COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SJC No. AFAR _____
Appeals Court No. 2020-P-1287
Super. Ct. No. 6984-CR-43355

COMMONWEALTH, Appellee

v.

JAMES STOKES, Appellant

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

INTRODUCTION AND REQUEST FOR FURTHER APPELLATE REVIEW

Federal and state law require the Commonwealth to disclose to the defense prior to trial that its witness is a police informant. In this case, the Commonwealth used one man, Raymond Demore, to hold, charge, and convict the defendant without disclosing that Demore was, in the words of the Boston Police, a "reliable informant." RA 142. [1] The failure to disclose Demore's status violated due process protections of the state and federal constitutions, contravened Brady v. Maryland, 373 U.S. 83 (1963), and undermined confidence in the conviction. Further appellate review is necessary to address the lower courts' rulings, which effectively encourage the Commonwealth to

[1] "RA" citations are to the Record Appendix in 2020-P-1287.

continue to disclose only a limited amount of impeachment evidence about its witnesses.

STATEMENT OF PRIOR PROCEEDINGS

Armand Cerbone was murdered on January 18, 1969. On June 23, 1969, on the strength of Demore's statements, police obtained warrants for murder in the Dorchester District Court for 16-year-old James Stokes, his 17-year old brother John Stokes and 21-year old Joseph Rego. On July 8, 1969, the Municipal Court in Dorchester (Troy, J.) found probable cause, again based on the testimony of Demore. On August 13, 1969, a Suffolk County grand jury indicted all three on first degree murder charges, based on Demore's testimony. RA 144-45 (indictment). Trial commenced on March 3, 1970, in Suffolk Superior Court in front of Judge Hudson. Demore was the central witness. On March 12, 1970, the jury returned a verdict of guilty of first-degree felony murder, as well as breaking and entering in the night as to all defendants. Tr. 1248-49. Although the original verdict was for the death penalty, the jury was reconvened and ultimately recommended against the death penalty, leaving James Stokes at the age of 17 with a sentence of life without the possibility of parole. Tr. 1255.

On March 18, 1970, the defendants filed a motion for new trial based on then-newly discovered statements made by Demore to his friend, Neil McIsaac on July 8, 1969. A hearing on the

motion was held over three days on March 18, June 15, and June 18, 1970. RA 205, 234, 285. On July 16, 1970, the trial court (Hudson, J.) denied the defendants' motions for new trial without issuing a written decision. RA 303. On April 10, 1971, the defendant filed a second motion for new trial arguing that the Court erred by allowing the Commonwealth to proceed on a felony-murder theory against a juvenile. The defendant filed the motion pro se and requested counsel. The Superior Court denied the motion on June 24, 1971, without assigning counsel.

On November 5, 1971, this Court issued a decision on the direct appeals of all three defendants pursuant to G.L. 278, §33E. See Commonwealth v. Rego, et. al., 360 Mass. 385 (1971). The Supreme Judicial Court found that the trial court had failed to properly instruct the jury as to the felony murder rule and remanded the cases to the Superior Court for the entry of verdicts of guilty of murder in the second degree as to all three defendants. Id. at 393-97. Since his direct appeal, Mr. Stokes has filed four more motions for new trial.

Mr. Stokes filed his most recent motion for new trial on November 12, 2019. Doc. 78. The Court (Locke, J.) denied the motion on October 20, 2020. Doc. 84. Oral argument was held in the Massachusetts Appeals Court in September of 2021. On November 4, 2021, the Massachusetts Appeals Court issues a Memorandum and Order Pursuant to Rule 23.0 affirming the denial

of the motion for postconviction relief. Exh. A (MAC Decision). This application follows.

STATEMENT OF FACTS

On January 18, 1969, Armanda Cerbone was murdered in the Dorchester factory where he was a nightwatchman. Months went by with no leads. Finally on June 15, 1969, the Boston Police took a statement from Raymond Demore (the same day he turned 17 years old), thus beginning a series of several meetings between Demore and detectives. Demore told police that the night of the murder (5 months prior), he had met with James and John Stokes, as well as another boy named Joseph Rego at the Lucky Strike bowling alley. Demore claimed that these three discussed a plan in his presence to break into the factory where Cerbone worked, only a half mile away; that they tried to enlist his help; and that Demore had refused and watched the three walk toward the factory from the bowling alley. The next morning, according to Demore, he met up with the boys again, also at the Lucky Strike, where they reported they had broken into the factory and hurt the guard. Demore testified along these lines at a probable cause hearing on July 8, 1969.

