

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT  
NO. 1785CR00312

COMMONWEALTH

vs.

JEREMY PATRICK ROBIN

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S  
MOTION FOR A NEW TRIAL**

Defendant Jeremy Robin moves for a new trial because he was deprived of his constitutional right to the effective assistance of counsel and because justice was not done. See Commonwealth v. Saferian, 366 Mass. 89, 96 (1974); Mass. R. Crim. P. 30(b).

At trial, the Commonwealth alleged that Mr. Robin “on May 7, 2017, intentionally stabbed Timothy Commerford in the chest with a knife, ultimately causing his death, and....also stabbed Richard Garcia in the back with a knife, causing him serious bodily injuries.” Tr.\_3/28.<sup>1</sup> Mr. Robin asserted that he was acting in self-defense and in defense of his girlfriend and his mother during a melee instigated by Mr. Commerford and Mr. Garcia. M. Exh. 1; Tr.\_3/37. Mr. Robin claimed that Mr. Commerford and Mr. Garcia brought knives that were used during the altercation; two knives were later found in the area with traces of blood and Mr. Garcia’s DNA on their blades. Tr.\_8/81-83. The prosecutor disputed that claim,

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<sup>1</sup> The trial transcript is referred to as “Tr.\_vol./page”; the trial exhibits as “Tr. Exh. #”; the affidavits as “Aff. ¶ #”; and the exhibits filed in support of this motion as “M. Exh. #.”

arguing that Mr. Robin and his girlfriend brought the knives. Tr.\_8/91, 101, 103, 107. The prosecutor urged the jury to reject Mr. Robin's "false stories that...Commerford and Garcia had come to his apartment to harm him." Tr.\_8/93, 100.

With those arguments in mind, the central issues were whether Mr. Robin had reasonably acted in self-defense and in defense of his mother or his girlfriend during the altercation. Tr.\_3/33, 37, 8/81-83, 90-91, 99-101, 103, 107. The jury were instructed to consider whether Mr. Robin believed that he (or his mother or his girlfriend) was in "immediate danger of...serious bodily harm"; "the weapons used"; and whether "the deceased or third party acting together with the deceased was the first to use deadly force, such as by escalating a simple fistfight into a knife fight[.]" Tr.\_8/60-68.

Accordingly, for reasons stated below, this Court should have "serious doubt whether the jury verdict would have been the same" had the jury been presented with forensic evidence supporting a reasonable inference that (1) Mr. Commerford handled the knives found at the scene; (2) Mr. Robin did not handle the knives found at the scene; and (3) Mr. Garcia later hid one knife under a pizza box and threw the other knife into the woods before police arrived. See Commonwealth v. Millien, 474 Mass. 417, 432 (2016).

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## **BACKGROUND**

### **A. Procedural History**

On August 15, 2017, Mr. Robin was indicted on charges of (1) manslaughter (G. L. c. 265, § 13); (2) aggravated assault and battery with a dangerous weapon (G. L. c. 265, § 15A(c)); and (3) assault and battery with a dangerous weapon (G. L. c. 265, § 15A(b)). M. Exh. 2.

On December 4, 2019, Mr. Robin filed notice of intent to introduce the affirmative defenses of self-defense and defense of others. M. Exh. 1.

On October 14, 2021, the jury trial began (Yarashus, J. presiding). M. Exh. 1.

On October 26, 2021, guilty verdicts were returned on all charges. M. Exh. 1.

On March 15, 2022, Mr. Robin was sentenced to not less than ten years and not more than fourteen years in prison on the manslaughter charge. He received concurrent prison sentences of six to seven years for aggravated assault and battery with a dangerous weapon and two to three years for assault and battery with a dangerous weapon. A notice of appeal was filed on that day. M. Exh. 1.

On January 17, 2023, Mr. Robin filed a motion for postconviction forensic DNA analysis pursuant to G. L. c. 278A. M. Exh. 1.

On May 8, 2023, the motion was allowed (Yarashus, J.). M. Exh. 1.

On June 14, 2023, the Court issued an order regarding postconviction forensic DNA analysis (Yarashus, J.). M. Exh. 1.

On October 6, 2023, the Court received DNA results and a case report from the Cybergeneics Corp. pursuant to the order. M. Exh. 1.

**B. Facts**

**1. The trial record**

**a) Opening statements**

In his opening, the prosecutor stated, “The defendant...admitted to Milford police officers that he stabbed Tim [Commerford] and Richard Garcia. He directed officers to a marsh area where he said he had thrown the knife after stabbing them. A knife was recovered from the marsh with the assistance of a Mendon police canine and his handler. Officers also found another knife in the area lying near a dumpster. Both of these knives were collected and a red-brown stain on the blades of each were linked to the DNA profile of Richard Garcia.” Tr.\_3/33.

In her opening, defense counsel stated, “We are not standing here in front of you saying that didn’t happen. Jeremy explained to the police immediately upon their arrival what had happened: I stabbed them. I was protecting myself. I was protecting my mother. I was protecting my girlfriend. There was nothing I could do.” Tr.\_3/37.

**b) Recorded statements of Defendant Jeremy Robin**

On the day of the incident, Mr. Robin was interviewed by Troopers Michael Leo and Charles Murphy; the interview took place while Mr. Robin was in custody at Milford Hospital following his arrest. Tr.\_6/101. Mr. Robin was in a bed and dressed in a hospital gown. Tr.\_6/103. A video recording of the interview was played for the

jury without objection. Tr.\_ 6/105, 7/5; Tr. Exh. 285. Following is a summary of Mr. Robin's statements to the troopers.<sup>2</sup>

Mr. Robin and Timothy Commerford had known each other before this incident. On a previous occasion Mr. Robin had flushed Mr. Commerford's heroin down a toilet; Mr. Commerford subsequently went to rehab. Int.\_6. (Mr. Commerford's mother testified that her son preferred "the kind of drugs that make you disassociate"—such as ketamine, Xanax, and heroin. Tr.\_3/156. She confirmed, "we sent him to numerous rehabs." Tr.\_3/155.) Mr. Robin did not hear from Mr. Commerford again until the day of the incident. Int.\_6.

On that day, Mr. Robin had posted his location on social media; Mr. Commerford could view Mr. Robin's postings. Int.\_7. Mr. Commerford knew where Mr. Robin lived. Int.\_13. Mr. Commerford messaged Mr. Robin and asked if he had any marijuana; Mr. Robin said he did not. Int.\_13.

While Mr. Robin was standing outside his building, Mr. Commerford and Mr. Garcia (who was driving) pulled up in a car and said, "Hey, Jeremy, come here. Get in the car." Int.\_7. Mr. Robin thought it "weird" that Mr. Commerford was sitting in the back seat. Int.\_15. Mr. Commerford asked Mr. Robin to "ride around the block." Int.\_15. Mr. Robin refused. Int.\_15. Mr. Commerford then accused Mr. Robin of robbing him. Int.\_8.

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<sup>2</sup> A transcript of the interview was marked for identification as Exhibit E. Tr.\_5/5-6, 8. The interview transcript is referred to as "Int.\_page."

Mr. Robin observed that Mr. Commerford was “impaired.” Mr. Commerford “was high or he was drunk.” Int.\_19. (A toxicology analysis confirmed the presence of alcohol in Mr. Commerford’s bloodstream (0.11 grams percent), as well as the painkiller buprenorphine and the anesthetic ketamine. Tr.\_4/50, 54.)

As Mr. Robin started to walk away, Mr. Commerford jumped out of the car, ran at Mr. Robin, and hit him. Int.\_8. A fistfight ensued. Int.\_8. Mr. Robin’s mother and his girlfriend came to his aid. Int.\_8. Mr. Garcia joined the fight and punched Mr. Robin’s mother in the face. Int.\_8. Mr. Robin grabbed his mother and girlfriend and said, “Let’s get inside.” Int.\_9. Mr. Garcia and Mr. Commerford appeared to be “all drugged out.” Int.\_23. Mr. Garcia hit Mr. Robin’s mother again. Int.\_9.

Mr. Commerford produced a knife and “threw the knife on the seat” of the car. Int.\_9, 23. Mr. Robin grabbed the knife, saw his mother and his girlfriend “bleeding and hurt and screaming and crying,” “snapped,” and “poked [Mr. Commerford and/or Mr. Garcia] once, twice, I don’t know.” Int.\_9, 24. Mr. Robin told the troopers, “I just stabbed Tim in the side like three times.” Int.\_28. (Mr. Commerford had one stab wound on the left side of his chest. Tr.\_4/27.) Mr. Robin then “threw the knife into the woods.” Int.\_9. Mr. Robin told the troopers, “This is what I think happened. All right. I might be wrong.” Int.\_28. Still, Mr. Robin insisted that Mr. Commerford “brought the knife to my house. He intended to do harm to me and it’s clear that he intended to do harm to me.” Int.\_12.

