Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJ-2014-0429

COMMONWEALTH OF MASSACHUSETTS

PLAINTIFF/APPELLEE

v.

ROBERT WADE,

DEFENDANTS/APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*, THE BOSTON BAR ASSOCIATION, IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL OF THE JUDGMENT BELOW

Michael D. Ricciuti (BBO#550771)
Kathleen D. Parker (BBO#681635)
Patrick C. McCooe (BBO#686223)
K&L GATES LLP
State Street Financial Center
One Lincoln Street
Boston, Massachusetts 02111-2950
617.261.3100 (telephone)
617.261.3175 (fax)

Attorneys for Amicus Curiae Boston Bar Association

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the Boston Bar Association

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I. INTEREST OF AMICUS CURIAE

The Boston Bar Association ("the BBA") was founded in 1761 by John Adams and other Boston lawyers and is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative and executive branches of government.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court's solicitation of amicus briefs to address the following issue:

> Whether, in order to obtain postconviction DNA testing under G. L. c. 278A and specifically, in order to support a finding under c. 278A, s. 7 (b) (3), that the evidence or biological material has not been subjected to the requested analysis for any of the reasons in [c. 278A, s. (3) (b) (5) (i)-(v)] it is sufficient for the defendant to establish that the requested analysis had not yet been developed at the time of the conviction, see c. 278A, s. 3 (b) (5) (i), or whether the defendant must also show that a reasonably effective attorney would have in fact sought the analysis had it been available.

Commonwealth vs. Robert Wade, No. SJC-11913, Amicus Announcement (October 22, 2015).

The BBA does not seek to be heard on the merits of Mr. Wade's underlying motion for a new trial, on which the BBA takes no position. Rather, the interest asserted by the BBA as amicus in this case is in ensuring that defendants like Mr. Wade have access to DNA testing as contemplated by the Legislature through G. L. c. 278A regardless of what such testing may show. This case raises important access to justice issues concerning the interpretation of that statute, which was designed to ensure access to justice through DNA testing, and a serious question about the scope of the attorney-client privilege.

The BBA has been, and remains, intensely and directly interested in Chapter 278A. The BBA proposed Chapter 278A to the Legislature as the result of the work of its Task Force on Wrongful Convictions and its resulting report, *Getting It Right: Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts*, in which the BBA concluded that a new statute was necessary to ensure access to DNA testing where a defendant claims factual innocence

and where DNA or other scientific testing would be appropriate. C. Add. at 33. The Legislature agreed and promulgated Chapter 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). The BBA is deeply concerned about the interpretation of Chapter 278A in this case, which frustrates the Legislature's aim. This is particularly the case where the Commonwealth has misused the BBA's testimony, which was given in favor of a statute to make DNA and other testing more freely available, to support a deeply flawed interpretation of Chapter 278A that would restrict such access.

Of equal importance to the BBA is the mistaken decision of the trial court which threatens defendants seeking the protection of Chapter 278A with the loss of the protections of the attorney-client privilege. The attorney-client privilege is critical to the proper functioning of the criminal justice system in Massachusetts. Safeguarding the attorney-client privilege is thus a vital concern for the BBA.

II. STATEMENT OF THE CASE AND THE FACTS

The BBA adopts the statement of the case and statement of facts set forth in Mr. Wade's brief as they relate to the two legal issues addressed by the BBA.

III. SUMMARY OF THE ARGUMENT

The trial judge below misread Chapter 278A. Under Chapter 278A, Section 7(b)(3), a defendant such as Mr. Wade who demonstrates that biological material was not subjected to the analysis requested under the statute because the requested analysis had not yet been developed at the time of conviction, as outlined in Chapter 278A, Section 3(b)(5)(i), has satisfied the requirements of Section 3(b)(5). The trial judge erred by requiring Mr. Wade to show that his attorney did not in fact seek DNA testing at trial, presumably to also satisfy the requirements outlined in Chapter 278A, Section 3(b)(5)(iv). Proof supporting either Section 3(b)(5)(i) or Section 3(b)(5)(iv), but not both, are all that is required under Section 3(b)(5). Once Mr. Wade demonstrated that the requested analysis had not yet been developed at the time of conviction, he satisfied the requirements of Section 3(b)(5)and

did not need to support any other prong of that section. (Pages 7-11).

