

NOTICE: All slip opinions and orders are subject to formal revision and are superseded by the advance sheets and bound volumes of the Official Reports. If you find a typographical error or other formal error, please notify the Reporter of Decisions, Supreme Judicial Court, John Adams Courthouse, 1 Pemberton Square, Suite 2500, Boston, MA, 02108-1750; (617) 557-1030; SJCRreporter@sjc.state.ma.us

SJC-13776

COMMONWEALTH vs. RICHARD HOLBROOK, JR.

Plymouth. May 8, 2026. - October 9, 2026.

Present: Budd, C.J., Gaziano, Wendlandt, Georges,
& Wolohojian, JJ.

Homicide. Evidence, Exculpatory, Information stored on
computer, Impeachment of credibility, Third-party culprit.
Witness, Impeachment. Electronic Mail. Practice,
Criminal, Assistance of counsel, Discovery, New trial.

Indictments found and returned in the Superior Court
Department on January 29, 2007.

Following review by this court, 482 Mass. 596 (2019), an
amended second motion for a new trial, filed on March 23, 2023,
was heard by William F. Sullivan, J.

Brian J. Kelly for the defendant.
Carolyn A. Burbine, Assistant District Attorney, for the
Commonwealth.

WOLOHOJIAN, J. Before us is the defendant's appeal from
the denial of his amended second motion for a new trial, which
was heard and decided on remand after we affirmed on direct
appeal the defendant's convictions of murder in the first degree

and related charges. See Commonwealth v. Holbrook, 482 Mass. 596, 611-612 (2019). The defendant raises two primary issues in this appeal. First, he contends that his trial counsel was ineffective in various ways both before and during trial. Second, he contends that he was prejudiced by the Commonwealth's failure to produce exculpatory evidence of e-mail messages on the victim's computer's hard drive. Discerning no abuse of discretion or other error on the part of the motion judge, or any entitlement to relief under G. L. c. 278, § 33E, we affirm the denial of the amended second motion for a new trial.

Background. We provide here only a brief summary of the evidence and theories at trial,¹ reserving additional facts, including those drawn from the motion judge's findings, for our later discussion of the issues raised.

1. Commonwealth's case. The victim was killed in his own apartment on Sunday, November 26, 2006, at approximately 12:23 P.M. (time of death). This time was established, in part, by a computer that had been abruptly shut down at that time and was found, together with a "webcam," submerged in a bathtub when the police arrived at the victim's ransacked apartment the next day. Minutes before the time of death, a friend saw the victim alive

¹ A more fulsome account of the trial evidence can be found in our decision affirming the defendant's convictions. See Holbrook, 482 Mass. at 597-600.

in his own apartment; the only other person present with the victim was the defendant. The defendant, who was homeless and needed money, had done some yard work for the victim two days earlier. The defendant had a distinctive appearance; he was tall, thin, unkempt, and unshaven, wore a distinctively branded tan-colored jacket, and had brown, rotted teeth.

At 12:45 P.M. (about twenty minutes after the time of death), the victim's mother saw the defendant go into the victim's car, which was parked in the driveway outside the victim's building, and then go back into the victim's apartment. Minutes later, a different friend of the victim saw the defendant place something in the victim's truck (also parked in the driveway), go back into the victim's building, and then return to the truck and drive away. Only forty-five minutes had elapsed from when the victim was last seen alive in his apartment with the defendant to when the defendant drove the victim's truck away. The three witnesses who observed these events either affirmatively identified the defendant; definitively testified that the man they observed was not a potential third-party culprit, Sean Meagher (whom they knew); or did both.

Very soon thereafter, at 1:03 P.M., the victim's truck arrived at a nearby grocery store, driven by a man the jury could reasonably conclude was the defendant based on their own

observation of the defendant in the court room and of the man depicted in the surveillance footage of the store parking lot. See Commonwealth v. Phillips, 495 Mass. 491, 495 (2025) (jury could observe defendant and compare his appearance with videographic evidence to assess "any points of similarity [such as facial features, hair, skin color, build, posture, and height]"); Commonwealth v. Austin, 421 Mass. 357, 366 (1995) ("The jury were capable of viewing the videotape and drawing their own conclusions regarding whether the man in the videotape was the defendant . . ."). At 1:19 P.M. the same man, after having exchanged \$89.51 in coins using the coin machine at the store, drove the victim's truck to a second parking lot, where he abandoned it six minutes later, at 1:25 P.M. The victim's large empty coin jug was subsequently found by police in the truck.

