

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

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No. \_\_\_\_\_

APPEALS COURT No. 2025-P-0158

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COMMONWEALTH

v.

RICHARD ANDREWS  
n/k/a JU-BANG BORN ALLAH

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**DEFENDANT'S APPLICATION FOR  
DIRECT APPELLATE REVIEW**

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Now comes the defendant-appellant, Ju-Bang Born Allah,<sup>1</sup> in the above-entitled case and applies, pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, for direct appellate review of the denial of his motion to withdraw his guilty plea.

**INTRODUCTION**

This application raises substantial and novel issues of first impression relating to a superior court judge's decision allowing the Hampden County District Attorney's Office to breach protected communications between a defendant in a criminal matter and his trial

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<sup>1</sup> The defendant legally changed his name to Ju-Bang Born Allah from Richard Andrews.

counsel in a case alleging prosecutorial misconduct and raising no allegations of ineffective assistance of counsel. The matter arises out of the defendant's motion to withdraw his guilty plea, in which he argued that the Commonwealth misrepresented DNA test results to defense counsel to strengthen the appearance of its case in plea negotiations, failed to disclose critical evidence including that the defendant was excluded as a DNA contributor to a key piece of physical evidence, and failed to disclose that a potential third-party culprit's DNA was in the complainant's underwear. Under these circumstances, the defendant contended in his motion that the Commonwealth engaged in egregious misconduct and that he suffered substantial prejudice and thereby should be allowed to withdraw his guilty plea. The defendant did not raise any allegations of ineffective assistance by his trial and plea counsel.

### **STATEMENT OF PRIOR PROCEEDINGS**

The defendant appeals from the denial of his motion to withdraw his guilty plea and the Hampden County Superior Court's decision allowing the Commonwealth to breach his attorney-client privileged communications.

On April 15, 1999, a Hampden County Grand Jury indicted the defendant, then known as Richard Andrews, on five counts, including rape, indecent assault and battery on a person over 14, assault with intent to rape (2 counts), and assault and battery.

On March 10, 2000, the defendant pleaded guilty to charges of rape, indecent assault and battery on a person over 14, assault with intent to rape (2 counts), and assault and battery. He received a sentence of 2.5 to 3.5 years on the rape conviction and seven years of probation from and after on the remaining counts.

On May 17, 2004, the defendant was determined to have violated the terms of his probation and re-sentenced to an aggregate of 5 to 7 years in prison on the remaining probationary sentences. He has served these sentences.

On August 31, 2023, Allah moved to withdraw his guilty plea and for post-conviction discovery. The Commonwealth opposed the motion on December 4, 2023.

On March 28, 2024, the court (Mulqueen, J.) held an evidentiary hearing on the defendant's motion to withdraw his guilty plea. Before the hearing, the defendant moved in limine seeking to limit the scope of



the testimony of his trial counsel, Attorney Scott Skolnick, to matters relevant to the underlying motion and to conform to counsel's continuing duties to the defendant pursuant to the Rules of Professional Conduct for Lawyers and the attorney-client privilege. At the outset of the hearing, the court heard from the parties and reserved action on the motion pending testimony. The defendant and Attorney Skolnick testified. At the conclusion of the hearing, the court took the motion under advisement and suspended the hearing pending its decision on the motion in limine.

On May 17, 2024, the court denied the defendant's motion in limine and ordered that the Commonwealth be allowed to inquire of Attorney Skolnick about his conversations with the defendant. On May 20, 2024, the defendant filed a notice of appeal of this decision. The court allowed the defendant's assented-to motion to stay the proceedings pending the interlocutory appeal.

On June 13, 2024, the defendant filed a petition pursuant to G.L. c. 211, § 3, in the single justice session of this Court. After considering submissions from the parties, the single justice (Gaziano, J.) on July 12, 2024, denied the petition on grounds that any error could be remedied

on appeal from any adverse ruling on the post-conviction motion. See SJ-2024-0211 (docket entry 13). The defendant timely appealed the single justice's decision to the full court, which on October 18, 2024, affirmed the single justice's denial of the 211, 3 petition. See SJC-13629 (docket entry 10).

On remand, the superior court continued the hearing and ordered that Attorney Skolnick testify as to his confidential communications with his client. In response to questioning by the Commonwealth, Attorney Skolnick revealed confidential, incriminating statements allegedly made by Allah to him during his professional representation in the case.

On January 15, 2025, the superior court (Mulqueen, J.) denied the defendant's motion to withdraw his guilty plea.

The defendant filed a timely notice of appeal on January 27, 2025. The case was entered in the Massachusetts Appeals Court on February 7, 2025. A brief is due to be filed in the Appeals Court on June 20, 2025.

## **FACTS**

According to discovery materials provided by the Commonwealth, on March 12, 1999, D.E.<sup>2</sup> alleged that a male claiming to be a maintenance man in her building at 14 Gerard Way in Holyoke contacted her by telephone. She told police that she informed the man that she did not know him. He asked whether he could come to her apartment, and she reported telling him no. A short time later, D.E., her 12-year-old daughter N.E., and daughter-in-law T.B. were in her apartment when a Black male who identified himself as JR arrived. D.E. let JR inside and told her guests that he was the maintenance man.

The police incident reports offer slightly differing accounts from D.E. as to what happened next. At some point after JR's arrival, D.E.'s goddaughter C.B. arrived, and N.E. and T.B. departed. D.E. told police that JR then grabbed her, pulled her into the bedroom, got on top of her, "and tried to force himself on her," and she detailed a sexual assault. D.E.'s phone rang during the assault, and she was eventually

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<sup>2</sup> In accordance with General Law chapter 265, section 24C, the complainant is referred to herein as "D.E." The application also uses abbreviations when referencing the complainant's family.

able to answer the call from her friend V.B., C.B.'s mother. D.E. said that at some point either before or during the call she kneed JR in the groin and he left the apartment. D.E. described JR as a very tall and heavy Black male with facial hair wearing blue jeans, a blue t-shirt, an army green and black jacket, and blue and white bikini-style underwear. She later told police that she realized that JR had ejaculated on her during the assault. At Holyoke Hospital staff collected forensic evidence from D.E., but she declined an internal examination.

Police officers spoke with C.B., then 14 years old. She said a man identifying himself as JR was in D.E.'s apartment when she was there. She departed and went with N.E. to see Joyce Crapps in apartment L in building 39. C.B. told the officers that JR entered apartment L in building 39 while she was there, then left a few minutes later. Police went to apartment L and spoke with Crapps, who later said the police were looking for her daughter Shantay's boyfriend, Richard Andrews, but that he was not there.

Police presented D.E. with an array of six photos including the defendant. She selected Andrews's photo and identified him as JR who had assaulted her. Officers showed the array to C.B. and she identified

Andrews's photo as the man known as JR. The police records do not detail the method of the photo identification processes.

According to a police report, on March 13, 1999, Andrews went to the Holyoke Police Department to speak with officers about the investigation. He told officers that T.B. had invited him into D.E.'s apartment and he had agreed. He told the officers that after T.B. and the others left the apartment D.E. propositioned him, but he had denied her advances and left shortly thereafter.

Attorney Scott Skolnick was appointed to represent the defendant. While preparing for trial, the defendant met with Attorney Skolnick several times. During these meetings Attorney Skolnick shared with the defendant discovery materials he received from the Commonwealth, including police reports, notes describing witness interviews, grand jury testimony, and other documents.

The Holyoke Police Department collected suspected biological materials from the scene, from the rape kit, and from blue and white underwear that Shantay Crapps told police belonged to Mr. Andrews.

The case was scheduled for trial on March 10, 2000. On that date, Andrews pleaded guilty to rape, indecent assault and battery on a

person over 14, assault with intent to rape (2 counts), and assault and battery. He received a sentence of 2.5 to 3.5 years on the rape conviction and seven years of probation from and after on the remaining counts.

#### Timeline of Plea and Plea Negotiations

Following his appointment, Attorney Skolnick communicated with the prosecutor assigned to the case, Assistant District Attorney Linda Pisano, about discovery materials and plea negotiations. According to a Case Progress Report note later provided to the defendant's successor counsel as part of the district attorney's trial file, ADA Pisano spoke with Attorney Skolnick on February 29, 2000, about the results of the DNA testing. The note states that she "[a]lso gave Atty Skolnick 1 wk to accept 2½-3½ agreed or else my offer would be 5-7."

On March 6, 2000, ADA Pisano followed up with Attorney Skolnick via a letter relating to the results of the forensic testing that had been performed by Cellmark Diagnostics on the biological materials and making a formal offer to resolve the case. In the letter, ADA Pisano wrote of the forensic testing, "As you are aware we have received the DNA results on the stain found on your clients [sic] underwear. The DNA of [D.E.] was found in the fluid mixture on his underpants. As you

are aware, Cellmark Diagnostics has assigned a statistical value to the probability that [D.E.] was the source of the DNA. The statistical probability that the DNA belongs to [D.E.] is incredibly high.” ADA Pisano then made an offer to resolve the case by way of plea, offering 2.5 years to 3.5 years committed to MCI-Cedar Junction on count 1 (rape) and to 7 years of probation on and after the committed sentence on the remaining counts. ADA Pisano put a time limit on the offer, writing that the defendant would have to notice his intent to plead guilty by March 10, 2000, and complete the plea by March 16, 2000. After receiving the letter, Attorney Skolnick spoke again with ADA Pisano on March 7, 2000, about the results of the DNA testing in the case and the plea offer. According to handwritten notes on a copy of the letter located in the files of the Hampden County District Attorney’s Office, someone, presumably ADA Pisano, wrote “3/7/00-Spoke to Scott This will be plea on 3/10.”

