COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

BROCKTON SUPERIOR COURT
NO. 8583CR81865

COMMONWEALTH

V.

DARRELL JONES

COMMONWEALTH'S OPPOSITION TO
THE DEFENDANT'S MOTION FOR A NEW TRIAL

INTRODUCTION

The Commonwealth hereby opposes the defendant's latest Motion for a New Trial. It is now almost thirty years after the defendant's trial and conviction for first degree murder. The defendant has already received the extraordinary plenary review of his conviction pursuant to G.L. c. 278, §33E on his direct appeal. Commonwealth v. Jones, 407 Mass. 168 (1990). He has also twice received post-conviction review for claims of ineffective assistance by his trial counsel, once in 1992 and once in 2000.

The defendant now raises a multiplicity of challenges to his conviction, all of which could have been raised in earlier proceedings. The defendant would have the court ignore the fact that the requirement that the defendant raise every available claim at the first opportunity applies with particular strength to cases that have been given Supreme Judicial Court's extraordinarily complete review pursuant to G.L. c. 278, § 33E. Commonwealth v. Smith, 460 Mass. 318, 319-

320 & n.1 (2011). However, a trial judge cannot properly grant a new trial without considering the legal significance of his failure to raise his claims earlier. Commonwealth v. LaFave, 430 Mass. 169, 173 (1999). Here despite the extraordinary number of his claims, the defendant has not shown that his case presents "the very rare situation" where relief is warranted on claims that could have been raised earlier. Smith, supra at 320.

TRIAL EVIDENCE

The jury could rely on the following evidence supporting the defendant's conviction.

At approximately 10:00 PM on November 11, 1985, the victim; Guillermo Rodrigues, also known as POW, was shot and killed halfway toward the rear of the parking lot at D'Angelo's sandwich shop on Montello Street in Brockton, MA. (Tr. II, 45, 76-77).[1] The block across the street contained an auto body shop with a fence around it, immediately across the street from D'Angelo's on the corner of Ward Street and Montello Street. (Def. Memo. 47; Tr. III, 38; A. 114). Pete and Mary's bar was next to the auto body shop and it was on the corner of Montello Street and Franklin Street. (Def. Memo. 47; Tr. III, 38; A. 114, 443). Pete and Mary's had both a front and a rear door and both were used by customers. (Tr. I, 59, 79-81; V, 79). At the beginning of the trial, the jury took a

[1] The trial transcript will be cited by volume and page as (Tr. __, __). The Commonwealth will follow the pagination of the defendant's appendices filed with his motion and cite the content of the first volume as (A. __), and the second volume as (Aff. __). The Commonwealth's Appendix will be cited as (Com. App. __).

view of the area around D'Angelo's and Pete and Mary's and of the inside of the bar. (Tr. I, 56-61).

It was undisputed that the victim was inside Pete and Mary's earlier in the evening before the shooting. (Tr. II, 41; III, 104, 123; V, 76, 97). It was also undisputed that the defendant, who was also known as Diamond, was in Pete and Mary's before the shooting. (Tr. III, 104, 121; V, 87, 106). Bridget Struthers testified that at one point she left Pete and Mary's, walked across the street to D'Angelo's, bought a sub for herself and then returned to the bar. (Tr. II, 124-125). She then talked to the defendant in the bar and offered to buy him a sub in exchange for some "joints." (Tr. III, 125). They left Pete and Mary's together and went across the street to D'Angelo's where she bought him a sub. (Tr. III, 126-127). The defendant then went right back to Pete and Mary's. (Tr. III, 128). Further the defendant admitted to the police that he had been in Pete and Mary's that night and that his friend went across the street to buy him a sub. (Tr. III, 68). However, he claimed he never left the bar prior to the shooting. Instead he just waited in the doorway for her to bring the sub back to him. (Tr. III, 68).

Denise Perkins (later Denis Jones) and Paul Jones were parked in their car in the D'Angelo's parking lot. (Tr. III, 7-9, 43-44). They saw a woman go into D'Angelo's, buy a sub and then go toward Pete and Mary's after she came back out. (Tr. III, 7-10, 44-45). Shortly thereafter, she came back from Pete and Mary's across the street in the company of a man. (Tr. III, 10). After they went into D'Angelo's, the man went back across the street to Pete and Mary's. (Tr. III, 11, 46-48).

Later, Denise saw the same man cross the street again from Pete and Mary's but this time he was with the victim and pushing him along (Tr. III, 12) Paul Jones also saw the victim and a man come across from the bar but he was not one hundred percent sure it was the same man. (Tr. III, 49-50). The second man was pushing the victim. (Tr. III, 12, 50). Then he shot the victim in the parking lot. (Tr. III, 13, 50-51). Denise "could tell he was the same guy that went in with the girl and came out with the girl." (Tr. III, 12).

Denise subsequently looked at an array of six to ten photographs of young men of similar race and build. (Tr. III, 22-23; IV, 55). She testified she narrowed the photos down to four but favored one. (Tr. II, 23). Detective LaGarde testified she picked out the defendant's photograph but said she was not one hundred percent sure. (Tr. IV, 56-57). A few days later, Denise looked at a larger group of photographs and picked out a photograph of the defendant as looking "almost exactly" like the man who shot the victim. (Tr. II, 23-24; IV, 58-59). She told Detective LaGarde that she had originally been reluctant to pick out the photo because she was afraid of retaliation. (Tr. IV, 59). In court, she picked out the defendant as being similar to the man who shot the victim, but she could not be one hundred percent sure. (Tr. III, 29-30).

Paul Jones separately looked at a set of ten to fifteen photographs. (Tr. III, 57; IV, 61). He went through the photographs saying it was not this one, but could be this one. (Tr. III, 57). Detective LaGarde said he picked out three photographs and said he felt the man who shot the victim was among the three. (Tr. IV, 61). Within the next two days, Paul went to the police station and again

looked at photographs. (Tr. III, 58; IV, 62). Paul testified he believed he picked out a photograph. (Tr. III, 59). He was not one hundred percent sure but he believed it was the same man who was with the girl in D'Angelo's and he thought that he was the same person who shot the victim. (Tr. III, 60-61). Detective LaGarde testified Paul selected three photographs on each occasion and the defendant's photo was one of those three both times. (Tr. IV, 61, 63-64).

There was another group of five people who were in a car parked in the D'Angelo's parking lot when the victim was shot. The group included Terri Lynn Starks, Walter (BoBo) Watson, Edna Levine, Lisa Pina, and Alfred Meron. (Tr. II, 41; III, 74-75, 94). Terri Lynn Starks testified she saw two men that she had seen inside Pete and Mary's earlier, crossing the street from the corner on Montello Street where the fence is. (Tr. II, 42, 44). It was the corner on the same street up which the perpetrator fled after the shooting. (Tr. II, 46). She said it was Franklin Street, but she was not sure of the name of the street. (Tr. II, 42, 44).

The only fence across the street from D'Angelo's was outside the auto body shop on the corner of Ward Street and Montello Street (A. 114; Def. Memo. 47), as the jury would have seen during the view. Denise and Paul Jones both described how they chased the man who shot the victim up Ward Street before he cut across toward Franklin Street through a parking lot behind the auto body shop. (Tr. III, 15, 52).

As they crossed the street and walked into the D'Angelo's parking lot, Terri Lynn saw that the man with the victim had a gun. (Tr. II, 43-45). Someone

in the car identified the man holding the gun as Diamond. (Tr. II, 45; III, 109).[2] The man identified as Diamond shot the victim when they were about halfway toward the rear of D'Angelo's parking lot. (Tr. II, 45-46).

