COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
NO. SJC-11409

ESSEX, SS.

COMMONWEALTH,
Appellant

V.

HECTOR MILETTE,
Appellee

ON RESERVATION AND REPORT
BY THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF AND RECORD APPENDIX FOR THE COMMONWEALTH

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ISSUE PRESENTED

A single justice of the Supreme Judicial Court for Suffolk County (Botsford, J.), has reserved and reported the following question to this Court:

> Does a special magistrate have the authority to reconsider and allow a motion to stay execution of a criminal defendant's sentence where a judge of the Superior Court has previously denied a motion to stay execution filed by the same defendant?

The single justice also reserved and reported questions arising from two other petitions filed by the Commonwealth concerning proceedings in the Drug Lab session of the Superior Court: Commonwealth v. Shubar Charles, (No. SJC-11408) (as to the authority of a special magistrate or a judge to consider and allow a motion for stay of execution of sentence pending disposition of the defendant's motion for new trial) and Commonwealth v. Superior Court (No. SJC-11410) (as to the validity of a plea entered pursuant to the two-part plea proceeding established by the Chief Justice of the Superior Court for cases in the Drug Lab session).

STATEMENT OF THE CASE[1]

Introduction[2]

The special Drug Lab session of the Superior Court was established in September 2012 by the Chief Justice of the Superior Court to handle litigation in the counties affected by the Hinton Drug Lab investigation, which remains on-going (R.A. 114-123).

Initially, in Essex County, then-Regional Administrative Justice David Lowy was assigned to the

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[1] Record references are: record appendix (R.A. _); transcript of November 13, 2012 stay hearing (Tr. I _); transcript of February 6, 2013 stay hearing (Tr. II _); and transcript of February 27, 2013 stay hearing (Tr. III _).

[2] In support of the petition addressing the two-part plea proceeding, Commonwealth v. Superior Court (No. SJC-11410), the Commonwealth filed an affidavit from assistant district attorney Gerald P. Shea (R.A. 107-113); in its answer to the petition, the Superior Court filed an affidavit from its general counsel, Maria Peña (R.A. 114-123), but neither the Superior Court nor the other defendants disputed the facts in the Shea affidavit. At a hearing before the single justice on March 13, 2013, the Commonwealth sought an opportunity to dispute claims in the Peña affidavit and the single justice acknowledged that such an opportunity should be provided. In the reservation and report, covering all three petitions, she suggested an agreed factual statement, but due to the press of the briefing schedule, an agreed statement was not reached. In this brief, the Commonwealth relies on the facts set forth in the Shea affidavit and the undisputed facts in the Peña affidavit, and reserves its right to file a supplemental addendum identifying those facts in the Peña affidavit that the Commonwealth disputes.

session (R.A. 108 ¶ 4). Before any hearings were held, he issued an administrative order setting forth the requirements for cases to be heard in the session, including that the defendant file a motion for new trial, a motion for a stay of execution of sentence, and the certificate of analysis showing that chemist Annie Dookhan was "the chemist or . . . supervised the analysis" (R.A. 38).

During October and November, J. Lowy ruled on more than fifty motions for stays of execution of sentence (R.A. 109 ¶ 8). At each hearing, the Commonwealth filed a written opposition to the motion on grounds that the court lacked authority to stay the execution of a sentence *while a new trial motion was pending* (R.A. 109 ¶ 9). At the first hearing in the Drug Lab Session, Judge Lowy found that the Court had the inherent authority to stay sentences, pending disposition of the new trial motion, relying on Commonwealth v. McLaughlin, 431 Mass. 506 (2000) (R.A. 69 ¶ 9).

In December 2012, pursuant to Mass. R. Crim. P. 47, the Chief Justice of the Superior Court appointed special magistrates pursuant to an Order of Appointment to preside over the Drug Lab sessions

(R.A. 10-11). Retired Superior Court Justice John Cratsley was appointed to the Essex session (R.A. 10-11). At every hearing on stay motions before S.M. Cratsley, the Commonwealth continued to assert its objection that no rule, statute, or case permitted consideration of a stay motion, pending the disposition of a new trial motion (R.A. 110 ¶ 13).

Over the Commonwealth's objection, the special magistrate allowed the stay motion in this case after it had been denied by Judge Lowy. The Commonwealth then filed a petition pursuant to G.L. c. 211, § 3, seeking to clarify whether authority exists for a special magistrate to reconsider, and allow, a stay of execution of sentence motion that had been denied by a Superior Court judge, and challenging the allowance of the motion in this case based on the factors applicable in Rule 31 proceedings.[3]

In Commonwealth v. Charles, SCJ-11408, the Commonwealth's petition raised a related issue, namely, whether the special magistrate or a judge has authority to consider and allow a motion for a stay of execution of sentence, pending a new trial motion.

