SJC-12678

COMMONWEALTH vs. JOSE RAMOS.

Hampden. April 6, 2022. - November 28, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Deoxyribonucleic Acid. Practice, Criminal, Postconviction relief. Evidence, Scientific test, Relevancy and materiality, Self-defense. Statute, Construction. Homicide. Self-Defense. Words, "Material."

Indictment found and returned in the Superior Court Department on April 15, 2015.

A postconviction motion for forensic testing, filed on May 19, 2020, was heard by Douglas H. Wilkins, J.

Michael Tumposky for the defendant.
Lee Baker, Assistant District Attorney, for the Commonwealth.

BUDD, C.J. The defendant, Jose Ramos, was convicted of murder in the first degree for killing Luis Sanchez. The defendant subsequently filed a motion under G. L. c. 278A (c. 278A) seeking deoxyribonucleic acid (DNA) testing of

fingernail clippings collected from the victim's body during an autopsy to support his contention that the victim was the first aggressor and that the defendant acted in self-defense. After a hearing, a judge of the Superior Court denied the motion on the grounds that the defendant had failed to demonstrate by a preponderance of the evidence that (1) the requested testing had the potential to result in evidence material to his defense and (2) a reasonably effective attorney would have sought this testing. See G. L. c. 278A, §§ 3 (b) (5) (iv), 7 (b) (3)-(4). Before us is the defendant's appeal from that ruling. For the reasons discussed infra, we reverse.

Overview of G. L. c. 278A. Pursuant to c. 278A, an individual "whose liberty has been . . . restrained as the result of a conviction" of a criminal offense in the courts of the Commonwealth, and who "asserts factual innocence of the crime for which [he or she] has been convicted," may file a motion requesting postconviction testing. G. L. c. 278A, § 2. If the motion meets certain threshold requirements, see G. L. c. 278A, § 3 (b) (§ 3 [b]),[1] a hearing will be held where the

[1] Section 3 (b) requires that the movant provide the following information:

> "(1) the name and a description of the requested forensic or scientific analysis; (2) information demonstrating that the requested analysis is admissible as evidence in courts of the commonwealth; (3) a description of the evidence or biological material that the moving party seeks to have

defendant must establish by a preponderance of the evidence each of the factors set forth in G. L. c. 278A, § 7 (b) (§ 7 [b]),[2] including that the "requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime," and that the evidence has not been analyzed previously for one of five

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> analyzed or tested, including its location and chain of custody if known; (4) information demonstrating that the analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; and (5) information demonstrating that the evidence or biological material has not been subjected to the requested analysis because [of one of the five reasons enumerated in § 3 (b) (5)]."

[2] Section 7 (b) requires the defendant to demonstrate the following by a preponderance of the evidence:

> "(1) that the evidence or biological material exists; (2) that the evidence or biological material has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value; (3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons in [§ 3 (b) (5) (i)-(v)]; (4) that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case; (5) that the purpose of the motion is not the obstruction of justice or delay; and (6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth."

reasons enumerated in § 3 (b) (5).[3] See G. L. c. 278A, § 7 (b) (4).

"If such a showing is made, the court shall allow the requested forensic or scientific analysis, the results of which may be used to support a motion for a new trial." Randolph v. Commonwealth, 488 Mass. 1, 4 (2021), quoting Commonwealth v. Williams, 481 Mass. 799, 801-802 (2019).

Background. 1. Evidence at trial. We summarize the facts of the underlying criminal case, reserving certain details for later discussion of the issues.

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[3] The defendant must demonstrate by a preponderance of the evidence that the requested analysis has not been done for one of the following reasons:

> "(i) the requested analysis had not yet been developed at the time of the conviction; (ii) the results of the requested analysis were not admissible in the courts of the commonwealth at the time of the conviction; (iii) the moving party and the moving party's attorney were not aware of and did not have reason to be aware of the existence of the evidence or biological material at the time of the underlying case and conviction; (iv) the moving party's attorney in the underlying case was aware at the time of the conviction of the existence of the evidence or biological material, the results of the requested analysis were admissible as evidence in courts of the commonwealth, a reasonably effective attorney would have sought the analysis and either the moving party's attorney failed to seek the analysis or the judge denied the request; or (v) the evidence or biological material was otherwise unavailable at the time of the conviction."

G. L. c. 278A, § 3 (b) (5).

On the evening of March 10, 2015, the defendant and the victim were staying at a homeless shelter in Springfield. At approximately 6 P.M., the defendant approached a shelter staff member in the intake office and told her that the victim "was giving him a lot of attitude" and that "somebody needed to speak to [the victim]." The defendant also said that he believed the victim was under the influence of alcohol. The staff member informed the defendant that she would have another staff member assess the situation. Meanwhile, the victim was observing this conversation through the intake office's window, which faced the hallway, and when the defendant left the office, the victim followed him. Both men walked toward the stairs to the basement dormitory where they both lived while at the shelter.

Shortly thereafter, the defendant and the victim ascended the stairwell from the basement and walked along the hallway toward the exit to the parking lot. Another staff member, who had been sent to check on them, observed that both the defendant and the victim appeared to be hurried and "hostile" as they ascended the stairs. This second staff member went to the intake office and told the first staff member that the defendant and the victim were going outside and that he thought they were going to fight. Both staff members went outside, along with a police officer who was stationed at the shelter. When they arrived outside, they saw the defendant and the victim "coming

apart" from one another and "squared off," and the defendant had a knife in his hand. The officer told the defendant to drop the knife, and the defendant did so. The victim was staggering and bleeding from his torso, and he fell down. The officer and the two staff members, however, did not see the defendant stab the victim or the events immediately preceding the stabbing.

Two witnesses who already were outside the shelter at the time of the altercation between the defendant and the victim gave conflicting testimony. One witness testified that she saw two men arguing and fighting in the parking lot. She saw the defendant make punching gestures toward the victim approximately ten to fifteen times as the victim attempted to block the blows. She neither saw anything in the victim's hands nor saw him throw any punches during the fight. The victim stumbled and fell, got up and removed his jersey, and was bleeding from his chest.

