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December 18, 2019

Maura S. Doyle, Clerk
Supreme Judicial Court for Suffolk County
John Adams Courthouse, 1st Floor
One Pemberton Square, Suite 1300
Boston, MA 02108-1707

Re: Commonwealth of Massachusetts v. Rafael Martinez
Single Justice No.: Not Yet Assigned

Dear Clerk Doyle:

Enclose please find Mr. Martinez's memorandum in support of his gatekeeper petition. I will file the record appendix separately shortly in hand as it includes large color glossies, copies of which have already been furnished to the Commonwealth.

Thank you.

Sincerely,

Ruth Greenberg

RG/ls
Enclosures
cc Ken Steinfeld, Esq.
Essex County District Attorney's Office

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SINGLE JUSTICE NO.
NOT YET ASSIGNED

COMMONWEALTH OF MASSACHUSETTS

V.

RAFAEL MARTINEZ

On Appeal from the Essex County Superior Court of the Denial of the Defendant's Motion for New Trial

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DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS PETITION FOR LEAVE TO APPEAL PURSUANT TO G.L. C. 278 §33E

December, 2019

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INTRODUCTION

Rafael Martinez was convicted in April, 2013 of murder in the first degree in connection with the death of Timothy Walker, who was shot to death on his front porch in Lawrence on July 24th, 2010. For nearly a year after the murder, the police had few leads or suspects in the case. A reliable informant, a Mr. Barker, told the police that one Ray Cherry, a member of the Bloods, had confessed to this murder, and then fled to Baltimore, but police did not follow up. The case was investigated as likely a gang murder, based on the suspicion that Timothy Walker was a member of the Crips and possibly a police informant. Few resources were devoted, and the crime remained unsolved. Law enforcement did not follow up to investigate Cherry's record, motive, or whether he had indeed fled to Baltimore as reported. Neither did trial counsel, and there was no third-party culprit evidence adduced at trial by either party regarding Mr. Cherry.

Surveillance video of the crime scene showed a Nissan Murano (law enforcement identified the vehicle from the video) stopping on a street near where the shooting of Mr. Walker took place, showed the perpetrator getting out of the car and walking down the street, and then, several minutes later, showed the perpetrator running back down the street

and getting back into the Murano. The video was not of sufficient quality to identify the perpetrator. His height was visible, and a portion of his footwear, white sneakers without distinctive markings. A crime scene amalgam videotape was inexpertly made by law enforcement from several cameras near the scene, some parts of which slowed and interrupted the perpetrator's gait. The perpetrator could be clearly seen standing directly under a store awning of measurable height, near a sign of measurable height, and next to the Murano, a vehicle of known height. No attempt was made to enlarge or clarify the video to see what markings, if any, were on the sneakers, and no attempt was made by either party prior to trial to measure the height of the perpetrator or the height of the defendant, against these fixed objects of known height.

Instead, the investigation of the murder of Timothy Walker was backburnered by law enforcement until May of 2011, when a woman named Michelle Wilson came to police and told them that she believed her daughter's boyfriend, Rafael Martinez, committed the murder. She told police that when a local news channel aired a special on the murder, including clips from the stuttering surveillance video, that she had a conversation with Martinez in which he said that he was the person on the video. Her accounts of how exactly this

conversation transpired differed. Her daughter, Tesseana Wilson, initially refused to talk to the police or to say that Mr. Martinez had said anything to her about being involved in the shooting. After significant pressure from her mother and the police, Tesseana told detectives that Mr. Martinez had told her, after the video aired, and after her mother had insisted, that he was the one pictured in the video.

Mr. Martinez was not a gang member, either of the Bloods or the Crips, had no relation to Mr. Walker or to Mr. Walker's neighborhood, and no motive to kill was ever established or even suggested. Mr. Martinez had played team sports in high school, had no criminal or juvenile record, and no prior contact with the police.

