

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SJ-2013-0083

COMMONWEALTH

v.

HECTOR MILETTE

DEFENDANT'S OPPOSITION, AND REQUEST TO RESERVE AND
REPORT ADDITIONAL QUESTION, IN RESPONSE TO THE
COMMONWEALTH'S PETITION UNDER G.L. c.211, § 3

Introduction

Defendant Hector Milette files this Opposition, including a Request to Reserve and Report an Additional Question, in response to the Commonwealth's Petition ("Pet.") filed on February 20, 2013, under G.L. c.211, § 3. The Petition urges narrow limits on the tools available to the courts now struggling with the massive litigation occasioned by the Hinton Lab scandal, and equally narrow limits on the remedies available to defendants harmed by that scandal.

The Commonwealth's effort should not succeed. According to its Petition in this case, and its petition in Commonwealth v. Charles, SJ-2013-0066, Special Magistrates and justices of the Superior Court may not stay sentences while new trial motions are pending. Instead, the Commonwealth argues that Milette and other defendants must continue serving their

sentences while awaiting rulings on those motions. Yet the Commonwealth concedes that the Hinton Lab scandal affects "thousands of defendants."^{1/} It also concedes that there is no fixed timetable for resolving post-conviction motions generated by this scandal; the proceedings are "open-ended," and investigations "could take months, if not longer." Pet. at 14. Though this litigation arises from misconduct perpetrated against defendants, the Commonwealth insists, in effect, that the delays and uncertainties of that litigation must inure to the detriment of those same defendants.

That cannot be right. As explained below, and in the Opposition filed today in Charles, the Superior Court in fact has the authority to confer upon a Special Magistrate the discretion to stay a sentence while a new trial motion is pending.^{2/}

Moreover, Milette urges the Single Justice to reserve and report an additional, more fundamental

^{1/} Commonwealth's Petition Pursuant to G.L. c. 211, § 3, District Attorney for the Eastern District v. The Superior Court, at 3 (Mar. 1, 2013).

^{2/} Undersigned appellate counsel, who is also co-counsel on appeal for Shubar Charles, was referred this case today by the Committee for Public Counsel Services. Counsel has only recently obtained a copy of the appellate record and has not had an opportunity to confer with Milette.

question: whether this Court should exercise its own authority to specify a range of equitable remedies governing the Hinton Lab litigation, including the presumptive stay of any potentially tainted sentence. This new question invites the Court to address a glaring problem with the Hinton Lab cases. Specifically, protracted and uncertain litigation in the lower courts is now exacerbating the harms of the massive scandal that created that litigation. This Court's intervention is necessary to safeguard the due process rights of defendants and to restore the integrity of the criminal justice system.

Summary Of Questions Presented

The Petition in this case, which the Commonwealth supplemented on February 28 ("Pet. Supp."), as well as the petition in Charles, challenge the authority of a Special Magistrate or a justice of the Superior Court to stay a sentence pending the resolution of a defendant's motion for a new trial filed in connection with the Hinton Lab scandal. As initially conceived, the Petition here challenged a Special Magistrate's decision, on February 12, 2013, to allow a motion for reconsideration of a Superior Court justice's prior denial of a motion to stay execution of Milette's

sentence. Thus, at first, the Petition challenged (1) the Special Magistrate's February 12 ruling; (2) the Superior Court's failure, as of February 20, to alter that ruling; and (3) the authority of the Superior Court, more generally, to stay the execution of sentences for defendants with pending motions for new trials. Pet. at 4-5.

Recent events have rendered the first two of those issues moot. On February 27, the Superior Court (Lu, J.) stayed the Special Magistrate's order and required that Milette be returned to custody. Pet. Supp. at 1-2. On February 28, abandoned its prior request that this Court stay the Special Magistrate's ruling and the Superior Court's temporary failure to stay that ruling. Thus, all that remains of the Petition – at least in this case – is a challenge to the authority of the Superior Court to stay the sentences of defendants who have pending motions for new trials.

But defendants Milette and Charles today propose an additional question for reservation and report to the Full Court, under G.L. c.211, § 6, and G.L. c.231, § 112. As explained primarily in Charles's Opposition, this question arises from the gravity of the misconduct underlying the Hinton Lab scandal, the enormity of the

harms that scandal has caused, and the scale of the litigation it has triggered. With each passing day, the litigation further erodes the due process rights of defendants. That erosion has affected Milette; he briefly secured a stay of his tainted sentence, only to be ordered back to prison last week.

Accordingly, Milette requests the relief described at the Conclusion below, including his release pending a ruling from this Court or a decision on his motion for a new trial. Generally speaking, Milette's requests for relief center on the following question, which Milette asks be reported to the Full Bench:

Should this Court exercise its own authority to specify a range of equitable remedies, including presumptive stays of sentences, governing the Hinton Lab litigation?