During this timeframe, Attorney Skolnick spoke with the defendant about the Commonwealth’s case, including ADA Pisano’s representations about the results of the DNA testing. Following their discussions, the defendant decided to accept the Commonwealth’s offer.

On March 10, 2000, he pleaded guilty to charges of rape, indecent assault and battery on a person over 14, assault with intent to rape (2 counts), and assault and battery. He received a sentence of 2.5 to 3.5 years on the rape conviction and seven years of probation from and after on the remaining counts.

Discovery of Undisclosed DNA Reports on Post-Conviction Review by Attorney Shepard

In August of 2021, the Committee for Public Counsel Services (CPCS) appointed Attorney Jane Shepard to screen the case. While collecting case materials, Attorney Shepard requested a copy of the Hampden County District Attorney's Office's case file, and she received it with a letter from the office dated October 20, 2021. The district attorney's case file included 44 pages of Bates stamped discovery, together with receipts for discovery. The letter includes receipts for discovery (for pages 1 to 35 but not for pages 36 to 44) signed by Attorney Skolnick; 48 pages of grand jury minutes for April 14, 1999, together with a receipt for discovery signed by Attorney Skolnick on June 17, 1999; a file note by ADA Pisano noting a discussion with Attorney Skolnick on February 29, 2000, concerning terms of a guilty plea; a letter dated March 6, 2000, from ADA Pisano to Attorney



Skolnick containing a formal plea offer; a March 4, 2000, DNA report from Cellmark Diagnostics; and other items.

In her review of this file, Attorney Shepard focused on the DNA testing results and the letter dated March 6, 2000, from ADA Pisano to Attorney Skolnick about those results. From her conversations with the defendant and Attorney Skolnick, Shepard learned that the DNA testing results had not been provided to the defense. In December of 2021, the CPCS appointed the undersigned counsel to represent the defendant in filing a possible post-conviction motion. Attorney Shepard provided copies of her records, including the DNA testing results and ADA Pisano's letter, to counsel.

#### Attorney Skolnick Did Not Receive a Copy of the DNA Testing Results

In an affidavit in support of the motion to withdraw the guilty plea, Attorney Skolnick averred that he did not believe that ADA Pisano ever provided him with a copy of Cellmark's forensic testing results. He did not receive or review the forensic testing results, reports, or supporting files before the defendant offered his plea. In an affidavit in support of the motion to withdraw the guilty plea, the defendant confirmed that he did not receive or review the forensic

testing results, reports, or supporting files before offering his plea.

Attorney Skolnick averred that he relied on ADA Pisano's representations as to the results of Cellmark's forensic testing in advising the defendant regarding whether to accept the Commonwealth's plea offer. He noted that the defendant in turn relied on his statements relating to ADA Pisano's representations about the testing results in deciding to plead guilty in the case.

The representations of Attorney Skolnick and the defendant are supported by the District Attorney's trial file. The final numbered item of discovery contained in the DA's trial file is a letter dated January 24, 2000, from the State Police Crime Laboratory to Cellmark Diagnostics providing an item to be tested. The DA's trial file also contains a copy of a Report of Laboratory Examination dated March 4, 2000, from Cellmark Diagnostics and addressed to Ms. Kellie A. Bogosian at the Massachusetts Department of State Police Crime Laboratory and copied to ADA Pisano. This report contains the results of polymerase chain reaction (PCR) testing performed on items submitted in the defendant's case. Notably, the five-page report is not Bates stamped and there is no

discovery receipt or other indication in the materials provided by the District Attorney's Office that it was ever disclosed to the defense.

In July of 2022, counsel contacted Attorney Skolnick while investigating the case. During the conversation, counsel informed Attorney Skolnick that he had received a copy of Cellmark's DNA report. After counsel provided a copy of Cellmark's DNA report to him, Attorney Skolnick realized he had never seen a copy of the report and that he did not believe it had ever been provided to him by the Commonwealth as part of discovery. Accordingly, he noted that the defendant would not have seen the report either.

The timing of the report's production, communications between Attorney Skolnick and ADA Pisano, and the timing of the plea further corroborate that the Commonwealth did not provide the report to the defense before the plea. The date of Cellmark's written report on the DNA testing results was March 4, 2000. It is clear from the DA's file that Cellmark must have contacted agents of the Commonwealth, whether Ms. Bogosian or ADA Pisano, before the written report was sent. ADA Pisano spoke with Attorney Skolnick on February 29, 2000, about the results of DNA testing, four days before the written report

was issued. ADA Pisano then wrote to Attorney Skolnick on March 6, 2000, about the DNA testing results and confirming the plea offer they had previously discussed. The next day Attorney Skolnick informed ADA Pisano that the defendant would accept the plea offer. On March 10, 2000, the defendant changed his plea. This timeframe supports the conclusion that the Commonwealth did not provide the defense with a copy of the report.

March 28, 2024, Evidentiary Hearing

At the outset of the hearing, the court heard from the parties on the defendant's motion in limine seeking to limit the scope of Attorney Skolnick's testimony to conform to the attorney-client privilege. The court reserved action on the motion pending testimony. The court heard from both the defendant and Attorney Skolnick.

During the Commonwealth's cross-examination of Attorney Skolnick, the following exchange occurred:

Assistant District Attorney Locke: Would it have been your customary practice to discuss with your client any other relevant considerations that may have impacted whether or not they should've taken a plea or not?

Attorney Skolnick: Yes.

ADA Locke: Do you remember having such discussions with the defendant in this case?

Attorney Skolnick: Several times.

ADA Locke: From those discussions, did you learn anything beyond the facts of the case, or the severity of the sentence, that contributed to your opinion as to whether the defendant should've pled guilty?

Attorney Skolnick: Yes.

ADA Locke: What were those? What were those facts?

Attorney Crouch: Objection, Your Honor. I have concerns where this is going to go.

The Court: All right. Repeat the question that you asked.

ADA Locke: I had asked whether there were other considerations beyond the sentence being offered and the underlying facts of the case that contributed to his decision to recommend that the plead guilty and he answered yes. And now I'd like to know what those facts or other considerations were.

The Court: All right. All right. And you have some concerns that the answers might be violative of the attorney-client privilege?

Attorney Crouch: Correct.

The Court: All right. And, you know the answer to this question?

ADA Locke: I do not.

The Court: Okay. So, there are other considerations that you learned about beyond the underlying facts of the case Mr. Allah was charged with, and beyond the sentence recommendation,

whether lenient or severe, that contributed to your recommendation that Mr. Allah plead guilty, or --

Attorney Skolnick: If I could qualify it, Your Honor.

The Court: Sure.

Attorney Skolnick: Speaking with -- the defendant several times, Your Honor, there was some information that was disclosed to me by him, which led to my reviewing the case with him as to what would be his best interest at that time --

Attorney Crouch: Objection, Your Honor.

Attorney Skolnick: -- regarding the case, Your Honor.

The Court: Okay. Well, he's not telling me what that information is. He's simply telling me there is information.

Attorney Crouch: Sure. Which I still think actually goes against Rule of Professional Conduct 1.6. This treads --

The Court: But, if the issue here is whether there was any impropriety in terms of his recommending or discussing the potential of a plea, how is whatever information he's -- he know, not relevant to that determination?

Attorney Crouch: Because we did not make any ineffective assistance arguments or any claims of deficiency on his practice. Our claim is purely prosecutorial misconduct, newly discovered evidence, not ineffective assistance. That's what differentiates this case from all of the other cases where we can get into that.

The court denied the defendant's motion in limine and Attorney Skolnick to testify about his confidential conversations with the defendant. The defendant appealed this decision and following the

denial of his interlocutory appeals, the case was remanded back to the superior court for further proceedings. On remand, the court ordered Attorney Skolnick to testify. In response to the prosecutor's questions, Attorney Skolnick revealed confidential, incriminating statements allegedly made by the defendant to him during his professional representation in the case. The court credited this testimony in its denial of the defendant's motion.

The defendant now challenges the trial court's denial of his motion in limine to protect these attorney-client communications and of his motion to withdraw his guilty plea.

### **ISSUES OF LAW RAISED BY THE APPEAL**

- I. Whether the superior court erred in its decision allowing the prosecutor to breach the attorney-client privilege and inquire into protected communications between the defendant and his trial counsel where the defendant's motion to withdraw his guilty plea raised only issues of prosecutorial misconduct and not any claims of ineffective assistance of counsel.
- II. Whether the superior court erred in denying the defendant's motion to withdraw his guilty plea where the evidence demonstrated that his plea was not made voluntarily and intelligently where the Commonwealth engaged in egregious misconduct, withheld exculpatory evidence, and intentionally misrepresented the results of key DNA testing in the case.

The defendant seeks direct appellate review of his case where it presents issues of first impression for this Court and of such public interest that justice requires a final determination by this Court, according to Massachusetts Rule of Appellate Procedure 11.