**c) Testimony of alleged victim Richard Garcia**

On the day of the incident, Mr. Garcia, 54, and Mr. Commerford, 21, were drinking vodka and driving around in Mr. Garcia's Jeep. Tr.\_7/53-54, 75, 79. Mr. Garcia was driving; Mr. Commerford was giving directions. Tr.\_7/54. They visited Mr. Commerford's parents and bought cocaine from a friend of Mr. Commerford's. Tr.\_7/54-56. Mr. Commerford then showed Mr. Garcia a picture on his smartphone of pills in a baggie and asked Mr. Garcia to drive to an address in Milford to "make this deal." Tr.\_7/56.

Mr. Garcia and Mr. Commerford were substance abusers; Mr. Commerford used "a wide array" of drugs, including "Ativan, Xanax, Molly, ecstasy, things like that." Tr.\_7/52. Mr. Garcia preferred "alcohol, marijuana, cocaine." Tr.\_7/50. In addition, Mr. Garcia had a history of violence, with prior convictions for armed robbery (with a knife), masked armed robbery (with a knife), and manslaughter (with a bat). Tr.\_7/100-106.

Before arriving at Mr. Robin's home, Mr. Commerford moved to the back seat of the Jeep, saying "he had problems before" with Mr. Robin. Tr.\_7/57. They pulled up in front of a building; Mr. Robin was outside. Tr.\_7/58-59. Mr. Commerford asked Mr. Robin to get in the Jeep but Mr. Robin refused. Tr.\_7/59. Mr. Commerford exited the car, and they started arguing and "throwing blows at each other." Tr.\_7/60. Two women ran over, and a "melee" erupted. Tr.\_7/60. Mr. Garcia exited the Jeep and joined the fight, trying to pull Mr. Commerford away from the others. Tr.\_7/60. Mr.

Garcia was being punched and kicked and “was trying to protect [him]self at that point.” Tr.\_7/61.

Mr. Garcia saw his Jeep being driven away and “started chasing” it. Tr.\_7/61. As he got to the edge of the parking lot, Mr. Garcia felt liquid, saw blood, and realized he had been stabbed. Tr.\_7/61. The Jeep then turned around and drove towards Mr. Garcia; he tried to reach in to get the driver out of the car. Tr.\_7/62. After the car stopped, Mr. Garcia saw Mr. Commerford lying face down. Tr.\_7/62. He ran over, turned Mr. Commerford onto his back, and saw a spot of blood on his chest and vomit by his mouth. Tr.\_7/62. Police and emergency personnel arrived and transported Mr. Garcia to a hospital. Tr.\_7/66. Police were aware that Mr. Garcia was in possession of cocaine at the time but did not charge him with possession or any other offense. Tr.\_7/40, 93.

Mr. Garcia testified that he did not see Mr. Commerford with a knife that day; Mr. Garcia testified that he did not have a knife in his car. Tr.\_7/58. Mr. Garcia testified that neither he nor Mr. Commerford brought a knife to Mr. Robin’s residence. Tr.\_7/68.

**d) Testimony of Mr. Robin’s mother, Christine Romasco**

On the day of the incident, Mr. Robin, his girlfriend, Alex, and his mother, Ms. Romasco, were in Ms. Romasco’s apartment at 19 Green Street in Milford; Mr. Robin went outside. Tr.\_8/5-7. When the dog started barking, Alex went to the window and saw someone hitting Mr. Robin; both women ran outside. Tr.\_8/7.

Ms. Romasco saw two men fighting with Mr. Robin on the street. Tr.\_8/8. Ms. Romasco and Alex joined the fight; Mr. Garcia grabbed and hit Ms. Romasco. Tr.\_8/8-9. Ms. Romasco turned to go inside, pushing Mr. Robin and Alex ahead of her, but Mr. Commerford and Mr. Garcia grabbed them from behind. Tr.\_8/9-10. Mr. Commerford and Mr. Garcia hit Ms. Romasco and Mr. Robin. Tr.\_ 8/10.

Ms. Romasco “jumped in their vehicle and drove the vehicle in a small U-turn ... hoping that one of them would chase” her. Tr.\_ 8/10. From the vehicle, Ms. Romasco saw Mr. Commerford “going at” Mr. Robin “with something in his hand.” Tr.\_ 8/11-12.

Ms. Romasco stopped the vehicle on the side of the road and yelled “call 911” out the window. Tr.\_ 8/12. She did not have a chance to speak to anyone because Mr. Garcia was hitting her. Tr.\_ 8/12. Mr. Garcia hit Ms. Romasco “between ten and 15 times.” Tr.\_8/32. Ms. Romasco exited the vehicle after police arrived and Mr. Garcia “slumped down to the side of the car.” Tr.\_ 8/13. Photos of the injuries to Ms. Romasco’s face were marked in evidence. Tr. Exhs. 297, 298.

Ms. Romasco testified that, prior to driving away in Mr. Garcia’s car, she had seen the blade of a knife on the ground next to Mr. Garcia’s foot. Tr.\_8/11, 32-33. Ms. Romasco testified, “When I originally came outside and before everything started, there was a knife on the ground by his foot.” Tr.\_8/33. On cross-examination, the prosecutor asked, “Did you hear the defendant say something about Richard Garcia throwing a knife?” Ms. Romasco answered, “I heard the police talking about it around me and him. I wasn’t really listening to the whole conversation.” Tr.\_8/32.

**e) Testimony of bystanders**

Jane MacKenzie and Wendy Rooney were driving past the scene and called 911. Tr.\_3/188-190. Ms. MacKenzie saw a woman with blood on her face. Tr.\_3/194. Ms. Rooney “saw a man coming from the driver’s side of the car and another one coming from the apartment building. And they proceeded to have a huge fight in the middle of the street.” Tr.\_3/206-207. Asked if one of the men came from inside the apartment building, Ms. Rooney answered, “That, I don’t know.” Tr.\_3/207. One man hit the other in the chest in “a half-moon motion” and the other dropped to the ground and ceased moving. Tr.\_3/207. “He then kicked him.” Tr.\_3/208.

Neighbor Glauca Sales Alves Dossantos initially saw three people fighting—two men (one young, one older) and a woman. Tr.\_6/122-124. Ms. Alves saw a young man fall to the ground. Tr.\_6/126. After the young man “fell to the ground rapidly,” another young man and a woman “went back to the building” but Ms. Alves did not “know if they entered it.” Tr.\_6/126-127. She did not see anyone with a knife. Tr.\_6/129.

Neighbor Manny Goncalves observed a “commotion” taking place in front of 19 Green Street. Tr.\_3/126. He heard the Jeep speed away and return. Tr.\_3/126. Mr. Goncalves approached the scene and saw an older man coming out of the woods across the street; the man was bleeding and said he had been robbed. Tr.\_3/129. When officers arrived, Mr. Goncalves told them, “I saw someone come out of the woods. I don’t know what they have to do with it, but somebody came out of the woods. I felt like that’s something they should know.” Tr.\_3/152.

**f) Testimony regarding two knives found in the area**

When Milford Police Chief Thomas O'Loughlin arrived on scene, first responders had already blocked off the street and transported Mr. Garcia and Ms. Romasco to the hospital. Tr.\_3/225-226. Mr. Commerford's body had been removed. Tr.\_3/226. Mr. Robin remained. Tr.\_3/227-228. See also Tr. Exhs. 3, 145.

Mr. Robin told Chief O'Loughlin, "He came to kill me." Tr.\_3/230. Mr. Robin said, "he [Mr. Commerford] had a knife." Tr.\_4/10. Mr. Robin said that that he (Mr. Robin) "took the knife away from [Mr. Commerford] and stabbed him with it." Tr.\_3/230. Mr. Robin said, "The other one [Mr. Garcia] kept fighting with me and I slashed him." Tr.\_3/230. Mr. Robin told Chief O'Loughlin that he "threw the knife over into the wooded area." Tr.\_3/230. Mr. Robin said, "when you find the knife, it'll have my fingerprints on it and it'll have his[.]" Tr.\_3/231.

Chief O'Loughlin found a knife in the area of a dumpster to the left of 19 Green Street, about thirty feet from the wooded area. Tr.\_3/228, 230; Tr. Exh. 70. It was a black-handled kitchen knife. Tr.\_5/112. The knife was "partially covered" by a pizza box. Tr.\_4/15. Chief O'Loughlin moved the pizza box, and the knife was there. Tr.\_3/236. Pictures were taken of the knife. Tr.\_3/228; Tr. Exhs. 71-72. Chief O'Loughlin kept the knife in place until the state police crime scene services unit arrived and collected it. Tr.\_3/236.

When shown a picture of the knife, Mr. Robin said, "No. That's not the knife." Tr.\_3/229. Mr. Robin said, "I'll tell you where the knife is. I threw it over there," pointing to a pathway about thirty feet from the dumpster that led to a brook.