Days later, Terri Lynn met with Detective Smith at the police station. (Tr. II, 47). She looked at between seven and twelve photographs of young black men. (Tr. II, 47-48; V, 25). She picked the defendant's photograph as the man who shot the victim. (Tr. II, 48; V, 26, 29-30).

BoBo Watson testified that someone in the car said they saw two guys arguing and that Darrell Jones shot someone. (Tr. III, 95-96). However, he claimed he did not really see anything and, after the shooting, BoBo just left, rather than "get killed or something like that." (Tr. III, 95-98). He did see a man running up Ward Street after the shooting. (Tr. III, 98).

Edna Levine claimed she did not see the two men at all. (Tr. III, 109-110). At trial, she said she picked out a picture out of the ones Detective Smith later showed her as showing the defendant, not as a picture of the person who shot the victim. (Tr. III, 113-114). Detective Smith testified that she previously said she saw the two men cross the street, saw the shooting and saw the shooter run up Ward Street. (Tr. V, 16). She picked out the defendant's photograph as showing the man she saw running away from the scene. (Tr. V, 16).

Lisa Pina testified she saw two men crossing Montello Street but she had not seen where they came from earlier. (Tr. III, 76). After they passed behind the car she was in, she saw the victim fall to the ground. (Tr. III, 77-78). Someone in

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[2] Terri Lynn testified Edna Levine said it (Tr. II, 45) and Edna testified Terri Lynn said it. (Tr. III, 109).

the car said Diamond's name. (Tr. III, 79). She told BoBo to leave immediately after the shooting, rather than run into D'Angelo's to call an ambulance. (Tr. III, 80). She claimed that when Detective Smith showed her some pictures a day or two later, she just picked out a picture at random. It happened to be the defendant's picture. (Tr. III, 83-84). Detective Smith testified that he asked her to pick out the man who shot the victim. (Tr. V, 9). She reluctantly selected the defendant's photograph. (Tr. V, 10).

After the shooting, the man identified as the defendant crossed Montello Street, ran up Ward Street, through a parking lot behind the auto body shop toward Franklin Street, and went over a fence by the cable vision building. (Tr. III, 15, 52). Denise and Paul Jones lost track of him at that point. (Tr. III, 15, 52). After that, they went back to D'Angelo's and called for an ambulance. (Tr. II, 16, 52-53).

Bob Kanicholas owned the bar, The Colonial Spa, which was up Franklin Street from Pete and Mary's and Montello Street. (Tr. IV, 44-45). That night at approximately 10:30 p.m. he noticed a black guy in the bar. (Tr. IV, 45). Monday nights usually had regulars in the bar and there were "not many black guys in the bar as a rule." (Tr. IV, 46). The man did not order a drink and the next time the owner turned around the man was gone. (Tr. IV, 46). The next morning the owner found a gun in the trash container in the men's room. (Tr. IV, 47). That same gun had been used to kill the victim. (Tr. IV, 93, 97).

There was approximately 200 yards between The Colonial Spa and Pete and Mary's. (Tr. II, 28; V, 24). The defendant was amongst the people outside of

Pete and Mary's when officer Shanks left the immediate scene of the shooting and went across the street to the bar. (Tr. II, 119).

ARGUMENT

The defendant was convicted of first degree murder in 1986. (Tr. VI, 99). His conviction was affirmed on direct appeal after an extraordinarily plenary review by the Supreme Judicial Court pursuant to G.L. c. 278, § 33E, in which the Supreme Judicial Court reviewed the entire trial record for any indication of a miscarriage of justice, whether or not based on issues raised by the defendant. Commonwealth v. Jones, 407 Mass. 168 (1990), Commonwealth v. Smith, 460 Mass. 318, 319-320 (2011). After such a review, trial court judges and the litigants are entitled to assume that the Supreme Judicial Court took its obligation seriously and considered any issues that were apparent on the record, whether or not they were mentioned in the ultimate decision. Smith, supra at 320, n.1.

The defendant has also previously filed two motions for a new trial that were resolved against him. In 1992 the defendant filed his first motion for new trial, claiming that he had received ineffective assistance of counsel. (A, 249). The motion was denied and the Single Justice of the Supreme Judicial Court denied the defendant leave to appeal as no "new and substantial issue" had been raised. (A. 265-266).

The defendant filed his second motion for new trial, again claiming he was provided ineffective assistance of counsel in 2000. (Com. App. 1). The motion was denied in August of 2000, and the Single Justice again denied leave to appeal as the motion did not "satisfy the 'new and substantial' standard." (A. 264-267).

In first degree murder cases subject to G.L. 278, § 33E in particular, a defendant is required to all his available claims at the earliest possible time. Commonwealth v. Gunter, 459 Mass. 480, 487 (2011). In the view of the Supreme Judicial Court, it is entirely appropriate for a judge hearing a motion for a new trial in a case that has already received plenary §33E review to summarily reject any claims that could have been raised earlier. Smith, supra at 320. "Indeed, that is a typical approach." Id. The same reasoning applies to issues that could have been made in prior motions for a new trial. Mains v. Commonwealth, 433 Mass. 30, 34 (2000) (same waiver principles under §33E apply to claims that could have been raised in prior motion for a new trial). Commonwealth v. Watkins, 433 Mass. 539, 547-548 (2001) (waived by failure to raise claim in previous pro se motion for a new trial).

The defendant would have this court treat the issues he is currently attempting to raise as if he had not already received a plenary of the entire trial record and consideration of his two prior claims of ineffective assistance. (Defendant's Memorandum, 35-36). However, a trial judge cannot properly grant a motion for a new trial without considering the legal consequences of a defendant's failure to previously raise an issue in earlier proceedings. Commonwealth v. LaFave, 430 Mass. 169, 173 (1999).

Video Tape of Terri Lynn Sparks Interview.

At the time of trial there was no question that there was something wrong with the tape of Terri Lynn Stark's video in that part of the interview was missing and had been replaced with a segment from the Phil Silvers television program.

The defendant requested a hearing before the video tape was introduced at trial. (Tr. II, 51). During the voir dire, Detective Smith described how a malfunction occurred when the tape was played for the defendant's counsel and a portion of the recording was replaced by portions of a television program. (Tr. IV, 16-17). Defendant's counsel raised some questions about how the malfunction occurred but then said "It's probably immaterial." (Tr. IV, 17-18). The full tape was played in court (making the problem with the tape obvious to the jury). (Tr. IV, 30-31). The defendant did not raise any further issue concerning the missing portion of the taped interview (Tr. IV, 31-47) and no objection to the judge's determination that the tape was, except for the missing portion, a fair and accurate representation of what occurred. (Tr. IV, 33-34).

The defendant now attempts to avoid any waiver of any claims about the problem with the tape by essentially claiming he could not have raised a claim earlier because currently available techniques for forensic evaluation of tapes were not previously available. (Def. Memo. 1, 36, 40-41). He claims that forensic "examination of questioned video recording for authenticity was not well reported until the late 1990's, with one of the first known peer reviewed publications on the subject" published in 1999. (Def. Memo. 40; quoting affidavit of Jeff Spivak, Aff. 81).

However, as with the analysis under §33E, evidence is not "newly discovered" or "newly available" when it could have been presented as part of an earlier motion for a new trial. Commonwealth v. Evans, 439 Mass. 184, 203 (2003) quoting Commonwealth v. Grace, 397 Mass. 303, 305 (1986). The

defendant's most recent prior motion for a new trial was filed in April of 2000 and denied in the trail court in August of 2000. (Com. App. 1). The denial became final with the denial of the defendant's §33E gatekeeper petition for leave to appeal in July of 2002. (A. 264-267). By the defendant's own accounting the tape of forensic examination he is claiming as "newly discovered" was available in the late 1990's. Therefore it was available prior to the defendant's previous motion in 2000.

