

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC NO. FAR-

APPEALS COURT NO. 2022-P-825

COMMONWEALTH

v.

ELANA GORDON

ON APPEAL FROM A JUDGMENT OF THE
PLYMOUTH SUPERIOR COURT

**ELANA GORDON'S APPLICATION
FOR DIRECT APPELLATE REVIEW**

Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
P.O. Box 760682
Melrose, Massachusetts 02176
(781) 572-3036
lawofficeofchristopherdemayo@gmail.com

MAY 2023

**REQUEST FOR DIRECT APPELLATE REVIEW
PURSUANT TO MASS. R. APP. P. 11**

Pursuant to Mass. R. App. P. 11, Defendant-Appellant Elana Gordon requests the Supreme Judicial Court to directly review her appeal. For the reasons discussed below, aspects of this Court’s Confrontation Clause jurisprudence are inconsistent with Supreme Court precedent and should be revisited. Also, this case presents an issue of first impression regarding unlisted Class B “opiates.”

STATEMENT OF PRIOR PROCEEDINGS

On May 30, 2018, a Plymouth County grand jury returned indictments against Ms. Gordon for conspiracy to distribute suboxone (G.L. c. 94C, § 40), possession of a Class B substance with intention to distribute (G.L. c. 94C, § 32A(c)), and unlawfully delivering a Class B substance to a prisoner (G.L. c. 268, § 28). RA.012-14.¹

Ms. Gordon subsequently moved to suppress statements she made to the police after her arrest as well as evidence related to a phone seized from her at the time of arrest. Following a June 19,

¹ “RA.012-14” refers to pages 12 to 14 of the record appendix, and other citations follow this format.

2019 evidentiary hearing, the motion to suppress was denied.

RA.007.

Trial on the possession and unlawful delivery charges was held on October 18, 19, 20, 21, and 22, 2021, Hon. Thomas F. McGuire, Jr., presiding. The jury returned guilty verdicts on both charges, 5 Tr. 65, and the possession charge was dismissed as duplicative. 5 Tr. 77.² After the verdict, Judge McGuire indicated that he would sentence Ms. Gordon to six months in the house of correction. 5 Tr. 75. At counsel's request, imposition of the sentence was stayed to November 22, 2023, and Ms. Gordon filed her notice of appeal that same day. RA.018.

On December 15, 2021, Ms. Gordon pleaded guilty to the conspiracy charge. The guilty plea was placed on file for six months, nunc pro tunc to November 22, 2021.

FACTS RELEVANT TO APPEAL

This case involves charges that Ms. Gordon, an attorney, smuggled suboxone strips into the Plymouth House of Correction on May 4, 2018 while meeting with an inmate.

² "5 Tr. 77" refers to page 77 of volume 5 of the trial transcript, and other citations follow this format.

The Commonwealth's Case

Matthew Pollara, an investigator with the Plymouth Sheriff's Department, testified that the Plymouth facility, including both the jail and house of correction, holds about 1,600 inmates. There are cameras throughout the facility and video is stored for 30 days. Correctional officers can listen to inmate phone calls, though calls with attorneys are not recorded. Three-way calls involve a call to someone on the facility's approved phone number list who, in turn, patches in a non-approved party. Three-way calls are not allowed under the Sheriff's policy book distributed to inmates. Typically, when there are three-way calls, prisoners are involved in "some sort of nefarious activity." [2 Tr. 49-61].

Non-attorney visits are separated by glass, so there is no way to pass items back and forth, and conversations during non-attorney visits are recorded. Attorneys, by contrast, go into a meeting room where they sit face to face with inmates. The attorney meeting rooms are video recorded but not audio recorded. Attorneys and inmates can share papers. [2 Tr. 61].

In December 2017 and January 2018 Pollara began an investigation of an inmate, Jassel Castillo, suspected of introducing

narcotics into the facility. Castillo had made several three-way calls, including two on May 3, 2018 involving Ms. Gordon. After Pollara heard these two calls he observed Ms. Gordon when she arrived at the house of correction on May 4, 2018 and he started following her movements with the facility's cameras. [2 Tr. 62-68].

During an attorney visit, the attorney leaves his or her bar card at the front desk, gets a visitor ID, and signs a log. Attorneys go through metal detectors, but their paperwork is not searched. The visitor form which Ms. Gordon signed contains instructions for visitors and indicates that she was visiting Noah Bell. At the time, Bell was an inmate in Castillo's cell block. [2 Tr. 69-75].