[3] Still pending before the single justice is the defendant's renewed motion for a stay of execution of sentence, which the Commonwealth has opposed.

Underlying Proceedings

On December 16, 2009, the defendant, Hector Milette, was indicted for three counts of trafficking in 100 grams or more of cocaine (G.L. c. 94C, § 32E(b)(3) and one count of trafficking in 14 grams or more of cocaine (G.L. c. 94C, § 32E(b)(2)) (R.A. 1-8) for his role in the sale of *three hundred and twenty-five grams of cocaine to one person over a three week period, and for possession of cocaine found in his home*. As the primary chemist, Annie Dookhan performed three of the four drug analyses (R.A. 17-20).

On May 9, 2011, the defendant pled guilty to all four indictments (Feeley, J.) (R.A. 1-8). As part of the plea deal, the first three indictments were reduced to trafficking in 28 grams or more of cocaine and the fourth was reduced to possession of a class B substance with intent to distribute (G.L. c. 94C, § 32A) (R.A. 1-8). He was sentenced to concurrent five years to five years and one day state prison terms for the trafficking convictions and a consecutive probationary term of three years for the possession with intent conviction (R.A. 1-8). At the plea hearing he was represented by attorney Frederick B. McAlary (R.A. 1-8).

On October 22, 2012, he filed a motion for new trial[4] raising claims related to the Hinton Drug Lab investigation (R.A. 9-14) and a motion to stay the execution of his sentences[5] (R.A. 15-16). The Commonwealth filed a written opposition to the stay motion on November 13 (R.A. 21-22). At a hearing the same day, the stay motion was denied from the bench (Lowy, J.) (R.A. 6).

On February 6, 2013, the defendant filed a motion to reconsider, with a supporting memorandum (R.A. 23-28). The motion was heard on February 12 by Special Magistrate Cratsley and allowed from the bench, over the Commonwealth's objection (R.A. 29). Pursuant to the procedure set out in the Order of Assignment, the Commonwealth filed its Objection[6] on February 13 (R.A. 30-32). The same day, and before a hearing on the

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[4] On September 12, 2012, the defendant filed a "Motion to Vacate Guilty Plea," raising issues related to the drug lab (R.A. 5), but no action was taken on the motion and presumably, it was replaced by the motion for new trial filed on October 22 (R.A. 6).

[5] The defendant attached copies of the drug certificates to both his new trial motion and his motion to stay. Only one set of certificates is included in the record appendix (R.A. 17-20).

[6] The Objection was referred to during the hearings as an "appeal" to the Regional Administrative Justice. See, e.g., Tr. II 22. This brief will use the term "Objection" in accordance with the Order of Assignment.

Objection, Judge Lu amended the defendant's conditions of release (R.A. 6, 33).

On February 21 (again, before a hearing on the Objection), the Commonwealth filed a petition pursuant to G.L. c. 211, § 3 as to the authority of the special magistrate to reconsider a motion to stay execution of sentence that had been denied by a Superior Court judge. On March 1, the Commonwealth supplemented the petition to inform the single justice that a hearing had been held on the Objection on February 27 (Lu, J.) (R.A. 6) and that J. Lu issued a written ruling the next day, staying the stay order, in view of the single justice's order in Commonwealth v. Charles, staying the order allowing a motion to stay execution of sentence (R.A. 34-35).

After a hearing on all three petitions on March 13 -- the petition as to the two-part plea proceeding had been filed by then -- the reservation and report was issued on March 22, 2013 (R.A. 39-43).

STATEMENT OF FACTS

I. November 13, 2012 hearing before Judge Lowy

On October 22, 2012, the defendant filed a motion for new trial and a motion for stay of execution of sentence (R.A. 9-16). In new trial motion, the

defense counsel averred 1) he had "become aware" of the Hinton Drug Lab investigation; 2) Annie Dookhan "performed the tests on all four substances[7] that were submitted to the laboratory for analysis in this case"; 3) the defendant was "presently serving a five-year state prison sentence based upon evidence which may have been falsified or otherwise corrupted" (R.A. 9).

