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February 22, 1996

Michael Elbery
168 Fairfield Street
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Dear Michael:

Enclosed is what I propose to file, including an affidavit needing your signature. I will also draft an affidavit with my signature to identify certain exhibits such as the grand jury minutes and probable cause transcript.

Very truly yours,

^ABobby Scheketoff

Robert L. Sheketoff

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIM. NOS.
93-01351, 93-01352, and
93-.01354

COMMONWEALTH)
V.)
MICHAEL ELBERY)

MOTION FOR NEW TRIAL

Now comes the defendant in the above-captioned matter and respectfully moves this Honorable Court pursuant to Rule 30 of the M.R. Crim. P. to grant him a new trial on the grounds that it appears that justice may not have been done as more specifically set forth below. The defendant further moves for appropriate discovery pursuant to Rule 30 (c)(4). In support of his motion, the defendant relies on the probable cause hearing transcript, the grand jury minutes, the trial transcript, the pleadings filed with the Superior Court, and the Affidavits and Memorandum filed herewith and incorporated herein by reference.

The defendant further says as follows:

1. He was denied his state and federal constitutional rights to the effective assistance of trial counsel under Article 12 and the Fourteenth Amendment due to serious failures upon the part of trial counsel which severely prejudiced the defendant.
2. The case against the defendant was far from overwhelming and depended in large part on a credibility contest between the alleged victim, Thomas King, and the defendant. Thus, failures

to undermine King or corroborate the defendant would be extremely-prejudicial.

3. The defendant testified that he was football tackled and that several people got on top of him. According to the defendant, any touching of King's eye would have been accidental during their struggle. King however testified that the defendant jammed his thumb into King's left eye twice, and the second time "on the inside of my eye and kept pushing the thumb into my eye."

4. The hospital record of King's injury, which was introduced as an exhibit at trial, was never explained to the jury. That record reveals with the benefit of expert analysis that King's injuries were superficial, and are inconsistent with his trial testimony.

5. Trial counsel had two avenues open to him prior to trial. He could have interviewed the medical personnel that treated King at the hospital, or he could have sought his own expert to review the medical record. Apparently, he did neither and produced no expert medical witness at trial to explain that the medical evidence contradicted King's testimony.

6. Trial counsel also failed to subpoena or produce the medical records of Christina Mann who claimed to have received stitches as a result of the defendant's breaking of a beer bottle in the bar. Her testimony colored the entire incident and served as the justification for King's aggressive behavior. Trial counsel was aware that his client wanted her testimony at least investigated, but simply ignored the issue.

7. King had significant problems with his police department as a result of the no probable cause finding by Judge Raphaelson. This information was disclosed to trial counsel by the prosecution. Inexplicably, trial counsel refrained from raising it before the jury. Thus, when the jury was instructed about taking "interest" into account in assessing credibility, the instruction appeared to only apply to the defendant.

8. King admitted at the probable cause hearing that he had told A.D.A. Salloum that he was not assaulted by the defendant with a beer bottle. Trial counsel failed to file a motion to dismiss under Commonwealth v. O'Dell, 392 Mass. 445, 446-47 (1984) after a misleading presentation to the grand jury on this issue. In addition, trial counsel failed to impeach King at trial on this issue. Further, trial counsel never requested the trial court to explain that a citizen has no right to arrest unless a felony was in fact committed. See Commonwealth v. Grise, 398 Mass. 247 (1986). Thus, the prosecutor's argument that King had the right went unchallenged. See Tr. 1242. Defense counsel's failings allowed full exploitation of this spurious charge.

9. Trial counsel failed to assure that the defendant's booking tape was preserved. That tape would have revealed the severe beating that the defendant received. Trial counsel also failed to introduce the defendant's entire medical record.

10. In addition, trial counsel failed to exercise appropriate judgment on issues of his independence from courtroom personnel and his own staff:

(a) Trial counsel's secretary revealed to the defendant after the trial that she grew up, with the witness Schlenner's wife and that they were best friends. Trial counsel never disclosed this information to the defendant.

(b) Trial counsel did not bring to the trial court's attention comments made by court officers to the Commonwealth witnesses before they testified that the defendant was going to sue them civilly.