Further, the Commonwealth's notes in its trial file indicate that the defendant's prior post-conviction counsel, Attorney Joseph Krowski, was given a copy of the tape of Terri Lynn Starks interview on January 5, 1999, prior to filing his motion for a new trial in 2000. (Com. App. 43, 44). There is therefore every indication that the defendant's counsel at the time considered raising an issue concerning the tape (at a time when the more recent techniques alleged by the defendant were available) but declined to do so. For this reason alone, the material now proffered by the defendant does not legally qualify as "newly discovered (or available) evidence."

In addition, even from the perspective of the time of trial, the defendant has not shown how any of the more recently developed techniques were necessary to raise an issue concerning how the error occurred. He makes no attempt to show what kind of analysis could have been done at the time of trial. The defendant's proferred experts just broadly state that more recent developments have made it possible to do more to detect tampering or editing than in the past. (Aff. 14; Aff. 81). They make no effort to indicate why the use of any such more

recently developed techniques was necessary to effectively raise questions about Detective Smith's explanation about how the obvious mistake in the tape occurred. The defendant's proffer is insufficient to establish that there was no available means for challenging Detective Smith's explanation at the time of trial. Commonwealth v. Caruso, 85 Mass. App. Ct. 24, 29-31 (2014) (surveillance tape analysis).

In fact, one of the main points proffered by the defendant's expert Marissa Dery is that just before the television program appears on the tape, the "Play" prompt appears on the display. In the view of Ms. Dery "If, as Smith testified, the interruption occurred due to Smith inadvertently pressing the record button rather than the play button on the VCR, I would instead expect to see a continuous sequence of video without any appearance of a blue screen or prompts such as the 'Play'." (Aff. 10). This mode of analysis did not depend on any recently developed forensic techniques, but rather on common sense and general familiarity with VCR recordings and operations. If accurate, it was fully available at the time of trial as a means of raising questions concerning Detective Smith's description of how the anomaly occurred. Caruso, supra at 31 (post-trial development of alternative method of making same evidentiary point that was available at trial does not create "newly discovered evidence."

The defendant's trial counsel did not refrain from questioning how the anomaly on the tape occurred because of any lack of forensic techniques. He did so because in his view the missing portion of the interview was immaterial. "It's probably immaterial." (Tr. IV, 18). Counsel's assessment was correct.

The defendant claims that it is inferable that during the missing portion of the tape, Terri Lynn Starks stated that she saw the victim and the shooter crossing Montello Street from the corner outside the auto body shop and that it was critical to the Commonwealth's theory of the case that the victim and the shooter were seen leaving Pete and Mary's through the door facing onto Montello Street. (Def. Memo. 46-48). However, the Commonwealth's theory did not at all depend on testimony from Terri Lynn Starks, or anyone else, that the victim and the shooter were seen leaving Pete and Mary's through the Montello Street door. Rather, the Commonwealth relied on the inference that they left the bar together based on the evidence that they had both been seen spending time in the bar earlier that night and that the shooter/defendant had been identified as the person who had just received a sandwich from Bridgette Struthers at D'Angelo's and had gone back across the street in the direction of the bar. After all, Terri Lynn Starks testified at trial that she first saw the victim and the defendant "as they hit the corner where the fence is." (Tr. II, 44). The fence, as the jury saw on the view, was outside the auto body shop and the corner of Montello Street and Ward Street. (Def. Memo. 47, figure 3). Denise first saw the two men "about in the middle of the other side of the building." (Tr. III, 28). Paul Jones first saw the two together "[w]hen they reached the parking lot of D'Angelo's." (Tr. III, 50). Lisa Pina saw two men crossing Montello Street but did not see where they came from. (Tr. III, 76). Edna Levine testified she was not even sure she saw the two men crossing Montello Street. (Tr. III, 109). BoBo Watson said he did not pay any attention to anyone crossing the street. (Tr. III, 95-96).

For the prosecution's theory that it was inferable that the two men left the bar together, it was immaterial whether they left through the door onto Montello Street or used the other door of the bar and walked around the back of the buildings before crossing Montello Street. (Def. Memo. 47, figure 2) (as would be more consistent with the defendant forcing the victim forward at gun point and concealing his efforts off the main street).

The defendant asserts that the videotape could have been excluded if more of an issue had been raised about the missing portion of the interview. (Def. Memo. 37, 43). However, Terri Lynn Starks testified at trial and described the same events she described during the interview, including when she first saw the victim and the shooter crossing Montello Street. (Tr. II, 43). She also described how Detective Smith showed her a number of photographs and she picked out one as showing the person who shot the victim. (Tr. II, 48). Ms. Starks testimony on these points was not challenged on cross-examination. (Tr. II, 50-51). In addition, although the defendant's counsel considered recalling Ms. Starks to the stand after the videotape, he ultimately chose not to do so. (Tr. II, 51-53; V, 119-120; VI, 2, 4-5).

Detective Smith also testified about how Ms. Starks selected the defendant's photograph as the shooter, out of a group of photographs he showed her. (Tr. V, 25-27, 29-30). The only points raised in cross-examination about the interview concerned Ms. Starks being under arrest at the time (Tr. V, 48-51) and the source of the defendant's picture that was shown to her. (Tr. V, 56, 62-63). In these circumstances, where the tape was just cumulative of essentially

unchallenged testimony at trial, there is no reason to think that the exclusion of the tape would have made any material differences to the verdict. See, Evans, supra at 190-191 (erroneous admission of hearsay identifying defendant was not prejudicial where cumulative of trial testimony).

Yet when a defendant relies on "newly discovered" or "newly available" evidence as supporting a motion for a new trial, he must establish not only that the evidence was not reasonably available for earlier proceedings, but also that there is a substantial risk that the jury would have reached a different conclusion had the "new" evidence been available at trial. Id. at 203. The defendant has failed to meet that burden, whether or not Detective Smith was mistaken on how the problem with the tape occurred. The record shows no reason to think the missing portion of the tape addressed anything material to the prosecution's theory that was not presented at trial and the remaining portion of the tape was just cumulative of other trial testimony.

The defendant has proffered opinions from two experts who opined that it was at least unlikely that the missing portion of the tape was lost in the manner described by Detective Smith. (Aff. 14; Aff. 84). They both also concluded that the loss of a portion of the tape was consistent with something that happened during copying the tape. (Aff. 14; Aff. 84). From this the defendant leaps to the conclusion that the police must have deliberately edited the tape to remove a portion of the interview. (Def. Memo. 5, 45-46, 48). However, the police had no reason or motive for doing so where in context it is apparent that the missing portion of the interview addressed when Ms. Sparks first saw the victim and the

shooter together and, as would be expected, Ms. Sparks testimony at trial was consistent with Detective LaGarde's report (the basis for the defendant's attempted reconstruction), and with the other witnesses. The exact location of when Ms. Starks first saw the two men was not at all critical to the prosecution's theory of the case or to the defendant's identification as the man who shot the victim. Regardless of how the anomaly on the tape occurred, it is not plausible that Detective Smith, or any other police officer, deliberately altered the tape where there was no reason to think the missing portion of the interview addressed anything that was critical to the identification of the defendant as the murderer and Ms. Starks was fully available to testify as to what actually took place during the interview.[3]

Alleged Brady Violation.