Another witness, called by the defense, testified that he saw the defendant and the victim engaged in "a lot of yelling and screaming" and a "pushing match," and "squaring up to fight." They began "fist fighting," although the altercation involved "bumping chest[s]" and "pushing off of each other," rather than actual "swings." Next, the victim took off his jersey, pulled out a screwdriver, and swung it at the defendant, jabbing at him, and the defendant kept backing away to avoid being hit. The defendant pulled out a weapon that looked like a

"sheetrock edger" and "pok[ed]" at the victim two or three times with the knife.

Police subsequently recovered both a knife and screwdriver at the scene. No fingerprints were detected on either item. Both the knife and screwdriver tested positive for occult blood. The victim's DNA was detected on the blade of the knife, but there was not enough blood for the police to conduct further analysis of the screwdriver.

Surveillance cameras, operated by the shelter, captured some of the events that occurred inside and outside the shelter. Video excerpts and still images from this surveillance footage were shown to the jury at trial. Footage from a camera inside the shelter shows the defendant and the victim as they left the building. The defendant was walking ahead of the victim as they headed toward the door and, just as they went through the exit of the shelter, the defendant stopped and let the victim pass him. Footage from an outside camera depicts the two men as they walked through the parking lot; the defendant was following several paces behind the victim, until the defendant suddenly sped up and contacted the victim from behind with an outstretched arm, and they moved beyond the camera's view. Subsequent footage shows the two men as they came back into view; the victim circled the defendant, took off his jersey, and

fell to the ground, while the defendant walked back toward the shelter.

Defense counsel argued in closing that his client had been acting in self-defense when he killed the victim. The prosecutor argued that the defendant acted with premeditation by ambushing the victim from behind, and also with extreme atrocity and cruelty. The jury found the defendant guilty of murder in the first degree on a theory of deliberate premeditation.

2. Procedural posture. While his direct appeal was pending, the defendant filed a c. 278A motion in the Superior Court, requesting that the fingernail clippings taken from the victim during the autopsy be tested for the defendant's DNA. As the Commonwealth conceded that the defendant had met the threshold requirements pursuant to § 3 (b), an evidentiary hearing was held, after which the motion judge[4] denied the motion. The defendant filed his subsequent appeal from that decision in this court because the direct appeal from his conviction of murder was pending here already. See Commonwealth v. Moffat, 478 Mass. 292, 293 (2017), S.C., 486 Mass. 193 (2020); G. L. c. 278A, § 18 (order allowing or denying motion under c. 278A is final and appealable). This court stayed the

[4] As the trial judge had retired, the motion was assigned to a different judge.

defendant's direct appeal pending the appeal from the denial of his c. 278A motion.

Discussion. At the motion hearing, the Commonwealth argued that the defendant failed to meet the requirements of § 7 (b). Specifically, according to the Commonwealth, the defendant failed to demonstrate that the presence of the defendant's DNA under the victim's fingernails would be "material or relevant" to the defendant's self-defense claim, see G. L. c. 278A, § 7 (b) (4), and that therefore the failure to request such testing was not ineffective assistance of counsel, see G. L. c. 278A, §§ 3 (b) (5) (iv), 7 (b) (3). In denying the defendant's motion, the motion judge essentially agreed with the Commonwealth. We review the defendant's appeal from that decision under a de novo standard. See Moffat, 478 Mass. at 298-299, quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986) ("For second-stage motions under G. L. c. 278A, § 7, where the motion judge was not the trial judge, and where the record before us is purely documentary, we . . . review claims of error under a de novo standard, because 'we regard ourselves in as good a position as the motion judge to assess the trial record'").

1. G. L. c. 278A, § 7 (b) (4). Whether DNA analysis of the victim's fingernail clippings has the "potential to result in evidence that is material to [the defendant's] identification

as the perpetrator of the crime" under § 7 (b) (4) depends on what the Legislature meant by the term "material."

a. Materiality standard in the context of G. L. c. 278A, § 7 (b) (4). As always, "[o]ur primary duty is to interpret a statute in accordance with the intent of the Legislature." Pyle v. School Comm. of S. Hadley, 423 Mass. 283, 285 (1996). See Boston Police Patrolmen's Ass'n v. Boston, 435 Mass. 718, 719-720 (2002), and cases cited. The Commonwealth urges us to adopt a definition of material evidence drawn from our decisions concerning the government's loss or destruction of potentially exculpatory evidence: "Evidence is material if, in considering the entire record, it creates a reasonable doubt as to the defendant's guilt that would not otherwise exist." Commonwealth v. Harwood, 432 Mass. 290, 295 (2000), quoting Commonwealth v. Otsuki, 411 Mass. 218, 231 (1991). We decline to do so.

The Legislature enacted c. 278A "to remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques." Commonwealth v. Wade, 467 Mass. 496, 504 (2014), S.C., 475 Mass. 54 (2016), quoting 2011 Senate Doc. No. 753 and 2011 House Doc. No. 2165. Because "defendants who sought access to DNA through motions for a new trial under Mass. R. Crim. P. 30 (b)[, as appearing in 435 Mass. 1501 (2001),] faced long delays and impediments to access," Wade,

supra at 505, the Legislature created a "process, separate from the trial and any subsequent proceedings challenging an underlying conviction, that permits forensic and scientific analysis of evidence or biological material, the results of which could support a motion for a new trial," Commonwealth v. Clark, 472 Mass. 120, 121-122 (2015).