Tr.\_3/229-230. Chief O'Loughlin called for a canine unit which located a knife "in that marsh area." Tr.\_3/232, 4/63; Tr. Exhs. 83-84. It was a wooden-handled kitchen knife. Tr.\_5/116.

The state police crime scene response unit arrived to collect evidence. Tr.\_5/30-31. In the area of the dumpster, red-brown stains were found on the ground. Tr.\_5/50-51; Tr. Exhs. 136-137. The pizza box and knife were on the ground to the right of the dumpster. Tr.\_5/51; Tr. Exhs. 138-141. The knife was collected, boxed, and numbered for identification. Tr.\_5/52. It was marked in evidence as Exhibit 274. Tr.\_5/53. A second knife was collected from the woods. Tr.\_5/53-54; Tr. Exhs. 142-144. The knife was boxed and numbered for identification. It was marked in evidence as Exhibit 275. Tr.\_5/54-55.

State police searched the kitchen of Mr. Robin's apartment, looking at the knives in a butcher block and in kitchen drawers. Tr.\_7/38-39. Police were trying to make a comparison to the knives that had been recovered. Tr.\_7/39. No matching knives were found. Tr.\_7/39. Police did not investigate whether any matching knives could be found at Mr. Garcia's residence, Mr. Commerford's residence, or at the residence of Mr. Commerford's parents. Tr.\_7/39-40.

**g) Testimony regarding forensic analysis of the two knives**

Before going to the Massachusetts State Police Crime Lab (the "Crime Lab"), each knife was processed for fingerprints. Tr.\_6/90. The knife that had been collected near the dumpster "did contain some fingerprints. However, they lacked sufficient quality and quantity for an identification or exclusion purposes." Tr.\_6/90. No

fingerprints were found on the knife that had been recovered from the woods. Tr.\_6/92-93.

At the Crime Lab, the knife from the dumpster area was labeled item no. 1-17. Tr.\_5/112-113, 116. Four red-brown stains on the knife were designated for testing; stain A was on the handle of the knife and stains B, C, and D were on the blade of the knife. Tr.\_5/113-114. Stains C and D tested positive for the presence of blood; stains A and B tested negative. Tr.\_5/114-115. The knife was swabbed for DNA evidence on both the handle and stains C and D. Tr.\_5/115-116.

The knife from the woods was labeled item no. 1-18. Tr.\_5/116. Three red-brown stains were marked for testing; two on the blade, stains A and B, tested positive for the presence of blood. Tr.\_5/118. The knife handle and the two stains on the blade were swabbed for DNA evidence. Tr.\_5/119.

The swabs were sent to the state police DNA unit for testing. Tr.\_5/119. The DNA unit used a “four-step process” on the swabs:

“The first step is called extraction, where we use heat and chemicals to break open the cells, because that’s where the DNA is found. The second step is called quantitation, where we use an instrument to cycle through temperatures to get an approximation of how much DNA is in each sample. The third step is called amplification, and we make millions of copies of the specific regions of the DNA that we look for or look at our lab. And then the last step is called detection. We use an instrument that separates all the DNA pieces based on size, and that’s basically what a DNA profile is.”

Tr.\_5/162. As part of the process, data was “transported into a software program from the final lab step.” Tr.\_6/73. Results were obtained on the following items:

- **Item 1-17.2 (swab from stain B on blade of knife found near dumpster).**

Tr.\_6/73-74. The Commonwealth’s DNA analyst testified that a male DNA profile was obtained that was consistent with the DNA profile of Mr. Garcia. The male DNA profile was not consistent with the DNA profiles of Mr. Commerford or Mr. Robin. Tr.\_6/74.
- **Item 1-17.3.1 (swab from handle of knife found near dumpster.)**

Tr.\_6/74-75. The Commonwealth’s DNA analyst testified, “The profile was a mixture of at least two contributors, including at least one male, but was not suitable for further comparison.... The quality threshold was not met, according to our protocols.” Tr.\_6/75.
- **Item 1-18.1.1 (stain from blade of knife found in woods).**

Tr.\_6/75. The Commonwealth’s DNA analyst testified that the DNA profile was a mixture of at least two contributors, and a major male profile was observed. Tr.\_6/76. Mr. Garcia’s known DNA profile was consistent with the major male profile; Mr. Commerford’s and Mr. Robin’s known DNA profiles were not consistent with the major profile. Tr.\_6/76. Regarding the minor profiles, the analyst testified, “the quality threshold was not met[.]” Tr.\_6/76.
- **Item 1-18.3.1 (swab from handle of knife found in woods).**

Tr.\_6/76. The Commonwealth’s DNA analyst testified that the DNA profile was a mixture of at least two contributors, including at least one male, but “the profile was not suitable for comparison.” Tr.\_6/77.

## **h) Closing arguments**

Defense counsel argued,

“We didn’t hear any evidence as to what knife was used on Mr. Commerford or what knife was used on Mr. Garcia. But we know this. We know that the knife found next to the dumpster with the black handle had Mr. Garcia’s DNA on it. We know that the knife with the brown handle found in the swamp had Mr. Richard Garcia’s DNA on it. Why would Richard Garcia’s DNA be on two knives? Because he brought a knife to this fight, because he used a knife in this fight, because Mr. Commerford used a knife in this fight.

...

“And what about fingerprints? ....The other two knives didn’t have fingerprints on them. But when Trooper Girouard testified, he told you he didn’t test those knives or any of these knives for fingerprints of Mr. Commerford, which they got at the autopsy, and fingerprints of Mr. Garcia.

...

“We know that somebody brought at least one knife with him to that fight, and we know it wasn’t Jeremy Robin.”

Tr.\_8/81-83.

The prosecutor told the jury to discredit Mr. Robin’s “false stories that ... Commerford and Garcia had come to his apartment to harm him.” Tr.\_8/93. The prosecutor argued, “Tim Commerford and Richard Garcia were not there to rob the defendant; they were there to buy drugs.” Tr.\_8/93.

The prosecutor claimed that during a pause in the altercation, Mr. Robin and his girlfriend had gone into the building and come “running back” out. Tr.\_8/90-91. The prosecutor asked the jury to “infer that” Mr. Robin and his girlfriend re-entered the building, retrieved two kitchen knives from the apartment, exited the building, and that Mr. Robin, with “a kitchen knife in his hand” then “attacked” Mr. Commerford, stabbing him in the chest. Tr.\_8/91.

The prosecutor told the jury to discredit Mr. Robin's statement that Mr. Commerford had a knife. The prosecutor argued, "none of the witnesses claimed they saw Tim Commerford or Richard Garcia with a knife." Tr.\_8/99. The prosecutor also told the jury to discredit Ms. Romasco's testimony that Mr. Commerford had an object in his hand during the melee. Tr.\_8/100. Rather, it was Mr. Robin who "went to the apartment building and then came running back with a kitchen knife to attack Tim[.]" Tr.\_8/101. Regarding the fact that two knives were recovered at the scene, the prosecutor argued,

"You could also infer that Richard Garcia was stabbed by two kitchen knives while his back was turned. Two kitchen knives were found during the investigation, one by the dumpster and one in the woods. Red-brown stains were recovered from both blades and, after DNA testing, were consistent with a profile for Richard Garcia on the blades—not the handles, on the blades—the DNA consistent with Richard Garcia. They were not able to get a profile off the handles."

Tr.\_8/103.

Those knives, the prosecutor argued, were brought to the scene by Mr. Robin and his girlfriend: "Two knives. Two people came running from the apartment building." Tr.\_8/103. "Neither kitchen knife belonged to Richard Garcia, and it could be inferred that it came from the defendant's kitchen, not the Jeep. Remember two people came out initially. Two people came running back to the apartment building. There is a kitchen in the apartment." Tr.\_8/107.

**2. ‘Below-threshold’ DNA test results provided in discovery suggested a match between Mr. Commerford and one of the knife handles.**

On January 29, 2018, the Crime Lab issued a six-page DNA Testing Report. M. Exh. 3. Eight swabs from various evidence items, including the knives, were subjected to “STR fragment analysis.” M. Exh. 3.

By way of explanation, “Short tandem repeat (STR) testing of deoxyribonucleic acid (DNA) focuses on specific places (loci) on the human chromosome where known sequences of DNA base pairs repeat themselves. A DNA analyst measures the number of times these repeat sequences occur at particular loci (called alleles), and uses that measurement to compare known standards against unknown forensic samples.” Commonwealth v. Sanchez, 476 Mass. 725, 729 n.5 (2017).

For each DNA sample in the report, “twenty-six genetic loci plus Amelogenin (sex indicator)” were profiled. M. Exh. 3. The results were presented in tabular form with a set of numbers in each box representing the alleles at each locus profiled. M. Exh. 3. Where an allele was below the Crime Lab’s “threshold,” the corresponding number was listed in parentheses. M. Exh. 3.

The following table, derived from the Crime Lab’s DNA report by undersigned counsel, compares Mr. Commerford’s DNA profile with the DNA profile obtained from the handle of the knife found near the dumpster.