Moreover, the trial court erred when it imposed on the defendant a requirement to prove the "primary cause" -- what the Commonwealth calls the "actual reason" -- that DNA testing was not conducted at the time of trial. This requirement is nowhere in the statute and, in all events, the defendant abandoned his argument under Section 3(b)(5)(iv)of the statute. But even had the argument been pursued, the trial court misread what the statute required. Section 3(b)(5)(iv) permits a defendant to obtain relief under Chapter 278A if he or she shows that the "results of the requested analysis were admissible," the requested analysis was not sought, and a "reasonably effective attorney would have sought the analysis." See Section 3(b)(5)(iv). The trial court properly found that the requested testing did not exist at the time of the conviction. As a result, a reasonably effective attorney could not have sought the requested analysis under Section 3(b)(5)(iv) because the requested analysis did not exist at the time of the conviction. The trial court's insistence that it determine the actual reason Mr. Wade's trial counsel did not seek a

different type of DNA testing at the time of trial was irrelevant to the issue as to whether a reasonably effective attorney would have sought the DNA analysis being requested under Chapter 278A. (Pages 11-15).

The trial court's mistaken reading of Chapter 278A imposes greater burdens on defendants seeking DNA and other testing than those required under Chapter 278A. As such, its decision not only contradicts the statute's plain text, but it also abrogates the Legislature's purpose to reduce the burdens faced by defendants seeking DNA testing and thereby "remedy the injustice of wrongful convictions of factually innocent persons by allowing access to analyses of biological material with newer forensic and scientific techniques." Wade, 467 Mass. at 504 (emphasis added). (Pages 15-18).

The trial court's erroneous reading of the statute also resulted in an even more fundamental error: an unusual order requiring Mr. Wade's trial counsel to reveal highly confidential communications protected by the attorney-client privilege. The trial court sought this testimony to determine the "primary cause" for a lack of DNA testing at trial. This was a

grave error. There was no express or implied waiver of the privilege by the defendant under the facts of this case, and none is required under Chapter 278A itself, to justify this improper invasion of the attorney-client privilege. (Pages 18-27).

Accordingly, the trial court's decision misreads Chapter 278A, thereby placing the attorney-client privilege at risk and imposing substantial barriers to DNA testing, turning on its head the Legislature's intent to make DNA testing more widely available through this statute. Left uncorrected, the decision below will strongly dissuade criminal defendants from seeking the protections of the law and substantially increase the barriers to defendants seeking DNA testing. This Court should thus reverse the trial court's order denying relief under Chapter 278A.

IV. ARGUMENT

A. The Trial Court Erred by Ignoring the Plain Text of M.G.L. c. 278A Section 7(b)(3) and 3(b)(5), Which Require A Defendant To Prove Only One Ground For Relief.

The trial court erred by ignoring the text of Sections 7(b)(3) and 3(b)(5) of Chapter 278A which requires Mr. Wade to prove only one of the specified reasons for relief under Section 3(b)(5).

In order to obtain testing requested under Chapter 278A, Section 7(b)(3) requires a defendant to prove a number of elements, by a preponderance of the evidence, including that "the evidence or biological material has not been subjected to the requested analysis for any of the reasons in clauses (i) to (v), inclusive, of paragraph (5) of subsection (b) of section 3" (emphasis added). Section 3(b)(5), in turn, provides that a defendant moving for relief under Chapter 278A must include "information demonstrating that the evidence or biological material has not been subjected to the requested analysis because" of one of five listed reasons (emphasis added). The reasons set forth in Section 3 include that "the requested analysis had not yet been developed at the time of the conviction." Section 3(b)(5)(i) (emphasis added).

Because the five enumerated reasons in Section 3(b)(5) are separated by the connector "or", a plain reading of the statute makes clear that proving the reason set forth in Section 3(b)(5)(i) alone fully justifies relief under the statute. See Wade, 467 Mass. at 510. As this Court found in interpreting Section 7 of Chapter 278A, "[t]he word 'or' has a

'disjunctive meaning unless the context and main purpose of all the words demand otherwise.'" Commonwealth v. Clark, 472 Mass. 120, 124 (2015) (citations omitted). A disjunctive reading is the proper reading here. This interpretation is confirmed by Section 7(b)(3), which states that a defendant seeking DNA testing under Chapter 278A need prove by a preponderance of the evidence "any of the reasons in clauses (i) to (iv),inclusive, of paragraph (5) of subsection (b) of section (3)" (emphasis added). Therefore, once a defendant establishes that the requested test was unavailable at the time of the conviction under clause (i), he or she does not also need to establish any of the other reasons set forth in Section 3(b)(5). This includes clause (iv), which permits a defendant to obtain relief under Chapter 278A if he or she shows that the "results of the requested analysis were admissible" and a "reasonably effective attorney would have sought the analysis." See Section 3(b)(5)(iv).