The next day, police found the victim dead in his apartment, having suffered three "chop wounds" to the head; his apartment had been ransacked, and his pockets had been cut open. No cash was found on the victim or on the premises even though the victim was well known for keeping substantial amounts of cash on hand. In the days after the murder, the defendant, who as we have already noted, was homeless and lacked money in the days before the murder, purchased numerous items with "wad[s]" of cash and paid cash to stay in a hotel.

2. Defendant's case. The defendant successfully moved to exclude inculpatory deoxyribonucleic acid (DNA) evidence obtained from within the victim's truck; specifically, DNA samples matching the defendant's profile were obtained from the steering wheel, the rear floor mat, and the handle of the driver's door. The trial judge excluded this evidence because the controls were inadvertently destroyed during the Commonwealth's testing of the samples.² Thus, the forensic evidence at trial was limited to a fingerprint on the inside doorknob to the room where the victim's body was discovered, DNA on the victim's wallet, and four palm prints in the victim's car. The defendant was eliminated as a contributor to any of this evidence.³

Given the defendant's success in suppressing the inculpatory DNA evidence from within the victim's truck, and the fact that the defendant could not be tied to the other forensic evidence, a central theme of the defense at trial was the lack of forensic evidence supporting the defendant's identity as the killer. This defense was pursued in tandem with a third-party

² Several of the DNA samples were limited in quantity and thus fully consumed during testing such that they could not be retested.

³ The fourth palm print lacked sufficient quality and quantity for comparison purposes.

culprit defense suggesting that Meagher was responsible for the murder. Meagher had previously lived with the victim for two years, and although Meagher admitted that he slept in the same bed as the victim while they lived together from 2003 to 2005, Meagher denied that their relationship was romantic. Meagher further admitted that he had communicated with the victim via e-mail messages after moving out and that he had seen the victim when he stopped by the victim's workplace in October 2006, the month before the murder.

3. Procedural history. A jury convicted the defendant of murder in the first degree on the theories of extreme atrocity or cruelty and felony-murder. The defendant thereafter obtained new counsel and moved for a new trial based on ineffective assistance of trial counsel, as well as for postconviction discovery. The trial judge allowed funds for the defendant to hire a data recovery expert to examine the hard drive of the submerged computer for evidence suggesting that the victim's relationship with Meagher had been romantic or that there was ongoing animosity between Meagher and the victim.

The data recovery expert was able to recover more than a dozen outgoing e-mail messages sent from the victim to Meagher from September 4, 2005, to November 20, 2005, over one year before the victim's death. Among other things, the victim wrote that he was "going crazy thinking of [Meagher]" and that he

"just want[ed] the past back" and that "it[']s about forgiv[e]ness and forgetting, the past is still with us, if you want to face it and come back we can get through it." The expert also recovered e-mail messages dating from November 19, 2005, to July 1, 2006, that were sent by the victim to third parties that referenced the victim and Meagher's romantic relationship.

Subsequently, the defendant amended his motion for a new trial to include arguments concerning newly discovered evidence and prosecutorial misconduct based on the prosecutor's failure to produce the e-mail messages prior to trial. The defendant also sought further discovery to request additional e-mail messages from third-party e-mail providers. The trial judge denied that motion, the defendant's request for an evidentiary hearing on his motion for a new trial, and the amended motion for a new trial. The defendant then obtained new appellate counsel and filed a second motion for a new trial, in which he requested an evidentiary hearing and asserted additional arguments of ineffective assistance of counsel, among other things. The trial judge denied that motion as well.

On direct appeal to this court, we vacated the orders denying the defendant's motions for a new trial and concluded that the trial judge erred in denying the defendant's motion for postconviction discovery, motion for an evidentiary hearing on

his amended first motion for a new trial, and request for an evidentiary hearing on his second motion for a new trial. Holbrook, 482 Mass. at 606-607, 611-612. We accordingly remanded the case to the Superior Court to allow for such postconviction discovery and for an evidentiary hearing. Id. at 612. We further allowed the defendant leave to amend his second motion for a new trial to include any information obtained from the discovery requests, and to appeal from the order denying his amended second motion for a new trial, should one enter, without going through the gatekeeper requirement of G. L. c. 278, § 33E. Id. At the same time, we affirmed the defendant's convictions and denied relief under G. L. c. 278, § 33E, based on the trial record, while leaving available subsequent § 33E review of the denial of his motion for a new trial. Id.