On August 12, 1969, John F. Doyle, the Boston Police Detective attached to the Suffolk County District Attorney's Office submitted an affidavit to the West Roxbury District Court in support of an application for a warrant to search for two

guns. RA 142-43. The search warrant application spoke of a Jamaica Plain garage where, Detective Doyle believed, the murder weapons could be found in a pile of tires. Id. Detective Doyle's source was Demore.[2,3] The next day, August 13, 1969, Demore testified to the grand jury.

In March of 1970, eight months after Detective Doyle wrote his affidavit, Demore testified for the Commonwealth as the sole witness against James Stokes. The entire case against James Stokes rested on Demore. RA 330 (Commonwealth acknowledging that it could not have made out even prima facia case for murder against James Stokes without Demore). Demore was not an eyewitness to the crime; nor did he claim to have seen the defendants at the scene of the crime. His testimony against James Stokes was substantially limited to reporting "insider information": statements that Demore claimed the defendants had made to Demore just prior to and following the murder. Stokes said he made no such statements. Tr. 1085.

The evidence at trial was as follows: around 10:30 PM on January 18, 1969, police found Armand Cerbone face down in a

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[2] To help corroborate Demore's story in the affidavit, Detective Doyle referred anonymously to testimony recently given in Dorchester District Court (on July 8, 1969) concerning the Stokes brothers and the Cerbone murder. That testimony, however, came from Raymond Demore.

[3] For reasons explained in the defendant's appellate brief, and as acknowledged at oral argument, there is no debate between the parties that Demore was the source referenced in the affidavit.

pool of blood on the first floor of the Pollak Factory, where he worked as the nightwatchman. His head had been smashed with a blunt object. Tr. 1108. A broken first-floor window, which led to an outdoor passageway between two section so the building, was the apparent point of entry into the factory. RA 74 (Drawing of the factory); Tr. Exhs. 7-8; Tr. 397-98, 408, 438. There was evidence that vending machines inside the factory had been tampered with. Tr. 486.

Demore testified that on the evening of January 18, 1969, at approximately 7:00PM, he met with James Stokes in the men's room of the Lucky Strike Bowling Alley in the Field's Corner section of Dorchester. Tr. 571-73. James asked Demore if he wanted "to go down - with my brother and my cousin to Polla[]k's to break in?" Tr. 576. Pollak's was a factory about half a mile away, where Demore worked. Tr. 577. See RA 73 (Map of the Area). Demore said James showed him a sawed-off shotgun that he was carrying in a paper bag. Tr. 574. Demore did not immediately respond to the question. Tr. 576. According to Demore, Rego and John Stokes then joined James and Demore in the restroom and John asked James whether he had told Demore about the plan to break into Pollak's. Tr. 577-78. James said "yes." Tr. 579. Again, Demore said nothing. Rego then announced that he did not want DeMore to join the defendants in the break. Tr. 580. A fistfight ensued. Tr. 581-82. After a "half hour" in the

restroom, the four men left the Lucky Strike. Tr. 582-83. Demore claimed he then watched the three defendants leave the Lucky Strike and walk in the direction of Pollaks. Tr. 585-88.

Demore further testified that the following morning, Sunday, January 19, 1969, he again spoke with James Stokes at the Lucky Strike while John and Rego stood nearby. Tr. 590. Demore asked James "what happened" and James replied, "Well, what do you think happened?" Id. Demore claimed James showed him a small paper bag. Id. Inside was "change and crumpled up bills," which James stated they got "from the machines in … Polla[]k's." Tr. 591, 593. James then told DeMore that while John was upstairs, the guard chased James downstairs and cornered him, and that Rego hit the guard from behind and subsequently "beat him to a pulp". Id. John and Rego then approached the two and John asked James whether he had told Demore about "what happened." Tr. 594. James said yes. Id. Demore further claimed that, later in the day, Sunday, January 19, 1969, he heard Rego in the company of others say, "that he [(Rego)] was in trouble and that he had beat up a guard, him and his two cousins." Tr. 597. He did not allege that James Stokes was present for that statement. There was no other evidence brought against James Stokes. No physical evidence was presented by the Commonwealth. The Commonwealth made no mention of the footprint found. No shotgun, no bag of change, no coins,

or crumpled bills were ever located. The Commonwealth never located a murder weapon. The Commonwealth acknowledged that the one fingerprint taken from the scene, Tr. 1110, did not match any of the defendants. Tr. 1117. Moreover, the Commonwealth acknowledged that the police had met with Demore on at least four occasions, for at least six hours, before he gave them his account.