The defendant also claims that it is inferable that the prosecution did not turn over Detective LaGarde's report prior to or during the trial. (Def. Memo. 54-58). He admits that he cannot rely on trial counsel's file to show that counsel did not have the report in his possession prior to trial, "Trial counsel, Kenneth Elias is deceased, and efforts to obtain any documents that he may have retained

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[3] The defendant's counsel misconstrues Dery's measurements concerning the length of the missing portion of the interview. (Def. Memo. 46). Ms. Dery indicated that she measured the actual length of the "recorded interview content" on the tape (Aff. 12) i.e. the length of the interview without the missing portion or the segment from the television program, not the total length of all the recording on the tape. The measurements then assume the general accuracy to the minute of Detective Smith's amounted starting and ending times (even though the detective consulted two separate clocks for the starting time). (Aff. 11). Ms. Dery then concludes that the missing portion of the interview was between eighteen seconds and two minutes and sixteen seconds long. (Aff. 13). That conclusion is consistent with Detective Smith's trial testimony that the tape mistakenly included about twenty seconds of a television program. (Tr. IV, 16-17; V, 36).

regarding this case have been unsuccessful." (Def. Memo. 54). He nevertheless claims that the trial record supports the conclusion that the report was not available to defense counsel. (Def. Memo. 56-58).

However, the record actually supports the conclusion that Detective LaGarde had the report with him at trial and that the defendant's counsel was aware of its contents. After the detective testified that Denise Perkins told him that she was reluctant to make an identification because she was afraid of retaliation, the defendant's counsel asked him "And you put that in your report, of course?" (Tr. IV, 76). When the detective said he did not remember, defense counsel asked him to look at his report that he had with him. (Tr. IV, 76).

The detective did so and confirmed that it was not mentioned in the report. (Tr. IV, 77). Indeed, an examination of Detective LaGarde's report does indeed confirm that no statement about fear of retaliation or any second visit with Denise Perkins or Paul Jones. (A. 29-37). The detective testified that he interviewed the defendant who denied ever leaving the bar that night and said he waited in the doorway while his friend went across the street to buy him a sub. (Tr. IV, 67-68). On cross-examination, defense counsel asked Detective LaGarde about notes he made the same day as his interview of the defendant. (Tr. IV, 78). Defense counsel had Detective LaGarde admit that those virtually contemporaneous notes did not mention any question to the defendant about whether he left the bar to get a sub. (Tr. IV, 78-79). As the defendant points out, the detective's notes that were admitted as Exhibit 17 were not the same as his subsequently more

comprehensive report that addresses far more than the detective's interview of the defendant. (Def. Memo. 56 n. 48; Tr. IV, 88-89; A. 29-37).

The defense counsel's point at trial was that the detective did not write down the defendant's alleged statement in his virtually contemporaneous notes even though he knew at the time that the defendant's having left the bar with a girl to get a sub was important because of the statements from Denise Perkins and Paul Jones. (Tr. IV, 79, 84-85). Despite the defendant's current suggestion to the contrary (Def. Memo. 56-57), that point remained regardless of whether the statement was described in a subsequently written report or before the Grand Jury. Further, no reasonable inference can be drawn from the fact that Detective LaGarde did not inappropriately volunteer a non-responsive answer that while he did not describe the statement in his notes made on the day of the interview, he did describe it in his subsequently written more comprehensive report. (Def. Memo. 57; Tr. IV, 84-85; A. 34). Similarly, the fact that the prosecutor chose to counter the suggestion of recent fabrication by presenting a prior consistent statement by the detective before the grand jury does not reasonably support the conclusion that the prosecutor must not have been aware of the existence of Detective LaGarde's report. (Tr. IV, 82-83, Def. Memo. 57). In fact, the notes themselves indicated that the defendant said he never left the bar that evening. (Tr. IV, 78, 80).[4]

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[4] The defendant attempts to make much of the fact that, in an apparent attempt to avoid having to establish a prima facie case for relief before being entitled to post-conviction discovery per Mass. R. Crim. P. 30(c)(4), defense attorneys presented a variety of public records requests to the District Attorney's Office. (Def. Memo. 54-56). In making such public records requests the defense

The defendant points out that during the trial, the defendant's counsel claimed that he did not have several other documents from the investigation. (Def. Memo. 54, n,44). These included a report by Sergeant Colocousis, the autopsy report, the ballistics report, (Tr. II, 66) and a sketch of the perpetrator. (Tr. III, 70). However, the defendant's counsel disavowed any claim that the materials had not been made available to him. (Tr. II, 66). He acknowledged, that the prosecutor insisted that he had provided "a packet of pretrial information" to him. (Tr. II, 66). The prosecutor also asserted he had provided the sketch to defense counsel. (Tr. III, 70).

The defendant's counsel also said that he intended to look at the information he alleged he was missing during the morning recess. (Tr. II, 66). The next day, after defense counsel suggested he did not have a copy of the

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attorneys were acting as individual private citizens outside of the criminal case. For the public records request, the fact that the requestor has an interest is a related criminal proceeding neither detracts nor lends support to the request. Bougas v. Chief of Police of Lexington, 371 Mass. 59, 64 (1976). The degree to which the requestor may be entitled to access to the requested material as discovery in the criminal proceeding is irrelevant to the public records request. "It is sufficient to say that pre-trial [or post-conviction] discovery is not available in criminal cases under G.L. c. 66, § 10, and, that the position of the [requestor]under the later statute is not enhanced by the lodging of criminal charges against them." Id. In fact, under the public records law, it is inappropriate for the custodian of the record to inquire, or to tailor the response to the purpose for the records request. (90 CMR 32.05(5).

The District Attorney's office responded to these public records request as it would to requests from any other citizen, redacting those portions of the records that could violate the Criminal Offender Record Information Act if publicly disclosed and declining to make physical evidence in the case that it might have (exhibits) publicly available in a manner that could violate the requirement under G.L. c. 278A, § 16-17, to preserve evidence in a criminal case with a conviction in a pristine unadulterated fashion. The propriety of the requests and responses under the Public Records law are fundamentally irrelevant to these proceedings in the criminal case.

sketch, the judge asked whether it was included "in that group yesterday." (Tr. III, 71). The defendant s counsel said he would look. (Tr. III, 71). No further issue was raised about the sketch. No issue on direct appeal or in the two prior post-conviction motions claiming ineffective assistance was raised by any of the defendant's new lawyers concerning any failure to provide reports to trial counsel or about counsel's alleged lack of familiarity with any reports or documents.

The only "packet" of investigatory material contained in the prosecution trial file is the same "packet" of documents bound together that the defendant more recently received from the Brockton Police Department. (A. 1-2, 8-88). It contains Detective LaGarde's report to Chief Sproules as Document 5. (A. 28-36). The same document is presented in Exhibit B, and described as found outside of the documents that were bound together. (A. 2, 89-97). Pretrial notes contained in the prosecution trial file also indicate that Attorney Elias had viewed the videotape of the Terri Lynn Starks interview and that the trial prosecutor (Kevin Cunningham who has long since left the office and become a District Court Judge) "Provided packet of police reports to Elias." (Com. App. 45).

The only "packet" of pretrial investigatory material appears to be the "packet" found in both the police file and the prosecution file. It includes Detective LaGarde's report and by all indications the packet was provided to trial counsel both before and during the trial. The defendant has not met his burden of

showing LaGarde's report had not been provided to the defense at the time of trial.[5]

To be entitled to any relief based on an alleged violation of Brady v. Maryland, 373 U.S. 83 (1999) through a failure to provide exculpatory information, a defendant has the burden of establishing both that the prosecution did not in fact provide the information at trial and that it tended to exculpate him. Commonwealth v. MacHudson, 446 Mass. 709, 727 (2006). To be "exculpatory" for Brady purposes the defendant had to establish that information in the report tended to negate his guilt or supported his innocence. Commonwealth v. Laguer, 448 Mass. 585, 595 (2007). Here the defendant has not met his burden on either requirement. He has not established that Detective LaGarde's report had not been provided to the defendant's counsel at the time of trial. The defendant has failed to meet his burden on the second prong because as previously indicated, where exactly across the street from D'Angelo's Terri Lynn Starks first saw the victim with the perpetrator was immaterial to the defendant's guilt or innocence.