(c) Trial counsel did not object to the courtroom clerk although the clerk's son was to be and did testify for the prosecution. Trial counsel revealed to the defendant during the trial that the clerk had expressed his anger at the cross-examination of his son to trial counsel.

11. These enumerated circumstances entitle the defendant to discovery, an evidentiary hearing, and a new trial.

Respectfully submitted,
By his attorney,

Robert L. Sheketoff
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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIM. NOS.
93-01351, 93-01352,
and 93-01354

COMMONWEALTH

V.

MICHAEL ELBERY

MEMORANDUM IN SUPPORT
OF MOTION FOR NEW TRIAL '

A. The Law

A motion for new trial is addressed to the sound discretion of the trial court. The first question presented by such a motion is whether a substantial issue necessitating an evidentiary hearing has been raised. Foggarty v. Commonwealth, 406 Mass. 103, 111 (1989); Commonwealth v. Meggs, 30 Mass. App. Ct. 111, 114 (1991). The trial court must evaluate the seriousness of the claim presented and the adequacy of the factual showing on the claim. See Commonwealth v. Stewart, 383 Mass. 253, 260 (1981).

When a substantial issue appropriately supported has been raised, an evidentiary hearing should be held. Commonwealth v. Aviles, 31 Mass. App. Ct. 244, 249 (1991). A substantial claim of ineffective assistance of counsel, an issue of constitutional importance, requires a hearing in the interests of justice. See Commonwealth v. Licata, 412 Mass. 654, 660-61 (1992).

The defendant at trial was entitled under the Sixth and Fourteenth Amendments and art. 12 to the effective assistance of

counsel. See Strickland v. Washington, 466 U.S. 688 (1984) and Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). When defense counsel's performance falls measurable below that which might be expected of an ordinary fallible lawyer, and the performance is seriously prejudicial to the defense, then a violation of the defendant's rights has occurred.

The failure to interview or call material witnesses or to adequately pursue a defense raises serious questions as to the effectiveness of counsel. See Commonwealth v. Licata, supra, 412 Mass. at 661; Commonwealth v. Aviles, supra, 31 Mass. App. Ct. at 247. The failure to observe and object to obvious error can amount to ineffective assistance of counsel. See Commonwealth v. Shelley, 374 Mass. 466, 473 (1978) (failure to object to improper argument); Kimmelman v. Morrison, 477 U.S. 365 (1986) (failure to properly preserve motion to suppress). Thus, counsel has an obligation to understand the law and the facts. An attorney, not unlike any other professional, is required to exercise the customary skill and knowledge which normally prevails at the time and place. See Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970) (en banc).

B. The Trial Facts

The Commonwealth and defense called ten witnesses at trial. The prosecutor conceded in his closing argument "that they all saw things a little bit differently.". See Tf.5:1233. Five of the witnesses were part of a group of men that went to the Winners Circle bar regularly and were friends. See Tr.3:749.

the Commonwealth's only other witness, Christina Mann, was called first to set the stage for the prosecution theory that the defendant was out of control and that King and his friends acted responsibly.

Christian Mann testified that on September 28, 1992 she was eighteen years old and worked as a waitress. Tr.1:139, 148. She worked the night of September 28, 1992 and then went to the Winners Circle bar with a co-worker, Alice Arsneault. Tr.1:139-40. About fifteen minutes after she arrived she heard an argument between the bartender and the defendant. Tr.1:140-41. It cooled down, and then there was more yelling; someone told the defendant to sit down. Tr.1:141-42. It started getting louder and she observed the defendant holding a beer bottle by its neck. Tr.1:142. He then hit the pole with the bottle, and she was cut with a bit of flying glass. Tr.1:143-44. She screamed and covered her eye; someone came over and told her it was just a little cut. Tr.1:144. She left with her friend, and went to a hospital where she received stitches. Tr.1:147. This cut became the a major justification for King's subsequent activities.