As a broad interpretation of c. 278A aligns with the remedial nature of the statute, see Williams, 481 Mass. at 808, we generally have "construe[d] the language of G. L. c. 278A, § 7 (b), in a manner that is generous to the moving party," Randolph, 488 Mass. at 11. In particular, we have emphasized that defendants need not demonstrate that the requested testing could result in evidence that would justify a new trial. See, e.g., Commonwealth v. Linton, 483 Mass. 227, 242 (2019) ("The requirements of G. L. c. 278A are, by design, less stringent than a motion for a new trial pursuant to Mass. R. Crim. P. 30"); Wade, 467 Mass. at 509 ("It would thwart the legislative purpose to impose on a moving party seeking forensic analysis pursuant to G. L. c. 278A an equal or greater burden of proof than that which is required of a party seeking discovery under Mass. R. Crim. P. 30 [c] [4]"). For example, in Linton we held that a defendant who had been convicted of murder in the first degree for strangling his wife had met the materiality standard for further DNA testing of swabs taken from the victim's neck,

where an expert witness had identified potentially exculpatory male DNA at a single locus in data derived from these samples using a lower threshold for detection. See Linton, supra at 241-242. In reaching that conclusion, we noted that we were "not deciding whether the evidence of a single potential allele supports the allowance of a motion for a new trial." Id. at 242.[5]

With the legislative intent of c. 278A and our prior case law in mind, we consider the meaning of "material" within the context of § 7 (b). Because "material" is not defined in c. 278A, we turn to "the plain and ordinary meaning of the word" as derived from sources such as "other legal contexts and dictionary definitions." Commonwealth v. Tinsley, 487 Mass. 380, 386-387 (2021), quoting Commonwealth v. Montarvo, 486 Mass. 535, 536 (2020). The definitions in these sources are, by and large, variations on the same theme. Nonlegal dictionaries equate "material" to "substantial" or "consequential," or define it as "of real importance or great consequence." See, e.g., Webster's Third New International Dictionary 1392 (2002); American Heritage Dictionary of the English Language 1083 (5th ed. 2011). Black's Law Dictionary defines "material" as

[5] We went on to hold, however, that the defendant's motion for postconviction DNA testing was properly denied for other reasons. See Linton, 483 Mass. at 245-246.

"significant" or "having some logical connection to consequential facts." Black's Law Dictionary 1170 (11th ed. 2019). A well-known hornbook on evidence explains that "[a] fact that is 'of consequence' is material." 1 McCormick on Evidence § 185, at 1108 (R.P. Mosteller ed., 8th ed. 2020). Synthesizing these various similar formulations, we believe that the phrase "evidence that is material" in § 7 (b) (4) means evidence that is of significance "to the moving party's identification as the perpetrator of the crime in the underlying case." G. L. c. 278A, § 7 (b) (4).

The Commonwealth's proposed definition of materiality would require more: a defendant would need to demonstrate by a preponderance of the evidence that the requested analysis has the potential to result in evidence that creates a reasonable doubt as to the defendant's guilt that would not otherwise exist. See Harwood, 432 Mass. at 295. However, c. 278A was intended to give defendants easier access to scientific or forensic testing than is available through a motion for a new trial, without having to prove that the test results will raise doubts about their convictions.[6] See, e.g., Clark, 472 Mass. at

[6] We note that in contrast to c. 278A, similar forensic testing statutes in other jurisdictions require a defendant who seeks such testing to demonstrate some degree of likelihood that he or she is innocent. See Wade, 467 Mass. at 509 n.16 (citing statutes). See, e.g., Or. Rev. Stat. § 138.692(6)(d) (judge shall order DNA testing if it is found that, "[i]n light of all

136, quoting Wade, 467 Mass. at 511 ("the Legislature intended to permit access to DNA testing 'regardless of the presence of overwhelming guilt in the underlying trial'").

Thus, we conclude, for purposes of § 7 (b) (4), that a defendant must demonstrate by a preponderance of the evidence that the requested analysis has the potential to result in evidence that is of significance to the moving party's identification as the perpetrator of the crime in the underlying case.

b. Application. Applying the standard articulated supra, we conclude that the defendant has demonstrated by a preponderance of the evidence that the DNA testing he seeks has the potential to result in evidence that would be material -- that is, of significance to issues concerning his identification as the perpetrator of murder in the first degree.

The Commonwealth's theory at trial was that the defendant ambushed the victim. The defendant countered that he had been acting in self-defense when he stabbed the victim. As stated in the affidavit submitted in support of his c. 278A motion, the defendant alleged that the victim first attacked him; they

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the evidence, there is a reasonable probability that, had exculpatory results been available at the time of the underlying prosecution, the person would not have been prosecuted or convicted of the offense"). No such language appears in c. 278A.

engaged in a fist fight; in the course of the fight, the victim pulled out a screwdriver and swung it at him in an attempt to stab him; and the defendant used a knife to defend himself. The defendant contends that testing of the victim's fingernail clippings has the potential to result in evidence that would be material to his self-defense claim because if it revealed the defendant's DNA on the victim's fingernails, it would support his contention that the victim had attacked the defendant first.

As we explained supra, the defendant need only show by a preponderance of the evidence that the results of the DNA testing "could be material" to his self-defense claim,[7] not that it "would have had any effect on the underlying conviction"

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[7] We previously have held that where a defendant denies having committed a crime on the ground that he or she was acting in self-defense, evidence that is material to the self-defense claim would be "material to the moving party's identification as the perpetrator of the crime" under c. 278A. See Williams, 481 Mass. at 806-809 (construing G. L. c. 278A, § 3 [b] [4]). See also id. at 806 & n.8 ("factual innocence" requirement of G. L. c. 278A, § 2, was met where defendant asserted that he acted in self-defense and therefore "no crime occurred").

In addition to arguing that the testing could result in evidence that is material to his self-defense claim, the defendant contends that this same evidence could be used to argue that he used excessive force in self-defense, or that he acted in the heat of passion induced by sudden combat resulting in voluntary manslaughter rather than murder in the first degree. See Model Jury Instructions on Homicide 78-82 (2018). We need not consider whether these alternative theories meet the materiality requirement in § 7 (b) (4) because we conclude infra that the defendant adequately demonstrated that the DNA testing he requested has the potential to result in evidence that is material to his self-defense claim.

(emphasis in original). Commonwealth v. Steadman, 489 Mass. 372, 389 (2022), quoting Wade, 467 Mass. at 508 (discussing parallel materiality requirement in § 3 [b] [4]). Here, the defendant has done so.