This application raises substantial issues relating to the superior court's decision allowing the District Attorney's Office to breach protected communications between a defendant in a criminal matter and his trial counsel in a case alleging prosecutorial misconduct and raising no allegations of ineffective assistance of counsel. Over a timely objection, the court allowed the prosecutor to inquire into attorney-client communications and breach the privilege. During his testimony, Attorney Skolnick testified that "during meetings both on the telephone and in person, Allah admitted to him that he had committed the acts forming the basis of the indictment." The court credited Attorney Skolnick's testimony in its denial of the motion.

This case raises a novel question of law and an issue of first impression in the Commonwealth related to critical areas of representation in criminal cases. The motion judge determined that because the defendant had filed a motion to withdraw his guilty plea,



which necessarily involved receiving legal advice from his attorney on whether to offer such a plea, that put their otherwise privileged communications “at issue” and thus permitted the Commonwealth to breach the attorney-client privilege, even where ineffective assistance was not at issue. Such a ruling threatens to erode one of the most fundamental protections in our legal system, setting a dangerous precedent for attorney-client confidentiality in criminal proceedings. If upheld, this reasoning would gut the attorney-client privilege and chill the very foundation of effective legal representation in criminal cases.

In the absence of relief, the Commonwealth will be newly empowered to inquire into protected conversations between trial counsel and defendants whenever motions to withdraw guilty pleas are filed, undermining the critical right to open communication between attorney and client. This will result in the avoidance of filing such motions in the future and a lack of candor and honest communications between defendants and their trial counsel. This application raises critical issues related to protected communications and challenges a decision allowing the Commonwealth to substantially undermine the attorney-client privilege and is appropriate for direct appellate review.

The defendant has demonstrated a substantial claim of violation of substantive rights.

As the defendant challenged the admission of the protected communications in timely motions, the argument is properly preserved for full appellate review and determination by this Court.

### **ARGUMENT**

#### **I. THE SUPERIOR COURT ERRED IN DECIDING TO ALLOW THE COMMONWEALTH TO BREACH THE ATTORNEY-CLIENT PRIVILEGE RELATING TO COMMUNICATIONS THE DEFENDANT HAD WITH HIS TRIAL ATTORNEY IN A CASE SOLELY RAISING PROSECUTORIAL MISCONDUCT ALLEGATIONS AND NO CLAIMS OF INEFFECTIVE ASSISTANCE.**

The defendant's motion to withdraw his guilty plea argued that the Commonwealth misrepresented DNA test results to defense counsel to strengthen the appearance of its case in plea negotiations, failed to disclose critical evidence including that the defendant was excluded as a DNA contributor to a key piece of physical evidence, and failed to disclose that a potential third-party culprit's DNA was in the complainant's underwear. The motion solely pertained to charges of egregious prosecutorial misconduct and did not raise any allegations of

ineffective assistance by defendant's trial and plea counsel, Attorney Skolnick.

At the hearing and in his filings, the defendant avoided potential issues related to the attorney-client privilege. During the hearing, the defendant limited his inquiries to the relevant factual questions raised in his motion to withdraw his guilty plea, namely (1) whether ADA Pisano provided to Attorney Skolnick the DNA report from Cellmark Diagnostics dated March 4, 2000, and (2) whether ADA Pisano sent and Attorney Skolnick received ADA Pisano's letter dated March 6, 2000, which the defendant argues mischaracterizes the results of the DNA testing. The defendant restricted his questioning to these topics and did not delve into other areas of discussion between the defendant and Attorney Skolnick. Accordingly, the defendant put "at issue" only questions related to these two germane factual inquiries.

**A. Protections of the Attorney-Client Privilege and Confidentiality.**

It is axiomatic that the attorney-client privilege, which encourages "full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice," is a necessary foundation for the

adversarial system of justice. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” *Trammel v. United States*, 445 U.S. 40, 51 (1980). The privilege operates to protect disclosures which might not have been made absent the privilege and to encourage open communication without fear. See *Fisher v. United States*, 425 U.S. 391, 403 (1976). The Supreme Judicial Court has long articulated the importance of upholding the sanctity of attorney-client communications, writing of the principle:

[S]o numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.

*Hatton v. Robinson*, 14 Pick. 416, 421-422 (1833).

As “the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent

tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process." See *In re John Doe*, 408 Mass. 480, 482 (1990), quoting *In re Grand Jury Investigation*, 723 F.2d 447, 451 (6th Cir. 1983). "But that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure." *In re John Doe*, 408 Mass. at 482. The "social good derived from the proper performance of the functions of lawyers acting for their clients...outweigh[s] the harm that may come from the suppression of the evidence." See *Commonwealth v. Goldman*, 395 Mass. 495, 502 (1985), quoting *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D.Mass. 1950).

The Massachusetts Rules of Professional Conduct further detail the obligations attorneys owe to their current and former clients. As Mr. Allah's former counsel, Attorney Skolnick has an obligation to not reveal confidential information relating to his representation of the defendant without his consent. "Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege,

(ii) likely to be embarrassing or detrimental to the client if disclosed, or  
(iii) information that the lawyer has agreed to keep confidential.”

Supreme Judicial Court, Rule of Professional Conduct 1.6(a). This duty continues even after the termination of the client-lawyer relationship.

See Supreme Judicial Court, Rule of Professional Conduct 1.9(c).

### **B. The Privilege Was Not Waived.**

The privilege of insisting that the attorney not disclose the client’s communications belongs only to the client and therefore can be waived only by the client. See *In re John Doe*, 408 Mass. at 483, citing *Hatton*, 14 Pick. at 422. The defendant did not waive the attorney-client privilege in bringing the instant motion, which sought to withdraw his guilty plea and requested a new trial by arguing that the Commonwealth failed to disclose exculpatory DNA testing results and by misrepresenting the DNA test results to defense counsel to strengthen the appearance of its case in plea negotiations. In its superior court filings, the Commonwealth suggested the “defendant has implicitly alleged that Attorney Skolnick was ineffective in advising him to plead guilty.” To the contrary, the defendant argued that the Commonwealth engaged in egregious misconduct and that he suffered

substantial prejudice meriting the withdrawal of his guilty plea. During the hearing and in his filings, the defendant argued that ADA Pisano engaged in prosecutorial misconduct that misled and misinformed Attorney Skolnick, not that trial counsel rendered ineffective assistance of counsel. The Commonwealth's attempts to recharacterize the defendant's arguments by shifting focus away from the alleged misconduct of ADA Pisano are flatly contradicted by the record.<sup>3</sup> ADA Pisano's successful efforts to mislead Attorney Skolnick about the results of the Cellmark DNA testing in the case do not provide a basis for finding that his representation was ineffective in this case for relaying that misinformation to the defendant. As the defendant did not, explicitly or implicitly, allege that Attorney Skolnick's assistance of counsel was ineffective, the attorney-client privilege and duty of confidentiality was not waived. See Supreme Judicial Court, Rule of Professional Conduct 1.6(b)(5); see also *XYZ Corp. v. United States (In re Keeper of the Records)*, 348 F.3d 16, 23 (1<sup>st</sup> Cir. 2003) (as the

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<sup>3</sup> The Commonwealth's arguments are further complicated by Attorney Skolnick's joining the Hampden County District Attorney's Office in February 2023, after he signed an affidavit in support of the defendant's motion in this case.

attorney-client privilege is “highly valued,” “courts should be cautious about finding implied waivers” and limit their scope); *In re Lott*, 424 F.3d 446, 453-54 (6<sup>th</sup> Cir. 2005) (waiver to be narrowly construed; claim of actual innocence does not impliedly waive privilege). The superior court’s decision finding an implied waiver of the attorney-client privilege is in error.

Moreover, even where there has been an implied waiver and disclosure of some communications, this does not suggest an implied waiver of all privileged communications on the same subject matter. See *XYZ Corp.*, 348 F.3d at 24; *Darius v. City of Boston*, 433 Mass. 274, 283 (2001) (“An ‘at issue’ waiver, in circumstances where it is recognized, should not be tantamount to a blanket waiver of the entire attorney-client privilege in the case”); *Clair v. Clair*, 464 Mass. 205, 219 (2013) (scope of an “at issue” waiver “is not to be viewed too broadly”). Rather, the scope of the waiver imposed must be no broader than necessary. See *United States v. Pinson*, 584 F.3d 972, 979 (10<sup>th</sup> Cir. 2009); *Bittaker v. Woodford*, 331 F.3d 715, 716 (9<sup>th</sup> Cir.) (2003). “A broad waiver rule would no doubt inhibit the kind of frank attorney-client communications and vigorous investigation of all possible defenses that



the attorney-client and work product privileges are designed to promote.” *Bittaker*, 331 F.3d at 722.