Claims not based on "newly discovered or available evidence."

All the rest of the defendant's claims are either based on the face of the record and therefore before the SJC on direct appeal or were available to be raised on a claim of ineffective assistance on direct appeal or in the prior two motions

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[5] It should be noted that at the time of trial in 1986 Mass. R. Crim. P. 14 did not include all police reports as a part of the automatic discovery that had to be provide prior to trial. Mass. R. Crim. P. 14(a) (Applicable prior to September 7, 2004). Reporters Notes to Mass. R. Crim. P. 14(a)(1)(A)(vii)(2004). While as the defendant now points out the defendant's trial attorney filed motions for discovery (Def. Memo. 54), there is nothing in the docket indicating that the motions were allowed. (A. 214-216).

for a new trial. This court is entitled to assume the points were considered and rejected previously by the Supreme Judicial Court and the defendant's prior three post-conviction counsel, none of whom were trial counsel. Smith, supra at 320, n.1. By now, some thirty years after the trial and after repeated post-conviction review, these previously available claims should just be summarily rejected, as is a typical approach. Id. After all, it should be a rare situation where relief is warranted on a previously available claim after a plenary review pursuant to §33E and two prior motions for a new trial. Id.; Mass. R. Crim. P. 30(c)(2)(any grounds not raised in original motion for new trial are normally deemed waived).

Alleged conflict of interest.

In particular, the defendant claims that he received ineffective assistance because his trial represented, or had ties to the representation of, Detective Smith and LaGarde in other matters and therefore was laboring under a conflict of interest. The defendant made the same claim in his second motion for a new trial and it was denied on August 1, 2000. (A. 264). The denial of that claim became final and unreviewable when the Single Justice denied leave for any further appellate review on July 23, 2002. (A. 264-267). As the Single Justice stated:

> Finally, the defendant asserts that he was denied the effective assistance of counsel because his attorney previously represented two Brockton police detectives and the mother of one adversarial witness who testified at trial. Counsel disclosed the conflict to the court on the second day of trial. The judge held a colloquy with the defendant outside the presence of the jury. The judge closely questioned the defendant with respect to the conflict and directly asked the defendant whether he wanted to change lawyers. The defendant emphatically declined any thought of a change in trial counsel. The Commonwealth presents unchallenged portions of the transcript in which the defendant states, "I will keep my same lawyer. I'm not changing. I'm not even considering that" and that he was "more than" satisfied with counsel. The defendant could have raised this issue in his

> direct appeal and also in his first motion for new trial and first gatekeeper petition. See. Commonwealth v. Watkins, 433 Mass. 539, supra.

(A. 266).

The facts and the law are the same today as they were at the time of his prior post-conviction proceedings. The defendant raises no new facts that were not fully available with minimal inquiry earlier. The alleged conflict of interest has already been decided with finality and the defendant is precluded by direct estoppel from raising the issue again. Commonwealth v. Rodriguez, 443 Mass. 707, 709-711 (2005). "Where an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties whether on the same or different claim." Id. at 710, quoting Restatement (second) of Judgments § 27 (1982).

Further, the defendant's examples of alleged prejudicial failure to conduct thorough cross-examination, supposedly due to the conflict of interest (Def. Memo. 67-69), do not support his claim.

Failure to cross-examine further about missing portion of tape

As previously indicated, trial counsel correctly viewed the missing portion of the interview tape as immaterial.

Failure to attempt to impeach Detective Smith with video showing stack of photos on table.

The video spoke for itself without giving Detective Smith the opportunity to explain it and the fact that the stack of photographs was on the table does not suggest the photos were shown to Terri Lynn Starks earlier. Although Attorney Barter's description of what Ms. Starks told him is hearsay and should not be

considered at all[6] (Aff. 208-216), it is noteworthy that there is no claim she was shown the photograph prior to the identification procedure shown on the tape. (Aff. 214).

Failure to cross-examination Detective Smith that at one point Stephen Betts was mentioned as a possible suspect.

The defendant faults his trial counsel for not asking Detective Smith about the fact that Steven Betts had been mentioned by some undisclosed sources as the possible perpetrator, on the idea that the questioning would support a Commonwealth v. Bowden, 379 Mass. 472, 483-486 (2011), type defense based on an alleged lack of thorough investigation. (Def. Memo. 68; A. 54). However, any such cross-examination would have likely lead to the information that the police did indeed look into the possibility that Steven Betts was the perpetrator. They went to talk to his ex-girlfriend's apartment and found the defendant's younger brother there. (A. 54). The ex-girlfriend had no apparent direct knowledge of anything about the murder. The police also questioned Bridgette Struthers (A. 23-24) and Miko Brown (A. 44) and they said they had not seen Betts that night in Pete and Mary's, in the area, or with the victim. The inquiry would have also likely led to the revelation that the only names generally mentioned as possible suspects were the defendant and Betts. The defendant has not even established that the inquiry would have been allowed in view of its apparent week probative value and the danger of diverting the jury's attention to

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[6] Commonwealth v. Goodreau, 442 Mass. 341, 353-354 (2004) (hearsay in an affidavit from counsel is properly ignored by the motion judge).

collateral matters. Commonwealth v. Silva-Santiago, 453 Mass. 782, 803-805 (2009).

Failure to cross-examine Detective Smith about a report saying that the name Diamond first came from a confidential informant and about the fact that witnesses attributed statement at scene about Diamond to Starks.

The only report discussing information from a confidential informant is by Sergeant Colocousis and it says "Officer James Silva stated to me as I was preparing this report that he heard from an informant that the party responsible for the incident was 'Diamond'." (A. 19). An additional identification of the defendant as the perpetrator would not have helped the defense.

As for the statement identifying "Diamond" at the scene, Terri Lynn Starks testified that Edna Levine said it. (Tr. II, 45). Edna denied saying it and testified it was Terri. (Tr. III, 109, 117-118). Lisa Pina testified that it was said by either Edna or Terri. (Tr. III, 79). BoBo Watson testified that "they" said it was Darrel Jones. (Tr. III, 96). The defendant's cross-examined all of these witnesses about the statement. (Tr. II, 50; III, 84, 102, 115-116). In these circumstances further cross-examination of Detective Smith on who made the statement would not have added anything to the defense.

Failure to confront Sergeant Colocousis with alleged later inconsistent statements by Denis Perkins and Paul Jones before the Grand Jury.

On cross-examination, Sergeant Colocousis testified that the first description of the perpetrator he received indicated that he was "approximately in the area of six feet tall." (Tr. II, 94-95). The Sergeant could not have been

impeached with later allegedly inconsistent statement by Perkins and Jones before the Grand Jury (of which the Sergeant had no apparent personal knowledge).

Failure to cross-examine Sergeant Colocousis about the fact that Brigette Struthers called the defendant "Deke" while the Sergeant's report continued to call him "Diamond."

The defendant had nothing to gain from this proposed line of cross-examination. The Sergeant's report showed that when questioned about the nickname, Struthers said "I call him 'Deke.' They call him 'Diamond Deke.'" (A. 23). At trial, Struthers testified that the defendant's nickname was "Diamond." (Tr. III, 121).

Failure to cross-examine Sergeant Colocousis about a report by Officer Shanks (according to the defense prepared two weeks before trial) indicating the Sergeant was present when the officers were approached by the defendant outside Pete and Mary's shortly after the shooting.