According to Pollara, it is forbidden for attorneys to leave paperwork with inmates; papers have to be mailed in. In May 2018 there was a posting in the house of correction, near "central control," saying "that you can't leave anything with inmates." A facility rule says that visitors will not deliver anything to a prisoner except through the "officer in charge." However, even if Ms. Gordon had asked one of the correctional officers about leaving her papers with Bell, it is unlikely that the officer would have let her do so because "the policy" states that attorneys may not leave things with inmates.

There are no circumstances where attorneys are allowed to leave things with inmates. [2 Tr. 77-82, 3 Tr. 49].

Pollara watched the live video feed of Ms. Gordon meeting with Bell. The video showed her leaving without the envelopes that she had entered the room with. When Bell was subsequently searched, Pollara and another correctional officer looked through his paperwork and seized two yellow envelopes. The bottoms of the envelopes were taped and some red or orange substance was bleeding through. The envelopes contained “case law or something like that.” Pollara peeled open the thick bottoms of the envelopes and found 61 orange strips concealed inside. [3 Tr. 12-31].

Massachusetts State Trooper Michael Pedersen was assigned to the Plymouth District Attorney’s Office from 2009 to 2020 and became aware of Pollara’s investigation. Based on information provided by Pollara, Pedersen and a prosecutor obtained an arrest warrant for Ms. Gordon for bringing drugs into prison. A warrant also allowed for seizure of her cell phone. [3 Tr. 58-61].

Pedersen, Detective Lieutenant Lisa Buckley, and Trooper Kevin McDermott interviewed Ms. Gordon on May 9, 2018, after her arrest. During the interview Ms. Gordon acknowledged being on

three-way calls with Castillo and his sister, and she acknowledged the calls occurred just before her visit to Noah Bell. Ms. Gordon admitted that she visited Bell based on these three-way calls. [3 Tr. 62-67].

Captain Gretchen Solina of the Plymouth Sheriff's Office testified that at any given time six to nine officers are monitoring facility video camera and telephone calls. The Plymouth facility employs the Securus phone system. Inmates can call people on an approved list of up to ten numbers. While the phone system allows for three-way calls, inmates are notified that they're not supposed to make them. [3 Tr. 73-76].

At the conclusion of Solina's testimony, two calls made on May 3, 2018 involving Ms. Gordon and Castillo were played for the jury. [3 Tr. 81-83].

State Police Lieutenant Frank Driscoll testified briefly that he was assigned to the Plymouth District Attorney's Office from 2007 to 2019, had received training on cell phone extractions, and had examined thousands of phones. When Driscoll powered on Ms. Gordon's Apple iPhone he saw a "welcome screen." Apple products can be remotely reset. Driscoll, however, was unsure whether Ms.

Gordon's phone could have been connected to a network and remotely reset; usually, the police put the phones they seize into airplane mode. Driscoll was unsure what Pedersen did before giving him Ms. Gordon's phone, he only knew that it had been powered off. Driscoll didn't know why the phone was in welcome screen mode when he powered it on. [3 Tr. 86-96].

After preliminary chain-of-custody testimony that an officer transported the 61 strips of suspected drugs to the State Police Crime Laboratory [4 Tr. 13-23], Carrie LaBelle testified regarding the analysis of the strips. LaBelle was a drug analyst at the Crime Laboratory for about 7 years before becoming a supervisor. As supervisor, she peer reviews other employees' work. When LaBelle peer reviews a case she makes sure that the forensic scientist took all the appropriate steps, according to protocol: weighing the substance, doing the screening test, then doing a confirmatory test. The scientist's notebooks should state the volume sampled, the solutions added, and so on. [4 Tr. 23-31].

In this case, the 61 strips were given a case number and assigned to analyst Kimberly Dunlap, who was no longer with the Crime Laboratory by the time of trial. Dunlap analyzed the

substance, then came to LaBelle to review her work. [4 Tr. 30]. The substance in this case was considered a pharmaceutical preparation, so the first step was to look for markings on the strips, then look those markings up in an online database. The second step was to analyze the substance chemically on an instrument. [4 Tr. 31-32].

