

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

No. FAR-_____
2024-P-0896

COMMONWEALTH OF MASSACHUSETTS,
Appellee

V.

LESLEY JURCZUK,
Defendant-Appellant

COMMONWEALTH'S APPLICATION FOR
LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

SUFFOLK COUNTY

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REQUEST FOR LEAVE TO OBTAIN FURTHER REVIEW

The Commonwealth respectfully requests leave from this Court to obtain further appellate review of the Appeals Court's memorandum and order in *Commonwealth v. Lesley Jurczuk*, 106 Mass. App. Ct. 395 (2026)(Add. 1-11). The Commonwealth seeks further review of the Appeals Court's decision vacating the denial of the defendant's motion for a new trial and remanding the case for an evidentiary hearing on a claim of ineffective assistance of counsel. Although the panel did not order a new trial, its decision substantially expands the circumstances in which an evidentiary hearing is required under Mass. R. Crim. P. 30(c)(3), particularly where a defendant relies on a late-filed affidavit from a retained expert who was known and available at trial, and where no affidavit from trial counsel is submitted.

Due to the Appeals Court's fundamentally flawed application of the law regarding motions for a new trial and motions for reconsideration, the decision raises questions of statewide importance concerning: 1) the threshold showing required to establish a "substantial issue" warranting an evidentiary hearing under Rule 30(C)(3), and 2) the proper scope of appellate review of documentary postconviction records and submissions when the motion judge was not the trial

judge. If left standing, this decision risk materially altering Rule 30 practice across the Commonwealth by essentially requiring that evidentiary hearings be granted whenever a defendant later submits an affidavit from an uncalled expert witness even where that expert's proposed testimony does not establish a legally meaningful path to acquittal and even where the record already supports a reasonable tactical explanation for trial counsel's decision, as the motion judge here found.

STATEMENT OF PRIOR PROCEEDINGS

On March 5, 2013, a Suffolk County grand jury returned one indictment, charging the defendant with murder, in violation of G. L. c. 265, § 1, for the death of Alexander Callahan (Add. 13, 15). On November 17, 2014, the jury found the defendant guilty of the lesser offense of voluntary manslaughter (Add. 19). He was sentenced to state prison for eighteen to twenty years (Add. 20). On June 11, 2018, the Appeals Court affirmed his conviction pursuant to then Rule 1:28 (C.A. 21). See *Commonwealth v. Jurczuk*, 93 Mass. App. Ct. 1114, 2018 Mass. App. Unpub. LEXIS 472 at *3 n.1 (June 11, 2018).

On November 15, 2018, the defendant filed a pro se motion to revise and revoke, claiming ineffective assistance of trial counsel in failing to call Dr. El-

zabeth Laposata, a forensic pathologist (Add. 21). That motion was denied by Judge Christine Roach on December 10, 2018, for "fail[ing] to raise a substantial issue by self-serving affidavit" (Add. 21)

On January 29, 2021, the defendant, now represented by counsel, filed a motion for a new trial claiming, mainly, ineffective assistance of his trial counsel (Add. 22). The Commonwealth filed an opposition on April 16, 2021 (Add. 22). On May 18, 2021, the Honorable Robert Ullmann denied the defendant's motion in a memorandum of decision without a hearing (Add. 22). On June 1, 2021, the defendant filed a notice of appeal (Add. 22).

On July 8, 2022, the defendant filed a motion to reconsider the denial of his motion for a new trial (Add. 23). On December 14, 2022, the Commonwealth filed an opposition (Add. 23). On January 27, 2023, the defendant filed a reply (Add. 24). On August 15, 2023, Judge Ullmann held a non-evidentiary hearing (Add. 24). On August 21, 2023, the defendant filed a post-hearing memorandum (Add. 24), and the Commonwealth replied (Add. 24). On September 13, 2023, Judge Ullmann denied the motion to reconsider in a lengthy memorandum (Add. 24, 28-40). The defendant filed a notice of appeal on October 10, 2023 (Add. 24).

On February 22, 2024, the defendant's current appellate counsel filed a notice of appearance in the

Superior Court case (Add. 24). On June 11, 2024, the defendant filed a supplement to his motion for reconsideration (Add. 25, 41-64), renewing his claim that trial counsel's decision not to call Dr. Laposata, whom the defense had retained and consulted before trial, prejudiced the defense at trial (Add. 41-64). At this time, after three previous denials of his post-conviction motions pressing the same claim, did the defendant provide the Court with an affidavit from the Dr. Laposta (Add. 60-64). Without requesting a response from the Commonwealth, Judge Ullmann denied the supplement on July 17, 2024, on the basis that no substantial issue had been raised (Add. 25, 65-69). The defendant filed a notice of appeal on July 29, 2024 (Add. 25). All of his dockets were subsequently consolidated under Appeals Court docket number 2024-P-0896 (Add. 25).

Oral argument was held in the Appeals Court before Justices Sacks, Smyth, and Wood on September 4, 2025. On January 2, 2026, the panel issued a published decision vacating the denial of the defendant's motion, sending the case back to the Superior Court for an evidentiary hearing.

STATEMENT OF RELEVANT FACTS

On December 2, 2012, Alexander Callahan was pronounced dead in his cell at the Suffolk County House

of Correction following a fight inside that cell with the defendant, Lesley Jurczuk. There was no dispute that the fight occurred, and the defendant testified to his own version of events. The jury rejected the defendant's claim of justified self-defense, finding him guilty of the lesser included offense of voluntary manslaughter.

POINTS ON WHICH FURTHER APPELLATE REVIEW IS SOUGHT

The Commonwealth seeks further appellate review on the issue of whether the Appeals Court erred in concluding that the defendant raised a "substantial issue" requiring an evidentiary hearing where trial counsel did not call a retained expert witness at trial, despite the absence of an affidavit of trial counsel explaining trial strategy, and where the expert's proposed testimony - both known and available at the time of trial - does not, even if credited, establish a legal theory supporting an acquittal. Further, the Commonwealth seeks clarification as to whether the Appeals Court exceeded the proper scope of appellate review by substituting its own assessment of trial strategy for the motion judge's discretion when reviewing a documentary claim under Rule 30(c)(3), especially where the motion judge articulated a reasonable, tactical basis for counsel's decision and the de-

fendant did not provide the affidavit of the expert until his fourth bite at the apple.

FURTHER APPELLATE REVIEW IS APPROPRIATE

I. THE APPEALS COURT'S DECISION MATERIALLY LOWERS THE RULE 30(C)(3) THRESHOLD TO ESTABLISH A SUBSTANTIAL ISSUE WARRANTING AN EVIDENTIARY HEARING ERRODING THE CONSIDERABLE DISCRETION A MOTION JUDGE HAS IN DETERMINING IF THAT BURDEN IS SUFFICED.

In the Commonwealth, a basic tenant of our criminal procedure is that "a judge has considerable discretion to reconsider prior orders, provided the request is made within a reasonable time." *Commonwealth v. Pagan*, 73 Mass. App. Ct. 369, 374 (2008), quoting from *Commonwealth v. Gonsalves*, 437 Mass. 1022, 1022 (2002). An appellate court therefore "review[s] the judge's action on the motion for an abuse of that considerable discretion." *Id.* The Appeals Court's decision here materially lowers the Rule 30(c)(3) threshold for evidentiary hearings in ineffective assistance cases involving uncalled experts. Rule 30(c)(3) expressly permits a judge to resolve a motion for a new trial on the papers "'if no substantial issue is raised by the motion or affidavits.'" *Commonwealth v. Marrero*, 459 Mass. 235, 240 (2011), quoting Mass. R. Crim. P. 30(c)(3). This Court has repeatedly emphasized that the affidavit requirement is not a mere formality, but a gatekeeping mechanism designed to permit the efficient resolution of postconviction

claims while preserving finality and judicial resources. See *Commonwealth v. Stewart*, 383 Mass. 253, 260 (1981) (“[t]he primary purpose of [Mass. R. Crim. P. 30(c)(3)] is to encourage the disposition of such motions upon affidavit”). The Appeals Court’s decision effectively erodes that gatekeeping function.

Under the Appeals Court’s reasoning, a defendant may establish a “substantial issue” warranting an evidentiary hearing by submitting a late affidavit from a retained expert who was present and available at trial, even where:

- the expert’s opinion was known to trial counsel at the time of trial;
- no affidavit from trial counsel is submitted explaining or disputing the strategic rationale for the decision;
- the motion judge has already articulated a reasonable tactical explanation grounded in the trial record; and
- the expert’s proposed testimony does not, as a matter of law, supply a viable path to acquittal under the offense of conviction.

Postconviction litigation increasingly includes claims that trial counsel were ineffective for failing to call a retained expert. A rule that routinely requires

evidentiary hearings whenever a defendant later submits an expert affidavit – particularly in the absence of any affidavit from trial counsel – will materially affect Superior Court resources and fundamentally alter Rule 30 practice throughout the Commonwealth. Such a rule risks transforming evidentiary hearings from an exception into a near default in expert-related ineffective assistance claims.

This case presents an appropriate vehicle for this Court to clarify that the mere existence of potentially “helpful” expert testimony does not, by itself, establish a substantial issue requiring a hearing, particularly where the expert’s theory does not undermine the legal basis of the conviction.

Though the Commonwealth does not dispute that the defendant’s “supplement” to his motion to reconsider, the one that contained the affidavit of Dr. Laposata, supported his original claims with “better evidence”, “[t]here is no error in the denial of a motion that merely seeks, as this one did, a ‘second bite at the apple.’” *Liberty Sq. Dev. Trust v. Worcester*, 441 Mass. 605, 611 (2004).

II. THE APPEALS COURT’S PREJUDICE ANALYSIS CONFLATES ALTERNATIVE MEDICAL MECHANISMS WITH LEGAL EXCULPATION UNDER A VOLUNTARY MANSLAUGHTER CONVICTION.

The defendant was convicted of voluntary manslaughter on a theory of excessive force in self-

defense. See *Commonwealth v. Acevedo*, 446 Mass. 435, 445-449. Under that theory, the Commonwealth was required to prove that the defendant intentionally applied force, that the force was not justified (or was excessive), and that the defendant's unlawful force caused the victim's death. See *Commonwealth v. Walker*, 443 Mass. 213, 222 (2005):

Each theory of voluntary manslaughter requires proof of an intentional infliction of injury on the victim. With respect to the two theories under heat of passion, the intended injury must be likely to cause death and in fact causes death. With respect to the theory of excessive force, the intended injury is death itself. Under all three theories, the defendant must have acted unlawfully. Under all three theories, the defendant's conduct must have been in response to conduct of the victim.

The Commonwealth was not required to prove an intent to kill, nor was it required to prove the precise mechanism by which the fatal injury occurred. The Appeals Court concluded that the jury "might have credited" the expert's testimony and returned a not guilty verdict. That conclusion rests on an analytical leap that warrants this Court's review. Even accepting the expert's proposed testimony at face value – that the fatal injury resulted from the victim striking a table during a fall rather than from blunt force trauma from intentional blows – the death still occurred during the defendant's intentional use of force in a physical

altercation. A fall or impact during a fight does not, without more, negate causation by unlawful or excessive force, nor does it establish a legally cognizable "accident" defense in the context of voluntary manslaughter.

By treating an alternative medical mechanism (foreseeable fall vs. intentional blows) as potentially dispositive of guilt, the Appeals Court risks collapsing the distinction between factual mechanism and legal causation. This conflation has implications well beyond this case, particularly in prosecutions involving deaths that occur during fights, restraints, or other dynamic encounters where injuries may result from secondary impacts rather than direct blows.

Clarification from this Court is warranted to ensure that postconviction prejudice analysis remains tethered to the legal elements of the offense of conviction, rather than to speculative reassessments of medical mechanics untethered from the governing legal doctrines.

III. THE APPEALS COURT'S OPINION BLURS THE LINE BETWEEN INDEPENDENT APPELLATE REVIEW AND SUBSTITUTION OF DISCRETION IN RULE 30 APPEALS.

The Appeals Court emphasized that, because the motion judge was not the trial judge, it was "in as good a position" as the motion judge to assess the record. While appellate courts may independently re-

view documentary records, that principle does not authorize substitution of judgment for the motion judge's discretionary determinations regarding whether a substantial issue has been raised. The law specifically states "[a]n appellate court's review of a trial judge's decision for abuse of discretion must give great deference to the judge's exercise of discretion; it is plainly not an abuse of discretion simply because a reviewing court would have reached a different result." *L.L. v. Commonwealth*, 470 Mass. 169, 185 n. 27 (2014).

Here, the motion judge issued multiple written decisions explaining why trial counsel's decision not to call the expert was reasonable and why the defendant failed to meet his burden under Rule 30(c)(3). The Appeals Court nonetheless vacated those rulings based on its own assessment that the expert affidavit raised "inconsistencies" warranting further inquiry.

The case thus implicates an important institutional question: when does "independent review" become impermissible substitution of discretion in postconviction proceedings? Absent guidance from this Court, the decision risks encouraging routine appellate second-guessing of motion judges' Rule 30 determinations whenever a new affidavit, or other potential "showing," is later produced, undermining the deference traditionally afforded to those rulings. See *Common-*

wealth v. Velez, 479 Mass. 506, 515 (2018) (“While ordinarily we defer to the discretion of a judge on whether a motion for a new trial requires an evidentiary hearing, in these unusual circumstances, we believe that an evidentiary hearing is necessary in order to determine whether trial counsel’s strategy was reasonable in light of the defendant’s particular mental health history”).¹ This is not an unusual circumstance warranting replacement of the motion judge’s discretion.²

The Appeals Court relied in part on the concept of “particular and demonstrable error” to justify consideration of the late-filed expert affidavit on reconsideration, notwithstanding that the affidavit was neither newly discovered nor newly available. See *Com-*

¹ An in-depth review of *Velez* reveals that **under its G. L. c. 278, § 33E review**, the proffered defense strategy at trial was not explained below – and in fact appeared contradictory – warranting the evidentiary hearing. 479 Mass. at 513-514. The Appeals Court conducts no such review. Here, it was clear and the motion judge appropriately found that the strategic choice was reasonable.

² Demonstrable errors of law are not discretionary decisions; rather, the Commonwealth has found one case that has vacated a denial of a motion for a new trial based on such a theory: a judge resentencing a defendant from a one-day sentence to 690 days where the court lacked jurisdiction to resentence the defendant as he had already served his sentence. See *Commonwealth v. Soto*, 98 Mass. App. Ct. 1120, 2020 Mass. App. Unpub. LEXIS 988, *4-*5 (November 23, 2020). This case bears no resemblance.

monwealth v. Demirtshyan, 87 Mass. App. Ct. 737, 741 n.8 (2015), quoting *Audubon Hill S. Condominium Assoc. v. Community Assn. Underwriters of America, Inc.*, 82 Mass. App. Ct. 461, 470 (2012). In deciding a motion to reconsider, the court considers whether the party seeking reconsideration has alleged either "changed circumstances", i.e., newly discovered evidence or a development of relevant law, **or** a particular and demonstrable error in the original ruling or decision. *Audubon Hill S. Condominium Assoc.*, 82 Mass. App. Ct. at 470. Contrary to the Appeals Court's opinion, Judge Ullmann expressly found that the defendant asserted neither "(b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision'" (Add. 68) and therefore considered the motion for the last remaining prong, newly discovered evidence or information (Add. 68). The Appeals Court's reasoning, if left unaddressed, risks expanding reconsideration practice in a manner inconsistent with the finality principles embedded in Rule 30 and this Court's precedent.

This case provides a focused opportunity to clarify the limits of reconsideration in postconviction proceedings and to reaffirm that Rule 30(c)(3)'s affidavit-based framework is not a provisional step that may be bypassed through successive motions and supplemental filings.

CONCLUSION

The Appeals Court's decision raises substantial questions affecting the administration of justice across the Commonwealth, particularly in the increasingly common context of postconviction claims. Further appellate review is warranted to clarify the standards governing Rule 30(C)(3) review, when an evidentiary hearing is required, and to delineate the proper scope of appellate review to ensure that the Commonwealth's longstanding prejudice analysis remains grounded in the legal elements of the offense of conviction. For those reasons, the Commonwealth respectfully requests that this Court grant further appellate review.

Respectfully submitted
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January 23, 2026

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Commonwealth v. Jurczuk

Appeals Court of Massachusetts

September 4, 2025, Argued; January 2, 2026, Decided

No. 24-P-896.

Reporter

106 Mass. App. Ct. 395 *; 2026 Mass. App. LEXIS 1 **; 2026 LX 31166; 2026 WL 15745

COMMONWEALTH vs. LESLEY JURCZUK.

Prior History: **[**1]** Suffolk. INDICTMENT found and returned in the Superior Court Department on March 5, 2013.

A motion to revise and revoke sentence, filed on November 15, 2018, was considered by *Christine M. Roach*, J., and a motion for reconsideration was also considered by her; a motion for a new trial, filed on January 29, 2021, was heard by *Robert L. Ullmann*, J., a motion for reconsideration was also heard by him, and a second motion for reconsideration was considered by him.

[Commonwealth v. Jurczuk, 93 Mass. App. Ct. 1114, 2018 Mass. App. Unpub. LEXIS 472, 104 N.E.3d 683, 2018 WL 2769118 \(June 11, 2018\)](#)

Core Terms

decedent, decedent's, defendant's, trial counsel, counsel's, floor, motion for a new trial, evidentiary hearing, neck, reconsideration motion, medical examiner, fight, cause of death, manifestly, blood, ineffective assistance claim, hemorrhage, trauma, self-defense, cartilage, strategic, fatal, opine, chin, door, ineffective assistance, opening statement, reconsider, inflict, judge's

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Homicide > *Practice, Criminal* > Assistance of counsel > Affidavit > New trial > Motion for reconsideration > *Constitutional Law* > Assistance of counsel > *Evidence* > Expert opinion > Accident > Medical record > Hospital record > *Witness* > Expert

This court vacated orders denying motions for a new trial and for reconsideration, filed by a criminal defendant following his conviction of voluntary manslaughter, and remanded the matter to the Superior Court for an evidentiary hearing to determine whether trial counsel's decision not to call an expert witness who was prepared to testify regarding her opinion that the decedent's cause of death was an accident, rather than the defendant's excessive use of force in self-defense, was manifestly unreasonable, particularly after counsel's opening statement promising the expert's testimony, where, had trial counsel offered the expert's testimony, the jury might have credited it and returned a verdict of not guilty, such that the motion for reconsideration was based on a particular and demonstrable error in the judge's order denying the motion for a new trial, as strongly suggested by an affidavit

from the expert presented by defense counsel to supplement the motion for reconsideration, which the judge declined to consider. [406-410]

At the trial of an indictment charging the defendant with murder in the second degree, counsel was not ineffective in failing to introduce hospital records showing injuries sustained by the defendant both at the time of the crime and two months earlier, where such evidence would not have materially affected the jury's determination whether the defendant caused the victim's death. [410-411]

Counsel: *Merritt Schnipper* for the defendant.

[*396] *Erin Knight*, Assistant District Attorney, for the Commonwealth.

Judges: Present: SACKS, SMYTH, & WOOD, JJ.

Opinion by: WOOD

Opinion

WOOD, J. On December 2, 2012, the defendant, Lesley Jurczuk, got into a fight with his cellmate Alexander Callahan (decedent) at the Suffolk County house of correction, after which Callahan died. A grand jury indicted the defendant for murder in the second degree. After a trial in the Superior Court, a jury convicted the defendant of voluntary manslaughter. A panel of this court affirmed the conviction in an unpublished memorandum and order. See *Commonwealth v. Jurczuk*, 93 Mass. App. Ct. 1114, 104 N.E.3d 683 (2018).¹

In 2021, the defendant filed a new trial motion, claiming that his trial attorneys (trial [**2] counsel) were ineffective for failing to call forensic pathologist Elizabeth Laposata (Dr. Laposata), whom the defendant had retained prior to trial, to challenge the Commonwealth's theory that the defendant caused the decedent's death, after promising the jury they would do so. Because the trial judge had retired, the motion was considered by a different judge (motion judge), who denied it.² The defendant filed a timely notice of appeal, which was stayed so that he could litigate a motion for reconsideration. Represented by postconviction counsel (prior counsel), the defendant moved for reconsideration of the denial of his new trial motion and requested an evidentiary hearing. Prior counsel did not provide affidavits from either Dr. Laposata or trial counsel. The motion judge denied the motion for reconsideration and, accordingly, the motion for an evidentiary hearing. The defendant again filed a timely notice of appeal.

Represented by new counsel (current counsel), the defendant then asked this court for leave to file in the trial court, and for that court to consider, an affidavit from Dr. Laposata. We granted that request. The defendant then filed a supplement to his motion to [*397] reconsider, [**3]³ supported by Dr. Laposata's affidavit, which opined that the

¹ After his conviction was affirmed, the defendant filed a motion to revise and revoke his sentence pursuant to [Mass. R. Crim. P. 29](#), as appearing in 474 Mass. 1503 (2016) ([rule 29](#)). That motion was denied, as was a subsequent motion for reconsideration. The defendant appealed from those orders, and we later consolidated that appeal with the defendant's appeal from the denials of his motion for a new trial and related motion for reconsideration. Based on the information before the judge at the time the [rule 29](#) motion and motion to reconsider the same were decided, those motions were properly denied, and we therefore affirm those orders.

² It is unclear whether the defendant drafted this motion himself. The defendant's then-postconviction counsel signed it, but the motion judge asserted that the defendant filed it without the assistance of counsel. We will accept the motion judge's characterization.