In contrast to the superior court’s decision, the defendant did not press a claim or defense to which privileged communications are integral while simultaneously refusing to produce those communications. See *Brauner v. Valley*, 101 Mass.App.Ct. 61, 69-70 (2022). As opposed to so-called “shield and sword” arguments, the communications the Commonwealth elicited were not integral to the claims here as they bore no relevance to the issues of whether ADA Pisano withheld the DNA report and misrepresented its contents. At the hearing, the Commonwealth broadly inquired—without knowing the answers to its questions—of Attorney Skolnick about his attorney-client protected communications with Allah. In its superior court filing, the Commonwealth suggested the court adopt a broad rule that would allow it to intrude on protected attorney-client communications any time a defendant filed a motion to withdraw a guilty plea under the guise of consideration of factors 4 and 5 of the *Scott/Ferrara* tests (4: “whether the evidence would have influenced counsel’s recommendation as to whether to accept a particular plea offer” and 5: “whether the

value of the evidence was outweighed by the benefits of entering into the plea agreement”). See *Commonwealth v. Scott*, 467 Mass. 336, 355-356 (2014); *United States v. Ferrara*, 456 F.3d 278, 290-293 (1st Cir. 2006). However, attorney-client communications are not relevant to factor 5, in which cases largely review the leniency of the plea versus the penalty the defendant faced after conviction at trial. Analysis of factor 4 does not require let alone allow a full examination of all the dimensions of the attorney-client relationship, including protected communications. Instead, the factor allows the Commonwealth to inquire of defense counsel, as occurred without objection in this case, whether his advice would have changed considering the evidence of misconduct. Attorney Skolnick provided testimony in response to the Commonwealth’s inquiries on this factor and the court was permitted to consider his statements in evaluating factor 4. Contrast *Commonwealth v. Woodberry*, 26 Mass.App.Ct. 636, 637-639 (1988) (involving explicit allegations of ineffective assistance of counsel in advising the defendant to accept a plea).

The relevant cases allowing some limited waivers of the attorney-client privilege have occurred either in civil cases or in the ineffective

assistance of counsel context in criminal cases, not in cases alleging prosecutorial misconduct. Contrast *Woodberry*, 26 Mass.App.Ct. at 637-639; *Commonwealth v. Balthazar*, 86 Mass.App.Ct. 438, 441 n.7 (2014) (“[B]ecause the defendant had asserted counsel was ineffective, counsel was permitted by Mass.R.Prof.C. 1.6[b][2], 426 Mass. 1322 [1998], to reveal confidences reasonably necessary to establish a defense in that controversy”). Even if the defendant had raised a claim of ineffective assistance of counsel, the attorney-client privilege would not be fully waived and counsel still maintains a responsibility of confidentiality and loyalty to the client. See *Commonwealth v. Brito*, 390 Mass. 112, 119 (1983) (“Once [a claim of ineffective assistance] is made, the attorney-client privilege may be treated as waived at least in part, but trial counsel’s obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel”); *Woodberry*, 26 Mass.App.Ct. at 637 (“Although it is true that an attorney may, in an effort to defend himself against allegations of misconduct, disclose confidential communications, the scope of that disclosure is not unlimited.”)

**STATEMENT OF REASONS WHY  
DIRECT APPELLATE REVIEW IS APPROPRIATE**

The defendant seeks direct appellate review of his case because it presents an important question of first impression that should be submitted for final determination to the Supreme Judicial Court, and because the question presented is of such public interest that justice requires a final determination by the full Court. The issue of when the Commonwealth may breach protected communications between an attorney and his client in the post-conviction context is a matter of great public interest, as it impacts many defendants throughout the Commonwealth. The defendant therefore respectfully asks this Court to allow his application for direct appellate review.

Respectfully Submitted,  
RICHARD ANDREWS,  
n/k/a/ JU-BANG BORN ALLAH,  
By his attorney,

Andrew S. Crouch

Andrew S. Crouch (BBO# 648496)  
22 Putnam Avenue  
Cambridge, MA 02139  
(617) 441-5111  
acrouch@andrewcrouch.com

June 10, 2025

## **CERTIFICATE OF SERVICE**

I, Andrew S. Crouch, hereby certify that I have served the foregoing application for direct appellate review and addendum upon the Commonwealth through the Court's electronic filing system on June 10, 2025, to:

Michael Locke, Esq.  
Hampden District Atty's Office  
Hall of Justice, 3rd Floor  
50 State Street  
Springfield, MA 01103

*Andrew S. Crouch*

Andrew S. Crouch

## **CERTIFICATE OF COMPLIANCE**

I, Andrew S. Crouch, hereby certify, pursuant to Massachusetts Rule of Appellate Procedure 16(k), that this application for direct appellate review complies with all applicable rules of court pertaining to the filing of applications and the type-volume limitation of MRAP 11(b) and 20(a)(4)(B).

1. The application contains 1,968 words excluding the parts of the application exempted by MRAP 11(b).
2. The application has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

*Andrew S. Crouch*

Andrew S. Crouch

## **ADDENDUM**

Docket Sheets 9979CR00735.....	36
Memorandum of Decision and Order on Defendant's Motion to Withdraw Guilty Plea and for a New Trial.....	45

## 9979CR00735 Commonwealth vs. Andrews, Richard

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 04/15/1999
- DCM Track:
- I - Inventory
- Initiating Action:
- RAPE c265 §22(b)
- Status Date:
- 04/15/1999
- Case Judge:
- Mulqueen, Hon. Jane E
- Next Event:
- 

All Information Party Charge Event Tickler Docket Disposition

### Party Information

#### Commonwealth

- Prosecutor

Alias

#### Party Attorney

- Attorney
- McMahon, Esq., Katherine E
- Bar Code
- 338410
- Address
- Office of the Hampden District Attorney
- Roderick L Ireland Courthouse
- 50 State Street
- Springfield, MA 01102
- Phone Number
- (413)505-5905

[More Party Information](#)

#### Andrews, Richard

- Defendant

Alias

#### Party Attorney

- Attorney
- Crouch, Esq., Andrew Scott
- Bar Code
- 648496
- Address
- Law Office of Andrew S. Crouch
- 22 Putnam Ave
- Cambridge, MA 02139
- Phone Number
- (617)441-5111

[More Party Information](#)

### Party Charge Information

- Andrews, Richard
- - Defendant
- Charge # 1:
- 265/22/A-1 - Felony RAPE c265 §22(b)
- Original Charge
- 265/22/A-1 RAPE c265 §22(b) (Felony)
- Indicted Charge
- 
- Amended Charge
- 

Charge Disposition



Disposition Date  
Disposition  
03/10/2000  
Guilty Plea

- **Andrews, Richard**
- - Defendant
- **Charge # 2:**  
**265/13H-1 - Felony** INDECENT A&B ON PERSON 14 OR OVER c265 §13H

- Original Charge
- 265/13H-1 INDECENT A&B ON PERSON 14 OR OVER c265 §13H (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**  
Disposition Date  
Disposition  
03/10/2000  
Guilty Plea

- **Andrews, Richard**
- - Defendant
- **Charge # 3:**  
**265/24/A-1 - Felony** ASSAULT TO RAPE c265 §24

- Original Charge
- 265/24/A-1 ASSAULT TO RAPE c265 §24 (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**  
Disposition Date  
Disposition  
03/10/2000  
Guilty Plea

- **Andrews, Richard**
- - Defendant
- **Charge # 4:**  
**265/24/A-1 - Felony** ASSAULT TO RAPE c265 §24

- Original Charge
- 265/24/A-1 ASSAULT TO RAPE c265 §24 (Felony)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**  
Disposition Date  
Disposition  
03/10/2000  
Guilty Plea

- **Andrews, Richard**
- - Defendant
- **Charge # 5:**  
**265/13A/B-0 - Misdemeanor - more than 100 days incarceration** A&B c265 §13A

- Original Charge
- 265/13A/B-0 A&B c265 §13A (Misdemeanor - more than 100 days incarceration)
- Indicted Charge
- 
- Amended Charge
- 

**Charge Disposition**  
Disposition Date  
Disposition  
03/10/2000  
Guilty Plea

## Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
02/06/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Probation Report		Held as Scheduled
03/17/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Rescheduled





<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
03/20/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
05/14/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
05/16/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
05/20/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Probation Report		Held as Scheduled
05/20/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Bail Review		Rescheduled
06/09/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Violation of Probation Hearing		Held as Scheduled
06/30/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
08/21/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
08/25/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
10/17/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Appearance / Appointment of Counsel		Held as Scheduled
11/25/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Probation Report		Held as Scheduled
11/28/2003 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Not Held
03/31/2004 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing		Held as Scheduled
04/09/2004 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Probation Report		Rescheduled
04/29/2004 09:00 AM	Criminal 1 - Ct. Rm. 1		Hearing for Probation Report		Held as Scheduled
05/17/2004 09:00 AM	Criminal 1 - Ct. Rm. 1		Violation of Probation Hearing		Held as Scheduled
03/28/2024 02:00 PM	Criminal 1 - Ct. Rm. 1	SPRF-3rd FL, CR 1 (SC)	Motion Hearing	Mulqueen, Hon. Jane E	Held as Scheduled
04/23/2024 02:00 PM	CR Session 2 - Ct. Rm 3	SPRF-3rd FL, CR 2 (SC)	Motion Hearing	Mulqueen, Hon. Jane E	Not Held
05/21/2024 02:00 PM	CR Session 2 - Ct. Rm 3	SPRF-3rd FL, CR 2 (SC)	Motion Hearing	Mulqueen, Hon. Jane E	Rescheduled
06/26/2024 02:00 PM	CR Session 2 - Ct. Rm 3	SPRF-3rd FL, CR 2 (SC)	Conference to Review Status	Mulqueen, Hon. Jane E	Held via Video/Phone
08/07/2024 02:00 PM	CR Session 2 - Ct. Rm 3	SPRF-3rd FL, CR 2 (SC)	Conference to Review Status	Mulqueen, Hon. Jane E	Rescheduled
09/25/2024 02:00 PM	CR Session 2 - Ct. Rm 3	SPRF-3rd FL, CR 2 (SC)	Conference to Review Status	Mulqueen, Hon. Jane E	Canceled
10/29/2024 09:00 AM	Criminal 1 - Ct. Rm. 1	SPRF-3rd FL, CR 1 (SC)	Conference to Review Status		Held via Video/Phone
11/20/2024 09:23 AM	CR Session 4 - Ct. Rm 5	SPRF-3rd FL, CR 4 (SC)	Motion Hearing		Not Held
11/20/2024 02:00 PM	Criminal 1 - Ct. Rm. 1	SPRF-3rd FL, CR 1 (SC)	Motion Hearing	Mulqueen, Hon. Jane E	Held - Under advisement
01/15/2025 02:00 PM	Criminal 1 - Ct. Rm. 1		Conference to Review Status		Not Held