Swab From Handle of Knife Near Dumpster	Timothy Commerford (Known Blood Standard)
(X)Y	X,Y
(14) (16) (17)(18)	14, 18
(15)(16)	15, 16
(11)	11, 11
NR	13, 13
(12)	11, 12
NR	13, 16
(9) (13)	9, 13
(14)	14, 18
(23)	19, 23
NR	11, 12
NR	10, 13
(6) (9.3)	6, 9.3
(14) (18)	14, 18
(29)	29, 30.2
NR	8, 12
NR	11, 12
NR	8, 11
(12) (14)	12, 14
(15)	15, 22
(13)	13, 15
NR	29.2, 31.2
NR	11, 16
(10)	10
(25) (26)	25, 26
NR	17
NR	16

NR = No Result (#) = Allele below threshold

Notably, where two below-threshold alleles were reported on the knife handle, Mr. Commerford shared those two alleles. Likewise, at all loci where only one below-threshold allele was reported, Mr. Commerford also shared that allele. M. Exh. 3.

### **3. Trial counsel did not consult with a DNA expert.**

On September 21, 2017, the Court allowed Mr. Robin's ex parte motion for funds to hire a specific DNA expert, Dr. Steven Laken. M. Exh. 4.

On November 6-7, 2017, Dr. Laken traveled to the Crime Lab to observe the exhaustive DNA testing of certain evidence items. Laken Aff. ¶ 6.

On or about April 23, 2018, the DNA file folder containing the above-cited DNA report was provided to counsel as part of discovery. M. Exh. 5.

On February 25, 2020, the Court allowed Mr. Robin's motion for funds to hire a specific DNA expert, Dr. Laken. M. Exh. 6. That day, Dr. Laken spoke with then-counsel Attorney Brian Murphy and reviewed DNA evidence. Laken Aff. ¶ 7.

On March 12, 2020, Attorneys Murphy and Maura Tansley were withdrawn as defense counsel, and Attorney Jaclyn Greenhalgh (trial counsel) was appointed to represent Mr. Robin. M. Exh. 1. Dr. Laken has no record of communicating with trial counsel at any time about this case. Laken Aff. ¶¶ 8-10. Trial counsel did not file a motion for funds for a DNA expert or DNA analysis. M. Exh. 1.

On October 8, 2021, during the trial readiness conference, trial counsel told the judge, "We're not going to be fighting over any science." Tr.\_10/8/21\_27. On October 13, 2021, during motions in limine, trial counsel told the judge, "There's no science dispute." Tr.\_10/13/21\_43. At trial, when the Commonwealth's DNA analyst testified that the profiles detected on the knife handles were not suitable for comparison, trial counsel did not cross-examine the analyst on those assertions or attempt to rebut

them. Tr.\_6/75-81. Trial counsel's brief cross-examination was limited to asking the analyst how many items were analyzed ("eight") and whether she could "tell from any of those eight tests what happened on May 7, 2017" ("no"). Tr.\_6/80-81.

Appellate counsel repeatedly inquired of trial counsel (now a District Court judge) about her decision not to consult with a DNA expert regarding the DNA testing results on the knife handles; trial counsel initially answered a cellphone call from appellate counsel and confirmed her email address by return email, but once provided with the details of Mr. Robin's claim, trial counsel did not respond to repeated calls and emails and did not provide an affidavit requested by appellate counsel. Power Aff. ¶¶ 13-20. See Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 551 (2014) ("where successor counsel filed affidavits attesting to...counsel's lack of cooperation...the lack of an affidavit cannot be a talisman that, by itself, defeats a claim of ineffective assistance of counsel").

Dr. Laken was not consulted again in this case until after the trial had concluded and trial counsel had withdrawn; Dr. Laken reviewed his case file and spoke with appellate counsel on July 11, 2022. Laken Aff. ¶ 8. From that conversation, appellate counsel learned about the TrueAllele Casework system and its utility for interpreting below-threshold DNA results. Power Aff. ¶ 5.

**4. Consultation with an expert would have led an effective attorney to investigate methodologies designed to interpret below-threshold DNA test results, such as the TrueAllele Casework system.**

The DNA profile from the handle of the knife collected near the dumpster was designated as "not suitable for further comparison" because the Crime Lab's "quality

threshold was not met, according to [its] protocols.” Tr.\_6/74-75. The DNA profile from the handle of the knife found in the woods was also designated as “not suitable for comparison” for the same reasons. Tr.\_6/76-77. Consequently, the Crime Lab did not analyze the knife-handle DNA results because they fell below a predetermined “threshold.” Tr.\_6/74-77.

“A brief explanation of certain aspects of DNA testing is necessary to understand the significance of ... ‘peaks’ and ‘thresholds.’ .... During [] testing, analysts run DNA samples through an instrument that produces a graphical representation of the results in an electropherogram. The electropherogram displays peaks corresponding to specific loci, measured in RFUs.<sup>3</sup> The higher the peak, the more amplified DNA is present at the location. Peaks that are at or above a minimum threshold RFU are ‘called’ or ‘reported’ as DNA results.

...  
“A lower threshold, the ‘analytical’ threshold, set at a point above background machine noise but below the calling level, ‘may be used for interpretational purposes along with other data when examining an individual’s DNA profile.”

Commonwealth v. Linton, 483 Mass. 227, 241 (2019) (citation omitted).

Thresholds are not absolute: they vary from lab to lab and between jurisdictions. Id. For example, the Crime Lab in 2015 “set its calling threshold at 165 RFUs”; “[in] 2015, the calling threshold at the Connecticut State forensics laboratory was seventy-five RFUs”; and the 2002 “protocols of the Federal Bureau of Investigation require all ‘labeled peaks of [fifty] RFU and greater’ to be interpreted.” Id.

Indeed, the Crime Lab’s protocols “allow[ed] an analyst to assess ‘below threshold’ level peaks ‘to support the inclusion and/or exclusion of an individual[.]’”

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<sup>3</sup> Relative fluorescence units. Commonwealth v. Linton, 483 Mass. 227, 211 (2019).

Id. In this case, however, the Crime Lab did not analyze the below-threshold results from the knife handles. Tr.\_6/74-77. Although it was “undisputed” at the time of trial that below-threshold “alleles may be used for interpretational purposes along with other data when examining an individual’s DNA profile[,]” the Crime Lab ignored the below-threshold alleles in this case. See Commonwealth v. DiCicco, 470 Mass. 720, 731 (2015).

The Crime Lab’s approach to the below-threshold results constituted a flaw in its analytical methodology—one with the potential to create an incomplete or misleading picture by omitting important data. As a solution to that problem, software programs have been developed,

“with the goal of undertaking analysis of these more complex samples in as objective a manner as possible. Such programs employ probabilistic genotyping, the ‘use of biological modeling, statistical theory, computer algorithms, and probability distributions,’ to ‘assist,’ rather than ‘replace,’ ‘the DNA analyst in the interpretation of forensic DNA typing results.’

“Specifically, the programs use mathematical models and simulations...to calculate a likelihood ratio—a statistic measuring the probability that a given individual was a contributor to the sample against the probability that another, unrelated individual was the contributor.... [T]he higher the likelihood ratio, the more solid the match.”

New Jersey v. Pickett, 246 A. 3d 279, 287 (N.J. Super. 2021).

One such program is the TrueAllele Casework system by Cybergenetics. Id.

“Cybergenetics is a Pittsburgh-based technology company that automates the analysis of DNA data. The company invented probabilistic genotyping over twenty years ago. Cybergenetics developed the TrueAllele Casework computer system for forensic DNA interpretation.

“TrueAllele Casework is a probabilistic genotyping computer software that interprets DNA using a statistical model. TrueAllele unmixes mixed DNA data. The end result of the TrueAllele interpretation process is a likelihood ratio (LR) match statistic that gives information on whether or not a person contributed their DNA to a sample.

“Electronic data from crime laboratories is the starting point for TrueAllele Casework interpretation of DNA evidence. ...The TrueAllele computer process can use all of the DNA data. Since the computer can statistically model the data, no thresholds are applied. Therefore, informative DNA data is not discarded.”

M. Exh. 9. See also M. Exh. 13.

“The TrueAllele Casework System does not generate a DNA profile, but analyzes the electronic raw data that has already been generated by a forensic crime lab, separates (or deconvolutes) the genotypes and calculates the likelihood ratio.... [T]he analyst operating the TrueAllele system reviews the raw electronic data and then inputs the data file into the computer, setting parameters such as the number of contributors and the quality of the mixture. The computer then separates the genotypes...to calculate the probability for what the different genotypes could be.”

New York v. Wakefield, 195 N.E. 3d 19, 23-24 (N.Y. 2022).

“TrueAllele’s probabilistic genotyping model, according to Dr. Perlin,<sup>4</sup> was developed in the context of well-known flaws in the field of ... threshold[] modeling in DNA interpretation.