Thomas King testified that he was a detective with the Westboro Police and worked the 3:00 p.m. to 11:00 p.m. shift on September 28, 1992. Tr.2:186. On his way home he was paged on his beeper and advised to pick up some evidence at the University of Massachusetts. Tr.2:187. After doing so, he went to the Winners Circle where he knew the bartender, Jeff Schlener. Tr.2:187. He arrived about 12:30 a.m. Tr.2:188. He had two

vodka drinks. Tr.2:188.

Shortly after his arrival he saw Schlener having a disagreement with the defendant. Tr.2:188-89. The defendant was cursing. Tr.2:189. He started walking over to the defendant and Mitch DePasquale stopped him. Tr.2:189. . The defendant swore at him and asked him to step outside. Tr.2:190. He walked away, told the defendant he wouldn't waste his time, and then sat down. Tr.2:190. The bar then quieted down. Tr.2:190.

Later, the defendant jumped up, yelled something, and smashed a beer bottle. Tr.2:191. He then held the jagged edges in front of him waving it in the direction of Schlener and the rest of the patrons. Tr.2:192. This, claim was King's best argument for his theory that he chased the defendant lawfully in order to make a citizen's arrest. He testified that one woman had her hand to her face and was bleeding. Tr.2:194. The defendant turned and ran out the door, and he ran after him. Tr.2:195.

The defendant ran about fifty yards, stopped, and turned. Tr.2:197. He told the defendant he had hurt a lady in the bar and that he wasn't going anywhere until the police arrived. Tr.2:199. The defendant then took a few punches at him, all of which he blocked, but one. Tr.2:200. He grabbed the defendant and tried to restrain his arms. Tr.2:201. The defendant got one arm free and jammed his thumb into his left eye. Tr.2:201. Feeling blinded in the eye, King said, he knocked the defendant to the ground. Tr.2:202. The defendant, jammed his thumb back into the same eye and kept pushing it in. Tr.2:202. At that point

King became aware that people were behind him, and he asked them to hold the defendant until the police arrived. Tr.2:202. He then rolled off the defendant, and found vitreous fluid and blood coming out of his eye. Tr.2:203. Two individuals came by and took him to Memorial Hospital. Tr.2:203. He had a cut on his eyeball. Tr.2:203-04. This medical testimony went unimpeached, and transformed a simple fight, in which King could easily be viewed as, the aggressor trying to make an arrest which he lacked authority to make, into a very serious criminal case.¹

Richard Taraskiewicz testified that he observed the defendant giving the bartender a hard time. Tr.3:493-94. He was sitting next to King and he made a comment about it to King. Tr.3:494. He then got up and went to the bathroom. Tr.3:494. While in the bathroom he heard King tell the defendant he should leave, and the defendant responded that they should go outside and fight. Tr.3:494. When he got out' of the bathroom, King sat next to him again. Tr.3:494.

Some time later, the defendant broke a bottle against the

1" In his summation, the prosecutor forcefully argued King's medical condition.

At that time is when the defendant gets his one arm free, digs his finger into King's eye and tries to put it out.

Tr. 1239.

* * * *

You all know that happened in this case. The defendant tried to take out Mr. King's eye.

Tr. 1242.

pole and some glass struck a woman. Tr.3:495. The defendant backed out of the bar holding the neck of the bottle to protect himself. Tr.3:495. King and the rest of them then went outside. Tr.3:495. He saw King and the defendant paired off, jogging back and forth. Tr.3:497. They worked their way down to Harpies Auto Parts. Tr.3:497.

The defendant threw the first punch, and then King and the defendant got into a wrestling match. Tr.3:498. They went to the ground. Tr.3:499. Taraskiewicz said he then advanced, and saw the defendant put his finger in King's eye. Tr.3:500. The fight then started to swing in the defendant's favor, and he and others jumped in to stop it. Tr.3:501.

When King got up, he saw blood coming out of King's eye. Tr.3:501. A car pulled up, and the two men in it offered to bring King to the hospital. Tr.3:501. He, Dennis O'Connor, and Mitch DePasquale restrained the defendant by holding him down. Tr.3:501-02.

