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SJC-12772

COMMONWEALTH vs. RICHARD S. FREIBERG.

November 13, 2019.

Practice, Criminal, Capital case, Postconviction relief, Appeal, Dismissal.

The defendant, Richard S. Freiberg, was convicted of murder in the first degree in 1987. This court affirmed the conviction. See Commonwealth v. Freiberg, 405 Mass. 282, 284 (1989). In January 2019, the defendant filed his fifth motion in the Superior Court seeking a new trial.¹ A judge in that court denied the motion, and the defendant then applied to a single justice of this court for leave to appeal from the denial of his motion, pursuant to the gatekeeper provision of G. L. c. 278, § 33E. The single justice denied the application, concluding that the application did not raise a new and substantial question. The defendant appeals from the single justice's denial of his application. The Commonwealth has moved to dismiss the appeal.²

The appeal must be dismissed because the single justice's denial of a gatekeeper application, under G. L. c. 278, § 33E, is final and unreviewable. See Zagranski v. Commonwealth, 477

¹ The defendant's four previous motions for postconviction relief were denied. This court affirmed the denial of the first motion for a new trial. See Commonwealth v. Freiberg, 405 Mass. 282 (1989). His applications to a single justice for leave to appeal from the denials of the remaining motions, pursuant to G. L. c. 278, § 33E, were denied.

² The defendant's request that counsel be appointed for purposes of the appeal is denied.

Mass. 1028, 1029 (2017). "A single justice, acting as a gatekeeper pursuant to G. L. c. 278, § 33E, may allow an appeal to the full court to proceed under that statute if the appeal presents a 'new and substantial' question." Commonwealth v. Anderson, 482 Mass. 1027, 1027 (2019), citing Commonwealth v. Gunter, 459 Mass. 480, 487, cert. denied, 565 U.S. 868 (2011). "If the appeal fails on either count, and the single justice denies the application, that decision 'is final and unreviewable.'" Anderson, supra, quoting Commonwealth v. Gunter, 456 Mass. 1017, 1017 (2010).

Appeal dismissed.

Richard S. Freiberg, pro se.
Julianne Campbell, Assistant District Attorney, for the Commonwealth.