...

“According to Dr. Perlin, unlike threshold DNA models, which exclude data from an analyst’s review, TrueAllele is fully continuous, in that it uses ‘the peak height data and the patterns of those peak rise[s].’ In contrast, using a ‘threshold model,’ a human analyst ‘get[s] a fixed list of possible alleles, and then by looking at all pairwise combinations of those alleles, those will be included genotypes.’

...

“In comparing TrueAllele to threshold methods of DNA analysis, Dr. Perlin explained that ‘the computer can do it or the lab can do it.... [H]aving a better way of understanding the data through statistical modeling and computer interpretation is a way of looking at the data you have and extracting more

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<sup>4</sup> “Dr. [Mark] Perlin, who has a medical degree as well as a Ph.D. in both mathematics and computer science, founded Cybergenetics in 1994 and is its Chief Scientist and Executive Officer.” New York v. Wakefield, 195 N.E. 3d 19, 23-24 (N.Y. 2022).

information from it.’ Computer analysis can thus go beyond human review of a sample using methods and calculations that a human would be unable to replicate.”

Id. at 33-34.

#### **5. TrueAllele results were admissible at the time of trial.**

TrueAllele results have been deemed reliable and admissible in Massachusetts (since 2016) and in other jurisdictions. See Randolph v. Commonwealth, 488 Mass. 1, 5 n.7, 12 (2021); Commonwealth vs. Richard Randolph, Suffolk County Superior Court No. 8484CR49007; Commonwealth vs. Heidi Bartlett, Plymouth County Superior Court No. 1283CR00157; M. Exh. 7A-7C. See also Wakefield, 195 N.E. 3d at 25-26; Daniels v. Florida, 312 So. 3d 926, 933-934 (Fla. Dist. Ct. App. 2021); Nebraska v. Simmer, 935 N.W. 2d 167, 172 (Neb. 2019); Pennsylvania v. Foley, 38 A. 3d 882, 888 (Pa. Super. Ct. 2012).

Cybergentics states that TrueAllele DNA match results have been used in 1,198 cases; TrueAllele has been used in forty-six states, in the District of Columbia, by the federal government, by the military, and in nine foreign jurisdictions, including the United Kingdom and Canada. M. Exh. 8. TrueAllele “has been validated in over 40 validation studies, eight published in peer-reviewed journals. The system has withstood over 35 admissibility challenges in 15 states, including Massachusetts, and in federal court.” M. Exh. 9.

In Massachusetts, TrueAllele has been used by the prosecution in Commonwealth vs. Bartlett, supra; Commonwealth vs. Lorenzo Jones, Suffolk Superior Court No. 1684CR00231; and Commonwealth vs. Tony Dyshaun Harris,

Middlesex Superior Court No. 1881CR00003. M. Exhs. 7B, 10. TrueAllele was used by the defense in Commonwealth vs. Randolph, supra, and Commonwealth vs. Jonathan Whigham, Suffolk Superior Court No. 2184CR00084. M. Exhs. 7B, 11A-B. Prosecutors in Massachusetts were using TrueAllele as early as 2016 and the Committee for Public Counsel Services was using TrueAllele as early as 2018—well before the trial of this case. M. Exh. 7B.

**6. Mr. Robin’s postconviction motion for DNA analysis by TrueAllele was allowed.**

On January 17, 2023, Mr. Robin filed a motion for postconviction forensic DNA analysis pursuant to G. L. c. 278A. M. Exh. 1. Mr. Robin sought further analysis of the below-threshold DNA test results for the swab from the handle of a knife found near the dumpster and the swab from the handle of the knife found in the woods. Mr. Robin argued that the below-threshold results on the knife handles suggested that the alleged victims had handled those knives and that a reasonably effective defense attorney would have sought further analysis. M. Exh. 12. Mr. Robin requested that the analysis be performed using the TrueAllele Casework system. M. Exh. 12.

The Commonwealth took no position on Mr. Robin’s c. 278A motion, deferring to the discretion of the Court. M. Exh. 14.

On May 8, 2023, the motion was allowed (Yarashus, J.). M. Exh. 12.

On June 14, 2023, the Court issued an order, based upon the agreement of the parties, regarding the forensic statistical DNA analysis to be performed by Cybergenetics using TrueAllele. M. Exh. 15.

On July 10, 2023, the Crime Lab sent the electronic data files specified in the order to Cybergenetics. Power Aff. ¶ 7. Cybergenetics received the data on July 11, 2023. Power Aff. ¶ 8.

**7. TrueAllele performed a probabilistic genotyping analysis on the knife handles.**

On July 27, 2023, Cybergenetics issued a one-page preliminary report providing DNA match statistics between the knife handle profiles and the known profiles for the alleged victims and Mr. Robin. Power Aff. ¶ 9. The bigger the number, the stronger the match. M. Exh. 16.

With respect to the handle of the knife found by the dumpster, the match statistic to Mr. Commerford was 1,000,000,000,000,000; the match statistic to Mr. Garcia was 100,000; and there was no statistical support for a match to Mr. Robin. M. Exh. 16.

With respect to the handle of the knife found in the woods, the match statistic to an unknown male was 10,000,000,000; the match statistic to Mr. Commerford was 10; and there was no statistical support for a match to Mr. Robin or Mr. Garcia. M. Exh. 16.

The parties requested a final TrueAllele report, and on August 9, 2023, the Court allowed Mr. Robin's motion for funds for a final report. Power Aff. ¶¶ 10-11; M. Exh. 17.

**8. TrueAllele results matched Mr. Commerford's DNA to both knife handles and Mr. Garcia's DNA to one knife handle, but excluded Mr. Robin as a contributor of DNA to either knife handle.**

Cybergenetics's six-page final report, dated September 1, 2023, was issued to the parties on that date. Power Aff. ¶ 12. (Both the preliminary and final reports were filed in Court on October 6, 2023. M. Exh. 1.)

The report described TrueAllele's process of interpreting DNA evidence by computer as follows:

"A definite genotype can be determined when a person's DNA produces unambiguous data. However, when the data signals are less definitive, or when there are multiple contributors to the evidence, uncertainty arises. This uncertainty is expressed in the resulting genotype, which may describe different genetic identity possibilities. Such genotype uncertainty may translate into reduced identification information when a comparison is made with a suspect.

"The DNA identification task can thus be understood as a two-step process:

1. objectively *inferring genotypes* from evidence data, accounting for allele pair uncertainty using probability, and
2. subsequently *matching genotypes*, comparing evidence with a suspect relative to a population, to express the strength of association using probability.

"The match strength is reported as a single number, the likelihood ratio (LR), which quantifies the change in identification information produced by having examined the DNA evidence.

"The TrueAllele Casework system is a computer implementation of this two-step DNA identification inference approach. The computer objectively infers genotypes from DNA data through statistical modeling, without reference to a known comparison genotype. To preserve the identification information present in the data, the system represents genotype uncertainty using probability. These probabilistic genotypes are stored on a relational database. Subsequent comparison with suspects provides evidentiary identification information."

M. Exh. 18.

Here, the TrueAllele analysts used the following methods of analysis:

“The DNA PowerPlex® Fusion 6C data profiles referenced in this report were previously developed and addressed in a DNA Testing Report issued by the Commonwealth of Massachusetts Department of State Police Crime Laboratory.

“The TrueAllele® Casework system processed each evidence item in independent replicate computer runs to infer possible DNA contributor genotypes from the samples.

“The National Institute of Standards and Technology generated the population allele frequencies.

“The DNA match statistics herein were calculated using VUIer™ version 3.3.8343.1R20b (26-Aug-2022) at a theta value (coancestry coefficient) of 1%.

“All evidence genotypes were compared with all reference and other evidence genotypes to compute likelihood ratio (LR) DNA match statistics. When there was no statistical support for a match, that comparison was not listed in this report.”

M. Exh. 18.

**a) DNA results for the handle of the knife found by the dumpster (Item 1-17.3.1): a match to Mr. Commerford and Mr. Garcia.**

“TrueAllele assumed that the evidence sample data (Item 1-17.3.1) contained two, three, or four contributors, and objectively inferred evidence genotypes solely from these data. Some evidence genotypes were inferred assuming known reference genotypes. Degraded DNA was considered. Following genotype inference, the computer then compared separated genotypes from this evidence item with provided reference (Items 7-1.1, 11-5.1.1, and 11-6.1) and evidence genotypes, relative to ethnic populations, to compute LR DNA match statistics. Based on these results:

“A match between the dumpster knife handle (Item 1-17.3.1) and Richard Garcia (Item 7-1.1) is:

215 thousand times more probable than a coincidental match to an unrelated African-American person,  
280 thousand times more probable than a coincidental match to an unrelated Caucasian person, and

178 thousand times more probable than a coincidental match to an unrelated Hispanic person.

For a match strength of 178 thousand, only 1 in 3.79 million people would match as strongly.