The witness called by the defense testified that there was a physical altercation between the defendant and the victim during which the victim attacked the defendant with a screwdriver. In response, the defendant took out a knife and poked at the victim two or three times with it. If evidence of the defendant's DNA were discovered on the victim's fingernail clippings, it could further corroborate this testimony and the defendant's self-defense theory by tending to prove that the victim had grabbed or struck the defendant. It also could help to contradict the Commonwealth's contention that the defendant suddenly ambushed the victim from behind and stabbed him in the back, without any prior fist fight, and counter the testimony of the prosecution witness who said that she did not see the victim throw any punches at the defendant. Moreover, the DNA evidence could be particularly significant because the Commonwealth's contention that the defendant was the first aggressor was premised solely on circumstantial evidence.

We therefore conclude that the defendant adequately demonstrated by a preponderance of the evidence that testing of the victim's fingernail clippings to determine whether they

contain traces of the defendant's DNA has the potential to result in evidence that is material, i.e., of significance to the defendant's contention that he acted in self-defense.

The dissent appears to take the position that for the DNA evidence to be material under § 7 (b) (4), it must have the potential to support independently and directly one or more elements of his self-defense claim, e.g., by demonstrating who was the first aggressor, or who initiated the use of deadly force, or whether the defendant's use of deadly force was justified. However, we have been consistent in taking a broader approach to the application of § 7 (b) (4). That is, in our view, the defendant only needs to show that the DNA evidence, in combination with other evidence presented at trial, would tend to support the defendant's self-defense claim. For example, we stated in Linton, 483 Mass. at 239 n.5, that under § 7 (b) (4), "[i]t is the defendant's burden to prove, by a preponderance of the evidence, that testing may result in evidence that, on its own, or with other evidence, might be material to the identity of the perpetrator" (emphasis added). Cf. Moffatt, 478 Mass. at 301 ("We do not suggest that postconviction forensic testing under G. L. c. 278A is limited to direct evidence of the perpetrator's identity. . . . [D]epending on the facts of a particular case, . . . DNA evidence could be used in conjunction with other evidence to establish the identity of a third

party"). As explained supra, the defendant has met that standard here by showing that the DNA evidence he seeks might be used to bolster the testimony of the lone defense witness and to challenge the Commonwealth's account of the sequence of events.[8]

2. G. L. c. 278A, § 7 (b) (3). As previously discussed, § 7 (b) (3) requires the defendant to establish by a preponderance of the evidence that the testing sought had not occurred previously due to one of the five reasons specified in § 3 (b) (5).[9] Here, the defendant argued that although trial counsel was aware, or should have been aware, of the victim's fingernail clippings, he failed to have them tested for DNA evidence, and "a reasonably effective attorney would have sought the analysis" because of the possibility that it could support

[8] There are, of course, situations where the purported connection between the DNA evidence a defendant hopes to recover through testing and the other trial evidence is so attenuated that a request for testing may be appropriately denied. For example, in Moffatt, 478 Mass. at 300-301, we held that the trial judge did not abuse her discretion in denying a request under c. 278A for DNA testing of cigarette butts that were found approximately 200 feet from the murder victim's body, where there was no evidence indicating when they might have been deposited or that any other alleged participants had been smoking. But the result in that case is explained easily under the standard of materiality set forth here. Because the cigarette butts could have been left by any number of people before or after the murder, the defendant failed to show by a preponderance of the evidence that testing of those cigarette butts would result in evidence that would be of significance to his identification as the perpetrator of the crime.

[9] See note 3, supra.

the defendant's self-defense claim. G. L. c. 278A, § 3 (b) (5) (iv). The defendant further argues that there would be little downside risk if the testing yielded a negative result, because that would not prove the absence of hand-to-hand combat between the defendant and the victim, but only that there was no resulting DNA evidence.

Bearing in mind the liberal construction to be given to c. 278A, we agree that a reasonably effective attorney would have requested the DNA testing in light of the fact that it potentially could corroborate the testimony of the lone defense witness and contradict the Commonwealth's argument.

We have held that the "reasonably effective attorney" standard under § 3 (b) (5) (iv) is not equivalent to the standard for assessing a claim of ineffective assistance of counsel in a motion for a new trial. See Linton, 483 Mass. at 237; Wade, 467 Mass. at 511. Consequently, although we have held that strategic or tactical decisions by counsel do not constitute ineffective assistance unless they are "manifestly unreasonable when made," see Wade, supra, quoting Commonwealth v. Watson, 455 Mass. 246, 256 (2009), that is not the appropriate standard to apply under § 3 (b) (5) (iv). For purposes of assessing trial counsel's decision not to seek scientific testing, the defendant needs to show "only that 'a' reasonably effective attorney would have sought the requested

analysis, not that every reasonably effective attorney would have done so." Wade, supra. See Linton, supra at 236-237. The defendant has met that standard.

Conclusion. For the foregoing reasons, the order of the Superior Court judge denying the defendant's motion under G. L. c. 278A is reversed.

So ordered.

CYPHER, J. (dissenting). Because I am of the opinion that deoxyribonucleic acid (DNA) testing, regardless of its result, would be immaterial to the defendant's identity as the perpetrator of the crime in the underlying case, as it could not support his claim of factual innocence, I respectfully dissent.

Background. I include additional facts, as the jury could have found them, that were not mentioned by the court but that are relevant to my analysis. On March 10, 2015, the defendant killed the victim by stabbing him four times: twice in his chest, once in his back, and once in his left torso. Two of those stab wounds penetrated his heart. Multiple sharp-force injuries were determined to be the victim's cause of death.

As mentioned by the court, the Commonwealth introduced video recordings of the incident from the shelter.[1] Video footage from inside the shelter's front door showed the defendant stepping to the side and letting the victim walk out of the shelter in front of him. The victim was seen walking in front of the defendant toward the street. As they neared the street, the defendant sped up and reached out to the victim from behind. After the defendant reached out to the victim, the victim fell to the ground out of view of the camera, and the

[1] As part of my review, I watched the video recordings of the altercation.

defendant briefly stood over him before they both went out of view of the camera.