Jeffrey Schlener testified that he was a bartender and was working at the Winner's Circle at the time of the incident. Tr.3:579-80. The defendant came in about 12:50 a.m. Tr.3:582. He made a comment to the defendant about his being opinionated and the defendant got mad. Tr.3:584-85. The defendant was swearing at him; King got up, walked over,, and told the defendant to leave. Tr.3:585. The defendant told King he should take him outside and beat him up. Tr.3:586. Schlener said he told King to slide over because it appeared that the defendant was calming

down, and King went back to his seat. Tr.3:586.

Three or four minutes later he heard a crash, and glass was flying. Tr.3:587. The defendant had taken a beer bottle and smashed it. Tr.3:587. One of the girls got' cut and yelled. Tr.3:588. The defendant ran out the door. Tr.3:588.

Schlener said he went and checked on the girl. Tr.3:591. King went out the door, and seconds later Donnie Wyme, Richard Taraskiewicz, and Dennis O'Conner followed. Tr.3:592-93. When he went out he saw King going to tackle the defendant, and the defendant threw a punch. Tr.3:594. The other three who had left the bar were right around them. Tr.3:594. Wyme came running back to him and told him King hurt his eye. Tr.3:595. He then called the police. Tr.3:595. When the police came the defendant stood up, and he looked a little dazed. Tr.3:597.

Mitchell DePasquale testified that he was a nursing assistant and had been employed as a door man at the Winners Circle. Tr.3:678-79. He had about four or five beers that night. Tr.3:697. He heard a yelling match between the defendant and King. " Tr.3:697. King walked around the bar toward the defendant. Tr.3:700. DePasquale said he then stood in front of King and told him to go back to his seat. Tr.3:701.

About fifteen minutes later he heard a beer bottle break, and saw the defendant standing next to the bar screaming something. Tr.3:703-04. He observed a woman, holding her face, and the defendant headed out of the bar. Tr.3:706. He paid attention to the woman for the next few minutes. Tr.3:707-08.

He then ran outside. Tr.3:708.

He saw King and the defendant in a wrestling match fifty yards up the street. Tr.3:709. They were in a bear hug, they separated, they spoke, and then they wrestled to the ground. Tr.3:711. King got up and walked away. Tr.3:712. DePasquale said he then helped restrain the defendant until the police arrive. Tr.3:714. He observed that King had blood pouring from his eye. Tr.3:715.

Dennis O'Connor testified that he was a radiographic technologist. Tr.3:747. He was at the Winners Circle when the defendant came in and started an argument with the bartender. Tr.3:748. King got up, approached the defendant, and asked him to calm down. Tr.3:749-50. Some time later the defendant smashed a beer bottle against a pole, and everyone stood up. Tr.3:750, 752. One of the women had her hand over her head, and the defendant left the bar. Tr.3:753. King followed him out, and then others left. Tr.3:754. He saw King and the defendant facing each other in the street having a heated argument. Tr.3:755-56. They tussled and wrestled to the ground. Tr.3:756. He sprinted up the street and when he- got to where they were, King was holding his eye. Tr.3:756. ; There was blood coming out of his eye. Tr.3:756. He and two others restrained the defendant. Tr.3:756-57.

John Hayes testified that he was twenty-two years old and was employed in the carpet cleaning business.' Tr.4:858. On the night in question he was with his best friend Mark Pinkham and

they decided to go to the Winners Circle for last call.

Tr.4:903-04. As they were driving down Shrewsbury Street he saw one person on the ground with perhaps three people holding him down. Tr.4:906-07.

When, Pinkham parked in front of the bar the doorman ran up and spoke to him. Tr.4:909. The doorman then helped King who had his hand over his left eye into the car. Tr.4:910, 912. Hayes said he told King to keep his hands out of his eye, that it would make it worse. Tr.4:913. They then drove to the hospital. Tr.4:915. King seemed intoxicated. Tr.4:917. King told them he thought he got poked in the eye. Tr.4:918. King was not bleeding. Tr. 4:935. To counter this powerfully exculpatory testimony, the prosecutor sarcastically asked the questions: "You didn't notice that this person had just had his eye almost gauged out, right?" "You didn't know that he just almost had his eye dug out of his head, right?" See Tr. 4:936-37.

