

SUBSTITUTE

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

HAMPDEN COUNTY

No. SJC-11709

COMMONWEALTH
V.
BRYANT WARE

**ON APPEAL FROM AN ORDER OF
THE HAMPDEN COUNTY SUPERIOR COURT**

SUBSTITUTE BRIEF FOR THE COMMONWEALTH

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August 2014

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ISSUE PRESENTED

WHETHER THE MOTION JUDGE DID NOT ABUSE HIS BROAD DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR POSTCONVICTION DISCOVERY WHEN THE DEFENDANT FAILED TO MAKE OUT A PRIMA FACIE CASE OF EGREGIOUS MISCONDUCT BY A GOVERNMENT AGENT THAT ANTEDATED THE ENTRY OF HIS PLEA; FAILED TO SHOW THAT THE REQUESTED DISCOVERY HAD A NEXUS TO HIS CASE; AND FAILED TO SHOW THAT THE DISCOVERY SOUGHT WOULD HAVE HAD A MATERIAL INFLUENCE ON HIS DECISION TO PLEAD GUILTY.

STATEMENT OF THE CASE

On August 29, 2007, a Hampden County Grand Jury returned a five-count indictment against the defendant, numbered HDCR2007-01072, charging him with possession of cocaine with intent to distribute (count 1); possession of a Class D controlled substance (count 2); violation of the controlled substances laws in proximity to a school or park (count 3); possession of a firearm without an FID card (count 4); and conspiracy to violate the drug laws (count 5) (R/3, 5, 7).¹ On May 21, 2008, the defendant pled guilty to the charges in counts 1, 2 and 4 before the Honorable Tina S. Page (R./5).² On count 1, he was sentenced to two

¹ The record appendix is cited herein as "(R./page number)"; the transcript of the defendant's February 4, 2011 guilty plea is cited as "(Pl. Tr./page number)"; the Commonwealth's Addendum is cited as "(Add./page number)"; and the defendant's brief is cited as "(Def. Br./page number)."

² The docket for case HDCR2007-01072 notes initial pleas of not guilty to the charges in count 3 and 5,

and a half years in the House of Correction, with one year to serve and the balance suspended with probation for two years. On counts 2 and 4, he was sentenced to six months in the House of Correction, to be served concurrently with the committed sentence on count 1 (R./5).

On November 25, 2009, another Hampden County Grand Jury returned a one-count indictment, numbered HDCR2009-01072, against the defendant, charging him with distribution of cocaine as a subsequent offense (R./8, 13). He was further charged with a violation of the probation imposed on him when he pled guilty to charges brought against him in indictment HDCR2007-01072 (R./6-7).

On March 9, 2010, another Hampden County Grand Jury returned an eight-count indictment, numbered HDCR2010-00253, against the defendant, this time charging him with possession with intent to distribute a Class A controlled substance (count 1); violation of the controlled substances laws in the vicinity of a school or park (count 2); five counts of assault and

and does not reflect the ultimate disposition of these charges (R./5, 7).

battery with a dangerous weapon (counts 3-7); and resisting arrest (count 8) (R./14, 19).

On February 4, 2011, the defendant pled guilty to the charges in count 1 and counts 3 through 8 in indictment HDCR2010-00253, the single count in indictment HDCR2009-01072, and to a violation of the probation imposed in connection with indictment HDCR2007-01072 (R./7, 12, 18-19). On completion of the February 4, 2011 plea, the Commonwealth entered a nolle prosequi on count 2 of indictment HDCR2010-00253 (R./19; Pl. Tr./5).

The defendant was sentenced to not more than seven and not less than five years in State Prison on the single charge in indictment HDCR2009-01072 (R./12). On indictment HDCR2010-00253, the defendant was sentenced to State Prison for not more than seven years and not less than five years on count 1, to run concurrent with the sentence imposed on the charge in indictment HDCR2009-01072; on count 3, to probation for eighteen months from and after the sentence on count 1; and on counts 4-8, to probation for eighteen months, that probationary period to run concurrent with the probationary period imposed on count 3 (R./18). The probation violation netted the defendant

commitment to the House of Correction for the eighteen month suspended portion of the sentence imposed on him on May 21, 2008, to run concurrent with the State Prison sentence imposed on the charge in indictment HDCR2009-01072 (R./7).

On August 12, 2013, the defendant filed a motion for a new trial supported by his affidavit in the case with docket number HDCR2009-01072. The motion was referred for screening to the Committee for Public Counsel Services (R./13). On February 14, 2014, the defendant filed a motion pursuant to Mass. R. Crim. P. 30(c)(4) for leave to conduct postconviction discovery related to possible misconduct by Sonja Farak, a chemist formerly employed by the forensic drug analysis laboratory in Amherst ("Drug Lab") and for funds to conduct that discovery (R./7, 13, 18). His specific request was that "all samples [in the possession of the Springfield Police Department that had tested positive for narcotics at the Drug Lab] from July 2004 through January 18, 2013, be visually inspected to see whether it can readily be determined that they contain two distinct substances, and that 100 randomly-selected samples from 2004 and 200 randomly-selected samples from each succeeding year be

re-tested to determine whether evidence of tampering may be identified" (R./37-38). The motion was denied on March 12, 2014 by the Honorable C. Jeffrey Kinder (R./307-308; Add./1-2). The defendant timely filed a notice of appeal (R./13, 309). The case was entered in this Court on March 28, 2014. The defendant's application for direct appellate review was entered in the Supreme Judicial Court on April 18, 2014, and allowed on July 2, 2014. The case was entered on the docket of this Court on July 17, 2014.

STATEMENT OF THE FACTS

1. The defendant's February 4, 2011 guilty plea.

On February 4, 2011, the defendant appeared before the Honorable Tina S. Page and pled guilty to counts 1, 3, 4, 5, 6, 7, and 8 of indictment HDCR2010-00253 and to the single count in indictment HDCR2009-01072 and admitted to a violation of terms and conditions of probation imposed on him following his plea of guilty to charges in indictment HDCR2007-01072 (Pl. Tr./6-7). During the plea hearing, the defendant admitted the truth of the prosecutor's recitation the following facts (Pl. Tr./21).

In July 2009, members of the Springfield Police Department were conducting a narcotics investigation

with assistance from the Massachusetts State Police.

On July 31, 2009, an undercover state police trooper went to 92 Mill Street, where the defendant, with a Mr. Faust, sold the undercover trooper two chunks of an off-white rock-like substance for twenty dollars. The substance was subsequently analyzed and determined to be crack cocaine (Pl. Tr./18). According to the defendant's affidavit, he understood that if the case had gone to trial, the Commonwealth would have proved by means of a certificate of analysis signed by Ms. Farak that the substance he sold to the undercover trooper in July 2009 was crack cocaine (R./236).

As of December 2009, there was an arrest warrant out for the defendant. On December 22, 2009, shortly after 7:30 p.m., a number of Springfield police officers on surveillance in cruisers at Westford Circle saw the defendant and decided to execute the arrest warrant. The officers activated the emergency lights on their cruisers and brought the defendant's car to a stop in the vicinity of the intersection of Homer and State Streets.

As the officers began getting out of their vehicles to arrest the defendant, he put his car in reverse and rammed into the cruiser occupied by

Sergeant Ambrose and Officer Julio Toledo, causing damage to the vehicle (Pl. Tr./19). Next, he drove forward and smashed into the cruiser being driven by Detective Jose Robles, causing substantial damage to the passenger side door of the cruiser. He then fled the area. The officers pursued him with their emergency equipment activated. When he reached King Street, the defendant drove his car into another cruiser - this one occupied by Detective Jay Wadlegger and Officer Kalish - and severely damaged it as well. At this point, the defendant's car was immobilized. As the officers tried to take him into custody, he struggled with them (Pl. Tr./20). The defendant admitted to the judge that he knew the men in the vehicles he rammed were "cops" (Pl. Tr./22-23).

After the defendant's arrest, officers searched his car and found eight bags, labeled "Dynasty," of a substance that was later analyzed and found to be heroin (Pl. Tr./20). So far as may be determined from the record, the defendant has not claimed that Ms. Farak was the analyst who tested the heroin seized from his car on December 22, 2009.³

³ So far as appears from the record, the defendant also has not claimed that Ms. Farak tested the controlled

2. Summary of findings regarding chemist Sonja Farak.

On September 9, October 7 and October 23, 2013, the Honorable C. Jeffrey Kinder conducted an evidentiary hearing in connection with a number of motions for new trials based on the alleged criminal conduct of Ms. Farak and on the findings resulting from a quality assurance audit of the Drug Lab issued by the Massachusetts State Police in October 2012. He limited the presentation of evidence to three issues: the timing and scope of Ms. Farak's alleged criminal misconduct; the timing and scope of the conduct underlying negative findings in the October 10, 2012 quality assurance audit of the Drug Lab; and how Ms. Farak's alleged criminal conduct and the audit findings might relate to the testing performed in the post-conviction motions pending before him (R./161, 180, 199, 217, 240-241).⁴

In summary, the judge found that there was powerful evidence that Ms. Farak was stealing cocaine

substances that were the basis of charges brought against him in indictment HDCR2007-01072.

⁴ These record references are to a subset of the decisions issued by Judge Kinder following the three days of evidentiary hearings that the defendant has chosen to include in his record appendix in this case (R./159-232, 238-254).

from samples sent to the Drug Lab for analysis and replacing the cocaine with other substances (R./171, 190, 209, 228, 252). He further found, based on circumstantial evidence, including when her co-workers began noticing her frequent absences from her workstation during the day, a contemporaneous falling off in her productivity, and the results of re-testing in 2013 of samples that Ms. Farak had previously tested in July, August and October 2012, that her thefts of cocaine had begun in the summer of 2012 (R./172, 191, 210, 228, 252). Judge Kinder was unpersuaded that items seized from Ms. Farak's car, including manila envelopes from the Drub Lab used to transport case-related materials to court⁵ and newspaper articles about other chemists charged with thefts of controlled substances,⁶ supported an

⁵ The evidence before the judge was that, when chemists from the Drug Lab were called to court to testify, they carried the laboratory file (which did not contain any controlled substances) with them to court in a manila envelope, and wrote the laboratory's case number on the outside of the envelope. These envelopes were often discarded after the case was tried (R./162, 181, 200, 218, 242).