In addition to the video footage, witnesses testified that as the defendant walked away from the victim, his demeanor was calm. While staff members attempted to treat the victim's wounds, the defendant sat down and smoked a cigarette. When police approached the defendant, without prompting, he stood up "very casually, nonchalant, took a puff of his cigarette," turned around, and put his hands behind his back. As he was escorted to a cruiser, passing the victim, the defendant said, "[T]hat guy's dangerous. He always carried knives. I don't feel bad about it."

Two eyewitnesses to the altercation, Julie Mayers and Raymond Perkins, Jr., testified at the trial. Mayers went to the shelter to visit friends and to smoke marijuana. As she watched the two men fighting, she saw the defendant make a "punching gesture," and she witnessed the victim stumble and fall to the ground. She watched the defendant repeat the "punching" motion about ten to fifteen times.[2] She did not see anything in the hands of the victim, but she saw him attempt to block himself from being hit. Mayers saw a screwdriver on the

[2] She acknowledged that she did not count.

ground next to the victim's jersey after the altercation. She identified the defendant in a showup identification that day.

Perkins, a resident of the shelter at the time of the murder, also was present in the parking lot at the time of the altercation. According to Perkins, the victim struck the defendant first with his bare hands. He maintained that the victim took off his jersey before he took out the screwdriver, "swinging" and "jabbing" it at the defendant. At some point, as the defendant was backing away, Perkins saw the defendant pull out from his jacket a "sheetrock edger" with which he "poked" the victim, causing the victim's "insides" to "spill[] out into the parking lot." Perkins testified that the screwdriver and the knife recovered by police were not the items with which he saw the victim and the defendant fighting during the altercation.

At the scene, officers secured not only the knife with a lime green handle and a screwdriver, but also the victim's jersey and shirt, both of which had "cuts" throughout. During booking, a lime green sheath for a knife was found in the defendant's jacket pocket.

In closing argument, the defense attorney argued that during the altercation the victim pulled out a screwdriver and

began to swing it at the defendant.[3] In response, the defendant then attempted to back away and return to the shelter, but was forced to defend himself with the knife by stabbing the victim.

The Commonwealth argued that the victim was "ambushed" from behind while he was walking through the parking lot and was stabbed in the back. The Commonwealth asserted that even if the jury were to believe the testimony of Perkins that the victim took off his jersey before he took out the screwdriver, the jersey had several "stab holes" in it consistent with the knife, indicating that the defendant used deadly force before the victim introduced the screwdriver.

Discussion. 1. Legislative background and statutory framework. "In 2012, the Legislature enacted G. L. c. 278A" to allow access to forensic and scientific evidence on "a motion by an individual who has been convicted of a criminal offense, who consequently has been incarcerated, and who asserts factual innocence." Commonwealth v. Wade, 467 Mass. 496, 497 (2014) (Wade II), S.C., 475 Mass. 54 (2016).

Before the enactment of the statute, a defendant seeking to obtain scientific testing of evidence through a motion for a new

[3] The defense attorney stated, "[T]he credible evidence in this case establishes that there's a fistfight that turns into a fight involving a deadly weapon, a screwdriver, which then allows under the law for [the defendant] to defend himself with a deadly weapon, a knife."

trial was required to make "a prima facie showing that the test results would warrant a new trial." Wade II, 467 Mass. at 505, quoting Commonwealth v. Evans, 439 Mass. 184, 204-205, cert. denied, 540 U.S. 923 and 540 U.S. 973 (2003). Thus, a defendant was in the difficult position of asserting the importance of evidence while simultaneously being unaware of its probity. Wade II, supra.

The statute creates a two-step process for requesting DNA analysis. Wade II, 467 Mass. at 501. The first step, the "nonadversarial" portion, is governed by G. L. c. 278A, § 3, which enumerates the required information that a moving party must include in his or her motion. Id. at 503-504. If the motion includes the required information, that step is satisfied. The second step involves a hearing. To ultimately prevail on a motion for posttrial forensic testing, a defendant must meet six criteria by a preponderance of the evidence. See G. L. c. 278A, § 7 (b).[4] See also Commonwealth v. Steadman, 489

[4] General Laws c. 278A, § 7 (b), requires that the following criteria be met: "(1) that the evidence or biological material exists; (2) that the evidence or biological material has been subject to a chain of custody that is sufficient to establish that it has not deteriorated, been substituted, tampered with, replaced, handled or altered such that the results of the requested analysis would lack any probative value; (3) that the evidence or biological material has not been subjected to the requested analysis for any of the reasons in [§ 3 (b) (5) (i)-(v)], inclusive; (4) that the requested analysis has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the

Mass. 372, 392 (2022) ("The more robust evidentiary analysis of the defendant's proof is to be faced at the § 7 hearing stage"). If all the elements articulated in § 7 (b) have been demonstrated by a preponderance of the evidence, "the court shall allow the requested forensic or scientific analysis, the results of which may be used to support a motion for a new trial" (emphasis added). Commonwealth v. Williams, 481 Mass. 799, 801-802 (2019).

2. Materiality under G. L. c. 278A. I am mindful that "the Legislature enacted G. L. c. 278A as a means to permit prompt access to scientific and forensic testing in order to remedy wrongful convictions." Commonwealth v. Linton, 483 Mass. 227, 234 (2019). As such, we "generous[ly]" construe the language in the statute as favorable "to the moving party." Id., quoting Commonwealth v. Clark, 472 Mass. 120, 136 (2015). The defendant argues that he has demonstrated, by a preponderance of the evidence, that the DNA testing of the victim's fingernail clippings would be material to his identification as the perpetrator of the crime of which he was convicted, murder in the first degree, thus satisfying § 7 (b) (4). He asserts that the testing would have "strongly

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underlying case; (5) that the purpose of the motion is not the obstruction of justice or delay; and (6) that the results of the particular type of analysis being requested have been found to be admissible in courts of the commonwealth."

supported a claim of 1) self-defense or 2) mitigation based on excessive use of force in self-defense or from heat of passion induced by sudden combat or provocation."