“A match between the dumpster knife handle (Item 1-17.3.1) and Timothy Commerford (Item 11-5.1.1) is:

72.7 quintillion times more probable than a coincidental match to an unrelated African-American person,

8.46 quintillion times more probable than a coincidental match to an unrelated Caucasian person, and

7.54 quintillion times more probable than a coincidental match to an unrelated Hispanic person.

For a match strength of 7.54 quintillion, only 1 in 77.8 sextillion people would match as strongly.

“A match between the dumpster knife handle (Item 1-17.3.1) and Jeremy Robin (Item 11-6.1) is:

660 times *less* probable than a coincidental match to an unrelated African-American person,

634 times *less* probable than a coincidental match to an unrelated Caucasian person, and

909 times *less* probable than a coincidental match to an unrelated Hispanic person.

For an exclusionary statistic of one over 634, only 1 in 11.8 thousand people would be excluded as strongly.”

M. Exh. 18.

**b) DNA results for the handle of the knife found in the woods (Item 1-18.3.1): a match to Mr. Commerford and an unknown male.**

“TrueAllele assumed that the evidence sample data (Item 1-18.3.1) contained two, three, or four unknown contributors, and objectively inferred evidence genotypes solely from these data. Degraded DNA was considered. Following genotype inference, the computer then compared separated genotypes from this evidence item with provided reference genotypes (Items 7-1.1, 11-5.1.1, and 11-6.1), relative to ethnic populations, to compute LR DNA match statistics. Based on these results:

“A match between the woods knife handle (Item 1-18.3.1) and Richard Garcia (Item 7-1.1) is:

69.4 times *less* probable than a coincidental match to an unrelated African-American person,

4.43 thousand times *less* probable than a coincidental match to an unrelated Caucasian person, and  
7.91 thousand times *less* probable than a coincidental match to an unrelated Hispanic person.

For an exclusionary statistic of one over 69.4, only 1 in 8.78 thousand people would be excluded as strongly.

“A match between the woods knife handle (Item 1-18.3.1) and Timothy Commerford (Item 11-5.1.1) is:

327 times more probable than a coincidental match to an unrelated African-American person,  
14.5 times more probable than a coincidental match to an unrelated Caucasian person, and  
14.8 times more probable than a coincidental match to an unrelated Hispanic person.

For a match strength of 14.5, only 1 in 305 people would match as strongly.

“A match between the woods knife handle (Item 1-18.3.1) and Jeremy Robin (Item 11-6.1) is:

284 times *less* probable than a coincidental match to an unrelated African-American person,  
20.8 thousand times *less* probable than a coincidental match to an unrelated Caucasian person, and  
34.9 thousand times *less* probable than a coincidental match to an unrelated Hispanic person.

For an exclusionary statistic of one over 284, only 1 in 24 thousand people would be excluded as strongly.

“TrueAllele also inferred a non-matching evidence genotype from the woods knife handle (Item 1-18.3.1). The probabilistic genotype of this unknown male contributor has an expected LR match statistic of 12 trillion (KL = 13.0806).”

M. Exh. 18.

## ARGUMENT

### **A. Trial counsel was ineffective for failing to consult with a DNA expert regarding the below-threshold DNA testing results.**

“To prevail on a motion for a new trial claiming ineffective assistance of counsel, a defendant must show that there has been a ‘serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer,’ and that counsel’s poor performance ‘likely deprived the defendant of an otherwise available, substantial ground of defence.’” Millien, 474 Mass. at 429-430, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). For the following reasons, counsel’s failure to consult with a DNA expert and to obtain a statistical analysis of the below-threshold DNA results from the knife handles “fell measurably below the standard of ‘an ordinary fallible lawyer.’” Commonwealth v. LaBrie, 473 Mass. 754, 769 (2016), quoting Saferian, 366 Mass. at 96 (“counsel’s failure to consult an independent oncologist fell measurably below the standard of an ordinary fallible lawyer”).

Central to counsel’s theory of defense was the contention that “Mr. Commerford used a knife in this fight.” Tr.\_8/81-82. The unused DNA testing results strongly supported that contention. The 2018 DNA Testing Report which was provided in discovery indicated that Mr. Commerford’s DNA matched the DNA found on the handle of the knife by the dumpster. M. Exh. 3. A simple comparison of the numbers on the DNA profile tables would have revealed an apparent match. No expertise was needed to make the comparison. Where a box on the table for the knife

handle contained a single number, eight out of eight matched the numbers in the corresponding boxes of Mr. Commerford's table. Where a box on the knife-handle table contained two numbers, twelve out of twelve matched the numbers in the corresponding boxes of Mr. Commerford's table. And where four numbers appeared in one of the boxes on the knife-handle table, two matched the numbers in the corresponding box of Mr. Commerford's table and the other two matched the numbers in the corresponding box of Mr. Garcia's table. M. Exh. 3. (Only Mr. Garcia's DNA was found on the blade. Tr.\_6/73-74.) The DNA profile from the handle of the knife found in the woods also suggested potential matches to Mr. Commerford. M. Exh. 3. (Again, only Mr. Garcia's DNA was found on the blade. Tr.\_6/76.)

From a basic comparison of the results tables, further investigation was warranted. Given the correspondence in the DNA testing results for Mr. Commerford and the knife handles, counsel was "under a duty ... to conduct an independent investigation of the facts, including an investigation of the forensic...evidence on which the Commonwealth intended to rely to prove the defendant's guilt." Commonwealth v. Baker, 440 Mass. 519, 529 (2003). Counsel was obligated to investigate alternative methods of DNA interpretation which could use the important but overlooked below-threshold results for the knives. The Crime Lab's classification of the results as below threshold "according to [its] protocols" did not render the data unusable. Tr.\_6/75. Interpretive thresholds vary from lab to lab; below-threshold results in one lab could be above threshold in another. See Linton, 483 Mass. at 241. Moreover, "it is undisputed that such potential alleles may be used for

interpretational purposes along with other data when examining an individual's DNA profile[.]” DiCicco, 470 Mass. at 731.

To obtain admissible results, counsel needed an expert to perform the analysis and testify about it. Courts “will ‘not permit the admission of test results showing a DNA match (a positive result) without telling the jury anything about the likelihood of that match occurring.” Commonwealth v. Mattei, 455 Mass. 840, 850 (2010), quoting Curnin, 409 Mass. at 222 n. 7 (1991). Evidence of a match “is of little or no value without reliable evidence indicating the significance of the match, that is, “evidence of the probability of a random match of [the victim’s or] the defendant’s DNA in the general population.” Id. at 850-851, quoting Commonwealth v. Rosier, 425 Mass. 807, 813 (1997).

In the years preceding Mr. Robin’s trial, “there were credible experts available” who would have provided the analysis required. Cf. Commonwealth v. Epps, 474 Mass. 743, 763 (2016) (“whether counsel’s representation in this case was ineffective, therefore, rests on whether, at the time of trial...there were credible experts available”). In contrast to the Crime Lab’s approach, TrueAllele was designed to “use all of the DNA data” with “no thresholds” so “informative DNA data” would not be discarded. M. Exh. 9. TrueAllele results were admissible in Massachusetts and had been used both by prosecutors and by the Committee for Public Counsel Services well before trial counsel’s appointment in this case. See Randolph, 488 Mass. at 5 n.7 (“in 2019, a new testing method called probabilistic genotyping was used”); Commonwealth vs. Heidi Bartlett, supra; M. Exh. 7B. In fact, the expert providing

the TrueAllele analysis supporting this motion has been a casework supervisor at Cybergeneics since 2012. M. Exhs. 7B, 19.

“In the circumstances, it was patently unreasonable for the defendant’s counsel not to consult with a qualified” DNA expert to explore a potential match of the knife handle to Mr. Commerford. Cf. LaBrie, 473 Mass. at 772. A preliminary DNA analysis of the data, which could have been obtained at no charge from TrueAllele, would have provided a match statistic to Mr. Commerford of 1,000,000,000,000,000,000 (with the size of the number correlating to the strength of the match); that statistic reasonably would have prompted a motion for funds for a final report. M. Exh. 16. Also important was the absence of statistical support for a match to Mr. Robin—even for the knife he allegedly threw into the woods. M. Exh. 16. Matching Mr. Commerford to the knife handles and excluding Mr. Robin from both “had the potential of raising a reasonable doubt” about Mr. Robin’s guilt. Id.

Therefore, “trial counsel’s decision to forgo any consultation with [a DNA expert] was manifestly unreasonable, and likely deprived the defendant of a substantial ground of defense on the central disputed issue in the case,” namely self-defense and defense of others. Id. at 773-774.