Gerald Perma testified that he was a Worcester Police Officer. Tr.4:967. On the night in question he was working the 11:00 p.m. to 7:00 a.m. shift. Tr. 4:969. He received a call at about 1:47 a.m. and responded to the Winners Circle. Tr.4:969. He observed the defendant on the ground with several people around him. Tr.4:974. Other officers' arrived at the same time, and the defendant was handcuffed. Tr.4:976. He had conversation with Schlener. Tr.4:976. The defendant had some scratches and bruises. Tr.4:988. He interviewed King; King wasn't drunk and his eye was bleeding. Tr.4:995.

The defendant testified that he was forty-two years old, married, and lived in Worcester. Tr.4:1007. He said that he owned Mulcahy's Barroom in Worcester for nine years, and had been out of business about three months on the night of the incident. Tr.4:1008. Prior to owning the bar he had worked as a CPA. Tr.4:1009.

The defendant said that he arrived at the Winners Circle at about 1:30 a.m. Tr.4:1012. He lived around the corner. Tr.4:1024. Schlener made fun of him for ordering the cheap beer. Tr.4:1026. Shortly thereafter Schlener pointed out that the defendant's bar was closed in a ridiculing fashion. Tr.4:1029-30.

The defendant responded in kind and Schlener got upset and turned red. Tr.4:1032. Schlener then had a conversation with King. Tr.4:1032-33. King and two other men got up, and King was yelling that he was going to give the defendant a beating. Tr.4:1033, 1035. As King and the others got close, the defendant got off his bar stool. Tr.4:1036. A heated yelling match followed. Tr.4:1038. The defendant told King if he wanted to fight they should go outside and fight one on one. Tr.4:1038.

Some other patrons got between them and got King out of the area, but one of the other men who had come over with King grabbed the defendant and pushed him backwards. Tr.4:1039. The bottle broke while he was wrestling with that man. Tr.4:1039-40. When he freed himself, he got out of the bar. Tr.4:1040. He ran towards his house with people following right behind him.

Tr.4:1043.

He was football tackled, and then several people got on top of him. Tr.4:1049. He used his hands and legs to try and escape, but within a minute he was completely subdued.

Tr.4:1050. Taraskiewicz had his boot on his neck and was applying pressure. Tr.4:1052-53. King came over and gouged his right eye with his finger. Tr.4:105 6.

After he was arrested, the police took him to the hospital. Tr.4:1059. After he was released from custody he went back to the hospital. Tr.4:1062.

Jeannette Elberry testified that she was a teacher in the Worcester Public Schools and was married to the defendant. Tr.5:1157-58. On September 29, 1992 at about 2:00 p.m. she went to the courthouse, and then left with the defendant. Tr. 5:1159-60. She observed injuries on him that included an elbow injury, facial bruising, and a heel mark on his neck. Tr.5:1160. Later that evening she took pictures of the injuries. Tr.5:1161.

C. Counsel's Failure

In the case at bar, the single most important issue was King's medical condition. The prosecutor blasted the key defense witness, John Hayes, on the medical issue. The prosecutor also felt free to make a powerful closing argument about the attempt to put out King's eye. While powerful, this argument was only possible because defense counsel failed to make King's medical record intelligible to the jury through expert medical testimony. In fact, King received only superficial injuries consistent with

being poked and inconsistent with his story that the defendant jammed his thumb into his eye and kept pushing his thumb in. See Hull Affidavit. In fact, King's eye was never dripping blood or vitreous fluid. See Hull Affidavit. Thus, the recurring theme of the bleeding eye espoused by King and his cohorts could have been shown by medical testimony to have been false; and, Hayes's testimony could have been demonstrated accurate.

The failure to present the truth about King's medical record was inexcusable and extremely prejudicial. By itself, such a blunder amounts to ineffective assistance of counsel. But in the case at a bar, there were other serious failures that were also extremely prejudicial. Although the prosecution disclosed King's departmental problems as a result of the no probable cause finding by Judge Raphaelson, defense counsel failed to impeach King about his interest in his career. See Elberry Affidavit. This interest gave King a motive to prevaricate and pressure his friends into doing the same.

