young as a participant in the shootings in this case; (ii) the documents did not establish a motive for Young -- who testified to knowing Felder and Lester and being friends with the former -- to fabricate his testimony in order to inculcate

them; (iii) the defendant's attempt to distance himself from the codefendants was unpersuasive because he was arrested with Lester and a specific amount of cash a few hours after the shootings; (iv) Young was not charged with any crime as a result of the Watson statement, which was unreliable as, at most, it mentioned only that someone who "looked like" Young may have been involved in an unrelated shooting alongside Felder and Lester; (v) police officers had previously investigated the possibility that Young was a participant in the murders rather than a survivor-victim; and, in any event, (vi) Young was subjected to extensive cross-examination on the possibility that he was a third-party culprit, as well as the inconsistent statements he initially provided to police, at trial.

Further, the motion judge concluded that because the defendant made a specific request for evidence of promises, rewards, and inducements, the intimidation report should have been disclosed and thus the defendant was entitled to a more favorable standard for establishing prejudice. By contrast, the judge rejected the defendant's contention that the Watson statement should also have been disclosed in response to the specific request, because the statement was speculative and did not identify Young as having committed any criminal act; nevertheless, the judge considered the Watson statement as Brady-Tucceri evidence for "the sake of completeness." The

motion judge concluded that the defendant was not prejudiced by the failure to disclose the documents. As to the defendant's argument that the undisclosed documents could have strengthened his claim at trial that Young was a third-party culprit, the motion judge determined there was no substantial nexus connecting Young to the commission of the shootings; instead, there was overwhelming physical evidence corroborating Young's version of events, including, inter alia, Young's description of the crime scene and weapons used matching the recovered ballistics, the cell phone recovered at the scene that supported Young's testimony that he had dropped his cell phone when the three assailants forced him into the attic of his home, and the approximately \$20,000 that had been recovered from the defendant and the codefendants, which matched the amount that Lewis had offered the perpetrators in exchange for his life. The motion judge also determined that Young's demeanor following the shootings, as described by his neighbor to police, was consistent with that of a terrified witness, not a culpable actor. The judge further found it was "illogical" to conclude that Young's criminal affiliation with Felder and Lester would have led him to incriminate them, and, moreover, provided no explanation for why Young would have pointed an accusing finger at the defendant.

Second, the motion judge, while crediting some parts of Cobham's testimony, concluded that his testimony, as well as the intimidation report and Watson statement, would not have been admissible, as the evidence was more prejudicial than probative as against the codefendants. The judge also determined that the Watson statement and Cobham's testimony lacked sufficient credibility to be admissible, and that the documents and Cobham's testimony offered as newly discovered evidence of impeachment provided an insufficient basis to require a new trial.

Third, the motion judge concluded that the prosecutor had not elicited false testimony where, viewed in context, Young's testimony regarding his association with the codefendants was not "blatantly false." Commonwealth v. O'Brien, 494 Mass. 288, 302 (2024). Fourth, the motion judge concluded that the defendant had not established either that trial counsel was ineffective in several respects or that first appellate counsel was unreasonable for failing to litigate a claim pursuant to Lora. 451 Mass. 425.⁹ Last, the motion judge concluded that the

⁹ The defendant's direct appeal was pending at the time this court issued Lora; consequently, the defendant is entitled to the benefit of that decision. See Commonwealth v. Augustine, 467 Mass. 230, 256-257 (2014).

additional evidence proffered by the defendant and the combined effect of purported errors did not warrant a new trial.

e. Further travel. The defendant filed a timely notice of appeal and has now filed a gatekeeper petition under G. L. c. 278, § 33E, seeking leave to appeal to the full court.

II. Discussion. A defendant whose conviction for murder in the first degree has been affirmed by this court after conducting plenary review under G. L. c. 278, § 33E, may appeal the denial of a post-conviction motion for a new trial only where the defendant presents a "new and substantial" issue. Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). "An issue is not 'new' within the meaning of G. L. c. 278, § 33E, where either it has already been addressed, or where it could have been addressed had the defendant properly raised it at trial or on direct review" (citation omitted). Id. at 490. An issue is "substantial" if it is "a meritorious issue in the sense of being worthy of consideration by an appellate court." Id. at 487.

a. Two newly discovered documents. The defendant's claims principally center on the prosecution's purported failure to disclose two documents -- the intimidation report and the Watson statement -- which the defendant contends memorialized a criminal association between Young, Felder, and Lester in the

year preceding the killings. The defendant argues that the documents could have been used to (1) further impeach Young's credibility; (2) mount a stronger third-party culprit defense; and (3) challenge the adequacy of the police investigation. These documents formed the basis of several legal arguments made by the defendant in his motion for a new trial.¹⁰

i. Intimidation report. I consider first whether the claim of nondisclosure as it relates to the intimidation report presents a "new" and "substantial" issue under the statute.

