THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE
DISTRICT ATTORNEY FOR THE ESSEX DISTRICT
SALEM NEWBURYPORT LAWRENCE

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March 1, 2013
VIA E-MAIL and
FIRST CLASS MAIL

Maura Sweeney Doyle, Clerk
Supreme Judicial Court for Suffolk County
John Adams Courthouse
One Pemberton Square, Room 1300
Boston, Massachusetts 02108
Attention: George E. Slyva, Second Asst. Clerk

Re: District Attorney for Eastern District
v. Superior Court
Supreme Judicial Court for Suffolk County
Docket No. SJ-2013-

Dear Clerk Doyle:

Enclosed please find for filing in the above-referenced case the Commonwealth's Petition Pursuant to G.L. c. 211, § 3, and Certificate of Service.

Thank you for your attention to this matter.

Very truly yours,

Ronald DeRosa
Assistant District Attorney
BBO No. 658915

bbn
cc: AAG Jennifer Grace Miller
AAG Randall Raviz
Beth Eisenberg, Esq.
Enclosures

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2013-_____

DISTRICT ATTORNEY FOR THE EASTERN DISTRICT

v.

THE SUPERIOR COURT

COMMONWEALTH'S PETITION
PURSUANT TO G.L. c. 211, § 3[1]

INTRODUCTION

This is the third of three petitions pursuant to G.L. c. 211, § 3 which seek this Court's clarification of the nature and extent of the authority of Special Magistrates appointed pursuant to an Order of Assignment by the Chief Justice of the Superior Court, Rouse, J., "to preside over criminal proceedings in

[1] References are as follows: Affidavit by Assistant District Attorney Gerald P. Shea (Ex. 1); email of administrative order by Essex Superior Court Regional Administrative Justice David Lowy (Ex. 2); Order of Assignment (Ex. 3); Commonwealth's objection to motions for stay of execution of sentence (Ex. 4); Form for "Findings and Report by Special Judicial Magistrate Regarding Guilty Plea Colloquy with Defendant" (revised Jan. 30, 2013) (Ex. 5); Form for "Guilty Plea Colloquy" procedure by Special Magistrate (Ex. 6); February 28, 2013 order of Essex Superior Court Regional Administrative Justice Lu on Commonwealth v. Milette, ESCR2009-1561 (Ex. 7); "Memorandum of Decision and Order on Defendant's Motion to Withdraw Guilty Plea," Commonwealth v. Earl Reed, Jr. (No. PLCR2010-00298, PLCR2011-00553) (Chernoff, Special "Judicial" Magistrate) (Ex. 8).

connection with cases relating to the William A. Hinton State Laboratory Institute in Jamaica Plan" (Ex. 3). See Mass. R. Crim. 47 governing the appointment of special magistrates. Specifically, the petitions seek: 1) clarification of the authority of the Special Magistrate and of a justice of the Superior Court to consider and grant a motion to stay execution of a sentence pending a new trial motion where no such authority exists pursuant to statute, court rule, or case law; 2) clarification of the authority of the Special Magistrate to vacate a conviction and to conduct a plea colloquy; and 3) a determination the validity of a plea conducted pursuant to the procedure established under the Order of Assignment issued by the Superior Court.

The first petition, Commonwealth v. Shubar Charles, No. SJ-2013-0066, was filed on February 14, 2013 and allowed (Botsford, J.) on February 15. That petition sought a stay of an order by a Superior Court judge staying execution of a sentence, pending a new trial motion, where no appeal is pending. The second petition, Commonwealth v. Milette, SJ-2013-0083, was filed on February 21 and a supplement to that petition was filed on February 28. That petition, as

supplemented, is pending. These two petitions raise issues related to stays of execution of sentences in Drug Lab cases, pending a new trial motion. This third petition relates to the validity of plea proceedings conducted in the Drug Lab Session.

On February 19, during a telephone conference on the first petition, this Court (Botsford, J.) established a schedule for the filing of the second and third petitions,[2] and for briefing and argument on questions that she will reserve and report to the Full Court.

The issues raised in these petitions are of critical, statewide importance, affecting thousands of defendants. The procedure for motions for stays of execution of sentences developed by the Superior Court is unprecedented, and without apparent authority, in that it permits a defendant, *upon the filing of a new trial motion*, to seek a stay of his sentence, relief that is unavailable to defendants who do not have

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[2] This Court later approved an extension of time for the filing of this third petition until today. After the February 19 conference, the Commonwealth ordered all relevant transcripts (from both court reporters and from the Superior Court Clerk and the Office of Transcription Services for JAVS recordings) and has provided those to the Court and counsel immediately upon receipt, including as recently as today.

cases in the Drug Lab Session. The bifurcated plea proceeding established by the Superior Court procedure is likewise unprecedented. If it does not result in a valid plea, defendants will be able to withdraw that plea, based on its invalidity, and try again.

These petitions provide the only vehicle for this or the Full Court to assess the validity of these two procedures. See Planned Parenthood League of Mass., Inc. v. Operation Rescue, 406 Mass. 701, 706 (1990) (relief under G.L. c. 211, § 3, is appropriate only "if no other remedy is expressly provided"); see also Commonwealth v. Tobias T., 462 Mass. 1001, 1001 (2012) (reviewing petition pursuant to G.L. c. 211, § 3 to determine whether claim involved "repeated or systemic misapplication of the law").

STATEMENT OF THE PROCEDURE, FACTS, AND ISSUE PRESENTED

The District Attorney for the Eastern District is the chief law enforcement officer for Essex County. See G.L. c. 12, §§ 13, 27. In the interests of brevity, the factual representations contained in the attached affidavit of Assistant District Attorney Gerald P. Shea (Ex. 1), describing the Drug Lab Session in Essex Superior Court, are not repeated here, but are incorporated herein by reference. In

the affidavit, Mr. Shea describes the origin of the Drug Lab Session, the procedure established by the court for filing and hearing motions to stay execution of sentences in Drug Lab cases, both before and after the appointment of the Special Magistrate, and the procedure intended by the Superior Court to be implemented for new trial motions and the bifurcated procedure for any guilty pleas that follow the allowance of a new trial motion.

The Commonwealth has preserved these issues by: 1) objecting to the stay procedures conducted by J. Lowy in the stay session before the Special Magistrate was appointed, by the Special Magistrate, and by the Regional Administrative Justice after the Special Magistrate allowed a stay motion and the Commonwealth filed its objection (Ex. § 4 (this is the form objection used in every case, see Ex. 1, ¶ 9); and by 2) insisting that a Superior Court judge conduct the entirety of the plea proceeding (Ex. 1, § 22).

The Commonwealth has identified several potential problems with the Superior Court's procedures for the stay motions and for guilty pleas. Most obvious is that no statute, rule, or case permits a stay of execution of sentence where no appeal is pending or

where a new trial has not been allowed, see Charles petition, p. 12-20, or consideration of a stay motion by a Special Magistrate, *after denial by a Superior Court judge*. See Milette petition, p. 11-20. It cannot be, as J. Lu ruled yesterday (Ex. 7), that a Special Magistrate has such authority based on an administrative order of the Chief Justice impliedly granting it. Likewise, although Special Magistrates are limited to ministerial duties, see Reporter's Notes to Mass. R. Crim. P. 47, the form for the findings and ruling by the special magistrate (Ex. 5) designates him as a "Special Judicial Magistrate" (Ex. 5), and Special Magistrates have designated themselves as such (Ex. 8). Further, one Special Magistrate has entered an *adjudicatory* order, not simply making "findings and rulings" on a new trial motion as authorized by the Order of Assignment (Ex. 6), but actually allowing a new trial motion, *as if he has the same authority as a judge to do so* (Ex. 8).

The procedures have also created confusion. For instance, the Special Magistrate denied the Commonwealth's motion to stay his order staying execution of the sentence in the Milette case, but after consultation with J. Lu, stated he would

henceforth stay rulings on motions to stay execution of a sentence in order to permit the parties to file an objection pursuant to the Order of Assignment (Ex. 1, ¶ 16). And then J. Lu, himself, stayed the stay order in Milette and ordered the defendant back into custody, he had been released on bail and outfitted with a GPS monitoring device on the Special Magistrate's order (Ex. 1, ¶ 16; see also Milette petition).

The Special Magistrate has inquired of counsel as to how the hearings on the new trial motions should be handled (Ex.1, ¶ 17), as if Rule 30 does not apply. And, of course, the question is made more complicated by the fact that discovery about the Drug Lab has been delayed or limited by the AG's and Inspector General's investigations, the latter of which is on-going; the lack of access to the chemists' files; and the issues pertaining to the availability of chemists to testify at new trial motion hearings (Ex. 1, ¶ 19).

