

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
NO. SJ-2022-0070

SUPERIOR COURT DEPARTMENT  
SUFFOLK SUPERIOR COURT  
No. 8684CR58208

COMMONWEALTH

vs.

FRANK DIBENEDETTO

MEMORANDUM OF DECISION

At his retrial in 1994, the defendant was convicted of murder in the first degree; his conviction was affirmed by the full court in 1998. See Commonwealth v. DiBenedetto, 427 Mass. 414, 426 (1998). Before me is the defendant's gatekeeper petition pursuant to G. L. c. 278, § 33E, in which he seeks leave to appeal from the denial of a motion to vacate his conviction and to enforce a plea offer that he be allowed to plead guilty to manslaughter. For the reasons that follow, the petition shall be allowed.

1. Background. The facts and procedural history of this case have been discussed a number of times in the full court's prior decisions. See Commonwealth v. DiBenedetto, 475 Mass. 429, 430-436 (2016); Commonwealth v. DiBenedetto, 458 Mass. 657, 658-

663 (2011); Commonwealth v. DiBenedetto, 427 Mass. at 416-420; Commonwealth v. DiBenedetto, 414 Mass. 37, 38-39 (1992). The defendant's current gatekeeper petition concerns his recently-filed motion to vacate the conviction of murder in the first degree and to enforce a plea arrangement that he had been offered before the 1994 retrial. The defendant contends that he would have accepted the Commonwealth's offer that he plead guilty to manslaughter but for the fact that the offer required his codefendant, Louis Costa, to accept it as well, and Costa refused.

The defendant contends that the Commonwealth's use of a "locked" or "packaged" plea offer violated his right to due process. After a non-evidentiary hearing on the defendant's motion to vacate his conviction, the motion judge, who was not the trial judge, denied the motion in a detailed memorandum of decision setting forth the reasons for the denial. The defendant's gatekeeper petition seeks leave to appeal from that decision.

2. Discussion. Following this court's plenary review under G. L. c. 278, § 33E, of a defendant's conviction of murder in the first degree, if the defendant subsequently files a motion for a new trial in the Superior Court, and that motion is denied, the defendant must seek leave to pursue an appeal of that denial through the gatekeeper provisions of G. L. c. 278, § 33E. No appeal may be taken unless a single justice of this court allows

the appeal "on the ground that it presents a new and substantial question which ought to be determined by the full court." G. L. c. 278, § 33E.

To be "substantial," a claim must present a "meritorious issue . . . worthy of consideration by an appellant court." 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." Gunter, supra. "The statute requires that the defendant present all his claims of error at the earliest possible time, and failure to do so precludes relief on all grounds generally known and available at the time of trial or appeal." Id., quoting Commonwealth v. Pisa, 384 Mass. 362, 365-366 (1981). "[I]n a capital case, issues raised in a post appeal motion for a new trial that were or could have been raised at trial or in the direct appeal" are evaluated to determine whether they present a substantial risk of a miscarriage of justice; to warrant such relief, . . . the claimed errors must be of significant magnitude. See Commonwealth v. Smith, 460 Mass. 318, 320-321 (2011).

The defendant's motion to vacate his conviction and to enforce the 1994 plea offer raises a new and substantial question regarding the scope of constitutional protections afforded a defendant during the plea-bargaining process. This is a matter of

first impression in the Commonwealth, and has been a subject of disagreement in the Superior Court. See Commonwealth vs. Smith, No. 7884CR17151 (August 4, 2021) (allowing postconviction relief as remedy for due process violation in plea offer and handling of plea). Indeed, I have allowed the Commonwealth's gatekeeper petition in that matter, where the Commonwealth agreed that the question was both new and substantial.

Upon consideration, it is **ORDERED** that the defendant's petition pursuant to G. L. c. 278, § 33E, shall be, and hereby is, **ALLOWED**. The Clerk of the Suffolk Superior Court shall assemble the record in 8684CR58208 and transmit the record to the Clerk of the Commonwealth's Office, John Adams Courthouse, One Pemberton Square, Suite 1-400, Boston, Massachusetts 02108.

It is **FURTHER ORDERED** that the case be paired with the proceedings to be entered in the full court in Commonwealth vs. Smith, Docket No. SJ-2022-0030.

By the Court,

/s/ *Frank M. Gaziano*

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Frank M. Gaziano  
Associate Justice

Entered: March 18, 2022