⁶ Police officers found three newspaper articles in Ms. Farak's car. The articles had been printed out on September 20, 2011; October 28, 2011; and December 2011 (R./166-167, 185-186, 204, 222-223, 246-247). One of them contained a handwritten note stating,

inference that Ms. Farak had stolen cocaine from samples submitted to the Drug Lab prior to the summer of 2012 (R./172, 191, 210, 228).

With respect to the quality assurance audit at the Drug Lab, the judge found that procedural deficiencies and a lack of oversight created a situation in which Ms. Farak was able to steal cocaine from samples submitted to the laboratory for testing. There was evidence before him, and he ruled, that the audit did not reveal unreliable testing at the laboratory (R./164, 174, 183, 192, 201-202, 211, 220, 229, 243-244). In or around September 2012, the Massachusetts State Police Forensic Services conducted an audit of all drug evidence at the Drug Lab. No missing samples were noted. On January 19, 2013, another audit was conducted. The only samples found to be missing were four samples known to have been removed from the Drug Lab by Ms. Farak (R./165-166, 184-185, 203, 221-222, 245).

On January 6, 2014, Ms. Farak pled guilty to various charges arising from her theft of cocaine from

among other things, "thank god I am not a law enforcement officer" (R./167, 186, 204, 223, 246-247).

samples entrusted to the Drug Lab for testing (Add./3-9).⁷

ARGUMENT

THE MOTION JUDGE DID NOT ABUSE HIS BROAD DISCRETION IN DENYING THE DEFENDANT'S REQUEST FOR POST-CONVICTION DISCOVERY WHEN THE DEFENDANT FAILED TO MAKE OUT A PRIMA FACIE CASE OF EGREGIOUS MISCONDUCT CONDUCT BY A GOVERNMENT AGENT THAT ANTEDATED THE ENTRY OF HIS PLEA; FAILED TO SHOW THAT THE REQUESTED DISCOVERY HAD A NEXUS TO HIS CASE; AND FAILED TO SHOW THAT THE DISCOVERY SOUGHT WOULD HAVE HAD A MATERIAL INFLUENCE ON HIS DECISION TO PLEAD GUILTY.

1. Standard of review and applicable law.

"The purpose of postconviction discovery is to allow a defendant to gather evidence to support a meritorious claim [for a new trial]." *Commonwealth v. Dubois*, 451 Mass. 20, 29 (2008); see also *Commonwealth v. Morgan*, 453 Mass. 54, 61-62 (2009) (in requesting postconviction discovery, a defendant must make a sufficient showing that the discovery sought is reasonably likely to warrant granting a new trial). "Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief." Reporter's Notes to Mass. R. Crim. P. 30,

⁷ This Court may take judicial notice of docket entries and papers filed in separate cases. See, e.g., *Home Depot v. Kardas*, 81 Mass. App. Ct. 27, 28 (2011).

West's Massachusetts Criminal Law and Procedure, at 633 (2014 ed.). A trial court judge has "broad discretion in deciding postjudgment discovery motions." *Commonwealth v. Daniels*, 445 Mass. 392, 393 (2005), citing *Commonwealth v. Tucceri*, 412 Mass. 401, 409 (1992).

According to the defendant, he seeks postconviction discovery to establish the timing of misconduct by Ms. Farak on the ground that information derived from such discovery might furnish him with evidence to support his new trial motion (Def. Br./9). The defendant's motion for a new trial presumably would be decided by reference to an analysis derived from *Ferrara v. United States*, 456 F.3d 278 (1st Cir. 2006). See, e.g., *Commonwealth v. Scott*, 467 Mass. 336, 346 (2014) (applying *Ferrara* analysis to motions for new trials based on misconduct of Annie Dookhan, formerly employed as a chemist in the Hinton forensic drug laboratory); *Commonwealth v. Rodriguez*, 467 Mass. 1002 (2014) (same); see also, e.g., *Commonwealth v. Jermaine Watt*, HDCR2009-1068 and 1069 (Oct. 30, 2013); *Commonwealth v. Deon Charles*, Hampden Superior Court, No. HDCR2011-00461 (Nov. 15, 2013); *Commonwealth v. Jose Garcia*, HDCR2006-00064 (Nov. 12, 2013);

Commonwealth v. Omar Harris, HDCR2010-01233 (Nov. 12, 2013); *Commonwealth v. William Guzman*, HDCR2012-00055 (Oct. 30, 2013) (R./159-232, 238-254) (applying analysis derived from *Ferrara* to motions for new trials based on Ms. Farak's misconduct). In *Scott*, the Court set forth the analysis as follows:

[W]hen a defendant seeks to vacate a guilty plea as a result of underlying government misconduct, rather than a defect in the plea procedures, the defendant must show both that 'egregiously impermissible conduct . . . by government agents . . . antedated the entry of his plea' and that 'the misconduct influenced his decision to plead guilty, or put another way, that it was material to that choice.'"

Scott, 467 Mass. at 346, quoting *Ferrara*, 456 F.3d at 290 (elisions in original).⁸

⁸ In *Commonwealth v. Scott*, 467 Mass. 336 (2014), exercising its general superintendence powers, this Court established a conclusive presumption that Ms. Dookhan's signature as the primary or secondary chemist on a drug certificate would be sufficient evidence "to establish the requisite nexus between egregious government wrongdoing and [a] defendant's case." *Id.* at 353. The Court emphasized that "this special evidentiary rule [was] *sui generis*." *Id.* (emphasis supplied). The Court further stated that:

[if] the *Ferrara* analysis [is] applied in the case of a motion for a new trial under Mass. R. Crim. P. 30(b) that does not arise from the investigation of [Ms.] Dookhan, the defendant will have the burden to establish each element of the first prong of *Ferrara*, and the adequacy of the defendant's showing will be committed to the sound discretion of the motion judge.

In denying the defendant's motion for postconviction discovery, the motion judge appears to have assumed that the defendant could make the requisite showing under the first prong of the *Ferrara* analysis, but could not carry his burden to satisfy the second prong of the analysis (R./307-308; Add./1-2). In the Commonwealth's view, the defendant's submission did not satisfy either prong of the *Ferrara* analysis.

1. The defendant failed to make the requisite showing of egregious misconduct by a government agent in his case antedating his guilty plea.

"Under the *Ferrara* analysis, the defendant first must show that egregious government misconduct preceded the entry of his guilty plea and that it is the sort of conduct that implicates the defendant's due process rights." *Scott*, 467 Mass. at 347. Ms. Farak's role as a chemist was to provide evidentiary support for the Commonwealth's prosecution of drug offenses. By stealing evidence necessary for trials in such cases, she compromised prosecutions and undermined public confidence in the work of the Drug Lab. The Commonwealth does not dispute that Ms. Farak's misconduct could, as a general matter, fairly

Id. at 354.

be characterized as egregious. The defendant, however, has failed to make out a *prima facie* case that any misconduct by Mr. Farak compromised the defendant's due process rights.

First, so far as the record discloses, Ms. Farak would have played a comparatively minor role in the Commonwealth's overall prosecution of the defendant. *Compare id.* at 348. It appears that her testimony might have been used as evidence in connection with the single narcotics-related charge in indictment HDCR2009-01072 (R./236). There is nothing in the record to suggest that testimony by Ms. Farak would have played any role in the Commonwealth's proof of the drug violations with which the defendant was charged in indictment HDCR2010-00253, nor would it have played a role in proving the violation of probation (Pl. Tr./18-19, 20-22).⁹ Further, the defendant faced charges of assault and battery with a

⁹ While the defendant's motion requests retesting of samples from 2004 to the present (R./37-38), a period of time that would encompass any tests conducted on the drugs that were the basis of some of the charges brought against him in indictment HDCR2007-01072, there is nothing in the record to suggest that Ms. Farak tested those drugs. See *Commonwealth v. Chatman*, 466 Mass. 327, 333 (2013) ("The defendant has the burden of proving facts upon which he relies in support of his motion for a new trial"); *Commonwealth v. Brown*, 378 Mass. 165, 171 (1979).

dangerous weapon (his car) on five police officers, as well as resisting arrest (R./19; Pl. Tr./19-20).

Those charges presumably would have been proved by testimony from the percipient witnesses. Thus, in contrast to *Scott*, it cannot be said that a lack of testimony by Ms. Farak "may have undermined the very foundation of [the defendant's] prosecution." *Id.*

Second, the defendant cannot meet his burden of showing that that Ms. Farak's misconduct should be attributed to the prosecution.

[Ms. Dookhan's] misconduct was the result of a misguided effort to test as many samples as possible (whether properly or not) and to further what she perceived to be the mission of the Commonwealth: to 'get [criminals] off the streets,' in her words. Thus, [Ms.] Dookhan's misconduct was not 'an individual unlawful scheme.'"

Scott, 467 Mass. at 350, quoting *Commonwealth v.*

Waters, 410 Mass. 224, 230 (1991).

The Supreme Judicial Court has recognized that "the misconduct of [government agents] engaged in their own individual unlawful scheme . . . [is] not related to 'the Commonwealth's interest in law enforcement' and therefore not attributable to the government." *Scott*, 467 Mass. at 350, quoting *Waters*, 410 Mass. at 230. Ms. Farak was engaged in an

individual unlawful scheme that was diametrically opposed to the Commonwealth's interest in law enforcement: she was stealing cocaine from samples submitted for testing. Overzealousness or sloppy work by a member of the prosecution team (broadly defined), is attributable to the Commonwealth. See *id.* This Court and the Massachusetts Appeals Court have, however, declined to order relief on the basis of misconduct by a member of the prosecution team who engages in unlawful misconduct unrelated to law enforcement. See *Waters*, 410 Mass. at 229-230 (declining to attribute to the Commonwealth alleged perjury by police officers supposed by the defendant to have engaged in extortion scheme); *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 65-66, rev. denied, 423 Mass. 1107, 1111 (1996) (declining to grant new trial based on state trooper's embezzlement of money from District Attorney's Office to support his gambling habit).