**B. Failure to consult with a DNA expert prejudiced Mr. Robin.**

“Turning to the second prong of the Saferian test,” the Court must consider whether counsel’s failure to consult with an expert in probabilistic genotyping “prejudiced the defendant. Prejudice in this context means that the defendant has likely been deprived of an ‘available, substantial ground of defence[.]’” Millien, 474

Mass. at 430-431, quoting Saferian, 366 Mass. at 96. A defense is “substantial’ for Saferian purposes where we have a serious doubt whether the jury verdict would have been the same had the defense been presented. The defendant need not prove that he or she would have been found not guilty if defense counsel had presented the jury with this ground of defense.” Id. at 432-433, citing Strickland v. Washington, 466 U.S. 668, 693 (1984). For the following reasons, the TrueAllele results presented here would have furnished Mr. Robin with an “available, substantial ground of defence.” Saferian, 366 Mass. at 96.

**1. Evidence matching Mr. Commerford to the knife handle would have provided the missing link in Mr. Robin’s defense.**

The trial testimony, viewed in the light most favorable to the defense, raised at least a reasonable doubt that Mr. Robin believed he and his loved ones were in imminent danger of death or serious bodily harm from which he could save himself and his loved ones only by using deadly force.<sup>5</sup> Cf. Commonwealth v. Teixeira, 486 Mass. 617, 622-623 (2021). In addition, the testimony suggested that the use of force by the alleged victims “escalate[d] to such a degree that the defendant reasonably believe[d] he [wa]s in imminent danger of death or great bodily harm,” as were his loved ones. See Commonwealth v. Barber, 18 Mass. App. Ct. 460, 463-464 (1984), S.C., 394 Mass. 1013 (1985).

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<sup>5</sup> Mr. Robin did not have a duty to retreat before using force in defense of his mother or his girlfriend “because ‘coming to the aid of another involves intervention and necessarily is irreconcilable with retreat.” Commonwealth v. Allen, 474 Mass. 162, 169-170 (2016) (citations omitted).

From the outset, Mr. Robin told police that Mr. Commerford “had a knife.” Tr.\_4/10. “He came to kill me.” Tr.\_3/230. He “brought the knife to my house. He intended to do harm to me and it’s clear that he intended to do harm to me.” Int.\_12. Mr. Garcia testified that Mr. Commerford had “had problems before” with Mr. Robin. Tr.\_7/57. Mr. Commerford directed Mr. Garcia to drive to Mr. Robin’s home. Tr.\_7/56. Mr. Commerford moved to the back seat. Tr.\_7/57. Upon arrival, he told Mr. Robin to get in the car. Tr.\_7/59. When Mr. Robin refused, Mr. Commerford got out of the car and pursued Mr. Robin. Tr.\_7/60. He hit Mr. Robin. Int.\_8. Mr. Commerford appeared to be “high or...drunk,” “impaired,” and “all drugged out.” Int.\_19, 23. He had been drinking vodka with Mr. Garcia. Tr.\_7/53-54, 75, 79. Alcohol, buprenorphine, and ketamine were in Mr. Commerford’s system. Tr.\_4/50, 54. Mr. Robin and his loved ones tried to retreat to their apartment, but Mr. Commerford and Mr. Garcia grabbed them and continued the assault. Tr.\_8/9-10; Int.\_9, 24. There was a knife next to Mr. Garcia’s foot. Tr.\_8/11, 32-33. Mr. Commerford produced a knife and threw it on the seat of the car. Int.\_9. Mr. Commerford was “going at” Mr. Robin “with something in his hand.” Tr.\_ 8/11-12. Mr. Robin, in his first police interview at the scene, “said he took the knife away from him and stabbed him with it.” Tr.\_3/230.

However, the defense lacked any forensic evidence to corroborate this testimony by connecting Mr. Commerford to either of the two knives found at the scene, allegedly with Mr. Garcia’s blood on their blades. Tr.\_5/112-119, 6/73-77, 90-93. The absence of a connection to the knives allowed the prosecutor to challenge

what he called Mr. Robin's "false stories that ... Commerford and Garcia had come to his apartment to harm him," and to assert, "At no time did Tim or Garcia use deadly force or threaten deadly force." Tr.\_8/93, 99.

A DNA expert would have provided the needed forensic evidence to corroborate Mr. Robin's account. An expert from TrueAllele would have testified that a match between Mr. Commerford and the knife handle was calculated to be "72.7 quintillion times more probable than a coincidental match to an unrelated African American person; 8.46 quintillion times more probable than a coincidental match to an unrelated Caucasian person; and 7.54 quintillion times more probable than a coincidental match to an unrelated Hispanic person." M. Exh. 18. That is a strong match. "For a match strength of 7.54 quintillion, only 1 in 77.8 sextillion people would match as strongly." M. Exh. 18. <sup>6</sup> Conversely, a match between Mr. Robin and the knife handle was calculated to be "634 times less probable than a coincidental match to an unrelated Caucasian person," and "only 1 in 11.8 thousand people would be excluded as strongly." M. Exh. 18. (Previously, the Commonwealth's DNA analyst testified that a male DNA profile found on the blade of the knife was inconsistent with the DNA profiles of Mr. Commerford or Mr. Robin. Tr.\_6/74.)

This credible, available evidence showing a DNA match between Mr. Commerford and the knife handle would have supplied the forensic missing link in Mr. Robin's claim that "Mr. Commerford used a knife in this fight." Tr.\_8/81-82; cf.

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<sup>6</sup> The most conservative result was used.

Commonwealth v. Epps, 474 Mass. 743, 769 (2016) (“missing link” in the defense was “any credible expert evidence” supporting that defense). The presence of Mr. Commerford’s DNA on the knife handle—and the exclusion of Mr. Robin as a contributor of DNA anywhere on the knife—supports the theory that Mr. Commerford and not Mr. Robin used that knife during the incident. M. Exh. 18. Given the absence of Mr. Commerford’s DNA from the blade of the knife, the match to the handle corroborates the testimony that Mr. Commerford—while intoxicated, armed, and aided by Mr. Garcia—placed Mr. Robin and his loved ones in imminent danger of serious bodily harm or death. See Teixeira, 486 Mass. at 622-623.

**2. The DNA evidence supports an inference that Mr. Garcia aided in Mr. Commerford’s attack, attempted to conceal the knives, and then lied about it under oath.**

It was the theory of the defense that Mr. “Garcia was stabbed in the back” because Mr. “Robin was defending himself, defending his girlfriend, and defending his mother.” Tr.\_8/75. The trial testimony, viewed in the light most favorable to the defense, supported the theory that Mr. Robin was “justified in using force against another to protect a third person [because] (a) a reasonable person in the actor’s position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect [her]self.’ ....[t]he reasonableness of the belief [depending] in part on the relationships among the

persons involved.” Commonwealth v. Allen, 474 Mass. 162, 168-169 (2016) (citations omitted).<sup>7</sup>

The jury heard testimony that Mr. Robin’s mother and his girlfriend came to his aid when they saw Mr. Garcia and Mr. Commerford fighting him in front of their home. Tr.\_8/8. Mr. Robin, his mother, and his girlfriend then tried to get back to their home but were grabbed and assaulted by Mr. Commerford and Mr. Garcia. Tr.\_8/9-10; Int.\_9, 24. Mr. Garcia had been drinking vodka and appeared to be intoxicated. Int.\_23; Tr.\_7/54. A knife was on the ground by his foot. Tr.\_8/11, 32-33. A knife was on the seat of his car. Int.\_9. Mr. Garcia repeatedly punched Mr. Robin’s mother in the face. Int.\_8-9. Her face was bloody from the beating. Tr.\_3/194. Mr. Robin could see that both his mother and his girlfriend were “bleeding and hurt and screaming and crying.” Tr.\_8/9-10; Int.\_9, 24. After bloodying the face of Mr. Robin’s mother, Mr. Garcia joined Mr. Commerford in fighting Mr. Robin until Mr. Robin “took the knife away from” Mr. Commerford, “stabbed him with it,” and “slashed” Mr. Garcia. Tr.\_3/230.

In addition to this testimony, Mr. Robin “sought to introduce so-called Adjutant evidence or ‘evidence of specific incidents of violence allegedly initiated by the victim.’” Commonwealth v. Souza, 492 Mass. 615, 616 (2023), citing Mass. G. Evid. § 404(a)(2)(B) (2023) and Commonwealth v. Adjutant, 443 Mass. 649 (2005); Tr.\_7/69. The Court ruled that Mr. Garcia’s prior convictions could come in. Tr.\_7/70.

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<sup>7</sup> As noted, a defendant does not have a duty to retreat before using force in defense of another “because ‘coming to the aid of another involves intervention and necessarily is irreconcilable with retreat.” Id. at 169-170 (citation omitted).