A. "New" analysis. Whether the intimidation report constitutes a "new" issue depends on whether the document was, in fact, not disclosed by the prosecution. Based on the circumstantial evidence presented, the defendant has met his burden to show that the intimidation report was not disclosed. See Commonwealth v. Pope, 489 Mass. 790, 799-805 (2022) (concluding that documents discrediting "linchpin" prosecution witness were not disclosed to defense, citing trial counsel's

¹⁰ Dovetailing with the arguments made in his third motion for a new trial, the defendant's petition further argues that, if the documents do not constitute Brady-Tucceri evidence, then they should be considered newly discovered evidence. Moreover, the defendant maintains he has discovered new evidence in the form of witness testimony by Cobham, which, he argues, he would have ascertained prior to trial had the prosecutor timely disclosed the Watson statement. Last, the defendant contends that trial counsel's failure to use the documents, if he had them in his possession, amounted to ineffective assistance of trial counsel. See n.7, supra.

earlier inquiry into existence of documents and overall trial strategy); Commonwealth v. Mazza, 484 Mass. 539, 550 (2020) (ordering new trial after defendant proved, through circumstantial evidence, that Commonwealth had failed to disclose statement of its central witness).

To begin, trial counsel averred he was asked to review the purportedly undisclosed documents at issue and that he did not have a memory as to whether he had received the documents during discovery; he also did not have a detailed memory of the case nor physical possession of the defendant's case file. To be sure, as the motion judge noted, the defendant did not call trial counsel to testify at the evidentiary hearing despite representing earlier in the proceedings that he would. Had he done so, trial counsel's lack of memory could potentially have been refreshed.¹¹

¹¹ The motion judge observed that a mere lack of memory does not foreclose the possibility that trial counsel's recollection of the documents could have been refreshed through proper questioning or the use of other materials. The motion judge also noted the failure of the defendant to call counsel for the codefendants in order to determine whether they had received the documents from the prosecution team. The defendant did submit (tardy) an affidavit from his private investigator, who averred to having no memory of the documents, but did not call the investigator as a witness at the hearing.

Nonetheless, circumstantial evidence supports the inference that trial counsel did not receive the intimidation report.¹² Trial counsel employed a third-party culprit strategy at trial, suggesting Young was the third coconspirator during his cross-examination of him, and again during closing argument. As the intimidation report details Young's criminal association with the codefendants, it seems improbable that trial counsel would not have used this arguably contemporaneous document¹³ to further argue that Young, and not the defendant, was the third shooter. After all, the intimidation report disclosed that Young threatened to kill the victim-witness if he did not drop the allegations that formed the basis for the charges against Felder, and that both he and Lester had engaged together in this threatening behavior; the report led to Young's arrest for witness intimidation -- a charge that was dropped in exchange for his cooperation. Moreover, while Young disclosed his friendship with Felder at trial and admitted that Lester had once taken him in when his father had thrown him out of the house, the intimidation report would have cast a different light on their relationship. The report would have shown Young's

¹² For reasons discussed infra, the Watson statement stands on different footing.

¹³ The murders occurred on February 6, 2005. For context, the March 2004 intimidation report was attached to a warrant dated May 17, 2004.

criminal nexus with Lester and Felder, as well as his willingness to at least threaten to kill on Felder's behalf and alongside Lester. Trial counsel might have used this information to enhance his argument that Young, who had been arrested for a crime involving a threat to kill on behalf of one codefendant and in coordination with the other codefendant, was also a coconspirator with them on the night of the shootings. See, e.g., Commonwealth v. Cowels, 470 Mass. 607, 621 (2015), quoting Commonwealth v. Liebman, 388 Mass. 483, 489 (1983) (new trial may be warranted "'[where] the Commonwealth's case depends so heavily on the testimony of a witness' and where the newly discovered evidence 'seriously undermines the credibility of that witness'").