The supporting memorandum 1) included a factual summary of the evidence as to each conviction (R.A. 10-12); 2) gave a general outline of the Hinton investigation to that point in time (without reference to any discovery that had been provided) (R.A. 13); 3) pointed out "Mitigating Factors" for the defendant's role in the crimes (R.A. 13); and 4) concluded that the new trial motion should be granted based on a) the "involvement" of "now indicted former chemist, Annie Dookhan who altered and falsified an analysis in this case"; b) the "minor roll" of the defendant in the crimes; c) the "absence of evidence of weapons and violence in th[e] case"; and d) the fact that the

[7] This was in error. According to the certificates, Dookhan analyzed three of the four samples (R.A. 17-20).

defendant had served 65% of his sentence and his "exemplary" "conduct while incarcerated" (R.A. 9).

The new trial motion was not supported by an affidavit, including an affidavit from the defendant that the substances he sold were not cocaine or that he did not know whether the substances were cocaine (R.A. 9-14). The motion to stay relied on arguments similar to those in support of the new trial motion, and included the claim that the defendant was not a security risk (R.A. 15-16).

On November 13, 2012, pursuant to an administrative order of Judge Lowy, the Commonwealth filed a written objection to the defendant's stay motion (R.A. 21-22), arguing that the court lacked authority to stay the execution of sentence before the disposition of the new trial motion[8] (R.A. 21-22). A hearing was held on the stay motion that day (Lowy, J.) (R.A. 6).

The defense counsel opened by pointing out that the defendant pled guilty to four indictments and was

[8] On the first day of the Drug Lab session, at the first hearing on a stay motion conducted by Judge Lowy, he ruled that the court had the inherent authority to stay the execution of sentences while a new trial was pending, relying on Commonwealth v. McLaughlin, 431 Mass. 506 (2000) (R.A. 109 ¶ 9).

sentenced to five years to five years and one day in state prison for three of the convictions, with a consecutive three-year probationary term for the fourth[9] (Tr. I 3). As of the date of the hearing, he had served "37 months of a mandatory 60-month sentence, or 62 percent of his sentence" (Tr. I 4).

Further, three of the indictments resulted from an undercover investigation in which police used a confidential informant to purchase cocaine from the defendant's co-defendant on three separate dates (Tr. I 4). The fourth indictment pertained to 23 grams of cocaine police found during the execution of a search warrant (Tr. I 4). The defense counsel argued mistakenly that Dookhan was the primary chemist "on each of the four indictments" (Tr. II 4-5). Without pointing to anything specific to the defendant's case, defense counsel asserted that there was "a great deal of question, concerning the veracity [of Dookhan], *and what happened during the testing of these drugs*" (Tr. II 5) (emphasis added).

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[9] As noted, as part of a plea bargain, the charges were "broken down" (Tr. I 13) from trafficking in 100 grams or more of cocaine to trafficking in 28 grams or more, and the fourth indictment was reduced from trafficking in 14 grams or more of cocaine to possession with intent to distribute (R.A. 1-8).

The defense counsel also claimed that the defendant "pled guilty primarily because of the drug certifications, and [had] put[] great faith in [the analyses]" (Tr. II 5). He noted, again without specific reference, that Dookhan had "not only changed things, she dry tested, she did everything irresponsibly that could be described pertaining to the drug lab," which, he pointed out, was "now closed" (Tr. II 5). He concluded by noting that whether the cocaine still existed to be retested was unknown and, even if it still existed, the defendant would contest any such retesting (Tr. II 5).

The prosecutor started his response by providing additional details about the underlying the convictions, namely, that the defendant, along with co-defendants, acted as middlemen for the sales of an "extensive amount" of cocaine over a period of time by a person named Alejandro Cruz (Tr. I 6). Each sale was for 125 grams of cocaine for $8000 (Tr. I 11; R.A. 10-12, 17-19). Three indictments charged the defendant with facilitating the sale and the fourth pertained to cocaine discovered during the execution of a search warrant (Tr. I 7). Although Dookhan was the primary chemist for the three sale indictments,

she was not involved with the analysis of the 27.56 grams of cocaine discovered during the execution of the search warrant (Tr. I 7-8). The prosecutor also argued that there was little likelihood that the substance sold by the defendant was not cocaine, because his source was his co-defendant Cruz and the substance found at Cruz's residence had been tested by the State Police crime lab, not the Hinton Lab, and had been determined to be cocaine (Tr. I 8-10). Finally, the prosecutor argued that the given the "nature" of the cocaine sales -- involving a large quantity and price, repeatedly, over a period of time -- it was "not a fair inference on these facts" that the defendant had "burn[ed]" the buyers by selling them something other than cocaine (Tr. I 11).