This Court recently provided guidance as to how a defendant can show, by a preponderance of the evidence, that the requested analysis had not yet been developed at the time of the conviction. In

Commonwealth v. Donald, 468 Mass. 37, 46-47 (2014), this Court explained that the statute entitles a defendant to the requested analysis where that analysis would be more probative than tests available at the time of trial. See 468 Mass. at 46-47 (a motion under Section 3 "should not be denied on the ground that the evidence sought to be tested has been subjected previously to a method of testing, if the accuracy of that testing has materially improved the test's ability to identify the perpetrator of a crime"). In this case, Mr. Wade seeks 15 CODIS loci testing. See Appellant's Brief, p. 10. Under Donald, the inquiry for the trial court under Section 3(b)(5)(i) is whether that particular test was available at the time of the conviction, and whether the "accuracy of that testing has materially improved the test's ability to identify the perpetrator of a crime." 468 Mass. at 47. As the Donald Court stated, such an inquiry is consistent with the Legislature's intent to enact Chapter 278A "to allow access to more sophisticated forensic and scientific tests than were available at the time of a moving party's trial." See id. at 46.

The trial judge, however, did not engage in this inquiry, but instead required Mr. Wade to prove the "primary cause" why DNA testing was not conducted at the time of trial. This "primary cause" requirement is not found anywhere in Section 7 or elsewhere in Chapter 278A. By injecting this requirement into the statute, the trial court improperly rejected Mr. Wade's argument as to clause (i) and erroneously focused its review on Mr. Wade's withdrawn argument that DNA testing was not sought because Mr. Wade's counsel did not seek such an analysis. See A. 510 (Trial Court Ruling, p. 5).

That the trial court's "primary cause" reading is in error is highlighted not only by the above-discussed statutory language, but by the text of the section on which the trial court based its decision, Section 3(b)(iv), which does not support the judge's reading. That clause focuses on whether "a reasonably effective attorney would have sought" at the time of trial the DNA analysis now being requested. Where, as here, the test that is being requested under Chapter 278A did not exist at the time of the conviction, Section 3(b)(iv)is simply inapplicable, as no attorney could have sought a nonexistent test. The trial

court's effort to determine whether Mr. Wade's trial counsel believed that the DNA testing that was available at the time of conviction should have been pursued was thus irrelevant to the issue posed under Section 3(b)(5)(i).

Additionally, even had Section 3(b)(5)(iv) been applicable here, the trial court's reasoning would still have been in error. In seeking the "primary cause" why DNA testing was not performed at the time of trial, the trial court sought to determine what Mr. Wade's counsel actually did and why. This subjective analysis was improper. As this Court found in Wade, Section 3(b)(5)(iv) creates an objective inquiry, and simply asks the trial court to determine what a "reasonably effective attorney" would have done, not a subjective inquiry as to what trial counsel actually did. See Wade, 467 Mass. at 511 ("a determination that the failure of Mr. Wade's trial counsel to seek DNA testing was a reasonable, strategic decision … does not preclude a determination that a 'reasonably effective attorney' would have done so"); Single Justice decision (Gants, J.) (A. 289) ("I recognize that the judge's finding must rest on whether 'a reasonably effective attorney' would have sought the

DNA analysis, and not on whether this attorney sought it"). Indeed, the Wade court noted that unlike legislatures in other states, the Massachusetts Legislature did not require defendants to show that their lawyers had foregone DNA testing for tactical or strategic reasons to obtain relief under the statute, making clear that the standard under Section 3(b)(5)(iv) is objective, not subjective. Wade, 467 Mass. at 511-12.