Based on Mrs. Wilson's report, police then began investigating Mr. Martinez, who was living in Lowell with his friend Maxwell Regan and Max's mother, Dolores Regan. When police came to speak to the Regans and search the house, they found a pair of sneakers in the trash. Max's mother confirmed that the sneakers had belonged to Rafael Martinez, and that earlier that day, he had asked for a plastic bag to throw them away. Nothing in the record of trial suggests that at the time Martinez openly threw away his sneakers he was aware that Mrs. Wilson had contacted the

police for any reason or that he was suddenly the subject of a murder investigation based on a purported confession. A witness at trial, a friend of Mr. Martinez, when shown the amalgam video, claimed to recognize the interrupted gait of the perpetrator as that of Mr. Martinez. This was the evidence at trial. There was a suggestion by the prosecutor that because the perpetrator had used a racial epithet and Mr. Martinez had once used a racial epithet, this was proof that the defendant was the killer. The jury did not hear that when Ray Cherry, violent Blood and alternate perpetrator, confessed committing this murder to Barker, Cherry used the same epithet the murder witnesses heard.

In closing, the prosecutor argued that Tesseana and her mother Michelle were telling the truth. (There was evidence that Michelle, Tesseana's mother, violent and erratic, prior to the purported confession, had previously punched the young Mr. Martinez full in the face for an imagined slight. Tesseana was aware of her mother's capacity for sudden violence.) The prosecutor argued that the sneakers Mr. Martinez threw away were the same sneakers visible on the video-surveillance tape and, without evidence that Mr. Martinez knew the police were looking for him before he discarded the sneakers, argued that Martinez discarded the sneakers because he knew the police were looking for him.

The Motion for New Trial

Following trial and represented by new counsel, and without objection from the Commonwealth, the defense employed an expert, Dr. Al Harper, a forensic anthropologist of national reputation specializing in human measurement and crime scene reconstruction. Dr. Harper was provided a copy of the video-surveillance tapes taken from the scene. He was also provided with the height of the defendant at the time of the crime, (between five foot eight and five foot eight and a half), the standard height of a Nissan Murano (five foot six to five foot six and a half) and the picture of the pair of sneakers recovered from the dumpster which the prosecutor had argued were the shoes worn by Mr. Martinez and pictured in the crime scene video. Dr. Harper was not provided any information about Ray Cherry.

Dr. Harper visited the crime scene and viewed where the cameras were placed and where, as confirmed by the transcript, the Murano had been parked, where the awning and signs were, and where the shooting took place. He enlarged the photographs created from the video, and determined what after review should have been apparent to the naked eye. He drew a straight line from the top of the Murano past the perpetrator and the perpetrator was substantially below the line.

The perpetrator is shorter than the Murano. The top of his head is below the Murano roofline. Mr. Martinez, five foot eight and a half, is taller than a Murano. Mr. Martinez cannot be the perpetrator.

Mr. Martinez has always asserted his innocence. At 18 he had no prior criminal or juvenile record. No motive for him to kill Mr. Walker has ever been suggested. Martinez's motion for new trial is a claim of actual innocence.

Dr. Harper further examined a still shot made from the surveillance video of the perpetrator next to the sign and the awning which he had measured, and using basic measurement principles for calculating the height of one object compared to another, calculated that the pictured perpetrator was shorter than five foot six, confirming again that the perpetrator was shorter than a Murano, and therefore could not be Mr. Martinez. Dr. Harper also enlarged the video-surveillance of the perpetrator's sneakers, and determined that the sneakers recovered from the dumpster did not match the sneakers in the video, despite the trial prosecutor's argument contrary.

Dr. Harper's affidavits so attesting were provided to the Commonwealth. The Commonwealth in response provided an affidavit from Denis Pierce, a former Lawrence police officer who had actually participated in this investigation

and who had subsequently resigned from the force to restyle himself as a video expert. This former police officer, an investigator on this case, attested that the video surveillance tapes were so murky that the vehicle could not be identified as a Murano. When confronted with evidence that his fellow police officers at trial had testified the video-surveillance obviously showed the car was a Murano, Pierce's assertion that the video was too murky to make out a Murano was conceded to be incorrect. The former police officer attested, similar to his repudiated conclusion that the video was too murky to identify a Murano, that the video was too murky to determine any markings on the sneakers. There is a giant "N" on the recovered sneakers, and, as attested to by Dr. Harper, none on the sneakers in the video-surveillance, as well as less immediately obvious but still apparent differences in color and design. Former officer Pierce opined that the perpetrator in the video might be bending his knees which would make him look shorter. Dr. Harper, who has a PHD in human measurement, provided a series of measurements showing that a perpetrator of five foot eight and half, wearing shoes, would have had to be bending at an obviously visible and improbably large angle in order to reduce his height to be as short as that of the videotaped perpetrator. The perpetrator as measured

in the still photo taken from video next to the sign is clearly standing upright, and is measured to be under five foot six. As to this last identifying and exculpatory measurement, former officer Pierce had no response.