James Stokes testified in his own defense and maintained his innocence. Tr. 1085. He could not, however, provide an alibi. Id. As he had been arrested more than 5 months after the crime, James, who was 16 at the time of the crime, said he simply did not remember where he had been that weekend. Id. John Stokes and Joseph Rego, both of whom Demore had also accused, provided alibis supported by multiple witnesses. Tr. 844-962; 1018.

The Commonwealth does not contest evidence that Demore was an informant working with Detective Doyle of the BPD at the time of the investigation; that the Commonwealth, including ADA Mundy and/or Sgt. Whalen, would have been aware of this; that the defense was not aware of it; and that this evidence would have had at least "a minimal tendency to impeach DeMore." Tr. Doc. ### (Commonwealth's Br.) at 13. In other words, the Commonwealth knew that Demore had been acting as an informant during the time

of the investigation into the crime but did not reveal this fact to the defense prior to trial.

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

The Lower Court erred in not finding a Brady violation where the Commonwealth failed to disclose that Demore was an informant.

REASON WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

1. THE LOWER COURTS' DECISIONS ALLOW THE COMMONWEALTH NOT TO DISCLOSE AN INFORMANT-WITNESS'S STATUS SO LONG AS CROSS-EXAMINATION REVEALS THAT HE MET REGULARLY WITH POLICE. THE COURTS' APPROACH TO THE PREJUDICE PRONG OF THE BRADY ANALYSIS ALLOWS THE PROSECUTOR TO HIDE THE TRUE RELATIONSHIP BETWEEN POLICE AND THE INFORMANT-WITNESS, THEREBY UNDERMINING THE INTEGRITY OF CONVICTIONS.

The Massachusetts Appeals Court, echoing the trial court, found that the defendant had not established that the Doyle affidavit was not disclosed, and that even if he had so established it, he still would have have been entitled to relief. MAC Decision at 3 n. 4. Both findings are incorrect.

A. THE CONTEXT OF THE TRIAL DEMONSTRATES THAT THE DEFENSE WAS UNAWARE THAT DEMORE WAS WORKING AS AN INFORMANT.

The defendant has the burden in a Rule 30 motion, including the burden of demonstrating nondisclosure of the Brady materials. Nonetheless, that burden may be borne by

circumstantial evidence. See Commonwealth v. Mazza, 484 Mass. 539, 550 (2020).[4] Here, the defense asked whether Demore had a relationship with police, but the question was excluded, because the defense had no foundation for such a question. Tr. 661.[5] The defense also asked whether the Demore was fabricating a story because police had "picked up Demore with a gun" one night, but, again, the question was excluded. Tr. 628.[6] The defense failed to use this document to cross-examine on bias, although the defense did try to cross-examine on bias in other, less devastating ways. For instance, the defense did try to prove that Demore harbored bias against John Stokes because they had dated the same girl. Tr. 619. The defense also failed to impeach Demore when he lied on the stand about providing evidence to police for the Doyle's search warrant. See Tr. 620

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[4] In Mazza, this Court considered, for instance, that trial counsel had failed to cross-examine the witness on an obvious line of impeachment. Id. at 550 & n. 24 (finding non-disclosure because "it is highly probable, based on his treatment of other witnesses, that [defense counsel] would have used the statement…"); id. ("there are several pieces of relevant, circumstantial evidence, including the defendant's affidavit, the affidavits submitted by his various postconviction counsel, and a record revealing experienced trial counsel's skillful use of other witness statements").

[5] MR. PINO: Outside of the occasions on which you went to see Officer DiNatale about this case, did you have other occasions to go to Division 11?" MR. MUNDY: "Concerning what, please?" MR. PINO. "Anything." MR. MUNDY. "I object." THE COURT: "I will exclude it."

[6] In this exchange, the prosecutor argues: "I don't see how it has anything to with this case." Defense counsel responds, "I'll tell you what it has to do with it." The Court then says, "No, you won't." Tr. 628-29.