³ One of the orders from which the defendant appeals separately denied the defendant's supplement to his motion to reconsider and his renewed motion to reconsider. For ease of reference, this opinion refers to the combined supplement and renewed motion to reconsider as the defendant's second motion to reconsider.

decedent's cause of death was a fall during the fight with the defendant, rather than an assault by the defendant as the Commonwealth alleged. Dr. Laposata explained that she appeared at the defendant's trial prepared to testify to that effect, but trial counsel informed her that her testimony was not required. The motion judge, however, declined to consider Dr. Laposata's affidavit or reconsider his prior rulings and denied the second motion to reconsider. The defendant again filed a timely notice of appeal.

This court consolidated all of the defendant's pending appeals. Because Dr. Laposata's affidavit raised a substantial issue whether trial counsel's decision not to call her as a witness was manifestly unreasonable, we vacate the denial of the second motion to reconsider the defendant's new trial motion and remand the case for an evidentiary hearing.

As we explain below, this case illustrates that the absence of an affidavit from trial counsel does not, "by itself, defeat[] a claim of ineffective assistance of counsel," [Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 551, 18 N.E.3d 694 \(2014\)](#), where the record demonstrates "inconsistencies that merit a closer look," [Commonwealth v. Velez, 479 Mass. 506, 514, 96 N.E.3d 683 \(2018\)](#), S.C., [487 Mass. 533, 168 N.E.3d 800 \(2021\)](#). See [Martinez, supra](#) (listing scenarios [****4**] where prior counsel may be reluctant to cooperate with ineffective assistance allegations). Dr. Laposata's affidavit appears helpful to the defense and is inconsistent with the motion judge's rationale for denying an evidentiary hearing, warranting a closer look at trial counsel's strategic decision not to call her as a witness.

Background. 1. Trial. We summarize the facts the jury could have found, reserving certain details for later discussion. The defendant was charged with murder in the second degree on the theory that he beat the decedent to death in a cell the two men shared at the Suffolk County house of correction. The defendant asserted that he acted in self-defense to repel an attack by the decedent and their other cellmate, Shaquille Manago, and that the decedent died accidentally when he fell and struck a hard surface in their cramped cell during the fight.

[***398**] a. *Opening statements.* In his opening statement, the prosecutor told jurors that the decedent "was killed with the bare hands of the defendant." Specifically, the prosecutor claimed that the defendant inflicted a fatal injury to the decedent's neck.

The defense's opening argument attacked the Commonwealth's cause of death [****5**] analysis as "inaccurate ... [and] incomplete." The defense promised jurors that Dr. Laposata, a former chief medical examiner for the State of Rhode Island, would testify that the decedent "didn't suffer ... classic defensive wounds," that there were "a number of ways" that the decedent could have incurred the fatal neck injury, and that there would be no evidence that the defendant inflicted the injuries that caused the decedent's death.

b. *Evidence from the house of correction.* On December 2, 2012, the defendant, the decedent, and Manago shared a cell in the house of correction. Their cell contained a wooden table located immediately to the left of its entryway. At 4:57 P.M., the defendant approached a correction officer and reported that "there's some guy on the floor in my cell." Correction officers responded and found the decedent unresponsive on the cell floor.

Within minutes, Suffolk County sheriff's department staff, including the sheriff's emergency response team and medical personnel, responded to the cell and began cardiopulmonary resuscitation on the decedent. He did not have a pulse. He was bleeding from his mouth, nose, and ears, and there was blood on the floor behind [****6**] his head. There was also blood splatter low on the concrete wall of the cell and a small amount of blood on a plastic chair.

Because the cell was small, first responders removed the table from the cell before rendering aid, and police did not examine it as part of their investigation.

The decedent sustained extensive trauma to his face including cuts on his mouth and eye. His face, jaw, and neck were bruised, swollen, and distorted.

The decedent was in his twenties at the time of this incident, while the defendant was in his early fifties. The decedent had “a smaller build” while the defendant was “bigger,” exercised frequently, and “was much larger than most inmates.”

The defendant had relatively minor injuries consistent with having been in a fight: there were fresh, small cuts and scrapes on his knuckles and fingers. The knuckles of his right hand were swollen and red. He also had scratches and gouges on his chest, and bruising and swelling around his ribs, but no injuries to his face or head.

[*399] Security video footage showed that between 4:31 P.M. and 4:42 P.M. only the decedent and the defendant were inside their cell. Manago described leaving the cell to wash out a container and returning **[**7]** to find the door closed and locked, with the lights off. Manago said he looked through a window in the door and saw the defendant and the decedent on opposite sides of the cell, saying “stay the fuck away from me” to each other. He left and returned, and the men were still standing and arguing.

Security video footage showed that at 4:43 P.M., Manago opened the cell door and observed the decedent lying on the ground; he appeared to be unconscious. According to Manago, the defendant grabbed the decedent by his left arm and tried to pull him up. He then said to Manago, “Help me get him up.” Manago refused. Six seconds after entering the cell, Manago backed out of the cell and went to the dining area. Security video footage showed the defendant leaving the cell shortly thereafter, entering a bathroom, and returning to the cell before alerting correction officers at 4:57 P.M.

c. *Medical examiner testimony.* A medical examiner performed an autopsy on the decedent the next day. He described “dramatic” blunt force injuries to the visible areas of the decedent’s face and head that were “not[] inconsistent” with having been struck by either a fist or a hard floor “more than once.” The decedent **[**8]** had multiple subgaleal hemorrhages (bleeding between his scalp and skull), and a single subdural hemorrhage — “an indicator of significant head injury” — within his brain. The medical examiner testified that “any brain injury is potential[ly] fatal.” His autopsy showed that the decedent’s subdural hemorrhage produced only five milliliters of blood, a fraction of the seventy-five milliliters that create lethal internal pressure.

The medical examiner did not see “any external injuries” on the decedent’s neck. Internally, the decedent’s neck showed fractures of his thyroid cartilage and hyoid bone, injuries that “could potentially be fatal” and which the medical examiner believed were caused by blunt force trauma equivalent to events like “car accidents, things where there’s a lot of energy ... applied to the neck.” The medical examiner said these injuries were “not[] inconsistent” with having been caused by fist or knee strikes.

The medical examiner opined that the cause of the decedent’s death was “[b]lunt injuries of the head and neck”; rejected the idea “it was the fractured larynx [i.e., thyroid cartilage] that caused his death independently”; and said “they both contributed **[*400]** to it. **[**9]** I don’t think you can separate one from the other.” The medical examiner could not exclude impacts from contact with the cell’s concrete walls or floor or metal bunks, as opposed to blows from fists or knees, as the cause of the decedent’s injuries. As to the decedent’s neck injuries, the medical examiner testified that it “may be possible” that if two grown men of the defendant’s and decedent’s sizes fell to the floor, they could generate enough force to cause the damage to the decedent’s thyroid cartilage and hyoid bone. Finally, the medical examiner opined that restricted airflow from the type of neck injuries the decedent suffered would cause irreversible brain damage within five minutes, but in the interim a person could get up and move around.

d. *The defendant’s testimony.* The defendant testified that the decedent and Manago confronted him in their cell after making comments about the defendant’s body odor. The decedent and Manago grabbed him by the head and slammed him into the cement block wall. When the defendant moved toward the door, Manago grabbed him, and the decedent began to hit him with a chair. Next, the decedent charged him “like a football player” and they both fell **[**10]** to the floor. The decedent’s face struck the floor. As they grappled, Manago kicked the defendant. Manago then left the cell. The defendant and the decedent both got up; the defendant sat on his bunk and the decedent sat on the table. At this point, the defendant claimed “everything seemed like it was fine” but then the decedent

“stands up, and he says, you mother fucker, I’m going to get you, and he turns around, and he shuts the light off, and he charges me, and then I grabbed him really hard, and then he lifts me off the floor, and then we both slam on the ground, and we both get up fast. And it was kind of like over.”

At that point, Manago opened the cell door and the defendant left the cell. The defendant left the cell shortly after Manago. At that time, the decedent was “sitting in the chair. ... [a]t the table.” The defendant went to the bathroom and used an extra shirt to stop the bleeding on his face. When the defendant returned after dinner, he found the decedent unresponsive on the cell floor and immediately alerted correction officers.

e. *Closing arguments.* During closing argument, the defendant’s trial counsel reminded jurors that the Commonwealth had to prove “this was [**11] not self-defense, that this was not an accident” and that the defendant’s intentional acts “caused [the decedent’s] death.” Trial counsel argued that autopsy evidence showed there [**401] was not enough blood in the decedent’s brain for a subdural hemorrhage to have caused his death, and “[h]e died from a fractured larynx in connection with a fracture[d] hyoid bone. Blunt force impact to his neck ... [a] [h]igh velocity impact [like those] seen in car accidents.” The only way such force could have been generated in such a small space, trial counsel argued, was if two grown men had fallen to the floor while grappling.

The prosecutor disputed that theory as to cause of death. The prosecutor argued that the defendant was fueled by “rage and anger” and killed the decedent with “multiple blows to the right side, to the left side, to the face, to the neck.” Displaying a photograph of the decedent’s body, the prosecutor disputed the defense argument that the fatal injury could have been caused by a fall or any accident: “[t]his isn’t a fall. Are you kidding? ... That isn’t a picture of an accident, of a fall. That’s a picture of intent to kill ... [or] inflict grievous bodily injury.” The prosecutor [**12] returned to this theme later:

“[t]his isn’t an accident. This is deliberate conduct that took a man’s life. ... [I]t certainly isn’t some accidental fall with [the defendant] in the cell, that convenient little fall. It [didn’t cause] four separate subgaleal hemorrhages to [the decedent’s] head. ... [H]ow can we forget that injury that [the defendant’s trial counsel] just conveniently glosses over, that injury to the neck, the tracheal cartilage hemorrhage. ... That’s a whole separate injury than all of the others. And [the defense] wants you to believe that came from a fall? Seriously? A fall? That injury.”

f. *Jury instructions.* The trial judge instructed the jury that “in order to find the defendant guilty of any criminal charge in this case[,] the Commonwealth must prove beyond a reasonable doubt that [the decedent’s] death was caused by an assault and battery by the defendant, not in proper self-defense, and that the death was not caused by accident.”

g. *Verdict.* The jury convicted the defendant of voluntary manslaughter.

2. *Postconviction proceedings.* a. *New trial motion.* The defendant’s new trial motion alleged several grounds for ineffective assistance of trial counsel, including [**13] (a) trial counsel’s failure to call Dr. Laposata after promising jurors they would hear from her; (b) failing to introduce medical records establishing that the defendant had a preexisting rotator cuff injury; and (c) failing to [**402] introduce medical records showing the extent of the defendant’s injuries in the fight. The motion judge denied this motion without holding an evidentiary hearing, in part because the defendant offered “no affidavits or other evidentiary support.”

b. *Prior counsel’s motion for reconsideration.* Prior counsel moved for reconsideration, asserting that the motion judge had abused his discretion in denying the defendant’s new trial motion because it had raised substantial issues indicating that justice had not been done. The motion to reconsider also requested an evidentiary hearing.

Prior counsel did not proffer an affidavit from Dr. Laposata or trial counsel. Instead, prior counsel submitted his own affidavit, summarizing information from Dr. Laposata’s assistant that Dr. Laposata “met with trial counsel [before trial] to help counsel understand the forensic pathology of the case and discussed her findings and opinions as to the cause of the decedent’s death.” She [**14] “review[ed] her testimony with trial counsel” outside the court room but was “informed ... she was not needed.” Prior counsel stated his “belief” that Dr. Laposata would have testified that the decedent’s injuries “were consistent with his head hitting a hard surface or object, such as the concrete floor of the cell or a bed frame or platform.”

Prior counsel stated that he had discussed the defendant's claims with trial counsel but that trial counsel had "declined to offer an affidavit attesting to ... ineffective representation of the defendant."⁴ Prior counsel's "understanding" was that trial counsel did not call Dr. Laposata because trial counsel erroneously believed that investigators did not find blood on the cell floor or on the bed frame or platform.⁵ Therefore, prior counsel believed that trial counsel "concluded that Dr. Laposata could not state that the decedent's injuries were consistent with his head hitting the cell floor or bed." Prior counsel explained that "[t]rial counsel's conclusion was incorrect, as there were photographs introduced in evidence and testimony that [both parties'] blood was found on the floor and a wall of the cell."

[*403] In his order denying prior counsel's **[**15]** motion for reconsideration, the motion judge concluded that the Commonwealth had presented "overwhelming evidence that [the defendant] had fatally beaten [the decedent], either intentionally or by using excessive force in self-defense." Without the benefit of any firsthand information from Dr. Laposata or trial counsel, the motion judge concluded that counsel's "decision not to call Dr. Laposata as a witness was clearly tactical, as trial counsel spoke to her immediately before deciding not to call her," and this "decision was not remotely manifestly unreasonable." The motion judge also concluded that "[Dr.] Laposata's proposed testimony was not the linchpin of a defense of self-defense. At most, her testimony might have called into question the extent of certain injuries to [the decedent]" and "would *not* have addressed the obvious flaw in [the defendant's] defense that, even if [the defendant] established a need to defend himself, the Commonwealth could readily prove that [the defendant] used more force than was reasonably necessary" to do so.

c. Dr. Laposata's affidavit. While the defendant's appeal from the denial of his new trial motion was pending, current counsel replaced prior **[**16]** counsel, and we granted his request "to file and the trial court ... leave to consider a motion regarding the affidavit from [Dr. Laposata]." Pursuant to our order, current counsel then filed a motion to supplement prior counsel's motion to reconsider, supported by Dr. Laposata's affidavit, in the Superior Court.⁶ Broadly, Dr. Laposata opined that the cause of the decedent's death was asphyxia caused by torn neck muscles he sustained when he fell onto the table in the midst of the fight with the defendant, rather than from blows inflicted by the defendant.

Dr. Laposata explained that trial counsel retained her ahead of the defendant's 2014 trial to develop an opinion and testify about the cause of the decedent's injuries and his death. Dr. Laposata developed an opinion and appeared at the Superior Court in Suffolk County on November 13, 2014, prepared to testify. She met with trial counsel, who told her that her testimony was not required. Had she been called, she would have provided the following opinion.

[*404] First, Dr. Laposata disputed the medical examiner's conclusion that the cause of death was the combined effect of blunt force trauma to the decedent's head and injuries to his neck, **[**17]** and that the causal effect of those injuries could not be separated. Dr. Laposata "believe[d] thyroid cartilage trauma and asphyxiation alone, not blunt force trauma to the head, caused [the decedent's] death."

Second, Dr. Laposata opined that this fatal trauma was not caused by punches, kicks, or an impact with the cell's concrete floor. "Rather, it was caused by [the decedent's] striking his chin on the table just to the left of the cell door, followed by impact to the front of his neck caused by this strike, when he and [the defendant] fell to the floor the second time" Dr. Laposata noted that "[p]hotographs of [the decedent's] body taken shortly after he died show a large, roughly circular bruise on the underside of his chin, with abrasions continuing onto the front of his chin on his

⁴ Prior counsel made the representation that trial counsel had "declined to offer" an affidavit attesting to ineffective representation of the defendant in a memorandum of law, not his affidavit.

⁵ Although prior counsel's affidavit indicates that he discussed the defendant's postconviction claims with trial counsel, it is unclear from the affidavit whether those discussions were the source of information that led prior counsel to this "understanding."

⁶ Dr. Laposata is a medical doctor specializing in forensic pathology. She has a bachelor of science degree from Bucknell University and a doctor of medicine degree from the University of Maryland School of Medicine. She completed her internship and residency in anatomic pathology at The Johns Hopkins Hospital and a fellowship in forensic pathology at the St. Louis University School of Medicine. She worked as an assistant medical examiner with the cities of St. Louis, Missouri, and Philadelphia, Pennsylvania, and served as the chief medical examiner for the State of Rhode Island from 1993 until 2005.

face.” Dr. Laposata asserted that “[t]he blood pattern evidence on the floor where [the decedent’s] body was found between the table and single wall-bunk” supported an inference that after the fall, he was unconscious and had a collapsed airway.

Dr. Laposata offered an opinion about “the most logical sequence of events producing [the decedent’s] visible and internal injuries”:

“During the first **[**18]** round of fighting, [the decedent] likely suffered his visible and serious but non-fatal head and face injuries, which may have left him dazed, concussed, and even semi-conscious. During the second round of fighting, when [the decedent] and [the defendant] were falling to the cell floor [the decedent] sustained the neck injury that ultimately killed him. This sequence of events, and particularly the fact that [the decedent] was already dazed and semi-conscious when he suffered his fatal injury, would explain his lack of immediate reaction to such a severe injury.”

Discussion. As noted above, the defendant alleges that trial counsel provided ineffective assistance by failing to call Dr. Laposata to support the defense theory that the decedent’s cause of death was an accident, despite having promised to call her during opening statements. Because the defendant submitted an affidavit from Dr. Laposata that raises significant questions about the reasonableness of trial counsel’s decision, we vacate the denial of the new trial motion and second motion to reconsider **[*405]** the defendant’s new trial motion and remand the case for an evidentiary hearing on the defendant’s claim of ineffective assistance. **[**19]**

1. *Standard of review.* “As a general matter, we review a judge’s denial of a defendant’s motion for a new trial to determine whether there has been a significant error of law or other abuse of discretion.” [Commonwealth v. Caldwell, 487 Mass. 370, 374, 167 N.E.3d 852 \(2021\)](#). “[W]e review independently findings made by the motion judge based entirely on documentary evidence.” *Id.* See [Commonwealth v. Gaines, 494 Mass. 525, 536, 240 N.E.3d 193 \(2024\)](#) (“Because the motion judge was not the trial judge, ... we consider ourselves in as good a position as the motion judge to assess the trial record” [quotation and citation omitted]). “Further, we make an independent determination as to the correctness of the judge’s application of constitutional principles to the facts as found” (quotations and citation omitted). [Caldwell, supra](#).

2. *Ineffective assistance of counsel.* a. *The standard.* The defendant claims that his representation at trial was not constitutionally adequate. Our inquiry with respect to claims of ineffective assistance of counsel is “whether there has been serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer — and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise **[**20]** available, substantial ground of defen[s]e.” [Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 \(1974\)](#). “When a defendant alleges that his attorney committed a strategic error, ... we consider whether trial counsel’s tactical choice was manifestly unreasonable at the time the choice was made.” [Velez, 479 Mass. at 512](#). “A strategy is manifestly unreasonable if lawyers of ordinary training and skill in the criminal law would [not] consider [it] competent” (quotation and citation omitted). *Id.* Where trial counsel’s tactic was manifestly unreasonable, counsel’s representation was ineffective if it created a substantial risk of a miscarriage of justice. [Commonwealth v. Randolph, 438 Mass. 290, 295-296, 780 N.E.2d 58 \(2002\)](#).

The defendant also asserts that he should have been granted an evidentiary hearing to determine whether he received ineffective assistance at trial. [Rule 30 \(c\) \(3\) of the Massachusetts Rules of Criminal Procedure](#), as appearing in 435 Mass. 1501 (2001), provides that a judge presented with a new trial motion may “rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.”

[*406] “To determine whether a ‘substantial issue’ has been raised, we consider the seriousness of the deficiency asserted and the adequacy of the defendant’s showing” (citation omitted). **[**21]** [Velez, 479 Mass. at 514](#). “A credible claim of ineffective assistance of counsel is serious and, when a sufficient showing is made, may merit an evidentiary hearing.” *Id.* “Turning next to the adequacy of the showing, the defendant’s submissions need not prove the [motion’s] factual premise ... but they must contain sufficient credible information to cast doubt on the issue” (quotations and citation omitted). [Commonwealth v. Welch, 487 Mass. 425, 445, 167 N.E.3d 1201 \(2021\)](#). One

relevant factor is whether “a hearing would have provided the judge with additional information relevant to the motion.” [Commonwealth v. DeVincent, 421 Mass. 64, 68, 653 N.E.2d 586 \(1995\)](#).

b. *Dr. Laposata*. The defendant argues that it was manifestly unreasonable not to call Dr. Laposata to challenge the Commonwealth’s theory as to the decedent’s cause of death. He notes that Dr. Laposata clearly disagreed with the Commonwealth’s medical examiner that the extensive blunt force traumas to the decedent’s head contributed to his death. She opined that “thyroid cartilage trauma and asphyxiation alone” were the cause of death. More specifically, she asserted that photographs of a large, roughly circular bruise on the underside of the decedent’s chin (which the Commonwealth’s medical examiner had not mentioned in his trial testimony) and abrasions continuing onto the **[**22]** front of his chin “strongly suggest that the thyroid cartilage fracture that killed [the decedent] ... was caused by [the decedent’s] striking his chin on the table just to the left of the cell door, followed by impact to the front of his neck caused by this strike.”

Moreover, Dr. Laposata offered support for a theory that the defendant did not cause this injury, but rather that it was the result of a fall. She opined that the decedent struck his chin and neck on the table “[d]uring the second round of fighting, when [the decedent] and [the defendant] were falling to the cell floor” Combined with the defendant’s testimony that the decedent charged at him and picked him up, causing the fall, Dr. Laposata’s opinion seems to support a defense that the cause of death was an accident rather than the defendant’s excessive use of force in self-defense. Thus, although trial counsel’s work resulted in a conviction of manslaughter rather than murder, had counsel offered Dr. Laposata’s testimony, the jury might have credited it and returned a not guilty verdict.

The motion judge initially denied prior counsel’s motion for reconsideration of the defendant’s new trial motion because prior **[**23]** **[*407]** counsel did not provide an affidavit from Dr. Laposata. Later, when current counsel presented Dr. Laposata’s affidavit to supplement the motion to reconsider, the motion judge refused to consider it because he found that it did not constitute newly discovered evidence and therefore did not satisfy any of the requirements for a motion to reconsider. In fact, a judge may also entertain a motion to reconsider if it is based on “a particular and demonstrable error in the original ruling or decision” (citation omitted). [Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737, 741 n.8, 36 N.E.3d 32 \(2015\)](#). The defendant satisfied that standard.