The Commonwealth also erroneously reads Chapter 278A to require defendants to prove the "actual" reason or reasons why DNA testing was not conducted at trial. See, e.g., A. 371-2, 375; Commonwealth Br. at 3 (under Chapter 278A, defendant must "prove the reason why testing was not performed"), 17 (defendant must prove the "actual reason" DNA testing was not conducted at the time of trial). It complains that Mr. Wade's reading of the plain text of Section 3(b)(5)(i) means that "whenever a defendant can demonstrate that a new scientific test is developed after his conviction, he is automatically entitled to subject the physical evidence to that new test." Commonwealth Br. at 28. This Court has already concluded that only where a new test would be more probative than tests

available at the time of trial does the statute provide for that testing. See Donald, 468 Mass. at 46-7. Further, a defendant who can satisfy the requirements of Section 3(b)(5)(i) is not "automatically" entitled to relief, but rather must still meet the remaining requirements of Chapter 278A.

The Commonwealth's reliance on the BBA's testimony in support of the bills that became Chapter 278A to support its deeply flawed reading of the statute is also in error. See Commonwealth Br. at 26-7; C. Add. 37. The BBA did not support imposing on defendants the increased burden under Section 7 which the Commonwealth seeks. The BBA's testimony cited by the Commonwealth addressed a defendant's preliminary obligation under Section 3 of the statute to support a request for DNA testing in order to be accorded a hearing, which is not at issue here. Moreover, the BBA supported what became Chapter 278A to streamline a defendant's access to DNA testing to address wrongful convictions and avoid costly litigation that had burdened defendants and prosecutors under the prior procedure. See C. Add. 40-1. The Commonwealth's reading of Chapter 278A urged here would substantially increase litigation of Chapter 278A claims and impose

the very costs that the BBA believes Chapter 278A was designed to avoid.

The trial court's reading of the plain text of Chapter 278A is in error. Its judgment thus should be reversed.

B. The Trial Court's Mistaken Interpretation of M.G.L. c. 278A Section 7(b)(3) and 3(b)(5) Frustrates The Legislature's Intent And Purpose To Expand Defendants' Access To DNA Analysis.

The trial court's interpretation of Chapter 278A substantially increases the burden on a defendant seeking DNA testing under Chapter 278A by requiring defendants to meet further requirements than the Legislature required under the statute. This not only contravenes the plain language of Chapter 278A, it frustrates the Legislature's purpose in passing the statute. The trial court's judgment thus should be reversed.

As this Court recognized in Wade, a statute "must be interpreted according to the intent of the Legislature." 467 Mass. at 501 (citations omitted). "Courts must ascertain the intent of the statute from all of its parts and from the subject matter to which it relates, and must interpret the statute so as to

render the legislation effective, consonant with sound reason and common sense." Clark, 472 Mass. 120, 121(citations omitted).

The interpretation of a statute begins with its text. Commonwealth v. Raposo, 453 Mass. 739, 743 (2009). As shown above, the text of Chapter 278A provides relief where a defendant can satisfy one of the requirements of Section 3(b)(5). Further, the statute simply does not require a defendant to show the "primary cause" or "real reason" that any DNA test was not pursued at trial. The trial court's reading of Chapter 278A thus wrongly imposes unnecessary hurdles to a defendant seeking relief under the statute.

This is directly contrary to the Legislature's intent. In passing Chapter 278A, the Legislature sought 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." Wade, 47 Mass. at 504, quoting 2011 Senate Doc. No. 753, 2011 House Doc. No. 2165 (C. Add at 4). "[T]he Legislature … intended that Chapter 278A provide increased and

expeditious access to scientific or forensic testing" and was designed to create "the process that allows the testing," since prior practice denied defendants such evidence in presenting a motion for a new trial. Wade, 467 Mass. at 509 (emphasis added).

In enacting G.L. c. 278A, § 3(b), the Legislature purposely "set[] a far lower bar for access to scientific testing than that required by similar statutes in other States."[1] Indeed, in Clark, this Court emphasized that the Legislature's goal was that Chapter 278A would make DNA testing more available even where the evidence of guilt was overwhelming:

> Given its compelling interest in remedying wrongful convictions of factually innocent persons, the Legislature intended to permit access to DNA testing 'regardless of the presence of overwhelming evidence of guilt in the underlying trial.' As such, it is entirely appropriate that we construe the language of G.L. c. 278A, § 7(b), in a manner that is generous to the [Defendant].