#### **Ticklers**









<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Under Advisement	11/20/2024	12/20/2024	30	01/15/2025




## Docket Information




<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>	<i>Image Avail.</i>
04/15/1999	Indictment returned	1	
03/10/2000	SEE DOCKET BOOK FOR PRIOR ENTRIES		
03/10/2000	COUNTS 1-5: (99-735 - 99-739) - Defendant retracts and pleads guilty to all counts - accepted (McDonald, J.)	32	
03/10/2000	COUNT 2: (99-736) Guilty plea		
03/10/2000	COUNT 3: (99-737) Guilty plea		
03/10/2000	COUNT 4: (99-738) Guilty plea		
03/10/2000	COUNT 5: (99-739) Guilty plea		
03/10/2000	COUNT 1: (99-735) SENTENCE: MCI Cedar Junction for not more than 3 1/2 years and not less than 2 1/2 years, with credit for 133 days by agreement, sentence to run from and after Superior Court sentence now serving on 99-1474 \$65.00 victim witness fee imposed.	33	
03/10/2000	Not. 6/178E	34	
03/10/2000	Defendant warned per Chapter 278, Sec. 22E of DNA	35	
03/10/2000	COUNT 2: (99-736) SENTENCE: Ordered on Probation for 7 years from and after the sentence imposed on 99-735, see court record for special condition, Probation supervisory fee of 45/month imposed. (McDonald, J.)		
03/10/2000	COUNT 3: (99-737) SENTENCE: Ordered on Probation for 7 years conc. w/Probation imposed on 99-736 (McDonald, J.)		
03/10/2000	COUNT 4: (99-738) SENTENCE: Ordered on Probation for 7 years conc. w/99-736. (McDonald, J.)		
03/10/2000	COUNT 5: (99-739) SENTENCE: Ordered on Probation for 7 years conc. w/99-736 (McDonald, J.)		
03/30/2000	Motion to waive fees & aff. N. 4/21	36	
04/24/2000	#36-- Denied (McDonald, J.) N. 4/28		
12/18/2000	Motion to waive the fees for the collection of DNA N. 12/19/2000	37	
01/02/2001	Motion (P#37) denied w/o prej. (See pleading) (McDonald, J.) N. 01/10/2001		
02/06/2003	Appointment of Counsel Edward B Fogarty		
02/06/2003	Notice of assignment of counsel filed. (see pleading #2 in 99-736)		
02/06/2003	After hearing defendant submits to violation of probation and court finds violation		
02/06/2003	Finding by Court: revocation finding and order (Curley, J) (see pleading #3 in 99-736		
02/06/2003	Defendant is subject to the following special conditions: upon release from current incarceration , defendant to be fitted with Elmo with a review after 1 year and a possible extension for 6 months (Thomas J. Curley, Jr., Justice)		
03/20/2003	Appointment of Counsel Edward B Fogarty		
03/20/2003	After hearing, conditions modified - see Clerk's log (Josephson, J.)		
05/14/2003	Appointment of Counsel Edward B Fogarty		
05/14/2003	Notice of assignment of counsel filed.(See pleading #4 in 99-736)		
05/14/2003	Bail set: \$10,000.00 cash/surety (Page, J.)		
05/14/2003	Bail: mittimus issued (See pleading #5 in 99-736)		
05/16/2003	Motion by Deft: to withdraw (see pleading #6 in 99-736)		
05/16/2003	Affidavit of in support of motion to withdraw		
05/16/2003	Motion (P#6) denied (Tina S. Page, Justice).		
06/09/2003	Sentence on 99-736: after violation of conditions, defendant sentenced to ELMO with conditions - see Clerk's log (Carhart, J.)		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
06/09/2003	Sentence on 99-737, 99-738 & 99-739: after violation of conditions (See sentence on 99-736)		
06/30/2003	After hearing, conditions modified (see Clerk's log) (McDonald, J.)		
07/21/2003	VTP warrant issued for temporary custody to detain (pleading #7 in 99-736)		
07/21/2003	VTP warrant recalled (Velis, J)		
07/21/2003	Bail set:released on same bail with same terms & conditions		
08/21/2003	Appointment of Counsel Mary Anne Stamm (Agostini, J.) (as to 99-736)		
08/21/2003	Attorney appearance On this date Mary Anne Stamm, Esq. dismissed/withdrawn as Appointed - Indigent Defendant for Defendant Richard Andrews		
08/25/2003	After hearing on 99-736; New residence approved for ELMO; defendant ordered to call probation department as directed (Agostini, J.)		
08/26/2003	Appearance of Deft's Atty: Mary Anne Stamm (See pleading #8 in 99-736)		
08/29/2003	Notice of assignment of counsel filed. (see pleading #9, on 99-736)		
10/17/2003	Appointment of Counsel Mary Anne Stamm		
10/20/2003	Notice of assignment of counsel filed. (pleading #10)		
10/20/2003	Appearance of Deft's Atty: Mary Anne Stamm (pleading #11)		
11/25/2003	Motion by Deft: to amend conditions of probation (See pleading #12 in 99-736)		
11/25/2003	Motion (P#12 in 99-736) allowed - see pleading (Bertha D. Josephson, Justice).		
11/28/2003	Request filed by probation for a warrant- Allowed (Josephson, J) (see pleading #13 in 99-736)		
11/28/2003	VTP warrant issued (see pleading #14 in 99-736)		
03/31/2004	VTP warrant recalled (on 99-736)		
03/31/2004	Committee for Public Counsel Services appointed, pursuant to Rule 53 (on 99-736)		
03/31/2004	Bail set: \$50,000.00 cash (on 99-736) (Josephson, J.)		
03/31/2004	Bail: mittimus issued (see pleading #15, on 99-736)		
04/30/2004	Pre-Revocation form filed (pleading #16 in 99-736)		
05/17/2004	Sentence: after violation of conditions on 99-736- MCI Cedar Junction for not more than 5 years and not less than 3 years concurrent with 99-737 (see pldg. #17), on 99-737- MCI Cedar Junction for not more than 7 years and not less than 5 years, on 99-738- MCI Cedar Junction for not more than 7 years and not less than 5 years, concurrent with 99-737 (see pldg. #2) , on 99-739 - Hampden County House of Correction for 1 years concurrent with 99-737 (see pldg. #2)		
05/17/2004	Sentence credit given as per 279:33A: 48 days by agreement		
07/24/2006	Motion by Deft: for production of transcripts	38	
07/28/2006	Motion (P#38) allowed (McDonald, J.) N. 7/31/06		
08/23/2021	Attorney appearance On this date Jane Shepard, Esq. added as Special Appearance for Defendant Richard Andrews	39	
08/23/2021	Attorney appearance On this date Jane Shepard, Esq. dismissed/withdrawn as Special Appearance for Defendant Richard Andrews		<a href="#">Image</a>
09/28/2021	Docket Note: copies made sent to Atty Jane Shepard		
08/31/2023	Defendant 's Motion to withdraw guilty plea and for a new trial	40	
08/31/2023	Richard Andrews's Memorandum in support of motion to withdraw guilty plea and for a new trial	41	
08/31/2023	Defendant 's Motion for post-conviction discovery	42	
			<a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
09/15/2023	Attorney appearance On this date Michael Locke, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth	43	 <a href="#">Image</a>
10/03/2023	Endorsement on Motion to Withdraw Guilty Plea and for a New Trial, (#40.0): Other action taken The Commonwealth has until December 4, 2023 to file it's Opposition		 <a href="#">Image</a>
10/03/2023	Attorney appearance On this date Andrew Scott Crouch, Esq. added for Defendant Richard Andrews		 <a href="#">Image</a>
12/04/2023	Commonwealth's Memorandum in opposition to Defendant's motion to withdraw guilty plea and motion for post conviction discovery	44	 <a href="#">Image</a>
12/04/2023	Commonwealth 's Motion to impound appendix	45	 <a href="#">Image</a>
12/04/2023	Commonwealth 's Appendix to Commonwealth's opposition to Defendant's motion for new trial	46	 <a href="#">Image</a>
02/15/2024	Endorsement on Motion to Withdraw Guilty Plea and for a New Trial, (#40.0): Other action taken To be scheduled for evidentiary hearing by clerk's office. n. via email 2/16/24		 <a href="#">Image</a>
02/16/2024	Endorsement on Defendant's Motion for Post-Conviction Discovery, (#42.0): Other action taken To be scheduled for hearing in conjunction with pleading No. 40.  n. via email 2/16/24		 <a href="#">Image</a>
03/27/2024	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 03/28/2024 02:00 PM Motion Hearing. Physical Habe to issue. Please have deft. here at 9 AM		
03/28/2024	Event Result:: Motion Hearing scheduled on: 03/28/2024 02:00 PM Has been: Held as Scheduled Comments: FTR 1 FOLEY Hon. Jane E Mulqueen, Presiding Staff: Nancy Ramos, Assistant Clerk Magistrate Alyson Yorlano, Assistant Clerk Magistrate		
03/28/2024	Defendant 's Motion in limine to conform testimony to the Attorney-Client Privilege	47	 <a href="#">Image</a>
04/19/2024	Commonwealth 's Motion to continue	48	 <a href="#">Image</a>
04/19/2024	Commonwealth's Memorandum Regarding Defendant's waiver of the Attorney-Client privilege	49	 <a href="#">Image</a>
04/22/2024	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 04/23/2024 02:00 PM Motion Hearing. PHYSICAL HABE TO ISSUE. PLEASE HAVE DEFT. HERE AT 1 PM		
04/22/2024	Event Result:: Motion Hearing scheduled on: 04/23/2024 02:00 PM Has been: Not Held For the following reason: Request of Commonwealth Comments: NO FTR USED Hon. Jane E Mulqueen, Presiding Staff: Michael T Sarnacki, Esq., Assistant Clerk Magistrate		
04/22/2024	Endorsement on Motion to continue, (#48.0): ALLOWED		 <a href="#">Image</a>
04/30/2024	Defendant 's Supplemental Motion in limine to conform testimony to the attorney-client privilege N.4/30/24	50	 <a href="#">Image</a>
05/17/2024	Endorsement on Motion in Limine to conform testimony to the attorney-client privilege, (#47.0): DENIED See endorsement Paper no 50  The defendant's claim in this matter centers around his decision to please guilty which was dependent upon legal advice he received from his attorney in conversations the defendant discussed both in his affidavit in support of his motion as well as his testimony at the hearing. Even though this matter does not involve a claim of ineffective assistance of counsel, the defendant's reliance on the advice of counsel is directly implicated in his claims. Therefore, this court finds that the defendant has put the privileged communication "at issue". See Brauner V. Valley, 101 Mass.App.CT.61 (2022). As "the underlying principal behind 'at issue'. waiver is that a party may not press a claim or defense to which privileged communications are integral, while simultaneously refusing to produce these communications if they are unavailable from other sources," Id. at 70, the defendant's motion to conform testimony to the attorney-client privilege is DENIED		 <a href="#">Image</a>
05/20/2024	Notice to the Supreme Judicial Court of Interlocutory Appeal  Applies To: Crouch, Esq., Andrew Scott (Attorney) on behalf of Andrews, Richard (Defendant)	51	 <a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
05/20/2024	Defendant 's Assented to Motion to continue hearing or for stay of proceedings pending interlocutory appeal  Applies To: Crouch, Esq., Andrew Scott (Attorney) on behalf of Andrews, Richard (Defendant)	52	 <a href="#">Image</a>
05/20/2024	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 05/21/2024 02:00 PM Motion Hearing. PHYSICAL HABE TO ISSUE. PLEASE HAVE DEFT. HERE AT 12 pm (NOON) Before Judge Mulqueen		
05/20/2024	Event Result:: Motion Hearing scheduled on: 05/21/2024 02:00 PM Has been: Rescheduled For the following reason: Request of Defendant Comments: MTC pl #2 Hon. Jane E Mulqueen, Presiding Staff: Nancy Ramos, Assistant Clerk Magistrate		
05/20/2024	Endorsement on Defendant's Assented-To Motion to continue hearing or for stay of proceedings pending interlocutory appeal, (#52.0): ALLOWED N. by email		 <a href="#">Image</a>
05/20/2024	Defendant 's Motion for Expedited Transcript of Hearing	53	 <a href="#">Image</a>
05/21/2024	Endorsement on Motion for expedited transcript of hearing, (#53.0): ALLOWED n email		 <a href="#">Image</a>
05/24/2024	List of exhibits  Motion Hearing	54	 <a href="#">Image</a>
06/25/2024	Habeas Corpus for defendant issued to Souza Baranowski Correctional Center returnable for 06/26/2024 02:00 PM Conference to Review Status. re: appeal before Mulqueen, J. at 2pm by zoom Meeting ID: 161 2460 9521 Passcode: 197417		
06/26/2024	Event Result:: Conference to Review Status scheduled on: 06/26/2024 02:00 PM Has been: Held via Video/Phone Comments: FTR 2 Hon. Jane E Mulqueen, Presiding Staff: Susan Joaquin, Assistant Clerk Magistrate		
07/15/2024	Notice of docket entry received from Supreme Judicial Court JUDGMENT: denying relief under c. 211, s.3 without a hearing. (Gaziano, J.)	55	 <a href="#">Image</a>
07/17/2024	Notice of docket entry received from Supreme Judicial Court You are hereby notified that the record in the above-entitled case has been assembled in the office of the Clerk of the Supreme Judicial Court for the County of Suffolk in accordance with the Rules of Appellate Procedure, Rule 9 (a). You are hereby further notified that the following documents were transmitted to the office of the Clerk of the Supreme Judicial Court for the Commonwealth as required by the Rules of Appellate Procedure, Rule 9 (e) (2): <ul style="list-style-type: none"> <li>Completed Appellate Court Entry Statement</li> <li>Copy of this Notice of Assembly to Parties/Counsel</li> <li>Copy of the Notice(s) of Appeal OR Reservation and Report</li> <li>One (1) copy of the Docket Entries which specifically notate any impounded documents that are included in the record</li> </ul> In accordance with the Rules of Appellate Procedure, Rule 10 (a) (1), the appellant must enter the case in the Supreme Judicial Court for the Commonwealth within fourteen (14) days of receipt of this notice. If on appeal from a final order or judgment of the single justice denying relief from an interlocutory ruling in the trial court, the appeal will be governed by S.J.C. Rule 2:21. THIS NOTICE DOES NOT CONSTITUTE ENTRY IN THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH. Very truly yours, /s/ Maura S. Doyle Maura S. Doyle Clerk	56	 <a href="#">Image</a>
08/02/2024	Event Result:: Conference to Review Status scheduled on: 08/07/2024 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Jane E Mulqueen, Presiding Staff: Michael T Sarnacki, Esq., Assistant Clerk Magistrate		
08/07/2024	Pro Se Defendant 's Motion for time served	57	 <a href="#">Image</a>