All that the defendant has to prove, however, is that the analysis of the fingernail clippings "has the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case" (emphasis added). Clark, 472 Mass. at 135, quoting G. L. c. 278A, § 7 (b) (4). "The Legislature's use of the word 'potential' in § 7 (b) (4) suggests an awareness of the fact that the requested forensic analysis may not produce the desired evidence, but such a consequence should not be an impediment to analysis in the first instance." Clark, supra at 135-136.

Despite this generous construction, the requirement prescribed by § 7 (b) (4) is not toothless. Although our case law recognizes the Legislature's intent to make postconviction forensic testing more accessible, this does not mean that every motion filed under § 7 should be allowed without scrutiny, abandoning common sense. Commonwealth v. Moffat, 478 Mass. 292, 301 (2017), S.C., 486 Mass. 193 (2020).

I largely agree with the court's definition of the word "material" in the context of postconviction forensic testing. Specifically, I agree that the phrase "evidence that is material" in § 7 (b) (4) means evidence that is significant "to

the moving party's identification as the perpetrator of the crime in the underlying case."[5]

Nonetheless, § 7 (b) (4) still requires that the evidence have some "potential" to be of consequence particularly in relation to the identity of the perpetrator of the crime in the underlying case. Had the Legislature intended for the testing of evidence that simply is relevant to any issue in the case, it would have said so. See Commonwealth v. Rossetti, 489 Mass. 589, 593 (2022), quoting Commonwealth v. Williamson, 462 Mass. 676, 679 (2012) (we "presume, as we must, that the Legislature intended what the words of the statute say").

Based on my reading of the statute as a whole, I diverge from the court in my understanding of what it means for testing to have the potential to be significant to "the moving party's identification as the perpetrator of the crime in the underlying case." G. L. c. 278A, § 7 (b) (4). General Laws c. 278A, § 1, defines "[f]actually innocent" as "a person convicted of a criminal offense who did not commit that offense." In order to

[5] I also agree that the Commonwealth's proposed definition, appearing in the context of a claim of prejudice for the government's loss or destruction of evidence and requiring that the requested analysis "create[] a reasonable doubt as to the defendant's guilt that would not otherwise exist," is more stringent than what was intended by the Legislature in the enactment of this statute. Commonwealth v. Harwood, 432 Mass. 290, 295 (2000), citing Commonwealth v. Otsuki, 411 Mass. 218, 231 (1991).

benefit from G. L. c. 278A, a defendant must "assert[] factual innocence of the crime for which [he or she] has been convicted." G. L. c. 278A, § 2. Pursuant to § 3, the moving party must file an affidavit stating, in part, that "the requested forensic or scientific analysis will support the claim of innocence." G. L. c. 278A, § 3 (d). This dovetails with the Legislature's purpose in enacting the statute to remedy wrongful convictions of factually innocent persons.

In Williams, we recognized that "factual innocence" as used in this statute includes a person asserting that he or she acted in lawful self-defense, because such a claim "negates the element of 'unlawfulness'" and "is a claim that the homicide was justified." Williams, 481 Mass. at 805-806, quoting Commonwealth v. Rodriguez, 370 Mass. 684, 688 (1976). We noted that "[o]ur jurisprudence has considered self-defense a factual issue, as it is directly correlated with the underlying facts of the case and whether the defendant acted justifiably under the circumstances." Williams, supra at 805. Going further, we pointed to the language "of the crime for which the person has been convicted" to state that "the defendant need not allege that he did not" kill the victim, but "need only assert that, because he acted in self-defense, he did not commit . . . the

crime of which he was convicted." Id. at 806, quoting G. L. c. 278A, § 2.[6]

In light of this precedent, I conclude that the language in § 7 (b) (4) that the analysis has "the potential to result in evidence that is material to the moving party's identification as the perpetrator in the crime in the underlying case" means that it must have the potential to be material to his or her factual innocence. I view the language "identification as the perpetrator of the crime in the underlying case" as tending to support "factual innocence," which would include evidence with the potential to support factual innocence through lawful self-

[6] The Massachusetts erroneous convictions law, G. L. c. 258D (c. 258D), is instructive in defining the term "innocence." In order to be eligible for relief, c. 258D requires a claimant's conviction to "have been overturned on 'grounds which tend to establish the innocence' of the plaintiff." Irwin v. Commonwealth, 465 Mass. 834, 843 (2013), quoting G. L. c. 258D, § 1 (B) (ii). The court interpreted the requirement to mandate that a conviction be "overturned 'on grounds resting upon facts and circumstances probative of the proposition that the claimant did not commit the crime.'" Irwin, supra at 844, quoting Guzman v. Commonwealth, 458 Mass. 354, 359 (2010). Procedural or evidentiary errors or structural deficiencies at trial that may be "'consistent' with innocence without any tendency to establish it" do not meet the definition in c. 258D. Irwin, supra at 846. For example, in Irwin, the court held that the inclusion of "highly prejudicial" evidence surrounding the claimant's prearrest silence that led to reversal did not qualify under c. 258D because it was not "probative of the proposition that [Irwin] did not commit the crime," and thus did not tend to establish his innocence. Irwin, supra at 855, quoting Guzman, supra at 362.

defense.[7] G. L. c. 278A, § 7 (b) (4). In the matter at bar, I do not think that the analysis of the DNA under the victim's fingernails meets this requirement.

Even if we were to assume that, after testing, the defendant's DNA was found on the victim's fingernail clippings, that fact would not have "the potential to result in evidence that is material to the moving party's identification as the perpetrator of the crime in the underlying case." Clark, 472 Mass. at 135, quoting G. L. c. 278A, § 7 (b) (4). The presence of the defendant's DNA on the victim's fingernail clippings would not lend any weight to his claim of self-defense because it would not show whether the victim was the first aggressor, or whether the defendant acted reasonably by using deadly force in self-defense. At most, this evidence could show that the victim used physical force against the defendant at some point in time before his death. This would be of no use to the defendant.