As for the bifurcated plea proceeding established by the Superior Court, if the defendant consents, the Special Magistrates will conduct a guilty plea colloquy and then submit proposed findings as to the voluntariness and intelligence of the plea, along with

a sentence recommendation, to the Regional Administrative Justice for "act[ion] without further hearing" (Exs. 5, 6). There is no authority for this bifurcated procedure, including in Rule 12, governing guilty pleas. There is also no such authority in Rule 47, or the Order of Assignment (Ex. 3).[3]

"When a criminal defendant pleads guilty, he waives his right to be convicted by proof beyond a reasonable doubt, his Fifth Amendment privilege against self-incrimination, his right to stand trial by jury, and his right to confront his accusers." Commonwealth v. DelVerde, 398 Mass. 288, 292 (1986) (citations omitted). "Because a plea of guilty involves these constitutional rights, [a] plea is valid only when the defendant offers it voluntarily, with sufficient awareness of the relevant circumstances and with the advice of competent counsel." Id. at 292-293 (quotations omitted).

One of the most important judicial functions in criminal cases is ensuring a guilty plea is intelligent and voluntary. See Commonwealth v. Correa, 43 Mass. App. Ct. 714, 717 (1997) (A "judge

[3] At the time of this filing, no plea has been conducted by the Special Magistrate because the Commonwealth has objected (Ex. 1, ¶ 22).

must determine by means of an adequate colloquy that the plea tendered is both intelligently and voluntarily made."). The acceptance of a guilty plea requires a "real probe of the defendant's mind," by the judge, to assure himself of the voluntariness and intelligence of the plea. Commonwealth v. Fernandes, 390 Mass. 714, 716 (1984).

The validity of a guilty plea is important to the Commonwealth, as well. See Commonwealth v. Lamrini, 27 Mass. App. Ct. 662, 665-666 (1989)("Guilty pleas are too important to the defendant, to the Commonwealth, and to the proper administration of justice for judges to 'wing' it or to adopt idiosyncratic practices that only result in confusion and further appeals."); see also Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."). In short, pleas are too important to be conducted pursuant to an unprecedented procedure, unauthorized by any statute, rule, or case. Guidance from the Full Court on the scope of the Special

Magistrate's authority in conducting such proceedings is necessary, before he conducts any such pleas.

Before the Drug Lab Session was created, Rule 47 Special Magistrates did not exist in Essex County (Ex. 1, ¶¶ 4, 6, 13). The rule itself intends that no adjudicatory functions are to be performed by a special magistrate. See Reporters Notes: "*functions to be performed by the office of special magistrate are administrative rather than adjudicatory*" (emphasis added); see also Commonwealth v. Santosuosso, 23 Mass. App. Ct. 310, 313 n.4 (1986) (courts may look to Reporter's Notes for guidance); accord Commonwealth v. Carney, 458 Mass. 418, 426 n.13 (2010) (noting that neither Rule 14 nor its Reporter's Notes provided guidance as to "whether rule 14(c)(1) permit[ed] the imposition of punitive monetary sanctions"); cf. Grafton Bank v. Bickford, 13 Gray 564, 567 (1859) (in a bankruptcy case a "special magistrate" was characterized as "a ministerial officer"). And the Order of Assignment itself grants authority "to conduct hearings on post conviction motions," i.e., a Rule 30 motion for new trial, but no express authority to conduct a plea proceeding; surely a guilty plea is not a "post-conviction motion" under the Order of

Assignment. Moreover, the Order of Assignment did not grant the Special Magistrate powers akin to those of a clerk-magistrate. See G.L. c. 221, § 62C; see also Smith, Criminal Practice and Procedure § 22.11 (3d ed. 2007 & Supp. 2012 (stating unambiguously, "a clerk-magistrate is not the same person as a [Rule 47] special magistrate"). Even so, the powers afforded a clerk-magistrate do not include the power to conduct plea hearings. G.L. c. 221, § 62C.

By their nature, such hearings are adjudicatory and not administrative proceedings. See Fernandes, 390 Mass. 716, quoting Commonwealth v. Foster, 368 Mass. 100, 107 (1975) (conducting plea colloquies is "not to become a 'litany' but is to attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure."); see also Lamrini, 27 Mass. App. Ct. at 665 (importance of plea colloquies requires judges to "bring to a hearing involving a change of plea the same mental intensity, concentration and discipline that they regularly employ *when presiding at a trial*") (emphasis added).

Additionally, the Reporter's Notes suggest that special magistrates are "similar" to federal magistrates, see 28 U.S.C. § 636, but also make clear that a special magistrate does "not carry with [him] such broad powers," including the power of the federal magistrate to conduct certain trials for misdemeanors and sentence defendants, 28 U.S.C. § 636(a)(3), (4), and (5), (c)(1), and conduct non-dispositive pretrial motions in criminal cases. 28 U.S.C. § 636 (b)(1)(A). See United States v. Raddatz, 447 U.S. 667, 681 n.8 (1980) (when enacting Federal Magistrates Act, "Congress reasoned that permitting the *exercise of an adjudicatory function* by a magistrate, subject to ultimate review by the district court, would also pass constitutional muster.") (emphasis added). And in any event, unlike the federal statute, there is no catch-all provision in Rule 47 allowing magistrates to "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). It is under this provision that federal Courts of Appeal have held that federal magistrates may conduct plea colloquies, so long as the defendant consents. See United States v. Williams, 23 F.3d 629, 633-634 (2nd Cir. 1994)

(magistrates conducting plea hearings both statutorily and constitutionally permissible so long as defendant does not object); accord United States v. Ciapponi, 77 F.3d 1247, 1250-1252 (10th Cir. 1996), United States v. Osborne, 345 F.3d 281, 285-290 (4th Cir. 2003) and United States v. Underwood, 597 F.3d 661, 665-673 (5th Cir. 2010).

Finally, having special magistrates conduct plea hearings may raise significant constitutional questions. See United States v. Dees, 125 F.3d 261, 266 (1997) ("Article III confers upon defendants a personal right to have their case heard by an Article III judge."); cf. Peretz, 501 U.S. at 936 ("it is arguable that a defendant in a criminal trial has a constitutional right to demand the presence of an Article III judge at voir dire"; Court did not answer question because defendant raised no objection on this ground at trial so it was deemed waived).

CONCLUSION

For the foregoing reasons, the Commonwealth requests that this Court determine the validity of a plea conducted pursuant to the procedure established under the Order of Assignment issued by the Superior

Court, together with the questions raised in the Charles and Milette petitions.

FOR THE COMMONWEALTH:

ELIN H. GRAYDON
Assistant District Attorney
for the Eastern District
BBO# 208140

and

RONALD E. DEROSA
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March 1, 2013

Ex. 1

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2013-_____

DISTRICT ATTORNEY FOR THE EASTERN DISTRICT

v.

SUPERIOR COURT

AFFIDAVIT

I, Gerald P. Shea, hereby depose and state:

1. I am an assistant district attorney in Essex County and have been since 1983, with the exception of a brief period in 1990-1991. I am also the Chief of the Superior Court Trial Team and I also supervise the ADAs who are assigned to Superior Court Drug Lab Session.

2. This affidavit describes the operation of the Drug Lab Session and is filed in support of the District Attorney's petitions: 1) to clarify whether a special magistrate under Mass. R. Crim. P. 47 or a Superior Court judge has authority to consider and grant a stay of execution of sentence (petition #1: Commonwealth v. Shubar Charles, No. SJ-2013-0066); 2) to clarify whether a special magistrate under Rule 47, or a Superior Court judge thereafter, has authority to consider and grant a motion to stay execution of sentence that was previously denied by a Superior Court judge, whether or not a change of circumstances is alleged (petition #2: Commonwealth v. Hector Milette, SJ-2013-0083); and 3) to determine the validity of a guilty plea entered pursuant to the bifurcated proceeding now in place in Superior Court.

3. Following press coverage of the so-called Drug Lab scandal at the Hinton Laboratory in Jamaica Plain involving chemist Annie Dookhan, the District Attorney convened a group of supervisory level prosecutors to discuss and address the issues that were anticipated. This group included the First and the Deputy First Assistant District Attorneys, Special Counsel to the District Attorney, the Chief of the Appeals Division, an Appeals Division ADA, and me. David Meier, who was appointed by the governor in September 2012

to oversee the Drug Lab Central Office, has estimated that 5400 Essex cases could be affected by the so-called scandal.