Background

I. The Hinton Lab Scandal

This case, like many others, arises from misconduct at the Hinton State Laboratory Institute in Jamaica Plain. The misconduct at the heart of the scandal is described in Charles's Opposition ("Charles Opp."), filed today, and Milette adopts both the facts and exhibits set forth in that Opposition.

By way of summary, the scandal affects tens of thousands of cases. The chemist at its core, Annie

Dookhan, is alleged to have repeatedly and deliberately falsified results, tampered with evidence, and forged signatures. Dookhan's name might be associated with 34,000 cases, and the true number of tainted cases might reach 190,000. The latter figure represents an estimate, advanced by the Chief Counsel of the Committee for Public Counsel Services ("CPCS"), of all drug cases processed by the Hinton Lab during Dookhan's tenure. Those cases might all be implicated by this scandal because of rampant problems with oversight, management, protocols, and with simply identifying Dookhan's cases. Charles Opp. at 4-5.

CPCS is not alone in suggesting that a broader set of cases is under suspicion. Middlesex District Attorney Gerald Leone has reportedly said that "preliminary information from his team assessing drug lab cases shows that prosecutors may have to dismiss more cases, beyond those that relied on testing from former chemist Annie Dookhan." Charles Opp. at 5. Leone stated that, due to "insufficiencies and inadequacies in practices, protocols and policies [at the Hinton Lab], it may be that a wide swath - if not all - of the cases done by the Jamaica Plain lab between 2003 and 2012 may not be prosecuted." Id.

The Department of Public Health ("DPH") has also noted wider problems with the Hinton Lab. A DPH investigation identified dangers within the lab as root causes vulnerable to fraud. DPH found insufficient safeguards for access to the Evidence Room and Evidence Safe, an absence of camera surveillance, the lack of a mechanism to detect or monitor adverse events, and numerous other problems. Charles Opp. at 8-9.

Although tens of thousands of cases now hang in the balance, it is unclear how or how quickly the litigation will proceed. On September 20, 2012, the Governor appointed David Meier to review the cases affected, and the Massachusetts Attorney General and Inspector General continue to investigate the matter. Citing those ongoing investigations, some prosecutors have said that they have "yet to formulate a position" on motions to vacate pleas. Charles Opp. at 9-10.

II. Procedural History

Having just been referred this case, the undersigned counsel is not yet prepared to give a complete accounting of its history. But the Commonwealth's account suggests that Milette is now serving sentences for cases in which Annie Dookhan was the primary chemist, and for which Milette has already

served substantial time. Pet. at 9-11.

A. Milette's Convictions

Milette pled guilty on May 9, 2011, to four crimes: three counts of trafficking at least 28 grams but less than 100 grams of cocaine, and one count of possession with intent to distribute a class B substance. Pet. at 5. On the trafficking convictions, Milette was sentenced to three concurrent terms of five years to five years and one day in prison. Id. On the final conviction, Milette received a consecutive three-year probationary term. Id.

Annie Dookhan was the primary chemist for each of the trafficking convictions. Pet. at 9-11. Those convictions arose from allegations that Milette sold cocaine to an informant on August 5, 18, and 27, 2009. Id. at 10. The fourth conviction arose from allegations that officers found cocaine during a search, on October 20, 2009, of an apartment shared by Milette and Eric Gonzalez. Id. at 11.

B. Post-Conviction Proceedings

On September 12, 2012, Milette moved to vacate his guilty plea. Pet. at 5. He then filed, on October 22, motions for a new trial and to stay the execution of his sentence. Id. The Commonwealth opposed the motion

to stay Milette's sentence, and the Superior Court (Lowy, J.) denied it on November 13, 2012. Id.

On February 6, 2013, Milette moved for reconsideration of the motion to stay his sentence. By that time, the Superior Court had assigned a Special Magistrate, the Honorable John C. Cratsley, "to preside over criminal proceedings in connection with cases relating to [the Hinton Lab]." Pet. at Exh. 3. The Special Magistrate's Order of Assignment specified an authority to, among other things, "conduct hearings on post conviction motions, to issue orders regarding discovery, and other matters, and to make proposed findings and rulings to the Regional Administrative Justice." Id. The Order of Assignment also specified a procedure of bringing to the Regional Administrative Judge any objections to "the findings and rulings of the Special Judicial Magistrate." Id.