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
08/30/2024	Endorsement on Motion for time served, (#57.0): DENIED The defendant is represented by counsel and the court will not entertain this pro se filing. Additionally, the issue upon which the defendant bases his request (prosecutorial misconduct) is being litigated currently in the Superior Court. (n via mail)  Judge: Mulqueen, Hon. Jane E		 <a href="#">Image</a>
09/24/2024	Event Result:: Conference to Review Status scheduled on: 09/25/2024 02:00 PM Has been: Canceled For the following reason: By Court prior to date Hon. Jane E Mulqueen, Presiding Staff: Brian Dolaher, Assistant Clerk Magistrate		
10/29/2024	Event Result:: Conference to Review Status scheduled on: 10/29/2024 09:00 AM Has been: Held via Video/Phone Comments: FTR 1 Hon. Jane E Mulqueen, Presiding Staff: Danielle Cruz, Assistant Clerk Magistrate Susan Joaquin, Assistant Clerk Magistrate Nancy Ramos, Assistant Clerk Magistrate		
11/04/2024	Habeas Corpus for defendant issued to MCI - Gardner returnable for 11/20/2024 09:23 AM Motion Hearing. Physical Habe to Issue. Please have Defendant Present at 2pm.-CANCELLED		
11/15/2024	Habeas Corpus for defendant issued to Massachusetts Treatment Center - Bridgewater returnable for 11/20/2024 09:23 AM Motion Hearing. PHYSICAL HABE TO ISSUE FOR DEFENDANT. PLEASE HAVE DEFT. HERE AT 1 PM, HEARING TO START PROMPTLY @ 2 PM		
11/20/2024	Notice of docket entry received from Supreme Judicial Court JUDGMENT after Rescript from the SJC for the Commonwealth, as on file. (Georges, J.) "Judgment affirmed."	58	 <a href="#">Image</a>
11/20/2024	Event Result:: Motion Hearing scheduled on: 11/20/2024 09:23 AM Has been: Not Held For the following reason: Transferred to another session Hon. Jane E Mulqueen, Presiding Staff: Shana Wilson, Assistant Clerk Magistrate		
11/20/2024	Matter taken under advisement: Motion Hearing scheduled on: 11/20/2024 02:00 PM Has been: Held - Under advisement Hon. Jane E Mulqueen, Presiding Staff: Danielle Cruz, Assistant Clerk Magistrate Susan Joaquin, Assistant Clerk Magistrate Edward Partyka, Assistant Clerk Magistrate		
01/14/2025	Habeas Corpus for defendant issued to Massachusetts Treatment Center - Bridgewater returnable for 01/15/2025 02:00 PM Conference to Review Status. VIA ZOOM @ 2 PM MEETING ID: 161 762 3470 PASSCODE: 235711		
01/15/2025	MEMORANDUM & ORDER:  and Decision on Defendant's motion to withdraw guilty plea and for a new trial  Judge: Mulqueen, Hon. Jane E	59	 <a href="#">Image</a>
01/15/2025	Event Result:: Conference to Review Status scheduled on: 01/15/2025 02:00 PM Has been: Not Held For the following reason: Request of Defendant Comments: FTR 1 Hon. Jane E Mulqueen, Presiding Staff: Danielle Cruz, Assistant Clerk Magistrate Nancy Ramos, Assistant Clerk Magistrate Shana Wilson, Assistant Clerk Magistrate		
01/27/2025	Notice of appeal filed. RE: DENYING THE DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA  Applies To: Andrews, Richard (Defendant); Crouch, Esq., Andrew Scott (Attorney) on behalf of Andrews, Richard (Defendant)	60	 <a href="#">Image</a>
01/30/2025	Court Reporter FTR/OTS is hereby notified to prepare one copy of the transcript of the evidence of 03/28/2024 02:00 PM Motion Hearing, 11/20/2024 02:00 PM Motion Hearing	61	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
02/07/2025	CD of Transcript of 03/28/2024 02:00 PM Motion Hearing, 11/20/2024 09:23 AM Motion Hearing received from Pamela Borges DosSantos PBH Paralegal & Transcription Services, Inc. 190 William Street New Bedford, MA 02740 Telephone: (508)996-3898 Facsimile: (508)996-2403 www.PBHParalegal-Transcription.com.		
02/07/2025	Attorney appearance On this date Michael Locke, Esq. dismissed/withdrawn as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/07/2025	Attorney appearance On this date Katherine E McMahon, Esq. added as Attorney for the Commonwealth for Prosecutor Commonwealth		
02/07/2025	Appeal: Statement of the Case on Appeal (Cover Sheet).  Applies To: Commonwealth (Prosecutor); Andrews, Richard (Defendant); Crouch, Esq., Andrew Scott (Attorney) on behalf of Andrews, Richard (Defendant); McMahon, Esq., Katherine E (Attorney) on behalf of Commonwealth (Prosecutor)	62	 <a href="#">Image</a>
02/07/2025	Notice of assembly of record sent to Counsel  Applies To: Commonwealth (Prosecutor); Andrews, Richard (Defendant); Crouch, Esq., Andrew Scott (Attorney) on behalf of Andrews, Richard (Defendant); McMahon, Esq., Katherine E (Attorney) on behalf of Commonwealth (Prosecutor)	63	 <a href="#">Image</a>
02/10/2025	Notice of Entry of appeal received from the Appeals Court	64	 <a href="#">Image</a>
<b>Case Disposition</b>			
<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>	
Disposed by Plea	05/17/2004	Mulqueen, Hon. Jane E	



COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT  
CRIMINAL ACTION  
No. 9979 CR 00735

COMMONWEALTH

HAMPDEN COUNTY  
SUPERIOR COURT  
FILED

vs.

JAN 15 2025

JU-BANG BORN ALLAH  
f/k/a RICHARD ANDREWS

*James J. Scott*  
CLERK OF COURTS

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO  
WITHDRAW GUILTY PLEA AND FOR A NEW TRIAL**

The defendant, Ju-Bang Born Allah, formerly known as Richard Andrews (Allah), moves to withdraw his guilty plea and for a new trial. At the time of his plea, Allah was represented by Attorney Scott Skolnick (Skolnick), while the Commonwealth's case was presented by Assistant District Attorney Linda Pisano (Pisano). A hearing on the defendant's present motion was held on March 28, 2024 and November 20, 2024 at which the court heard the testimony of Skolnick and of Allah. In addition to testimony from Skolnick and Allah, the court admitted three exhibits into evidence: (1) Cellmark DNA Report (Exhibit 1); (2) Letter to Skolnick from Pisano found in the Commonwealth's case file (Exhibit 2); and (3) Fax Cover Sheet addressed to Skolnick located in the Commonwealth's case file (Exhibit 3).

I. Prior Proceedings

Allah's present motion relates to charges on which he was indicted in 1999. After initially pleading not guilty, he changed his plea to guilty on all of the indictments<sup>2</sup> after a full colloquy by the court, McDonald, J. He was sentenced on 9979 CR 00735 to not less than two

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<sup>2</sup> 9979 CR 00735; 9979 CR 00736; 9979 CR 00737; 9979 CR 00738; and 9979 CR 00739.

and one half years and not more than three and one half years in state prison. On the four other indictments he was sentenced to a term of seven years probation. On May 17, 2004, Allah was found in violation of probation and sentenced to not less than five years and not more than seven years in state prison.<sup>3</sup>

Prior to accepting the plea agreement, Allah testified that he was aware of the strength of the Commonwealth's case and the leniency of the recommended sentence based on the facts of the case.

Allah testified that in 2021 as part of a parole process he was appointed counsel. Counsel provided him with a copy of his case file which included a redacted copy of a Cellmark Diagnostics report (DNA report) that Allah testified he had never seen before. Another counsel from the Committee for Public Counsel Services (CPCS) had been appointed to pre-screen his case. Allah contacted her and she provided Allah with a complete copy of the District Attorney's Office file which included an unredacted DNA report. Allah testified that a letter to Skolnick from Pisano caught his eye as he had never seen the letter before.

Allah stated during the parole process that, at the time he changed his plea, he did not know that Cellmark had excluded him as the source of semen in D.E.'s underwear or that another male's DNA had been found in D.E.'s underwear. Allah further stated that even knowing he risked a longer sentence by going to trial, knowing now the status of the DNA, had he known the DNA evidence at the time, he would have gone to trial instead of changing his plea.

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<sup>3</sup> Allah received a sentence of 5-7 on 9979 CR 00737. He received a concurrent 5-7 year sentence on 9979 CR 00738. The sentence on 9979 CR 00736 was 3-5, concurrent with 9979 CR 00736, and on 9979 CR 00739 Allah received a one year house of correction sentence to be served concurrently with his state prison sentence.

## II. Testimony of Allah

At the March 28, 2024 evidentiary hearing, Allah testified that he met with Skolnick one time in the Hampden House of Correction to prepare for trial. He testified that Skolnick showed a DNA report from the Massachusetts State Police Crime Laboratory and informed him that his DNA was found. Allah testified that he kept stressing to Skolnick that something was wrong and that it was not possible that his semen could have been found on the victim.

Allah testified that the trial was scheduled on March 10, and he spoke to Skolnick on the telephone on March 9 specifically regarding whether to go to trial or change his plea. Allah told Skolnick “what route he preferred.”<sup>4</sup> Allah stated that during the phone call Skolnick told him that he had spoken to Pisano, who informed Skolnick that Allah’s semen was found on D.E.. Allah testified that he told Skolnick that was not possible because he did not have sex with her.

On March 10, Allah met with Skolnick four or five times in lock up. Allah testified that Skolnick again told him that his semen had been found on D.E. and that Pisano also told him that D.E.’s DNA was in the defendant’s underwear. Allah testified “I felt like I was just cornered,” and “I felt I had no other way out.”

## III. Affidavits and Testimony of Skolnick

In Skolnick’s first affidavit, submitted by Allah in support of his present motion, Skolnick averred, “On March 6, 2020 ADA Pisano wrote me a letter relating to forensic testing that had been performed by Cellmark Diagnostics on the biological materials and making a formal offer to resolve Mr. Andrew’s criminal case. In the letter, ADA Pisano wrote of the forensic testing, ‘As you are aware we have received the DNA results on the stain found on your clients [sic] underwear. The DNA of [D.E.] was found in the fluid mixture on his underpants.

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<sup>4</sup> Allah did not testify whether he told Skolnick he wanted to change his plea or go to trial.

As you are aware, Cellmark Diagnostics has assigned a statistical value to the probability that [D.E.] was the source of the DNA. That statistical probability that the DNA belongs to [D.E.] is incredibly high.”<sup>5</sup> <sup>6</sup> Skolnick also averred, “To the best of my knowledge, ADA Pisano never provided me with a copy of Cellmark’s forensic testing results , reports, or supporting files before Mr. Andrews offered his plea . . . .” <sup>7</sup> Skolnick further stated, “Attorney Crouch later provided me with a copy of Cellmark’s DNA report. This was the first time I can recall seeing a copy of the Cellmark DNA report. I do not believe that it was ever provided to me by the Commonwealth as part of discovery in the case. Accordingly, I did not provide a copy of the report to Mr. Andrews.”<sup>8</sup>

In support of its opposition to defendant’s motion for new trial, the Commonwealth submitted a second affidavit by Skolnick. Skolnick stated, “I do not specifically remember whether or not I received the plea offer letter from ADA Linda Pisano that the defendant attached to his motion.”<sup>9</sup> He also averred, “I do not specifically remember whether or not I received a copy of the Cellmark DNA report. If I did receive it, I would have shared its contents with Mr. Andrews.” <sup>10</sup>

Prior to the evidentiary hearing on March 28, 2024, Allah filed a Motion to Conform Testimony to the Attorney-Client Privilege.<sup>11</sup> The court did not rule on that motion prior to Skolnick’s testimony. At the hearing, Skolnick testified that he represented Allah in the original matter. Skolnick’s case file, including any notes contained therein, no longer exists. Skolnick recalled that some items of the victim’s clothing were collected and tested, as was Allah’s

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<sup>5</sup> January 22, 2023 Skolnick affidavit, paragraph 8.