4. Then, on October 2, 2012, the then-Regional Administrative Justice of Essex Superior Court Lowy conducted a meeting to announce to my Office, the Committee for Public Counsel Services in Salem, the Essex Bar Advocates, members of the criminal defense bar, the Probation Department, and the Clerk's Office that a special session was being created to conduct hearings on motions for a stay of execution of sentence and requests for bail for a limited category of cases, namely: defendants who were in custody and in whose cases Dookhan was the primary or confirmatory chemist. The judge announced the procedure to be followed: defendants were to file a motion for new trial (or to vacate a guilty plea) and a motion for a stay of execution of sentence; most of the hearings were to be held by video-conference with the penal institution where the defendant was incarcerated; and Judge Lowy would conduct those hearings. I attended this meeting, with the Deputy First Assistant District Attorney. Eventually, a list of dates was issued by the Clerk's Office and, as the motions were filed, a list of cases was generated.

5. Defense attorneys, including bar advocates and CPCS were invited to add to the list, if they met the criteria. The Clerk's Office generated new lists frequently.

6. After this meeting, on December 12, 2012, Judge Lowy, through an Assistant Clerk, issued an email describing the cases for which stay-of-execution hearings would be held. The defendant had to be in custody for a drug conviction imposed in Superior Court, the drugs had to have been tested in the Jamaica Plain Lab, and Dookhan had to have been the primary or confirmatory chemist. Defendants were required to file a new trial motion, a stay of execution of sentence motion, and a copy of the drug analysis. I understood that cases that did not meet this description would follow the usual procedure for Rule 30 motions. Hearings before J. Lowy began later that month, for stay motions only. We were unaware then that a Special Magistrate would be appointed.

7. Eventually approximately fifty stay motions were filed. Almost all of them relied solely on published media report about the scandal at the Jamaica Plain Lab. Some

defendants also included reports of the Attorney General's investigation (i.e., summaries of witness interviews, mostly witnesses at the Lab Lab). I am not personally aware of any motion supported by an affidavit from the defendant or any other witness (claiming, for example, that the substance was not drugs or that the defendant did not know what it was); most, if not all motions, have relied on an affidavit solely from the defense counsel.

8. J. Lowy conducted stay hearings on October 24 and 29, November 2, 5, 7, 9, 13, 15, and 16, 2012. Seven prosecutors were assigned to the stay session, including two Appeals Division ADAs, two Superior Court ADAs, and me. These cases could not be assigned to the Superior Court ADA who handled the plea or trial because some are no longer employed in our office and others did not have enough schedule flexibility in light of their full caseloads of ongoing investigations and prosecutions. In addition to prosecutors reassigned from other assignments to the stay session, other support staff was required to retrieve files from storage, gather certificates of analysis, provide discovery, enter cases in a database, and perform related tasks. Our response to each case required a time-consuming case-by-case review. Cases in this session were limited to those in which the defendant was incarcerated and in which Dookhan was the primary or confirmatory chemist, so no conviction was older than 2003, when she was hired as a chemist. These particular case files had not been destroyed under the provisions governing record retention, but I anticipate that as we move through the motions to older cases in which the defendant is no longer incarcerated, some of those case files will have been destroyed.

9. At the stay hearings before J. Lowy, we filed an objection in every case, challenging his authority to conduct a hearing on a motion to stay execution of a sentence in a case where no appeal was pending or no motion for new trial had been allowed. At the first hearing in the special session, Judge Lowy overruled our objection, finding that the Court had the inherent authority to stay the execution of sentences, relying on Commonwealth v. McLaughlin, 431 Mass. 506, 514-520 (2000).

10. In total, J. Lowy denied twenty-five motions and allowed fifteen. Ten were withdrawn, likely for strategic reasons. I am not aware of a defendant whose stay motion was denied

who then filed a motion of a stay of execution of sentence pursuant to Mass. R. App. P. 6. Of the original fifty stay motions, twenty cases are still open, not having been resolved by a plea.

11. After the rulings on the stay motions, some cases were next scheduled for status and some for discovery. Hearings on the underlying new trial motions did not materialize, in part because there was a lot of uncertainty about the process.

12. As the number of cases fitting the criteria began to wind down, J. Lowy announced that another special session had been created; prosecutors and the defense bar would learn about it from the trial court; and he would no longer hear the stay motions in Drug Lab cases.

13. On November 26, 2012, Superior Court Chief Justice Rouse issued an Order of Assignment, appointing John Cratsley as a Special Magistrate under Mass. R. Crim. 47 to hear post-conviction Jamaica Plain Drug Lab cases. This new session began on December 5, 2012. By that point, all the stay of execution motions that had been filed had been heard by J. Lowy. When such motions were scheduled for SM Cratsley's session, we objected on the grounds that he lacked authority, under the Order of Assignment or otherwise (i.e., under Mass. R. Crim. P. 31), to hear such motions.

14. We filed a notice of objection, pursuant to the Order of Assignment, when Special Magistrate Cratsley allowed a stay-of-execution motion in Commonwealth v. Kauppinen (ESCR2009-0715), but after we announced an intention to file an objection, the case was resolved by a new plea to an agreed-upon disposition. The next case in which the special magistrate allowed a stay-of-execution motion was Commonwealth v. Shubar Charles, the subject of petition #1. Other cases in which we filed an objection were resolved by way of a new plea, before a justice of the Superior Court, after the Commonwealth agreed to the allowance of the new trial motion. No defendant whose stay motion was denied by SM Cratsley filed an objection or appeal to the Regional Administrative Justice, J. Lu.

15. The same day the special magistrate allowed the stay motion in the Charles case, he denied a stay motion in at least one other case. In the Charles case, we objected to consideration of the motion by the special magistrate, we

filed an objection to J. Lu pursuant to the Order of Assignment, and we asked SM Cratsley to stay the stay order, pending J. Lu's consideration of our objection. SM Cratsley denied our motion to stay the stay order. Petition #1, Commonwealth v. Shubar Charles, SJ-2013-0066, followed.

16. The second stay-of-execution case to make its way through the process to J. Lu is Commonwealth v. Hector Milette (petition #2). In that case, J. Lowy denied the defendant's stay motion on its merits on November 13 and not on our objection as to his authority to consider the motion; on February 6 the defendant filed a motion for reconsideration before the special magistrate; on February 12, SM Cratsley heard the motion over the Commonwealth's objection that he lacked authority and that no appeal was pending or no motion for new trial had been allowed; he allowed the motion and would not stay its allowance on the Commonwealth's request; that night, the defendant posted bail. The next day, the Commonwealth filed an objection to J. Lu; without conducting a hearing, he modified the conditions of the stay, but did not stay the special magistrate's order; on February 14, Special Magistrate advised that he had reviewed the process with J. Lu that henceforth, he (Special Magistrate Cratsley) would stay his orders on motions to stay execution of sentence to permit review by J. Lu under the Order of Assignment; J. Lu conducted a hearing on the objection on February 27. He stayed the special magistrate's order, thereby restoring the denial of the stay of execution of sentence that J. Lowy had entered, and he ordered the defendant back into custody to serve his sentence. Meanwhile, we had filed petition #2. Yesterday, February 28, J. Lu issued an order, vacating the order entered by the special magistrate, staying execution of the sentence. In total, five ADAs have handled this case: one on the stay motion, two on the reconsideration motion and the hearing on the Commonwealth's objection before J. Lu, and two who filed petition #2. Moreover, the defendant has had three hearings on his stay motion and/or his reconsideration motion: initially before J. Lowy, then before the special magistrate, then before J. Lu.

17. As for the new trial motions, the special magistrate has inquired of counsel for both parties as to how they wish to proceed, i.e., by stipulation, oral argument, written memoranda, or evidentiary hearing, without having made a

preliminary ruling under Rule 30 as to whether the defendant has raised a substantial claim supported by a substantial evidentiary showing. The first new trial motion, in Commonwealth v. Angel Rodriguez, (ESCR2007-00875), was heard on February 14, 2013, before the special magistrate, on the papers and oral argument, without any testimony being offered; it was taken under advisement, but the parties have since filed a joint motion to stay a ruling on the motion and the defendant has moved to re-open the evidence; both motions were allowed on February 26.