On February 12, the Special Magistrate granted Milette's motion to stay his sentence, and gave five reasons doing so: (1) Milette had served 40 months of his 60-month sentence; (2) he was housed in minimum security at MCI Shirley; (3) Dookhan was the primary chemist for three of Milette's four counts of conviction; (4) Milette had "an alleged middleman

role"; and (5) Milette appeared ready to live with family or a girlfriend if he made bail. Pet. at Exh. 4. The Magistrate set \$2,000 bail and imposed a nighttime curfew, GPS monitoring, weekly reporting to probation, and drug and alcohol screens. Id. at 8. The Special Magistrate denied the Commonwealth's motion to stay the order, and Milette posted bail on February 12. Id.

But Milette is now back in prison. On February 13, the Commonwealth filed objections to the Special Magistrate's ruling. A Superior Court justice heard those objections on February 27, while the Commonwealth's Petition was pending in this Court – and vacated the Special Magistrate's order. That court also ordered Milette back into custody. Pet. Supp. at 1-2.

Brief Argument

This case perfectly illustrates the challenges of the ongoing Hinton Lab litigation. It is undisputed that Milette is serving sentences associated with Annie Dookhan, who stands accused of a massive fraud. Yet Milette, like thousands of other defendants, faces a difficult road to justice. In the last four months, his motion to stay his sentence has been denied, granted, and (in effect) denied again. There is no evident timetable for deciding his motion for a new trial.

Meanwhile, he is incarcerated, with no guarantee that his case will be heard on the merits before his sentence runs out.

If Milette's case had been implicated in some lesser fraud, his post-conviction motions likely would have met a swifter, more certain, and more just adjudication. Thus, it appears that he faces slow and uncertain proceedings only because his case is caught up in one of the largest criminal justice scandals in the Commonwealth's history.

Viewed in that light, the Commonwealth's challenge to the Superior Court's authority to stay Milette's sentence is both incorrect and misguided. It is incorrect because, as shown below and in Charles's Opposition, the Superior Court has inherent authority to stay sentences. It is misguided because, in the wake of the Hinton Lab scandal, courts should seek to deliver justice to defendants and to restore faith in the justice system. They should not seek to narrow the means of addressing this crisis.

That need for justice is why Milette has proposed that the Full Bench address broader issues about this Court's equitable powers. At the very least, the Court should exercise those powers to stay the execution of

Milette's sentence and every similar sentence. But the Court should also exercise those powers to tackle other vexing problems now confronting the lower courts.

Defendant Charles's Opposition presents the relevant arguments, and Milette will expand on them in a full brief to be filed later this month. In this submission, Milette hereby incorporates Charles's arguments and discusses them briefly below.

I. The Special Magistrate's Order Staying Milette's Sentence Was A Reasonable Exercise Of Authority Inherently Vested In The Superior Court.

A. The power to stay court orders is among the traditional inherent powers of the court. Given the extraordinary level of fraud committed at the Hinton lab, such orders are appropriately available to Special Magistrates and judges, based on considerations of wise judicial administration and the necessity of remedying massive constitutional harms. Charles Opp. at 19-25.

Here, the Commonwealth concedes that courts have the "inherent authority" to stay the execution of sentences, but it argues that such authority should not be exercised because stays would be "open-ended." Pet. at 13-14. In fact, the open-endedness of this litigation cuts against the Commonwealth's position. This litigation has no known schedule only because the

underlying scandal is so immense. If anything, such indefinite litigation threatens the rights of defendants. See, e.g., Commonwealth v. Weichel, 403 Mass. 103, 108-10 (1988) (holding that inordinate appellate delay can threaten due process). Such a delay, particularly in the context of such a huge scandal, is a reason for courts to exercise their authority to stay sentences.

B. The Special Magistrate acted within its discretion in staying Milette's sentence. Charles Opp. at 25-30. For starters, the Special Magistrate's grant of a motion to reconsider a prior Superior Court ruling was not an end-run around that court. The Order of Assignment required the Special Magistrate to hear the motion for reconsideration.

What is more, the Special Magistrate's ruling was reasonable. As the Magistrate noted, Milette is serving sentences for three counts in which Annie Dookhan was the primary chemist. He has served roughly 40 months out of a 60-months sentence, so he is running out of time to obtain meaningful post-conviction relief. The Magistrate authorized the stay on the condition that Milette accept severe restrictions on his liberty, including a curfew and GPS monitoring. Finally, Milette

does not appear to pose a threat to public safety.

II. This Court Should Exercise Its Own Authority To Specify A Range Of Equitable Remedies, Including Presumptive Stays Of Sentences, Governing The Hinton Lab Litigation.

This Court's superintendence powers supply an alternative ground for staying Milette's sentence and, more fundamentally, for addressing the criminal justice crisis arising from the Hinton Lab scandal. Far from warranting a narrow approach to judicial remedies – as the Commonwealth argues – the scandal calls for broad judicial intervention. Charles Opp. at 30-38.