472 Mass. at 136, citing Wade, 467 Mass. at 511.

Even though the motion judge did not have the benefit of Clark at the time of his decision, Clark only

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[1] Wade, 467 Mass. at 509 and n.16; Clark, 472 Mass. at 132, n.14.

reiterates what this Court had already stated in Wade and Donald: Section 3(b) is to be interpreted in light of legislative intent to expand access to DNA testing. See Wade, 467 Mass. at 497, 505; Donald, 468 Mass. at 46.

Because the trial court's judgment is contrary to the text of, and intent behind, Chapter 278A, it should be reversed.

C. The Trial Court Erroneously Compelled Disclosure Of Highly Confidential Attorney-Client Privileged Information.

The trial judge's erroneous focus on the "primary cause" that DNA testing was not pursued at trial was not only inconsistent with the plain language of the statute and the legislative intent in promulgating it, it also led the court to a deeply flawed conclusion that Mr. Wade had waived the attorney-client privilege merely by pursuing relief under Chapter 278A. As a result, the trial court forced Mr. Wade's trial counsel to reveal confidential attorney-client communications. See A. 384 ("THE COURT: The privilege has been waived"). Because this error strikes at a fundamental tenet of the criminal justice system in Massachusetts, the trial court's judgment should be reversed.

The attorney-client privilege is a bedrock principle undergirding the legal system in Massachusetts. "The purpose of the privilege 'is to enable clients to make full disclosure to legal counsel of all relevant facts ... so that counsel may render fully informed legal advice,' with the goal of 'promot[ing] broader public interests in the observance of law and administration of justice.'" Comm'r of Revenue v. Comcast Corp., 453 Mass. 293, 303 (2009) (citations omitted). The "attorney-client privilege exists 'to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.'" Clair v. Clair, 464 Mass. 205, 218-9 (2013), quoting Upjohn Co. v. United States, 449 U.S. 383, 390(1981). "The privilege operates to protect disclosures which might not have been made absent the privilege. It encourages clients to seek an attorney's advice and to be truthful with the attorney, which in turn allows the attorney to give informed advice; the attorney-client privilege serves the public interest and the interest of the administration of justice." Commonwealth v. Goldman, 395 Mass. 495, 502 (1985) (citations

omitted). The attorney-client privilege thus permits confidential information to be withheld from disclosure that would otherwise be appropriate in adversary proceedings. As this Court held in Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.:

> The attorney-client privilege is so highly valued that, while it may appear to frustrate the investigative or fact-finding process ... [and] create [] an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process,... it is acknowledged that the social good derived from the proper performance of the functions of lawyers acting for their clients ... outweigh [s] the harm that may come from the suppression of the evidence.

449 Mass. 609, 615-616 (2007), internal quotations omitted. As a result, the balance between discovery of relevant facts and preservation of the attorney-client privilege "is unquestionably resolved in favor of recognizing the privilege." Comcast, 453 Mass. at 304 (emphasis added); see also, e.g., Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 457 n. 26 (1997); Massachusetts Guide to Evidence, §502(b)(1) ("A client has a privilege to refuse to disclose and prevent others from disclosing confidential communications

made for the purpose of obtaining or providing legal services to the client"); Mass. R. Prof. C. 1.6(a)("A lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation").

Waivers of the attorney-client privilege must be voluntary. See In The Matter Of The Reorganization of Elec. Mut. Liab. Ins. Co., Ltd., 425 Mass. 419, 423 (1997) (no voluntary waiver of the privilege where the confidentiality of privileged communications is breached, but proponent of privilege had taken reasonable precautions against disclosure). Here no such voluntary waiver occurred.