Further supporting the conclusion that the intimidation report was not disclosed is the testimony offered by the defendant's first appellate counsel at the evidentiary hearing, who testified to receiving trial counsel's complete file in 2008 in connection with the defendant's postconviction motions; however, she has no memory of whether the intimidation report was in the file despite reviewing the file closer to the present time than trial counsel. This bolsters trial counsel's affidavit. See, e.g., Mazza, 484 Mass. at 549-550 (affidavit from postconviction counsel attesting no memory of witness

statement "relevant" to establishing whether evidence withheld from trial counsel and therefore "new").

Significantly, the Commonwealth has no record of disclosing the intimidation report to the defendant. This further supports the inference the report was not disclosed, as trial counsel averred. See Pope, 489 Mass. at 799. While no one single piece of evidence is dispositive, see Mazza, 484 Mass. at 550, on balance, the defendant's trial strategy of pointing to Young as the third-party culprit, combined with the Commonwealth's acknowledged failure to proffer any affirmative evidence that the intimidation report was disclosed, supports the conclusion that the defendant has sustained his burden of showing that trial counsel did not have the intimidation report at trial, and, therefore, the report's nondisclosure constitutes a "new" issue under our case law sufficient for full court review. See id.

B. "Substantial" analysis. Regarding whether the defendant's arguments concerning the intimidation report are "substantial," my analysis is informed by our jurisprudence that the "[t]he bar for establishing that an issue is 'substantial' . . . is not high," and "meritorious" grounds generally are those deemed non-frivolous. Gunter, 459 Mass. at 487, citing Dickerson v. Attorney Gen., 396 Mass. 740, 743-744 (1986). See

also Commonwealth v. Moffett, 383 Mass. 201, 208-209 (1981). Regarding the intimidation report, the defendant has cleared this low bar.

As discussed supra, trial counsel marshalled a defense based on pointing to Young as the third-party culprit. Ahead of trial, counsel made a request for evidence of promises, rewards, and inducements, which resulted in the prosecution disclosing that Young's witness intimidation charge was dismissed in exchange for his cooperation in the instant case; however, the defendant has marshalled evidence sufficient to conclude that the disclosure stopped short of turning over the intimidation report.¹⁴

In view of the importance of Young's testimony to the prosecution's case against the defendant, the defendant has raised a substantial issue worthy of appellate review as to whether he has sustained prejudice from the purported nondisclosure. See Pope, 489 Mass. at 805. Despite serving as the prosecution's linchpin witness against the defendant and the codefendants, Young did not attribute any specific remarks to the defendant on the night in question, a detail that

¹⁴ The motion judge concluded -- and neither party disputes -- that the defendant made a specific request for information that should have revealed the evidence at issue contained in the intimidation report.

distinguishes Young's testimony regarding the defendant from his testimony regarding the codefendants. Moreover, no forensic evidence tied the defendant to the scene of the crime; the same cannot be said of his codefendants. Further, the defendant presented an alibi at trial; while the alibi was not without weaknesses, the mother of a friend of the defendant testified he had been inside her house, watching the "Super Bowl," until sometime after the inciting events of the crime had begun. Last, while the defendant was arrested with Lester hours after the shootings, and while he had substantial cash on hand that, together with the cash found on Lester and Felder, roughly equaled the amount taken from Lewis, the defendant's cash was not maintained in the distinctive manner that Lewis had arranged it; this further distinguished the defendant from the codefendants, whose share of the Lewis cash was found folded in Lewis's unique manner.

In these circumstances, the defendant has presented a substantial issue worthy of the full court's consideration on the question of whether the intimidation report, had it been disclosed timely, would have made a real difference in the jury's deliberations with respect to the defendant. See, e.g., Tucceri, 412 Mass. at 411 (in dealing with claimed failure of prosecution to disclose exculpatory evidence, judge's task "is to decide what effect the omission might have had on the jury").

The court thus agrees with the defendant that the purported Brady-Tucceri violation as it relates to the intimidation report is analogous with others in cases under G. L. c. 278, § 33E, in which we have allowed review by the full court. See Pope, 489 Mass. at 791. See, e.g., Commonwealth v. Jackson, 468 Mass. 1009, 1010 (2014) (gatekeeper petition allowed where defense counsel learned postconviction that Commonwealth did not disclose inducements made to key witness); Commonwealth v. Healy, 438 Mass. 672, 678-679 (2003) (gatekeeper petition allowed where Commonwealth withheld forensic report containing purportedly exculpatory evidence contradicting prosecution's theory). I therefore conclude that the arguments concerning non-disclosure of evidence, newly discovered evidence, and, in the alternative, ineffective assistance of trial counsel, which all are predicated on the purportedly undisclosed intimidation report, to be "new" and "substantial" under the gatekeeper statute, and, in turn, worthy of consideration by the full court. Gunter, 459 Mass. at 487.