For example, Schlener testified at the probable cause hearing that after the initial argument, King went back to his seat, and the defendant got up and a beer bottle was shattered. See P.C. Tr. 82. He further testified that "somebody" yelled, call the police. P.C. Tr. 1123. By trial, Schlener's memory had improved in King's direction. Now three or four minutes elapsed before the bottle was smashed, and it was King who asked him to call the police. See Tr. 3:587, 588.

DiPasquale testified at the probable cause hearing that he

was "one of the ones" that got between King and the defendant. See P.C. Tr. 190. He testified he stepped in front of King and was holding him around his waist, but not tightly. See P.C. Tr. 194. He testified he tried to coax him back to his seat. See P.C. Tr. 194. By trial, DiPasquale's memory had improved in King's direction. All he had to do was "kind of touch him on the hip section" to get King back to his seat. See Tr. 701.

King testified at the probable cause hearing. He failed to mention anything about DiPasquale stopping him from approaching the defendant. He said that the defendant smashed the bottle over the bar. See P.C. Tr. 8. He said he saw one woman put her hand, to her face. See P.C. Tr. 9. He said he saw the defendant waive the bottle towards Schlener. See P.C. Tr. 9. He said he told the defendant he wasn't going anywhere until the police came. See P.C. Tr. 11. He admitted that he told Assistant District Attorney Salloum that he had not been assaulted by the defendant with a bottle. See P.C. Tr; 7 6-7 7.

By the time of the grand jury presentation, King had made certain adjustments. He remembered that his friend DiPasquale had put his hand on his stomach when he started to approach the defendant. G.J. Tr. 5. The defendant smashed the beer bottle on the pole. G.J. Tr. 5. Both women put their hands to their face. G.J. Tr. 5. The defendant made jabbing motions with the broken bottle towards Schlener. G.J. Tr. 6. He told the defendant he had hurt someone in the bar. G.J. Tr., 6.

In addition, King was never impeached with his conversations

with prosecutor Salloum during which he admitted he never was assaulted by the defendant with the bottle. This indictment never should have been tried. It gave King the foundation on which to build his citizen's arrest theory, and colored the entire trial. A motion to dismiss should have been filed under Commonwealth v. O'Dell, 392 Mass. 445, 446-47 (1984). It was improper to hide from the grand jury the very testimony that resulted in a no probable cause finding by Judge Raphaelson. It was ineffective assistance of counsel not to have filed such a motion. And, it was just as egregious not to have blasted King with it before the jury or to have asked for instructions explaining the right of a citizen to make an, arrest.

These serious failures to undermine King were compounded by the failures to bolster the defendant or challenge Christina Mann. Mann's injury claim was the second foundation of King's good citizen theory. There was no apparent scar, a police report that indicated a hospital search had proved negative, and no production of a hospital record by the Commonwealth. At the very least, Mann's claim should have been investigated. In addition, the failures to preserve the booking tape and to produce all of the defendant's hospital records were inexcusable.

The defendant's Sixth and Fourteenth Amendment rights and his rights under Art. 12 also include the right to counsel, free of any conflict of interest, and unrestrained by commitments to others. See Commonwealth v. Davis, 376 Mass. 777, 780-81 (1978). Here serious questions are raised as to whether defense counsel

had commitments through his staff to. a material prosecution witness, see Commonwealth v. Walter, 396 Mass. 549, 554-55 (1986); and to courtroom personnel.

Respectfully submitted,
By his attorney,

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COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS,

SUPERIOR COURT
CRIM. NOS.
93-01351, 93-01352,
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COMMONWEALTH

v.

MICHAEL ELBERY

DEFENDANT'S AFFIDAVIT
IN SUPPORT OF MOTION
FOR NEW TRIAL

Michael Elbery being duly sworn deposes and says:

1. That I am the defendant in the above-named case.
2. That I was represented at trial by Louis Aloise. I was aware that he had formerly been a prosecutor for many years at the Worcester District Attorney's Office.
3. I demanded prior to trial that Attorney Aloise interview and subpoena the medical people who treated Mr. King on September 29, 1992, for his injury. Attorney Aloise told me it was not necessary and that when you subpoena hospital employees no one shows up, and there is nothing you can do about it.
4. On information and belief, which I believe to be true, Attorney Aloise never spoke with the doctor that treated Mr. King on September 29, 1992, and never sought an expert medical witness to interpret Mr. King's hospital record. Attorney Aloise never mentioned doing either thing to me.
5. I could not understand at trial why my lawyer did not explain Thomas King's hospital record to the jury. I knew that

the record had to be inconsistent with his claim of what I did to his eye at trial.