On remand, a different judge (motion judge), who had not presided at trial, allowed the defendant's postconviction discovery requests.⁴ None bore fruit: the third-party e-mail

⁴ After postremand discovery, the parties stipulated to the following:

"[The victim's] computer and webcam were found in the bathtub, where they had been submerged in water. The hard drive and webcam were sent to the [United States] Secret Service in California. The Secret Service created a forensic image of the hard drive. The Secret Service returned the victim's hard drive, webcam and the forensic image it created to the Plymouth County Sheriff's Department. The forensic image was stored on equipment belonging to the Secret Service. The Plymouth County

account providers reported that no records existed; the original hard drive could not be located by the police; and the forensic image of the hard drive had been damaged, making no data recoverable. Accordingly, the motion judge found that postremand discovery uncovered no additional exculpatory evidence.

Thereafter, the motion judge held an evidentiary hearing over six days during which four witnesses -- trial counsel and three prosecutors -- testified, and the parties submitted fifteen exhibits. In a detailed and thoughtful written decision, the motion judge denied the amended second motion for a new trial, and it is this ruling that is now before us on appeal by the defendant.

Discussion. The defendant argues that the motion judge abused his discretion in denying the defendant's amended second motion for a new trial. A judge may allow a motion for a new trial "if it appears that justice may not have been done." Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). We review the denial of a motion for a new trial for abuse of discretion. See Commonwealth v. Noguera, 496 Mass. 601, 610

Sheriff's Department copied the image . . . onto a hard drive of its own . . . [and] returned the . . . image and equipment to the Secret Service" (Paragraph numbers omitted.)

(2025). "Where[, as here,] a judge conducted an evidentiary hearing on the motion, we accept the judge's findings if supported by substantial evidence in the record and defer to the judge's assessment of witnesses' credibility." Id. But, because the motion judge did not preside at the trial, "[w]e regard ourselves in as good a position as the motion judge to assess the [trial] record." Commonwealth v. Bonnett, 482 Mass. 838, 848 (2019).

We note at the outset that all of the motion judge's findings are well supported by substantial evidence with one small exception of no import to our analysis.⁵ Further, the motion judge did not credit trial counsel's testimony on several important points, and we accept those credibility determinations as they were made by the fact finder who assessed that testimony firsthand. See Noguera, 496 Mass. at 610. We accordingly incorporate below the motion judge's findings as they pertain to our discussion of each of the defendant's arguments.

1. Ineffective assistance of counsel. "In reviewing a defendant's claim of ineffective assistance of counsel in a case of murder in the first degree, we do not evaluate the claim

⁵ The motion judge found that the defendant's postremand data recovery expert examined the original submerged hard drive when, in fact, the company had examined the Plymouth County sheriff's department's copy of the Secret Service's copy of the hard drive.

under the traditional standard set forth in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)." Noguera, 496 Mass. at 610. "Instead, we apply the more favorable standard of G. L. c. 278, § 33E, and review the defendant's claim for a substantial likelihood of a miscarriage of justice" (citation omitted). Id. "Under this standard, we first ask whether defense counsel committed an error in the course of trial, and if there was error, we ask whether it was likely to have influenced the jury's conclusion" (quotations and citation omitted). Id. "We consider the defendant's claim of ineffective assistance even if the action by trial counsel does not constitute conduct falling measurably below that . . . of an ordinary fallible lawyer" (quotations and citation omitted). Id. at 610-611.

a. Investigation and preparation for trial. The defendant argues that a new trial is necessary because his trial counsel failed to investigate adequately the case because he (i) failed to investigate the hard drive of the computer by not utilizing his retained forensic computer expert, not interviewing the Commonwealth's computer experts, and improperly relying on the representations of the Commonwealth concerning the contents of the hard drive, and (ii) failed to interview Meagher or to obtain forensic evidence from him.

Trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary." Commonwealth v. Duran, 435 Mass. 97, 102 (2001), quoting Strickland v. Washington, 466 U.S. 668, 691 (1984). To establish that trial counsel was ineffective for lack of adequate investigation, "a defendant must identify with particularity how any investigation that counsel failed to conduct would have benefited the defense." Commonwealth v. Shepherd, 493 Mass. 512, 536-537 (2024). See Commonwealth v. Alcide, 472 Mass. 150, 158 (2015) ("we consider whether the defendant has made some showing that better work might have accomplished something material for the defense" [quotation and citation omitted]). "Speculation, without more, is not a sufficient basis to establish ineffective representation." Duran, 435 Mass. at 103.

i. Failure to investigate computer evidence or to seek continuance to do so. Trial counsel filed two motions for discovery: one requesting all exculpatory evidence known to the Commonwealth, and a second specifically requesting "all analysis of the computer hard drive found at the crime scene including but not limited to the content contained in the emails and internet searches on the hard drive." The first motion was allowed by agreement; the second was never argued or acted on, and trial counsel did not pursue it. That said, trial counsel sought and obtained funds to retain a computer expert, and in fact retained a computer expert. But trial counsel did not

provide a digital image or copy of the hard drive to the expert nor did the expert obtain one from the Commonwealth, the expert did not produce a report, and trial counsel did not call the expert at trial.

Trial counsel and the prosecutors spoke with Michael Perry, a computer expert employed by the Plymouth County sheriff's department, prior to his testimony. At a sidebar conference during trial, the trial judge inquired whether Perry had discovered anything of significance on the computer from around the time of the murder, and the prosecutor responded that it was her understanding that there was nothing on the webcam showing the murder taking place and that there was a hard shutdown of the computer at 12:23 P.M. Trial counsel then stated, "I have no idea. I've been trying to get this information. My understanding[is] they couldn't access the computer. I didn't know they could."⁶ The trial judge then conducted a voir dire examination of Perry, who stated that he had examined the victim's computer to determine the time of its last shutdown, but that he had conducted no other examination of the hard drive nor had he viewed any of the computer's contents.

⁶ Trial counsel testified that it was his belief the trial prosecutors had told him there was nothing exculpatory on the hard drive. But the motion judge found that the prosecutors had not in fact made this representation.

Perry then testified. On cross-examination, trial counsel asked Perry what he had found on the hard drive, and specifically if he could ascertain which Internet websites the victim had visited.⁷ Trial counsel also asked whether Perry had looked at any of the victim's e-mail messages, and Perry said that he had not. Perry testified that Melissa Marino, with whom he worked, had forensically examined the computer. Perry also testified that there were e-mail messages on the victim's computer. On redirect examination, Perry testified that Marino had reported to him that nothing of evidentiary value relating to the murder had been found on the hard drive.⁸ Trial counsel did not take any action in reaction to Perry's testimony.

The motion judge did not err in concluding that trial counsel's investigation and preparation regarding the contents of the victim's hard drive fell measurably below that expected of an ordinary fallible lawyer. See Commonwealth v. Poum, 496 Mass. 267, 285 (2025). In these circumstances, a reasonably competent attorney would have conducted an independent investigation into the hard drive by utilizing an expert, and, as necessary, questioning and obtaining information from the

⁷ Trial counsel wished to elicit testimony from Perry that the victim visited websites with homosexual content.

⁸ Perry defined "evidentiary value" as "[s]omething that's pertaining to the case that would help, like a web cam."

Commonwealth and its experts. See Alcide, 472 Mass. at 160 (reasonably competent attorney would have become familiar with discovery materials, examined physical evidence, independently investigated certain aspects of case, and utilized experts where necessary). See also Commonwealth v. Dowds, 483 Mass. 498, 504 (2019) (ineffective assistance where counsel was aware medical records would be worth examining and yet counsel did not consult with expert concerning defendant's brain injuries); Commonwealth v. Baker, 440 Mass. 519, 529 (2003) (counsel ineffective for not conducting independent expert investigation into hair samples that could have challenged Commonwealth's theory of guilt).

That said, we see no error in the motion judge's conclusion that trial counsel's failure in this regard did not create a substantial likelihood of a miscarriage of justice. See Commonwealth v. Teixeira, 486 Mass. 617, 637 (2021). The defendant argues that, had he had access to the victim's e-mail messages to Meagher before trial, he would have been able to cross-examine Meagher not only about the nature of his relationship with the victim, but also about Meagher's alibi for the time of the murder.⁹ We are not persuaded. Although it is true, as the defendant argues, that the e-mail messages could

⁹ Meagher and his girlfriend both testified that they had been together with her children on the day of the murder.

have been used to impeach Meagher's testimony that his relationship with the victim was merely platonic, the messages in no way suggest that Meagher had any motive or intent to kill the victim nor that Meagher harbored any animosity towards him and, moreover, the messages were remote in time to the murder. Contrast Alcide, 472 Mass. at 160, 162-164 (counsel ineffective for failing to call witnesses who would testify that third-party suspect had more plausible motive, opportunity, and intent than defendant).