(Demore lying on the stand). Neither the openings nor closings referred to Demore's status. ADA Mundy capitalized on this by asking the jury repeatedly in closing whether the defense had presented *any* motive to fabricate. Tr. 1187-91. The defense had not, of course, because it did not know Demore was an informant. Furthermore, the defendant himself was unaware that Demore was an informant at trial. RA 38 at ¶11 ("I was not aware at trial that Raymond Demore was likely working as a police informant at the time of the investigation into this case. If I had known Demore was an informant, I would have asked my lawyer to cross-examine him about it.").[7] All things considered, it should be clear from the record that the defense did not have the material going into trial.[8]

B. NONDISCLOSURE OF DEMORE'S STATUS WAS PREJUDICIAL.

"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 omitted). Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017).

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[7] One explanation for Attorney Pino's reference to the Jamaica Plain garage in his cross-examination is the information passed onto him from Officer John Murray concerning Demore. See RA 165.
[8] If this Court is persuaded, *arguendo*, that non-disclosure of Demore's informant status would rise to a Brady violation, it should report the case and remand to the trial Court for a finding of whether the information was, in fact, disclosed.

The first two prongs are not disputed. First, the Commonwealth had this information. RA 142. See Strickler v. Green, 527 U.S. 263, 281 (1999). Second, the information was exculpatory. Banks v. Dretke, 540 U.S. 668, 701-02 (2004) ("As to the first Brady component (evidence favorable to the accused), beyond genuine debate, the suppressed evidence relevant here, Farr's paid informant status, qualifies as evidence advantageous to Banks."); Commonwealth v. Caldwell, 487 Mass. 370 (2021) ("the prosecutor's note was exculpatory in that it could have led to evidence that would have called into question the witness's credibility."). The question is therefore one of the third prong: prejudice.

The prejudice standard here is more favorable -"substantial basis" for prejudice) - because the evidence was specifically requested. Commonwealth v. Tucceri, 412 Mass at 407, 412 (1992). The defense requested exculpatory information about Demore at the outset of the trial, during the trial and at the end of trial. ADA Mundy represented that he had no evidence of that nature. Tr. 3. Defense counsel persisted in his specific requests as to Demore's credibility. Tr. 2-3. Attorney Pino reiterated his request early in the trial and objected to the judge's decisions. Tr. 366-67. He did so again at the end of the trial. Tr. 1118. Attorney Pino also put ADA Mundy on notice that the police may know more about Demore than ADA Mundy

did. Tr. 6-7. ("My investigation indicates there are some police officers that made some statements [as to inducements or rewards] … [T]here was a talk with DeMore."). This claim should therefore be evaluated on the "more favorable" materiality (prejudice) standard - i.e., a "substantial basis" to claim prejudice. Id. See Commonwealth v. Ferrara, 368 Mass. 182, 189 (1975); Hill, 432 Mass. at 716.

The Appeals Court dismisses the "substantial basis" for prejudice, finding, as the Superior Court did, that "at trial, defense counsel elicited testimony showing DeMore was working closely with police, including DeMore's own admission that he was questioned 'close to every night,' and was providing information related to the defendants. … This evidence could have raised the inference of bias, even without the explicit reference to DeMore's status as an informant." Mass. Appeals Court Decision at 3-4, citing Commonwealth v. Elangwe, 85 Mass. App. Ct. 189, 196 (2014).

The lower courts' findings are wrong on both the law and the facts. First, as a matter of law, this is one of the unique cases where the defendant had only one single witness against him; a new trial is appropriate "if case depends heavily on the testimony of a particular witness and new evidence seriously undermines the credibility of that witness." Caldwell, 487 Mass. at 379, n.11.

Second, evidence of "ongoing communications" between Demore and police do not serve to notify the jury that Demore was serving as an informant. Neither Sullivan nor Elangwe, 85 Mass. App. Ct. 189 - both of which were cited by *both courts* - involved the non-disclosure the informant status of the central witness, as was the situation here (and in Banks). The law makes a significant distinction between a witness who has "ongoing communications" about a crime and a witness who was an active informant for the police. See Commonwealth v. Brzezinski, 405 Mass. 401, 408 (1989); On Lee v. United States, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination and to have the issues submitted to the jury with careful instructions.").