The defendant responded that it was "speculation, at best" that there was a connection between the cocaine in Cruz's house and the cocaine sold to the confidential informant through the defendant as the middleman, and that he "was not indicted based upon anything that [Cruz] had in his house" (Tr. I 13).

Judge Lowy denied the motion (Tr. I 14):

> The issue is whether or not, considering everything, if everything were known, and I wouldn't call it speculation,

> I'd call it an inference as the source [of the cocaine] is the same. And, here, the key is that the alleged source of all of these alleged narcotics is tested by a chemist completely unrelated to the lab and Annie Dookhan

(Tr. I 14).

II. February 6, 2013 hearing on motion to reconsider before Special Magistrate Cratsley

On February 6, 2013, the defendant filed a motion to reconsider Judge Lowy's denial of the stay motion (R.A. 23). The reconsideration motion was based on the fact that Dookhan had "now been indicted and arraigned in six counties" (R.A. 23). The supporting memorandum was essentially the same memorandum filed in support of the new trial motion, adding information about his conduct while incarcerated (R.A. 24-28). By this point, S.M. Cratsley had been assigned to the Drug Lab session, so he heard the reconsideration motion, on February 12 (R.A. 6).

The defense counsel started by asking the special magistrate to reconsider Judge Lowy's ruling based on "changes of circumstances concerning the investigation into the misconduct of the Jamaica Plain Lab" (Tr. II 4), particularly that Dookhan had been indicted in

three additional counties[10] and "more troubling revelations are coming out of" the Hinton Lab investigation, but he did not identify what these were (Tr. II 4).

He then provided an overview of the facts underlying the convictions, arguing that the defendant "was not a major player in the investigation" (Tr. II 4-5). The defense counsel listed the dates of the cocaine sales and noted that on the day of the third sale for which the defendant was convicted, as a middleman, there had been another drug buy with the confidential informant in which the defendant had not participated (Tr. II 5). The defense counsel then referenced the drug certificate for the defendant's third conviction (R.A. 17), pointing out that the weight of the drugs on the certificate reflected that Dookhan had "combined [the cocaine from] both buys," and had done so, in defense counsel's "opinion," "to get the amount over 200 grams" (Tr. II 5). He added that the defendant had been a "model prisoner," was assigned to a minimum security facility, and had a place to live if he were released (Tr. II 6).

[10] In the new trial motion, the defendant alleged that Dookhan "has been arraigned in three counties" (R.A. 13).

Finally, he argued that "in other counties" stays of execution of sentence were being granted "routinely," some cases were "being nolle prosequied," and in federal court, any case that Dookhan "touched" was not being prosecuted (Tr. II 7).

The prosecutor began with the facts of the crimes, noting first that after every controlled buy involving the defendant, the police weighed and field tested the cocaine purchased by the informant (Tr. II 8). She countered the assertion that the defendant was not a "major player" because, according to the police report, the police knew him and considered him to be a "high impact player" (Tr. II 9). She then provided a factual summary for each conviction (Tr. II 9-11). The defendant facilitated controlled buys that occurred on August 5, 18 and 29 in 2009 (Tr. II 10-11). After the first deal, he gave his phone number to the informant and told the informant to contact him directly (Tr. II 10). Each deal involved the sale of 125 grams of cocaine for $8,000 (Tr. II 10-11).

As to the defendant's assertion that Dookhan mixed the two different samples to achieve a weight over 200 grams, she pointed out that the amount exceeded 125 grams because it was likely the police

submitted the cocaine to the lab from two different drug buys, each for 125 grams, together, because two separate controlled buys occurred *on the same day (Tr. II 11-12)*. As such, she argued, the different samples were likely weighed together (Tr. II 11-12). She also said there was no evidentiary support for the argument that Dookhan mixed these particular substances (Tr. II 12). And, in any event, the police weighed the samples before sending them to the lab and recorded the weights in the police report (Tr. II 12).

The prosecutor also argued that it was evident the defendant was dealing cocaine from his statement to the confidential informant, which was recorded, telling the informant "about the best place to buy drugs" and advising not to "go to [a] certain street because [it was] really hot with police" (Tr. II 12). The prosecutor also pointed out the defendant was the beneficiary of a very reasonable plea deal and that during the colloquy, he admitted he had trafficked cocaine (Tr. II 13). As she succinctly put it, under "the standard for a motion for a new trial, [the defendant was] unlikely to succeed" (Tr. II 13). Finally, she argued that, were the motion for new trial allowed, the defendant would again be facing

charges of trafficking in more than 100 grams, which would increase the possible minimum mandatory sentence and give him an incentive to flee (Tr. II 14).