The defendant additionally supported his argument with the affidavit of trial counsel attesting that he had simply never thought of measuring the height of the defendant compared to the perpetrator. The defendant brought to the Court's attention at argument that the third party culprit in this case, Ray Cherry, was a member of the Bloods, thus motivated to kill someone believed to be a member of the Crips, had confessed to Mr. Barker, had said he was running away to Baltimore, had indeed moved to Baltimore shortly following this crime as had been reported by Mr. Barker, and, wait for it, was under five foot six inches tall. Trial counsel further attested that had he been aware that the defendant was taller than a Murano and that third party culprit Ray Cherry, like the pictured perpetrator, was not, he would have investigated this third party culprit defense.

Motion counsel argued first that trial counsel was ineffective in not employing an expert to determine that the defendant was taller than a Murano and the perpetrator was shorter, and that the shoes of the perpetrator were not the shoes discarded by the defendant, or, if it were not

deficient performance for trial counsel to neglect to investigate this critical information of misidentification in a misidentification defense, then this misidentification evidence was newly discovered evidence; either way Mr. Martinez was entitled to a new trial at which the exculpatory height differential was presented and argued and a third party culprit defense was investigated and presented, especially given that the third party had confessed, and that his confession was corroborated by the fact he had indeed fled to Baltimore, had a gang rivalry motive, and was shorter than a Murano.

The defendant also argued that the prosecutor's reliance on argument that the shoes recovered from the dumpster were those belonging to the perpetrator when there was now expert evidence contrary, standing alone, was sufficient to require a new trial. See Commonwealth v. Baker, 440 Mass. 519 (2003): Commonwealth asks jury to infer that a hair in hole in wall belongs to injured baby; new trial ordered when subsequently retained expert testifies the hair is not the baby's as argued.

The trial court disagreed. The trial court ruled that it was not deficient performance for trial counsel to neglect to consider determining whether the perpetrator was shorter than a Murano and the client taller, or whether the

sneakers actually matched. The trial court opined from the bench that in all his many years experience he had never seen an expert or an argument that a perpetrator pictured standing next to a fixed object of known height was either shorter or taller than the charged defendant, and that Dr. Harper was not qualified to measure a person from a picture because he was an expert in measuring, not in video-surveillance.

The defendant moved to reconsider, offering the supporting affidavit of video expert Michael Garneau of Rampion, attesting that Dr. Harper was qualified to opine because no video-related distortion was involved; just measurement science, that the testimony of an expert was valuable in explaining to a jury the absence of video-related distortion (the trial judge himself expressed confusion on this topic) and that measurement by comparison to fixed objects in video and photograph was a long and universally known and widely used tool in criminal and civil court. Cf. Commonwealth v. Caruso, 85 Mass. App. Ct. 24 (2014); the Pythagorean Theorem is not new. The Caruso court noted an FBI affidavit asserting measurements of a pictured perpetrator against an object of known size had been used in criminal prosecutions for over a century; Garneau attested to teaching such techniques to the criminal

bar, and the defendant provided the trial court with an FBI publication saying same from 1979. Clearly the trial judge's inexperience with such measurement as a necessary tool in the toolbox of the ordinary fallible lawyer presenting a misidentification defense, or a tool used by the ordinary prosecutor to identify a miscreant, was sui generis.

The defendant reiterated his alternative argument; if, as the judge claimed, there was no duty to investigate this exculpatory information prior to trial because such measurement was not part of the ordinary toolbox, then motion counsel's subsequent discovery of this highly exculpatory evidence was extraordinary and the evidence was newly discovered and the principles laid out in Commonwealth v. Grace, 397 Mass. 303(1986) required a new trial. See Commonwealth v. Brescia, 471 Mass. 381 (2015); justice may not have been done, citing Grace, supra. The defendant pointed out that if trial counsel had done this investigation pretrial and received an unfavorable result, he would not have been obliged to disclose it, (see Commonwealth v. Haggerty, 400 Mass. 437 (1997)), and that the results of the omitted investigation were entirely exculpatory and would have redirected trial counsel's trial strategy entirely; even if he had not been successful in

introducing the Pythagorean theorem itself as reliable at trial, but merely had placed the defendant in front of a Murano in front of the jury, together with Ray Cherry and Ray Cherry's confession, and showed the video, the evidence would have made a real difference in the jury's consideration. The case against Mr. Martinez was weak, consisting primarily of the testimony of his ex-girlfriend's angry mother that he confessed.