ii. Watson statement. A. Nondisclosure. The Watson statement stands on different footing than the intimidation report, principally because the defendant has not articulated how the statement was responsive to any specific or general evidentiary requests made during pretrial motion practice; instead, the defendant's petition largely treats the Watson

statement and the intimidation report as a package deal. More important, however, the contents of the Watson statement do not implicate Young expressly in any criminal activity.

The defendant contends it may be inferred that Young received an inducement by not being charged with the conduct referenced in the Watson statement, and on that basis maintains that the Watson statement should have been disclosed in response to the same request that should have elicited the intimidation report. See discussion supra. However, as the motion judge observed, the statement offers tenuous grounds for connecting Young to any suspected criminal activity, writing that, "Watson did not unequivocally identify Young as a perpetrator in any criminal conduct . . . with respect to . . . Felder and [] Lester['s brother][;] Watson stated only that the third [shooter] 'looked like [Young].'" Indeed, Young was not charged (and likely could not have been charged) with any of the incidents based on the content of the Watson statement. In short, the Watson statement does not directly implicate Young in any criminal conduct, let alone criminal conduct committed alongside the codefendants;¹⁵ consequently, the defendant has failed his burden to articulate how the contents of the

¹⁵ In fact, Watson took care in his statement not to name the third participant to the shooting described therein, electing instead to refer to that individual simply as "the passenger."

statement triggered a disclosure obligation for the prosecution. See Commonwealth v. Lykus, 451 Mass. 310, 326 (2008), and cases cited (defendant bears burden of showing that undisclosed exculpatory evidence should have been produced by Commonwealth following specific request). Accordingly, the defendant's claim that the Watson statement violated the prosecutor's disclosure obligation, and thus constitutes Brady-Tucceri material, is not a "substantial" issue.

B. Newly discovered evidence. The defendant argues in the alternative that, even if the Watson statement does not comprise Brady-Tucceri material, it nevertheless qualifies as "new" because the statement is newly discovered. See Commonwealth v. Drayton, 473 Mass. 23, 31 (2015) ("Where a defendant moves for a new trial on the basis of newly discovered evidence, the defendant 'must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction'" [citation omitted]).

The problem with this theory is that the Commonwealth has proffered evidence into the record that trial counsel had, in fact, received the Watson statement at the time of the defendant's trial. While serving as defense counsel for Lester's brother in an unrelated criminal matter, trial counsel accepted discovery from the Commonwealth that included, inter

alia, the Watson statement;¹⁶ the receipt for that discovery, which was signed by trial counsel, was dated August 1, 2006, approximately six months before the defendant's trial began. Therefore, as trial counsel had the Watson statement in his possession in the lead up to the defendant's trial, the evidence is not "newly discovered" for purposes of Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), see Commonwealth v. Grace, 397 Mass. 303, 306 (1986) (to establish that evidence is "newly discovered," defendant must show that evidence was "unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial" [emphases added]), nor is it "new" for purposes of G. L. c. 278, § 33E.¹⁷

¹⁶ See RA2:328 (discovery receipt in Benjamin Lester case signed by Attorney David Hodge, then-attorney for Washington); RA2:394 (affidavit by Assistant District Attorney, Cynthia Payne, averring that Attorney Hodge had represented Benjamin Lester and had received the Watson statement in discovery as part of that case "on or about August 8, 2006").

¹⁷ In his reply, the defendant contends that the government's obligation to disclose the Watson statement cannot be satisfied by its disclosure of the statement in connection with a different, albeit contemporaneous case, citing Banks v. Dretke, 540 U.S. 668 (2004), and Banks v. Reynolds, 54 F.3d 1508 (1994). The argument, and accompanying case law, concern a prosecutor's obligation to disclose exculpatory material, see Reynolds, supra at 1517 ("Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a Brady violation"); as discussed in the preceding section, that constitutional obligation did not extend to the Watson statement. In sum, the cited case law does not relate to the question whether a document can comprise "newly discovered"