For the first step, Dunlap made a preliminary identification of buprenorphine and naloxone, a combination commonly known as suboxone. For the confirmatory step, one of the strips was dissolved in solvent, then Dunlap used a gas chromatography–mass spectrometry (GCMS) instrument to identify the components. Labelle observed the same GCMS results that Dunlap observed, and concurred that they supported a conclusion of buprenorphine and naloxone. Buprenorphine is a Class B controlled substance. [4 Tr. 32-36].

LaBelle did not independently test or retest the substance contained in the 61 strips. She independently reviewed Dunlap's data and decided that it supported Dunlap's conclusion. If any issues or discrepancies are noted during a technical review, then a fresh sample is retested, but LaBelle did not note any such issues or discrepancies. [4 Tr. 40-42].

The Defense Case

Ms. Gordon took the stand in her own defense. She testified that she was self-employed throughout her career a lawyer, had primarily handled real estate work, but had done some district court criminal work. In May 2018 she was restarting her practice after taking some time off during a contentious divorce. She had one or two open foreclosure matters at the time. [4 Tr. 48-50].

Ms. Gordon had represented Jassel Castillo in a 2016 probation matter and had previously represented other members of his family. By May of 2018 Castillo was not a current client but he wanted Gordon to represent him on a matter. His sister, Minoska Bello, reached out to Ms. Gordon about her talking with Castillo. Ms. Gordon was advised that Castillo had a referral for her, involving someone he knew in the Plymouth House of Correction named Noah Bell. Ms. Gordon wasn't sure whether she would represent Bell on his pending domestic assault case, but she agreed to meet with him. Castillo wanted Ms. Gordon to review law about impeaching witnesses with Bell. Ms. Gordon received \$200 for the meeting. She initially planned to see both Bell and Castillo on her visit to the house

of correction, but on a later call Castillo told her that he didn't want to see her after all. [4 Tr. 52-56, 60].

The day before the visit, Bello offered to provide the relevant laws that Gordon would be discussing with Bell, and Gordon accepted the offer because she had no ink for her printer and approximately 100 pages of printing was required. Bello dropped the papers off with Gordon that day, May 3, 2018. [4 Tr. 54-55].

At the house of correction the next day, Ms. Gordon told the lobby officer that she had papers that she would be leaving with Bell during the visit. When she went through the x-ray machine the correctional officer didn't look in the envelopes. She wrote Bell's name on the envelope and signed her initials so that facility staff would know it was from her to Bell. [4 Tr. 57-59].

Ms. Gordon had no knowledge that the envelopes contained anything other than legal paperwork, and she didn't see any orange substance bleeding through the envelopes. She had previously left paperwork with inmates. She had no knowledge of contraband and would not have sacrificed her career, daughter, and life for \$200. [4 Tr. 59-61].

On cross examination, Ms. Gordon agreed that she had previously been paid \$150 for a meeting with Castillo. The \$150 and \$200 payments both came from Bello and went into Gordon's PayPal account. Ms. Gordon knew that Castillo had drug charges. She denied that it was wrong to be on three-way phone calls with inmates, though she agreed that such calls are recorded. [4 Tr. 64-69].

On the day in question, Ms. Gordon showed the envelopes to the correctional officer behind window at front desk. She then showed them to the correctional officer by the x-ray machine, a woman with a blond ponytail. This officer looked in the envelope and pulled out the paperwork. Finally, she showed the envelopes to the correctional officer by the attorney room. [4 Tr. 70-82]. Ms. Gordon did not know anything about her phone being reset until the she heard about it at trial. [4 Tr. 87].

The Commonwealth's Rebuttal Case

The prosecution called Plymouth County Sheriff's Officer Sherrie Miller as a rebuttal witness. Miller was the lobby officer at the house of correction on May 4, 2018. She was not aware of an attorney trying to give paperwork to an inmate on this day (although,

she admitted on cross examination, she did not have a fresh memory of the day). Miller reiterated that attorneys may not leave papers with inmates. She had no authority to allow an attorney to leave paperwork with inmate. [4 Tr. 96-101].

ISSUES OF LAW RAISED BY THE APPEAL

1. Did the trial court erroneously admit, over objection, two jail phone calls involving Ms. Gordon that were prejudicial and minimally probative? [Reviewed for prejudicial error].