Informant status, specifically, must be revealed to the defense prior to trial because such status carries substantial risk of bias. On Lee, 343 U.S. at 757 (concluding that the use of an informant violated the defendant's right to due process when the jury was ignorant of the informant's "true role in the investigation and trial of the case"); Hoffa v. United States, 385 U.S. 293, 311 (1966) (requiring certain procedural safeguards, such as cross-examination, jury instructions on

witness credibility, and elucidation of the facts surrounding the witness's connection to the government informant because "perhaps even more than most informers, [this informant] may have had motives to lie."); Banks, 540 U.S. 668, 702 ("The United States Supreme Court recognizes the serious questions of credibility informers pose. Jurors suspect informants' motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable. The Supreme Court therefore allows defendants broad latitude to probe informants' credibility by cross-examination and counsel submission of the credibility issue to the jury with careful instructions."). Accord United States v. Giglio, 405 U.S. 150, 154 (1972)(The government must fully disclose to the defendant the terms of any agreement with a cooperating witness). The lower courts glossed over these precedents.

Second, as to the facts: the jury did not interpret Demore's "ongoing communications" with police as part of an informant arrangement and then scrutinize Demore through that lens. See Comm.'s Appellate Br. at 10. As ADA Mundy explained in closing, police were meeting with Demore over and over not because he was an informant, but because it was a "serious matter." Tr. 1167. ("I think the logical inference to be drawn by the action of the police is when Demore spoke on the 13th

they didn't run out and make arrests and make search warrants. They investigated this thing and spoke to him many times. It is a very serious matter charging someone with murder or with any crime for that matter."). The evidence was that Demore just happened to show up at the station on his own and just began talking. Tr. 411, 541, 544, 1195 ("DeMore is down the police station on June 13. We don't know what happened down there. The [police] didn't ask for the conversation. But in any event, [Demore] starts talking."). To the contrary, the police likely did ask for the conversation with their informant. Yet, the jury were led to believe that Demore had no motive to lie at all. Tr. 1187 ("Did [the defense] in their cross-examination, bring out any motive whatsoever, a motive on Demore's part that this is a fabrication? ... Did they establish any motive on Demore to come in here and testify falsely?"); Tr. 1187 ("You think this is all a fabrication?"); Tr. 1191 ("How would Demore know they broke into machines if this is a big fabrication?"). ADA Mundy's focus on Demore's lack bias itself demonstrates the prejudice. See Kyles v. Whitley, 514 U.S. 419, 444 (1995) ("The likely damage [(prejudice)] is best understood by taking the word of the prosecutor.").

Under Kyles, the prejudice standard allows this Court to consider a counterfactual: What would the evidence at trial have looked like if the defense had been able to present evidence

about Demore's informant status? Kyles, 514 U.S. at 434. At a minimum, the defense would have inquired about the nature of Demore's relationship with the police: what were the three prior arrests? How long had this been going on? If Demore was acting as an informant, what benefit was he receiving? It is almost impossible to document the many ways the trial would have been different if the fact of Demore's status was revealed. Perhaps Demore would not even have testified under those circumstances. But at the very least, the trial could have been different in at least the following specific ways:

First, the defense might have argued that Demore was not credible based on his relationship to police, and jury may have been inclined to completely disregard Demore, which may have significantly damaged the Commonwealth's case. See Banks, 540 U.S. 668, 702; Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L. J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable … .").

Second, the defense might have pointed to the fact that Demore had an extensive criminal record between 1968 and the trial, but nothing from the time he began cooperating in 1969. RA 45-46, 85-88. See Commonwealth v. Birks, 435 Mass. 782, 787

n.4 (2002) (witnesses' subjective hopes and expectations that their testimony might benefit them in disposition of their own cases "are obviously relevant to the questions of bias and motivation and are also fair game for cross-examination"); Commonwealth v. Rodwell, 394 Mass. 694, 699-700 (1985). Indeed, the bias revealed by this Doyle Affidavit may be only the tip of the iceberg. As argued in the defendant's discovery motion, see Doc. 76 at ¶5 (c), Demore had an extremely lengthy record around the time of this investigation and trial, both as a juvenile and as an adult, including eight juvenile charges leading up to his testimony at the probable cause hearing. After he testified, Demore had no charges on his record for almost two years, before picking up eight more cases again starting in 1971. Id. Once full discovery of this case is granted, the suppression of these records may prove to be significant. See Ferrara, 368 Mass. at 189.