Dr. Laposata’s affidavit, documenting how she would have testified as to the cause of death, strongly suggested that the motion judge made several errors in denying the new trial motion. First, in explaining his decision, the motion judge found that the evidence overwhelmingly proved that the death was caused by the beating inflicted by the defendant. Considered in light of Dr. Laposata’s affidavit, the medical evidence on the cause of death was no longer one-sided, let alone overwhelming. Second, the motion judge found that Dr. Laposata’s opinion was not the linchpin of the defense and would not have addressed the “obvious flaw” that **[**24]** the defendant used excessive force in self-defense. In fact, Dr. Laposata’s affidavit raised substantial questions about the decision not to call her as a witness in light of her powerful, contradictory opinion that the defendant’s assault did not cause the decedent’s death. Third, the motion judge found that trial counsel’s decision not to call Dr. Laposata was “not remotely manifestly unreasonable.” In fact, Dr. Laposata established that the only proffered basis for not calling her — trial counsel’s purported belief that the forensic evidence contradicted her opinion — was wrong; the blood pattern evidence on the floor was consistent with her opinion. In short, Dr. Laposata’s affidavit was at least powerful evidence that the motion judge’s denial of the defendant’s new trial motion was based on “particular and demonstrable error” (citation omitted). [Demirtshyan, 87 Mass. App. Ct. at 741 n.8](#).

We do not fault the motion judge for denying the first motion to reconsider, given that prior counsel did not provide an affidavit from Dr. Laposata. The only indication about how she would have testified was trial counsel’s assertion in his opening statement. Nevertheless, when current counsel provided Dr. Laposata’s affidavit, establishing **[**25]** that the motion judge’s decision had been based on “particular and demonstrable error,” the motion judge **[*408]** should have considered it to determine whether the defendant had raised a substantial issue warranting an evidentiary hearing and ultimately whether “justice may not have been done.” [Mass. R. Crim. P. 30 \(b\)](#), as appearing in 435 Mass. 1501 (2001).

The dispositive question is whether trial counsel's decision not to call Dr. Laposata was manifestly unreasonable, in light of the facts that (1) she would have offered an opinion helpful to the defense and (2) trial counsel had promised the jury, during opening statements, that Dr. Laposata would dispute the Commonwealth's theory as to the cause of death. To determine whether counsel's strategic decision not to call Dr. Laposata was manifestly unreasonable, "it is necessary to understand counsel's reasoning" at the time of the decision. [Velez, 479 Mass. at 513](#). See [Commonwealth v. Coonan, 428 Mass. 823, 827, 705 N.E.2d 599 \(1999\)](#) (assessing if counsel's decisions were reasonable "when made" [citation omitted]). This task is complicated because the defendant did not submit an affidavit from either of his two trial attorneys.⁷ Moreover, in his own affidavit, the defendant admits that he does not know why his trial counsel decided not to call Dr. Laposata. **[**26]**

Faced with a claim of ineffective assistance of counsel, the motion judge is sometimes "entitled to draw a negative inference from the defendant's failure to secure an affidavit from trial ... counsel." [Martinez, 86 Mass. App. Ct. at 550](#). However, the absence of an affidavit from trial counsel does not, "by itself, defeat[] a claim of ineffective assistance of counsel," [id. at 551](#), where the record demonstrates "inconsistencies that merit a closer look," [Velez, 479 Mass. at 514](#). See [Martinez, supra](#) (noting possible scenarios where prior counsel may be reluctant to cooperate with ineffective assistance allegations). See also [Commonwealth v. Miller, 101 Mass. App. Ct. 344, 352, 191 N.E.3d 327 \(2022\)](#) ("prior counsel ... may refuse to provide an affidavit despite having favorable information to assist the former client," in which case, absence of affidavit will not defeat claim of ineffective assistance).

This case is similar to *Commonwealth v. Velez*, where the defendant alleged, in a new trial motion, that trial counsel had provided ineffective assistance by failing to present a mental health or criminal responsibility defense. [Velez, 479 Mass. at \[*409\] 506](#).⁸ Prior to trial, trial counsel had filed a motion to suppress the defendant's statements to police in which he denied committing the crimes. [Id. at 508-510](#). The motion to suppress was denied. [Id. at 511](#). The new trial motion was supported **[**27]** by some evidence, but not an affidavit of trial counsel. [Id. at 513](#). The Commonwealth argued that trial counsel's decision not to pursue a criminal responsibility defense was a reasonable tactical decision because it would have contradicted the defendant's statements to police denying that he committed the crimes. [Id. at 512-513](#). The motion judge denied the defendant's request for an evidentiary hearing and his new trial motion. [Id. at 514](#).

On review, the Supreme Judicial Court noted that appellate courts "ordinarily ... defer to the discretion of a judge on whether a motion for a new trial requires an evidentiary hearing." [Velez, 479 Mass. at 515](#). "Often, affidavits alone suffice to determine the necessity of an evidentiary hearing." [Id. at 514](#). The court noted that "this is not a case where it is apparent on the face of the record that counsel was ineffective." *Id.* But the Supreme Judicial Court did not treat the lack of an affidavit from trial counsel as "a talisman that, by itself, defeats a claim of ineffective assistance of counsel." [Martinez, 86 Mass. App. Ct. at 551](#).

After considering the affidavits that were submitted to the motion judge, in combination with preliminary hearing transcripts that were not originally in the record, which showed that trial counsel **[**28]** waived a criminal responsibility defense prior to learning whether the defendant's statements would be suppressed, [Velez, 479 Mass. at 513 & n.7](#), the court "perceive[d] inconsistencies [in counsel's strategic choices] that merit[ed] a closer look," [Id. at 514](#).⁹ Because the court could not "be certain" whether trial counsel had made "a sound strategic choice," the

⁷ Again, prior counsel represented in his motion for reconsideration, but not his affidavit, that trial counsel had "declined to offer an affidavit attesting to" ineffective representation of the defendant.

⁸ The defendant in *Velez* was appealing from a conviction of murder in the first degree, and thus, the defendant would eventually have had to establish that trial counsel's performance created a substantial *likelihood* of a miscarriage of justice, whereas the defendant here will eventually have to establish a substantial *risk* of a miscarriage of justice to obtain a new trial. [Velez, 479 Mass. at 512](#). As the court implicitly concluded in *Velez*, here, the potential for a miscarriage of justice is sufficient that, instead of resolving the matter based on *Saferian's* prejudice prong, we focus at this stage on the performance prong. See *id.*

court vacated the denial of the new trial motion and remanded for [*410] an evidentiary hearing “in order to determine whether trial counsel’s strategy was reasonable.” *Id. at 514-515*. In support of its ruling, the court wrote, “[w]ithout sufficient information about trial counsel’s intentions and strategic choices, the motion judge could not determine whether it was manifestly unreasonable for trial counsel to forgo these defenses when he chose to do so” (quotation and citation omitted). *Id. at 515*.

Here, as in *Velez*, the motion judge did not receive any direct “information about trial counsel’s intentions and strategic choices,” *479 Mass. at 515*, beyond Dr. Laposata’s brief statement that she was “met outside the courtroom by one of [the defendant’s] attorneys and told that [her] testimony was not required.”¹⁰ Nevertheless, here, as in *Velez*, we “perceive inconsistencies” between Dr. Laposata’s opinion and the motion judge’s [**29] rationale for denying an evidentiary hearing. Compare *id. at 514* (“We have reviewed the defendant’s mental health records, and we cannot say that ... a [mental health] defense did not have potential support”).

As in *Velez* and *Martinez*, an evidentiary hearing is necessary to determine whether trial counsel’s decision to not call Dr. Laposata was manifestly unreasonable, particularly after the opening statement promising her testimony. Accordingly, we vacate so much of the order denying the defendant’s motion for a new trial and the order denying the second motion to reconsider that were entered as to trial counsel’s alleged ineffectiveness for failure to call Dr. Laposata, and remand this case to the Superior Court for an evidentiary hearing at which the defendant may present testimony from witnesses including trial counsel and Dr. Laposata. See *Martinez, 86 Mass. App. Ct. at 552* (“The hearing will permit the judge ... to hear from plea counsel ...”).¹¹

c. *Trial counsel’s decision not to introduce medical records.* The defendant also alleges that his trial counsel provided ineffective assistance by failing to introduce his hospital records documenting his rotator cuff injury two months before the fight, and documenting injuries sustained [**30] during the fight. We agree with the motion judge, on this record, that counsel’s decision not to introduce these hospital records does not warrant a new trial.¹² As the motion judge noted, the Commonwealth did not dispute that the defendant suffered injuries in the fight. The issue was whether he caused the decedent’s death. Additional evidence of the defendant’s injuries would not have materially affected the jury’s resolution of that question. Likewise, the fact that the defendant had suffered a rotator cuff injury at least two months earlier would not have been material where the evidence demonstrated that the defendant clearly inflicted a severe beating on the decedent, including multiple subgaleal hemorrhages, between his scalp and skull, and a single subdural hemorrhage — “an indicator of significant head injury” — within his brain.

Conclusion. The orders dated December 10, 2018, and January 4, 2019, denying the defendant’s motion to revise and revoke and the related motion to reconsider, are affirmed. So much of the May 18, 2021 order denying the

⁹ Specifically, trial counsel ruled out a criminal responsibility defense before knowing whether the jury would hear the defendant’s statements that were the subject of the motion to suppress and would have contradicted that defense. *Velez, 479 Mass. at 512-513 & n.6*.

¹⁰ Although prior counsel’s affidavit indicates that he spoke with trial counsel, it is not clear from the affidavit whether those discussions were the source of the information he relayed regarding their strategic choices.

¹¹ Because we remand for an evidentiary hearing to determine whether trial counsel’s decision not to call Dr. Laposata was manifestly unreasonable, we do not address the defendant’s related argument that counsel was ineffective in promising, during the defense’s opening statement, to call Dr. Laposata and then failing to do so. Such a broken promise could be grounds for a finding of ineffective assistance. See *Commonwealth v. Duran, 435 Mass. 97, 109, 755 N.E.2d 260 (2001)*. But the reasonableness of trial counsel’s decision “will depend on such factors as the nature and extent of the promise made in the opening statement, any strategic justifications for the subsequent decision not to produce the evidence, and the likely impact on the jury of the failure to produce the promised evidence.” *Id. at 110*. We expect the evidentiary hearing will shed light on these issues.

¹² We do not mean to rule out revisiting those issues if they are shown to have additional significance based on what emerges at the evidentiary hearing.

motion for a new trial and the July 17, 2024 order denying the second motion to reconsider based on the failure to call Dr. Laposata, **[**31]** are vacated, and the case is remanded to the Superior Court for further proceedings consistent with this opinion. Those orders are otherwise affirmed.

So ordered.

End of Document

1384CR10160 Commonwealth vs. Jurczuk, Lesley

- Case Type:
Indictment
- Case Status:
Open
- File Date
03/05/2013
- DCM Track:
C - Most Complex
- Initiating Action:
MURDER c265 §1
- Status Date:
03/05/2013
- Case Judge:
- Next Event:

[All Information](#) | [Party](#) | [Charge](#) | [Event](#) | [Tickler](#) | [Docket](#) | [Disposition](#)

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Party Charge Information

- **Jurczuk, Lesley**
- - Defendant
- Charge # 1:
- **265/1-0 - Felony** MURDER c265 §1

- Original Charge
- 265/1-0 MURDER c265 §1 (Felony)
- Indicted Charge
- Amended Charge

Charge Disposition
Disposition Date
Disposition
11/17/2014
Guilty Verdict - Lesser Included

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
03/22/2013 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
05/16/2013 02:00 PM	Criminal 6		Pre-Trial Conference		Not Held
05/16/2013 02:00 PM	Criminal 4		Pre-Trial Conference		Held as Scheduled
06/20/2013 02:00 PM	Criminal 6		Hearing		Not Held
06/20/2013 02:00 PM			Hearing		Held as Scheduled
08/15/2013 02:00 PM	Criminal 6		Status Review		Not Held
09/24/2013 02:00 PM	Criminal 6		Pre-Trial Hearing		Rescheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
10/17/2013 02:00 PM	Criminal 6		Pre-Trial Hearing		Held as Scheduled
10/31/2013 02:00 PM	Criminal 6		Hearing		Rescheduled
11/19/2013 02:00 PM	Criminal 6		Hearing		Rescheduled
12/30/2013 09:30 AM	Criminal 6		Hearing		Held as Scheduled
01/24/2014 09:00 AM	Criminal 9		Non-Evidentiary Hearing to Dismiss		Held as Scheduled
01/24/2014 09:00 AM	Criminal 6		Hearing on Motion to Continue		Held as Scheduled
01/24/2014 02:00 PM	Criminal 6		Status Review		Not Held
02/04/2014 09:00 AM	Criminal 6		Trial Assignment Conference		Canceled
02/04/2014 02:00 PM	Criminal 6		Trial Assignment Conference		Held as Scheduled
03/04/2014 09:00 AM	Criminal 6		Final Pre-Trial Conference		Canceled
03/04/2014 09:00 AM	Criminal 9		Non-Evidentiary Hearing on Suppression		Held as Scheduled
03/06/2014 02:00 PM	Criminal 6		Status Review		Canceled
03/18/2014 09:00 AM	Criminal 6		Jury Trial		Canceled
04/24/2014 02:00 PM	Criminal 6		Hearing on Motion to Continue		Held as Scheduled
05/20/2014 02:00 PM	Criminal 6		Final Pre-Trial Conference		Not Held
05/20/2014 02:00 PM	Criminal 4		Final Pre-Trial Conference		Rescheduled
06/10/2014 09:00 AM	Criminal 6		Jury Trial		Not Held
06/10/2014 09:00 AM	Criminal 4		Jury Trial		Rescheduled
09/11/2014 02:00 PM	Criminal 6		Final Pre-Trial Conference		Rescheduled
10/02/2014 02:00 PM	Criminal 9		Final Pre-Trial Conference		Held as Scheduled
10/07/2014 02:00 PM	Criminal 3		Hearing		Canceled
10/09/2014 09:00 AM	Criminal 6		Jury Trial		Not Held
10/09/2014 09:00 AM	Criminal 3		Jury Trial		Rescheduled
10/09/2014 09:00 AM	Criminal 6		Jury Trial		Canceled
10/10/2014 02:00 PM	Criminal 3		Hearing		Held as Scheduled
10/21/2014 09:00 AM	Criminal 3		Jury Trial		Rescheduled
10/29/2014 09:00 AM	Criminal 3		Hearing		Held as Scheduled
10/30/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
10/31/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
11/03/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/04/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/05/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/10/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/12/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/13/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/14/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
11/17/2014 09:00 AM	Criminal 3		Jury Trial		Held as Scheduled
12/02/2014 09:00 AM	Criminal 3		Hearing		Held as Scheduled
12/03/2014 09:00 AM	Criminal 3		Hearing for Sentence Imposition		Held as Scheduled
06/28/2023 09:30 AM	Criminal 6		Motion Hearing	Ullmann, Hon. Robert L	Rescheduled
08/15/2023 02:00 PM	Criminal 6		Motion Hearing	Ullmann, Hon. Robert L	Held - Under advisement

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	03/22/2013	03/22/2013	0	12/18/2014
Final Pre-Trial Conference	03/22/2013	03/04/2014	347	12/18/2014
Case Disposition	03/22/2013	03/17/2014	360	12/18/2014
Under Advisement	08/15/2023	09/14/2023	30	09/13/2023