Relying on a report by officer Shanks which was, according to the defendant, written two weeks before trial (Com. App. 46) the defendant claims his counsel should have questioned Sergeant Colocousis about whether he spoke to the defendant outside of Pete and Mary's that night but did not recognize him as particularly matching the descriptions by Paul Jones or Denise Perkins. (Def. Memo. 68). However, through his cross-examination of Officer Shanks, the defendant's counsel pursued the far more direct point that the defendant spoke with Officer Shanks outside of Pete and Mary's in the immediate vicinity of Paul Jones and Denise Perkins while they were looking for the shooter, yet they failed

to identify him at that time. (Tr. II, 119-121, 126-128; III, 19-20, 54, 55-56,66-68). "That trial counsel selected certain avenues of impeachment, and did not exhaust every conceivable further avenue, does not mean that counsel was ineffective." Commonwealth v. Horton, 434 Mass. 823, 836 (2001).

Failure to cross-examine Detective Colocousis, Smith and LaGarde about the fact that none of the witnesses described the shooter as having a "tail" in the back of his hair.

Reports by Sergeant Colocousis indicated that two people who were not present in the area of Pete and Mary's on the night of the murder generally described the defendant as having a piece of hair, a "tail," growing down from the back of his head. This information could not have been presented through the detectives. The description of the defendant with a "tail" had no relevancy whatsoever unless they were true and if proferred through the detectives, constituted inadmissible hearsay.

Claims of ineffective assistance not based on alleged conflict of interest.

The defendant next raises additional claims of ineffective assistance that rely entirely on material that was available at the time of previous post-conviction proceedings. As previously stated, by now all such belated claims should be summarily denied.

For the contrary proposition, the defendant relies strongly on Commonwealth v. Alcide, 472 Mass. 150 (2015). (Def. Memo. 74, 75, 77, 80). However, the situation in Alcide was a far cry from the circumstances in this case. The ineffective assistance claim in Alcide was considered as a part of the SJC's

plenary review and direct appeal governed by §33E. Alcide at 150-151, 157, 167 n.23. Here, where the claims are based on the trial record or material readily available for earlier proceedings, the defendant is effectively required to show not only that the actions of his trial counsel were manifestly unreasonable but, by missing such allegedly significant and critical defects in trial counsel's performance, so were the actions of new counsel and the SJC on direct appeal and the two other attorneys who previously presented ineffective assistance claims. The defendant now uses the same factual circumstances that were available to him at the time of his prior unsuccessful arguments to fashion a new argument he could have made earlier. "This he may not do." Commonwealth v. Gagliardi, 418 Mass. 562, 566 n.2 (1994).

The defendant simply ignores the fact that the obligation to raise available issues at the earliest supporting has particular application in first degree murder cases subject to §33E. He just claims that, despite the fact that the consideration in Alcide was part of the plenary review on direct appeal, "the result should be no different." (Def. Memo. 75). In further support of his attempt to have the court ignore the established law governing binding waiver, the defendant relies on Commonwealth v. Brescia, 471 Mass. 381 (2015) for the idea that regardless of any established law governing the scope of review, in the particular situation, a judge in the trial court is warranted in granting a new trial whenever the judge concludes justice may not have been done. However, in Brescia the SJC made a point of noting that its discussion of the applicable standards in the particular and

unusual circumstances of that case[7] was premised on the absence of specific established standards for the situation presented. Id. at 388-389. The SJC did not suggest that their discussion was intended to override particular established standards that otherwise applied. Rather, it applied to the "[s]ituations that are not encompassed by the more specific standards determined in our case law" (id. at 391) "in those rare cases not governed by more specific standards." (Id. at 391 n.11). The court also made a point of distinguishing cases where arguments had been waived by not being raised in earlier proceedings. (Id. at 389 n.8). Smith, supra in fact provides a good example of a case where the SJC overturned a trial judge's view that the interests of justice made it one of the rare cases where relief was warranted in a first degree murder case on a claim that could have been raised earlier. Id. at 320.

Effect of subsequent Board of Bar Overseers proceedings.

The defendant claims that the Board of Bar Overseers proceedings against his trial attorney show that his trial counsel was ineffective. The defendant's trial counsel was suspended from the practice of law on October 20, 1987 for matters related to his actions as the executor and attorney for an estate. (A. 440-442). That suspension applied retroactively to September 28, 1987. (A. 442). Trial counsel was under investigation by the Board of Bar Overseers during the defendant's trial. (Defendant's Personal Affidavit, paragraph 6, submitted in support of the defendant's second new trial motion. Com. App. 50). Since the

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[7] Unbeknownst to the jury, the defendant suffered a stroke while he was testifying that did not negate his competency but did affect the nature and credibility of his presentation. Id. at 386-387, 393-394.

defendant's direct appeal was not decided until 1990 (Commonwealth v. Jones, 407 Mass. 168 (1990)), the defendant and his new counsel could have raised the fact of the suspension in his direct appeal.

The defendant particularly relies on general statements trial counsel made during proceedings for reinstatement conducted in 1993. (Def. Memo. 76; A. 343, 360-362). The defendant and his counsel at the time were at least generally aware of the Board of Bar proceedings against trial counsel when they filed his second claim of ineffective assistance in 2000, as shown by the defendant's personal affidavit submitted in support of that claim. (Com. App. 50). There is no reason to think that the material from the 1993 proceedings was not readily available to the defendant for presentation in support of the motion for new trial in 2000, if the defense thought it was worthwhile. By failing to raise this material earlier the defendant waived any right to its consideration as support for an ineffective assistance claim.

In any event, the fact that trial counsel was the subject of Board of Bar Overseers proceedings or that he was suspended from the practice of law, is not enough to show ineffective assistance of the defendant's trial. Commonwealth v. McGuire, 421 Mass. 236, 238 (1995). Nor is enough to argue that the Board of Bar Overseers proceedings demonstrate a general cavalier or neglectful attitude toward the attorney's responsibilities. Commonwealth v. Thomas, 399 Mass. 165, 169 (1987). To the contrary, the defendant's claim for relief must rest on specific instances of misconduct concerning his case. Id. The defendant's proffer of trial counsel's statements concerning his broad general practice made in

support of his petition for reinstatement, that make no particular reference to the defendant's case, just are not enough to provide any significant support to an ineffective assistance claim.[8]

Information concerning Miko Brown.

Next the defendant claims trial counsel was ineffective for failing to present information provided by Miko Brown. (Def. Memo. 77-78). Miko Brown's statement to Detective Luciano (A. 44) and her recent affidavit (Aff. 226-227) indicate that she was with the victim at Pete and Mary's that night. At one point, they left the bar and, as Miko walked away, the victim crossed the street to his car in the D'Angelo's parking lot. (A. 44; Aff. 226-227). There was no indication of the time when they left the bar or whether the victim drove away or returned to the bar after walking to his car.

At trial, the testimony of multiple witnesses left no question that the victim and another man crossed the street from the general area of the bar and walked through the D'Angelo's parking lot toward the rear, where the victim was shot by the other man. There was also no question that it was the victim who was found lying in the D'Angelo's parking lot. In these circumstances, there was little to be gained by presenting Miko Brown's less than definitive testimony to suggest that all the eyewitnesses who saw the two men together just before the victim got shot were testifying falsely (or mistakenly) for no apparent reason. Here again,

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[8] The defendant cites to one page of payment request records as indicating trial counsel only requested payment for thirty seven hours mostly for court appearances. (Def. Memo. 76-77; A. 484). However, the previous page of the defendant's appendix, A. 483, shows requests in the defendant's case for an additional 113.5 hours, sixty of which was for work outside the courtroom such as research and investigation.

ineffective assistance is not shown by failing to present every conceivable basis for impeaching the testimony of other witnesses. Horton, supra.