2. Did it evidence of purported house of correction rules, supposedly violated by Ms. Gordon, mislead the jury and create a substantial risk of a miscarriage of justice? [Reviewed for substantial risk of a miscarriage of justice].

Did defense counsel exacerbate this error by conceding during closing argument that Ms. Gordon had violated the rules, where his doing so suggested that he did not believe her testimony?

3. Did the trial court erroneously admit irrelevant, prejudicial evidence that Ms. Gordon's phone was allegedly "wiped" where there was no foundation that Ms. Gordon could have wiped the phone? [Reviewed for prejudicial error].

4. Did the trial court erroneously admit expert testimony identifying a sample as a Class B controlled substance where the testimony included important hearsay as to what another analyst did, in violation of the Confrontation Clause? [Reviewed for whether any error was harmless beyond a reasonable doubt].

Did the testifying expert lack the necessary qualifications to opine that the sample was a Class B drug? [Reviewed for substantial risk of a miscarriage of justice].³

³ As Issues 1, 2 and 3 are likely of less interest to the Court, this application is focused on Issue 4.

ARGUMENT

I. An Expert's Testimony That A Non-testifying Scientist Performed A Drug Analysis Of A Sample Violates The Confrontation Clause, Regardless Of Whether The Expert Purports To Conduct "Independent" Review Of Data Allegedly Derived From The Analysis. Insofar As This Court's Precedents Are To The Contrary, It Should Revise Its Confrontation Jurisprudence.

Carrie LaBelle testified in relevant part as follows:

So, the first test that the analyst performed was a pharmaceutical ID. So, what they did was, they input – they recorded in their notes what imprint was that they observed on the actual item of evidence. They input that into their choice of a database. I believe they used drugs.com, but I can double-check on that. It gave back a preliminary identification of Buprenorphine and Naloxone, and then that printout is retained in the case record.

Because the preliminary identification indicated a mixture of Buprenorphine and Naloxone, the analyst chose to do the GCMS instrument. They took a portion of one of the films, they recorded it into a solvent, I believe it was methanol is what we commonly use, and then the instrument will print out data after it goes -- runs through the instrument, and then that data we retain in the case and is reviewable.

This testimony came in without any limiting instruction. Slightly later, LaBelle testified that she reviewed "that data" referenced above and that "the data supports the identification of Buprenorphine and Naloxone."

After defense counsel elicited on cross examination that LaBelle had not performed any hands-on testing of the substance, and had simply reviewed the file, he moved to strike her testimony in its entirety as a violation of the Confrontation Clause. The judge overruled the objection on the ground that LaBelle had provided an “independent” analysis of the GCMS data.

The defense objection was meritorious. Portions of LaBelle’s testimony were clearly inadmissible, *e.g.*, her statement that analyst Dunlap’s online research “gave back a preliminary identification of Buprenorphine and Naloxone.” “Expert testimony as to the opinions or conclusions of a second, nontestifying expert constitutes inadmissible hearsay.” *Commonwealth v. Fulgiam*, 477 Mass. 20, 45 (2017). Similarly, LaBelle’s testimony that “the data *supports the identification* of Buprenorphine and Naloxone” (emphasis added) appears intended to vouch for Dunlap’s prior identification. Again, this is improper. *Cf. Fulgiam*, 477 Mass. at 46 (“[V]erifying’ suggests that a nontestifying expert concurs with the testifying expert’s conclusion...”).

But defense counsel’s objection went much further. The gist of his objection was that a Crime Laboratory employee who had had no

hands-on involvement in testing a substance could not opine on its identity without relying on crucial out-of-court statements, for their truth, in violation of the Confrontation Clause. LaBelle's testimony that the "data ... supports the identification of Buprenorphine and Naloxone" was a tacit claim that the "data" she reviewed had resulted from Dunlap's processing of the substance recovered from the envelope. LaBelle's testimony would otherwise be irrelevant.