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/05/2013	Indictment returned	1	
03/05/2013	MOTION by Commonwealth for arrest warrant to issue; filed & allowed. McIntyre, J	2	Image
03/05/2013	Warrant on indictment issued		
03/05/2013	Warrant was entered onto the Warrant Management System 3/5/2013		
03/05/2013	Order of notice of finding of murder indictment	3	
03/05/2013	Notice & copy of indictment sent to Chief Justice & Atty General		
03/22/2013	Defendant brought into court.		
03/22/2013	Order of notice of finding of murder indictment w/return of service endorsed thereon was received from the Sheriff and Filed.	3	
03/22/2013	Appearance of Deft's Atty: Timothy R Flaherty	3.1	
03/22/2013	Deft arraigned before Court. Indictment Read to Offense #001.		
03/22/2013	RE Offense 1:Plea of not guilty		
03/22/2013	Mittimus without bail issued to Suffolk County Jail (Nashua Street) w/o/p. Mittimus issued.		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/22/2013	Assigned to track "C" see scheduling order		
03/22/2013	Tracking deadlines Active since return date		
03/22/2013	Case Tracking scheduling order mailed 3/22/2013		
03/22/2013	Continued to 5/14/2013 for hearing on PTC		
03/22/2013	Continued to 9/24/2013 for hearing on PTH		
03/22/2013	Continued to 3/4/2014 for hearing on FPTH		
03/22/2013	Continued to 3/18/2014 for hearing on PTD		
03/22/2013	Commonwealth files statement of the case.	4	
03/22/2013	Commonwealth files notice of discovery I. Wong, Mag - P. Haggan, ADA - ERD/JAVS - T. Flaherty, Attorney	5	
03/22/2013	Warrant canceled on the Warrant Management System 3/22/2013		
04/09/2013	Commonwealth files statement of the Case	6	
05/16/2013	Defendant not present.		
05/16/2013	Filed: Joint Pre-Trial Memorandum	7	
05/16/2013	Commonwealth files notice of discovery.	8	
05/16/2013	Commonwealth files motion and order for taking of a biological sample from the defendant.	9	
05/16/2013	Case continued by agreement to June 20, 2013 at 2pm, for Buccal swab.(Sentence being served at South Bay. Defendant is being held at Baranowki). Brady, J- P. Haggan, ADA - T.Flaherty, Atty, N.McCann, CR.		
06/20/2013	Defendant brought into court		
06/20/2013	Deft files Opposition to taking Buccal Swab	10	
06/20/2013	Hearing Re: Paper #9. After hearing Motion Paper #9 allowed for the reasons stated in the motion. Kottmyer, J		
06/20/2013	Case continued by agreement to 8/15/13 at 2:00 for a status hearing. Jail List and Habe to S. Bay. Kottmyer, J., P. Haggan, ADA., T. Flaherty, Atty., W. Greenlaw, Court Reporter		
10/17/2013	Deft files Motion for rule 17 (a) 2 Summons for records re:Office of the Suffolk County Sheriff's records regarding Lesley Jurzcuk, Alexander Callahan and Shaquille O' Neal Manago.	11	
10/17/2013	Case continued to 10/31/2013 @2:00pm for Lampron Hearing, 11/19/2013 @2:00 for filing of any motions to dismiss or suppress and 12/30/2013 @9:30am for status re:defense as diminished capacity. All dates are by agreement. Habe to South Bay for 10/31/2013 and jail list. Locke, RAJ - P. Haggan, ADA - JAVS/ERD - T. Flaherty, Attorney		
10/17/2013	Defendant not present. Status conference held before Locke, RAJ.		
12/12/2013	Defendant files: Motion for Rule 17(a)(2) Summons for Records Re: Office of the Suffolk County Sheriff Records Regarding Lesley Jurzcuk, Alexander Callahan and Shaquille O'Neal Manago	12	
12/30/2013	Defendant brought into court.		
12/30/2013	Suffolk County Sheriff Department's Opposition to Defendant's Motion for Third Party Records filed.	13	
12/30/2013	Hearng held before Locke, RAJ. on Paper #12. After hearing, motion is taken under advisement.		
12/30/2013	Defendant's Consolidated Motion to Dismiss filed.	14	
12/30/2013	Continued to 1/24/14 at 9:00 a.m. for Hearing on Defendant's Motion to Dismis and to 906 for filing of Motion to Suppress. Locke, RAJ. - M. Lee, ADA for P. Haggan - T. Flaherty, Atty - M. Romero, SCSD - N. King, CR.		
12/30/2013	The Court, Locke, RAJ. allows Paper #12 in part as endorsed. (Copy of endorsement e-mailed to parties).		
01/24/2014	Defendant brought into court.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
01/24/2014	Commonwealth files Memorandum in Opposition to The Defendant's Consolidated Motion to Dismiss.	15	
01/24/2014	Deft files Motion to Suppress Statements with affidavit and memorandum in support thereof.	16	
01/24/2014	After hearing Motion to Dismiss P#14, taken under advisement. Salinger, J. - P. Haggan, ADA - T. Flaherty, Attorney - Javs.		
01/28/2014	MEMORANDUM & ORDER: Denying Defendant's Motion to Dismiss Indictment. Salinger, J. Copies mailed to both parties 1/29/14.	17	
01/28/2014	MOTION to Dismiss (P#14) denied as endorsed. Salinger, J.		
02/04/2014	Defendant brought into court - scheduling conference held before Kottmyer, J. The parties agree to the following dates and waive Rule 36: 5/20/2014 FPTC at 2:00 PM and 6/10/2014 for trial. Case continued to 3/6/2014 at 2:00 PM by agreement for status re: records - (see P#12; subpoenas to issue to Suffolk County Sheriff's Dept) Kottmyer, J - P. Haggan, ADA - N. King, Court Reporter - T. Flaherty, Atty		
02/06/2014	Summons issued to Suffolk County Sheriff, returned by 3/4/2014 to Suffolk Superior Criminal Clerk's Office.		
02/27/2014	Other records from Suffolk County Sherriff's Department received Note: Included is one sealed package to be turned over to Commonwealth and one sealed package to be turned over to Defense Counsel. The Court Clerks office retains the original list provide by the Suffolk County Sheriffs Department.		
03/04/2014	Defendant brought into court.		
03/04/2014	Commonwealth files Pre-Motion Hearing Memorandum in Opposition to the Defendant's Motion to Suppress Statements.	18	
03/04/2014	After hearing Motion to Suppress P#16, Denied in Open Court (See Record) Case has next Court Date). Salinger, J. - P. Haggan, ADA - T. Flaherty, Attorney - Javs.		
03/25/2014	Commonwealth files Notice of Discovery III (Bates Stamp 602-1047)	19	
04/07/2014	Commonwealth files: Notice of Discovery IV	20	
04/17/2014	Deft files Motion to Continue the Trial	21	
04/23/2014	Continued to 4/24/2014 for hearing on motion to continue ctrm 906 @ 2:00pm.Deft's appearance waived by counsel attest C .Kalell(acm)		
04/24/2014	Defendant not in Court, Presence waived this day by counsel, hrg re: Motion to Continue Trial held.		
04/24/2014	Appearance of Deft's Co-Atty: Isaac Borenstein filed	22	
04/24/2014	After hearing Deft's Motion (P#21) Allowed without Objection, Kottmeyer, J. Rule 36 waived by Counsel. 5/20/14 FPTH event canceled. 6/10/14 Trial event canceled.		
04/24/2014	Continued by agreement to 9/11/14 at 2PM re: FPTH (Ctrm 906) and by agreement to 10/9/14 re: Trial (Ctrm 906) - Kottmyer, J - P.Haggan, ADA - N.King, CR - I.Borenstein, Atty		
08/07/2014	Commonwealth files Notice of Discovery V (Bates stamp 1256-1298)	23	
09/10/2014	Commonwealth files Notice of discovery VI (Bates stamp 1299-1306)	24	
09/11/2014	Defendant brought into court, status conference held before Connors, J.		
09/11/2014	Commonwealth files Certificate of compliance	25	
09/11/2014	Case continued until 10/7/2014 by agreement for FPTC and hearing re motion in limine. Connors, J. - P. Haggan, ADA. - T. Flaherty/l. Borenstein, Atty. - R. LeRoux, C.R.		
09/29/2014	Other records from NSJ received		
10/02/2014	Defendant brought into court.		
10/02/2014	Commonwealth files Motion for View.	26	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/02/2014	Commonwealth files Notice of Intent, Pursuant to Commonwealth v. Adjutant and Commonwealth v. Morales, To Introduce Rebuttal Evidence of Defendant's Prior Violent Acts as Relevant to Issue of " First Aggressor ".	27	
10/02/2014	Filed: Joint Pre-Trial Memorandum.	28	
10/02/2014	Deft files Notice of Preferred Adjutant Evidence.	29	
10/02/2014	Continued by agreement to 10/30/2014 for Trial Third Session Courtroom 808. Hely, J. - P. Haggan, ADA - T. Flaherty and I. Borenstein, Attorney - Javs.		
10/10/2014	Defendant brought into court. Hearing held.		
10/10/2014	Deft files Motion in Limine Regarding Adjutant Evidence.	30	
10/10/2014	Commonwealth files response and opposition to defendant's notice re: proposed Adjutant evidence.	31	
10/10/2014	After hearing, defendant's motion regarding adjutant evidence is taken under advisement.		
10/10/2014	Case held in Session - Ready for trial on October 30, 2014.		
10/10/2014	Continued to 10-29-14 by order of the Court for remand in Third Session (Ct. Rm. 808). Habe to South Bay and Souza. Hely, J. - P. Haggan, ADA - T. Flaherty & J. Bornstein, Attys.		
10/28/2014	Deft files motion in limine re: photographs of victim	32	
10/28/2014	Deft files motion in limine re: photograph of defendant	33	
10/28/2014	Deft files motion in limine to exclude prospective evidence of consciousness of guilt	34	
10/28/2014	Deft files motion in limine to exclude prior specific acts of violence committed by defendant	35	
10/28/2014	Deft files motion in limine re: photographic evidence of defendant's underwear covered in fecal matter	36	
10/28/2014	Deft files motion in limine re: photographic evidence of injuries sustained during jail fight with Michael Lee in connection with proffered adjutant evidence	37	
10/28/2014	Deft files motion in limine re: use of the term "victim"	38	
10/28/2014	Deft files motion in limine to prohibit decedent's family from testifying	39	
10/29/2014	Commonwealth files proposed statement of the case and proposed individual voir dire questions for purposes of jury impanelment	40	
10/29/2014	Commonwealth files motion for judicial inquiry into criminal history records of potential trial jurors ect. (see mtn)	41	
10/29/2014	Commonwealth files motion in limine re: autopsy photograph of victim	42	
10/29/2014	Commonwealth files motion to exempt family members of victim and certain investigating Detective from general order of sequestration	43	
10/29/2014	Commonwealth files motion in limine re: photograph of victim	44	
10/29/2014	Commonwealth files supplemental response and opposition to defendant's notice re: proposed Adjutant evidence	45	
10/29/2014	Commonwealth files list of potential witnesses	46	
10/30/2014	Defendant brought into court. Commonwealth moves for trial. Defendant answers ready. Court Hely, J. orders fifteen (15) jurors impaneled. During impanelment, Court elects to go with sixteen (16) jurors. Impanelment process complete with sixteen (16) jurors (not sworn).		
10/30/2014	Court recognizes personally without surety for witnesses Shaquille Manago & Alyeri for their appearances on 11/3/14. Hely, J. - P. Haggan, ADA - P. Pietrella, C./R. - T. Flaherty & I Bornstein, Atty		
10/30/2014	Deft files motion for individual voir dire and proposed questions for jurors	47	
10/30/2014	Deft files motion in limine re: state of mind of decedent	48	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
10/31/2014	Defendant brought into court. Court conducts individual voir dire with two (2) jurors: J#32 in S#4 & Juror #51 in S#8, after hearing, jurors excused for hardship. Court elects to replace jurors and re-open impanelment process.		
10/31/2014	Commonwealth files opposition to defendant's motion in limine re: state of mind	49	
10/31/2014	Impanelment complete with sixteen (16) jurors present and sworn. Indictments formally read / Opening statements / Evidence begins. Hely, J. - P. Haggan, ADA - P. Pietrella, C./R. - T. Flaherty & I. Borenstein, Atty's		
11/03/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - P. Haggan, ADA - D. Cercone, C./R. - T. Flaherty & I Borenstein, Atty's		
11/04/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. Court conducts a view of the crime scene. D. Cercone, C./R.		
11/04/2014	Commonwealth files requests for Habeas Corpus for two (2) witnesses	50	
11/04/2014	requests (P#50) for habeas corpus, allowed. Hely, J.		
11/05/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - D. Cercone, C./R.		
11/10/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - E. Tyler, C./R.		
11/12/2014	Deft files request for jury instructions	51	
11/12/2014	Court recognizes personally without surety for tew (2) witness W.W. and A.M. for their testimony on 11/13/14		
11/12/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - L. McInnes, C./R.		
11/13/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. Commonwealth rests its case in chief. Defendant rests. Charge conference held. Hely, J. - E.Tyler, C./R.		
11/13/2014	Commonwealth files request for jury instructions	52	
11/13/2014	Deft files motion for required finding of not guilty at the close of Commonwealth's evidence	53	
11/13/2014	MOTION (P#53) after hearing, denied (Charles J. Hely, Justice).		
11/13/2014	Defendant's renewed motion (P#53) for required finding of not guilty at the close of all evidence, after hearing, denied. Hely, J.		
11/14/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - D. Cercone, C./R.		
11/14/2014	Commonwealth files supplemental request for jury instructions	54	
11/14/2014	Case proceeds with closing arguments and charge.		
11/14/2014	Court appoints juror #68 in S# 11 W.J. as foreperson of the jury		
11/14/2014	In the final submission of the case to the jury with a panel of sixteen (16) jurors present, the Court orders jury reduced to twelve (12) members and instructs the clerk to withdraw from the barrel names of Juror # 62 in S# 9 D.L.. / J#67 in S#10 J.R. / J#118 in S#1 E. M-H. / J#3 in S#14 F.R. each designated as alternate jurors. Jury deliberations begin at 1:35 pm.		
11/14/2014	Appearance of Commonwealth's Atty: Teresa K. Anderson		
11/14/2014	Court allows jury to separate and reconvene on Monday - 11/17/14 Hely, J. - D. Cercone, C./R.		
11/17/2014	Defendant brought into court. Trial resumes with sixteen (16) jurors present before Hely, J. - M. Pollier, C./R.		
11/17/2014	Jury returns verdict at 2:30pm		
11/17/2014	RE Offense 1:Guilty verdict (lesser offense)		
11/17/2014	Verdict affirmed, verdict slip filed	56	
11/17/2014	Mittimus without bail issued		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/17/2014	Continued to 12/3/14 by O/CT for sentence imposition in Ill session. Hely, J. - P. Haggan, ADA - M. Pollier, C./R. - T. Flaherty & I. Borenstein, Atty's		
11/17/2014	Deft files supplemental request for jury instructions	55	
12/03/2014	Defendant brought into court for sentence imposition. Commonwealth moves for sentencing.		
12/03/2014	As to Off. # 001 - M.C.I. at Cedar Junction - Max: Twenty (20) Years - Min: Eighteen (18) Years * Forthwith not withstanding sentence presently serving at S. Bay. Mittimus issued		
12/03/2014	Victim-witness fee assessed: \$90.00 imposed (Charles J. Hely, Justice)		
12/03/2014	Sentence credit given as per 279:33A: Zero (0) days credit		
12/03/2014	Notified of right of appeal under Rule 64		
12/03/2014	Notified of right of appeal under Rule 65. Hely, J. - P. Haggan, ADA - D. Cercone, C./R. - T. Flaherty & I. Borenstein, Atty's		
12/03/2014	Commonwealth files sentencing memorandum	57	
12/03/2014	Deft files sentencing memorandum	58	
12/09/2014	Attorney, Timothy R Flaherty's MOTION to withdraw as counsel of record for Lesley Jurczuk and request for appointment of Appellate Counsel	59	
12/09/2014	NOTICE of APPEAL FILED by Lesley Jurczuk	60	
12/09/2014	Notice of appeal from sentence to Cedar Junction MCI (Walpole) filed by Lesley Jurczuk	61	
12/18/2014	Court Reporter Javs SUF CR 9 is hereby notified to prepare one copy of the transcript of the evidence of 01/24/2014 Hearing re: Motion to Dismiss before Salinger, J		
12/18/2014	Court Reporter Javs SUF CR 9 is hereby notified to prepare one copy of the transcript of the evidence of 03/04/2014. Hearing re: Motion to Suppress before Salinger, J		
12/18/2014	Court Reporter Pietrella, Paula is hereby notified to prepare one copy of the transcript of the evidence of 10/30/31,2014 - Motions, Impanelment, Trial before Hely, J		
12/18/2014	Court Reporter Cercone, Diane is hereby notified to prepare one copy of the transcript of the evidence of 11/03/04/05/14/2014 and 12/03/2014. Trial before Hely, J		
12/18/2014	Court Reporter Tyler, Elizabeth C. is hereby notified to prepare one copy of the transcript of the evidence of 11/10/13/2014. Trial before Hely, J		
12/18/2014	Court Reporter McInnes, Lawrence (Per Diem) is hereby notified to prepare one copy of the transcript of the evidence of 11/12/2014 . Trial before Hely, J		
12/18/2014	Court Reporter Pollier, Allison is hereby notified to prepare one copy of the transcript of the evidence of 11/17/2014 . Trial before Healy, J		
12/29/2014	Victim-witness fee paid as assessed \$90.00		
01/13/2015	Transcript of testimony received volumes January 24, 2014 from Transcript of proceedings from Court Reporter Javs SUF CR 9		
02/11/2015	Transcript of testimony received volumes # October 30, 31, 2014 from Transcript of proceedings from Court Reporter Pietrella, Paula		
04/08/2015	Transcript of testimony received volumes November 11, 2014 from Transcript of proceedings from Court Reporter McInnes, Lawrence (Per Diem)		
04/15/2015	Transcript of testimony received volumes November 10, 2014 from Transcript of proceedings from Court Reporter Tyler, Elizabeth C.		
04/22/2015	Transcript of 11-13-2014 received		
04/24/2015	Appearance of Deft's Atty: Kevin J Reddington, filed	62	
05/05/2015	Transcript of testimony received volumes November 3, 4, , 2014 and December 3, 2014 from Transcript of proceedings from Court Reporter		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
	Cercone, Diane		
05/18/2015	Order from Appellate Division of the Superior Court Department for the Review of Sentence it is ORDERED that the judgement imposing said sentences stand and that said appeal be and is hereby dismissed. Welch, Page & Locke, JJ.	63	
07/10/2015	Transcript of 12-3-14 received from Court Reporter Cercone, Diane		
10/20/2015	CD of Transcript of 11/17/2014 09:00 AM Jury Trial received from Court Reporter Allison Pollier.		
07/13/2016	Notice sent to attorneys that transcripts are available. Transcripts sent to J. Zanini, A.D.A., and Kevin Reddington, Esq.		
08/02/2016	Appeal: notice of assembly of record		
08/02/2016	Statement of Case Appeal filed:		
08/05/2016	Notice of Entry of appeal received from the Appeals Court Case was entered on August 3, 2016. Filed.	64	
06/07/2017	Court Reporter Allison Pollier is hereby notified to prepare one copy of the transcript of the evidence of 11/17/2014 09:00 AM Jury Trial		
10/04/2017	Other 's Motion to Authorize Release of Grand Jury Minutes Filed by Suffolk County Sheriffs Dept. (Copy with Docket to Roach,RAJ)	65	
10/13/2017	Commonwealth 's Response to Motion to Authorize Release of Grand Jury Minutes. (Notice sent to Roach-RAJ with copy of Response and Docket Sheets)	66	
10/13/2017	Commonwealth 's Motion for a Protective Order. (Notice sent to Roach-RAJ with copy of Motion and Docket Sheets)	67	
10/16/2017	Endorsement on Motion to Authorize Release of Grand Jury Minutes, (#65.0): ALLOWED for the reasons stated (Copy and Notice Sent to A Forbes, AAG, R Griffin, ATTY, K Reddington, ATTY, N Brandt, ADA, and T Anderson, ADA) Judge: Roach, Christine M		 Image
10/16/2017	Endorsement on Motion for a Protective Order, (#67.0): ALLOWED Protective Order Issued (Copy and Notice Sent to A Forbes, AAG, R Griffin, ATTY, K Reddington, ATTY, N Brandt, ADA, and T Anderson, ADA) Judge: Roach, Christine M		 Image
09/19/2018	Rescript received from Appeals Court; judgment AFFIRMED . (Faxed to probation)	68	 Image
11/15/2018	Pro Se Defendant 's Motion to revise and revoke filed (Copy of 69,70,71 sent to Roach, RAJ with docket sheets)	69	 Image
11/15/2018	Pro Se Defendant 's Motion for leave to amend motion to revoke and revise sentence filed (Copy of 69,70,71 sent to Roach, RAJ with docket sheets)	70	 Image
11/15/2018	Pro Se Defendant 's Motion for leave to file ex parte motions filed (Copy of 69,70,71 sent to Roach, RAJ with docket sheets)	71	 Image
12/10/2018	Endorsement on Motion to revise and revoke , (#69.0): DENIED "Following review, motion denied, as it fails to raise a substantial issue by self serving affidavit" (Copy to Defendant Pro-Se and J. Zanini, ADA) Judge: Roach, Christine M		 Image
12/10/2018	Endorsement on Motion for leave to amend motion to revoke and revise sentence filed, (#70.0): DENIED (Copy to Defendant Pro-Se and J. Zanini, ADA) Judge: Roach, Christine M		 Image
12/10/2018	Endorsement on Motion for leave to file ex parte motions, (#71.0): DENIED "As Moot" Copy to Defendant Pro-Se and J. Zanini, ADA Judge: Roach, Christine M		 Image
01/02/2019	Pro Se Defendant 's Motion for reconsideration of defendant's motion to revoke and revise sentence (Copy and docket sheets sent to Roach,RAJ) (Filed)	72	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/04/2019	Endorsement on motion for reconsideration of defendant's motion to revise and revoke sentence, (#72.0): DENIED (Copy to Defendant Pro-Se and J. Zanini, ADA)		 Image
01/04/2019	The following form was generated: A Clerk's Notice was generated and sent to: Defendant: Lesley Jurczuk		
01/17/2019	Notice of appeal filed by defendant (Pro-Se) regarding the Denial of His Motion to Revise and Revoke Sentence on December 10, 2018 and Reconsideration of Motion to Revise and Revoke Sentence on January 4, 2019	73	 Image
01/23/2019	Appeal: notice of assembly of record sent to Counsel ADA J.Zanini, Defendant (Pro-Se), and Clerk J.Stanton		
01/23/2019	Appeal: Statement of the Case on Appeal (Cover Sheet).	74	
01/28/2019	Notice of Entry of appeal received from the Appeals Court Case was entered in this court on January 23, 2019	75	 Image
10/18/2019	Notice of docket entry received from Appeals Court RE#17: Allowed. Appellant is granted leave to file, and the trial court to consider, a motion for new trial. Appellate proceedings stayed to 11/22/19. Status report due then regarding the filing of the motion	76	 Image
01/25/2021	Attorney appearance On this date Erin D Knight, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth		
01/25/2021	Commonwealth 's Notice of appearance filed.	77	 Image
01/29/2021	Defendant 's Motion for new trial with Affidavit. Filed (Notice sent to Ullmann,J with copy of motion and docket sheets).	78	 Image
02/09/2021	Endorsement on Defendant 's Motion for new trial, (#78.0): Other action taken "Commonwealth to respond by 4/16/21" Copy to C. Campbell, ADA and B. Grossberg, Attorney and Erin Knight, ADA		 Image
02/10/2021	The following form was generated: A Clerk's Notice was generated and sent to: Defendant: Lesley Jurczuk C. Campbell, ADA Prosecutor, Attorney: Erin D Knight, Esq.		
04/16/2021	Opposition to paper #78.0 defendant's motion for a new trial filed by Commonwealth Notice sent Ullmann, RAJ. with copy of (P#79), and docket sheets along w/(P#78)	79	 Image
05/18/2021	MEMORANDUM & ORDER: on Defendant's Motion for New Trial. Motion for New Trial (Paper # 78) DENIED. See Scanned Memorandum of Decision Judge: Ullmann, Hon. Robert L (Notice sent to Atty Grossberg and ADA E. Knight with a copy of Decision)	80	 Image
06/01/2021	Notice of appeal filed by defendant regarding the Denial of His Motion for New Trial.	81	 Image
06/02/2021	Notice of assembly of record sent to Counsel Applies To: Grossberg, Esq., Bernard (Attorney) on behalf of Jurczuk, Lesley (Defendant); Campbell, Esq., Cailin (Attorney) on behalf of Commonwealth (Prosecutor)		 Image
06/02/2021	Notice to J. Stanton, Clerk of the Appeals Court of Assembly of Record		 Image
06/02/2021	Appeal: Statement of the Case on Appeal (Cover Sheet).	82	 Image
09/02/2021	Appeal entered in Appeals Court on 09/02/2021 docket number 2019-P-0124 ORDER: The appeals 2019-P-0124 and 2021-P-0484 are consolidated for briefing and decision. 2019-P-0124 is closed. All papers shall be transferred to 2021-P-0484. All future filings shall refer only to 2021-P-0484. Appellate proceedings stayed to 9/13/21. Status report due then concerning efforts undertaken since the date of the 8/11/21 status report to obtain the outstanding affidavits and complete the motion to reconsideration to be filed in the trial court.	83	 Image
09/02/2021	Notice of docket entry received from Appeals Court ORDER: The appeals 2019-P-0124 and 2021-P-0484 are consolidated for briefing and decision. 2019-P-0124 is closed. All papers shall be transferred to 2021-P-0484. All future filings shall refer only to 2021-P-0484. Appellate proceedings stayed to 9/13/21. Status report due then concerning efforts undertaken since the date of the 8/11/21 status report to obtain the outstanding affidavits and complete the motion to reconsideration to be filed in the trial court	84	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
07/05/2022	Notice of docket entry received from Appeals Court RE#13: Appellate proceedings stayed to 9/1/22. Status report due then regarding the status of the motion for reconsideration filed in the trial court or within 7 days of a decision on the motion, whichever is sooner.	85	 Image
07/08/2022	Defendant 's Motion for reconsideration of Motion for New Trial with Exhibits A, B and C (Impounded) and Affidavit of the Defendant in Support of Defendant's Motion for Reconsideration of Motion for New Trial and Affidavit of Bernard Grossberg, Esq., in Support of Defendant's Motion for Reconsideration of Motion for New Trial, filed (Notice, copy and docket sheets sent to Ullmann, RAJ.)	86	 Image
07/22/2022	Endorsement on Motion for Reconsideration of Motion for New Trial, (#86.0): Other action taken Commonwealth to Respond by 09/08/2022. The Commonwealth should cite to Arguments in Paper #79 instead of repeating them in detail (Notice sent to ADA E. Knight and Atty. B. Grossberg).		 Image
09/07/2022	Notice of docket entry received from Appeals Court RE#14: Appellate proceedings stayed to 10/17/22. Status report due then concerning trial court's disposition of pending motion for reconsideration.	87	 Image
11/01/2022	Notice of docket entry received from Appeals Court RE#15: The status report is accepted for filing. Appellate proceedings remain stayed to 11/15/2022. A status report from the Commonwealth is due then regarding the filing of a response to the defendant's motion for reconsideration as ordered by the trial court on 7/22/22. Notice/attest/Ullmann, J.	88	 Image
11/07/2022	Defendant 's Motion to Summarily Allow Defendant's Motion to Reconsideration of Motion for a New Trial or in the Alternative, Motion to Release the Defendant on Bail Pending Decision on Motion for Reconsideration of Motion for a New Trial with Exhibit A. Filed (Motion and Docket Sheets sent to Ullmann, RAJ)	89	 Image
11/08/2022	Commonwealth 's Notice of Appearance re: Assistant District Attorney Erin Knight	90	 Image
11/08/2022	Commonwealth 's Motion to Enlarge the Date for Filing a Response, with Affidavit (Notice sent to Ullmann-RAJ with Copy of Motion and Docket Sheets).	91	 Image
11/14/2022	Endorsement on Motion to Enlarge the Date for Filing a Response, (#91.0): ALLOWED "ALLOWED." (Copy and Notice sent to ADA E. Knight and Attorney B. Grossberg)		 Image
11/15/2022	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Bernard Grossberg, Esq. Law Office of Bernard Grossberg 38 Green St, Milton, MA 02186 Prosecutor, Attorney: Erin D Knight, Esq. Suffolk County District Attorney's Office 1 Bulfinch Place, Boston, MA 02114		
11/23/2022	Commonwealth 's Motion to Enlarge the Date for Filing a Response with affidavit, filed. (notice, copy of motion and docket sheets sent to Ullmann, RAJ)	92	 Image
12/14/2022	Commonwealth 's Motion to Accept Its Opposition as Timely Filed, filed. (notice, copy of motion and docket sheets sent to Ullmann, RAJ)	93	 Image
12/14/2022	Opposition to paper #86.0 Motion for Reconsideration of The Motion for New Trial (with appendix) filed by Commonwealth (copy of opposition, notice and docket sheets sent to Ullmann, RAJ)	94	 Image
12/14/2022	Endorsement on Motion to Enlarge the Date for Filing a Response, (#92.0): ALLOWED (notice and copy of endorsement sent to ADA E. Knight and Atty B. Grossberg)		 Image
12/16/2022	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Bernard Grossberg, Esq. Law Office of Bernard Grossberg 38 Green St, Milton, MA 02186 Prosecutor, Attorney: Erin D Knight, Esq. Suffolk County District Attorney's Office 1 Bulfinch Place, Boston, MA 02114		
01/04/2023	Endorsement on Motion to Accept Its Opposition as Timely Filed, (#93.0): ALLOWED "ALLOWED." (Copy and Notice sent by mail to ADA E. Knight and Atty B. Grossberg)		 Image
01/05/2023	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Bernard Grossberg, Esq. Law Office of Bernard Grossberg 38 Green St, Milton, MA 02186 Prosecutor, Attorney: Erin D Knight, Esq. Suffolk County District Attorney's Office 1 Bulfinch Place, Boston, MA 02114		
01/09/2023	Defendant 's Motion to Enlarge Time to File Reply to Commonwealth's Opposition to the Defendant's Motion for Reconsideration of Motion for New Trial, filed. (Notice, Copy, and Docket Sheets sent to Ullmann, RAJ)	95	 Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
01/13/2023	Endorsement on Motion to Enlarge Time to File Reply to Commonwealth's Opposition to the Defendant's Motion for Reconsideration of Motion for New Trial, (#95.0): ALLOWED "ALLOWED. Reply brief due 1/27/23." (Copy and Notice sent by mail to ADA E. Knight and Atty B. Grossberg)		 Image
01/17/2023	The following form was generated: A Clerk's Notice was generated and sent to: Defendant, Attorney: Bernard Grossberg, Esq. Law Office of Bernard Grossberg 38 Green St, Milton, MA 02186 Prosecutor, Attorney: Erin D Knight, Esq. Suffolk County District Attorney's Office 1 Bulfinch Place, Boston, MA 02114		
01/27/2023	Defendant 's Reply to Commonwealth's Opposition to the Defendant's Motion for Reconsideration of Motion for New Trial, with Affidavit of Counsel, filed (Notice, Copy, and Docket sent to Ullmann, RAJ.)	96	 Image
02/01/2023	Commonwealth 's filing of CD containing transcripts with CD in file, filed	97	 Image
06/26/2023	Event Result:: Motion Hearing scheduled on: 06/28/2023 09:30 AM Has been: Rescheduled For the following reason: By Court prior to date Comments: Parties to reach out to Clerk for new July date. Hon. Robert L Ullmann, Presiding Staff: M. Regan, Assistant Clerk Magistrate		 Image
08/10/2023	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 08/15/2023 02:00 PM Motion Hearing. Live Transport	98	
08/15/2023	In custody defendant is brought to court. Hearing re: Arguments on Defendant's Motion for New Trial is held as scheduled (Paper #s 86, 94, 96 and 97) After a hearing, motion is taken under advisement. Ullmann, J. (RAJ) - J. Araujo, ACM - E. Knight, ADA - B. Grossberg, Atty. - FTR 2:20 pm		
08/21/2023	General correspondence regarding received from Bernard Grossberg, Esq. re: Post-Hearing Pleading	99	 Image
08/21/2023	Commonwealth 's Response to Defendant's Post-Argument Filing	100	 Image
09/13/2023	MEMORANDUM & ORDER: and Decision on Defendant's Motion to Reconsider Denial of Motion for New Trial **DENIED** Judge: Ullmann, Hon. Robert L	101	 Image  Image
10/10/2023	Notice of appeal filed. Memorandum of Decision and Order on Defendant's Motion to Reconsider Denial of Motion for New Trial, Denying the Defendant's Motion for Reconsideration of His Motion for a New Trial and Motion for a New Trial, Issued on September 13, 2023.	102	 Image
10/27/2023	Notice of docket entry received from Appeals Court RE#26: Appellate proceedings stayed to 11/20/23. Status report due then indicating whether the related appeal from the denial of the motion for reconsideration has entered. *Notice/attest	103	 Image
02/14/2024	CD of Transcript of 08/15/2023 02:00 PM Motion Hearing received from Carolyn Sproul.		
02/22/2024	Attorney appearance On this date Merritt Spencer Schnipper, Esq. added as Private Counsel for Defendant Lesley Jurczuk		
02/22/2024	Merritt Spencer Schnipper, Esq.'s Notice of Appearance, filed.	104	 Image
02/24/2024	Attorney appearance On this date Allen H Forbes, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/27/2024	Attorney appearance On this date Nicholas Brandt, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/27/2024	Attorney appearance On this date John P Zanini, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/27/2024	Attorney appearance On this date Patrick Michael Haggan, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/27/2024	Attorney appearance On this date Teresa K Anderson, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/27/2024	Attorney appearance On this date David D McGowan, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/27/2024	Appeal: Statement of the Case on Appeal (Cover Sheet).	105	 Image
02/27/2024	Notice to Clerk J. Stanton of the Appeals Court of Assembly of Record		 Image
02/27/2024	Notice of assembly of record sent to Counsel		 Image
03/05/2024	Notice of docket entry received from Appeals Court The appeals 2021-P-0484 and 2024-P-0210 are consolidated for briefing and decision. 2021-P-0484 is closed. All papers shall be transferred to 2024-P-0210. All future filings shall refer only to 2024-P-0210. Appellant's brief and appendix in the consolidated appeal is due on or before 05/08/2024.	106	 Image
03/05/2024	Notice of docket entry received from Appeals Court ORDER: In response to the status report filed in 21-P-484 (#34), the appellant is given leave to file and the trial court is given leave to consider a motion regarding the affidavit from the forensic pathologist. Appellate proceedings stayed to 5/6/24. Status report due then regarding the status of the referenced motion.	107	 Image
06/11/2024	Defendant 's Supplement to Motion for Reconsideration of Motion for New Trial filed (Copy, Notice, and Docket sent to Wall, RAJ)	108	 Image
06/17/2024	Endorsement on Defendant 's Supplement to Motion for Reconsideration of Motion for New Trial, (#108.0): Other action taken 6-17-24 Referred to Ullman, J. Wall, J.		 Image
07/17/2024	ORDER: Memorandum of Decision and Order on Defendant's Motion for Reconsideration of Motion for New Trial Defendant's Motion for Reconsideration of Motion for New Trial is DENIED (Copy and Notice sent by mail to ADA McGowan and Atty Schnipper)	109	 Image
07/29/2024	Notice of appeal filed. By Defendant Regarding The Court's July 17, 2024 Memorandum of Decision and Order on Defendant's Motion for Reconsideration of Motion for New Trial (Paper #109).	110	 Image
08/06/2024	Appeal: Statement of the Case on Appeal (Cover Sheet).	111	 Image
08/06/2024	Notice to Clerk of the Appeals Court of Assembly of Record		 Image
08/06/2024	Notice of assembly of record sent to Counsel		 Image
08/07/2024	Appeal entered in Appeals Court on 08/06/2024 docket number 2024-P-0896	112	 Image
08/14/2024	Notice of docket entry received from Appeals Court RE: No. 2024-P-0210 RE#8: The appeals 2024-P-0210 and 2024-P-0896 are consolidated for briefing and decision. 2024-P-0210 is closed. All papers shall be transferred to 2024-P-0896. All future filings shall refer only to 2024-P-0896. Appellant's brief and appendix in the consolidated appeal is due on or before 09/16/2024.	113	 Image
08/14/2024	Notice of docket entry received from Appeals Court RE: No. 2024-P-0896 RE#5: The appeals 2024-P-0210 and 2024-P-0896 are consolidated for briefing and decision. 2024-P-0210 is closed. All papers shall be transferred to 2024-P-0896. All future filings shall refer only to 2024-P-0896. Appellant's brief and appendix in the consolidated appeal is due on or before 09/16/2024. No	114	 Image

Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Disposed by Jury Verdict	11/17/2014	

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 1384-CR-10160

COMMONWEALTH

vs.

LESLEY JURCZUK,
Defendant.

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION FOR NEW TRIAL

The defendant, Lesley Jurczuk ("Jurczuk"), moved for a new trial, asserting that the prosecution failed to disclose exculpatory evidence and engaged in improper conduct at trial, and that his own trial counsel was ineffective. For the below reasons, the motion is **DENIED**.

Relevant Facts¹

In March 2013, Jurczuk was indicted for murder in the death of Alexander Callahan. Trial was held in October and November 2014 before Superior Court Judge Charles Hely. On November 17, 2014, a jury found the defendant guilty of the lesser offense of voluntary manslaughter. On December 3, 2014, Judge Hely sentenced Jurczuk to 18-20 years in state prison. The Appeals Court affirmed the conviction pursuant to Rule 1:28. See *Commonwealth v. Jurczuk*, 93 Mass. App. Ct. 1114 (2018).

Jurczuk subsequently filed a motion to revise and revoke his sentence, which was denied by Superior Court Judge Christine M. Roach in December 2018. In January 2019, Judge Roach denied Jurczuk's motion to reconsider her ruling. On January 17, 2019, Jurczuk appealed Judge Roach's decision. In October 2019, the Appeals Court granted Jurczuk leave to file a new trial motion. Jurczuk filed this new trial motion on January 29, 2021.

¹ All relevant facts are based upon the docket sheet.

Discussion

A. The Legal Standard

A defendant bears the burden of proof to establish that a motion for a new trial should be granted and to establish disputed facts. *Commonwealth v. Ubeira-Gonzales*, 87 Mass. App. Ct. 37, 41 (2015). “The defendant has the burden of producing a credible reason to reverse the final decision, arrived at after trial or plea, that outweighs the risk of prejudice to the Commonwealth.” *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631, 637 (2001). The court has discretion to decide whether a motion for new trial raises a substantial issue that requires an evidentiary hearing. *See Commonwealth v. Shuman*, 445 Mass. 268, 278 (2005). Even in the absence of countervailing evidence, a court may disregard a self-serving affidavit. *See Commonwealth v. Vaughn*, 471 Mass. 398, 405 (2015).

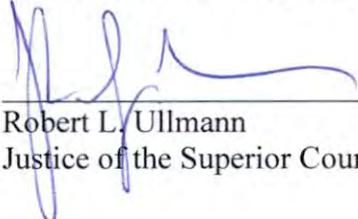
B. Application of the Legal Standard

The Court denies Jurczuk’s new trial motion, substantially for the reasons set forth at pages 15-22 of the Commonwealth’s opposition brief. (Paper # 79) Jurczuk’s claims are entirely unspecific and unsupported. He makes no citations to the record, cites no supporting case law, and offers no affidavits or other evidentiary support. Nor is there any supporting memorandum of law. Jurczuk’s claims are conclusory. He has not raised any substantial issue that requires an evidentiary hearing. Therefore, his motion will be denied without a hearing.

Conclusion and Order

For the above reasons, defendant’s Motion for New Trial (Paper # 78) is **DENIED**.

Dated: May 17, 2021



Robert L. Ullmann
Justice of the Superior Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 1384-CR-10160

COMMONWEALTH

vs.

LESLEY JURCZUK

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S
MOTION TO RECONSIDER DENIAL OF MOTION FOR NEW TRIAL**

The defendant, Lesley Jurczuk (“Jurczuk”), has moved for reconsideration of this Court’s May 17, 2021 Memorandum of Decision and Order denying Jurczuk’s *pro se* Motion For New Trial (Paper # 86). Now, with the benefit of experienced and competent counsel, Jurczuk has made arguments that were not previously made, and developed previously made arguments that were rejected by this Court.

The Court concludes that although trial counsel arguably could have done more at times to press the defense of self-defense, any shortcomings fall far short of establishing ineffective assistance of counsel. Moreover, as discussed below, trial counsel *did* pursue a defense of self-defense, which surely contributed to Jurczuk’s acquittal on the murder charge, though he was convicted on the lesser offense of manslaughter. For these and other reasons set forth below, Jurczuk’s motion for a new trial is **DENIED**.

PROCEDURAL HISTORY

In March 2013, Jurczuk was indicted for murder in the December 2, 2012 beating death of Alexander Callahan (“Callahan”) in a cell at the South Bay House of Correction occupied by Jurczuk, Callahan and Shaquille Manago (“Manago”). Trial was held in October and November 2014 before Superior Court Judge Charles Hely. On November 17, 2014, a jury found the

defendant guilty of the lesser offense of voluntary manslaughter. On December 3, 2014, Judge Hely sentenced Jurczuk to 18-20 years in state prison. The Appeals Court affirmed the conviction pursuant to Rule 1:28. See *Commonwealth v. Jurczuk*, 93 Mass. App. Ct. 1114 (2018).

Jurczuk subsequently filed a motion to revise and revoke his sentence, which was denied by Superior Court Judge Christine M. Roach in December 2018. In January 2019, Judge Roach denied Jurczuk's motion to reconsider her ruling. On January 17, 2019, Jurczuk appealed Judge Roach's decision. In October 2019, the Appeals Court granted Jurczuk leave to file a new trial motion. Jurczuk filed a Motion for New Trial on January 29, 2021, and the Commonwealth opposed the motion. On May 17, 2021, this Court denied the motion. (Paper # 80) On July 6, 2022, Jurczuk filed the pending Motion for Reconsideration (Paper # 86). The Commonwealth opposed the motion.

DISCUSSION

I. The Legal Standards

A. Motions for New Trial

A defendant bears the burden of proof to establish that a motion for a new trial should be granted and to establish disputed facts. *Commonwealth v. Ubeira-Gonzales*, 87 Mass. App. Ct. 37, 41 (2015). "The defendant has the burden of producing a credible reason to reverse the final decision, arrived at after trial or plea, that outweighs the risk of prejudice to the Commonwealth." *Commonwealth v. Wheeler*, 52 Mass. App. Ct. 631, 637 (2001). The court need not conduct an evidentiary hearing if the motion and supporting affidavits fail to raise a substantial issue. Mass. R. Crim. P. 30(c)(3); see also *Commonwealth v. Shuman*, 445 Mass.

268, 278 (2005). The court has discretion to decide whether a motion for new trial raises a substantial issue. *Id.*

B. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must prove “behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer,” which “likely deprived [him] of an otherwise available, substantial ground of defense.” *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). Massachusetts law follows the two-prong standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires the defendant to prove (1) deficient performance and (2) resulting prejudice, i.e. a reasonable probability that effective assistance would have led to a different outcome. See *Commonwealth v. Clarke*, 460 Mass. 30, 45 (2011). Tactical decisions do not constitute ineffective assistance of counsel unless they were “manifestly unreasonable.” *Commonwealth v. Holland*, 476 Mass. 801, 812 (2017). In considering any ineffective assistance of counsel claim, the court must consider both the seriousness of the issue and the adequacy of the defendant’s showing on that issue. See *Commonwealth v. Lys*, 481 Mass. 1, 5 (2019).

II. Application of the Legal Standards

A. Alleged Grounds for Ineffective Assistance

In his motion for reconsideration, Jurczuk argues that his trial counsel was ineffective because:¹

1. Trial counsel failed to investigate or present a third-party culprit defense. Paper # 86 at 7.
2. Trial counsel failed to interview or elicit Jurczuk’s testimony about James Moran, the inmate friend of Callahan whom Callahan wanted in his cell instead of Jurczuk. *Id.* at 7-8.

¹ Jurczuk also makes passing reference to the Commonwealth’s failure to provide discovery, but makes no showing that the Commonwealth failed to disclose evidence in its possession, custody, or control.

3. During Jurczuk's testimony, trial counsel failed to elicit that Callahan had made violent statements, told Jurczuk about his criminal record, and concealed a razor blade inside the cell; and that Manago had also made admissions of violence. *Id.* at 8; Jurczuk Aff. at 2.²

4. Trial counsel failed to introduce Boston Medical Center and other records to corroborate Jurczuk's testimony about the injuries he sustained during the fatal encounter. Paper # 86 at 9, 11-12; Jurczuk Aff. at 3.

5. Trial counsel failed to introduce Lemuel Shattuck Hospital records of Jurczuk's rotator cuff injury and diagnosis made two months before the assault. Paper # 86 at 11; Jurczuk Aff. at 2-3.

6. Trial counsel failed to support a representation in the opening statement that the defendant would call an expert to testify as to Jurczuk's and Callahan's injuries. Paper # 86 at 10-11; Jurczuk Aff. at 4-5; Grossberg Aff. at 2-4.

7. Trial counsel failed to request exculpatory evidence from the jail cell, including the T-shirt that Jurczuk alleges he was wearing during the attack. Paper # 86 at 13-14; Jurczuk Aff. at 4.

During oral argument, current counsel acknowledged that Jurczuk's most viable argument supporting his motion for new trial is that trial counsel failed to fully pursue a defense of self-defense. While some of the above arguments relate to this failure, counsel correctly conceded that the other arguments have less force.³

² "Jurczuk Aff." is the defendant's affidavit attached to Paper # 86; "Grossberg Aff." is the affidavit of Jurczuk's counsel on this motion, also attached to Paper # 86.

³ The Court briefly addresses the other grounds of alleged ineffective assistance of counsel *infra* at 11-12.

B. Summary of Jurczuk's Testimony and the Commonwealth's Case

At trial, Jurczuk testified on his own behalf, describing an unprovoked attack by Callahan and Manago in the cell. First, Callahan and Manago slammed his head into a wall and then Manago held him while Callahan headbutted him. Tr. VIII at 32-34. After Manago left the cell, he and Callahan had a brief scuffle, during which they both fell to the floor. Jurczuk testified that when he left the cell to wash up and get pizza, Callahan was sitting in a chair. *Id.* at 36-38.

Much of the rest of the evidence at trial, however, was inconsistent with Jurczuk's version of events. First, jail video showed that, except for six seconds, only Jurczuk and Callahan were in the cell during the time Callahan suffered his fatal injuries. See Tr. II at 208, 224. In addition, Callahan's injuries were extensive and severe. As set forth in the Appeals Court's affirmance of Jurczuk's conviction:

“[A]utopsy revealed that the victim had suffered significant contusions around the head, face, and neck; a subdural hematoma, i.e. bleeding on the brain; a fracture to the tracheal cartilage, i.e. the Adam's apple; and a fracture of the hyoid bone in the neck.” In addition, the physician who conducted the autopsy testified that at least forty pounds of pressure would have been needed to cause the injury the victim sustained to his tracheal cartilage, and that he had only seen such severe injuries “caused by high velocity collisions like car accidents.”

2018 Mass. App. Unpub. LEXIS 472 * 2, n.1. Callahan's face was severely beaten; a guard who knew Callahan couldn't recognize him. See Tr. III, at 155-156; Tr. IV at 139-140; Tr. V at 10, 20, 104. The pattern of blood stains on the floor of the cell was consistent with Callahan being beaten in one corner of the cell, not a fight. See Tr. III at 137; Tr. VI at 52-53; Tr. VII at 139. Callahan's knuckles had no bruising or scrapes, nor was there any other indication that he had used them to strike Jurczuk. See Tr. V at 18-19; Tr. VII at 264.

In marked contrast, Jurczuk had relatively minor bodily injury. See Tr. IV at 155; Tr. VII at 122; Ex. 194. Immediately after the fight, Jurczuk threw away his t-shirt and washed

Callahan's blood off his hands, elbows and other parts of his body, then went to the cafeteria to eat pizza. See Tr. V at 21-22; Tr. VI at 112-113; Tr. VIII at 36-37; see also Tr. IX at 73. Only then did Jurczuk tell a guard about the incident. See Tr. VIII at 37-38. After the fight, Jurczuk was "alert." Tr. V at 16.⁴

Faced with overwhelming evidence that Jurczuk had fatally beaten Callahan, either intentionally or by using excessive force in self-defense, trial counsel adopted an approach to the case, presented in the opening statement, that allowed room for flexibility (no eyewitness testimony, flawed autopsy by the medical examiner, innocent explanation for defendant's post-fight conduct); highlighted the Commonwealth's high burden of proof; and attempted to derive benefit from the victim's connection to the Boston Police Department.⁵ See Tr. II at 94-100. Defense counsel described the prosecution's case as "a flawed, incomplete investigation...fueled by a rush to judgment." Tr. II at 95.

C. Any shortcomings by trial counsel in pressing Jurczuk's defense of self-defense fall far short of ineffective assistance.