Third, the defendant has not made an adequate showing that Ms. Farak's misconduct preceded his guilty plea. The defendant pled guilty on February 4, 2011 to charges initiated by indictments returned in 2009 and 2010 (R./11-13, 17-19). Judge Kinder held an

extended evidentiary hearing over three days in September and October 2013 addressed in significant part to making findings concerning the timing and scope of Ms. Farak's misconduct (R./161, 180, 199, 217, 240-241). He heard the evidence alluded to by the defendant, with other evidence, and concluded that it did not establish that Ms. Farak's misconduct predicated July 2012. See, e.g., *Jermaine Watt*, slip op. at 13-14 & n.2; *Deon Charles*, slip op. at 13-14 & n.2; *Jose Garcia*, slip op. at 13-14 & n.2; *Omar Harris*, slip op. at 13-14 & n.2. (R./171-172, 190-191, 209-210, 227-228). "The determination of the weight and credibility of the [evidence] is the function and responsibility of the judge who saw and heard the witnesses." *Commonwealth v. Bresnahan*, 462 Mass. 761, 775 (2012), quoting *Commonwealth v. Moon*, 380 Mass. 751, 756 (1980). This Court does not "disturb the factual findings of [a] motion judge unless they are clearly erroneous." *Commonwealth v. Iguabita*, 69 Mass. App. Ct. 295, 304, rev. denied, 449 Mass. 1108 (2007), quoting *Commonwealth v. Healy*, 438 Mass. 672, 679 (2003). That the defendant disagrees with the motion judge's factual findings, which were based on the judge's assessment of the weight and credibility

of the evidence concerning the timing of Ms. Farak's misconduct, does not make out a *prima facie* case that Ms. Farak's misconduct predated the defendant's February 4, 2011 guilty plea. See *Bresnahan*, 462 Mass. at 775; *Iguabita*, 69 Mass. App. Ct. at 304.

Finally, the defendant cannot show - as he must - that the discovery he seeks has the requisite nexus to his own case. See *Scott*, 467 Mass. at 350-351. The Commonwealth's obligation is to disclose information in its possession, custody or control that is material to the defense. See *Daniels*, 445 Mass. at 403-404; see also Mass. R. Crim P. 14(a). The defendant's discovery request was not focused on inspection and re-testing of the drugs that were the basis of the charges against him. Rather, he sought an order requiring wholesale retesting of hundreds of samples submitted for testing over a period of some ten years. The nature of Ms. Dookhan's misconduct was such that it was not possible, after the fact, to resolve the question whether she engaged in misconduct in a particular case. See *Scott*, 467 Mass. at 351-352. It was for this reason that this Court exercised its superintendence power to create a conclusive presumption of government misconduct in cases where

Ms. Dookhan was the primary or secondary analyst. See *id.* at 352. That is not so as to Ms. Farak's misconduct, where re-testing of substances previously tested by her can and has been done. See, e.g., *Jermaine Watt*, slip op. at 10-11; *Deon Charles*, slip op. at 10-11; *Jose Garcia*, slip op. at 10-11; *Omar Harris*, slip op. at 10-11; *William Guzman*, slip. Op. at 11-12 (R./168-169, 187-188, 206-207, 224-225, 248-249). Here, the defendant sought overbroad, burdensome and costly discovery that lacked any nexus to his own case. See *Daniels*, 445 Mass. at 404 (it is highly relevant to decision to allow postconviction discovery that defendant pinpointed a limited number of files that could be searched without difficulty).

The judge properly denied the defendant's motion for postconviction discovery where the defendant did not meet his "burden to establish each element of the first prong of *Ferrara*." *Scott*, 467 Mass. at 354.

2. The defendant failed to demonstrate a reasonable probability that he would not have pled guilty had he known of Ms. Farak's misconduct.

As to the second prong of the *Ferrara* analysis, the defendant failed to establish a reasonable probability that he would not have pled guilty had he

known of Ms. Farak's misconduct. See *Scott*, 467 Mass. at 355-357. "At a minimum, [a] defendant must aver" that but for the government misconduct, "he would not have pleaded guilty and would have insisted on going to trial." *Scott*, 467 Mass. at 356, citing *Commonwealth v. Clarke*, 460 Mass. 30, 47 (2011). This defendant has not done so (R./236).

Nor did the motion judge err in concluding that, in the totality of the circumstances, the defendant had failed to demonstrate a reasonable probability that he would have taken his chances and gone to trial on all of the charges he was facing in February 2011 (R./307-308; Add./1-2). The Commonwealth's evidence in connection with indictment HDCR2009-01072 included strong circumstantial evidence of drug distribution: the defendant sold what appeared to be crack cocaine to an undercover police officer in circumstances typical of a street level drug transaction (Tr./19).

See *Wilkins v. United States*, 2014 WL 2462554 (1st Cir. June 3, 2014) (defendant failed to show reasonable probability that he would have gone to trial had he known of Ms. Dookhan's misconduct when defendant sold drugs to undercover officer in transaction that mirrored prototypical street corner drug buy). The

Commonwealth's other case against the defendant was even stronger. A jury likely would have inferred that the defendant was trying to escape because he knew he had drugs in his car when he rammed no fewer than three police cruisers occupied by a total of five officers (Pl. Tr./19-20). Multiple police officers could testify to their first-hand knowledge of the defendant's violent attempt to escape, using his car as a dangerous weapon, and to the subsequent discovery in his car of a very suggestively packaged substance that appeared to be heroin (Pl. Tr./19-20). See *Scott*, 467 Mass. at 356-357 (factor in determining whether defendant has established reasonable probability he would not have pled guilty is whether Commonwealth possessed other circumstantial evidence of drug possession and overall strength of Commonwealth's case). There is no indication in the record that Ms. Farak tested the drugs seized from the defendant on December 22, 2009. Evidence of Ms. Farak's misconduct would have been a weak counterweight to the case the Commonwealth could have put on had the defendant chosen to go to trial. See *Clarke*, 460 Mass. at 48 (defendant seeking to withdraw guilty plea failed to show requisite prejudice when

evidence facing defendant left little prospect he would escape guilty verdicts on significant charges).

Moreover, the defendant faced dire sentencing consequences had he proceeded to trial. See *id.* In addition to the drug-related charges, he was indicted on five charges of assault and battery with a dangerous weapon and a charge of resisting arrest as well as a violation of probation. While the drug-related charge in HDCR2009-01072 - apparently the only case involving an analysis by Ms. Farak - may not have been a minor component of the overall plea agreement, the other charges were very significant, and, as the motion judge noted, the plea agreement "significantly reduc[ed] [the defendant's] sentencing exposure" (R./308; Add/2). See *Scott*, 467 Mass. at 357. (generous terms of plea deal a factor in reasonable probability test). Leaving aside the charge in HDCR2009-01072, the defendant faced a minimum mandatory sentence of five years on the drug charge in HDCR2010-00253 (Pl. Tr./24), two and half years on the school zone violation from and after the sentence imposed on the drug conviction and sentences of up to ten years in State Prison on each of the five charges of assault and battery with a dangerous weapon, a

sentence of up to two and a half years on the charge of resisting arrest, and an eighteen month sentence for his violation of probation (Tr./35). See G.L. c. 94C, §§32(b), 32J; G.L. c. 265, §15A(b). So far as appears from the record, the defendant had no substantial ground of defense that would have been pursued at trial and did not face collateral consequences, such as deportation, that might have influenced his decision on whether to accept the plea deal. See *Scott*, 467 Mass. at 356; *Clarke*, 460 Mass. at 47-48.

In view of the totality of the circumstances, the judge's conclusion that the defendant failed to establish that any misconduct by Ms. Farak would have been material to his decision to plead guilty and that he failed to establish a *prima facie* case for relief should be affirmed. See *Clarke*, 460 Mass. at 49; *Morgan*, 453 Mass. at 63.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the denial of the defendant's motion pursuant to Mass. R. Crim. P. 30(c)(4) for postconviction discovery and for funds.

THE COMMONWEALTH

JAMES C. ORENSTEIN
DISTRICT ATTORNEY

JANE DAVIDSON MONTORI
ASSISTANT DISTRICT ATTORNEY
CHIEF APPELLATE DIVISION

By Katherine Robertson
KATHERINE ROBERTSON
ASSISTANT DISTRICT ATTORNEY
Hall of Justice
50 State Street
Springfield, MA 01102
(413) 505-5904
BBO # 557609
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CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(k)

I hereby certify, as required by Massachusetts Rule of Appellate Procedure 16(k), that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to the following: Mass. R. App. P. 16(a); 16(b); 16(e); 16(f); 16(g); 16(h); Mass. R. App. P. 18; and Mass. R. App. 20.

Date: 8/8/14

Katherine Robertson
Katherine Robertson

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS

HAMPDEN COUNTY
SUPERIOR COURT

FILED

COMMONWEALTH

v.

BRYANT WARE

HAMPDEN SUPERIOR COURT

Nos. HDCR2010-00253;
HDCR2009-01072; and,
HDCR2007-01072.

FEB 14 2014

MOTION FOR LEAVE TO CONDUCT
POST-CONVICTION DISCOVERY,
CLERK OF COURTS AND FOR FUNDS.

Now comes Bryant Ware, the defendant herein, and, pursuant to Rule 30(c)(4) of the Massachusetts Rules of Criminal Procedure, respectfully submits a motion for leave to conduct post-conviction discovery, and for funds.

As detailed in the attached memorandum, the sought discovery is reasonably likely to uncover evidence that might warrant granting a new trial.