A. This scandal warrants the presumptive stay of any sentence associated with misconduct at the Hinton Lab. Those sentences would include those of defendants, such as Milette, whose leading drug counts are associated with Annie Dookhan's work. Although the Commonwealth seems to argue that such stays are warranted only where a defendant can affirmatively establish a clear causal connection between Dookhan's misconduct and the defendant's conviction, Pet. at 17-20, that approach overlooks two key considerations.

First, the massive misconduct underlying this litigation – which was perpetrated by at least one public official – is itself a reason to grant relief. Setting aside a judgment, let alone staying sentences,

can be warranted in cases of egregious government misconduct. See Commonwealth v. Cronk, 396 Mass. 194 (1985) (egregious misconduct may warrant dismissal of charges); Commonwealth v. Manning, 373 Mass. 438 (1977) (dismissing indictment when government actors deliberately violated constitutional rights).

Second, the sheer size of the Hinton Lab litigation is now adding new constitutional violations on top of old ones. Because the number of affected cases might ultimately reach 190,000, Charles Opp. at 5, defendants face long waits to obtain counsel, file motions, and obtain merits hearings. That delay implicates serious due process concerns. Weichel, 403 Mass. at 108-10. Given such protracted litigation, defendants like Milette may well have a right to the stay of their sentences. This Court should therefore make such stays presumptively available.

B. But this Court should not stop there, because stays alone will not stop ongoing infringements of the rights of defendants. This Court should also exercise its considerable authority to direct the litigation.

If ever a situation cried out for extraordinary relief, it is the Hinton Lab debacle. The harm involved is a colossal pattern of falsified evidence generated

by Dookhan (and quite possibly others), occasioning massive litigation on an unprecedented human and fiscal scale. These cases "cannot be remedied in the normal course of [proceedings] because an essential component of the 'normal course' . . . is precisely what is missing here. The course of the proceedings in these cases is per se not normal." Lavallee v. Justices of Hampden Superior Court, 442 Mass. 228, 240 (2004) (addressing shortage of criminal defense lawyers in the bar advocates program).

This Court has, in addition to its equitable powers, the unique authority under G.L. c.211, § 3, to guide lower courts concerning how to best – and most flexibly – remedy the harms of this scandal and restore the public's faith in the justice system. In previous instances warranting authoritative direction to the lower courts, this Court has fashioned critical guidance. See, e.g., Lavallee, 442 Mass. 228; Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 436 Mass. 347, 351 (2002). It should do so here as well.

Conclusion

For the reasons stated above and in Shubar Charles's Opposition, defendant Milette respectfully requests that this Court:

(1) Enter an order allowing Milette's release, under the same conditions established by the Special Magistrate, pending a ruling on this case or on Milette's motion for a new trial, whichever occurs first.

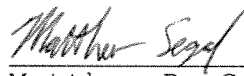
(2) Determine under this Court's supervisory power that, in any case involving a defendant who is incarcerated for a conviction involving evidence associated with Annie Dookhan, there shall be a presumption that a motion for a new trial is meritorious and that a stay of the sentence is appropriate.

(3) Retain jurisdiction of this matter for the purpose of determining what additional orders may be necessary and appropriate, under the Court's supervisory power, to ensure the orderly, efficient, and just resolution of Hinton Lab cases. Such additional orders should protect the rights of defendants to due process of law and to the just and speedy determination of their claims. In connection

therewith, the Court should conduct further hearings and consider such evidence as may be necessary, or refer the matter to a Special Master.

Respectfully submitted,

HECTOR MILETTE
By his attorneys,



Matthew R. Segal, BBO #654489
John Reinstein, BBO #416120
Laura Rótolo, BBO #665247
AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS
211 Congress Street
Boston, MA 02110
617-482-3170
msegal@aclum.org

Dated: March 5, 2013

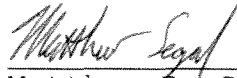
CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2013, one copy of the Defendant's Opposition, and Request to Reserve and Report Additional Questions, in Response to the Commonwealth's Petition Under G.L. c.211, § 3, in the case of Commonwealth v. Hector Milette, Supreme Judicial Court for Suffolk County, Single Justice, No. SJ-2013-0083, was sent via e-mail and first-class mail, postage prepaid, to:

Ronald E. DeRosa, Esq.
Assistant District Attorney
Salem, MA 01970

Elin H. Graydon, Esq.
Assistant District Attorney
10 Federal Street
Salem, MA 01970

Frederick B. McAlary, Jr., Esq.
15 Chestnut Street
Andover, MA 01810



Matthew R. Segal, BBO #654489
AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS
211 Congress Street
Boston, MA 02110
617-482-3170