Jurczuk argues that trial counsel's approach to the defense of self-defense was ineffective in three primary respects. First and foremost, trial counsel stated in his opening that the defense would call an expert on self-defense, and the expert was never called. Second, trial counsel failed to offer in evidence medical records showing the extent of Jurczuk's injuries. Third, trial counsel barely alluded to the defense of self-defense in his closing. The Court will address each of these arguments in turn, along with a fourth argument raised in the brief but not at oral argument.

⁴ The jury clearly rejected Jurczuk's testimony, which was inconsistent with much of the physical evidence, including the autopsy report, video, medical records, photographs, and the pattern of Callahan's blood stains on the cell floor. See *supra* at 5.

⁵ Callahan's cousin was a veteran Boston Police Department homicide detective. See *infra* at 12.

1. Trial counsel's reference in his opening statement to a defense expert who was never called was not ineffective assistance.

Jurczuk argues that trial counsel's reference in his opening statement to a defense expert who was never called as a trial witness was the abandonment of a valid defense that amounts to ineffective assistance of counsel. In support of his argument, Jurczuk cites several SJC and Appeals Court decisions in which the abandonment of a defense during trial was held to be ineffective assistance. As discussed *infra*, these cases are distinguishable from Jurczuk's case in dispositive ways.

It cannot be denied that trial counsel's mention of a defense expert in his opening statement was more than a passing reference. Trial counsel stated:

And you'll hear from another pathologist, a Dr. Laposata, a former state chief state medical examiner for the state of Rhode Island, who teaches at Brown University Medical School, teaches at Boston University Medical School, who did some evaluations of her own of Dr. Cummings' work and the autopsy performed and comes to very different conclusions. And she'll testify that Callahan didn't suffer what's normally referred to as classic defensive wounds. That's not it at all. And that Callahan didn't have an injury to his head, which is referred to as a subdural hematoma, that would cause his death. Absolutely not.

Tr. II at 98. However, Dr. Laposata's proposed testimony was not the linchpin of a defense of self-defense. At most, her testimony might have called into question the extent of certain injuries to Callahan.

The cases relied upon by Jurczuk are readily distinguishable. For example, in *Commonwealth v. Westmoreland*, 388 Mass. 269 (1983), defense counsel presented a defense of insanity and mental impairment, calling as an expert a psychiatrist who testified that at the time of the attack, the defendant was suffering from a mental defect, specifically antisocial personality disorder. *Id.* at 271. The expert further testified that because of this defect the defendant lacked substantial capacity to conform his conduct to the requirements of the law. *Id.* Notwithstanding

this evidence, defense counsel failed even to mention the defense of mental impairment in closing argument and instead inexplicably argued:

Now, Mr. Foreman, ladies and gentlemen of the jury, I'm not a smart guy. I'm a Chelsea street guy. I don't know about these psychiatric things. I just know I can conform my conduct and I know that Westmoreland didn't conform his. Temporary insanity? That's for you. Maybe not. Probably not. I don't think you're going to buy that...

Id. at 272. This was manifestly unreasonable advocacy.

In *Commonwealth v. Swan*, 38 Mass. App. Ct. 539 (1995), the charge was larceny over \$250 based on the defendant's failure to pay for auto repair work. Defense counsel appropriately noted in his opening that the Attorney General's regulations required auto repair shops to obtain written authorization before doing repair work, which the repair shop had not done for defendant's repairs. Despite having a virtually guaranteed successful defense, defense counsel failed to introduce the regulations or ask the judge to take judicial notice of them. *Id.* at 542-543.

Commonwealth v. Aviles, 31 Mass. App. Ct. 244 (1991), involved the failure to develop an alibi defense, a defense that might well have been successful based on witnesses who were clearly available. *Id.* at 245-247. See also *Commonwealth v. Sarvela*, 16 Mass. App. Ct. 934, 934 (1963) (trial counsel's closing in disorderly conduct case, "contradicting the defendant's testimony and that of all his witnesses," was "manifestly unreasonable").

Here, Dr. Laposata's testimony would *not* have addressed the obvious flaw in Jurczuk's defense that, even if Jurczuk established a need to defend himself, the Commonwealth could readily prove that Jurczuk "used more force than was reasonably necessary under all the circumstances to protect himself from an attack." Tr. IX at 153. See also SJC, Model Jury Instructions on Homicide III: Self-defense and defense of another (April 2018). Indeed, Dr. Laposata would have been required to concede the disparate extent of the injuries on cross-

examination. Therefore, Jurczuk has not shown that trial counsel's reference in his opening to an expert that he did not end up calling to testify resulted in prejudice to him.⁶

In contrast to trial counsel's reference to Dr. Laposata in his opening, which was not a tactical decision, the decision not to call Dr. Laposata as a witness was clearly tactical, as trial counsel spoke to her immediately before deciding not to call her. See Grossberg Affidavit at 6. This tactical decision was not remotely "manifestly unreasonable." *Holland*, 476 Mass. at 812.

2. Trial counsel's decision not to use Jurczuk's medical records was not ineffective assistance.

Jurczuk's argument that trial counsel should have obtained and introduced Boston Medical Center records to corroborate his injuries misses the mark. The Commonwealth did not deny that Jurczuk sustained injuries, but Jurczuk's injuries paled beside those of Callahan and forensic evidence indicated Jurczuk and Callahan did not fall to the floor during a brief scuffle, but that Jurczuk had fatally beat Callahan in a corner of the cell. See *supra* at 5-6.

Jurczuk's argument that trial counsel was ineffective for failing to obtain Lemuel Shattuck Hospital records of his rotator cuff injury and diagnosis made two months before the fatal assault borders on the frivolous. Jurczuk was very muscular and worked out every day. See Tr. III at 227; Tr. IV at 190; Tr. V at 49, 79. Trial counsel would have lost all credibility by arguing that Jurczuk did not have the ability to kill Callahan based on a months-old rotator cuff injury.

⁶ The Court agrees with current counsel's argument in his 8/16/23 letter to the Court that trial counsel's reference to Dr. Laposata in his opening should not be analyzed as a tactical decision. Therefore, the Court has applied the standard *Strickland* analysis to this decision, without the added leeway for tactical decisions. See *supra* at 3.

3. Contrary to Jurczuk's argument, trial counsel pressed the defense of self-defense in his closing.

Jurczuk's argument that trial counsel abandoned the defense of self-defense in his closing inaccurately describes the closing argument. Although trial counsel used the words self-defense only a few times during the closing, much of the closing focused on Jurczuk's testimony that Callahan initiated the fight. Moreover, under the facts and circumstances of the case, trial counsel's arguments that Jurczuk had reasonable provocation and faced sudden combat were part and parcel of the defense of self-defense. See Tr. IX at 42-43, 45-46, 47, 48-51. Self-defense was one focal point of trial counsel's closing.

4. Trial counsel's failure to elicit Jurczuk's testimony about purported violent statements by Callahan was not ineffective assistance.

Although not raised at oral argument, Jurczuk argues in his pleadings that trial counsel was ineffective because, when Jurczuk testified, trial counsel failed to elicit testimony that Callahan had made violent statements to Jurczuk, told him about his criminal record, and concealed a razor blade inside the cell. This argument has two basic flaws.

First, there is no corroboration of the statement in Jurczuk's affidavit that he had given this information to trial counsel before trial. Neither of Jurczuk's trial attorneys, both of whom continue to practice law, have submitted affidavits. The Court can properly discount Jurczuk's affidavit under these circumstances as self-serving. See *Commonwealth v. Vaughn*, 471 Mass. 398, 405 (2015) (even in absence of countervailing evidence, court may disregard self-serving affidavit).

Second, even assuming that Jurczuk had given this information to trial counsel before testifying, it was a reasonable tactical decision not to use it, given its questionable credibility absent corroboration. Moreover, this evidence likely would have opened the door to evidence of

prior violence by Jurczuk that could have significantly harmed his case. See *Commonwealth v. Morales*, 464 Mass. 302, 303 (2013) (where defendant offers *Adjutant* evidence, that is, evidence of specific acts of prior violent conduct that victim is reasonably alleged to have initiated, Commonwealth may be able to offer evidence of defendant's prior violent acts). These tactical decisions were not remotely "manifestly unreasonable." *Holland*, 476 Mass. at 812.

D. Jurczuk's other claims of ineffective assistance are devoid of merit.

Although not raised by appellate counsel in oral argument, the Court will briefly address Jurczuk's other claims of ineffective assistance of counsel, as follows:

1. third-party culprit defense

Jurczuk's argument that trial counsel was ineffective for failing to present a third-party culprit defense is baseless. Video established that during the attack, the only person in the cell other than Jurczuk and Callahan was Manago, who was only in the cell for six seconds. More fundamentally, the notion that Manago killed Callahan completely flies in the face of Jurczuk's own testimony that he was attacked by Callahan and Manago. And, given Jurczuk's testimony that only he, Callahan, and Manago were involved in the fatal fight, a defense that some other phantom inmate not seen by Jurczuk or captured on video killed Callahan borders on the preposterous. Indeed, the third-party culprit defense undermines the defense of self-defense. Appellate counsel presumably recognized these flaws in not pressing this ground at oral argument.

2. evidence about Callahan's friend, inmate Moran

Jurczuk's argument that trial counsel should have interviewed or elicited testimony about James Moran, the inmate friend of Callahan's whom Callahan wanted in his cell instead of Jurczuk, is equally meritless. The Commonwealth did not dispute that Callahan wanted Jurczuk

out of the cell. On the contrary, in its closing, the Commonwealth stated that Callahan picking on Jurczuk was the motivation for Jurczuk's fatal attack. See Tr. IX at 65. Nothing would have been gained by having Jurczuk testify to these facts or calling Moran as a witness.

3. failure to obtain and use discovery

Jurczuk's argument that trial counsel failed to request exculpatory evidence obtained from the jail cell has no factual basis. There has been no showing that the Commonwealth failed to turn over evidence that police and corrections officers recovered from the crime scene. Jurczuk argues that introducing the shirt he was wearing during the fight would have assisted his defense because it was torn. But the only evidence of a shirt is the one Jurczuk threw away after the fight. While Jurczuk claims this was not the shirt he was wearing during the fight, his uncorroborated claim does not establish the existence of another shirt, no less a shirt that was in the Commonwealth's possession, custody or control and not disclosed.

E. Summary of trial

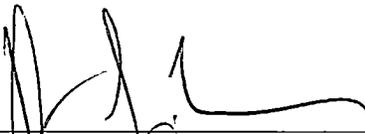
Jurczuk's attorneys were required to defend a case in which most of the testimony of 35 witnesses and well over 200 exhibits all pointed to Jurczuk's killing of Callahan. Far from being ineffective, trial counsel pursued a multi-pronged defense, relying not only on self-defense, but also highlighting certain gaps in the evidence, the Commonwealth's heavy burden of proof, and the Commonwealth's alleged "rush to judgment" based on the fact that the victim was the nephew of a veteran Boston Police Department homicide detective. See Tr. X at 40-41. Trial counsel convinced the jury to acquit on the second-degree murder charge. Moreover, several of the trial judge's key rulings limited the Commonwealth's evidence in ways that gave great weight to avoiding unfair prejudice to Jurczuk, including the exclusion of an incriminating

statement by Jurczuk and all five of his prior criminal convictions. See Tr. VIII at 8-9, 14-16. In all respects, justice was done at Jurczuk's trial.

CONCLUSION AND ORDER

For the above reasons, Defendant's Motion to Reconsider Denial of Motion for New Trial (Paper # 86) is **DENIED**.

Dated: September 13, 2023



Robert L. Ullmann
Justice of the Superior Court

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COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS)	
)	
v.)	1384CR10160
LESLEY JURCZUK)	

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SUPPLEMENT TO DEFENDANT'S MOTION FOR RECONSIDERATION OF MOTION FOR NEW TRIAL

Pursuant to the Order of the Appeals Court dated March 5, 2024, see Docket 2024-P-0210, Defendant Lesley Jurczuk hereby files this Supplement to his Motion for Reconsideration of Motion for New Trial (Paper #86, "Reconsideration Motion") consisting of the attached Affidavit of Elizabeth Laposata, M.D., and the below Memorandum of Law.

Although Dr. Laposata was retained by Jurczuk's counsel and appeared at the courthouse ready to testify in the defense case during trial, trial counsel elected not to call her as a witness and to rely instead only on cross-examination of the Commonwealth's expert, medical examiner Peter Cummings, M.D., to address pathology and cause of death-related issues at trial. Dr. Laposata's Affidavit shows that Jurczuk was significantly prejudiced by counsel's decision to proceed without her testimony. Had she been called as a trial witness, Dr. Laposata would have provided a substantial benefit to the defense by disputing Dr. Cummings' cause of death analysis and explaining that Alexander Callahan's death was likely caused

by an accident occurring in the context of Jurczuk's proportional use of self-defense in response to Callahan's attacks on him, rather than through his use of excessive force in self-defense as necessarily implied by the jury's voluntary manslaughter verdict. Because the absence of Dr. Laposata's testimony from trial deprived Jurczuk of evidentiary support for his claim to have acted lawfully in his interaction with Callahan and of a potential acquittal rather than mitigated-liability conviction on the murder charge, counsel provided ineffective assistance when they did not call her to the stand. The Court should therefore GRANT Jurczuk's Reconsideration Motion now and order the indictment returned to the trial list.

Defendant's prior filings on his Motion for New Trial (along with the Reconsideration Motion, Papers #78, 96 & 99) and the Court's September 13, 2023 Memorandum of Decision and Order on Defendant's Motion to Reconsider Denial of Motion for New Trial (Paper #101, "Memorandum and Order") are expressly incorporated herein. Defendant therefore sets forth in this Memorandum of Law only those additional facts and arguments necessary to the Court's consideration of Dr. Laposata's Affidavit and the potential impact of her testimony on the outcome of his trial.

1. Relevant Background

Defendant was convicted in 2014 of voluntary manslaughter after a jury trial on an indictment charging second-degree murder, and the Appeals Court affirmed his conviction in 2018. He then filed a series of motions

culminating in the Reconsideration Motion, which the Court denied after a non-evidentiary hearing with its Memorandum and Order. Defendant timely noticed his appeal from this denial, and that appeal entered in the Appeals Court on February 27, 2024. See Docket 2024-P-0210 Papers #1, 2. On February 28, 2024 Defendant moved the Appeals Court to stay his appeal and

remand Defendant's case to the Superior Court for the limited purpose of presenting that Court with an affidavit from the forensic pathologist [Dr. Elizabeth Laposata] and supporting legal argument regarding whether Defendant was prejudiced at trial by his counsel's failure to call the pathologist-witness [to testify in his defense].

See Docket 2021-P-0484 Paper #34. On March 5, 2024 the Appeals Court ordered that "appellant is given leave to file and the trial court is given leave to consider a motion regarding the affidavit from the forensic pathologist."

See Docket 2024-P-0210.

2. Additional Trial Evidence Relevant to the Present Question

At the time of the fight between Jurczuk and Alexander Callahan that led to the charges in this case, their cell contained a wooden table situated immediately to the left of its entryway, below where a television was affixed to the wall. 11/3/2014:74-75,106.¹ Because the cell did not contain enough room for first responders to operate in with the table present, they removed the table and placed it in the hallway outside the cell before rendering aid to Callahan. 11/3/2014:75-76,104-106,150. Police officers who responded to the

¹ Citations to the trial transcripts are identified as Month/Day/Year:Page(s).

Suffolk County Jail in the wake of the incident “used [the table] as a staging area for some of [thei]r equipment” and did not see stains or anything ‘of evidentiary significance’ on it, though they did not examine it as part of their investigation. 11/10/2014:61,75,87,203; 11/12/2014:137,197.

Dr. Cummings autopsied Callahan’s body the day after he died. 11/12/2014:219-226. He described “dramatic” blunt force injuries to the visible areas of Callahan’s face and head that were “not[] inconsistent” with having been struck by either a fist or a hard floor “more than once.” 11/12/2014:240. Dr. Cummings located multiple subgaleal hemorrhages, located between Callahan’s scalp and skull, and a single subdural hemorrhage, located within his brain. 11/12/2014:244-248. While this subdural hemorrhage produced only 5 ml of blood, not the 75 ml than can create lethal internal brain pressure, Dr. Cummings testified “any brain injury is potentially fatal.” 11/12/2014:249-251.

By contrast, Dr. Cummings did not see “any external injuries” on Callahan’s neck. 11/12/2014:251. Internally, however, Callahan’s neck showed fractures of his thyroid cartilage and hyoid bone, injuries that “could potentially be fatal” and which Cummings believed were caused by blunt force trauma. 11/12/2014:258. Cummings said these neck injuries were “not[] inconsistent” with having been caused by fist or knee strikes. 11/12/2014:258-259. In his opinion, the cause of Callahan’s death was “[b]lunt injuries of the head and neck” that could not be separated out; Cummings rejected the idea

'it was the fractured larynx [i.e., thyroid cartilage] that caused his death independently' and said "they both contributed to it. I don't think you can separate one from the other. They are both very severe injuries."

11/12/2014:264,295.

On cross-examination, Cummings said he could not exclude impacts from contact with the cell's concrete walls or floor or metal bunks, as opposed to direct blows from fists or knees, as the cause of Callahan's injuries and allowed that the injuries to his face were not "necessarily consistent with a fall but I certainly can't exclude it." 11/12/2014:289-290. With regard to the injuries to Callahan's neck, he said it "may be possible" that if two grown men with the relative size of Jurczuk and Callahan fell to the floor they could generate enough force to cause the damage to Callahan's thyroid cartilage and hyoid bone he found during the autopsy. 11/12/2014:305-306. Finally, Cummings opined that restricted airflow from the type of neck injuries Callahan suffered would cause irreversible brain damage within five minutes, but that in the interim a person could get up and move around. 11/12/2014:306.

In his trial testimony, Jurczuk explained how Callahan and Shaquille Manago confronted him in their shared cell, Callahan pushing and then striking him while Manago held him tight from behind. 11/13/2014:31-33. Callahan struck Jurczuk in the gut and the two of them fell to the floor, with Callahan striking his face against it. 11/13/2014:33. As they grappled on the

floor, Manago directed kicks at Jurczuk. 11/13/2014:34. Manago then left the cell, and Jurczuk and Callahan both got up off the floor, with Jurczuk sitting on his bunk and Callahan on the table below the television. 11/13/2014:34.

According to Jurczuk, at this point “everything seemed like it was fine” but then Callahan

stands up, and he says, you mother fucker, I’m going to get you, and he turns around, and he shuts the light off, and he charges me, and then I grabbed him really hard, and then he lifts me off the floor, and then we both slam on the ground, and then we both get up fast. And it was kind of like over.

11/13/2014:35; see also 11/13/2014:86 (“[w]hen we hit the floor, there was no struggle after that”). Jurczuk left the cell; at that time, Callahan was “sitting in the chair...[a]t the table” below the television. 11/13/2014:36. When Jurczuk returned to the cell after dinner, he found Callahan unresponsive on the floor between the table and a bunk and immediately alerted correctional officers. 11/13/2014:37-38.

3. Dr. Laposata’s Opinions

Ten years after she arrived at Suffolk Superior Court prepared to testify in Jurczuk’s defense case before being told by counsel her testimony was not required, forensic pathologist Dr. Elizabeth Laposata has provided an affidavit summarizing the testimony she would have provided had she been called to the stand. See attached Affidavit of Elizabeth Laposata, M.D., (“Laposata Affidavit”) at ¶3.

Dr. Laposata disagrees with Dr. Cummings' conclusion that injuries to Callahan's head and neck combined to cause his death and that two cannot be separated for this purpose; she "believe[s] thyroid cartilage trauma and asphyxiation alone, not blunt force trauma to the head, caused Mr. Callahan's death." Laposata Affidavit at ¶4. In her opinion, while the injuries to Callahan's head disclosed in his autopsy—which could have been caused by some combination of blows from Jurczuk, kicks by Manago, and impacts on the cell floor or other objects—were "serious injuries that likely concussed Mr. Callahan and may have caused him to be dazed and even temporarily lose consciousness...they were survivable, and would not have been fatal so long as appropriate medical treatment was provided within a reasonable time." Laposata Affidavit at ¶5. Dr. Laposata bases this conclusion on "the relatively small amount of internal bleeding and lack of injuries to the brain itself resulting from these injuries." Laposata Affidavit at ¶5.

"In contrast to these survivable head injuries, the injury to Mr. Callahan's thyroid cartilage in his neck and resulting interruption of airflow to his lungs was a severe trauma that likely caused him to lose consciousness within one to two minutes and to die from asphyxiation shortly thereafter." Laposata Affidavit at ¶6. However, based on her review of Dr. Cummings' autopsy report and other relevant materials, Dr. Laposata does not believe the fatal trauma to Callahan's neck was caused either by blows from Jurczuk or the impact of a fall on the cell's concrete floor. Laposata Affidavit at ¶6.

“Rather, it was caused by Mr. Callahan’s striking his chin on the table just to the left of the cell door, followed by impact to the front of his neck caused by this strike, when he and Mr. Jurczuk fell to the floor the second time they grappled.” Laposata Affidavit at ¶6. She explains:

[p]hotographs of Mr. Callahan’s body taken shortly after he died show a large, roughly circular bruise on the underside of his chin, with abrasions continuing onto the front of his chin on his face. The skin of the front of his neck itself (within which the fatally damaged thyroid cartilage is contained) shows no visible injury or focal trauma that would be caused by application of force to a discrete area suggesting a direct blow. The amount of force necessary to cause trauma to the thyroid cartilage of the sort Mr. Callahan suffered would be virtually impossible for a human being to deliver with a punch or even a kick, especially if such a blow was not delivered directly to the area of injury. Instead, this injury that resulted in Mr. Callahan’s death was, in my opinion, almost certainly caused by a fall during which he struck his chin on the surface of an object (the table in the cell at the time of the fight) and hyper-extended the interior muscles of his neck. During this fall and strike, the front of Mr. Callahan’s neck also likely impacted the wide flat surface of the apron/skirt below the tabletop while he was moving forcefully towards the floor...[a]n impact on this table, and not a steel bunk or concrete floor, is most consistent with the under-chin bruising shown in Mr. Callahan’s autopsy.