The defense counsel responded that the defendant's recorded conversations had been suppressed (Tr. II 14) and that his role in the operation was minor because he made only $2 for every gram sold[11] (Tr. II 15).

The special magistrate allowed the reconsideration motion because:

> 1) [the] defendant has served 40 of his 60 month sentence; 2) [he] is currently housed in a minimum security bunkhouse at MCI[-]Shirley 3) Annie Dookhan [was] the primary chemist on 3 of the 4 drug certs 4) [the] defendant is one of multiple co-defendants with an alleged middleman role 5) [he] has family and or girlfriend to live with if he posts bail and goes on GPS monitoring

(R.A. 6, 29). The special magistrate set bail at $2000 and imposed a number of conditions of release (Tr. II 17-20). He also denied the Commonwealth's motion to stay the order pending a hearing on its Objection in front of Regional Administrative Justice Lu (Tr. II 18).

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[11] At that rate, the defendant would have made $750 from the three drugs deals with the confidential informant, which totaled 375 grams.

After another case was heard, the Commonwealth[12] requested, and the special magistrate allowed, further hearing on this case (Tr. II 21). The Commonwealth renewed its request for a stay of the special magistrate's order in order to maintain the "status quo" of the case "until the appeal is perfected before the Regional Administrative Justice" (Tr. II 21). When the magistrate explained that he denied the Commonwealth's motion to stay the stay of execution of the sentence because he "assumed" the parties could go before the Regional Administrative Justice "right now," the prosecutor responded that the session where Judge Lu was sitting was "closed" (Tr. II 21). And the court officer noted Judge Lu was gone for the day (Tr. II 21).

The prosecutor then argued that, in light of the fact that the Order of Assignment allowed a 48-hour window for the Commonwealth to file its objection, "fair[ness]" required the magistrate's ruling be stayed for 48 hours (Tr. II 22). The special

[12] The transcript identifies the prosecutor only as "ADA," but during this portion of the hearing the Commonwealth was represented by Assistant District Attorney Gerald P. Shea, who filed the affidavit in support of the petition involving two-part plea proceedings. Commonwealth v. Superior Court, SJC-11410.

magistrate responded that the "problem" with that argument was that his allowance of the motion to stay execution of the sentence "indicate[d] that [he had] some belief in the legitimacy of [the] appeal (sic)" and that his past "practice" had been to deny stays so as not to undermine the legitimacy of his rulings (Tr. II 22). The prosecutor noted that, in his view, the magistrate's ruling was not unassailable, particularly since Judge Lowy had previously denied the defendant's stay of execution motion (Tr. II 22). When the special magistrate said he was "baffled" as to "why [the Essex District Attorney's Office was] so out of line with [the position of] all the other counties" (Tr. II 23), the prosecutor responded that the Commonwealth was simply trying to follow the procedures outlined in the rules of criminal procedure and the Order of Assignment (Tr. II 23-24). After reviewing the Order, the special magistrate adhered to his ruling denying a stay of his order, noting the Order "doesn't have any text [stating the procedure] one way or the other" (Tr. II 24).

III. February 27 hearing before Judge Lu

The Commonwealth filed its Objection to the special magistrate's ruling the next day, February

13,[13] and hearing was held on the Objection on February 27[14] (R.A. 6). After summarizing the prior proceedings, the Commonwealth argued that the special magistrate's ruling allowing the motion to stay was erroneous because 1) no change in circumstances occurred after Judge Lowy's ruling (Tr. III 7-9); 2) the special magistrate acted beyond his authority when he reconsidered Judge Lowy's ruling (Tr. III 9-10); 3) the court lacked authority to stay the execution of a sentence when the motion for new trial was pending (Tr. III 10); and 4) even if the court found such power existed in the special magistrate or the court, the defendant had not met his burden (Tr. II 10-11).

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[13] As it turned out, the defendant posted bail the night of February 12 (R.A. 6). When the Commonwealth filed its Objection, Judge Lu, on his own and without a hearing, modified the conditions of the defendant's release, pending the hearing on the Objection, to include home confinement (R.A. 33; Tr. III 24-25). Judge Lu later said he and Special Magistrate Cratsley had spoken, and the special magistrate's stay of execution orders were to be stayed during the 48-hour Objection window (Tr. III 7).

[14] The hearing was delayed because the defense counsel had suffered an injury (Tr. III 4). During the intervening period, the Commonwealth filed the petition, on February 21, following the related petition in Commonwealth v. Charles on February 14, in which the single justice stayed the order allowing a stay of execution of the defendant's sentence "pending further order of the court."