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[7] Although I agree with the court's suggestion, see ante at note 6, that our forensic testing statute does not have explicit language requiring a defendant seeking testing to demonstrate a degree of likelihood that he or she is innocent, I emphasize that our statute does require a defendant to assert that he or she is "factually innocent." G. L. c. 278A, § 2. As explained supra, it is my opinion that the requirement of the potential to produce evidence material to "identification as the perpetrator of the crime," looking at the statute in its entirety, means that the analysis has the potential, albeit not to "a degree of likelihood," to support the defendant's factual innocence.

Even if the defendant had not initiated the fight, he was not necessarily entitled to an instruction on self-defense unless there was some evidence warranting a reasonable doubt that (1) he had reasonable grounds to believe (and subjectively did believe) that he was in imminent danger of death or serious bodily harm, from which he could only save himself by using deadly force; (2) he availed himself of all the proper means to avoid physical combat before resorting to deadly force; and (3) he used force not exceeding that which was reasonably necessary in all the circumstances of the case. Commonwealth v. Pring-Wilson, 448 Mass. 718, 733 (2007), quoting Commonwealth v. Harrington, 379 Mass. 446, 450 (1980).

The victim's fingernail clippings could not demonstrate, or corroborate, any of these three considerations by a preponderance of the evidence. Even if I ignore the video evidence -- which strongly suggests that the defendant did not use the proper means to avoid deadly force and that he initiated the fight -- the defendant's DNA on the victim's fingernails could not demonstrate that the victim was the first aggressor, or that the victim used force causing the defendant to fear serious bodily harm or death at the time of the altercation.[8]

[8] The video footage depicted the defendant stepping to the side and allowing the victim to walk out of the shelter in front of him. The defendant then sped up and reached out to the victim, and the victim fell to the ground with the defendant

That the victim may have used physical force, even if he initiated the encounter, would have no bearing on whether he was the first to use deadly force with the screwdriver. This was the defendant's contention at trial. For this reason, I disagree with the court that the DNA evidence could be "particularly significant" to refute the Commonwealth's contention that the defendant was the first aggressor. Ante at . As the defendant cannot use the fingernail clippings to bolster his claim of self-defense, he cannot show, by a preponderance of the evidence, that their testing may lead to evidence that is material to his identification as the perpetrator of the crime.

Further, even if the presence of the defendant's DNA on the victim's fingernail clippings could be interpreted as contradicting the Commonwealth's theory at trial,[9] that would not meet the low standard set out in § 7 (b) (4). Put differently, such evidence would not, as the court suggests, "contradict the Commonwealth's contention that the defendant suddenly ambushed the victim from behind . . . without any prior fist fight."

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standing over him. After the seconds-long altercation, the defendant slowly walked away toward the front of the shelter, seemingly ignoring the victim who approached him and circled around him.

[9] I.e., that there was no physical altercation prior to the defendant stabbing the victim.

Ante at . The presence of the defendant's DNA could not show when the victim contacted the defendant or in what manner he did so. It could not show whether he touched the defendant in self-defense or, for example, threw a punch in a fist fight. It could not corroborate whether the contact came before, during, or after the altercation on the video footage. For the same reason, it could not, as the majority states, "counter the testimony of the prosecution witness who said that she did not see the victim throw any punches at the defendant." Id. at . Mayers testified that she saw the victim attempting to block himself from being hit, which just as plausibly may have resulted in the defendant's DNA underneath the victim's fingernails. In my opinion, the suggestion that the sought-after DNA could contradict the Commonwealth's theory of the case is unpersuasive.

As discussed supra, the victim's use of nondeadly physical force does not speak to the reasonableness of the defendant in using deadly force, and the DNA evidence does nothing to demonstrate whether the victim used the screwdriver in deadly force. "[F]irst aggressor" refers to "not only the person who initiated the confrontation, but also the person who initiated the use or threat of deadly force." Commonwealth v. Camacho, 472 Mass. 587, 592 (2015). See Commonwealth v. Chambers, 465 Mass. 520, 528 (2013), quoting Commonwealth v. Maguire, 375

Mass. 768, 772 (1978) ("In our common law, a criminal defendant who is found to have been the first aggressor loses the right to claim self-defense unless he 'withdraws in good faith from the conflict and announces his intention to retire'"). The DNA testing does not have the potential to result in evidence that could corroborate the defendant's contention that the victim was the first aggressor. Regardless of the strength of the Commonwealth's case at trial, the fingernail clippings would be of no use to the defendant in demonstrating factual innocence through self-defense, and thus he cannot show by a preponderance of the evidence that they have the potential to result in evidence that is material to his innocence of murder in the first degree.[10]

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[10] See Moffat, 478 Mass. at 300-301 (testing of cigarette butts on side of road near victim's body, where there was nothing to indicate temporal link with shooting and no statements from defendant to police that alleged third-party culprits smoked cigarettes at scene, would not result in evidence material to identity of perpetrator). Contrast Clark, 472 Mass. at 135 (where testimony from victim was that assailant used kitchen knife, testing of DNA on handle had potential to result in evidence material to defendant's identification as perpetrator); Commonwealth v. Lyons, 89 Mass. App. Ct. 485, 486-487, 495 (2016) (potential for materiality in testing of strands of hair found in victim's hands where defendant denied she killed victim); Commonwealth v. Coutu, 88 Mass. App. Ct. 686, 702 (2015) (DNA testing of victim's finger swabs had potential to result in material identification evidence where she testified that she tried to "peel" and "pull" assailant's fingers off her nose and mouth and assailant was stranger to victim).