18. When new trial motions are allowed, we understand from the special magistrate that any subsequent guilty pleas are to be conducted in the following manner: the special magistrate will conduct the entire guilty plea colloquy, including making findings as to the intelligence and voluntariness of the plea and the Superior Court judge will then accept the plea and impose the sentence, after a brief confirmatory hearing in the defendant will be asked to affirm his understanding of and agreement with the procedure conducted by the Special Magistrate.

19. Since the problems at the Drug Lab came to light, our office has made numerous requests for information from the Attorney General and the Inspector General about their investigations. Because the Lab was closed in late August, 2012 and because its staff was suspended, we did not have access to specific case files, to lab personnel, or even to lab manuals or lab protocols. At some point, we learned that we could get some information from Lab files from 2010 to the present. We understand from the Assistant Attorney General assigned to handle discovery for the Department of Public Health/Jamaica Plain Lab that suspended chemists are available, if summonsed, but that they do not have access to the lab files, pending the Inspector General's investigation.

20. Also throughout the process, our office has notified the defense bar that we would provide information/discovery as we received it, and we did. This discovery included police reports and witness interviews from the Attorney General's investigation into Dookhan; emails (after they had been redacted by other DAs' offices); additional reports from the AG's Office as we received them; and the Grand Jury transcripts and exhibits from the AG's presentation of the case against Dookhan. We will continue to provide information as it becomes available. We are also providing

case-specific information, in our possession, to defense counsel and will continue to do so, including certificates of analysis. To date, we have received approximately 150 such requests. To provide this information, the case file must be located and reviewed.

21. Also throughout the process, we have negotiated approximately twenty-five new pleas, involving further reductions in sentences in some cases. Some defendants have been released and some were resentenced to a shorter term of incarceration. Each case required a case-by-case review. The team of prosecutors assembled for this purpose includes two ADAs who are assigned exclusively, and other Superior and District Court ADAs, with existing caseloads. In my estimation, most cases (that have not yet been resolved by a new plea) have been before the Court four or five times (for the stay motion, for discovery, and/or for status).

22. Salem Superior Court is staffed with a first criminal session judge and three additional judges, two of whom are assigned to criminal sessions. Generally, trials are held in the morning; motions are heard in the afternoon. The first session judge is also generally available in the afternoon. We have insisted that all plea proceedings be conducted in their entirety by a Superior Court judge. All of the pleas, thus far, have been conducted in this manner. There has been no case in which a judge was not available to conduct a plea.

Signed under the penalties of perjury this 1st day of March, 2013.

Gerald P. Shea
Assistant District Attorney
for the Eastern District
BBO No. 455980

Ex. 2

Shea, Jerry (EAS)

From:	Carlotta M Patten <carlotta.patten@jud.state.ma.us>
Sent:	Friday, October 12, 2012 9:19 AM
To:	Shea, Jerry (EAS)
Subject:	Essex County Drug Lab Cases
Attachments:	Essex County Drug Lab Hearing Schedule 10-4-2012.wpd

On behalf of Judge Lowy:

This email will follow up on the protocol for Essex County Drug Lab cases that was discussed at the October 2 meeting:

1. The hearing dates for the Essex County drug lab cases are attached. Cases will be grouped by institution on the dates provided, and the goal is to videoconference on the majority of the dates. An interpreter will be present in the courtroom on all dates to assist where needed. Habes will not issue unless otherwise stated on the attached list, and the Court will not issue notices to appear. We will work first off of the preliminary list distributed to the Essex Superior Court.

2. Essex County "Drug Lab" cases are cases where the defendant is currently incarcerated on a lead drug charge where Annie Dookhan was the chemist or where she supervised the analysis. All pending cases cases in which motions regarding the integrity of the drug lab is questioned will be docketed in the Clerk's office but will be directed to the First Session. All motions for new trial in which Annie Dookhan was not the chemist or supervising chemist will be directed to the sentencing judge, or if the sentencing judge is retired, to the Regional Administrative Justice.

3. All defendants on the preliminary list must file a motion for new trial and a motion to stay execution of sentence in order to be heard on the dates provided. The motions may be filed by fax to the following number: 978-825-9989. Motions should be captioned with the heading "Drug Lab." A copy of the drug certificate referencing Annie Dookhan's involvement must be attached to the motion(s). The Commonwealth shall file a written response to the motion for stay, as well as a written statement regarding bail if a stay is granted. If a defendant is scheduled to be heard on a certain day, and that defendant does not file a written motion in advance of the hearing date, that defendant will be removed from the list. If a motion is filed in a Drug Lab case which case is not on the preliminary list, the court will make every effort to schedule that motion for hearing on the dates provided in the attachment. Defense motions shall be filed no later than one week prior to the scheduled hearing date.

4. Counsel present at the hearing will coordinate a next date for the case.

5. If a motion for stay is granted and the defendant is to be released, the defendant will be released from the institution.

6. Judge Lowy is the presiding judge in the drug lab session (Courtroom J). Inquiries may be directed to Carlotta Patten (978-825-4827) or Lisa Partelow (978-825-4817) .

Thank you very much.

Ex. 3

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

ORDER OF ASSIGNMENT

In accordance with the provisions of Mass. R. Crim. P. 47, the Justices of the Superior Court hereby appoint

Hon. John C. Cratsley (ret.)

as Special Judicial Magistrate of the Superior Court, to preside over criminal proceedings in connection with cases relating to the William A. Hinton State Laboratory Institute in Jamaica Plain. The appointment shall commence on November 26, 2012 and will remain in effect until further order of the court. Said Special Judicial Magistrate shall be compensated in the same manner as is provided by the General Laws for the compensation of masters in civil cases.

Pursuant to Mass. R. Crim. P. 47, the Special Judicial Magistrate shall have the powers, duties, and authority to preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, and to mark up motions for hearing. The Special Judicial Magistrate shall also have the power and authority to conduct hearings on post conviction motions, to issue orders regarding discovery, and other matters, and to make proposed findings and rulings to the Regional

Administrative Justice. If any party objects to the findings or rulings of the Special Judicial Magistrate, it must notify the Special Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours after receipt of the proposed findings and rulings stating the grounds for the objection. If no objection to the proposed findings and rulings of the Special Judicial Magistrate is filed within three court days of when the Special Judicial Magistrate makes said findings and rulings, they shall be acted upon by the Regional Administrative Justice without further hearing.

Further, the Special Judicial Magistrate shall perform such other duties as may be authorized by order of the Superior Court.

Barbara J. Rouse
Chief Justice
Superior Court

DATED: 26 November 2012

Ex. 4

ESSEX, SS

ESSEX SUPERIOR COURT
DRUG LAB SESSION
No. ESCR

COMMONWEALTH

v.

COMMONWEALTH'S OPPOSITION TO THE
DEFENDANT'S MOTION TO STAY EXECUTION OF SENTENCE

The Commonwealth opposes the defendant's motion to stay the execution of his sentence. The defendant's motion must be denied as no authority exists that provides for a stay of the execution of the defendant's sentence without a pending direct appeal, see Mass. R. Crim. P. 31, or a pending appeal from a ruling on a Motion for a New Trial, see Mass. R. Crim. P. 30(c)(8)(a). Neither situation applies here.

Should the Court consider the merits of the defendant's motion, it should still be denied because he cannot show he a) is likely to succeed on his motion for new trial; and b) is not a security risk. Cf. Commonwealth v. Cohen, 456 Mass. 128, 131 (2010) ("Two considerations govern the discretion that each judge or Justice may exercise in reviewing a stay request: security and likelihood of success on appeal."). The Commonwealth relies on its oral argument at the hearing on the defendant's motion as support for its position that the defendant cannot meet either of these prongs.

As such, the Commonwealth's respectfully requests that the Court deny the defendant's motion to stay the execution of his sentence.

FOR THE COMMONWEALTH:

JONATHAN W. BLODGETT
DISTRICT ATTORNEY
FOR THE EASTERN DISTRICT

ASSISTANT DISTRICT ATTORNEY
Ten Federal Street
Salem, Massachusetts 01970
(978) 745-6610
BBO #

Ex. 5

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT

_____, ss. INDICTMENT NOS. _____

COMMONWEALTH

v.

_____

FINDINGS AND REPORT BY SPECIAL JUDICIAL MAGISTRATE REGARDING GUILTY PLEA COLLOQUY WITH DEFENDANT

The defendant appeared before this Special Judicial Magistrate requesting to change his/her plea to guilty to the above indictments. I have informed the defendant that he/she has a right to appear before a justice of the Superior Court who will conduct a plea colloquy by asking questions to determine if the defendant's decision to plea guilty is voluntary, and to make sure that the defendant understands the consequences of his/her guilty plea.