The prosecutor then made a substantive argument based on the merits of the motion (Tr. II 11-16).

The defense counsel responded that the change in circumstances was that Dookhan had been "indicted and arraigned in six counties of the Commonwealth" for her actions at the lab and that he had been provided more discovery with regard to Dookhan's wrongdoing, although he did not identify any specific disclosure made in that discovery (Tr. III 16-17). He then made a substantive argument as to the merits of the stay motion and argued that the special magistrate acted within the scope of authority as set out in Rule 47 (authorizing the appointment of special magistrates) and the Order of Assignment (Tr. III 26-28). Finally, he argued that the District Attorney's Office in Essex County was acting differently from other district attorney's offices in the Commonwealth and the United States Attorney's Office, where cases were "routinely being nol prossed and dismissed" (Tr. III 28).

Judge Lu took the matter under advisement (Tr. III 33-34). He stated that he found a change of circumstances (Tr. III 33), but stayed the order staying the execution of the sentence until further order of the Superior Court or the Supreme Judicial

Court, and ordered the defendant, who had posted bail, back into custody (Tr. III 33-34).

The next day, February 28, Judge Lu issued a written memorandum of decision, making the following findings: 1) the special magistrate and the court had the authority to stay the execution of the defendant's sentence; and 2) a change in circumstances warranted the allowance of the defendant's motion to stay (R.A. 34-35). Without citing any authority, he ruled that "the Special Magistrate had the authority to make the orders that it did, and that the court (this Associate Justice) had the authority to rule, pursuant to the appeal procedure, as it did" (R.A. 34-35). However, recognizing that the stay of execution of sentence ordered in Commonwealth v. Charles (No. SJ-2013-0066), had been stayed by a single justice, Judge Lu "vacate[d]" the initial stay order entered by Special Magistrate Cratsley and ordered the defendant to "resume serving the remainder of his state [prison] sentence" (R.A. 34-35), with the following qualification: "if this court were instructed [by an appellate court] that it had the authority to stay the sentence and set a bail, it would rule as it did on February 13, 2013" (R.A. 34-35).

ARGUMENT

THE SPECIAL MAGISTRATE LACKS AUTHORITY TO STAY THE EXECUTION OF A SENTENCE PENDING DISPOSITION OF A MOTION FOR NEW TRIAL FOR THE REASONS SET FORTH IN THE COMMONWEALTH'S BRIEF IN COMMONWEALTH V. CHARLES, SJC-NO. 11408; THE SPECIAL MAGISTRATE LACKS AUTHORITY TO RECONSIDER A STAY MOTION AFTER ITS DENIAL BY A TRIAL JUDGE; AND EVEN IF SUCH AUTHORITY EXISTS, THE DEFENDANT DID NOT MEET HIS BURDEN.

A. For the reasons set forth in the Commonwealth's brief in Commonwealth v. Charles, SJC-No. 11408, at pp. 22-30, no authority exists for the special magistrate to stay execution of a sentence pending disposition of a new trial motion and for the reasons set forth at pp. 30-33, even if authority to consider a stay of execution motion exists, the special magistrate cannot consider it

The single justice filed one reservation and report, covering all three petitions. Each case was docketed separately, however, and the Commonwealth has filed a brief for each case. To some extent, the question in this case as to the authority of the special magistrate "to reconsider and allow a motion to stay execution of a criminal defendant's sentence" overlaps with and is repetitive of the question presented in Commonwealth v. Charles, No. SJC-11408, concerning the authority of a special magistrate and a judge to consider and allow a stay of execution motion. Therefore, in the interests of brevity, the Commonwealth incorporates herein by reference the

argument at pp. 22-33 of the Charles brief as to the special magistrate's underlying authority, and focuses in this brief on the reconsideration issue.

The Commonwealth adds the following, however:

The defendant did not make a specific factual showing as to any taint in his case by reference to the discovery provided by the Commonwealth, or otherwise, in his motion for new trial or supporting memorandum (R.A. 9-14), his motion for a stay (R.A. 15-16), his motion to reconsider (R.A. 23) or his supporting memorandum (R.A. 24-28).[15] See Reporter's Notes to Rule 30(c)(3) ("The motion [for new trial] should specify the grounds for relief . . . and the affidavit should provide the factual support necessary to determine the issue."). Instead, he simply pointed out, erroneously, that Dookhan was the "custodial

[15] The defendant's claim in his memorandum supporting the new trial motion that Dookhan "combin[ed] . . . the two C.I. drug buys from the August 27, 2009" to achieve a weight over 200 grams (R.A. 13) would not qualify as newly discovered evidence because it was known to the defendant at the time of his plea. See Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986) (to qualify as newly discovered the evidence "must . . . have been unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial").