Laposata Affidavit at ¶7-8. Dr. Laposata details the manner in which such a hyperextension could have caused Callahan’s fatal neck injury, as well as how such a cause of death is consistent with the forensic evidence in Jurczuk’s case:

[d]uring a fall in which Mr. Callahan struck the underside of his chin against this table, damage to his thyroid cartilage would have been caused by a combination of two forces: the angular force of his falling body (and possibly Mr. Jurczuk’s as well) striking the table surface, and the action of the internal musculature of his neck in responding to the hyperextension

caused when his neck was forced into a position such that the underside of his chin was moved in an unnatural and damaging upward direction. This combination of forces would be sufficient to cause the damage Mr. Callahan suffered to his thyroid cartilage without any visible injury to the exterior of his neck itself through a mechanism similar to that suffered when unrestrained occupants hit their chin against automobile dashboards during car accidents causing hyperextension. Additional contact by the front of his neck with the broad flat surface of the table apron/skirt directly below the table surface after chin impact is also consistent with a crushing type of fracture without discrete focal skin bruise. The blood pattern evidence on the floor where Mr. Callahan's body was found between the table and single wall-bunk show that his body was without substantial movement indicating unconsciousness and showing expired (or exhaled) blood pattern from attempts to breath against a collapsed airway.

Laposata Affidavit at ¶9. Noting that the fight between Callahan and Jurczuk "occurred in a small, tightly confined area—something perhaps best illustrated by the fact first responders had to remove the table that likely caused Mr. Callahan's fatal injury from the cell before they had sufficient room to render aid"—and in light of both the existing forensic evidence and Jurczuk's testimony to two separate attacks by Callahan, Dr. Laposata sets forth "the most logical sequence of events producing Mr. Callahan's visible and internal injuries." Laposata Affidavit at ¶10.

During the first round of fighting, Mr. Callahan likely suffered his visible and serious but non-fatal head and face injuries, which may have left him dazed, concussed, and even semi-conscious. During the second round of fighting, when Mr. Callahan and Mr. Jurczuk were falling to the cell floor Mr. Callahan sustained the neck injury that ultimately killed him. This sequence of events, and particularly the fact that Mr. Callahan was already dazed and semi-conscious when he suffered his fatal injury, would explain his lack of immediate reaction to such a severe injury. It could also explain how Mr.

Jurczuk, who testified that the cell lights were out during this second phase of the fight and said he left the cell as soon as he was able to get up off the ground, could believe Mr. Callahan was not seriously injured at the time he left even though the thyroid cartilage injury he had suffered would prove fatal within a matter of minutes.

Laposata Affidavit at ¶10.

Finally, Dr. Laposata rules out other potential sources, aside from the table she believes he likely struck while falling to the floor for the second time, of the fatal injury to Callahan's neck. Laposata Affidavit at ¶8. Though the cell's concrete floor is hard enough to cause such an injury, "[t]here is simply no way for a bruise like the one on the underside of Mr. Callahan's chin to be caused by contact with a flat surface like a floor." Laposata Affidavit at ¶8. Similarly, it is also "[un]likely that Mr. Callahan struck the underside of his chin on one of the metal cell bunks, since the steel edges of the bunks shown in scene photos would have left a more linear bruise or mark at the point of impact." Laposata Affidavit at ¶8. Meanwhile, "[t]he fact that Mr. Jurczuk was recovering from rotator cuff injury at the time of his fight with Mr. Callahan would certainly have reduced his ability to exert force with that injured arm." Laposata Affidavit at ¶11.

4. Trial Counsel's Failure to Present Jurors with Dr. Laposata's Explanation of How Callahan Could Have Incurred His Fatal Neck Injury Accidentally in the Course of Jurczuk's Justified Exercise of Proportional Self-Defense Deprived Defendant of the Possibility of a Full Acquittal on the Murder Charge

The jury's verdict of voluntary manslaughter means, as a practical matter, that it found Jurczuk acted legitimately in self-defense against

Callahan's attack but used excessive, and ultimately fatal, force in doing so. Because trial counsel elected to forgo testimony from Dr. Laposata, Jurczuk's retained expert, and to instead address forensic pathology and cause of death issues solely through cross-examination of the Commonwealth medical examiner, the defense case on such questions was confined to Dr. Cummings' generic statements on cross-examination that Callahan's injuries were 'not inconsistent' with falls or strikes on the cell floor—testimony that was wholly inadequate to meet visual and other autopsy evidence, as well as prosecutorial argument, suggesting Callahan was killed by a savage beating. Had counsel called her to the stand, Dr. Laposata's testimony would have transformed the defense case by separating Callahan's visually impactful but non-fatal head and face injuries from the exclusively internal injuries that caused his death, explaining in detail to jurors how Callahan could have sustained his fatal injury accidentally in the course of Jurczuk's legitimate and proportional exercise of self-defense, and challenging the Commonwealth's emotionally powerful argument that Jurczuk callously beat Callahan and left him to die while he went to eat pizza in the jail dining hall² by showing that, despite the fact his death was imminent, it was entirely possible that, as Jurczuk testified, Callahan 'seemed fine' when Defendant

² In his closing, the prosecutor portrayed "Lesley Jurczuk [as someone] who was able to kill a man with his bare hands and then go eat some pizza afterwards. That's the Lesley Jurczuk that you need to worry about...A man is dead on his cell floor, and he is eating pizza. He's chatting away, because he has to make everything seem normal." See 11/14/2014:66,77.

left the cell. Because Dr. Laposata's testimony would have given jurors a route to acquitting Jurczuk on the murder charge, rather than only convicting him of the lesser-included offense of manslaughter, he was prejudiced by counsel's failure to call her to the stand. The Court should therefore allow Defendant's Motion for New Trial and reverse his conviction.

Defendants alleging ineffective assistance of counsel must show deficient attorney performance that likely deprived them of an otherwise available, substantial ground of defense, and in considering such claims reviewing courts must consider both the seriousness of the issue presented and the adequacy of a defendant's showing on that issue. Memorandum and Order at 3 (citing *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974) and *Commonwealth v. Lys*, 481 Mass. 1, 5 (2019)). On the specific question of ineffectiveness claims based on defense counsel's failure to present expert testimony on cause of death, the Supreme Judicial Court has held that cross-examination of a prosecution expert that merely calls into question aspects of an otherwise compelling Commonwealth case is not an adequate substitute for a defense expert who can coherently enunciate an alternative cause of death that supports a defendant's version of events. See *Commonwealth v. Haggerty*, 400 Mass. 437, 441-443 (1987) (noting that "[d]isbelief of [prosecution expert's] testimony would not furnish the [jury with a] basis for finding the other way" in the absence of expert testimony supporting defense theory) (quotation omitted); see also *Commonwealth v. Martin*, 427 Mass.

816, 821-822 (1998) (finding ineffective assistance where “[d]efense counsel could have used [an] expert to reveal defects in the scientific evidence” underlying prosecution case, and without defense expert “[t]he cause-of-death issue was not fully presented to the jury”).

Because trial counsel did not present Dr. Laposata’s affirmative explanation of how Callahan’s death was plausibly caused solely by hyperextension of his neck through impact with the table when he and Jurczuk fell to the ground the second time, the only meaningful cause of death evidence before the jury was Dr. Cummings’ testimony that Callahan died due to a combination of head and neck injuries. The practical effect of this cross examination-only strategy, in light of the bruising and swelling of Callahan’s head and face apparent in photographs introduced in evidence, was to concede that force applied by Jurczuk played at least some role in his death, and thus the appropriateness of a voluntary manslaughter conviction. See *Commonwealth v. Baker*, 67 Mass.App.Ct. 760, 767 (2006) (“a contributing cause can be a proximate cause of death [even when] there may be a combination of causes that result in death... [a] cause is concurrent if it was operative at the moment of death and acted with another cause to produce the death”) (quotation omitted); see also *Commonwealth v. Joyce*, 18 Mass.App.Ct. 417, 421 (1984) (defendant’s “actions need not have been the sole cause which contributed to [victim’s] death” to support manslaughter conviction). Had Dr. Laposata testified and drawn a line between Callahan’s

serious but non-fatal head and face injuries and the fatal damage to his thyroid cartilage, jurors would have had a clear path to acquittal even if they found Jurczuk inflicted some or all of Callahan's visible injuries, since those non-fatal injuries were inflicted in the context of what their verdict shows they found was a legitimate, if excessive, use of force in self-defense. *Baker*, 67 Mass.App.Ct. at 767 (defendant's unlawful actions must contribute to death to be basis of manslaughter conviction).

Distinct from, and perhaps even more significant than, the aid Dr. Laposata's testimony could have provided in contesting the physiological mechanics of Callahan's death is the support her detailed analysis of the fatal neck injury would have provided to Jurczuk's testimony, which was the only direct evidence at trial of how his fight with Callahan played out. At bottom, Jurczuk's testimony told a story that combined elements of self-defense and accident: he effectively defended himself with proportional force against a first attack by both Manago and Callahan and a second attack from Callahan alone; both attacks included falls to the cell floor by Jurczuk and Callahan; after the second fall both men got up and Jurczuk left the cell while Callahan sat in a chair at the table below the cell's television; and upon his return to the cell, Jurczuk found Callahan on the cell floor between the table and a bunk even though he had appeared 'fine' after the fight. See 11/13/2014:29-38. The implication of this testimony was that, even though Jurczuk used only proportional force in response to Callahan's attacks, some other cause—

likely one of the falls the men took to the floor while they were grappling—produced Callahan’s death.

The Appeals Court has recognized that, though “the defenses of accident and self-defense are mutually exclusive” as a general matter, a narrow class of cases exists involving an “accidental killing [that occurs] while exercising one’s right to self-defense.” *Commonwealth v. Turner*, 24 Mass. App. Ct. 902, 903 (1987). In such cases “the principles of self-defense may be involved in an accident defense, not for purposes of establishing the defense of self-defense but to show that the defendant was engaged in a lawful act.” *Id.*

If the victim was the aggressor, and the defendant, even though not intending to kill the victim, accidentally administered the fatal wound while attempting to defend himself, it cannot be said that his conduct was unlawful. However, defendant could not appeal to the law of self-defense as a justification for the homicide. Instead, [the] defendant could invoke the right of self-defense in arguing that his act which accidentally resulted in the killing of the victim was not itself unlawful.

Id. (quoting *State v. Sprague*, 394 A.2d 253, 257-258 (Maine 1978))

(alterations omitted).

Dr. Laposata’s opinions would have greatly aided Jurczuk’s defense by supporting his trial testimony to what was, in essence, a *Turner* theory. By separating Callahan’s visible, non-fatal injuries from the wholly internal neck injury that actually caused his death, she would have contradicted Dr. Cummings’ cause of death opinion and provided the jury with grounds to find that whatever force Jurczuk applied to Callahan was not excessive and, even

if it was to some extent, did not cause his death. See *Commonwealth v. Jones*, 75 Mass. App. Ct. 38, 41 (2009) (“to prove voluntary manslaughter, the Commonwealth must prove an intentional infliction of injury likely to cause death, which causes death and the defendant acted unlawfully”). And by giving a detailed explanation of how Callahan could have accidentally sustained his fatal neck injury when he and Jurczuk fell to the floor and Callahan struck his chin on the table below the television during Callahan’s second attack that was grounded in the specifics of Callahan’s autopsy (the bruise under his chin) and the layout of the cell at the time of the fight (the tight space between the bunks and table and Jurczuk’s description of the men’s positioning during their fight), Dr. Laposata would have given jurors a solid scientific basis on which to credit Jurczuk’s testimony to the fight and its aftermath.

Additionally, by explaining why strikes from Jurczuk’s fists or knees would not have been forceful enough to cause Callahan’s fatal neck injury and why his autopsy results were inconsistent with the thyroid fracture being caused by either the cell floor or one of its metal bunks, Dr. Laposata would have contradicted Dr. Cummings’ testimony on these points and informed jurors that an accidental strike on the table and resulting hyperextension of Callahan’s neck was in fact the *most likely* cause of his death. And by explaining that, notwithstanding the fact he had accidentally sustained an injury that would kill him within minutes, it was entirely possible that

Callahan initially got up and sat in a chair after the table strike and that Jurczuk left the darkened cell actually believing Callahan was not seriously hurt, Dr. Laposata would have supported Jurczuk's version of events and undercut the prosecution argument he was a callous, violent man who beat his cellmate to death and then immediately went to eat pizza and chat with other inmates in the dining hall only to disingenuously raise the alarm upon his return.

Finally, Dr. Laposata's testimony would have been consistent with and supportive of the defense theory of the case while providing jurors with an objective, scientific basis to discount the prosecutor's strident arguments for conviction. In defense counsel's opening, he told jurors that Dr. Laposata would explain Callahan's head injuries were not the cause of his death, which likely resulted from his fractured larynx and resulting constricted airflow incurred through impact on some object struck while the men struggled in the tight, confined space of their cell. 10/31/2014:98-99. Yet only Dr. Laposata's foregone testimony could have provided the defense with evidentiary support on these questions. Similarly, counsel argued these points and an accident theory—on which the Court instructed the jury—in closing, but without Dr. Laposata's testimony had nothing other than Dr. Cummings' vague concessions to the 'possibility' of a fall causing Callahan's fatal injury to point jurors to for support of acquittal on accident grounds. 11/14/2014:42-43,51-53,145-146. Meanwhile, without Dr. Laposata's

testimony in the case, the prosecutor felt free to argue in his closing that Callahan sustained multiple blows to his neck and that those blows could have been delivered by Jurczuk's elbow, and to mock the idea that Callahan's fatal neck injury could have been caused by an accidental fall rather than Jurczuk's purposeful application of force. See 11/14/2014:74,80-82 ("that injury to the neck, the tracheal cartilage hemorrhage...[defense counsel] wants you to believe that came from a fall? Seriously? A fall? That injury"). In fact, the autopsy evidence was inconsistent with Jurczuk having delivered blows to Callahan's neck with his elbow or any other body part, while a fall was actually the cause of Callahan's neck injury *most consistent* with it. But without Dr. Laposata's testimony, jurors did not have the tools with which to assess the prosecutor's misleading claims.

In sum, there can be no question Dr. Laposata's missing expert testimony "might have accomplished something material for the defense" if presented at trial because it would have corroborated Jurczuk's version of events in the cell, contested both Dr. Cummings' specific opinion that Callahan was killed by a combination of head and neck injuries and the Commonwealth's more general theory that Jurczuk's application of force to Callahan caused his death, supported a finding of accident, and undercut the Commonwealth's depiction of Jurczuk as a callous killer. *Commonwealth v. Millien*, 474 Mass. 417, 431 (2016) (quoting *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977)). Jurczuk was prejudiced by trial counsel's failure to

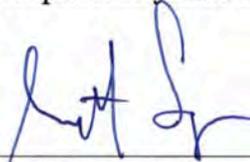
present this compelling expert testimony in his defense. He is entitled to a new trial.

5. Conclusion

WHEREFORE, for the foregoing reasons, Defendant Lesley Jurczuk respectfully requests that the Court GRANT his Motion for New Trial, reverse his conviction, and return his indictment to the trial list.

June 6, 2024

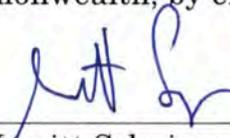
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that on June 6, 2024 I served the foregoing document on ADA Erin Knight, counsel for the Commonwealth, by electronic mail.



Merritt Schnipper

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS)	
)	
v.)	1384CR10160
)	
LESLEY JURCZUK)	

AFFIDAVIT OF ELIZABETH LAPOSATA, M.D.

Elizabeth Laposata deposes and states:

1. I am a medical doctor specializing in forensic pathology. I have a Bachelor's of Science degree from Bucknell University and a Doctor of Medicine degree from the University of Maryland School of Medicine. I completed my internship and residency in anatomic pathology at Johns Hopkins Hospital and a fellowship in forensic pathology at the St. Louis University School of Medicine. I worked as an assistant medical examiner with the cities of St. Louis, Missouri, and Philadelphia, Pennsylvania, and served as the chief medical examiner for the state of Rhode Island from 1993-2005. A complete copy of my current curriculum vitae is attached to this affidavit.

2. I make the following statements based on my review of the autopsy of Alexander Callahan performed by Dr. Peter Cummings, M.D., as well photographs taken during that autopsy; photographs of the cell in which the fight underlying the charges in this case occurred, as well as the area outside that cell and other areas of the jail relevant to the case; photographs of and medical records regarding Mr. Jurczuk; trial testimony from Dr. Cummings, Mr. Jurczuk, correctional officers Troy Salvetti and Keith Storlazzi, and paramedic Roger Aiello; other trial evidence relevant to the incident between Mr. Jurczuk and Mr. Callahan and the physical environment in which it occurred; conversation with Attorney Merritt Schnipper; and my own personal recollections.

3. I was retained by Mr. Jurczuk ahead of his 2014 trial to review relevant case materials and provide testimony regarding injuries incurred by Mr. Callahan and the cause of his death. I appeared at Suffolk Superior Court on November 13, 2014 for the purpose of providing this testimony, and was prepared to do so if called to the stand. However, when I reached the courthouse I was met outside the courtroom by one of Mr. Jurczuk's attorneys

and told my testimony was not required. I therefore did not testify at Mr. Jurczuk's trial or otherwise provide to the Court the opinions for which I was retained. The below affidavit provides a summary of the testimony I would have given if called as a witness during Mr. Jurczuk's trial and will give if called in connection with his motion for new trial.

4. In Dr. Cummings' opinion, Mr. Callahan's death was caused by a constellation of head and neck injuries encompassing (1) various blunt force traumas to the head and the subgalea, subarachnoid and subdural hemorrhages resulting from them and (2) trauma to the thyroid cartilage resulting in a compromised airway and lack of oxygen to the brain. Dr. Cummings did not believe it was possible to separate these categories of injury for the purpose of assessing cause of death. As discussed more fully below, I disagree with this conclusion and believe thyroid cartilage trauma and asphyxiation alone, not blunt force trauma to the head, caused Mr. Callahan's death.

5. Based on the records and trial evidence I reviewed, the various subgaleal (scalp) hemorrhages and single subarachnoid and small subdural hemorrhage Mr. Callahan suffered could have been caused by blows delivered by Mr. Jurczuk while in combat with Mr. Callahan, kicks delivered by Shaquille Manago while Mr. Jurczuk and Mr. Callahan were grappling on the cell floor, the impact of the cell floor or other objects on Mr. Callahan's head as he twice fell to the floor during his combat with Mr. Jurczuk, or some combination of these causes. These were serious injuries that likely concussed Mr. Callahan and may have caused him to be dazed and even temporarily lose consciousness. They also resulted in significant visible bruising and abrasions. However, the relatively small amount of internal bleeding and lack of injuries to the brain itself resulting from these injuries shows they were survivable, and would not have been fatal so long as appropriate medical treatment was provided within a reasonable time. In my opinion, Mr. Callahan was not beaten to death by blunt force to the head.

6. In contrast to these survivable head injuries, the injury to Mr. Callahan's thyroid cartilage in his neck and resulting interruption of airflow to his lungs was a severe trauma that likely caused him to lose consciousness within one to two minutes and to die from asphyxiation shortly thereafter. However, Dr. Cummings' autopsy report and accompanying photographs, and the pattern injury to the underside of Mr. Callahan's chin these materials reveal, strongly suggest that the thyroid cartilage fracture that killed Mr. Callahan was not caused by blows from Mr. Jurczuk or the impact of falling on the cell's concrete floor. Rather, it was caused by Mr. Callahan's striking his chin on the table just to the left of the cell door, followed by impact to the

front of his neck caused by this strike, when he and Mr. Jurczuk fell to the floor the second time they grappled.

7. Photographs of Mr. Callahan's body taken shortly after he died show a large, roughly circular bruise on the underside of his chin, with abrasions continuing onto the front of his chin on his face. The skin of the front of his neck itself (within which the fatally damaged thyroid cartilage is contained) shows no visible injury or focal trauma that would be caused by application of force to a discrete area suggesting a direct blow. The amount of force necessary to cause trauma to the thyroid cartilage of the sort Mr. Callahan suffered would be virtually impossible for a human being to deliver with a punch or even a kick, especially if such a blow was not delivered directly to the area of injury. Instead, this injury that resulted in Mr. Callahan's death was, in my opinion, almost certainly caused by a fall during which he struck his chin on the surface of an object (the table in the cell at the time of the fight) and hyper-extended the interior muscles of his neck. During this fall and strike, the front of Mr. Callahan's neck also likely impacted the wide flat surface of the apron/skirt below the tabletop while he was moving forcefully towards the floor.

8. While a concrete floor is hard enough to cause significant bodily trauma if struck with enough force, its extensive flat surface eliminates it as a potential cause of the injury to Mr. Callahan's thyroid cartilage on the front of his neck. There is simply no way for a bruise like the one on the underside of Mr. Callahan's chin to be caused by contact with a flat surface like a floor. Nor is it likely that Mr. Callahan struck the underside of his chin on one of the metal cell bunks, since the steel edges of the bunks shown in scene photos would have left a more linear bruise or mark at the point of impact. Instead, it is likely that Mr. Callahan struck the underside of his chin on the broad surface of the wooden table that scene photographs and trial evidence show was in the cell at the time of his fight with Mr. Jurczuk but which was removed by first responders when they arrived to render aid. An impact on this table, and not a steel bunk or concrete floor, is most consistent with the under-chin bruising shown in Mr. Callahan's autopsy.