I have also informed the defendant that as Special Judicial Magistrate of the Superior Court, I can conduct the plea colloquy and make findings regarding the defendant's decision to plea guilty and that I will report such findings to a justice of the Superior Court so that the Court can conduct further proceedings in the case, including sentencing. The defendant has consented to this procedure and has signed the attached form stating his/her decision that the Special Judicial Magistrate conduct the plea colloquy and report his/her findings to a justice of the Superior Court.

Therefore, after conducting the oral colloquy, I make the following findings regarding the defendant's decision to plea guilty:

1. I find that the defendant _____ is not presently under the influence of drugs or alcohol.

2. _____ I find that the defendant has reported that he/she is not presently suffering from any mental illness or condition.

   _____ I find that the defendant has *self-reported* that he/she _____ _____, and as to that illness or condition, I find that it does not affect the ability of the defendant to understand, comprehend and participate fully in the proceedings here today.

3. I find that the defendant's change of plea to guilty with respect to each of the indictments pending against him/her is made knowingly, willingly, intelligently and voluntarily, and with full knowledge of its consequences.

4. I find that the defendant's change of plea to guilty is also made upon and with the advice of competent counsel, _____.

5. I find that there is a factual basis for the defendant's plea of guilty to each of these indictments in the evidence that has been summarized to the court by _____ on behalf of the Commonwealth.

6. I find that the defendant fully understands that if he/she is not a citizen of the United States, his/her conviction on one or more of these charges shall have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.

7. I find that the defendant has knowingly, intelligently, and voluntarily waived all of his/her statutory and constitutional rights as explained during the oral colloquy and has understood the consequences of his/her plea of guilty or nolo contendere, or admission to sufficient facts.

ACCORDINGLY, I report these findings to a Justice of the Superior Court for further proceedings, and recommend that the Court accept the defendant's plea of guilty to each of these indictments.

_____

Date Special Judicial Magistrate of the Superior Court

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT

_____, ss. INDICTMENT NOS. _____

COMMONWEALTH

v.

_____

CONSENT TO APPEAR BEFORE SPECIAL JUDICIAL MAGISTRATE FOR GUILTY PLEA COLLOQUY AND REQUEST THAT FINDINGS BE REPORTED A JUSTICE OF THE SUPERIOR COURT

I, _____, defendant in this case, have been informed that I have a right to have the a justice of the Superior Court conduct an oral colloquy regarding my decision to plea guilty to the above indictments. I consent to appear before a Special Judicial Magistrate of the Superior Court for such a guilty plea colloquy, and understand that he/she will report his/her findings regarding my decision to plea guilty to a justice of the Superior Court so that this justice can conduct any further proceedings regarding my decision to plea guilty, including sentencing as agreed to by the parties on those charges to which I wish to plea guilty.

_____ _____

Print Defendant's Name Defendant's Signature

Dated: _____

Ex. 6

GUILTY PLEA COLLOQUY

(Revised July 16, 2010; Revised December 4, 2012 for Special Magistrates use)

Intro: Purpose of questions- to determine whether you are entering this plea voluntarily and with a full understanding of its consequences. If at any time you do not understand any question or you want to speak privately with your lawyer, say so.

1. Name, age, birth date, place of birth?

2. Is English your original language? Can you read and write in English? Having any difficulty understanding translation being provided by the interpreter?

3. **Waiver to proceed before Special Magistrate:** Acknowledge signature. Read? Attorney present? Opportunity to ask attorney questions? Understood? Signed voluntarily?

4. How far did you go in school? Where/when did you last attend/graduate from school?

5. What kind of employment have you had? Where? When? Responsibilities?

6. Have you ever been treated for any mental illness or condition? Are you aware of any mental illness or condition that you may now have?

7. Have you taken any medication within the last 24 hours? (Side effects?)

8. Have you had any alcohol within the last 24 hours? Drugs?

9. Do you know what you are charged with? Tell me your understanding of the charges? Have you discussed with your attorney the meaning of these charges and the elements of each of these offenses? (Attorney confirm explained elements.)

10. (Prosecutor recite maximum penalties, any mandatory minimums) Do you understand that if you were to be sentenced to the maximum allowed by law for these offenses, and if the Court were to impose those sentences to run consecutively, you could be sentenced to a total of ___? (Point out mandatory; potential if probation revoked.)

If filing is being recommended- see additional colloquy and consent form regarding filing.

11. **Agreed Recommendation as to Sentence**

I have been informed that your attorney and the prosecutor have agreed that they will jointly recommend that you be sentenced to _____. Is that your understanding of the agreement? [If probation, explain conditions, consequences]. **Do you understand that as a Special Magistrate, I will not be sentencing you on this case and I cannot make a commitment on the sentence? If I agree with the sentence that your attorney and prosecutor are recommending, I will file a report recommending that the sentencing judge**

accept the sentence that they are jointly recommending. Do you understand this? Do you understand that **the sentencing judge is** not bound by **the sentence they are recommending or by my recommendation,** ~~the recommendation and that I am~~ **the sentencing judge is** free to impose whatever sentence **he/she** deems appropriate within the limitations of the law? **However,** but if **the sentencing judge decides not to accept the recommended sentence,** ~~do not accept the agreed recommendation~~ then you will have the right to withdraw your guilty plea?

No Agreement on Sentence

I am informed that there is no agreement between your attorney and the District Attorney regarding sentencing. The prosecutor and your attorney will each recommend the sentence that they think is appropriate **to the sentencing judge who will impose the sentence. ~~I~~ The sentencing judge** will then impose ***whatever*** sentence ~~I~~ **he or she** deems appropriate. If, however,~~I~~ **the sentencing judge** imposes a sentence that exceeds the prosecutor's recommendation then you will have the right to withdraw your guilty plea. Do you understand that?

12. At this point I am going to ask the prosecutor to recite the facts as the Commonwealth's evidence would show them to be. Please listen carefully to the prosecutor's statement of the facts, so that you can respond to some questions I will ask you about them.

Are the facts as stated by the prosecutor correct? Did you in fact commit the acts as stated? Do you understand that by pleading guilty you admit the facts as alleged by the Commonwealth?

[Alford- if appropriate: Even though you do not admit to all of the facts, do you accept that the evidence against you would provide a strong basis for a jury to find you guilty? Have you concluded, after consulting with your lawyer, that it is in your best interest to plead guilty? Do you want me to resolve the case in this plea proceeding?]

13. Do you wish to plead guilty to these offenses?

14. Do you understand that:

(A) by pleading guilty you are giving up the right to a trial with or without a jury to determine your guilt or your innocence?

(B) if you chose to have a jury trial you would have the right to participate in the selection of 12 jurors who would decide your guilt or innocence, and before you could be convicted, those jurors would have to return a unanimous verdict?

(C) by pleading guilty you give up the right to face your accusers and to question them, and to present evidence in your own defense?

(D) by pleading guilty you give up the right to exercise your privilege against self-incrimination?

(E) if you chose to have a trial the Commonwealth would be required to prove your guilt beyond a reasonable doubt, and by pleading guilty you give up your right to be presumed innocent until proven guilty beyond a reasonable doubt?

(F) by pleading guilty, you are waiving any motions that may be pending, and are also waiving the right to appeal from any pre-trial rulings that may already have been made, such as on any motions to suppress evidence?

15. Do you choose to waive all of those rights that I have just explained to you?

16. Do you plead guilty willingly, freely, and voluntarily?

17. Has anyone forced you to plead guilty?

18. Have any promises or threats been made to induce you to plead guilty?

19. Have you had enough time to discuss this matter fully with your attorney? Has your attorney fully explained to you all of your rights and all of your options, including all of the considerations involved in making your decision whether to have a trial or to plead guilty?

20. Do you feel that your attorney has acted in your best interests? Are you fully satisfied with all of the advice and representation you have received from your attorney? Do you understand that you are not required to take your lawyer's advice?

21. **Alien Warning (G. L. c. 278, § 29D)**

If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty [plea of nolo contendere] [admission to sufficient facts] *shall* [pursuant to *Padilla*] have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States. Understanding this, do you still wish to plead guilty to this/these indictments?

[To Defense Attorney] Have you investigated what adverse immigration consequences may or will result from conviction on the pending charges and have you discussed this with the defendant?

[To defendant] Has your attorney advised you of consequences on your immigration status if you plead guilty to these charges? Do you still wish to plead guilty to this/these indictments?