chemist" for "[a]ll three of the drug samples"[16] and that the analyses occurred "during the period identified as being when [her] misconduct was at its height" (R.A. 13). This did not amount to the "substantial showing" that the drug analysis *in his case* was in fact, or even might be, tainted. See Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 407 n.5 (1983) ("If defense counsel desires to offer evidence on [any] ground at the hearing [on the new trial motion], he must submit an affidavit to support his contention."). After all, he admitted during his plea that the substance was, in fact, cocaine, and he did not submit any contrary affidavit in support of his new trial motion that it was not, or even that he thought it was not.[17]

In sum, but for the proceeding established by the Superior Court for adjudicating stay motions in the Drug Lab session, which is outside the requirements of

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[16] In fact, she played no role in one analysis (R.A. 17-20).

[17] In this regard, he is no different from any other defendant in Essex County: none has submitted an affidavit attesting that the substance at issue was not a narcotic, or was not known to the defendant to be a narcotic (R.A. 108-109 ¶ 7).

Rules 30 and 31, the stay motion in this case would not have been considered.

B. The special magistrate acted beyond the scope of his authority when he reconsidered a ruling of a judge

A judge has the authority to reconsider an issue that has been decided by another judge, see, e.g., Cataldo Ambulance Service, Inc. v. Chelsea, 426 Mass. 383, 389 (1998); accord Herbert A. Sullivan, Inc. v. Utica Mut. Ins. Co., 439 Mass. 387, 401 2003), quoting Franchi v. Stella, 42 Mass. App. Ct. 251, 258 (1997) ("it is within the inherent authority of a trial judge to 'reconsider decisions made on the road to final judgment'"). On the other hand, a judge "has no duty to reconsider a case, an issue, or a question of fact or law, once decided, . . . should hesitate to undo his or her own work . . .[and] [s]till more should he hesitate to undue the work of another judge." Peterson v. Hopson, 306 Mass. 597, 603 (1940). "While it is appropriate for a judge to honor what a colleague has ordered earlier in a case, that is a practice, not an inflexible rule," "deviation from the prior order" is permissible if "called for in the light of subsequent events, the public interest or the

interests of the parties." Commonwealth v. Carrunchio, 20 Mass. App. Ct. 943, 944 (1985).

Nothing, however, gives a special magistrate, who has very limited authority pursuant to Rule 47, power "to undo the work of [a] judge," whose authority is superior. See Peterson, 306 Mass. at 603; cf. Commonwealth v. Colon, 52 Mass. App. Ct. 725, 730 n. 1 (2001) ("As an intermediate appellate court . . . [the Appeals Court is] bound to follow the decisions of the Supreme Judicial Court"). And, moreover, nothing in the Order of Assignment or Rule 47 expressly permitted Special Magistrate Cratsley to reconsider rulings on *any motion* that had been ruled on by a Superior Court judge. To the extent the defendant was entitled to reconsideration of his stay motion, the matter should have been put to J. Lowy who denied the motion in the first place.

There was, in any event, no change in circumstances that might have justified reconsideration by the special magistrate. As noted, the defendant's claim of a change in circumstances was that 1) Dookhan had been indicted and arraigned in three additional counties, beyond the indictments in three counties mentioned in his original stay motion

(R.A. 13) and 2) he had been provided with additional discovery (Tr. III 16-17). He also argued that he had been a "model prisoner," in a minimum security facility, with a place to live if he were released (Tr. II 6), and finally, that stays of execution of sentence were being granted "routinely," "in other counties" and some cases were "being nolle prosequied," and in federal court, any case that Dookhan "touched" was not being prosecuted (Tr. II 7).

These factors did not justify reconsideration by the special magistrate: the additional indictments, for the same or related misconduct as the original indictments, were hardly a change of circumstance; the defendant did not identify anything specific in the additional discovery that suggested any misconduct that was not known at the time of the original stay motion (Tr. III 16-17); his "exemplary" "conduct while incarcerated" (R.A. 9) had been highlighted during the hearing on the original motion; and the handling of stay motions in other counties or by federal authorities did not compel the District Attorney to take a different position as to the lawfulness of the

stay proceeding before the special magistrate.[18] To be sure, "[j]udges are not condemned to abstain from entertaining seconds thoughts that may be better ones," Commonwealth v. Downs, 31 Mass. App. Ct. 467, 469 (1991), but a defendant must produce a meaningful basis for asking a judge to do so.