First, there was plainly no express waiver of the attorney-client privilege in this case. Mr. Wade explicitly forwent the argument under Section 3(b)(5)(iv)that the Court concluded resulted in a waiver, that Mr. Wade's lawyer failed to seek DNA analysis where "a reasonably effective attorney would have." A. 367-70. There thus can be no doubt that Mr. Wade did not expressly waive the privilege after he abandoned this argument.[2]

[2] The Commonwealth's argument that Section 15 of Chapter 278A prohibited Mr. Wade from foregoing his

Second, there was no implied waiver of the attorney-client privilege, and the trial court erred by agreeing with the Commonwealth's contention that the filing for relief under Chapter 278A constituted such an implied waiver. See A. 510; Add. 9; Commonwealth Br. at 43 ("The filing of the motion under chapter 278A waived the defendant's attorney-client privilege"). Chief Justice Gants rightly signaled in the Single Justice decision in this matter that such an aggressive reading of the statute was erroneous, and properly limited the scope of the examination of Mr. Wade's trial counsel to inquiries that did not reveal attorney-client communications. See A. 289-90 (Single Justice Opinion) ("I am skeptical of the Commonwealth's argument that a defendant, by moving for post-trial forensic or scientific analysis under G.L. c. 278A, necessarily waives his attorney-client privilege with respect to all communications with his trial counsel").

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claim under Section 3(b)(5)(iv) is flatly wrong. Commonwealth Br. at 37, 46. Section 15 prohibits the Commonwealth from seeking a waiver of a defendant's right to seek relief under Chapter 278A, such as in a plea agreement. It plainly does not prevent a defendant from forgoing an argument that threatened the sanctity of the attorney-client privilege.

In Darius v. Boston, 433 Mass. 274 (2001), this Court established the "general framework" for considering when the making of an argument effected an "at issue" waiver of the attorney-client privilege. Clair, 464 Mass. at 214; Massachusetts Guide to Evidence, §523(b) ("[A] privilege is waived if the person upon whom this Article confers a privilege against disclosure … introduces privileged communications as an element of a claim or defense"). Darius recognized that there are "some circumstances in which the privilege may be deemed waived other than by express waiver"; for instance, "a litigant may implicitly waive the attorney-client privilege, at least partly, by injecting certain claims or defenses into a case." Darius, 433 Mass. at 277; Mass. G. Evid. § 523(b)(2) (2015) (privilege waived where person or entity holding privilege "introduces privileged communications as an element of a claim or defense"). Thus, where "[t]he nature of the defendants' allegations placed the work [the attorney] performed in the underlying litigation directly at issue, and [the attorney] was the only source available to testify regarding the work she performed," an implied waiver could be found. Clair, 464 Mass. at 219,

quoting Zabin v. Picciotto, 73 Mass.App.Ct. 141, 158 (2008) (emphasis added). Even where an "at issue" waiver is found, however, the scope of that waiver is not a "blanket" waiver but rather a "limited waiver of the privilege with respect to what has been put 'at issue.'" Darius, 433 Mass. at 277-78.

Under these principles, the privilege is waived where a party affirmatively puts privileged communications in dispute so that the substance of otherwise protected communications becomes "essential" to determining the claim. Such a waiver may occur in criminal cases where a defendant affirmatively asserts that his counsel was ineffective; in that circumstance, "the attorney-client privilege may be treated as waived at least in part" to resolve the claim made, even though "trial counsel's obligation may continue to preserve confidences whose disclosure is not relevant to the defense of the charge of his ineffectiveness as counsel." Commonwealth v. Brito, 390 Mass. 112, 119(1983).

Any basis for finding an "at issue" waiver in this case evaporated when Mr. Wade withdrew his claim under Section 3(b)(5)(iv). The trial therefore court mistakenly concluded that Mr. Wade had forever waived

the privilege, and fundamentally erred when it repeatedly pressed Mr. Wade's counsel to waive the privilege, ordering him to "answer the question" that required a waiver of the privilege (A.382-391) -- whether "the defendant [told] you he had sex" with the victim (A.382-91) -- to determine the "primary cause" that DNA testing was not pursued at the time of trial. The trial court's pursuit of the "primary cause" for the failure to request the DNA testing did not justify the invasion of the attorney-client privilege. See Goldman, 395 Mass. at 499-500 (defendant does not waive the privilege by taking the stand or by testifying about events that had been the topic of a privileged communication, and only waives the privilege by "testif[ying] as to the specific content of an identified privileged communication"); see also Buster v. Geo. W. Moore, Inc., 438 Mass. 635, 654 (2003) ("To abrogate the attorney-client privilege merely because of a litigant's invocation of a legal position or theory in a pleading 'would pry open the attorney-client relationship and strike at the very core of the privilege,'" citing Darius, 433 Mass. at 280).