Alleged available third party culprit evidence.

Next, the defendant claims that his trial counsel should have presented evidence indicating that several times during the investigation Steven Betts had been mentioned as a possible suspect. (Def. Memo. 78). Detective Smith's report just indicated that "Steven Betts' name has been mentioned several times as possibly being the one that did the shooting." (A. 54). Detective Smith did not attribute that information to any more than rumor on the street. The detective subsequently interviewed Betts' ex-girlfriend, Jay Boone, who stated "she had heard Steven might have been involved." (A. 54).

Hearsay suggesting a third party, rather than the defendant, actually committed the crime is only admissible if there are substantial connecting links between the third party and the commission of the crime. Commonwealth v. Alcantara, 471 Mass. 550, 559-560 (2015). The evidence must have a rational tendency to prove that the third party was actually the murderer and cannot be too remote or speculative. Here, there is no indication that the vague suspicion of Steven Betts described in the report was based on anything more than rumors on the street. Such layered hearsay from uncertain sources was unreliable and inadmissible. Id.[9]

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[9] The defendant also points to the report indicating that a man was found hiding in the closet of Denise Bradshaw's apartment for no apparent reason." (Def. Memo. 79; A. 51). However, there is absolutely no connecting link between that man and the shooting of the victim several days earlier. Therefore, it was also inadmissible to suggest a possible third party culprit. Id. at 560.

Additional information concerning height.

Next, the defendant points out that the defendant's booking sheet describes his height as six feet (actually "6.00") (A. 205), while Detective LaGarde's summary of the autopsy report described the victim as six feet, one inch tall (A. 37) and that trial counsel failed to present this despite the fact that several witnesses described the victim as noticeably taller than the man who shot him. (Def. Memo. 78-80). However, the defendant has not shown that this deprived him of a substantial ground of defense. The actual source and reliability of the information in the booking sheet has not been established. It could very well be that it was an estimate self-reported by the defendant. Similarly, it remains unclear exactly how Detective LaGarde got this information for his summary at the autopsy. The actual autopsy (which does not list Detective LaGarde as being present) does not provide any information concerning the victim's height. (Com. App. 47). The failure to present this apparent hearsay of undetermined reliability does not establish that the defendant was deprived of an available and substantial ground of defense or that he received ineffective assistance of counsel.

Additional cross-examination of Terri Lynn Starks.

The defendant next questions why his trial counsel did not cross-examine Terri Lynn Starks more and why he did not recall her to the stand after indicating that he might do so. (Def. Memo. 80-83).[10] Ms. Starks did not identify the

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[10] At the end of the fifth day of trial, trial counsel told the judge he had not decided whether he would recall Ms. Starks to the stand and "would like to talk about it with my client at length" first. (Tr. V, 119-120).

defendant as the shooter in the courtroom, and while the videotape effectively locked her into her prior selection of a photograph, at trial she did not identify the defendant's photograph as the one she selected. (Tr. II, 48-49). Her testimony therefore did not particularly hurt the defendant in ways that it could have or show a desire on her part to tailor her testimony to support the prosecution. In these circumstances there was little to be gained by introducing details about charges she was facing at the time of trial to suggest she had a particular motivation to please law enforcement.

As for the charges of the time of the interview, after Detective Smith identified the picture selected by Ms. Starks (Tr. V, 26-27, 29-30), the defendants trial counsel elicited that Ms. Starks had been placed under arrest and held overnight prior to the interview. (Tr. V, 46, 48). The detective wanted her brought in so that he could question her. (Tr. V, 48). Contrary to the customary practice of bringing people in custody to the District Court first thing in the morning, Ms. Starks was told she would be taken to court after the interview was over. (Tr. V, 48-50). After Ms. Starks cooperated with the interview, she was taken to court and "at some point" released. (Tr. V, 50-51). The jury was therefore made aware of the circumstances suggesting pressure from the existence of charges at the time of the interview.

On the morning of the sixth day of trial, while everyone was waiting for Ms. Starks to arrive, the judge informed the jury "I don't think it's any secret, ladies and gentleman, that this witness is in custody, and we depend on others to bring her here." (Tr. VI, 4). In his closing argument, the defendant's counsel

pointed out that Ms. Starks gave her statement while she was under arrest and that she was "in custody now." (Tr. VI, 12). In these circumstances, it would not particularly assist the defense to add that the charges pending against Ms. Starks were for being a common night walker, (A. 473-479), a misdemeanor offense that did not require deceit or dishonesty.

Contrary to the defendant's claim, (Def. Memo. 83-84) the trial record does not support any idea that trial counsel eventually decided not to recall Ms. Starks to the stand because he did not want to wait any longer because of other unrelated business. The portion of the record cited by the defendant concerns a significantly later portion of the proceedings when trial counsel requested, and received, leave during the jury deliberations to go to his office that was five to ten minutes away. (Tr. VI, 80). From all that is shown by the record, trial counsel may very well have spoken with Ms. Starks after her return to the courthouse and reasonably concluded that any further testimony from her would not be helpful to the defense.

Counsel's opening.

The defendant next complains that his trial stated in his opening indicated that the jury could expect to hear, from the "first officer on the scene," that the defendant was one of the people that came out of the bar during the first stages of the investigation, and that the defendant talked to Paul Jones and Denise Perkins, but he later failed to produce that evidence. (Def. Memo. 84-86).[11]

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[11] The full context of that portion of counsel's opening statement is as follows:

To establish a claim of ineffective assistance for failing to produce evidence mentioned in the opening the defendant must show that the lack of the evidence effectively deprived him of a substantial ground of defense. Commonwealth v. Dunham, 435 Mass. 97, 110 n.14 (2001). He must also show that it was manifestly unreasonable to mention the evidence in the opening but fail to secure its presentation later. "In determining whether failure to produce evidence promised in an opening statement is ineffective assistance of counsel, we look at whether there was some incompetency in the preparation of the statement and whether the failure to produce evidence was due to events beyond

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"Well, let's see where that leads us. Jones and Denise Perkins. It really wasn't simply what Kevin said. They didn't look at some photographs and say, oh, yeah, that's him, listen to how they did it. Listen to if they even are certain today as to what they did and what they saw. One thing is sure. When they say that earlier that night they saw Struthers and Darrell Jones go into D'Angelo's to get a sub, they did indeed see that, they did. Then a few minutes later they saw the shooting and sometime later, when they finally decided that it was Darrell Jones, could that have been the product of who they saw earlier? Is it possible that in their desire to catch someone who committed a crime that after some times goes by that the fixation in their mind is the last black male they saw, you're going on get some evidence, you've already heard, how this party that did it ran up some streets, apparently jumped a fence or ended up in a barroom and all that business, and yet you will get from the police, from the police, the first officer on the scene, that amongst the people who came out of Pete and Mary's when he arrived there to investigate was Darrell Jones. He was there. Could he have been there? You're going to hear that he was there, no question, from a police witness, right there, right there, when Jones and Perkins came back in that minute of driving around looking for him, he was there with all the other witnesses. You'll get testimony that Darrell Jones talked to Jones and Perkins (sic) and asked if they were witnesses and if they saw the crime and their response was yes, we're witnesses, they're talking to Darrell Jones at the scene, nobody recognized him. I suggest to you you will get all that. I suggest to you when you are done you will be left with the question why in the world would he do that. Is anybody going to give you any motive why Darrell Jones would shoot Rodrigues? I suggest that there will be evidence put before you both through the examination of the government witnesses and through the production of our own evidence."
(Tr. II, 18-20).

counsel's control or had strategic justification." Commonwealth v. Garvin, 456 Mass. 778, 791 (2010).