As the motion judge reasoned, the jury could well have concluded (and the verdict reflects that they in fact did so conclude) that Meagher's lack of candor about the nature of his relationship with the victim was due to embarrassment or fear of stigma about having been engaged in a homosexual relationship, rather than concluding that it cast doubt on his alibi. See Commonwealth v. Casey (No. 1), 442 Mass. 1, 8 (2004) (even where defendant suggests witness has strong motive to lie, credibility is issue left for jury). In any event, trial counsel ably impeached Meagher concerning his relationship with the victim, successfully eliciting an admission that he slept in the same bed as the victim during the two years they lived together. See Commonwealth v. Sifa Lee, 483 Mass. 531, 545 (2019) (no ineffective assistance for failing to admit impeachment evidence where counsel already highlighted witness's tendency to lie).

Finally, the motion judge also appropriately took into account the strength of the evidence against the defendant, which included testimony from multiple witnesses placing the defendant or someone resembling him -- and not Meagher -- at the victim's house and driving the victim's truck during a very tight time frame around the victim's time of death. See Commonwealth v. Moseley, 483 Mass. 295, 306 (2019) (counsel's failure to offer certain evidence not ineffective in light of overwhelming evidence of defendant's guilt).

As to trial counsel's failure to seek a continuance or a mistrial after Perry's testimony, the motion judge discredited trial counsel's testimony that he failed to act due to inexperience and instead found that the decision was tactical. See Commonwealth v. Dame, 473 Mass. 524, 536, cert. denied, 580 U.S. 857 (2016) ("Credibility determinations are the province of the motion judge who had the opportunity to observe the witness[]" [quotation and citation omitted]). Trial counsel was an experienced criminal defense lawyer who had handled many serious criminal cases, representing both the Commonwealth as well as criminal defendants,¹⁰ and had previously tried murder

¹⁰ Trial counsel's defense experience included working as a trial attorney and bar advocate with the Committee for Public Counsel Services (CPCS). See Committee for Pub. Counsel Servs. v. Middlesex & Suffolk County Dist. Courts, 497 Mass. 287, 288 nn.3, 4 (2026) ("Bar advocates are private counsel who are paid by the Commonwealth to represent indigent criminal defendants,"

cases. Moreover, trial counsel had in other cases sought continuances when surprised with new evidence at trial.

But even assuming, as the defendant argues, that trial counsel, upon learning midtrial that there was material evidence of which he was previously unaware, necessarily "lack[ed] sufficient information to evaluate his . . . strategic options and to make decisions in the best interests of the client" (citation omitted), Noguera, 496 Mass. at 615, we discern no likelihood of a miscarriage of justice from that failure in the circumstances here. As we have already discussed, discovery of the e-mail messages that were ultimately recovered from the computer would not have contributed meaningfully to the defense had they been discovered earlier. And it is entirely speculative that any additional information would have been obtained from the computer had trial counsel sought a continuance, let alone that any additional information would have been useful to the defense. See Duran, 435 Mass. at 103 (insufficient basis to establish ineffective representation where defendant could not "identify [any] information that might have been unearthed by [the] investigation"). Contrast Baker, 440 Mass. at 526-527 (counsel's failure to seek continuance deprived defendant of substantial ground of defense where

and "CPCS is the entity that administers the bar advocate program").

further investigation would have discredited prosecution's theory of case).

ii. Failure to seek evidence from Meagher. The defendant argues that trial counsel should have sought and obtained forensic evidence from Meagher in the form of fingerprint and palm print exemplars and a DNA sample. Prior to trial, trial counsel had received police reports concerning interviews of Paul Williams, Ian Anderson, and James Mann. Williams, who himself was a police officer, had told the police that he believed he saw Meagher at the victim's house on the afternoon of November 25, 2006, i.e., the day before the victim's murder. Anderson had told the police that Meagher was a drug addict, had problems with his mental health, and was trying to extort money from the victim. Anderson suggested to the police that they should check the victim's e-mail messages for anything related to Meagher. Mann, who had been romantically involved with the victim and lived with him until six months before the victim's death, told police that Meagher had sent e-mail messages to the victim while Mann lived with him. Mann suspected Meagher was the murderer because Meagher knew the alarm codes to the victim's apartment and knew the victim kept cash on hand.