22. **Sex Offender Registration and Reporting Law (G. L. c. 6, §§ 178C-178P)**

Do you understand that, as a result of your plea of guilty to this/these indictments, you may be required to register as a sex offender under the sex offender reporting law?

23. **Community Parole Supervision for Life** (G. L. c. 6, § 178H(a)(1)-(3); G. L. c. 265, § 45; G. L. c. 275, § 18)

Do you understand that if you plead guilty to one or more of these indictments, then you may be subject to a petition and hearing to determine whether you should be placed on community parole supervision for life, under the jurisdiction of the Parole Board, subject to imprisonment for any violation of such parole?

24. **Sexually Dangerous Person** (G. L. c. 123A, §§ 1-16)

Do you understand that by pleading guilty to a sex offense, by law you may be subject to a separate civil proceeding authorizing your civil commitment as a sexually dangerous person? Do you understand that if you are found to be a sexually dangerous person, you may be held in custody in a treatment center for an indeterminate period of a minimum of one (1) day to life *after* you complete your prison sentence, unless and until you are found no longer to be a sexually dangerous person?

25. **DNA sample** (G. L. c. 22E, § 3)

Do you understand that by pleading guilty to this/these indictments, you will be required to provide a DNA sample for inclusion in the state DNA database?

26. Are you in any way confused by any of the questions I have asked you?

27. Are there any questions that you have now that you would like to discuss with your attorney privately before I accept your plea?

28. As I understand it from the answers you have given me, you are pleading guilty to these indictments because you are guilty and for no other reason. Is that correct?

29. **To Counsel:** Is there any other area of inquiry that in your view should be addressed, or any reason you are aware of that I should not accept the defendant's plea?

30. **Acceptance of Plea/findings of the Court**

I find that:

Defendant is fully competent to waive his rights and to plead guilty.
There is a sufficient factual basis for the plea.
Defendant fully understands the rights he is waiving and the consequences of his guilty plea.
Defendant waives his rights and pleads guilty freely, voluntarily, and intelligently.

[Alford- if appropriate: There is strong evidence of the defendant's guilt, and that, even though the defendant does not admit to all of the facts as alleged, after consulting with his

Ex. 7

38

Commonwealth of Massachusetts v. Hector Milette
Essex Superior Court (Salem), ESCR2009-1561-001-004

February 28, 2013 –The Commonwealth objects to an order issued by a Special Magistrate (Cratsley, S.M.) allowing the defendant, Hector Milette's, motion for reconsideration of this court's (Lowy, J.) denial of his motion for a stay of execution of his sentence.

On May 9, 2011, the defendant pleaded guilty to four counts of trafficking in cocaine in an amount of twenty-eight grams or more. On September 12, 2012, the defendant filed a motion to vacate his guilty plea. On October 22, 2012, the defendant filed motions for a new trial and to stay the execution of his sentence on the ground that Annie Dookhan was the primary chemist on three of the four drug certificates supporting his convictions. On November 13, 2012, this court (Lowy, J.) denied the defendant's motion to stay the execution of his sentence.

On February 12, 2013, the Special Magistrate allowed the defendant's motion for reconsideration, and stayed the execution of his sentence subject to the following conditions: $2,000.00 cash bail; an evening curfew; probation supervision and weekly reporting; GPS monitoring; and random drug and alcohol screens. On February 13, 2013, the Commonwealth filed an objection to the Special Magistrate's ruling. After considering the motion anew on the papers only, this court modified the conditions of probation to include "24/7 electronic home confinement" pending a hearing on the Commonwealth's objection scheduled for February 27, 2013.[1] At the hearing, this court vacated the stay issued by the Special Magistrate.

At the hearing, the Commonwealth contended that the Special Magistrate lacked the authority to issue the stay, and that even if he had such authority, there was no change of circumstances since November 13, 2012 that would call for reconsideration of the court's denial of the stay of execution. Although the Supreme Judicial Court held in Commonwealth v. McLaughlin that Rule 31(a) of the Massachusetts Rules of Criminal Procedure does not authorize a judge to stay execution of a sentence unless an appeal is pending, 431 Mass. 506, 518 (2000), the Court also acknowledged that a trial judge retains a separate, "inherent power to stay execution of a sentence." Id. at 519-520. Furthermore, pursuant to Rule 47 and an Order of Assignment by the Chief Justice of the Superior Court (Rouse, C.J.), the Special Magistrate has the "power and authority to conduct hearings on post conviction motions . . . . " Accordingly, the Special Magistrate had the authority to issue the stay of execution and set bail in this case.

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[1] The Commonwealth has filed an emergency petition pursuant to G. L. c. 211, § 3 with the Single Justice of the Supreme Judicial Court to stay the orders of both the Special Magistrate and this court, and to stay any further consideration of the defendant's motion pending decisions of the Supreme Judicial Court on this and related petitions. While this court is aware of the limitations on its power to act upon certain motions after the entry of an appeal, see Commonwealth v. Montgomery, 53 Mass. App. Ct. 350 (2001), the court has been advised by counsel that the Supreme Judicial Court is waiting for this court's decision on the Commonwealth's objection. Rather than delay proceedings seeking leave to proceed, this court decides the issues.

In addition, circumstances have changed since November 13th that would warrant such reconsideration: Annie Dookhan has been indicted in multiple counties for alleged malfeasance at the Hinton Drug Lab; extensive evidence concerning that malfeasance has become available; and ongoing investigations may yield further information that may be favorable to the defendant.

Based on the information available to date, if this court were instructed that it had the authority to stay the sentence and set a bail, it would rule as it did on February 13, 2013, on the papers: $2,000 cash bail, and strict pretrial probation with "24/7" electronic home confinement.

The court finds that the Special Magistrate had the authority to make the orders that it did, and that the court (this Associate Justice) had the authority to rule, pursuant to the appeal procedure, as it did. Also, separately, the court finds that it has the authority to independently stay the sentence and set terms and conditions of release. However, in light of the order of the Single Justice of the Supreme Judicial Court in Commonwealth v. Charles, No. SJ-2013-0066 (Mass. Feb. 15, 2013) (Botsford, J.), and in the absence of any meaningful difference between the facts presented here and those in Charles, the court vacates its earlier stay. This is the same order that the court issued from the bench yesterday.

ORDER:

The stay of execution dated February 12, 2013 is vacated, and the defendant, Hector Milette, shall resume serving the remainder of his state sentence.

John T. Lu

John T. Lu
Justice of the Superior Court

Ex. 8

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss. **SUPERIOR COURT**
PLCR2010-00298; 2011-00553

COMMONWEALTH

vs.

EARL REED, JR.

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

Earl Reed, Jr. ("the defendant") pleded guilty on May 23, 2012 to two indictments as follows:

Indictment 2010-00298:	
(001) Trafficking in Oxycodone	5-7 years
(002) Possession Class C	3 years probation F&A (001) above
Indictment 2011-00553: [1]	
(001) Trafficking in Oxycodone	3-4 years concurrent with 2010-00298 (001) above
(002) School Zone	2 years house of correction F&A 11-0053 (001) and concurrent with 10-00298 (001).

Chemist Annie Dookhan ("Dookhan") was the primary chemist for the samples on the 2010-00298 indictments, which were analyzed on April 22 and 23, 2011. Chemist Dookhan was not involved in the analysis of the substances on the 2011-00553 indictment, which were analyzed on October 10, 2011.

The defendant now moves to withdraw the guilty pleas on both indictments because Dookhan was the primary chemist for the testing of the samples in indictment 2010-00298. The defendant's theories are that because Dookhan was involved in testing samples in his case his

[1] The indictment alleges that the defendant was trafficking heroin, however the parties agree that this is a mistake and are proceeding as if the indictment alleges that the defendant engaged in trafficking oxycodone.

plea was not voluntarily and intelligently made, was entered in violation of due process and is invalid because there is no factual basis. The defendant also argues that the Commonwealth's failure to disclose the misconduct violates Brady v. Maryland, 373 U.S. 83 (1963), evidence of the misconduct constitutes newly discovered evidence, it is in the interest of justice to allow him to withdraw his plea, and he received ineffective assistance of counsel at the time of his plea.

After a hearing the Court **DENIES** the Motion to Withdraw the Guilty Plea as it finds that the defendant has failed to prove that the drug certificates were material to his decision to plead guilty.