Specifically, Mr. Ware seeks to conduct re-testing of narcotics evidence maintained by the Springfield Police Department concerning cases brought between July, 2004, and January 18, 2013. Mr. Ware had three such cases during that time. Also during that time, Sonja Farak was employed by the Massachusetts State Laboratory in Amherst as an assistant analyst. Ms. Farak has recently pled guilty to tampering with evidence in four separate cases. During proceedings in this court, four more cases were identified. Information as to Ms. Farak's impairment of the integrity of the Commonwealth's evidence in those four latter cases appears to have been discovered by happenstance, rather than as the result a comprehensive investigation of her criminal misconduct. Ms. Farak has not been prosecuted for her criminal misconduct in those four latter cases.

DENIED. See endorsement on the reverse side of
this page. *Jkl*

Add. 1

Defendant argues that he should be entitled to conduct post-conviction discovery, including the retesting of thousands of samples of controlled substances tested by Sonja Farak from 2004 to 2013, in an effort to further determine the scope and timing of her misconduct. I disagree. I conclude that the defendant has failed to establish a *prima facie* case for relief under Mass. R. Crim. P. 30(c)(4). In analyzing whether Farak's misconduct would have been material to the defendant's decision to plead guilty, I consider whether a reasonable defendant standing in the defendant's shoes would likely have altered his decision to plead guilty had he known about the misconduct. First, there is no evidence that the test results in this case were inaccurate, or that Farak was involved in any misconduct at the time Ware pled guilty. Moreover, separate and apart from the timing of Farak's misconduct, there were good reasons to accept the plea agreement. Ware knew that in one case he had been caught in a hand to hand drug sale with an undercover police officer and faced a minimum mandatory 5 year sentence. In a second case he faced a drug charge and school zone offense which would require a minimum mandatory sentence of 7 years, plus multiple charges of assault and battery and resisting arrest. By accepting the plea agreement, Ware resolved both cases with a 5-7 year concurrent sentence, significantly reducing his sentencing exposure. Given the strength of the Commonwealth's cases, the significant benefit Ware received from the plea agreement and the absence of any evidence that Farak's misconduct affected the testing in this case, I conclude that such misconduct would not have been material to his decision to plead guilty. Accordingly, he has failed to establish a *prima facie* case for the relief he seeks. The motion is therefore

DENIED. J Kinder 3/12/14

**Commonwealth of Massachusetts
HAMPSHIRE SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Farak, Sonja

Details for Docket: HSCR2013-00060

Case Information

Docket Number:	HSCR2013-00060	Caption:	Commonwealth v Farak, Sonja
Entry Date:	04/01/2013	Case Status:	Criminal - CTRm 2- 3rd fl
Status Date:	01/06/2014	Session:	Disposed (sentenced)
Lead Case:	NA	Deadline Status:	Active since
Trial Deadline:	04/23/2013	Jury Trial:	NO

Parties Involved

3 Parties Involved in Docket: HSCR2013-00060

Party Involved: Defendant

Last Name: Farak **First Name:** Sonja

Address: 37 Laurel Park

City: Northampton

Zip Code: 01060

Telephone:

Party Involved: Plaintiff

Last Name: Commonwealth

Address:

City:

Zip Code:

Telephone:

Party Involved: Surety

Last Name: Farak **First Name:** Linda J.

Address: 37 Norse Man Drive

City: Portsmouth

Zip Code: 02871

Zip Ext:

Telephone:

Attorneys Involved

3 Attorneys Involved for Docket: HSCR2013-00060

Attorney Involved:		Firm Name:	MA02
Last Name:	Kaczmarek	First Name:	Anne
Address:	1 Ashburton Place	Address:	19th Floor
City:	Boston	State:	MA
Zip Code:	02108	Zip Ext:	
Telephone:	617-727-2200	Tel Ext:	2677
Fascimile:	617-727-5761	Representing:	Commonwealth, (Plaintiff)

Attorney Involved:		Firm Name:	MA02
Last Name:	Lux	First Name:	Beth A.
Address:	1350 Main Street	Address:	fourth floor
City:	Springfield	State:	MA
Zip Code:	02108	Zip Ext:	
Telephone:	413-523-7712	Tel Ext:	
Fascimile:	413-784-1244	Representing:	Commonwealth, (Plaintiff)

Attorney Involved:		Firm Name:	
Last Name:	Pourinski	First Name:	Elaine M
Address:	13 Old South Street	Address:	
City:	Northampton	State:	MA
Zip Code:	01060	Zip Ext:	
Telephone:	413-587-9807	Tel Ext:	
Fascimile:	413-586-6619	Representing:	Farak, Sonja (Defendant)

Calendar Events

13 Calendar Events for Docket: HSCR2013-00060

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	04/22/2013	14:00	Arraignment	1	Event held as scheduled

2	06/10/2013	14:00	Conference: Pre-Trial	1	Event held as scheduled
3	06/24/2013	14:00	Hearing: Discovery Motions	1	Event held--(ACTIVE) under advisement
4	08/26/2013	14:00	Hearing: Pre-Trial	1	Event held as scheduled
5	10/11/2013	09:00	Status: Filing deadline	1	Event rescheduled by court prior to date
6	11/12/2013	09:00	Status: Filing deadline	1	Event held as scheduled
7	11/12/2013	14:00	Hearing: Evidentiary-suppression	1	Event rescheduled by court prior to date
8	12/12/2013	14:00	Hearing: Evidentiary-suppression	1	Event canceled not re-scheduled
9	12/23/2013	15:00	Hearing: Motion	1	Event held as scheduled
10	01/03/2014	11:00	Hearing: Plea Change	1	Event not reached by Court
11	01/06/2014	14:00	Hearing: Plea Change	1	Event held as scheduled
12	01/16/2014	14:00	Conference: Final Pre-Trial	1	Event canceled not re-scheduled
13	02/05/2014	14:00	TRIAL: LIST	1	Event canceled not re-scheduled

Full Docket Entries

131 Docket Entries for Docket: HSCR2013-00060

Entry Date:	Paper No:	Docket Entry:
04/01/2013	1	Indictment returned from Statewide Grand Jury
04/01/2013	3	Commonwealth's Motion to Consolidate in Hampshire County
04/01/2013		MOTION (P#2) Allowed. (Ball, J) Copies mailed 4/8/2013
04/01/2013	2	Commonwealth's Motion to Transfer Indictments
04/01/2013		MOTION (P#3) Allowed. (Ball, J) Copies mailed 4/8/2013
04/22/2013	4	Appearance of Commonwealth's Atty: Anne Kaczmarek
04/22/2013	5	Appearance of Deft's Atty: Elaine M Pourinski
04/22/2013		Deft arraigned before Court
04/22/2013		RE Offense 1:Plea of not guilty
04/22/2013		RE Offense 2:Plea of not guilty
04/22/2013		RE Offense 3:Plea of not guilty
04/22/2013		RE Offense 4:Plea of not guilty
04/22/2013		RE Offense 5:Plea of not guilty
04/22/2013		RE Offense 6:Plea of not guilty
04/22/2013		RE Offense 7:Plea of not guilty
04/22/2013		RE Offense 8:Plea of not guilty
04/22/2013		RE Offense 9:Plea of not guilty
04/22/2013		Bail: \$5,000.00 Cash - same bail previously posted in Belchertown
04/22/2013		District Court Docket No. 1398CR0167 - to be transferred* -New Crimes
04/22/2013		Colliquy. -111E Section 10 Drug warning. (Kinder, J.)
04/22/2013		Bail: Same previous conditions as ordered in District Court of

04/22/2013 Belchertown, specifically: 1) Meet with Probation weekly. 2) Random screens for drugs. 3) Curfew of 10PM - 5AM (with windows for visiting parents out of state, including overnight visits) Further window for work, if obtained, with prior notice to Probation. 4) Passport to be retained by Probation.(C. Jeffrey Kinder)

04/22/2013 Assigned to Track "B" see scheduling order

04/22/2013 Tracking deadlines Active since return date

04/22/2013 6 Case Tracking scheduling order (C. Jeffrey Kinder) mailed 4/23/2013

04/22/2013 7 Commonwealth files Statement of Case

04/22/2013 8 Commonwealth files First Certificate of Discovery

05/06/2013 9 Recognizance form filed. \$5,000.00 received from Eastern Hampshire District Court (ball transfer).

05/06/2013 9 Out of Court PTC. PTC report to be filed on or before 08/26/13.

06/10/2013 10 Defendant's Motion to view the alleged crime scene

06/21/2013 11 Defendant's Motion to redact witness' grand jury testimony prior to dissemination to the district attorneys and Motion to Impound Grand Jury testimony

06/21/2013 11 Commonwealth's Motion for Order to Disseminate Grand Jury materials to certain parties

06/24/2013 12 Discovery motions - Allowed as indicated by Court on Motions (Josephson, J)

06/24/2013 MOTION (P#10) Allowed (Bertha D. Josephson). Copies mailed 6/24/2013

06/24/2013 MOTION (P#12) Allowed as indicated on the record as to request made orally. (Bertha D. Josephson). Copies mailed 6/24/2013

06/24/2013 Hearing on (P#11) Defendant's Motion to redact witness' grand jury testimony prior to dissemination to the district attorneys and Motion to Impound Grand Jury testimony held, matter taken under advisement

06/24/2013 (Bertha D. Josephson)

06/24/2013 MOTION (P#11) Allowed (Bertha D. Josephson). Copies mailed 6/25/2013

07/15/2013 13 Commonwealth's Motion for Order to disseminate Grand Jury materials to certain parties

07/15/2013 13 MOTION (P#13) Allowed (Richard J. Carey). Copies mailed 7/15/2013

08/26/2013 Event: Pre Trial hearing held (Richard J. Carey)

08/26/2013 14 Pre-trial conference report filed; Trial Month February 2014; Final PTC January 16, 2014 @ 2 PM (Carey, J)

08/26/2013 15 Commonwealth files Second Certificate of Discovery

10/08/2013 16 Agreed upon motion to continue motion filing and motion hearing date