To no avail; the trial court ruled, wrongly applying the standard of Commonwealth v. Saferian, 366 Mass. 89 (1974) rather than that of Commonwealth v. Wright, 411 Mass. 678 (1992) that the defendant was not entitled to relief under either a theory of ineffective assistance or a theory of newly discovered evidence.

Notice of intent to appeal was timely filed at every pertinent stage of these proceedings and because the issues raised are both new and substantial, a gatekeeper petition was timely filed and this memorandum in support, with accompanying exhibits, timely follows. A hearing is most respectfully requested. With the Courts permission, the defendant will furnish a record appendix of pleadings and rulings, together with the glossy photographs provided to the Commonwealth and the trial court, within the next 54

days. A copy of the transcript of hearing before Feeley, J., will e provided as soon as it is prepared.

PROCEDURAL BACKGROUND

In 2013, Rafael Martinez was charged with first-degree murder and convicted of the charged crime after a six-day jury trial. Mr. Martinez's conviction was affirmed on January 5, 2017 by the Supreme Judicial Court. The Court declined to grant relief pursuant to G.L. c. 278, § 33E. Commonwealth v. Martinez, 476 Mass. 186 (2017). The defendant's motion for new trial and related motions for reconsideration were all denied by the trial judge and notices of appeal appropriately filed, and this memorandum in support of permission to appeal to the full bench is timely.

ARGUMENT

I. THE ISSUES RAISED IN MARTINEZ'S CASE PRESENT NEW AND SUBSTANTIAL QUESTIONS WARRANTING THE FULL COURT'S REVIEW.

The defendant's claim is new within the meaning of Massachusetts jurisprudence because it is a claim of ineffective assistance of counsel not apparent from the trial record, or, alternatively, a claim of newly discovered evidence not reasonably discoverable before trial. Neither

of these claims could have been raised on direct appeal. See Commonwealth v. Zinser, 466 Mass. 807, 809, n. 2 (2006). This is the defendant's first motion for new trial so there is no waiver. If the trial judge is correct that trial counsel had no duty to investigate the evidence presented at the motion for new trial (that the pictured perpetrator is shorter than a Murano and the defendant is taller, and that the shoes on the perpetrator are not the match argued by the trial prosecutor) then the evidence is newly discovered. Either way, the claim could not have been raised until the omitted post-trial post-appeal investigation was complete, and the claim is new within the meaning of established Massachusetts precedent. Cf. Commonwealth v. Randolph, 438 Mass. 290 (2002); Commonwealth v. Gunter, 459 Mass. 480 (2011); Commonwealth v. Smith, 460 Mass. 318 (2011).

"The bar for establishing an issue is 'substantial' is ... not high. It must only be meritorious in the sense of being worthy of consideration by an appellate court". Commonwealth v. Gunter, supra, at 487. A claim of ineffective assistance, if supported, as here, by affidavit of trial counsel and by expert affidavit as well, is a substantial claim of the denial of a constitutional right. Here, trial counsel neglected to do investigation. If the investigation done post-trial had been done pre-trial, and

the expert evidence presented by the defendant been credited by the jury, the defendant would have been acquitted. That the Commonwealth now presents an "expert" testifying contrary is of no moment; even assuming the jury could credit that the "expert" who was unable to identify a clearly identifiable Murano in a video could be be believed as to whether anything else could be identified in a video, indeed could be believed at all, such credibility contests are not the province of appellate courts; the law requires credibility be decided by a jury. Cf. Commonwealth v. Roberio, 482 Mass. 278 (1998).

Furthermore, the omitted investigation in this case not only impacted the jury's evaluation of the misidentification defense presented, it also impacted and altered the very choice of defense strategy at trial itself. As trial counsel attested, had he been aware the defendant was taller than a Murano, and that confessed alternate suspect and third party culprit Ray Cherry, like the pictured perpetrator, was smaller, trial counsel would have explored and presented a third party culprit defense. Subsequent investigation as presented to the trial court corroborates the information supplied by Mr. Barker; Cherry did indeed flee to Baltimore and he is a Blood, displaying himself in social media in full Blood red regalia, with guns, and

embracing violence, confirming a gang motive to kill Mr. Walker, who was believed to be a Crip. The Commonwealth cannot in good faith deny this case (until the defendant was accused by his girlfriend's angry violent mother) was investigated as a gang motivated execution.