Trial counsel pursued a third-party culprit defense at trial. However, trial counsel did not seek to obtain forensic exemplars or samples from Meagher. The motion judge could

permissibly conclude that this was a reasonable strategic decision. See Noguera, 496 Mass. at 610. As the motion judge pointed out, it would have been reasonable for counsel to assume that Meagher's DNA or fingerprints would be found in the victim's home considering that Meagher had lived there previously. Thus, the presence of such forensic evidence would have had weak, if any, probative value in support of a third-party culprit defense. See Commonwealth v. Camuti, 493 Mass. 500, 510 (2024), S.C., 495 Mass. 630 (2025) (not ineffective to not request DNA test where results could have easily been explained by reasons that did not support defense theory). In addition, particularly in light of the strength of the evidence against the defendant, had trial counsel sought and obtained forensic evidence from Meagher, he risked creating evidence that might have excluded Meagher as a source of the fingerprints, palm prints, and DNA, thus weakening trial counsel's ability to suggest Meagher was the murderer. See id. (not ineffective to not order DNA test that "would have risked undermining the defendant's strongest defense"). It was thus a reasonable strategic decision not to obtain forensic evidence from Meagher so as not to undermine the third-party culprit defense. See Commonwealth v. Kolenovic, 471 Mass. 664, 675 (2015), S.C., 478 Mass. 189 (2017) (counsel's decision not to

pursue further investigation based on assessment of likelihood of success of defense theory was reasonably strategic).¹¹

b. Presentation of defense during trial. A defendant is entitled to a new trial when his or her trial counsel effectively leaves the defendant "denuded of a defense" (citation omitted). Commonwealth v. Farley, 432 Mass. 153, 156 (2000), S.C., 443 Mass. 740, cert. denied, 546 U.S. 1035 (2005). Where such a claim of ineffective assistance is made, we consider whether "better work might have accomplished something material for the defense" (citation omitted). Id. Here, the defendant argues that trial counsel was ineffective by failing to pursue a Bowden defense, Commonwealth v. Bowden, 379 Mass. 472 (1980), and by failing to call Williams and Mann as witnesses at trial.

i. Bowden defense. "Pursuant to a Bowden defense, a defendant may introduce evidence regarding the police investigation in order to create an inference that the evidence at trial may be inadequate or unreliable because the police failed to . . . pursue leads that a reasonable police

¹¹ Although the defendant argues that trial counsel was ineffective for failing to interview Meagher, he has not articulated what might reasonably have been obtained by that interview, let alone its materiality to the defense; his argument accordingly rests on speculation. See Duran, 435 Mass. at 103.

investigation would have . . . investigated, and [such] . . . investigation may have led to significant evidence of the defendant's guilt or innocence" (quotation and citation omitted). Commonwealth v. Wood, 469 Mass. 266, 277 (2014). "[T]he failure of the police to investigate leads concerning another suspect is sufficient grounds for a Bowden defense." Id., quoting Commonwealth v. Silva-Santiago, 453 Mass. 782, 802 (2009). Here, the defendant argues that trial counsel should have pursued a Bowden defense based on the police's failure to investigate further Meagher after interviewing Williams, Anderson, and Mann.

We begin by noting that the jury heard evidence that the police had considered Meagher a suspect, had interviewed Meagher and his girlfriend, and had confirmed Meagher's alibi. The jury also heard evidence that during their investigation, the police learned the following: the victim had paid the defendant, who lacked money, to rake leaves two days before the murder; the victim's home was ransacked and his pockets slashed when he was killed, and no money was found on the victim's person or in his home despite his custom of keeping cash on hand; the defendant was seen with the victim in his apartment only minutes before the murder; the defendant, or someone resembling him, was seen by multiple witnesses shortly after the murder going back and forth between the victim's apartment and his vehicles in the

driveway and then driving the victim's truck away; someone resembling the defendant was videotaped minutes later exchanging coins for bills at a nearby grocery store; and the defendant purchased a new cell phone and checked into a hotel with a big "wad" of cash in the days after the murder. See supra.