10/09/2013 MOTION (P#9) Allowed (Bertha D. Josephson). Copies mailed 10/9/2013

12/23/2013 17 Commonwealth's Motion to revoke bail

12/23/2013 MOTION (P#17) Allowed (Mary-Lou Rup). Copies mailed 12/23/2013

12/23/2013 Mittimus without bail issued to Chicopee Women's Correctional Center

12/23/2013 Commonwealth's Motion to Revoke bail allowed. Defendant to be held

12/23/2013

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without right to bail at the Women's Correctional Institution in Chicopee (see also 13-061) (Rup, J)

12/23/2013 18 Appearance of Commonwealth's Atty: Beth A. Lux

01/06/2014 RE Offense 1:Guilty plea

01/06/2014 RE Offense 2:Guilty plea

01/06/2014 RE Offense 3:Guilty plea

01/06/2014 RE Offense 4:Guilty plea

01/06/2014 RE Offense 5:Guilty plea

01/06/2014 RE Offense 6:Guilty plea

01/06/2014 RE Offense 7:Guilty plea

01/06/2014 RE Offense 8:Guilty plea

01/06/2014 RE Offense 9:Guilty plea

01/06/2014 19 Waiver of defendants' rights

01/06/2014 20 Commonwealth and Defendant file sentence recommendation(s) (unagreed)

01/06/2014 21 Defendant's Motion to file sentencing memorandum and letters under seal

01/06/2014 21 MOTION (P#21) Denied (Mary-Lou Rup). Copies mailed 1/8/14

01/06/2014 22 Dft files Sentencing Memorandum

01/06/2014 Plea of not guilty changed to guilty; accepted (Mary-Lou Rup)

01/06/2014 23 Finding on plea of guilty (Mary-Lou Rup)

01/06/2014 Defendant sentenced to Count 1: 2 1/2 years Women's Correctional Facility in Chicopee, 18 Months direct, balance suspended with 5 years probation Mary-Lou Rup)

01/06/2014 Special conditions of probation on Count 1 after direct period of incarceration: 1) no illegal drugs / alcohol; 2) substance abuse counseling / treatment as recommended; 3) mental health evaluation with counseling and treatment as recommended; 4) take any medications as recommended; 5) 4 AA or NA Meetings per week; 6) sign any appropriate releases for probation to monitor substance abuse treatment or mental health treatment; 7) 500 hours community service as determined by probation; 8) random screens for illegal drug and alcohol abuse (Mary-Lou Rup)

01/06/2014 Defendant sentenced to Counts 2, 3, 6, 7 & 8: on each count, each concurrent with each other and Count 1 of 13-60, 2 1/2 Years Women's Correctional Facility in Chicopee, 18 months direct, balance suspended with 5 years probation (same special conditions) (Mary-Lou Rup)

01/06/2014 Defendant sentenced to Count 5: 1 year Women's Correctional Facility in Chicopee, concurrent with Count 1 of 13-060 (Mary-Lou Rup)

01/06/2014 Defendant sentenced to Counts 4 and 9: on each count and each concurrent with each other and probation imposed on Counts 1, 2, 3, 6, 7, and 8,: 5 Years Probation, same special conditions (Mary-Lou Rup)

Sentence credit given as per 279:33A: 14 days (12/23/13 - 1/6/14)
 01/06/2014 Drug fee assessed: \$150.00 to be collected during probation (Mary-Lou Rup)
 01/06/2014 Victim-witness fee assessed: \$90.00 to be collected during probation (Mary-Lou Rup)
 01/06/2014 Probation supervision fee assessed: \$60.00 per month probation fee plus \$5.00 per month victim/services fee or alternative community service (see also 13-061) (Mary-Lou Rup)
 01/06/2014 24 Sentence fees/costs assessment by the Court (Mary-Lou Rup)
 01/06/2014 25 Reasons for Not imposing a sentence of incarceration (Mary-Lou Rup)
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 1
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 2
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 3
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 6
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 7
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 8
 01/06/2014 Mittimus issued to Chicopee Women's Correctional Center on Count 5
 01/06/2014 Bail in the amount of \$5,000.00 returned to Surety Linda Farak Check #1113
 01/06/2014 Abstract sent to RMV
 02/03/2014 Certified copy of indictment and docket sent to Ann L. Bodor, Paralegal , The Commonwealth of MA, Dept. of the State Treasurer, One Ashburton Place, Boston, MA 02108-1608.
 02/03/2014 Mailed documents and disc (transcript) to Rebecca A. Jacobstein, Committee for Public Counsel Services, Public Defender Division, Appeals Unit, 44 Bromfield St., Boston, MA 02108-4909.
 05/14/2014
 05/14/2014
 05/14/2014

Charges

9 Charges for Docket: HSCR2013-00060

No.	Charge Description:	Indictment:	Status:
1	TAMPERING WITH RECORD,DOCUMENT OR OTHER OBJ FOR OFFICIAL USE IN PROC		Guilty plea
2	TAMPERING WITH RECORD,DOCUMENT OR OTHER OBJ FOR OFFICIAL USE IN PROC		Guilty plea
3	TAMPERING WITH RECORD,DOCUMENT OR OTHER OBJ FOR OFFICIAL USE IN PROC		Guilty plea
4	TAMPERING WITH RECORD,DOCUMENT OR OTHER OBJ FOR OFFICIAL USE IN PROC		Guilty plea
5	DRUG, POSSESS CLASS B c94C s34		Guilty plea
6	DRUG, LARCENY OF c94C s37		Guilty

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		plea
7	DRUG, LARCENY OF c94C s37	Guilty plea
8	DRUG, LARCENY OF c94C s37	Guilty plea
9	DRUG, LARCENY OF c94C s37	Guilty plea

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Effective: August 2, 2012

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

■ Title XV. Regulation of Trade (Ch. 93-110H)

■ Chapter 94C. Controlled Substances Act (Refs & Annos)

→ → § 32. Class A controlled substances; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, etc.; eligibility for parole

(a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance as defined by section thirty-one of this chapter under this or any prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than 3 1/2 nor more than fifteen years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of 3 1/2 years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum 3 1/2 year term of imprisonment, as established herein.

(c) Any person serving a mandatory minimum sentence for violating any provision of this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or

section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

CREDIT(S)

Added by St.1980, c. 436, § 4. Amended by St.1982, c. 458; St.1982, c. 650, § 6; St.1983, c. 571, § 1; St.2010, c. 256, § 67, eff. Nov. 4, 2010; St.2012, c. 192, § 12, eff. Aug. 2, 2012.

Current through Chapter 164 of the 2014 2nd Annual Session

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Effective: August 2, 2012

Massachusetts General Laws Annotated Currentness

Part I. Administration of the Government (Ch. 1-182)

 ■ Title XV. Regulation of Trade (Ch. 93-110H)

 ■ Chapter 94C. Controlled Substances Act (Refs & Annos)

 → → § 32J. Controlled substances violations in, on, or near school property; eligibility for parole

Any person who violates the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I while in or on, or within 300 feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school if the violation occurs between 5:00 a.m. and midnight, whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years. A fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum two year term of imprisonment as established herein. In accordance with the provisions of section eight A of chapter two hundred and seventy-nine such sentence shall begin from and after the expiration of the sentence for violation of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I.

Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.

Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to a house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C.

(iii) the offense was committed during the commission or attempted commission of the a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.

CREDIT(S)

Added by St.1989, c. 227, § 2. Amended by St.1993, c. 335; St.1998, c. 194, § 146; St.2010, c. 256, § 72, eff. Nov. 4, 2010; St.2012, c. 192, §§ 30, 31, eff. Aug. 2, 2012.

Current through Chapter 164 of the 2014 2nd Annual Session

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<http://web2.westlaw.com/print/printstream.aspx?mt=56&prft=HTMLE&vr=2.0&destinatio...> 7/23/2014



Effective: May 22, 2002

Massachusetts General Laws Annotated Currentness

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

 ⇨ Title I. Crimes and Punishments (Ch. 263-274)

 ⇨ Chapter 265. Crimes Against the Person (Refs & Annos)

 → → § 15A. Assault and battery with dangerous weapon; victim sixty or older; punishment; subsequent offenses

(a) Whoever commits assault and battery upon a person sixty years or older by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault and battery upon a person sixty years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until two years of said sentence have been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served two years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relating to the power of the court to place certain offenders on probation shall not apply to any person seventeen years of age or over charged with a violation of this subsection.

(b) Whoever commits an assault and battery upon another by means of a dangerous weapon shall be punished by imprisonment in the state prison for not more than 10 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than \$5,000, or by both such fine and imprisonment.

(c) Whoever:

(i) by means of a dangerous weapon, commits an assault and battery upon another and by such assault and battery causes serious bodily injury;

(ii) by means of a dangerous weapon, commits an assault and battery upon another who is pregnant at the time of such assault and battery, knowing or having reason to know that the person is pregnant;

(iii) by means of a dangerous weapon, commits an assault and battery upon another who he knows has an outstanding temporary or permanent vacate, restraining or no contact order or judgment issued pursuant to section 18, section 34B or section 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A, or section 15 or 20 of chapter 209C, in effect against him at the time of such assault and battery; or

(iv) is 17 years of age or older and, by means of a dangerous weapon, commits an assault and battery upon a child under the age of 14;

shall be punished by imprisonment in the state prison for not more than 15 years or in the house of correction for not more than 2 1/2 years, or by a fine of not more than \$10,000, or by both such fine and imprisonment.

(d) For the purposes of this section, "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

CREDIT(S)

Amended by St.1981, c. 678, § 1; St.1995, c. 297, § 5; St.2002, c. 35, § 2.

Current through Chapter 164 of the 2014 2nd Annual Session

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Add. 15



C
 Massachusetts General Laws Annotated Currentness
 Massachusetts Rules of Criminal Procedure(Refs & Annos)
 → Rule 14. Pretrial Discovery

[Text of rule applicable to cases initiated (by indictment or complaint) on or after September 7, 2004.]

(a) Procedures for Discovery.