The jury then heard that Mr. Garcia had been convicted of manslaughter for beating a man to death with a baseball bat, and that he had twice been convicted of robbery while armed with a knife. Tr.\_7/103-106.<sup>8</sup>

Disputing Mr. Robin's account, Mr. Garcia testified that he and Mr. Commerford had been driving to Milford to help his daughter move furniture when they stopped at Mr. Robin's house to buy pills. Tr.\_7/55-56. Mr. Garcia claimed that he joined the fight only after "the women got to Tim" and was simply trying to protect himself and Mr. Commerford from the two women. Tr.\_7/60-61. Mr. Garcia testified that he never saw a knife. Tr.\_7/61. And neither he nor Mr. Commerford brought a knife or had a knife—nor was there a knife in his car. Tr.\_7/58, 68. Although he owned a utility knife, Mr. Garcia maintained he was not carrying it at the time. Tr.\_7/49.

The TrueAllele report indicates that Mr. Garcia was lying when he claimed that neither he nor Mr. Commerford brought a knife to the scene. Tr.\_7/58, 68. Mr. Garcia not only knew that Mr. Commerford had used a knife—he took that knife, carried it by the blade, and concealed it under a pizza box by the dumpster. The knife was on the ground to the right of the dumpster. Tr.\_5/51. Mr. Garcia was seen walking by the woods near the dumpster. Tr.\_3/129. Red-brown stains were found

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<sup>8</sup> The evidence was admitted pursuant to the rule that "where the identity of the first aggressor is in dispute and the victim has a history of violence, ... the trial judge has the discretion to admit evidence of specific acts of prior violent conduct that the victim is reasonably alleged to have initiated, to support the defendant's claim of self-defense,' regardless of whether the defendant knew of the victim's prior violent acts. This evidence 'may be admitted as tending to prove that the victim and not the defendant was likely to have been the "first aggressor' because it may show 'that the victim acted in conformance with his character for violence' on the occasion in question." Souza, 492 Mass. at 621, quoting Adjutant, 443 Mass. at 654.

in the area of the dumpster. Tr.\_5/50-51. Mr. Garcia “was covered in blood.” Tr.\_7/61. Mr. Garcia’s blood was found on the knife’s blade. Tr.\_5/113-116, 6/73-74. Mr. Commerford’s DNA was on the knife’s handle, as was Mr. Garcia’s. M. Exh. 18. And Mr. Robin’s DNA was on neither the blade nor the handle. Tr.\_6/74; M. Exh. 18.<sup>9</sup> There was only one reasonable explanation for the placement of the knife under the pizza box: Mr. Garcia put it there.

Regarding the knife found in the woods, Mr. Garcia’s profile was consistent with the major profile on the blade, but Mr. Commerford’s and Mr. Robin’s profiles were not. Tr.\_6/75-76. Mr. Commerford matched the DNA found on the handle (“only 1 in 305 people would match as strongly”) while Mr. Robin and Mr. Garcia were excluded. M. Exh. 18. These results suggest that the knife allegedly thrown by Mr. Robin was not found. Int.\_9; Tr.\_3/230. TrueAllele also inferred from the results an expected match statistic (12 trillion) to an unknown male. M. Exh. 18. Notably, TrueAllele did not infer a match to an unknown female, debunking the claim that Mr. Robin’s girlfriend brought one of the knives to the scene. Tr.\_8/103.

From this evidence, it would be reasonable to infer that the second knife had been handled by Mr. Commerford before Mr. Garcia took the knife by the blade and threw it into the woods. Mr. Garcia was covered in blood. Tr.\_7/61. Stains on the

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<sup>9</sup> The DNA profile from the blade of the knife found by the dumpster was consistent with Mr. Garcia’s DNA profile; the “expected frequency of occurrence of this profile is approximately 1 in 823.7 octillion unrelated individuals.” Tr.\_6/74. The TrueAllele report calculated that a match between Mr. Garcia and the handle of the knife by the dumpster is “178 thousand times more probable than a coincidental match to an unrelated Hispanic person,” and “only 1 in 3.79 million people would match as strongly.” M. Exh. 18.

blade tested positive for blood. Tr.\_5/118. His DNA profile was consistent with the bloodstains. Tr.\_6/75-76. Mr. Garcia was seen “coming out of the woods across the street[.]” Tr.\_3/129. And officers were overheard talking about “Richard Garcia throwing a knife.” Tr.\_8/32. (As there was no objection to this hearsay testimony, it “may be weighed with the other evidence, and given any evidentiary value which it may possess.” Mahoney v. Harley Private Hosp., Inc., 279 Mass. 96, 100 (1932)).

The TrueAllele results in combination with the trial testimony therefore suggest that Mr. Garcia aided in Mr. Commerford’s attack on Mr. Robin and his family and then attempted to conceal the knives before the police arrived, demonstrating consciousness of wrongdoing. Cf. Commonwealth v. Vick, 454 Mass. 418 (2009) (“inference of guilt...may be drawn from evidence of...concealment, or similar acts, such as false statements to the police”). The TrueAllele results also support the Adjutant defense that Mr. Garcia “acted in conformance with his character for violence’ on the occasion in question.” Souza, 492 Mass. at 621, quoting Adjutant, 443 Mass. at 654. In light of the trial testimony, forensic evidence that Mr. Garcia concealed the knives and then made false statements regarding who brought them “would have made a real difference, therefore, to the defense’s prospects.” Cf. Commonwealth v. Alcide, 472 Mass. 150, 164 (2015).

**3. Counsel’s manifestly unreasonable failure to consult with a DNA expert deprived Mr. Robin of a substantial ground of defense.**

“The Commonwealth’s presentation at trial underscored the importance of the DNA analysis to the case.” Commonwealth v. Cameron, 473 Mass. 100, 107-108 (2015). Although Mr. Robin and his mother claimed that the alleged victims were armed with knives, the failure to analyze the DNA on the knife handles “acted to tip the balance against the defendant. Had the [probabilistic genotyping] DNA evidence been [used] at the trial, there is a ‘substantial risk that the jury would have reached a different conclusion.’ Cf. id. at 110 (citation omitted).

At trial, the prosecutor was free to claim—based on a very weak inference—that Mr. Robin “went to the apartment building and then came running back with a kitchen knife to attack Tim[.]”<sup>10</sup> Tr.\_8/101, 103. The prosecutor asked the jury to “infer that Richard Garcia was stabbed by two kitchen knives.... [that] were found during the investigation, one by the dumpster and one in the woods. Red-brown stains were recovered from both blades and, after DNA testing, were consistent with a profile for Richard Garcia on the blades—not the handles, on the blades—the DNA consistent with Richard Garcia. They were not able to get a profile off the handles.” Tr.\_8/103. The absence of a comparison to the handles thus permitted the prosecutor

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<sup>10</sup> Nobody saw Mr. Robin and his girlfriend run into the building and re-emerge with knives in the middle of the altercation. Ms. Rooney testified that, before the “huge fight” she “saw a man...coming from the apartment building.” Tr.\_3/206-207. Asked if the man came from inside the apartment building, Ms. Rooney answered, “That, I don’t know.” Tr.\_3/207. Ms. Alves testified that, after one of the men “fell to the ground” and did not get back up, another man and a woman “went back to the building” but she did not “know if they entered it.” Tr.\_6/126-127.

to argue that the knives, “came from the defendant’s kitchen, not the Jeep.” Tr.\_8/107.

Without a complete presentation of the DNA evidence, including results for the knife handles, the “evidentiary picture put to the jury...was sufficiently different from what it would have been under the direction of a reasonably effective attorney that we cannot say with the requisite substantial confidence that, in the absence of counsel’s errors, the verdict would have been the same.” Alcide, 472 Mass. at 169. Mr. Robin was thus denied the opportunity to present important evidence to the jury that they could weigh against the allegations concerning his guilt. Id.

As with any expert testimony, the TrueAllele results “likely would be challenged on cross-examination or by a prosecution expert called in rebuttal[.]” Epps, 474 Mass. 769. However, the Court “need not determine who would prevail in this battle of the experts, or whether the defendant would be found not guilty were it presented.” Id. at 770. The Court “need only determine, in the circumstances of this case, whether there is a substantial risk of a miscarriage of justice where the jury heard no scientific...expert challenging the” Commonwealth’s theory that Mr. Robin and his girlfriend—not the alleged victims—brought knives to the fight. Cf. id. The answer should be clear. “[D]efense counsel’s manifestly unreasonable failure” to retain and consult with a DNA expert on the below-threshold results “likely deprived the defendant of an available, substantial ground of defense.” Millien, 474 Mass. at 438. Because Mr. Robin “was deprived of his constitutional right to effective counsel,” his convictions must be vacated and a new trial ordered. Id.

**CONCLUSION**

For the foregoing reasons, Mr. Robin respectfully requests that his motion for a new trial be allowed.

Respectfully submitted,

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By his attorney,

***/s/ Andrew P. Power***

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Dated: 11/30/23

**CERTIFICATE OF SERVICE**

I hereby certify that on this date of 11/30/23, I have made service of a copy of this motion by electronic mail upon Assistant District Attorney Nathaniel Beaudoin, Office of the District Attorney/Worcester.

***/s/ Andrew P. Power***

Andrew P. Power