Here, evidence came in through Officer Shanks, the second officer on the scene, (Tr. II, 113-115), that the defendant came out of Pete and Mary's and spoke to Officer Shanks while he should have been within the sight of Denise Perkins and Paul Jones. (Tr. II, 119-120). Nevertheless, Jones and Perkins said they did not see anyone there who was involved. (Tr. II, 120). Defendant's trial counsel emphasized that point on cross-examination. (Tr. II, 126-129, 131-132). Thus this aspect of the openings was presented in the evidence, although not in the exact form that the defendant claims it should have been. Garvin, supra at 790.

The defendant's trial counsel apparently believed he would be able to elicit evidence that the defendant spoke to Paul Jones and Denise Perkins outside the bar. He challenged the credibility of Officer Shanks testimony, in response to cross-examination, that the defendant and his companions did not speak to Paul Jones and Denise Perkins. (Tr. II, 127-129). He also questioned Paul Jones about whether anybody came over to him and asked him if he was a witness. (Tr. III, 67). Thus counsel attempted to elicit the evidence he previously described. Garvin, supra at 791.

There is nothing in the record, or presented by the defendant, indicating what prompted trial counsel to mention this expected evidence in the opening, or what may have stopped him from presenting anything further. For all we know the information may have come from the defendant himself and counsel may have

expected to present it through, at least, testimony from the defendant. After all, the prior affidavits of the defendant state that he expected to testify as the trial began, but decided not to once they received the results of the polygraph test mid-trial. (Com. App. 54-55; A. 236-237).[12] Toward the end of the third day of trial, the defendant's trial attorney announced that the defendant was not going to testify and that he would provide the prosecutor with a copy of the polygraph report. (Tr. III, 133). The defendant has not met his burden of showing it was manifestly unreasonable to mention this aspect of the anticipated evidence in the opening and that counsel was not prevented from presenting the supporting evidence by circumstances and strategic concerns beyond his control. Garvin, supra at 791; Duran, supra at 110. Finally, the prosecutor never asked the jury to draw any inferences against the defendant for any alleged failure to fulfill any promises made in the defense counsel's opening. (Tr. III, 17-30). Duran, supra at 111. The defendant has not shown ineffective assistance in counsel's opening.

Closing argument.

The defendant also claims that his trial counsel presented an ineffective closing. (Def. Memo. 86-87). Trial counsel argued that the somewhat equivocal identifications of the defendant as the shooter were unreliable in the general circumstances, whether or not the witnesses were intentionally lying. (Tr. VI, 7-14). He also emphasized that no motive for a shooting by the defendant had been presented. (Tr. VI, 11). The defense now argues that in addition, or instead, trial

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[12] The defense reaction to the polygraph test results was addressed in both prior motions claiming ineffective assistance.

counsel should have emphasized particular points the defense now finds particularly significant.

"[S]uggesting ways in which counsel's closing argument might have been stronger does not make out a claim of ineffective assistance." Commonwealth v. Denis, 442 Mass. 617, 627-628 (2004). After all, any competent counsel, using hindsight, can craft a more eloquent, forceful, and potentially more beneficial closing. Id. at 627. Even tactical decisions in regards to closings that may appear questionable after the fact do "not suffice to support an ineffective assistance claim." Commonwealth v. Bonnett, 472 Mass. 827, 842 (2015). Rather, the defendant must show that his lawyer's closing effectively denied him of an otherwise available and substantial ground of defense. Commonwealth v. Triplett, 398 Mass. 561, 568-569 (1986) quoting Commonwealth v. Street, 388 Mass. 281, 287 (1983). The defendant has made no such showing in this case.

Seating during trial.

The defendant's claim concerning his counsel's not allowing him to be seated at counsels table was raised and rejected in the defendant's second motion for a new trial. (A. 264-265; Com. App. 19-25). The Single Justice explicitly denied any further review on the claim. (A. 265). Nothing new of any substance has been added to the claim now. (Def. Memo. 88-89). Direct estoppel applies and no further consideration is warranted. Rodrigues, supra at 710.

Statement during the view.

The defendant also claims that his counsel made an erroneous statement during the view when he stated "you will get some testimony that the perpetrator

... continued up Franklin Street to The Colonial Spa." (Tr. I, 58-59; Def. Memo. 89-91). However, at trial it was undisputed that Denise Perkins and Paul Jones saw the perpetrator run behind Pete and Mary's towards Franklin Street and climb over a fence by the cable vision building. (Tr. III, 15, 38, 52). That same night the owner of the Colonial Spa bar, which was up Franklin Street, noticed a black man who came into the bar, stayed a short while and left without buying anything. (Tr. IV, 44-46). The next morning the murder weapon was found in the men's room in a rubbish bin. (Tr. IV, 47). The fact that the perpetrator made his way up Franklin Street to the Colonial Spa was shown by an obvious and undisputed inference at trial, given the location of the murder weapon. That it was established by an obvious and undisputed inference rather than direct testimony as might be expected from counsel's suggestion during the view could not have mattered to the defense or prejudiced the defendant.

Developments on identifications.

Finally, the defendant notes changes in the approach to identification evidence that have occurred since his conviction became final in 1990. The defendant's counsel filed a motion to suppress the out of court identifications prior to trial. (A. 215). The defendant also challenged the out of court identifications as unduly suggestive in his direct appeal. (Com. App. 60, 81-85). The SJC summarily rejected the claim after its plenary review "we see nothing improper in the identification procedures." Jones, supra at 170.

The defendant would have this court ignore that prior final decision and review the issue again by applying much later developed principles from cases in

the last few years where it was expressly stated that the new holdings only apply to cases commenced in the future. Commonwealth v. Bastaldo, 472 Mass. 16, 24-25 (2015) (modifying required instructions for the future but not applying modification in that case); Commonwealth v. Gomes, 470 Mass. 352, 360-361 (2015) (establishing model instruction to be applied in future cases but not case before court); Commonwealth v. Collins, 470 Mass. 255, 265 (2014) (new holding only applies to trials commenced after date of opinion); Commonwealth v. Crayton, 470 Mass. 228, 241-242 (2014) (same as Collins);Commonwealth v. Silva-Santiago, 453 Mass. 782, 798 (2009) (setting protocol court expects to be followed in the future). These newly developed, prospective only, holdings do not apply, as a matter of law, to the consideration of the defendant's case decided with finality twenty six years ago.

Contrary to the defendant's claim (Def. Memo. 93-94) the cases of Commonwealth v. Adjutant, 443 Mass. 649 (2005) and Commonwealth v. Pring-Wilson, 448 Mass.718 (2007) do not suggest any allowable deviation from that rule. In Adjutant, the court adopted a new rule and applied it in that case. "Because the defendant alleged the error and argued for the rule on direct appeal, she should have the benefit of this decision." Adjutant, supra at 667.

Pring-Wilson was on direct appeal when Adjutant was decided. Pring-Wilson, supra at 719-720. Like the defendant in Adjutant, the defendant in Pring-Wilson had also alleged essentially the same newly found error and had argued it as a basis for post-conviction relief. Pring-Wilson, supra at 736. In these circumstances, the Court reached the not unusual or exceptional determination

that defendants in similar situations deserved similar results. It is a far different matter to suggest that principles said to apply only to future cases (and not even in the case before the court) warrant consideration in cases decided with finality after direct review more than twenty years earlier.

CONCLUSION

The defendant has not established that any of the multiplicity of issues he presents could not have been presented in prior post-conviction proceedings. In the end, the defendant essentially just disagrees with the jury's determination that the evidence warranted his conviction. He has not shown that his case is the rare first degree murder case after plenary review that has such exceptional circumstances that relief is warranted on the basis of issues that could have been raised in prior proceedings. Smith, supra.

Respectfully submitted,

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