(1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of

physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) *Motions for Discovery.* The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) *Certificate of Compliance.* When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) *Continuing Duty.* If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) *Work Product.* This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) *Protective Orders.* Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) *Amendment of Discovery Orders.* Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) *Notice of Alibi.*

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to sub-

division (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, or order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

- (ii) the names and addresses of expert witnesses whom the defendant expects to call; and
- (iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

- (i) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.
- (ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.
- (iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the Commonwealth's examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) *Notice of Other Defenses.* If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) *Self Defense and First Aggressor.*

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a

brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

(c) Sanctions for Noncompliance.

(1) *Relief for Nondisclosure.* For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) *Exclusion of Evidence.* The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

CREDIT(S)

Amended March 8, 2004, effective September 7, 2004; April 4, 2005, effective May 1, 2005; December 17, 2008, effective April 1, 2009; June 26, 2012, effective September 17, 2012.

Current with amendments received through 6/30/2014

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**C**

Massachusetts General Laws Annotated Currentness

Massachusetts Rules of Criminal Procedure (Refs & Annos)

→ Rule 30. Post Conviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) *Service and Notice.* The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) *Waiver.* All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) *Affidavits.* Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) *Discovery.* Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) *Counsel.* The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) *Presence of Moving Party.* A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) *Place and Time of Hearing.* All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) *Appeal.* An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) *Appeal under G.L. c. 278, § 33E.* If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

CREDIT(S)

Amended effective April 14, 1995; amended September 6, 2001, effective October 1, 2001.

Current with amendments received through 6/30/2014

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ADDENDUM

Reporter's Notes to Mass. R. Crim. P. 30, West's Massachusetts Criminal Law and Procedure (2014 ed.)

Reporter's Notes

This rule, which marks a significant departure from prior Massachusetts practice, is derived from a number of sources. See Fed.R.Crim.P. Rules 33, 35; ABA *Standards Relating to Post-Conviction Remedies* (Approved Draft, 1968); *Rules of Criminal Procedure* (U.L.A.) Rule 632 (1974).

The moving party is to seek post conviction relief from the trial judge presiding at the initial trial. See *Commonwealth v. Sullivan*, 385 Mass. 497, 498 n. 1 (1981) (the judge who presided at a defendant's trial normally should hear that defendant's motion for a new trial). The trial judge is familiar with the case which "may make for more efficient handling." ABA *Standards, supra*, § 14, comment at 30. See *McCastle, Petitioner*, 401 Mass. 105, 107 (1987) (Rule 30 "assigns the motion to the trial judge who heard the case on the theory that [the judge's] familiarity with the case can assist in its effective handling"). However, for this same reason the trial judge may bring to the hearing a prejudice that another judge would not have. Recusal of the trial judge should thus be liberally exercised, particularly where it is requested by the moving party. See ABA *Standards, supra*, § 14(e). A second advantage to be gained from giving the trial court original jurisdiction to hear post conviction motions is that the necessary witnesses, if any, are likely to be convenient to the court.

Subdivision (a). When originally adopted in 1979, this subdivision consolidated the previously distinct procedures of habeas corpus and writ of error. The purpose of the revision was to simplify post conviction procedure, while maintaining the full scope of relief previously available. See ABA *Standards Relating to Post-Conviction Remedies* § 1.1 (Approved Draft, 1968). However, the writ of habeas corpus still has limited application in cases contending that the term of a lawfully imposed sentence has expired and basing a claim for relief on grounds distinct from issues arising at the indictment, trial, conviction or sentencing stages. See e.g., *Averett, Petitioner*, 404 Mass. 26, 30 (1988) (forfeiture of good time credits). A petition for a writ of habeas corpus is appropriate only where the petition alleges that the petitioner is entitled to immediate release. See *Stewart, Petitioner*, 411 Mass. 566, 568 (1991). On the other hand, a rule 30(a) motion is not available to contest the legality of a sentence that the defendant has already completed. Cf. *Commonwealth v. Lupo*, 394 Mass. 644, 646 (1985) ("Rule 30 [a] is intended primarily to provide relief for defendants incarcerated in violation of Federal law or of the laws of the Commonwealth.")

In addition to permitting convicted defendants to seek release from illegal confinement or other restraint on their liberty, this subdivision permits them to seek the correction of an illegal sentence. A distinction is drawn between an illegal

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Reporter's Notes to Mass. R. Crim. P. 30, West's Massachusetts Criminal Law and Procedure (2014 ed.) (continued)

sentence and a sentence imposed in an illegal manner. See Fed.R.Crim.P. Rule 35, *supra*, note 14, *infra*.

The concepts of an illegal sentence and an illegally-imposed sentence are narrow and permit the trial judge no discretion in the decision to modify a sentence. Both concepts presume that a defendant's conviction is in all ways valid and that only the sentence is in some manner defective. The difference between the two is that an illegal sentence is one that is not permitted by law for the offense committed by the defendant, *i.e.*, a sentence that exceeds the permissible maximum. See, e.g., Commonwealth v. Almers, 397 Mass. 705 (1986) (challenge to legality of consecutive sentences); Commonwealth v. Harris, 23 Mass. App. Ct. 687, 691-92 (1987) (court sentenced defendant for an offense other than that for which the jury convicted). Illegality has been held to include not only facially illegal sentences, but sentences premised upon a major misunderstanding by the sentencing judge as to the legal bounds of the judge's authority. E.g., United States v. Lewis, 392 F.2d 440 (4th Cir. 1968) (sentencing judge believed parole permissible upon imposition of maximum sentence); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (sentence constituted penalty upon exercise of defendant fifth amendment rights); Robinson v. United States, 313 F.2d 817 (7th Cir. 1963) (sentencing judge recommended parole when defendant ineligible). An illegally-imposed sentence is one where the irregularity lies with the procedure employed in imposing the sentence. See, e.g., Hull v. United States, 368 U.S. 424 (1962) where the trial court denied the defendant his right of allocution, which was held to be a procedural irregularity. In the context of a probation revocation order, a motion under Rule 30(a) would be appropriate only as a vehicle for challenging the legality of the sentence the defendant received and not the legality of the order revoking probation. Irregularities in the probation revocation process should be challenged through a direct appeal. See Commonwealth v. Christian, 429 Mass. 1022 (1999).

An illegal sentence must be corrected by the court at any time upon proper motion by the defendant. An illegally-imposed sentence can only be corrected upon a motion filed within the time permitted by Mass.R.Crim.P. Rule 29(a), that is, within 60 days after imposition. See *Rules of Criminal Procedure* (U.L.A.) Rule 632 (1974). The only restriction upon the correction of an illegal sentence is that it cannot be increased if it has been partially executed. See United States v. Benz, 282 U.S. 304 (1931).

Subdivision (b). This subdivision was taken primarily from Fed.R.Crim.P. Rule 33. The standard established in the first sentence is, however, taken directly from former G.L. c. 278, § 29 (St.1966, c. 301).

Prior to 1964 a motion for a new trial under G.L. c. 278, § 29 could only be granted within one year after the end of the trial. See Fine v. Commonwealth, 312 Mass. 252 (1942); Commonwealth v. Sacco, 261 Mass. 12 (1921). However, a 1964 amendment rewrote the statute so that the court could consider such a motion filed at any time after judgment. St.1964, c. 82.

In the absence of constitutional error, whether to grant a motion for a new trial on an issue that has been properly presented to the court is within the sound discretion of the trial judge. See Commonwealth v. Smith, 318 Mass. 141, 142 (1980). The basis for a new trial can either relate to the conduct of the trial, *e.g.*, Commonwealth v. Vaidulas, 333 Mass. 247, 250 (2001) ("The only means of revisiting after trial a matter raised in a motion in limine is through a motion for postconviction relief under rule 30(b)"); Commonwealth v.

Francis, 411 Mass. 579, 585-86 (1992) (improper jury instruction); Commonwealth v. Westmorland, 388 Mass. 269, 271 (1983) (ineffective assistance of counsel); Commonwealth v. Schand, 420 Mass. 783, 787-88 (1995) (prosecutor's failure to disclose exculpatory evidence); Commonwealth v. Nickerson, 388 Mass. 246, 249-250 (1983) (defendant's mental incompetence); Commonwealth v. Ciminera, 14 Mass.App.Ct. 101, 107-110, *aff'd* 384 Mass. 807 (1981) (jury misconduct); or to the discovery of new facts that bear on the question of guilt, see, e.g., Commonwealth v. Bires, 359 Mass. 657, 664-666 (1983) (newly-discovered evidence); Commonwealth v. Watson, 377 Mass. 814, 815 (1979) (recanted testimony).

A defendant seeking a new trial on the basis of newly-discovered evidence must establish both that the evidence is newly-discovered and that it casts real doubt on the justice of the conviction. See Commonwealth v. Pike, 431 Mass. 212, 218 (2000). The allegedly new evidence must be material and credible and carry a measure of strength in support of the defendant's position. Commonwealth v. Grace, 397 Mass. 303, 305-06 (1986). A defendant must also show that the evidence was unknown to the defendant or the defendant's counsel, and not discoverable through "reasonable pretrial diligence" at the time of trial or at the time of the presentation of any earlier motion for a new trial. See Pike, 431 Mass. at 218. "The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations. This process of judicial analysis requires a thorough knowledge of the trial proceedings and can, of course, be aided by a trial judge's observation of events at trial." Commonwealth v. Moore, 408 Mass. 117, 126-27 (1990), quoting Commonwealth v. Grace, 397 Mass. 303, 305-06 (1986).

A new trial motion under Rule 30(b) is the appropriate vehicle to attack the validity of a guilty plea or an admission to sufficient facts. See Commonwealth v. Fanelli, 412 Mass. 497 (1992) (treating the defendant's postsentence motion to withdraw guilty pleas as a motion for a new trial pursuant to Mass.R.Crim.P. 30); Dunbrack v. Commonwealth, 398 Mass. 502 (1986) (the appropriate method for attacking the lawfulness of the admission to sufficient facts and the sentence imposed is a postconviction motion for new trial pursuant to rule 30(b) and not a petition under c. 211 § 3). A Rule 30(b) motion is also appropriate where the defendant has been deprived of a constitutionally-protected right by counsel's failure to appeal. See Commonwealth v. Cowie, 404 Mass. 119, 121 (1989). However, granting a new trial because the verdict is against the weight of the evidence should be done according to Rule 25(b)(2), not Rule 30. See Commonwealth v. Preston, 393 Mass. 318, 324 (1984).