Moreover, police conducted multiple photographic arrays and the defendant was uniformly identified as the person seen at the victim's house at or around the time of the murder. The police could observe the appearances of Meagher and the defendant, including the defendant's distinctive rotten teeth, and compare them with the various witness identifications and the surveillance footage. In sum, the evidence created a significant headwind against which to mount a viable Bowden defense for failure to further investigate Meagher as a third-party culprit. See Commonwealth v. Dyer, 460 Mass. 728, 753-754 (2011), cert. denied, 566 U.S. 1026 (2012) (counsel can reasonably assess viability of Bowden defense in light of weight of evidence suggesting defendant's guilt).

Given the strength of the evidence against the defendant, the motion judge concluded that he was "not left with a serious doubt that the result of the trial might have been different if counsel had raised a Bowden defense based on Anderson's statement to check [the victim's] emails and Williams'[s] statement that he believed he saw Meagher at [the victim's]

house the day before the murder." We discern no abuse of discretion on the motion judge's part in this regard. Contrast Commonwealth v. Ellis, 475 Mass. 459, 480-481 (2016) (newly discovered Bowden evidence would have been real factor in jury's deliberations where it raised "substantial doubts regarding the good faith and honesty of some of the investigating detectives").

The motion judge could also properly consider, as he did, that had trial counsel raised a Bowden defense, the Commonwealth would have been allowed to rebut it. See Commonwealth v. Avila, 454 Mass. 744, 752 & n.8 (2009); Silva-Santiago, 453 Mass. at 803 n.25 (Bowden defense "is a two-edged sword for the defendant, because it opens the door for the Commonwealth to offer evidence explaining why the police did not follow the line of investigation suggested by the defense"). Cf. Commonwealth v. Candelario, 446 Mass. 847, 855-856 (2006) (counsel not ineffective for forgoing weak defense where Commonwealth had strong contradicting evidence that would cast defendant in worse light). As we have already noted, this is not a case where the police failed to consider Meagher as a possible suspect or rushed to judgment in focusing on the defendant and, moreover, the defendant has failed to show what advantage he would have derived from opening the door to further explanation by the Commonwealth of its decision not to pursue further its

investigation into Meagher. The motion judge did not err in concluding that trial counsel was not ineffective for failing to pursue a Bowden defense.

ii. Calling witnesses. The defendant argues that trial counsel was ineffective for not calling Williams and Mann to impeach Meagher's testimony that he had not seen or contacted the victim for at least one month prior to the murder. "The determination whether to call a witness is a strategic decision," and one that will only amount to ineffective assistance "if it was manifestly unreasonable when made" (citation omitted). Teixeira, 486 Mass. at 637. The decision to call a witness to impeach another witness "is, by its very nature, fraught with a host of strategic considerations to which we will, even on [G. L. c. 278, § 33E,] review, still show deference" (citation omitted). Shepherd, 493 Mass. at 537. As such, "a claim of ineffective assistance based on failure to use particular impeachment methods is difficult to establish" (citation omitted). Id.

Trial counsel subpoenaed Williams for trial but, after speaking with him, decided not to call him as a witness.¹² The

¹² At the evidentiary hearing on the amended second motion for a new trial, trial counsel claimed not to remember what he had discussed with Williams before deciding not to call him as a witness.

motion judge found the benefit of calling Williams was slim where Williams's testimony was not unequivocal; Williams only "believed" he saw Meagher at the victim's house the day before the murder. And Williams did not place Meagher at the victim's house on the day of the murder itself. The motion judge concluded that this minimal benefit was outweighed by the risks inherent in exposing Williams to cross-examination by the prosecution. See Teixeira, 486 Mass. at 638 ("Such a decision by counsel not to call a witness whose testimony counsel felt might not be credible, and which might in counsel's view harm his client's case, is not manifestly unreasonable"). The judge also considered that those risks were exacerbated by the fact that Williams had made no written report and had not testified before the grand jury, and so trial counsel lacked the tools needed to limit Williams's testimony. In sum, we discern no error in the motion judge's determination that trial counsel's decision not to call Williams was not manifestly unreasonable. See Commonwealth v. Bateman, 497 Mass. 169, 186 (2026) (failure to call witness did not prejudice defendant where witness's testimony would not contradict strength of incriminating evidence against defendant).

We reach a similar conclusion with respect to the decision not to call Mann. As the motion judge found, Mann's testimony, for the most part, would have revealed nothing new to the jury.