The issue raised here is substantial. The expert evidence, if credited, proves this defendant is innocent of this murder. "A defendant's submissions in support of a new trial need not prove the factual premise of that motion "in order to merit an evidentiary hearing but if taking as true the claims made in that motion, a serious issue is raised, a hearing should be held. Commonwealth v. Licata, 412 Mass. 654 (1992). Here, though a motion for new trial could be granted on affidavits showing a dispute between experts requiring jury resolution and no possible basis for any reasonable lawyer to neglect doing this investigation, a motion for new trial cannot be, as here, denied on the basis of affidavits alone, even by the trial judge. At a minimum, this case requires remand, if not the immediate order of a new trial by the full bench.

II. THE MOTION JUDGE MADE CLEAR ERRORS OF FACT AND LAW IN DENYING THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The trial court employed the wrong standard of review in deciding whether Mr. Martinez did not receive the

effective assistance of counsel to which he is entitled in this first degree murder case. The trial court relied on Commonwealth v. Saferian, 366 Mass. 89 (1974) in determining that no ordinary fallible lawyer presenting a defense of misidentification in a murder case where there were photographs of the perpetrator next to fixed objects of known height was obliged to consider whether the pictured perpetrator was the same size as the defendant. The correct standard of review, Commonwealth v. Wright, 411 Mass. 678 (1992), is more favorable to a defendant. Because the trial court employed the wrong standard of review, his opinion is entitled to no deference. Because the judge ruled against the defendant as a matter of law without taking evidence, an appellate Court is in as good a position as the trial court to resolve this case on the pleadings, affidavits, and exhibits. This case should be considered by the full Court.

The necessity of using the appropriate standard of review when assessing deficient performance for failure to assess the size of a pictured defendant in a murder case, as opposed to a misdemeanor, has actually been addressed by Massachusetts. In Commonwealth v. Caruso, ante, at note 10, the Appeals Court wrote, in discussion of whether trial counsel was deficient in failing to obtain measurements from a video "the stakes of the prosecution at issue are

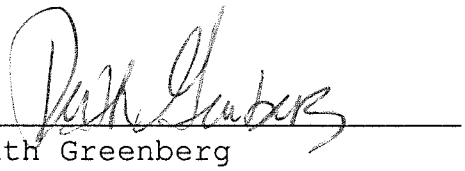
relevant... in preparing a defense to a charge of murder in the first degree counsel would naturally be expected to conduct a more intense investigation." In Caruso, the trial lawyer was defending only crimes against property and even then he at least consulted with a video expert; here and for no reason trial counsel, representing an eighteen year old on a murder charge, did not even inquire. The judge's misunderstanding of the standard in order to save this conviction should not be condoned in this case of actual innocence, where the course of the entire trial was altered by counsel's error in failing to investigate.

CONCLUSION

Mr. Martinez maintains his innocence, asserts that his trial counsel was ineffective in failing to investigate and present exculpatory evidence which not only would have made a real difference in the jury's consideration but which would have redirected trial strategy entirely by strengthening the identification of a third party culprit. Alternatively, if the investigation was not part of the toolbox of the ordinary lawyer defending a case of murder in the first degree, a higher standard than that of a lawyer defending a property crime, then the exculpatory evidence falls within the ambit of the newly discovered, and justice requires the grant of a new trial nonetheless. Martinez

requests permission to appeal to the full bench, and for argument before this Court.

Respectfully submitted,



Dated: December 18, 2019

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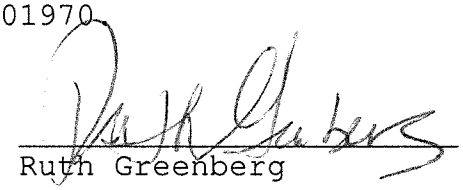
Affidavit & Certificate of Service

I, Ruth Greenberg, that a copy of this memorandum has been mailed by first-class mail on this day to Ken Steinfeld, Esq., Essex County District Attorney's Office, 10 Federal Street, 5th Floor, Salem, MA 01970.



Dated: December 18, 2019

Ruth Greenberg