Third, the defense might have argued that Demore could not have been all that "reliable" of an informant (or witness). The August 12, 1969, "tip" that Demore fed Doyle - alleging that the Stokes had guns at their home in Jamaica Plain - was false. No guns were ever found.

Fourth, the defense could have challenged the fabricated story that Demore just "happened" to come to the police station

on June 13, 1969, and just "start talking." Tr. 634-35; 694-95. If he was an informant in the area, the BPD likely came to him.[9]

Fifth, if requested, the defense would have gotten the "customary, truth-promoting precautions that generally accompany informant testimony." Banks, 540 U.S. at 701-02; On Lee, 343 U.S. at 757 ("a defendant is entitled to … have the issues submitted to the jury with careful instructions").

Sixth, the defense would have caught Demore in a lie about whether he had told police that he knew about guns hidden in Jamaica Plain. See Tr. 620.

Seventh, and finally, it is "not difficult to imagine how different the defendant's closing argument would have been had he known" about Demore's relationship with the BPD. Commonwealth v. Ellis, 475 Mass. 469, 478 (2016). ADA Mundy knew (or should have known) that his central witness was an informant and may have had a bias in favor of the police. But he argued lack of bias anyway, effectively presenting a false picture of the evidence. If the defense had been aware of Demore's relationship with police, it would have demonstrated Demore's bias and/or motive to fabricate to the jury. Indeed, Demore's motive to lie would have been the central focus, as it provided Stokes with

[9] It is likely not a coincidence that Demore gave his first statement to the Boston Police the day he turned 17. The BPD would have been waiting to speak with him until he did not need an interested adult present. See Commonwealth v. A Juvenile, 389 Mass. 128, 133 (1983).

the only possible defense he had: fabrication. The error is compounded where the jury were never otherwise made aware of Demore's bias and worse, the Commonwealth affirmatively argued in closing that Demore had no motive to fabricate, even though he did. Tr. 1187-91 (ADA Mundy asking rhetorically, "[d]id the [defense] in their cross-examination, bring out ***any motive whatsoever***, a motive on DeMore's part that this is a fabrication?")(emphasis added). See Hill, 432 Mass. at 715 n.21.

Simply put, the Commonwealth got an unfair advantage by hiding its witness's motives and then it unfairly pressed that advantage by arguing that he had no such motives. There is much more than a "substantial basis" for claiming prejudice. Daniels, 445 Mass. at 404-05.

CONCLUSION

Given the substantial issue raised below, this Court should grant review on the question of whether the Commonwealth's failure to apprise the defense that the central witness was an informant was a Brady violation.

Respectfully submitted,

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Dated: November 24, 2021

Exh. A

November 4, 2021, Massachusetts Appeals Court Memorandum and Order Pursuant to Rule 23.0

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1287

COMMONWEALTH

vs.

JAMES J. STOKES.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following his 1970 conviction of murder in the second degree and the denial of five previous motions for a new trial,[1] the defendant appeals from the denial of his motion for postconviction relief based on claims of newly discovered evidence, Brady violations, and ineffective assistance of counsel.[2] We discern no cause to disturb the order denying the

[1] At trial the jury convicted the defendant of murder in the first degree; the Supreme Judicial Court reduced the charge to murder in the second degree in its disposition of the defendant's direct appeal. See Commonwealth v. Rego, 360 Mass. 385, 396-397 (1971).

[2] Additionally, the defendant claims that justice may not have been done due to his young age at the time of trial and his consequent inability to assist counsel in formulating his defense.

defendant's motion, and affirm, addressing the defendant's claims in turn.[3]

1. Newly discovered evidence. A defendant seeking a new trial based on newly discovered evidence has the burden of showing that the evidence is both "newly discovered . . . and that it casts real doubt on the justice of the conviction" (quotation and citation omitted). Commonwealth v. Brown, 71 Mass. App. Ct. 743, 748 (2008). As the motion judge observed, all evidence the defendant describes as newly discovered was either known to the defendant at the time of trial, known to him soon after trial and before his several appeals, or is consistent with other evidence or testimony presented at trial and therefore does not cast real doubt on the justice of his conviction. As such, the defendant's claim was properly rejected.