That trial counsel not only possessed the Watson statement in advance of the defendant's trial, but he knew of its existence and content as he considered strategies for the defendant's case, is buttressed by the careful language used in his affidavit submitted as part of the defendant's most recent motion for a new trial. Therein, trial counsel averred that he "d[id] not have any recollection of receiving or not receiving [the Watson statement] as part of the discovery in the Washington case" (emphasis added). This plainly is not the same as averring he lacked knowledge of the statement at the time of the defendant's trial, see Grace, 397 Mass. at 306; and the inference that trial counsel knew of the Watson statement's existence is further strengthened by the defendant's curious decision not to call trial counsel as a witness at the evidentiary hearing despite, as the motion judge noted, having made "prior representations that he would [do so]."¹⁸ That the

evidence where the document was known to trial counsel as he prepared the defense strategy.

¹⁸ In his reply brief, the defendant cites to Mazza, 484 Mass. 539, for the proposition that "evidence supporting a claim [of newly discovered evidence] need not be strictly new for the claim to survive the gatekeeper [stage]." Reply at *15. That case, however, is inapt for several reasons, not the least of which that trial counsel was deceased at the time Mazza filed the operative motion for a new trial in 2011 (the killing and trial took place in 1972 and 1973, respectively), and so could not be expected to testify or aver to whether he had received the statement of the prosecution's key witness during pretrial

motion judge ultimately did not discuss the import of the discovery receipt and affidavit in his disclosure analysis and instead assume that the Watson statement went undisclosed for "completeness," has no bearing on this court's responsibility to independently assess the documentary evidence to ensure the requirements of allowing the petition have been met. See Commonwealth v. Gaines, 494 Mass. 525, 536 (2024), citing Commonwealth v. Haley, 413 Mass. 770, 773 (1992).

Accordingly, the defendant has not met his burden to show that the Watson statement is "new" because it is newly discovered evidence for purposes of satisfying G. L. c. 278, § 33E.

C. Ineffective assistance. The defendant argues in further alternative that, had trial counsel been in possession of the Watson statement at the time of trial, his decision not to investigate its contents further -- inclusive of conducting an interview of Cobham -- or employ it at trial was constitutionally deficient. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Despite the low bar for showing a "substantial" argument, here the defendant has not cleared that hurdle. Specifically, his argument that trial counsel's

discovery. 484 Mass. at 545, 548-549. Such is not the case here.

decision not to develop the Watson statement was manifestly unreasonable is entirely without merit where, among other infirmities, the statement failed to identify Young expressly as a participant in any criminal conduct. See Commonwealth v. Acevedo, 446 Mass. 435, 446 (2006) (where new trial sought based on claim of ineffective trial counsel, defendant must show that trial decision at issue was "manifestly unreasonable" when made [citation omitted]).

iii. Cobham testimony. The resolution of all theories under which the defendant maintains that the Watson statement may pass through to the full court against the defendant, see § II (a) (ii) supra & § II (b) infra, necessarily means that Cobham's credited testimony likewise may not pass to the full court for consideration. First, the defendant makes no claim that Cobham's testimony comprised material that the prosecution team should have disclosed under Brady-Tucceri.¹⁹ Second, because the Watson statement is not newly discovered evidence, neither is Cobham; trial counsel could have learned of Cobham's involvement in the incidents described by Watson when he received the Watson statement in discovery for the

¹⁹ Put another way, the record does not support any claim that the Commonwealth had evidence in its possession relating to or discussing Cobham other than the Watson statement, which, for reasons discussed at length above, is neither Brady-Tucceri material nor newly discovered evidence.

contemporaneous Benjamin Lester matter. See Grace, 397 Mass. at 306.

Third and last, the defendant has not raised a substantial question regarding whether trial counsel provided ineffective assistance by failing to locate and/or interview Cobham, where Cobham offered, at most, cumulative corroboration of unspecified criminal activity between Young and the codefendants as well as one specific instance of theft of an automobile -- a far cry from murder. In these circumstances, the defendant has not met the low threshold of "substantial" as to whether trial counsel's decision not to pursue Cobham -- a witness who was known to the defendant and with whom the defendant engaged in an organized drug trade -- was manifestly unreasonable. See Acevedo, 446 Mass. at 446.