The situation is the same as in *Illinois v. Williams*, 132 S.Ct. 2221 (2012), where an analyst testified that "a computer match [was] generated of the male DNA profile found in semen from the vaginal swabs of [the victim] to a male DNA profile [from the defendant]." An independent lab had been given responsibility for profiling the DNA in semen from the vaginal swabs; the testifying analyst had not been involved. A majority of the court found that her reference to a "DNA profile found in semen from the vaginal swabs" was a tacit repetition of the independent lab's out-of-court statement that it had, in fact, produced the profile from the DNA in the vaginal swabs. Five justices rejected the argument that out-of-court statements introduced as a purported basis of an expert's opinion are not being used for their truth. *See* 132 S.Ct. at 2257 (Thomas, J., concurring in judgment)

(“There is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert’s opinion and disclosing that statement for its truth.”); *id.* at 2269 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.) (“[A]dmission of the out-of-court statement in this context has no purpose separate from its truth; the factfinder can do nothing with it *except* assess its truth and so the credibility of the conclusion it serves to buttress.”).

The *only* reason why the defendant in *Williams* lost his Confrontation Clause argument is because Justice Thomas deemed the underlying DNA report from the independent lab not sufficiently “formal” to qualify as a “testimonial” statement. *Id.* at 2260.

However, there is no question that Massachusetts drug certifications, which are signed by the analyst who performs the work and notarized, are sufficiently formal. Justice Thomas has so held. *See Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, (2009) (Thomas, J., concurring) (Massachusetts drug certifications sufficient formal to be “testimonial”). LaBelle’s hearsay account of Dunlap’s representation thus violated the Confrontation Clause, notwithstanding LaBelle’s claim that she performed an “independent” analysis of the data.

Indeed, Ms. Gordon’s case is even stronger than that of the defendant in *Williams*. At the time of Dunlap’s chemical analysis, Ms. Gordon was already a suspect, underscoring the “testimonial” nature of Dunlap’s statements. Contrast *Williams*, 132 S.Ct at 2244 (“At the time of the testing, petitioner had not yet been identified as a suspect...”). Ms. Gordon was tried by a jury. Contrast *id.* at 2236-37 (“This case, however, involves a *bench trial*, and we must assume that the trial judge understood that the portion of [the testifying expert’s] testimony to which the dissent objects was not admissible to prove the truth of the matter asserted.”)(emphasis in original). As noted, there was no limiting instruction regarding LaBelle’s testimony about Dunlap’s alleged actions, so it came in for the truth.

To the extent that this Court’s precedents approve of so-called basis testimony such as LaBelle offered here, they are contrary to Supreme Court precedent. In particular, in *Commonwealth v. Greineder*, 464 Mass. 580, 592 (2013), this Court, considering the effect of *Williams* on Massachusetts law, found it significant that “the [*Williams*] dissent concluded: ‘There was nothing wrong with [the expert’s] testifying that two DNA profiles — the one shown in the ... report and the one derived from [the defendant’s] blood – matched

each other; that was a straightforward application of [the expert's] expertise.” This Court concluded, “Thus, no member of the Supreme Court plainly concluded that the expert opinion testimony was improper.” *Id.* But the *Williams* dissent’s point was that an expert can properly opine that two DNA profiles match *if* there is proper evidence of each profile. If the only evidence of a profile is the expert’s repeating of formal, out-of-court statements by another analyst, then – the dissent and Justice Thomas agreed – that expert’s testimony violates Confrontation Clause.

The Court reached the right result in *Greineder*, given that the expert there was relying on a DNA profile created by Cellmark, *see* 464 Mass. at 582, the same independent lab used by the police in *Williams*. The profile presumably lacked the formality that Justice Thomas required, since he found Cellmark’s report not sufficiently formal in *Williams*. *See* 132 S.Ct at 2255. But this Court erred in *Greineder* insofar as it read *Williams* to bless all expert testimony relying on out-of-court statements.

This Court’s decision in *Commonwealth v. Chapell*, 473 Mass. 191, 201-02 (2015), also warrants revisiting. There, the Court held that a crime lab supervisor’s testimony about a DNA profile prepared

by an analyst was proper because “the defendant here certainly was able to cross-examine the Commonwealth’s expert Schneeweis meaningfully about the reliability of the underlying DNA testing procedures and data, given that Schneeweis was the crime lab’s section manager....” But, although a manager can meaningfully testify as to the lab’s “DNA testing procedure,” she cannot meaningfully testify about “data” where she had no hands-on involvement in the lab work. The Supreme Court has specifically so held. *See Bullcoming v. New Mexico*, 564 U.S. 647 (2011)(“But surrogate testimony of the kind [testifying substitute analyst] Razatos was equipped to give could not convey what [non-testifying analyst] Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.”).