2. Brady violations. The defendant alleges that the Commonwealth withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). "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

[3] In evaluating the defendant's claims of newly discovered evidence and Brady violations, we have confined our analysis to those argued in his briefs.

prosecutor's control; (2) that the evidence is exculpatory; and (3) prejudice" (quotations omitted). Commonwealth v. Sullivan, 478 Mass. 369, 380 (2017), quoting Commonwealth v. Murray, 461 Mass. 10, 19, 21 (2011).

a. Doyle affidavit. The defendant contends that the Commonwealth failed to disclose evidence, contained in an affidavit of Boston police officer John Doyle, that its primary witness, Raymond DeMore, was working as an informant for the Boston Police Department at the time of his trial, and that the failure to disclose this fact prejudiced him.[4] We discern no error of law or abuse of discretion in the motion judge's conclusion that the Commonwealth's failure to disclose DeMore's informant status was not prejudicial. At trial, defense counsel elicited testimony showing DeMore was working closely with police, including DeMore's own admission that he was questioned "close to every night," and was providing information related to the defendants. As observed by the motion judge, this evidence

[4] We note that the record does not establish that the Doyle affidavit was in fact withheld from the defense. Though appellate counsel represents that trial counsel is still alive, appellate counsel also represents that trial counsel has no memory of whether the affidavit was disclosed to him before trial. The Commonwealth and the defendant offer competing theories, drawn from the record, on whether the affidavit was disclosed, but neither is compelling. The motion judge made no finding on the question, and it is not our function to resolve disputed questions of fact. Like the motion judge, however, we conclude that the defendant would not be entitled to relief even if he were to establish that the affidavit was not disclosed.

"could have raised the inference of bias, even without the explicit reference to DeMore's status as an informant." In any event, "'[e]ven if the impeachment of [DeMore] at trial on the bias at issue was not as effective or potent as it might have been . . . that purpose was in fact accomplished' where [the] jury were generally aware of [his] bias." Commonwealth v. Sullivan, 478 Mass. 369, 384 (2017), quoting Commonwealth v. Elangwe, 85 Mass. App. Ct. 189, 196 (2014). "It is well established that '[n]ewly discovered evidence that tends merely to impeach the credibility of a witness will not ordinarily be the basis of a new trial.'" Commonwealth v. Lo, 428 Mass. 45, 53 (1998), quoting Commonwealth v. Ramirez, 416 Mass. 41, 47 (1993).

b. Brody report. The defendant's claim that the Brody report (related to a silicone cast of a partial footprint found at the crime scene) was exculpatory is without merit because the record shows that the cast was inconclusive and could not be used for identification. Additionally, the defendant has known about the existence of the Brody report for many years — if not decades — and has failed to raise the claim in any of his prior appeals. As such, the motion judge correctly determined that he waived the argument.

3. Zalkind memorandum. There is no merit to the defendant's claim that the Zalkind memorandum, which (the

defendant claims) shows that the prosecution was instructed to withhold evidence from the defense, supports the other alleged Brady violations. Whatever the Zalkind memorandum may mean, it does not support the defendant's claims that the Doyle affidavit and the Brody report were "Brady materials."[5]

4. Ineffective assistance of counsel. There is likewise no merit to the defendant's claim that his trial counsel was constitutionally ineffective by reason of his failure to impeach DeMore's testimony based on the assertion that he testified only to matters that were publicly reported in newspapers. As a threshold matter, we note that the claim is waived by his failure to raise it in any of his prior motions. In any event, as the motion judge observed, the trial transcript discloses that there was testimony to the effect that DeMore read the newspaper and clipped articles related to the case. Based on such testimony, the jury were aware that DeMore obtained information from the newspaper, and could have considered whether such public reports were the source of his knowledge. Accordingly, the defendant has not established that trial counsel's performance fell "measurably below that which might be expected from the ordinary fallible lawyer," Commonwealth v.

[5] The defendant's argument regarding the impact of the Zalkind memorandum on the prosecutor's mental processes amounts to little more than speculation.

Saferian, 366 Mass. 89, 96 (1974), or that "better work [by counsel] might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977).[6]

Order denying motion for postconviction relief affirmed.

By the Court (Green, C.J., Singh & Hand, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: November 4, 2021.

[6] We likewise reject the defendant's broad contention that "justice may not have been done" in this case. The defendant points to no specific evidence to support this claim, and the general contention that the defendant's age at the time of trial made him unable to adequately assist trial counsel in formulating a defense is inadequate, on its own, to warrant a new trial.

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