The requirement that the trial judge make findings upon a motion for a new trial is contrary to the traditional rule in the Commonwealth, see Commonwealth v. Morgan, 280 Mass. 392 (1932), but is based upon the following language of the court in Earl v. Commonwealth, 356 Mass. 181 (1969):

"We recognize that the single justice has power to entertain writs of error in such cases, but it is preferable that these questions be resolved in the first instance by the trial judge upon a motion for a new trial. The effect of this practice will be to place in the hands of the trial judge, rather than in the hands of the single justice, the task of resolving factual disputes underlying alleged constitutional errors."

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Reporter's Notes to Mass. R. Crim. P. 30, West's Massachusetts Criminal Law and Procedure (2014 ed.) (continued)

Id. at 183. *Accord, Commonwealth v. Penrose*, 363 Mass. 677 (1973). Cf. *Commonwealth v. Preston*, 393 Mass. 318, 323 n. 4 (1984) (declining to address the issue whether findings are required in response to all rule 30(b) motions regardless of outcome). The absence of a finding of fact hampers appellate review of the judge's decision on a new trial motion. See, e.g., *Commonwealth v. Caban*, 48 Mass. App. Ct. 179, 184 (1999) (remanding case for finding of fact).

General Laws c. 279, § 41 provides that judgment should be entered against a corporation that fails to appear in court to answer charges against it. If the corporation can later show cause to excuse its prior neglect, it should be permitted to have the prior judgment vacated upon a motion for a new trial.

The original Reporter's Notes to Rule 30 intended that the remedy available under this subdivision be truly post-conviction, that is, not open to a defendant until the validity of the finding or verdict of guilt was conclusively established by an appellate court if an appeal was taken. This policy was designed to avoid complex and duplicitous proceedings and to protect the interests of the defendant, who is ordinarily limited to a single motion for a new trial. In the years since this subdivision was first promulgated, however, it has not been unusual for defendants to file a rule 30(b) motion after a notice of appeal has been filed. If the motion is pending at the time the appeal is entered, counsel then request a stay of the appeal until the motion is disposed of so that any appeal from the ruling can be consolidated with that from the judgment. See *Commonwealth v. Powers*, 21 Mass. App. Ct. 570, 572 n. 2 (1986). The Supreme Judicial Court has recognized that a judge may rule on a new trial motion prior to the determination of an appeal from the conviction. See *Commonwealth v. Hallet*, 427 Mass. 552, 555 (1998) (describing considerations a judge should take into account in deciding whether to rule on the merits of a new trial motion presented prior to the determination of an appeal); *Commonwealth v. Smith*, 384 Mass. 519, 524 (1981) ("defendant's appeal from his conviction should, when possible, be combined for review with his appeal from the denial of any motion for a new trial").

This rule does not limit access of a criminal defendant to review pursuant to G.L.c. 211, § 3, which grants the Supreme Judicial Court general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided. That power, however, should be and has been exercised only in exceptional circumstances when necessary to protect substantive rights. See *McGuinness v. Commonwealth*, 420 Mass. 495, 497 (1995); *Forte v. Commonwealth*, 418 Mass. 98, 99 (1994); *Commonwealth v. McCarthy*, 375 Mass. 409, 414 (1978) and cases cited.

Subdivision (c)(2). *See* *McGuinness v. Commonwealth*, 420 Mass. 495, 497 (1995). In 2001, this subsection was amended to eliminate the requirement that the Attorney General be served in every case where a motion is filed under Rule 30(a). This subsection now requires service of a motion for a new trial under either subsection (a) or subsection (b), upon the office of the prosecutor who represented the Commonwealth in the trial court, whether a District Attorney's Office or the Attorney General's Office. The prosecutor's office which maintains the original trial file is in the best position and is responsible for responding to motions for a new trial.

(c)(2). Subdivision (c)(2) was modeled after M.R. REV STAT ANN, tit 14 § 5507 (1964), and was intended to establish finality of convictions and to eliminate "piecemeal litigation . . . whose only purpose is to vex, harass, or delay." *Sander v. United States*, 272 U.S. 418 (1923). See *Commonwealth v. Donahue*, 6 Mass. App. Ct. 971 (1979) (defendant's fourth motion for new trial). This rule is not intended to foreclose from future consideration grounds which were not known and could not have been found out with the exercise of due diligence. The constitutionality of the Maine statute from which this subdivision is taken was upheld by the Supreme Court in *Murch v. Metram*, 409 U.S. 41 (1972). See ABA Standards Relating To Post-Conviction Remedies § 6.2(b)(1) (Approved Draft, 1968).

The rule of waiver established in the subdivision applies as a result of case law to claims that were not preserved at trial or not raised in an appeal, as well as to claims that were not put forward in a prior new trial motion. See *Rodwell v. Commonwealth*, 432 Mass. 1016, 1017 (2000) ("If a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief, the claim is waived."); *Commonwealth v. McLaughlin*, 364 Mass. 211, 229 (1973) (quoting from *Commonwealth v. Dascalakis*, 246 Mass. 12, 24 (1923) ("It has been the unbroken practice both under the statute [former G.L. c. 278, § 29] on which Rule 30 was based] and at common law respecting motions for new trial not to examine anew the original trial for the detection of errors which might have been raised by exceptions taken at the trial.")); Waiver applies equally to constitutional and non-constitutional claims. See *Commonwealth v. Deearm*, 397 Mass. 136, 139 (1986).

Where a new trial motion presents a claim that could have been raised at trial but was not, the discretion a judge has to entertain the issue, as well as the scope of appellate review of the judge's decision, differs depending on the timing of the motion. Where the motion is presented to the court prior to the determination of an appeal, the motion judge, especially if the judge presided over the original trial, has wide discretion to consider an issue that was not raised at trial. See *Commonwealth v. Hallet*, 427 Mass. 552, 554-55 (1998). If the judge does consider the issue on its merits, it opens the issue up to full appellate review. *Id.* If the judge does not consider the issue on the merits, however, and denies relief based on the waiver doctrine, the standard for appellate review is confined to whether there was a substantial risk of a miscarriage of justice. *Id.* at 554. A judge should take into account in deciding to deny a new trial motion on the merits rather than on the basis of waiver, the advantage and disadvantage of making full appellate review available. *Id.*

Since it affects the scope of appellate review, if the judge is going to deny the motion, the judge should make clear whether the decision is based on a consideration of the merits, or on the basis that the error did not raise a substantial risk of a miscarriage of justice – which is the standard for considering issues that have been waived because they were not preserved at trial. See *id.* at 555. (The judge should recognize that, unless the asserted error concerns a manifest injustice or creates a substantial risk of a miscarriage of justice, she has wide discretion whether to consider any new trial issue fully on its merits.) *Commonwealth v. Depace*, 433 Mass. 379, 382 n.2 (2001) (where the judge considered the matter only on the threshold question whether the defendant raised a substantial issue necessitating an evidentiary hearing, the issue was not preserved for full appellate review); *Commonwealth v. Oliveira*, 431 Mass. 609, 612 (2000) (where the judge considered the matter only to determine if the issue raised in

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assisted error that created a substantial risk of a miscarriage of justice; that issue was not preserved for full appellate review, an evaluation of the issue on habeas corpus review, or a new trial motion is presented after an appeal has been decided, the discretion the judge has to consider an issue that could have been raised earlier is much more limited. In this posture, the Supreme Judicial Court has recommended restricting consideration of such ordinarily waived issues to those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result. Commonwealth v. Watson, 409 Mass. 110, 112 (1991). In determining if a substantial risk of a miscarriage of justice warrants the judge in considering a claim that would otherwise be precluded because it was not raised earlier, the judge should take into account three factors taken from Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 21 n.22 (1986): whether there is a genuine question of guilt or innocence; whether the error was significant enough in the context of the trial to make it plausible to infer that the result might have been different but for the error; and whether counsel's failure to object at trial was simply a reasonable tactical decision. See Commonwealth v. Amirault, 424 Mass. 618, 647 (1997). However, where a new trial motion raises an issue for the first time whose constitutional significance was not established until after the trial and appeal, so that the defendant did not have a genuine opportunity to preserve the issue in the normal course of events, the judge may consider it. See Commonwealth v. Burkett, 396 Mass. 509, 511 (1985). The standard of review from the denial of a new trial motion filed after an appeal has been decided is the same: whether the motion judge considered the issue or not, whether there was a substantial risk of a miscarriage of justice. See Commonwealth v. Curtis, 417 Mass. 619, 624 n.4 (1994).

(c)(3). The primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit. In accordance with prior practice, see Commonwealth v. Hubbard, 371 Mass. 160, 174 (1978) (quoting Commonwealth v. Coggins, 324 Mass. 552, 556-57; cert. denied, 388 U.S. 881 (1949)), such motions should ordinarily be heard on the facts as presented by affidavit; although, in particular circumstances, the judge may, in the exercise of discretion receive oral testimony. See Commonwealth v. Figueiroa, 422 Mass. 73, 77 (1996) (the decision whether to hold an evidentiary hearing on a new trial motion under Rule 30 is within the sound discretion of the judge). Where a substantial issue is raised, however, the better practice is to conduct an evidentiary hearing. See Blackledge v. Allison, 431 U.S. 53, 75-76 (1977). (Compare Commonwealth v. Escata, 412 Mass. 654, 660 (1992) (error to refuse hearing on new trial motion which raised a substantial issue of ineffective assistance of counsel), with Commonwealth v. Stewart, 383 Mass. 253, 257 (1981) (not error to refuse a hearing on new trial motion which failed to raise substantial issue concerning perjury by prosecution witness). In determining whether the motion raises a substantial issue which merits an evidentiary hearing, the judge should look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing. See *id.* at 257-58. Whether or not a substantial issue is presented must, of course, be determined on the face of the motion and affidavit. The motion should specify the grounds for relief. Commonwealth v. Saarela, 13 Mass. App. Ct. 402, 407 (1983); and the affidavit should provide the factual support necessary to determine the issue. The court is fully warranted in dismissing a motion unaccompanied by affidavit, see Commonwealth v. Golantoni, 31 Mass. App. Ct. 299, 302 (1991); or one whose factual allegations are obscure, *cf.* Sayles v. Commonwealth, 373 Mass. 856 (1977). Impressionistic

and conclusory, cf. Commonwealth v. Coyne, 322 Mass. 599, 600 (1957), can undermine, *see id.* Commonwealth v. Lopez, 422 Mass. 551, 562 (1998); and, *id.* at 561, note, "such is not the case, however, if the trial judge is satisfied that the affidavit is sufficient to establish the facts." The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate, by the trial judge.

