

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2025-0436

Plymouth Superior Court
No. 80451-2

COMMONWEALTH

v.

HERBERT ANDREWS, JR.

MEMORANDUM OF DECISION & ORDER

Pursuant to the gatekeeper provision of G. L. c. 278, § 33E, the defendant Herbert Andrews, Jr. seeks leave to appeal an order of the Plymouth Superior Court denying his third motion for a new trial. For the reasons set forth below, the defendant's application is **granted**.

In 1985 a jury convicted the defendant and his co-defendant of two counts of murder in the first degree. The defendant timely appealed, and this court affirmed his convictions on direct appeal. See Commonwealth v. Andrews, 403 Mass. 441 (1988). The defendant has filed two previous motions for a new trial, which were denied in 1994 and 2009, respectively.

In September of 2024 the defendant filed his third motion for a new trial, which is the subject of the instant petition. His argument for a new trial was that the Commonwealth had committed a Brady violation by failing to disclose interview notes made by a police investigator before trial. See Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017) (discussing Brady v. Maryland, 373 U.S. 83 [1963])). In the defendant's view, these notes were exculpatory (and therefore subject to disclosure) because they identified several third parties with motive to kill one of the victims, Thomas Sylvester.

On August 15, 2025, after a hearing, the motion judge (who was not the trial judge) issued an order denying the motion. In her decision the motion judge concluded both that the interview notes were not sufficiently exculpatory to require disclosure, and that even if the notes should have been disclosed, the defendant was not prejudiced by their nondisclosure. The defendant now seeks leave to appeal that denial.

Where, as here, a defendant's conviction for murder in the first degree has been affirmed by this court following plenary review, G. L. c. 278, § 33E provides that no appeal from the denial of a post-conviction motion will be available "unless the appeal is allowed by a single justice of the supreme judicial court on the ground that it presents a new and substantial question which ought to be determined by the full court." This

court has summarized the "new and substantial" requirement as follows:

"The bar for establishing that an issue is 'substantial' in the context of the gatekeeper provision of § 33E is not high. It must only be a meritorious issue in the sense of being worthy of consideration by an appellate court. At the same time, an issue must also be 'new' to pass the gatekeeper's inspection. This presents a more significant hurdle. 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" (citations and quotations omitted).

Commonwealth v. Gunter, 459 Mass. 480, 487 (2011).

Here, the notes that form the basis of the defendant's motion for a new trial were disclosed to him for the first time in 2022.¹ Accordingly, I conclude that the issue is sufficiently "new" for § 33E purposes.

I also conclude that the defendant has shown that the Brady issue raised by his motion is sufficiently "substantial" under § 33E to at least be "worthy of consideration by an appellate court." Gunter, 459 Mass. at 487. "[I]n Massachusetts, when we speak of a prosecutor's Brady obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any

¹ The 2022 disclosure, made in response to a public records request, contained redacted versions of the notes. Over the Commonwealth's opposition, the defendant then successfully moved for posttrial discovery, which resulted in the Plymouth Police Department producing unredacted versions of the notes in 2024.

facts that would tend to exculpate the defendant or tend to diminish his or her culpability." Matter of a Grand Jury Investigation, 485 Mass. 641, 649 (2020). See Commonwealth v. Pope, 489 Mass. 790, 800 (2022), quoting Sullivan, 478 Mass. at 381 ("exculpatory is not a narrow term connoting alibi or other complete proof of innocence").

Although the notes are difficult to parse, they appear to contain information that was not included in the investigator's written report, which was disclosed. And that previously undisclosed information could, as the defendant argues, support two distinct third party culprit theories. First, the police detective wrote that Sylvester, one of the victims, had been threatened by the brothers of his ex-girlfriend Mary Parsons. Parsons had recently stabbed Sylvester in the chest during a domestic dispute, and at a bar the night before the killings Sylvester had, in front of one of Parson's brothers, unsuccessfully attempted to persuade her to leave with him. Second, the detective wrote that Sylvester's father had recently told him "you better get up money or they'll kill you."

In concluding that the notes were not exculpatory the motion judge relied on Commonwealth v. Don, 483 Mass. 697, 712 (2019), where this court held that third-party culprit evidence was admissible only if a defendant "demonstrate[s] that the acts of another person are so closely connected in point of time and

method of operation as to cast doubt upon the identification of [the] defendant as the person who committed the crime," (quotation and citation omitted). In her view, the information in the notes was simply too speculative, particularly where the defendant did not provide any corroborating evidence for either third party culprit theory. But Don concerned the admissibility at trial of third party culprit evidence, see id. at 11-12, not whether such evidence is exculpatory for the purposes of disclosure. These are distinct inquiries. See Matter of Grand Jury Investigation, 485 Mass. at 653 ("the ultimate admissibility of the information is not determinative of the prosecutor's Brady obligation to disclose it"). And, even if not admissible for the purposes of proving that a third party committed the killings, the defendant argues that the notes may have served to attack the adequacy of the police investigation. See Sullivan, 478 Mass. at 382 ("this evidence also was exculpatory because it bolstered the defendant's Bowden defense"). Mindful that the bar posed by § 33E's "substantial" requirement "is not high," Gunter, 459 Mass. at 487, for these reasons, I conclude that the defendant's petition presents a "substantial" issue for the purposes of § 33E.²

² To obtain a new trial, the defendant will also need to demonstrate that he was prejudiced from the nondisclosure. See Commonwealth v. Murray, 461 Mass. 10, 20-21 (2011). The motion judge concluded that there would be no prejudice, citing the

Accordingly, it is therefore ordered that:

1. the defendant's application under the gatekeeper provision of G. L. c. 278, § 33E, for leave to appeal the denials of his motion for a new trial and motion for reconsideration, is allowed; and

2. the Plymouth County Superior Court Criminal Clerk's Office shall assemble forthwith the record in docket no. 80451-2 and transmit 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.

/s Scott L. Kafker

Scott L. Kafker
Associate Justice

Entered: July 15, 2026

extensive trial evidence of the defendant's guilt, including two detailed and corroborated eyewitness accounts of the defendant's participation in the killings. I note that the motion judge applied the prejudice standard used for nondisclosure in the face of general discovery requests, see id. at 21, but the defendant's petition asserts that the nondisclosure was intentional, and if so the defendant would benefit from a more favorable standard, see Pope, 489 Mass. at 801.