For example, the jury heard testimony from other witnesses that Meagher had lived with the victim for two years, and that the victim always kept significant amounts of cash on hand. See Commonwealth v. Freeman, 442 Mass. 779, 791 (2004), S.C., 451 Mass. 1006 (2008) (decision not to call witness where testimony was cumulative not error); Commonwealth v. Britto, 433 Mass. 596, 602-603 (2001) (failure to call witness not ineffective where testimony cumulative). Although it is true that Mann's statement that Meagher had sent e-mail messages to the victim was not cumulative, the judge concluded it would not have materially aided the defense given that the existing messages did not reveal that Meagher harbored any animosity toward the victim or an intent to kill him. We see no error in the motion judge's analysis on this point, nor in his conclusion that trial counsel's decision not to call Mann was not manifestly unreasonable.

2. Prejudice from undisclosed evidence. "To obtain a new trial on the basis of nondisclosed exculpatory evidence, a defendant must establish (1) that the evidence was in the possession, custody, or control of the prosecutor or a person subject to the prosecutor's control; (2) that the evidence is exculpatory; and (3) prejudice" (quotations, citation, and alteration omitted). Commonwealth v. White, 497 Mass. 475, 498 (2026).

In the defendant's direct appeal, we concluded that the undisclosed outgoing e-mail messages from the victim to Meagher were exculpatory. Holbrook, 482 Mass. at 610. There is no dispute that the hard drive on which the e-mail messages were located was in the possession, custody, and control of the prosecutor. And the motion judge found that the defendant specifically requested evidence from the computer in his second discovery motion. The motion judge therefore properly reviewed the Commonwealth's failure to disclose the e-mail messages to determine "whether the defendant has demonstrated that a substantial basis exists for claiming prejudice" (quotation and citation omitted). Id. at 611.

The motion judge could properly conclude that the defendant did not meet the required showing of prejudice. The judge acknowledged that the e-mail messages were the only evidence available to impeach Meagher's claim that his relationship with the victim had not been romantic, but the judge rejected the idea that impeachment on that topic would have led the jury to disbelieve Meagher's alibi. The judge found that the jury would have understood Meagher's impulse to lie about an intimate relationship to which stigma might attach. Moreover, the judge noted that the jury heard evidence that the police vetted Meagher's alibi. In addition, the motion judge observed that the jury themselves were able to compare the appearance of the

man before them in the court room against the one captured in the store surveillance footage, and also to compare Meagher's and the defendant's physical appearances because both were present in the court room. See Phillips, 495 Mass. at 495; Austin, 421 Mass. at 366. Also, the e-mail messages did not suggest that Meagher harbored any animosity toward the victim or had a motive to kill him. And they in no way undermined the strength of the evidence tying the defendant to the victim's apartment and truck around the time of his murder. See supra. In short, the motion judge concluded that there was no reasonable possibility that the e-mail messages would have made a difference to the jury. We see no error in that regard, or in the judge's conclusion that the defendant did not show a substantial basis for claiming prejudice from the Commonwealth's failure to disclose the outgoing e-mail messages. Compare Commonwealth v. Kostka, 489 Mass. 399, 415 (2022) (nondisclosed exculpatory evidence concerning defendant's alibi "would have had little if any impact on the jury's thinking" where surveillance footage captured defendant around time of crime). Contrast Commonwealth v. Goparian, 496 Mass. 348, 363-364 (2025) (defendant made substantial basis for claiming prejudice from withheld admissions by third-party culprit that suggested he, not defendant, killed victim).

Conclusion. For the reasons set out above, the motion judge did not abuse his discretion in denying the defendant's amended second motion for a new trial. In addition, pursuant to G. L. c. 278, § 33E, we have fully reviewed the record in light of the issues raised by the defendant's amended second motion for a new trial and conclude that the defendant is not entitled to relief under that statute. Accordingly, we affirm the order denying the defendant's amended second motion for a new trial.¹³

So ordered.

¹³ While this appeal was pending, the defendant filed a third motion for a new trial directly with this court. That motion is hereby transferred to the Superior Court for disposition. In the event that either the defendant or the Commonwealth seeks to appeal from the disposition of that motion, any such appeal will be subject to the gatekeeper provision of G. L. c. 278, § 33E, and will not receive plenary review by this court. The rescript in this matter shall not be stayed.