More generally, a defendant like Mr. Wade should not be found to have waived the attorney-client privilege merely by making a claim under Section 3(b)(5)(iv) of Chapter 278A. As the Donald court and Chief Justice Gants concluded, a motion under that section calls on the court to apply an objective test of what a reasonably effective counsel could have done, not a subjective analysis of what trial counsel actually did. Because a motion relying on Section 3(b)(5)(iv) is not the equivalent of an ineffective assistance of counsel motion, it does not call for a subjective analysis. A Chapter 278A motion relying on Section 3(b)(5)(iv) should not be considered, in and of itself, a waiver of the privilege as a matter of law.

As noted above, the purpose of Chapter 278A was to broaden the availability of DNA testing to criminal defendants who meet the requirements of the statute. The trial court's reading of the statute to find an "at issue" waiver injected a substantial element of risk that turns this legislative intent on its head. Left uncorrected, the trial court's interpretation will strongly deter criminal defendants, including those in capital cases, from seeking the protections

of the law. Such a result will chill access to justice through the mechanism of Chapter 278A, directly contrary to the legislature's purpose for promulgating the law.[3]

V. CONCLUSION

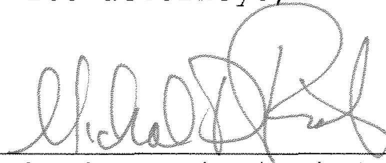
The trial court's erroneous interpretation of Chapter 278A, and its unsupportable finding of a waiver of the attorney-client privilege, wrongly imposed substantial barriers to defendants like Mr. Wade who seek the relief the Legislature intended to provide them through Chapter 278A. The trial court's fundamentally flawed decision, which misapprehended the text and purpose of the statute and wrongly invaded the attorney-client privilege, should be reversed.

[3] Although not argued below, it also appears the trial court erred when it made no effort to protect from disclosure the mental impressions of Mr. Wade's trial counsel. As this Court made clear in Comcast, the work product doctrine is broader than the attorney-client privilege. It "enhance[s] the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties." Comcast, 453 Mass. at 311, quoting Ward v. Peabody, 380 Mass. 805, 817 (1980). "The purpose of the doctrine is to establish a 'zone of privacy for strategic litigation planning'" and protects a lawyer's "mental impressions" from disclosure. Comcast, 453 Mass. at 311-12 (citation omitted). At a minimum, the mental impressions drawn and conclusions reached by Mr. Wade's counsel should not have been exposed.

Respectfully submitted,

BOSTON BAR ASSOCIATION,

By its attorneys,



Michael D. Ricciuti (BBO#550771)
Kathleen D. Parker (BBO#681635)
Patrick C. McCooe (BBO#686223)
K&L GATES LLP
State Street Financial Center
One Lincoln Street
Boston, Massachusetts 02111-2950
617.261.3100 (telephone)
617.261.3175 (fax)

Dated: November 24, 2015

RULE 16(k) STATEMENT

I hereby certify that the foregoing Brief Of Amicus Curiae, The Boston Bar Association, In Support Of Defendant-Appellant And Reversal Of The Judgment Below complies, to the best of my knowledge and belief, with the Rules of Court pertaining to the filing of appellate briefs, including those requirements specified in Mass. R. App. P. 16(k).

Michael D. Ricciuti

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2015, I caused to be served two copies of the foregoing Brief Of Amicus Curiae, The Boston Bar Association, In Support Of Defendant-Appellant And Reversal Of The Judgment Below, by first-class mail, on the following counsel of record:

For Appellant Robert Wade:

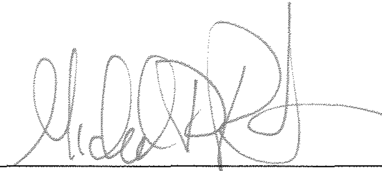
Janet Hetherwick Pumphrey, Esq.
45 walker Street
Lenox, MA 01240

For Appellee Commonwealth of Massachusetts:

Mary Lee, Esq.
Assistant District Attorney
Plymouth County District Attorney's Office
32 Belmont Street
Brockton, MA 02301

For Amicus Curiae Committee for Public Counsel Services, Innocence Program:

Ira L. Gant, Esq.
Committee for Public Counsel Services
Innocence Program
21 McGrath Highway
Somerville, MA 02143



Michael D. Ricciuti