b. Prosecutorial misconduct. The prosecutorial misconduct claim also does not meet the gatekeeper requirements. I agree with the motion judge that the prosecutor's purported failure to correct Young's trial testimony regarding the full nature of his relationship with the codefendants, and Lester in particular, does not rise to prosecutorial misconduct under Napue, 360 U.S. 264, and O'Brien, 494 Mass. at 302, and thus is not "substantial," even under the relaxed bar set by Gunter. As the motion judge reasoned, viewed in context, Young's testimony with

respect to Lester -- that Lester lived in the neighborhood and that he had given Young shelter after Young's father had thrown him out of his home -- was not substantially misleading, see O'Brien, supra; and consequently no correction on the part of the prosecutor was required in view of the contents of the intimidation report or the Watson statement. See id., quoting Commonwealth v. Forte, 469 Mass. 469, 491 (2014) ("[m]inor inconsistencies do not [necessarily] constitute falsities").

c. Lora claim. Turning to the first issue in the petition not predicated on the documents, the defendant argues that his first appellate counsel was ineffective for failing to pursue a Lora claim, 451 Mass. 425. This issue does not appear to be "new"; rather, the defendant could have raised -- and, indeed, nominally did raise²⁰ -- the issue of first appellate counsel's effectiveness for failing to challenge as pretextual the traffic stop in his second motion for a new trial. The claim accordingly is waived, see Mass. R. Crim. P. 30 (c) (2), and the

²⁰ In his pro se memorandum in support of his second motion for a new trial, filed in February 2014, the defendant raised the issue of whether "trial counsel deprived [him] of" effective assistance "by failing to raise a claim that the [arresting] trooper conducted a race based or pretext[ual] stop of the motor vehicle in which he was a passenger." The substitute memorandum filed by counsel, however, only presents one issue, namely, whether the defendant was entitled to a new trial "based on the unconstitutional exclusion of the public from the courtroom during jury selection at his trial."

defendant may not reframe this issue as ineffective assistance of appellate counsel for purposes of the instant petition. See Commonwealth v. Laurore, 437 Mass. 65, 77 (2002) (defendant may not "repackage" newly discovered evidence assertion "in the trappings of an ineffective assistance of counsel claim . . . to avoid the obstacle that the 'new evidence' motivating the claim is not new" for purposes of G. L. c. 278, § 33E).

Moreover, the defendant has not raised a "substantial" issue regarding first appellate counsel's decision not to pursue such a claim where, among other infirmities, the judge on the defendant's motion to suppress expressly credited the arresting trooper's testimony that he did not see the occupants of the vehicle, including the defendant and Lester, prior to initiating the traffic stop. Acevedo, 446 Mass. at 446. In these circumstances, the defendant has not raised a substantial issue on the question whether it was manifestly unreasonable to conclude that a motion to suppress based on racial profiling would not have been successful. See Commonwealth v. Diaz, 448 Mass. 286, 289 (2007) ("An ineffective assistance claim based on the failure to bring a motion requires the defendant to show that the motion would likely have been granted").

d. Confluence of factors. Turning to the tranche of evidence and related theories raised by the defendant in the

final substantive section of his petition,²¹ the defendant concedes that the material therein is "not new." See Gunter, 459 Mass. at 487-488, and cases cited.

III. Order. Based on the foregoing, it is **ordered** that:

1. The defendant's application under G. L. c. 278, § 33E, for leave to appeal the denial of his third motion for a new trial, is **allowed** with respect to the Commonwealth's alleged failure to disclose the intimidation report on the theory that said report constitutes either undisclosed exculpatory material, newly discovered evidence, or plausible grounds for a claim of ineffective assistance of trial counsel (§ II [a] [i]), and **denied** as to all other arguments (§ II [a] [ii]-[d]); and

2. It is **further ordered** that the Hampden County Superior Court Criminal Clerk's Office shall assemble forthwith the record in docket no. 0579-CR-00222 and transmit the same to the Clerk's Office of the Supreme Judicial Court for the Commonwealth, John Adams Courthouse, One Pemberton Square, Room 1-400, Boston, Massachusetts 02108.

²¹ These arguments have or could have been raised previously and include: defense counsel's allegedly deficient investigation of the defendant's alibi; disputed descriptions of the car in which the defendant and Lester were travelling based on the testimony of the State Trooper who pulled over the car containing Lester and the defendant the day after the murders; and alternative explanations offered for the defendant's possession of a large bundle of cash at said traffic stop.

3. It is **finally ordered** that the pending motions for leave to file letter briefs as amicus curiae in support of the defendant's petition for leave to appeal pursuant to G. L. c. 278, § 33E, are allowed.

By the Court,

/s/ Dalila Arguez Wendlandt
Associate Justice

Entered: July 21, 2026