In her concurrence in *Bullcoming*, Justice Sotomayor opined that “[i]t would be a different case if, for example, a supervisor *who observed an analyst conducting a test* testified about the results or a report about such results,” *id.* at 2722 (emphasis added), but here

LaBelle did not observe Dunlap preparing the samples or using the gas chromatography machine. She simply reviewed the file.

Had the *Bullcoming* or *Williams* Courts considered Ms. Gordon's case, a majority of the justices would have found LaBelle's testimony regarding Dunlap's testing violative of the Confrontation Clause. Justices who have joined the court in the interim are in accord. *See Stuart v. Alabama*, 139 S.Ct. 36, 36 (2018)(Gorsuch, J., dissenting from denial of writ of certiorari, joined by Sotomayor, J.)("[T]he State refused to bring to the stand the analyst who performed the [blood alcohol] test. Instead, the State called a different analyst ... Through these steps, the State effectively denied Ms. Stuart the chance to confront the witness who supplied a foundational piece of evidence in her conviction.").

II. Where The Commonwealth Seeks To Prove A Substance Is An "Opiate" Not Specifically Listed Under Class B, It Is Obligated To Produce A Qualified Medical Expert To So Opine.

LaBelle's testimony was improper for the additional reason that she was not qualified to opine that buprenorphine is a Class B drug.

"Buprenorphine" does not appear on the list of Class B drugs in G.L. c. 94C, § 31. In addition to the specific substances listed under "Class B," the statute makes it illegal to possess certain types of Class

B substances, such as “opium and opiate.” Presumably, the Commonwealth intended to prove that buprenorphine was an “opiate,” which is in turn described as “any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.” G.L. c. 94C, § 1. But there is no suggestion in the record that LaBelle was qualified to opine that buprenorphine met this definition. She did not claim to be a pharmacologist, toxicologist, or psychiatrist. When the Commonwealth seeks to prove that a chemical not listed in § 31 meets some chemical or biological definition, then it must produce an expert qualified to so testify. Although Massachusetts appellate courts do not appear to have addressed this issue, other courts have so held. *See People v. Davis*, 303 P.3d 1179, 1184 (Cal. 2013) (“Because it is not specifically listed in any schedule ... it was incumbent on the People to introduce competent evidence or a stipulation about MDMA’s chemical structure or effects.”).

The Commonwealth was obliged to present a qualified expert to opine that buprenorphine has “addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion

into a drug having addiction-forming or addiction-sustaining liability,” G.L. c. 94C, § 1, yet it failed to do so. The Court cannot be confident this error did not “materially influence[]” the verdict, *Lavin*, 101 Mass. App. Ct. at 292, where it is unclear that buprenorphine’s “addiction-sustaining liability” is in fact “similar to” morphine’s. Publicly-available information suggests otherwise: “Buprenorphine is a partial agonist at the mu receptor, meaning that it only partially activates opiate receptors ... it differs from other full-opioid agonists like morphine and fentanyl, allowing withdrawal symptoms to be milder and less uncomfortable for the patient.”⁴

Furthermore, although buprenorphine is undoubtedly a prescription drug, and therefore a Class E substance, this fact does not alter the substantial risk analysis because the indictments specifically charged Class B offenses, and a Class E offense is not lesser included of a Class B offense. *See Commonwealth v. McGilvery*, 74 Mass. App. Ct. 508, 512 (2009). So the error very likely “materially influenced” the guilty verdict on the charged offenses, even if other charges were possible.

⁴ “Buprenorphine,”
<https://www.ncbi.nlm.nih.gov/books/NBK459126/>.

WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Portions of this Court's holdings in *Greineder* and *Chapell* are inconsistent with the Supreme Court's holdings in *Bullcoming* and *Williams*. Only this Court can revise its jurisprudence, and it should do so now in a case where the issue was preserved below and is squarely presented. While that is sufficient reason to grant this application, there are also practical and policy considerations.

The Court is obviously well aware of the massive fraud that occurred at the Hinton and Amherst drug labs. More recently, the Court has been dealing with faulty breathalyzer testing. Experience makes clear that is not enough for a jury to simply hear from a supervisor about how a forensic science lab is *supposed to* operate. The jury needs to hear how it *actually did* operate in the given case. Protocols are one thing, practice another. There will be times when only the analyst who performed the hands-on work can provide the vital testimony.