<sup>6</sup> The court notes Skolnick averred that Pisano wrote him a letter, not that it was sent or received.

<sup>7</sup> January 22, 2023 Skolnick affidavit, paragraph 11.

<sup>8</sup> January 22, 2023 Skolnick affidavit, paragraph 12.

<sup>9</sup> November 21, 2023 Skolnick affidavit, paragraph 5.

<sup>10</sup> November 21, 2023 Skolnick affidavit, paragraph 6.

<sup>11</sup> Paper No. 47.

underwear. Prior to the date of trial, Skolnick's understanding of the DNA evidence was that evidence had been collected and there was some evidence of the defendant's DNA being involved.

Regarding the Cellmark report, Skolnick testified at the hearing that he did not recall the first time he saw the document. Confronted with his first affidavit, Skolnick testified, "It's stated in here – It states that it is the first time I can recall seeing the copy of the CellMark – DNA report. So again, to reiterate, I may have seen it well before this. I don't have an independent memory of that."<sup>12</sup> When asked if he recalled whether Pisano had provided him a copy of the Cellmark report before Allah pleaded guilty, Skolnick answered "I do not have an independent recollection one way or the other."<sup>13</sup> Similarly, when questioned about the letter from Pisano, Skolnick replied "I do not have independent recollection what day I first saw this."<sup>14</sup>

Skolnick, understandably, did not have independent recollection of his meetings with Allah prior to the plea<sup>15</sup>. However, he testified that it was his practice to meet with clients at the house of correction prior to trial and speak to clients in lock up on days they were brought to court, including the day of Allah's scheduled trial. Skolnick further testified that it would have been his practice to discuss Pisano's statements about the results of the DNA testing with Allah. Skolnick's understanding of the DNA testing in the case was "what was presented to me . . . [t]he information that I believe I received from Attorney Pisano,"<sup>16</sup> but he could not specifically recall what Pisano had told him about the DNA results.

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<sup>12</sup> Motion hearing transcript page 20 line 24 through page 21 line 4.

<sup>13</sup> Motion hearing transcript page 21 lines 11-12.

<sup>14</sup> Motion hearing transcript page 21 lines 23 and 24.

<sup>15</sup> This motion was filed twenty four years after Allah's guilty plea.

<sup>16</sup> Motion hearing transcript page 24 lines 18, and 20 through 21.

Skolnick testified that if he had read the DNA results, he would have been aware that Allah was excluded as a source of the DNA obtained from the victim, D.E.. Asked whether he received those results he stated, “Again, I believe I did. I’m not a hundred percent sure, sir.”<sup>17</sup>

Skolnick could not say whether he did or did not receive the March 6, 2020, letter from Pisano referenced in his first affidavit. He has no definitive recollection as to whether he received the DNA results in this case. This court credits his testimony. Skolnick recalls learning that on the day of the crime, the victim has a consensual sexual encounter with another man. He knows that D.E. passed away several years after the case was resolved.

During cross examination, the Commonwealth asked Skolnick a series of questions regarding relevant considerations Skolnick discussed with Allah, which may have impacted whether or not Allah should have pleaded guilty. Skolnick confirmed he had those discussions with Allah. The Commonwealth then inquired whether Skolnick learned anything beyond the facts of the case, or the severity of the sentence, that contributed to his opinion as to whether Allah should plead guilty. Skolnick answered in the affirmative. Allah objected when the Commonwealth asked Skolnick what those facts were. Without ruling on the objection, the court instructed the Commonwealth to limit its inquiry into what effect, if any, the additional facts had on Skolnick’s recommendation to his client. Skolnick testified that the facts learned from his client made it more likely for him to recommend that Allah plead guilty.

At that point, the court suspended the cross examination and allowed redirect examination. At the conclusion of redirect examination, the hearing was then suspended and the court allowed the parties to brief the issue regarding attorney-client privilege. The court received filings on April 19, 2024, from the Commonwealth and April 30, 2024, from Allah. On May 15,

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<sup>17</sup> Motion hearing transcript page 26 lines 3 through 8.

the court denied Allah's motion to conform testimony. The defendant filed an interlocutory appeal.<sup>18</sup> On July 12, the single justice (Gaziano, J.) denied Allah's G.L. c. 211, §3 petition, that judgment being affirmed on November 15.

On November 20, 2024, the court heard additional testimony from Skolnick regarding the information that affected his decision whether to recommend that Allah plead guilty. Specifically, Skolnick testified that during meetings both on the telephone and in person, Allah admitted to him that he had committed the acts forming the basis of the indictment. During redirect examination, Skolnick confirmed that Allah had not denied to Skolnick that he committed the acts. The court credits Skolnick's testimony.

### **STANDARD OF REVIEW**

"A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b)." Commonwealth v. Camacho, 483 Mass. 645, 648 (2019), quoting Commonwealth v. Cotto, 471 Mass. 97, 105 (2015). Under Mass. R. Crim. P. Rule 30 (b), a motion judge, applying a "rigorous standard," Commonwealth v. Williams, 71 Mass. App. Ct. 348, 353 (2008), may grant a motion for new trial when "it appears that justice may not have been done" and that decision is committed to the sound discretion of the judge. Camacho, 483 Mass. at 648, citing Commonwealth v. Scott, 467 Mass. 336, 344 (2014). In a motion for new trial, the defendant bears the burden to prove facts that are neither agreed upon nor apparent on the record. Commonwealth v. Comita, 441 Mass. 86, 93 (2004).

"A 'plea is valid only when the defendant offers it voluntarily, with sufficient awareness of the relevant circumstances (citation omitted), and with the advice of competent counsel.'"

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<sup>18</sup> SJ-2024-0211.

Commonwealth v. Berrios, 447 Mass. 701 (2006) quoting Brady v. United States, 397 U.S. 742, 758. “[A] guilty plea is void if it is involuntary and unintelligent for any reason. Id. quoting Huot v. Commonwealth, 363, Mass. 91, 96 (1973). “A plea is voluntary if entered without coercion, duress, or improper inducements.” Id. That a “defendant felt he had no choice but to plead guilty does not provide a proper basis to invalidate the plea[.]” Id. at 709.

The defendant contends that Pisano failed to provide the Cellmark lab results report to Skolnick and sent a plea offer letter with incorrect information in it. He argues these actions constitute egregious government misconduct warranting a new trial. In analyzing claims of egregious government misconduct, it is the defendant’s burden to establish both prongs of a two-prong test. Commonwealth v. Scott, 467 Mass. 336, 347 (2014); Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006) (Scott-Ferrara). The first prong requires a defendant to establish that egregious government misconduct occurred in his case, preceded the entry of his guilty plea, and that it was the sort of conduct that implicated the defendant’s due process rights.

Commonwealth v. Scott, 467 Mass. at 347.

It is unclear from the testimony at the hearing whether Skolnick received the report, as he has no recollection to that effect. However, the Commonwealth’s fax cover sheet (Exhibit 3) creates a strong inference that the report was faxed to Skolnick on March 6, 2000. The sheet contains Skolnick’s name, the date sent and specifies five pages were to be sent. Immediately behind the fax cover sheet is the five page-Cellmark DNA report. The copy of the DNA report has numbering and wording on the top that indicates it was received from Cellmark on March 6, 2000. Skolnick’s lack of recollection does not contradict this documentary evidence that the Commonwealth fulfilled its obligation.

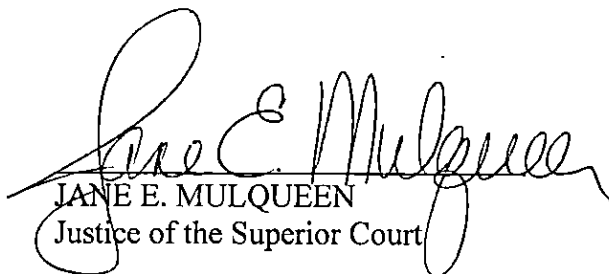


Nor is there any evidence that the plea offer letter with incorrect information was ever sent by Pisano or received by Skolnick. The letter was located in the Commonwealth's file, with a wet signature, and contained handwritten notations on it describing a telephone call with Skolnick the day after the letter was dated. Nothing about these circumstances suggests that the letter was actually sent (or received); to the contrary, the more natural inference would be that the letter was a draft that never left the Commonwealth's file. Without evidence supporting the defendant's contentions regarding the DNA report and the plea offer letter, the defendant has failed to meet his burden.

To succeed on a motion to withdraw his guilty plea, Allah must provide evidence of egregious misconduct by the government that preceded the entry of his guilty plea. See Scott, 467 Mass. at 446. He has failed to do so. Given the court's conclusion that Allah has failed to satisfy the first prong of Scott-Ferrara, it "need not consider whether under the second prong the defendant demonstrated 'a reasonable probability that he would not have pleaded guilty.'" Commonwealth v. Resende, 475 Mass. 1, 16 (2016) quoting Commonwealth v. Scott, 467 Mass. at 355.

### **ORDER**

For the foregoing reasons, Allah's motion to withdraw guilty plea and for a new trial is **DENIED.**

  
JANE E. MULQUEEN  
Justice of the Superior Court

DATE: January 15, 2025