(c)(4). Discovery in the context of a new trial motion is not a matter of right. The motion must first establish prima facie cause for relief before discovery is available. However, where that hurdle is met and discovery would be appropriate to develop facts necessary to support the claim, it is within the judge's discretion to allow discovery. Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief. Cf. Harris v. United States, 394 U.S. 286, 300 (1969). This subsection provides that the Commonwealth, as well as the defendant, may obtain discovery. Cf. Rules Governing § 2254 Cases in the United States District Courts, Rule 6(c) (recognizing the right of the respondent in a habeas corpus case to take the deposition of the petitioner). If, upon completion of discovery, the defendant is totally unable to make a reasonable proffer of evidence on a crucial element of the case, no hearing need be held and the motion may be dismissed. *See Commonwealth v. Johnson*, 39 Mass. App. Ct. 111, 114 (1995).

In 2001, this subsection was amended to eliminate confusion arising from the reference to discovery in civil cases. The judge has wide discretion to allow the appropriate form of discovery, *see Commonwealth v. Stewart*, 383 Mass. 253, 261 (1981), which may include orders to produce evidence or statements, as provided in the Rules of Criminal Procedure, and in an unusual case, may include depositions or other modes of discovery provided in the Rules of Civil Procedure. Where necessary, a party subject to discovery may seek an appropriate protective order.

In 2001, this subsection was also amended to require the opposing party to receive notice and an opportunity to be heard before the judge grants a discovery request. This provision is particularly important in the context of a request that evidence in the possession of the Commonwealth be made available to the defendant for scientific testing, such as DNA analysis. Before ordering such discovery, the judge must take into account a number of issues whose resolution requires the Commonwealth's participation, including the potential relevance of the results to the ground, the motion advances for a new trial, the feasibility of successful testing, and the details of access to and testing of the evidence. *See generally* National Commission on the Future of DNA Evidence, Postconviction DNA Testing: Recommendations For Handling Requests (Nat'l. Inst. Justice 1999) at 52-53.

(c)(5). As a matter of constitutional obligation, the state need only ensure that indigent defendants have meaningful access to whatever post conviction proceedings are generally available. *See Commonwealth v. Coneccicut*, 388 Mass. 255 (1982). Counsel is not necessary in every case to ensure that and *id.* at 261. The decision whether to appoint counsel on a motion for a new trial is within the discretion of the trial judge. However, where the motion raises a meritorious, or even colorable, claim, it is much the better practice to assign counsel. *Id.* at 262. G.L.c. 211D, § 1, provides for the Committee for Public Counsel Services to represent indigent defendants in post conviction proceedings, and judges may refer requests for counsel to the Committee for initial screening.

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If the motion is frivolous, repetitive, or the issues are so simple and easy that an attorney is not necessary to elucidate them, the judge may deny a motion for the appointment of counsel. *See Conceicao, supra*, 388 Mass. at 261-62. Where the motion is presented to the trial judge, the judge may take into account the fact of familiarity with the original record, or with that in prior new trial motions, in declining to appoint counsel. *Id.* at 261.

By amendment in 2001, this subsection gave judges discretion to allow for the payment of costs associated with the preparation and presentation of a new trial motion. Such costs may include the preparation of a transcript, obtaining the services of an investigator, retaining the services of an expert, or paying for scientific testing. As with the decision to appoint counsel, there is no constitutional right to have the state pay for these types of costs associated with a new trial motion. *See Commonwealth v. Davis*, 410 Mass. 680, 684 n. 7 (1991). But where the defendant seeks costs that are reasonably necessary to develop support for a well founded basis for granting a new trial, it is appropriate for the judge to exercise discretion and allow the request. In making the decision to allow costs associated with a new trial motion, the judge should take into account the likelihood that the expenditure will result in the defendant's being able to present a meritorious ground for a new trial. Where the request concerns scientific testing of evidence in the Commonwealth's possession, as with DNA analysis, the court should consider a request for funds in conjunction with the appropriate discovery motion under subsection (c)(4) seeking access to the evidence in question.

By amendment in 2001, this subsection required that the Commonwealth be given notice and an opportunity to be heard with respect to a request for costs in connection with a new trial motion. Unlike a request for costs prior to trial, in the context of a new trial motion there is no reason to deny the Commonwealth an opportunity to participate in a hearing on this type of request in order to avoid the prejudice that can result from the defendant's being forced to reveal trial strategy prematurely. *Cf. McKinney v. Paskett*, 753 F.Supp. 861, 864 (D.C. Id. 1990). The sound exercise of a judge's discretion to allow the defendant costs will depend in part on an evaluation of the legal theory which the expenditure of funds would support. The Commonwealth's participation in this process will result in a better informed decision. This subsection, however, does not give the Commonwealth a right to participate in the determination of a request for the initial appointment of counsel.

(c)(6). Subdivision (c)(6) was originally taken from 28 U.S.C. § 2255 (1949) and authorizes the court to make a determination—with or without a hearing—without requiring the presence of the moving party.

The defendant's presence is not required at a hearing on a motion for a new trial. *See Commonwealth v. Owens*, 414 Mass. 595, 604 (1993) citing *Commonwealth v. Costello*, 121 Mass. 371, 372 (1876). Where the defendant's presence will be of little help to the court—e.g., at the determination of purely legal issues—a proper determination can be made in his absence. *Sanders v. United States*, 373 U.S. 1, 21 (1963); *Howard v. United States*, 274 F.2d 100, 104 (8th Cir. 1960). *See Mass.R.Crim.P.*, Rule 18 and Reporters' Notes. It is therefore appropriate to screen post-conviction motions carefully, and to utilize other than summary disposition only where an evidentiary hearing to resolve factual issues requires the presence of the defendant. *ABA Standards Relating to Post-Conviction Remedies* § 4.5(a); § 4.6, commentary at 74-75 (Approved Draft, 1968).

(c)(7). This subdivision is designed to expedite the determination of motions filed pursuant to this rule. In 2001, it was amended to give the parties at least 30 days notice of a hearing on a new trial motion, unless the judge determines that good cause exists to order the hearing held sooner. In light of the fact that the Commonwealth need not respond to every new trial motion, since some may be denied on their face as without merit, the primary objective of this provision is to avoid the problem of having the Commonwealth placed in the position of having to respond to a new trial motion without adequate time to prepare.

(c)(8) & (c)(9). Subdivision (c)(8) was originally patterned after CAL PENAL CODE § 1506 (Deering Supp. 1976).

Appeals from new trial motions in cases subject to G.L. c. 278, § 33E go to the Supreme Judicial Court. In all other cases, the Appeals Court is the appropriate venue. Either party may appeal from an adverse determination on a new trial motion. A ruling in favor of a defendant on a motion for relief from unlawful restraint or for a new trial pursuant to this rule does not preclude a Commonwealth appeal, since a successful appeal would merely reinstate the verdict or finding of guilt and would not subject the defendant to re-prosecution or multiple punishment. *United States v. Wilson*, 420 U.S. 332 (1975).

A defendant's request for release on bail pending appeal is a matter within the discretion of the trial judge. *See Forte v. Commonwealth*, 418 Mass. 98, 100 (1994). However, the provision giving the judge discretion to release a defendant on bail pending appeal applies only to appeals from an order for a new trial or an order determining that the defendant's sentence should be reduced to a term of imprisonment less than the time he already has served. *See Stewart v. Commonwealth*, 413 Mass. 664 (1992).

Under subdivisions (c)(8)(B) and (c)(9), the appellate court is to determine the defendant's costs of appeal which are then to be paid to the defendant by the Commonwealth on the order of the trial court. In 1995, the Standing Advisory Committee on Criminal Procedure reconsidered the several rules concerning the payment of reasonable attorney's fees to insure that they were consistent. In *Latimore v. Commonwealth*, 417 Mass. 805 (1994), the Commonwealth filed an application for leave to appeal the allowance of the defendant's motion for a new trial under the provisions of G.L. c. 278, § 33E. The application was denied by the single justice and the defendant moved for costs and attorney's fees. Because the application for appeal in a capital case was controlled by section 33E, rather than Rule 30(c)(8)(B), no specific provision for payment of fees and costs were available. The court observed that this situation, while rare, presented an anomaly in the rules.

The committee reconsidered the appropriate rules and added language to address the situation where the Commonwealth is making application for leave to appeal and adds directions for payment of fees and costs upon the denial of the application.

The Single Justice in the Memorandum of Decision in the County Court in *Commonwealth v. Latimore*, Supreme Judicial Court for Suffolk Co. 92-0469 said that in appropriate circumstances he would read the authority granted to the Appeals Court to include the Supreme Judicial Court. To confirm this authority to include both appellate courts, Rule 30(c)(8)(B) was amended to specifically include both courts.

The specific shortcoming of the rules addressed in *Latimore* was corrected by the addition of Rule 30(c)(9) which provides the Supreme Judicial Court with authority to award fees and costs in capital cases under the provision of G.L. c. 278, § 33E.