C. The special magistrate and the judge abused their discretion when ruling on merits of stay motion

Should this Court determine that the special magistrate and the judge had the authority to stay the defendant's sentence (the issue in Charles), the stay motions should nonetheless have been denied. Two factors govern the consideration of a motion for stay of execution of sentence pending appeal: 1) the security risk presented by the defendant, Commonwealth v. Levin, 7 Mass. App. 501, 505 (1979); and 2) the likelihood of the success of his claims on appeal. Id. at 504; see also Commonwealth v. Hodge, 380 Mass. 851, 855 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979). Because the new trial motion is pending,

[18] The special magistrate described this as the Essex District Attorney's Office being "so out of line with [the position of] all the other counties" (Tr. II 23); the prosecutor explained that the Commonwealth was simply trying to follow the procedures outlined in the rules of criminal procedure and the Order of Assignment (Tr. II 23-24).

the pertinent inquiry as to the second prong would involve the likelihood of success of the claims in the new trial motion. The stay motion should have been denied, by both the special magistrate and J. Lu, because it failed on both security and likelihood-of-success grounds.

Assuming authority to stay the sentence without a ruling on a new trial motion, the judge erred when he ruled that the defendant had met his burden under the two-prong stay test. First, the length of time served by the defendant is not a recognized factor in assessing whether he poses a risk of harm and has no bearing on the likelihood of success of his new trial motion, and puts the defendant in no different position than any other defendant who files a stay motion after having served some portion of his sentence. The special magistrate should not have relied on this factor (R.A. 50).

As to the likelihood of success of his new trial motion, the defendant made general claims about Dookhan's wrongdoing that are not sufficient to meet his burden (R.A. 9-14). See Commonwealth v. Grace, 397 Mass. 303, 305-306 (1986) ("A defendant seeking a new trial on the ground 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."). For instance, based on the drug certificate reflecting a weight of "249.50 grams" for "2 plastic bags" (R.A. 17), he argues that Dookhan "co-mingl[ed] or combin[ed] the two CI drugs buys from August 27, 2009," claiming this to be a "blatant example of the activity at the" Hinton lab (R.A. 13). He ignores the fact that any such "co-mingling" was readily apparent on the drug certificate when he pled guilty, admitting that the substance at issue was cocaine, in a quantity -- 28 grams or more -- that was far less than that listed on the certificate. Thus, this was not newly discovered evidence. See id. ("Not only must the allegedly new evidence demonstrate the materiality, weight, and significance that we have described, but it must also have been unknown to the defendant or his counsel and not reasonably discoverable by them at the time of trial").

Even if it can be said that this amounted to newly discovered evidence, he still did not meet his burden because 1) the drug certificate in question clearly delineated that the drugs were found in "2 plastic bags" (R.A. 17) and 2) the police both *field*

tested and weighed the drugs before they were sent to the lab (Tr. I 9). Thus, apart from the defendant's admission during his plea, there is independent evidence as to the nature and quantity of the substance at issue.

Additionally, as noted above, the defendant has filed no affidavit suggesting that the substances were not cocaine. He has made no specific argument as to how Dookhan's wrongdoing might have affected his decision to plead guilty to substantially reduced charges for which he received a far shorter sentence than the minimum mandatory term he was facing. And even though Dookhan was the primary chemist on three of the four analyses, she was not involved in the analysis on the cocaine seized during the execution of the search warrant, for which, before his plea, the defendant faced a minimum mandatory three year state prison term.

Moreover, he is a security risk: his record includes convictions for unlawful possession of a firearm and assault and battery by means of a dangerous weapon (R.A. 99-106). Although he argued that 1) he was only "the middleman" who made only $250 per transaction, and was "hardly a big time drug

dealer"; 2) the acts did not involve threats or violence; and 3) he was housed in a minimum security facility and had no disciplinary reports during his incarceration (R.A. 44-49). But these arguments overlook the fact that he pled guilty to his role in the sale of *three hundred and twenty-five grams of cocaine to one person over a three week period.* He also ignores the violent nature of the drug dealing business in general, and the significant damage to the community caused by drug dealing and use. As such, he did not meet his burden to show he is not a security risk and the stay motion should have been denied on this ground alone.

CONCLUSION

For the reasons stated, the Commonwealth requests that this Court conclude that neither the special magistrate nor the judge had authority to consider and allow the motion to stay execution of the defendant's sentence, that the special magistrate did not have the authority to reconsider a judge's ruling denying the motion and enter further orders consistent with this determination, including the vacatur of the orders allowing the stay motion.

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