9. During a fall in which Mr. Callahan struck the underside of his chin against this table, damage to his thyroid cartilage would have been caused by a combination of two forces: the angular force of his falling body (and possibly Mr. Jurczuk's as well) striking the table surface, and the action of the internal musculature of his neck in responding to the hyperextension caused when his neck was forced into a position such that the underside of his chin was moved in an unnatural and damaging upward direction. This combination of forces would be sufficient to cause the damage Mr. Callahan suffered to his thyroid cartilage without any visible injury to the exterior of

his neck itself through a mechanism similar to that suffered when unrestrained occupants hit their chin against automobile dashboards during car accidents causing hyperextension. Additional contact by the front of his neck with the broad flat surface of the table apron/skirt directly below the table surface after chin impact is also consistent with a crushing type of fracture without discrete focal skin bruise. The blood pattern evidence on the floor where Mr. Callahan's body was found between the table and single wall-bunk show that his body was without substantial movement indicating unconsciousness and showing expired (or exhaled) blood pattern from attempts to breath against a collapsed airway.

10. The materials I reviewed show that the fight in this case occurred in a small, tightly confined area—something perhaps best illustrated by the fact first responders had to remove the table that likely caused Mr. Callahan's fatal injury from the cell before they had sufficient room to render aid. Based on Mr. Jurczuk's trial testimony that he and Mr. Callahan physically grappled with each other in two separate incidents separated by a short period of time, the most logical sequence of events producing Mr. Callahan's visible and internal injuries is as follows. During the first round of fighting, Mr. Callahan likely suffered his visible and serious but non-fatal head and face injuries, which may have left him dazed, concussed, and even semi-conscious. During the second round of fighting, when Mr. Callahan and Mr. Jurczuk were falling to the cell floor Mr. Callahan sustained the neck injury that ultimately killed him. This sequence of events, and particularly the fact that Mr. Callahan was already dazed and semi-conscious when he suffered his fatal injury, would explain his lack of immediate reaction to such a severe injury. It could also explain how Mr. Jurczuk, who testified that the cell lights were out during this second phase of the fight and said he left the cell as soon as he was able to get up off the ground, could believe Mr. Callahan was not seriously injured at the time he left even though the thyroid cartilage injury he had suffered would prove fatal within a matter of minutes.

11. My review of materials related to this case has included records of a September 2012 MRI of Mr. Jurczuk's shoulder that discloses a tear in his rotator cuff. This sort of injury usually requires surgery to repair and, in any case, does not heal itself in a short period. The fact that Mr. Jurczuk was recovering from rotator cuff injury at the time of his fight with Mr. Callahan would certainly have reduced his ability to exert force with that injured arm.

12. My review of materials related to this case has also included records of a December 5, 2012 CAT scan of Mr. Jurczuk's head that discloses a nasal septum deviation to the right, soft tissue swelling of the bridge of the nose. (This post-traumatic septal deformity was later repaired on October 18, 2013). That CAT scan also showed swelling (bruises) of the tissues of his

forehead, right side of the skull and periorbital regions. These injuries could have been incurred during Mr. Jurczuk's fight with Mr. Callahan as a result of blows delivered by Mr. Callahan, kicks delivered by Mr. Manago, impact on the concrete cell floor, or some combination of these causes.

SWORN UNDER PENALTY OF PERJURY



June 3, 2024

Elizabeth Laposata, M.D.

109

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 1384CR10160

COMMONWEALTH

vs.

LESLEY JURCZUK

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT’S
MOTION FOR RECONSIDERATION OF MOTION FOR NEW TRIAL**

The defendant, Lesley Jurczuk (“Jurczuk”), previously moved for reconsideration of this Court’s May 17, 2021 Memorandum of Decision and Order denying his *pro se* Motion for New Trial (Paper # 86), and this Court denied Jurczuk’s Motion for Reconsideration on the merits (Paper # 101). Jurczuk appealed that decision to the Appeals Court, which granted leave for Jurczuk to file, and this Court to consider, a Supplement to Defendant’s Motion for Reconsideration (Paper # 108), containing an affidavit of forensic pathologist Dr. Elizabeth Laposata and a request that the Court grant him a new trial. Having considered the affidavit of Dr. Laposata, and for the below reasons, Jurczuk’s supplemental motion to reconsider the denial of his motion to reconsider is **DENIED**.

BACKGROUND

In March 2013, Jurczuk was indicted for murder in the December 2, 2012 beating death of Alexander Callahan (“Callahan”) in a cell at the South Bay House of Correction occupied by Jurczuk, Callahan, and Shaquille Manago (“Manago”). Jurczuk stood trial in October and November 2014 before Superior Court Judge Charles Hely. Prior to trial, trial counsel retained forensic pathologist Dr. Elizabeth Laposata to review case materials and provide an opinion

regarding Callahan's injuries and cause of death. Dr. Laposata appeared at Suffolk Superior Court on November 13, 2014. Trial counsel spoke to Dr. Laposata before ultimately deciding to not call her as a witness. On November 17, 2014, a jury found Jurczuk guilty of the lesser included offense of voluntary manslaughter. On December 3, 2014, Judge Hely sentenced Jurczuk to 18-20 years in state prison. The Appeals Court later affirmed the conviction. See *Commonwealth v. Jurczuk*, 93 Mass. App. Ct. 1114 (2018) (Rule 1:28 opinion).

Subsequently, Jurczuk filed a motion to revise and revoke his sentence, which Superior Court Judge Christine Roach denied in December 2018. In January 2019, Judge Roach denied Jurczuk's motion to reconsider her ruling. On January 17, 2019, Jurczuk appealed Judge Roache's decision. In October 2019, the Appeals Court granted Jurczuk leave to file a motion for new trial. Jurczuk filed a *pro se* Motion for New Trial (Paper #78) on January 29, 2021, and the Commonwealth opposed the motion. In his motion, Jurczuk argued *inter alia* that trial counsel's failure to present Dr. Laposata's testimony at trial constituted ineffective assistance of counsel. The motion was not accompanied by a memorandum or an affidavit from Dr. Laposata. On May 17, 2021, this Court denied the motion (Paper #80). On July 6, 2022, represented by experienced counsel, Jurczuk filed a Motion for Reconsideration (Paper #86). In that motion, Jurczuk again argued that trial counsel's failure to call Dr. Laposata as a witness at trial constituted ineffective assistance. The motion was not accompanied by an affidavit from Dr. Laposata. On September 13, 2023, this Court denied the motion for reconsideration (Paper #101). Jurczuk appealed this Court's decision to the Appeals Court, which granted leave for Jurczuk to file, and this Court to consider, a supplement to the motion for reconsideration containing an affidavit of Dr. Laposata.

Jurczuk filed his Supplement to Defendant’s Motion for Reconsideration (Paper #108) on June 11, 2024. In her accompanying affidavit, Dr. Laposata avers that she “was retained by Mr. Jurczuk ahead of his 2014 trial to review relevant case materials and provide testimony regarding injuries incurred by Mr. Callahan and the cause of his death.” Dr. Laposata further writes that “[t]he below affidavit provides a summary of the testimony [she] would have given if called as a witness during Mr. Jurczuk’s trial”

DISCUSSION

“A genuine motion for reconsideration must be based on (1) a change in circumstances ‘such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision.’” *Commonwealth v. Demirtshyan*, 87 Mass. App. Ct. 737, 741 n.8 (2015), quoting *Audubon Hill S. Condo. Assoc. v. Community Assoc. Underwriters of Am., Inc.*, 82 Mass. App. Ct. 461, 470 (2012). To be considered “newly discovered,” evidence “must have been ‘unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial,’” *Commonwealth v. Don*, 483 Mass. 697, 704 (2019), quoting *Commonwealth v. Grace*, 397 Mass. 303, 306 (1986), or at the time of the presentation of any earlier motion for a new trial, *Commonwealth v. Pike*, 431 Mass. 212, 218 (2000).

Although Jurczuk’s first Motion for Reconsideration (Paper # 86) did not meet the above standards for a motion to reconsider, this Court gave the motion full consideration on the merits because Jurczuk had filed his motion for new trial *pro se*. This second motion to reconsider is filed under entirely different circumstances, and the Court will apply the applicable legal standard.

Jurczuk does not cite any “development of relevant law; or...particular and demonstrable error in the original ruling or decision,” *Demirtshyan*, 87 Mass. App. Ct. at 741 n.8, that would warrant reconsideration. Therefore, Jurczuk’s only conceivable argument is that the affidavit of Dr. Laposata constitutes newly discovered evidence. However, the affidavit itself reveals that counsel retained Dr. Laposata in advance of trial and that Dr. Laposata appeared at the courthouse prepared to testify and consulted with trial counsel before counsel made the decision to not call her as a witness. As such, the testimony of Dr. Laposata was known to the defendant and trial counsel prior to and at the time of trial. Further, appellate counsel referenced trial counsel’s failure to call Dr. Laposata as a trial witness, arguing that her testimony would have benefited the defense, in the original motion to reconsider the denial of the defendant’s motion for new trial. Therefore, appellate counsel knew of Dr. Laposata and the content of her potential testimony prior to filing the motion to reconsider the ruling on the motion for new trial. Consequently, the affidavit of Dr. Laposata does not constitute newly discovered evidence sufficient to justify a motion for reconsideration. See *Murray v. Beth Isr. Deaconess Med. Ctr., Inc.*, 2022 WL 517937 at *4 (2022) (Rule 23.0 opinion) (affidavits containing information that could have been provided earlier do not constitute new evidence and, therefore, judge not required to consider motion to reconsider).¹

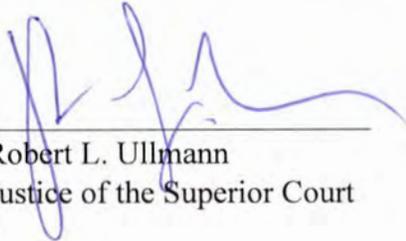
In short, the affidavit of Dr. Laposata provides no grounds for this Court to reconsider its Memorandum of Decision and Order denying Jurczuk’s motion for a new trial.

¹ Although not a ground for the Court’s decision on the pending motion, the Court notes that Dr. Laposata’s theory hinged on the cause of death being a freak injury resulting from the victim’s chin hitting the corner of a table and that, on cross-examination, Dr. Laposata would have been required to acknowledge the extensive, brutal head and body injuries that undeniably resulted from Jurczuk’s blows. Trial counsel’s tactical decision not to call Dr. Laposata may well have assisted Jurczuk by avoiding evidence that supported the murder charge.

CONCLUSION AND ORDER

For the above reasons, the defendant's Supplement to Defendant's Motion for Reconsideration (Paper #108), renewing Motion for Reconsideration of Motion for New Trial (Papers #86), is **DENIED**.

Dated: July 17, 2024



Robert L. Ullmann
Justice of the Superior Court



Neutral

As of: January 23, 2026 8:16 PM Z

Commonwealth v. Soto

Appeals Court of Massachusetts

November 23, 2020, Entered

20-P-171

Reporter

2020 Mass. App. Unpub. LEXIS 988 *; 98 Mass. App. Ct. 1120; 158 N.E.3d 889; 2020 WL 6840746

COMMONWEALTH VS. EDDIE A. SOTO.

Notice: Summary decisions issued by the Appeals Court pursuant to M.A.C. [Rule 23.0](#), as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as [rule 1:28](#), as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to [rule 23.0](#) or [rule 1:28](#) issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See [Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4, 881 N.E.2d 792 \(2008\)](#).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by [Commonwealth v. Soto, 486 Mass. 1112, 2021 Mass. LEXIS 46 \(Mass., Jan. 14, 2021\)](#)

Disposition: Order allowing motion to reconsider affirmed.

Core Terms

vacate, sentence, guilty plea, resentence, reconsideration motion, school zone, ineffective

Judges: Vuono, Meade & Blake, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO [RULE 23.0](#)

This is the defendant's appeal from the allowance of the Commonwealth's motion to reconsider a judge's allowance of the defendant's motion to vacate his 2013 guilty pleas to narcotics-related offenses. On appeal, he claims the District Court judge abused her discretion by allowing the Commonwealth's motion for reconsideration, and that he received ineffective assistance of counsel. We affirm.

On November 13, 2013, the defendant pleaded guilty to possession with intent to distribute heroin (count one), to committing that offense in a school zone (count two), and to possession with intent to distribute cocaine (count

three).¹ A judge accepted the defendant's pleas and sentenced him on counts one and three, to concurrent terms of one day in the house of correction. On count two, the defendant was sentenced to the mandatory minimum term of two years in the house of correction, to run from and after the sentence imposed on count one.

In January of 2014, a nonevidentiary hearing was held on the defendant's motion to vacate the guilty pleas. At the hearing,² the Commonwealth assented to the motion as far as it concerned count two, the school [*2] zone violation, and requested the defendant be resentenced on counts one and three. By agreement, the defendant was resentenced on those counts to concurrent terms of 690 days in the house of correction, deemed served. The parties also agreed that count two, the school zone violation, should be dismissed.

In June of 2018, the defendant filed a motion, claiming that the docket did not correctly reflect what occurred at the January 2014 hearing. Specifically, the defendant claimed that the record should be "corrected" to show that convictions on counts one, two, and three were all vacated. That motion was denied.

In September 2018, the defendant filed a second motion to vacate his guilty pleas. In August 2019, after a hearing, the motion was allowed. Within a few weeks, the Commonwealth moved for reconsideration of the allowed motion. After a hearing, the motion to reconsider was allowed, and the judge reinstated the defendant's one-day sentences on counts one and three. This appeal followed.

1. *The motion to vacate.* The defendant claims that his guilty pleas should have been vacated because he did not have a full understanding of the "interdependent charges," and his agreement with the [*3] Commonwealth was based on a "mutual mistake" as to the consequences of the charge. We disagree.

What underlies the defendant's claim is the Supreme Judicial Court's decision in [Commonwealth v. Bradley, 466 Mass. 551, 998 N.E.2d 774 \(2013\)](#), which held that that the legislative amendment to the school zone statute, which reduced the necessary distance from the school from 1,000 to 300 feet, "applies to all cases alleging a school zone violation for which a guilty plea had not been accepted or conviction entered as of August 2, 2012." *Id. at 561*. See St. 2012, c. 192, [§ 30](#), amending [G. L. c. 94C, § 32J](#). In light of *Bradley*, the amended school zone applied to the defendant's case.

However, contrary to the defendant's claim, and assuming the contract principle of mutual mistake applies to guilty pleas, there was no mutual mistake. *Bradley*, decided two weeks after the defendant pleaded guilty, represented a change in the law. That neither party predicted the outcome in *Bradley* was not a mutual mistake. Importantly, the defendant was represented by counsel, he has made no claim that the plea colloquy was inadequate, and the record discloses his familiarity with the criminal justice system. See [Commonwealth v. Furr, 454 Mass. 101, 109, 907 N.E.2d 664 \(2009\)](#); [Commonwealth v. Russell, 37 Mass. App. Ct. 152, 157, 638 N.E.2d 37 \(1994\)](#). In the end, the defendant cannot establish prejudice because his conviction for the [*4] school zone violation was vacated.

2. *The motion to reconsider.* The defendant also claims the judge abused her discretion by allowing the Commonwealth's motion to reconsider because it was not based on "(1) a change in circumstances 'such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision.'" [Commonwealth v. Demirtshyan, 87 Mass. App. Ct. 737, 741 n.8, 36 N.E.3d 32 \(2015\)](#), quoting [Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470, 975 N.E.2d 458 \(2012\)](#). Even assuming motions to reconsider are so limited, as the Commonwealth properly notes, subsection (2) applies in these circumstances.

¹ That same day, the Commonwealth nolle prossed counts four (second school zone charge) and five (conspiracy to violate the drug laws).

² Despite a writ of habeas corpus being issued to the defendant's place of incarceration, the defendant was not transported to the court house. Defendant's counsel asked that the defendant's presence be waived due to the fact that, based upon the agreement of the parties, the defendant would be resentenced to a term deemed served and would be released that day.

Here, the parties agreed that the January 31, 2014, resentencing was improper because it increased the defendant's one-day sentences (which he had served) to 690 days. See [Commonwealth v. Scott, 86 Mass. App. Ct. 812, 815, 22 N.E.3d 171 \(2015\)](#); [Aldoupolis v. Commonwealth, 386 Mass. 260, 272, 435 N.E.2d 330 \(1982\)](#). However, the parties disagreed about the remedy for this error. Although the remedies found in [Mass. R. Crim. P. 29](#), as appearing in 474 Mass. 1503 (2016), were not available for timing reasons, nor under [Mass. R. Crim. P. 30 \(a\)](#), 435 Mass. 1501 (2001), for custodial reasons, did not mean (as the defendant contends) that the only remedy available was to vacate the defendant's convictions. This is especially true because the defendant did not raise any claim that his plea was not voluntary and intelligent, which if he had, would have made [Mass. R. Crim. P. 30 \(b\)](#), as appearing [*5] in 435 Mass. 1501 (2001), the proper procedural avenue. See [Furr, 454 Mass. at 106; Commonwealth v. Ubeira-Gonzalez, 87 Mass. App. Ct. 37, 39, 23 N.E.3d 127 \(2015\)](#). When the judge adopted the defendant's vacation claim, she made a demonstrable error of law, which made the Commonwealth's motion to reconsider an appropriate vehicle to rectify that error.

For purpose of clarity, we also note that the judge did not abuse her discretion by allowing the motion for reconsideration and correcting her error. Because the defendant had already served his sentence, the court lacked jurisdiction to resentence him, rendering the new sentence void. See [Commonwealth v. McNulty, 42 Mass. App. Ct. 955, 956, 680 N.E.2d 129 \(1997\)](#). In that posture, the judge had the authority to correct the docket and restore the original sentence. See [Commonwealth v. Boe, 456 Mass. 337, 348, 924 N.E.2d 239 \(2010\)](#).

3. *Ineffective assistance of counsel.* The defendant claims he received ineffective assistance of counsel because (1) counsel did not seek to "vacate the interrelated pleas," and agreed to an illegal resentencing involving a substantial increase in the sentences to counts one and three, which had already been served, and (2) counsel acted without the defendant's informed consent when waiving his presence at the hearing. Even though the Commonwealth concedes that resentencing the defendant and doing so without the defendant being present was improper, on this record, [*6]³ the defendant has failed to establish that his attorney was ineffective under [Commonwealth v. Saferian, 366 Mass. 89, 96, 315 N.E.2d 878 \(1974\)](#).

A. *Vacating the guilty pleas.* The defendant finds fault in his counsel for failing to vacate his guilty pleas after there was no longer a factual basis to support the school zone violation.⁴ We disagree, as there was no basis to vacate the defendant's convictions on counts one and three.

Relying on [Commonwealth v. Walters, 479 Mass. 277, 94 N.E.3d 764 \(2018\)](#), the defendant claims that the dependent relationship of the defendant's 2013 plea required that counts one and three be vacated. In *Walters*, the defendant was convicted by a jury of six counts, one of which was vacated by the Supreme Judicial Court due to insufficient evidence, and the defendant was resentenced. *Id.* at 277-278. The court held that the judge "had discretion to determine the resentencing structure as long as she did not add additional time to the original, lawfully imposed sentence." *Id.* at 284. Here, the judge erred in adding time to a sentence the defendant had served, but the judge had no basis to vacate counts one and three. However, the defendant suffered no prejudice as this error was corrected, and the original one-day sentences were restored.⁵

In any event, given the Commonwealth's evidence supporting counts [*7] one and three, as well as the defendant's criminal record, even if these counts had been vacated, there is no likelihood that the defendant would have been able to obtain a more favorable disposition at a new trial than the one day sentences he received on those counts.

³ The defendant raises this claim on direct appeal, which is the weakest posture for such a claim and is "strongly disfavored." [Commonwealth v. Zinser, 446 Mass. 807, 811, 847 N.E.2d 1095 \(2006\)](#). See [Commonwealth v. Keon K., 70 Mass. App. Ct. 568, 573-574, 875 N.E.2d 498 \(2007\)](#).

⁴ The defendant also claims that his counsel should have moved to dismiss the school zone charge for lack of probable cause. The claim is without effect as the school zone plea was vacated by agreement of the parties.

⁵ The same is true as it relates to the claim of ineffective assistance of counsel for agreeing to the illegal resentencing.

The defendant has failed to establish that that "better work might have accomplished something material for the defense." [Commonwealth v. Satterfield, 373 Mass. 109, 115, 364 N.E.2d 1260 \(1977\)](#).

B. *Resentencing without the defendant's presence*. The defendant also claims that counsel was ineffective for negotiating the resentencing agreement without his informed consent and presence. Although, as the Commonwealth properly concedes, it was improper to resentence the defendant, and to do so without his presence, see [Commonwealth v. Scott, 86 Mass. App. Ct. 812, 815, 22 N.E.3d 171 \(2015\)](#); [Mass. R. Crim. P. 18 \(a\)](#), 378 Mass. 887 (1979), again, the defendant cannot establish ineffective assistance under the second prong of *Saferian*. Similar to the failure to vacate claim, the defendant suffered no prejudice, as this resentencing error was corrected and the original one-day sentences were restored.

Order allowing motion to reconsider affirmed.

By the Court (Vuono, Meade & Blake, JJ.⁶),

Entered: November 23, 2020.

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⁶ The panelists are listed in order of seniority.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the pains and penalties of perjury that I have today made service on the defendant by email:

Merritt Schnipper
mschnipper@schnipperhennessy.com

/s/Erin D. Knight
ERIN KNIGHT
Assistant District Attorney
For The Suffolk District

January 23, 2026