BACKGROUND

Indictment 2010-00298 – The defendant was arrested on March 31, 2010 after a search warrant was executed. The defendant admitted to police that he was in possession of oxycodone during the search. He was arrested with two females, who acknowledged that they were in the process of a drug transaction at the time the warrant was executed. The two females were willing to testify that the defendant had sold them oxycodone in the past and they were purchasing it from him at the time the officers intervened.

The substances found on the defendant's person were sent to the Department of Public Health Drug Lab ("Drug Lab") on April 5, 2010 and were analyzed on April 22, 2010 and April 23, 2010 by Annie Dookhan, who is being investigated for allegedly tampering with drug samples. There is no specific evidence of misconduct in this case. Daniel Renczkowski appears as the confirmatory chemist on all of the drug certificates. The drug certificates identify the substances as oxycodone with a total weight of 82.61 grams and Diazepam with no specified weight. The defendant was indicted on May 28, 2010 of trafficking in oxycodone and unlawful possession of a Class C substance.

Indictment 2011-0053 - While awaiting trial on 2010-00298, the defendant was again arrested during a drug transaction when police executed a search warrant to search his person on August 4, 2011. Police again found the defendant with two others who acknowledged that they had purchased oxycodone from the defendant in the past and that they were purchasing it from him at the time.

The samples were sent to the Drug Lab on September 28, 2011 and analyzed on October 10, 2011 by chemist Hevis Lieshi with Della Saunders as the confirmatory chemist. Neither chemist Lieshi nor Saunders are being investigated for any misconduct in the Drug Lab. Annie Dookhan did not participate in the testing of the samples obtained on this occasion. The drug certificates show a finding of 21.61 grams of oxycodone.

On May 23, 2012, the defendant entered a guilty plea on both indictments. At the time of the guilty plea, there was no indication that the Plymouth District Attorney ("the Commonwealth") knew of any misconduct at the Drug Lab that was unknown to defense counsel. Two months before the guilty plea, defense counsel filed a Supplemental Motion for Discovery seeking information about the misconduct at the Drug Lab. The motion was allowed in part and denied in part (Chin, J.).

The defendant now seeks to withdraw his guilty plea in light of the misconduct that has occurred in the Drug Lab. The Commonwealth argues that the defendant's plea was made with the advice of counsel in contemplation of all of the circumstances, including potential misconduct at the lab, the existence of witnesses, the defendant's admissions, and that the drug certificates were not material to the defendant's decision to plead guilty.

DISCUSSION

A guilty plea may be withdrawn in the sound discretion of a motion judge pursuant to Mass. R. Crim. P. 30. Commonwealth v. Conaghan, 433 Mass. 105, 106 (2000); Commonwealth v. Penrose, 363 Mass. 677, 681 (1973). A motion to withdraw a guilty plea is treated as a motion for a new trial. Conaghan, 433 Mass. at 106. Rule 30(b) allows for a new trial where "it appears that justice may not have been done." Mass. R. Crim. P. 30(b).

I. Intelligent and Voluntary

The defendant claims that his plea was not intelligently and voluntarily made and was made without sufficient understanding of the surrounding circumstances because he relied partially on drug certifications signed by Annie Dookhan. A guilty plea can only be valid if it is made intelligently and voluntarily and with sufficient understanding of the circumstances. Brady v. Maryland, 373 U.S. 83 (1963). In order for a plea to be voluntary and intelligent, it must be made with an understanding of the elements of the crime charged. This is satisfied where the elements of the crime are explained to the defendant or where the defendant admits to the facts constituting the crime. Commonwealth v. Lopez, 426 Mass. 657, 660 (1999). A voluntary and intelligent plea must also be made with an understanding of the procedural rights to be waived, and must be free from undue pressure by the government. Commonwealth v. Robbins, 431 Mass. 442, 449 (2000).

There is no indication from the plea colloquy that the guilty plea was accepted without proper confirmation that it was made of the defendant's free will with understanding of the charges against him and the consequences of pleading guilty. In addition, the defendant made his decision to enter a guilty plea with a full understanding of the circumstances surrounding his case. It is clear that the defendant knew that he had been caught in a drug sale on both occasions

and he had admitted to possession of oxycodone on the first occasion, and that the Commonwealth had two witnesses willing to testify at trial regarding the identity of the substances for each indictment. The defendant also had an opportunity to consider that a sentence on two separate trafficking convictions might be reduced if he agreed to enter a guilty plea. The amount of information available to the defendant prior to his plea and the lack of any evidence that the plea was entered into without full understanding of the charges against him indicate that the plea was intelligent and voluntary.

II. Due Process

A. False Evidence

The defendant next argues that the plea is based on false evidence and therefore was entered in violation of his 14th Amendment right to due process. "A conviction that is obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue v. Illinois, 360 U.S. 264, 269 (1959) (where the prosecution presented perjured testimony at trial with the knowledge that it was untruthful). There is no indication that the Commonwealth knew that these particular drug certificates could be tainted.

As letters to the Norfolk and Suffolk County District Attorneys' offices attached to Affidavit Of Counsel In Support Of Motion To Withdraw The Defendant's Guilty Plea indicate, the evidence of the misconduct at the time of the defendant's plea suggested only a limited impact on a select batch of ninety drug samples all coming from Norfolk County. The samples from the defendant's case were not included in those initial tainted samples. Therefore, the Commonwealth cannot be said to have knowingly utilized false evidence.

B. Brady v. Maryland

The defendant argues that his plea is invalid because the Commonwealth's failure to

disclose the misconduct in the Drug Lab violated his right to due process. Under Brady v. Maryland, 363 U.S. 83 (1963), there is a duty to disclose exculpatory evidence to the defendant, meaning "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). Typically, the prosecutor is not expected to produce exculpatory evidence held by government agencies other than the prosecutor and police. See Commonwealth v. Campbell, 378 Mass. 680, 702 (1979) (prosecution had no duty to get evidence of interview of jailhouse witness from Department of Corrections because defense could have accessed the records and it was impractical for prosecution to comb records due to size of government); compare Commonwealth v. Lykus, 451 Mass. 310, 324 (2008) (where the FBI's failure to disclose exculpatory voice recordings was imputed to the prosecution because the two entities had a substantial level of cooperation during investigation); Commonwealth v. Donahue, 396 Mass. 590, 597 (1986) (where the prosecution was required to get information from the FBI to check for exculpatory evidence). Thus, the prosecution is not necessarily required to discover exculpatory evidence in the possession of the Drug Lab.[2]

Even if the Commonwealth's duty to discover exculpatory evidence extends to the Drug Lab, there is no indication that the misconduct had been exposed, or that the prosecutor had access to such information, prior to the time the defendant made his guilty plea. See Commonwealth v. Adrey, 376 Mass. 747, 753 (1978) (no Brady violation because no showing that police or prosecution knew or had notes reflecting that witness had lack of memory before

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[2] There are instances in other jurisdictions that consider a drug lab to be part of the prosecution team, but in those cases there was enough control over the lab to warrant a finding that the prosecution effectively had possession and control of the evidence. See In re Brown, 17 Cal.4th 873, 880 (1998) (where the lab was part of the sheriff's department and was part of prosecution's investigative team); Damien v. State, 881 S.W.2d 102, 107 (Tex. 1994) (where the county crime lab was effectively in possession and control of prosecution). That is not the case here. The Drug Lab was an independent agency not run by the police or prosecution at the time of the defendant's plea.

his testimony); Commonwealth v. Adams, 374 Mass. 722, 730 (1978) (no violation for failure to disclose criminal records of prosecutions' witnesses because defendant made no showing that the records existed). The prosecution cannot be expected to disclose information that was not available to it.

In addition, the prosecution is not required to disclose evidence that the defendant is able to obtain on his own. See Campbell, 378 Mass. at 702. Here, the defendant filed a motion for additional discovery regarding misconduct in the lab and was provided with the available evidence with the exception of a few requests that were denied. Any additional information became available to the defendant as it became available to the Commonwealth through the media and letters from the Drug Lab. The defendant entered his plea on May 23, 2012, but exhibits attached to defense counsel's affidavit indicate that it was not until the State Police prepared to take over the Drug Lab in July 2012 that the extent of Dookhan's misconduct came to light. It is inappropriate to impute to the Commonwealth a duty to disclose information undiscoverable at the time of the plea, especially where any evidence available to the Commonwealth was available to defense counsel. As a result, failure to turn over evidence of the misconduct to the defendant was not a violation of the defendant's due process rights under Brady.