Contrary to the court's assertion, I do not take the position that, for the DNA evidence to meet the standard set out by the statute, it must have the potential to "'independently' and 'directly'" support an element of his self-defense claim. Ante at . I simply conclude that the evidence must have the potential to support his factual innocence through his self-defense claim. Where the DNA under the victim's fingernails cannot support the defendant's self-defense claim, either independently or in conjunction with the other evidence presented at trial, it cannot assist him in demonstrating his factual innocence, and it does not qualify under the statute.

Assuming, without deciding, that the defendant can rely on the alternative theory of voluntary manslaughter in meeting the materiality test, the presence of the defendant's DNA under the victim's fingernails would not give rise to a claim of mitigation from murder to manslaughter based on excessive use of force in self-defense or heat of passion induced by sudden combat or provocation.[11] "A killing 'is voluntary manslaughter,

[11] It is unlikely that a defendant asserting mitigating circumstances to a lesser included offense could avail him- or herself of the testing procedure provided for by G. L. c. 278A. Previously, in Williams, we limited our holding to cases "in which the defendant alleges that no crime occurred (as compared to a case in which a defendant alleged that he or she committed a lesser included offense)." Williams, 481 Mass. at 806 n.8. Voluntary manslaughter is a lesser included offense of murder in the first degree. Model Jury Instructions on Homicide 74 (2018).

not murder, if malice is negated by reasonable provocation[,] . . . sudden combat,'" or excessive use of force in self-defense. Commonwealth v. Acevedo, 446 Mass. 435, 449 (2006), quoting Commonwealth v. Boucher, 403 Mass. 659, 663 (1989). See Commonwealth v. Hinds, 457 Mass. 83, 91 (2010). At most, the presence of the defendant's DNA would suggest physical contact, such as the victim scratching or touching the defendant at some point in time.

Even when a victim initiates physical contact with a defendant, the evidence may not be sufficient to warrant a manslaughter instruction. Commonwealth v. Yat Fung Ng, 489 Mass. 242, 257 (2022). This is because "reasonable provocation also requires an objective showing that the precipitating event would have provoked heat of passion in the ordinary person." Commonwealth v. Felix, 476 Mass. 750, 757 (2017). Physical contact initiated by the victim may be even less telling "where the defendant outweighs and is physically far more powerful than the victim, and the defendant uses a weapon or excessive force." Id.

"[S]udden combat is among those circumstances constituting reasonable provocation." Commonwealth v. Howard, 479 Mass. 52, 58 (2018), quoting Camacho, 472 Mass. at 601 n.19. "A victim's conduct must present a 'threat of serious harm' to be considered reasonable provocation." Commonwealth v. Rhodes, 482 Mass. 823,

827 (2019), quoting Commonwealth v. Ruiz, 442 Mass. 826, 839 (2004).

Here, the victim was five feet, five inches tall and weighed approximately 120 pounds. The defendant, at the time, was approximately five feet, nine inches tall and weighed approximately 200 pounds. Touching, scratching, or even punching, at some point in time, in the circumstances of this case, would not permit an instruction on reasonable provocation where the defendant was larger than the victim, led him to the outside of the shelter in order to fight, and was armed with a knife. See, e.g., Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001) ("Bianchi's further testimony that the victim punched him in the face during their 'argument' adds little to his claim of provocation, where he intentionally precipitated the confrontation in violation of the protective order, was a weightlifter who outweighed the victim by more than 170 pounds, and was armed with a fully loaded weapon"). Thus, the defendant cannot show, by a preponderance of the evidence, that the fingernail clippings may lead to material evidence demonstrating his innocence of murder in the first degree in this respect.

For a defendant to be entitled "[t]o receive an instruction on the excessive use of force in self-defense, 'the defendant must be entitled to act in self-defense,' Commonwealth v. Berry, 431 Mass. 326, 335 (2000), but 'used more force than was

reasonably necessary in all the circumstances of the case.'" Commonwealth v. Anestal, 463 Mass. 655, 674 (2012), quoting Commonwealth v. Glacken, 451 Mass. 163, 167 (2008). To be entitled to use deadly force, a defendant "must have 'a reasonable apprehension of great bodily harm and a reasonable belief that no other means would suffice to prevent such harm.'" Anestal, supra, quoting Commonwealth v. Houston, 332 Mass. 687, 690 (1955). For the reasons indicated supra, because the presence of the defendant's DNA under the victim's fingernails would not be material to his self-defense argument where he used deadly force, it also would not be helpful to his argument of excessive force in self-defense.

That the jury in this case were instructed on voluntary manslaughter, with mitigating circumstances of heat of passion on reasonable provocation and excessive use of force in self-defense, is of no matter to the analysis. I take no position on whether the evidence, as it was presented at trial, warranted a voluntary manslaughter instruction. The point, as relevant here, is that the addition of the DNA on the victim's fingernail clippings would not contribute to an attempt to demonstrate the reasonableness of the defendant's actions. Therefore, the defendant is unable to show by a preponderance of the evidence

that the testing could lead to material evidence demonstrating the identity of the perpetrator of the crime in this case.[12]

Conclusion. Although "the Legislature intended to permit access to DNA testing 'regardless of the presence of overwhelming evidence of guilt in the underlying trial,'" and we construe the language in the statute as being generous to the moving party, that does not mean that the defendant has no hurdle to clear within the statute. Clark, 472 Mass. at 136, quoting Wade II, 467 Mass. at 511. The Legislature did not intend to permit access where the DNA testing, regardless of its result, would be immaterial to the defendant's identity as the perpetrator of the crime in the underlying case. Because the presence of the defendant's DNA under the victim's fingernails could not lead to material evidence with respect to the defendant's factual innocence where it cannot provide information explaining the defendant's use of deadly force, and at most could demonstrate that the victim touched the defendant at some point in time before his death, I am of the opinion that the defendant's motion pursuant to G. L. c. 278A, § 7, properly was denied.

I respectfully dissent.

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[12] Because the defendant cannot satisfy § 7 (b) (4), I do not address whether he satisfies § 7 (b) (3). See G. L. c. 278A, § 7 (b) (court shall allow analysis if "each of the following has been demonstrated by a preponderance").