6. During the trial, I believed that Christina Mann's testimony colored the whole incident and was highly prejudicial to me. I saw no scar on her face where she claimed to have received stitches. I had been shown a police report by Attorney Aloise which indicated that a search had been made at area hospitals by the police without success for the woman who was cut in the bar. I urged Attorney Aloise to subpoena her hospital record to court so that we could determine whether or not she had actually received stitches. I was certain that if she had, the prosecution would have had the hospital record.

7. After the trial, Attorney Aloise informed me that he had been told by the prosecution before the trial that King had been demoted after Judge Raphaelson found no probable cause in the District Court. I was astonished that my attorney had not sought to impeach King with this information or obtain any records concerning it. It was my belief that my attorney did not want to hurt King.

8. Attorney Aloise also informed me that A.D.A. Michael Salloum told him that both Mr. Schlener and Mr. King admitted to him before the probable cause hearing took place that I never waived the bottle at them. I believed that the incident with the bottle and the indictment for that incident were very prejudicial to me. I do not understand why Attorney Aloise did not file a motion to dismiss that indictment based on the information he had received

from the prosecution. I do not understand why he did not call A.D.A. Salloum at trial or attempt to impeach Mr. King with this information.

9. I told Attorney Aloise on numerous occasions that he should get my booking tape because it would reveal how badly I had been beaten. I also asked him to produce all my medical records for the jury's consideration.

10. After my conviction and while I was on a stay pending appeal, I spoke to Attorney Aloise's secretary who I knew as Sharon. She told me that her opinion was that I was the guilty party and deserved conviction for bothering Jeff Schlener. I inquired as to whether she knew Schlener and she responded that Schlener was married to her best friend Linda D'Errico. She said that she and Linda were best friends at Shrewsbury High and that Jeff and Linda Schlener were nice people. I believe my attorney should have revealed this to me because it was a serious conflict that could influence him and could lead to a breach of the attorney-client privilege.

11. On the first day of trial, in front of my attorney, court officers told the assembled Commonwealth witnesses that I would be suing them all. I do not understand why my attorney never brought this to the Court's attention.

12. My attorney knew that an important Commonwealth witness was

the son of the courtroom clerk. During the trial, my attorney told me that the clerk had expressed his anger to him about the way he cross-examined his son.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS
_____, 1996

DAY OF

Michael Elberry

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

SUPERIOR COURT
CRIM. NOS.
93-01351, 93-01352, and
93-01354

COMMONWEALTH)
v.)
MICHAEL ELBERY)

AFFIDAVIT IN SUPPORT OF
DEFENDANT'S-MOTION FOR
NEW TRIAL

Dr. Joe Hull being duly sworn deposes and says:

1. That I am a licensed physician in the Commonwealth of Massachusetts. I am board certified in emergency and internal medicine. I am presently Medical Director of the Emergency Department of Anna Jaques Hospital in Newburyport.
2. I have reviewed the hospital record of Thomas King attached hereto and marked Exhibit One.
3. The record reveals that the injury to the left eye consisted of superficial abrasions to the lids and a small laceration of the conjunctiva which did not require suturing. The globe (eyeball) was not penetrated and there was no bleeding into any part of the eye or impairment of vision. Treatment was conservative with application of antibiotic ointment and a patch which is typical for minor injuries to the superficial covering of the eye.
4. In my opinion, these injuries are superficial and are consistent with being poked in the eye. In my opinion, one would expect to find more serious injuries if someone had jammed his

thumb into that eye on the inside of the eye and kept pushing his thumb into the eye.

5. In my opinion, the injury sustained here would not have resulted in the leaking of any vitreous fluid or noticeable blood loss from the eye.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 5th DAY OF


Dr. Joe Hull