III. No Factual Basis

Next, the defendant argues that his guilty plea had no basis in fact because it was partially based on falsified drug certificates. A court cannot accept a guilty plea unless there is a basis in fact for the plea and "a defendant's choice to plead guilty will not alone support conviction; the defendant's guilt in fact must be established." Commonwealth v. Del Verde, 398 Mass. 288, 296-297 (1986) (court may not convict unless sufficient facts to establish each element of the

offense, either shown by Commonwealth or admitted by defendant).

The defendant argues that the drug certificates were the basis on which the court accepted his plea. However, the Commonwealth had two witnesses willing to testify as to the identity of the substances in question on each indictment and the defendant himself made a statement that he possessed oxycodone during the first arrest and was subsequently indicted for the same offense. The Commonwealth asserts that the witness' confirmation of the identity of the substances and the defendant's admissions, both in court and to police, provide a factual basis for the plea.

Although the use of a drug certificate confirms that a particular substance is an illegal drug with more certainty than any amount of circumstantial evidence, the identity of a substance may still be proven through circumstantial evidence. See Commonwealth v. Mendes, 463 Mass. 353, 360 (2012); Commonwealth v. Dawson, 399 Mass. 465, 467 (1987). It is well established that the identity of a substance may be confirmed at trial through the testimony of an experienced user or an experienced police officer. Dawson, 399 Mass. at 467. Accordingly, the witnesses' testimony viewed with the defendant's admission that he possessed oxycodone in the first instance and the second indictment on the same charge provides a factual basis for the plea.

IV. Newly Discovered Evidence

The defendant contends that Dookhan's misconduct is newly discovered evidence that entitles him to withdraw his guilty plea. A motion for a new trial may be granted where the evidence is newly discovered, credible and material, and casts real doubt on the conviction. Commonwealth v. DiBenedetto, 458 Mass. 657, 664 (2011), Commonwealth v. Pike, 431 Mass. 212, 218 (2000); Commonwealth v. LaFaille, 430 Mass. 44, 55 (1999). Newly discovered evidence is evidence that was "unknown to the defendant or his counsel" and was "not

reasonably discoverable at the time of trial." Commonwealth v. Grace, 397 Mass. 303, 306 (1986). It is the defendant's burden to show that the evidence was not discoverable by reasonable pre-trial diligence. Id. Evidence presented as newly discovered must be reliable and credible. Commonwealth v. Shuman, 445 Mass. 268, 271-272 (2005). The court, however, is "not obligated to accept as creditable" evidence that a defendant offers. Commonwealth v. Wheeler, 52 Mass. App. Ct. 631, 639 (2001). While a defendant need not prove the factual premise of the motion, he must provide "sufficient credible information to cast doubt on the issue." Commonwealth v. Goodreau, 442 Mass. 341, 348 (2004).

The standard is whether the new evidence would probably have been a real factor in the jury's deliberations. Lykus, 451 Mass. at 326. An important consideration is the strength of the case against the defendant. Id. Regardless of whether based on a guilty plea or a jury trial, a conviction must be overturned if allowing it to stand amounts to a manifest injustice. See Commonwealth v. Duest, 30 Mass. App. Ct. 623, 630 (1991) ("The fundamental test . . . is that the decision of the judge is not to be reversed unless a survey of the whole case shows that his decision, unless reversed, will result in manifest injustice"); see also Commonwealth v. Sharpe, 322 Mass. 441, 445 (1948) (manifest injustice to allow conviction of traffic violation to stand where evidence that the traffic sign was not properly maintained was withheld from defendant); compare Commonwealth v. Brown, 378 Mass. 165, 171 (1979) (no manifest injustice to allow conviction to stand where newly discovered testimony not credible and would not have had large impact on jury).

Here, Dookhan's misconduct is newly discovered evidence because its extent had not been realized at the time of the defendant's plea and defendant's motion for discovery regarding the misconduct failed to uncover additional evidence. Therefore, the defendant must show that

the evidence is material, thereby casting doubt on his conviction.

Newly discovered evidence must be material to a defendant's defense in order to warrant the granting of a new trial. Commonwealth v. Chetwynde, 31 Mass. App. Ct. 8, 14 (1991) (granting new trial where defense counsel's lies to defendant about results of motion to suppress convinced defendant that successful defense was unlikely and was material to his decision to plead guilty). In weighing his options a defendant will often consider the strength of the case against him. Brady v. United States, 297 U.S. 742, 757 (1970). The defendant argues that the drug certificates are an important part of the Commonwealth's case and therefore are material. As discussed above, the significance of a drug certificate is well known. Mendes, 463 Mass. at 360. However, it does not matter how substantial a piece of evidence is if, in light of all of the circumstances, it was not material to a decision to plead guilty.

To secure a drug trafficking conviction, the Commonwealth must prove beyond a reasonable doubt that a substance is in fact the drug alleged in the indictment. Commonwealth v. Vasquez, 456 Mass. 650, 361 (2010); United States v. Miller, 471 U.S. 130, 142 (1985). In addition, the Commonwealth must establish the weight of the substance in question. See G.L. c. 94C, § 32. Here, the Commonwealth's proof consisted not only of the drug certificates, but also witness testimony, admissions of the defendant in the first indictment and a separate indictment for possession of oxycodone, which is the same drug the defendant admitted to possessing in the first indictment.

The Commonwealth argues that the defendant chose to plead guilty because he was guilty, knew the identity and amount of drugs in his possession, and understood the strength of the evidence against him. The argument that a defendant pleads guilty only because he is guilty is insufficient; there are many reasons a defendant might accept the Commonwealth's version of

events by pleading guilty. However, an admission in open court of the facts alleged is not to be taken lightly. Where a defendant makes a plea based on one piece of tainted evidence, without more, it is not in the interests of justice to allow the plea to stand. On the other hand, where a defendant makes a plea in consideration of an array of evidence against him, one piece of evidence that may be tainted does not necessarily undermine the conviction. Where evidence is merely cumulative of other admissible evidence it does not materially affect a defendant's decision to plead guilty. See Lykus, 451 Mass. at 331 (motion for new trial denied where voice recording cumulative of eight witness' identification of voice); compare Vasquez, 456 Mass. at 366 (motion for new trial allowed where improperly admitted drug certificate was only evidence establishing substance was cocaine).

The defendant admitted to possession of oxycodone both to police and in open court based on the amount of evidence available against him and chose to agree that he possessed enough of the substance to satisfy the requirements of a trafficking charge. See G.L. c. 94, § 31. Had his admission in open court been accepted only based on the drug certificates, the defendant's position might be different. However, considering all of the evidence available aside from the drug certificates, it is likely that one in the defendant's position would enter a guilty plea. Accordingly, the newly discovered evidence of the misconduct in the Drug Lab was not material to the defendant's plea and therefore does not require the allowance of his motion on this ground.

V. Ineffective Assistance of Counsel

Finally, the defendant contends that he received ineffective assistance of counsel at the time of the plea. An attorney has rendered ineffective assistance where his behavior falls "measurably below that which might be expected from an ordinary fallible lawyer" and that

behavior "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). A strategic decision is only ineffective if it was manifestly unreasonable when made and it could have been reasonably foreseen that some other action would have better protected the defendant. Commonwealth v. Montez, 450 Mass. 736, 754 (2008); Commonwealth v. Adams, 347 Mass. 722, 728 (1978).

Here, plea counsel states in his affidavit that he would not have advised the defendant to plead guilty, and the defendant would not have pleaded guilty, had Dookhan's misconduct been known. It cannot be said that counsel should have anticipated the extent of the misconduct in th Drug Lab and the potential impact on the defendant's case. Defense counsel's motion to obtain discovery regarding the misconduct is evidence of his diligence in gathering all of the facts available to make a strategic decision. The advice to plead guilty, even in light of the possible impeachment evidence regarding some misconduct in the Drug Lab, does not amount to ineffective assistance of counsel. Therefore, this argument fails.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendant's Motion to Withdraw Guilty Plea pursuant to Mass. R. Crim. P. 30(b) be **DENIED**.[3]

Paul A. Chernoff
Judicial Magistrate

DATED: January 30, 2013

[3] In accordance with the Order of Assignment of the Chief Justice, if any party objects to the findings and rulings herein, it must notify the Judicial Magistrate, opposing counsel and the Regional Administrative Justice in writing within 48 hours stating the grounds for the objection.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2013, one copy of the Commonwealth's Petition Pursuant to G.L. c. 211, § 3, in the case of District Attorney for the Eastern District v. Superior Court, Supreme Judicial Court for Suffolk County, Single Justice, No. SJ-2013- , was sent via e-mail and first class mail, postage prepaid to:

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