The burden on the Commonwealth to occasionally bring in an ex-employee to testify – or when this isn't possible, to occasionally re-test a sample – is relatively slight. Enabling defense counsel to ferret out mistakes and fraud through meaningful cross examination

can prevent wrongful convictions, reduce later collateral litigation, and perhaps avoid debacles of the Dookhan-Farak variety. So, besides being required, strict adherence to the Confrontation Clause is a good policy whose benefits outweigh costs.

Finally, the issue of whether a substance meets the statutory definition of “opiate” is one the Court has not previously addressed. On its face, this portion of G.L. c. 94C, § 31 seems in need of construction, for the operative language – “any substance having an addiction-forming or addiction-sustaining liability similar to morphine” – is vague. What drug is “similar to morphine” in terms of addictive properties? The “opium or opiate” language in § 31 is apparently taken from a federal statute, 21 U.S.C., § 802(18), but the vagueness issue does not arise under federal law because the Drug Enforcement Agency periodically publishes updated schedules of the various classes of controlled substance.⁵ The Court should provide guidance about this and other situations involving unlisted controlled substances.

⁵ Buprenorphine is a federal Schedule III drug. *See* 21 C.F.R. 1308.13(e)(2)(i). Since the federal statute, like the Massachusetts one, has five categories of controlled substances, the federal Schedule III is analogous to Massachusetts Class C.

Respectfully submitted,

Elana Gordon,

By her counsel,

/s/ Christopher DeMayo

CHRISTOPHER DEMAYO (BBO #653481)
LAW OFFICE OF CHRISTOPHER DEMAYO
P.O. Box 760682
Melrose, MA 02176
(781) 572-3036
lawofficeofchristopherdemayo@gmail.com

Dated: APRIL 2023

CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. A. P. 16(K)

Pursuant to Mass. R.A.P. 13(d), I hereby certify that the foregoing application complies with the rules of court. In particular, the application is composed in 14 point proportionally spaced Times New Roman font and the Argument section is 1,997 words long.

/s/ Christopher DeMayo

Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
P.O Box 760682
Melrose, MA 02176
781-572-3036
lawofficeofchristopherdemayo@gmail.com

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(d), I hereby certify that on this date of May 1, 2023 I served the foregoing Application for Direct Appellate Review on the Commonwealth by sending copies via efileMA / e-mail to counsel of record, Carolynne Burbine, ADA.

/s/ Christopher DeMayo

Christopher DeMayo (BBO # 653481)
Law Office of Christopher DeMayo
P.O Box 760682
Melrose, MA 02176
781-572-3036
lawofficeofchristopherdemayo@gmail.com

ADDENDUM

Docket	29
Carrie LaBelle Testimony	39

1883CR00198 Commonwealth vs. Gordon, Elana

- Case Type:
- Indictment
- Case Status:
- Open
- File Date
- 05/30/2018
- DCM Track:
- A - Standard
- Initiating Action:
- CONSPIRACY TO VIOLATE DRUG LAW c94C §40
- Status Date:
- 06/20/2018
- Case Judge:
-
- Next Event:
- 05/23/2022

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)

Party Information

Plymouth County District Attorney
- Prosecutor

[Alias](#)

Party Attorney

- Attorney
- Hanley Elumba, Esq., Jessica Ann
- Bar Code
- 655236
- Address
- Plymouth County District Attorney's Office
- 166 Main street
- Brockton, MA 02301
- Phone Number
- (508)894-2576

[More Party Information](#)

Gordon, Elana
- Defendant

[Alias](#)

Party Attorney

- Attorney
- Perruzzi, Esq., Christopher A
- Bar Code
- 558273
- Address
- Perruzzi Law Office, LLC
- 1266 Furnace Brook Parkway
- Suite 400
- Quincy, MA 02169
- Phone Number
- (617)586-0883

[More Party Information](#)

T- Mobile
- Keeper of Record

[Alias](#)

[Party Attorney](#)

[More Party Information](#)

Apple Inc
- Keeper of Record

[Alias](#)

[Party Attorney](#)

[More Party Information](#)

Party Charge Information

- **Gordon, Elana**
- - Defendant
- **Charge # 1:**
94C/40-0 - Misdemeanor - more than 100 days incarceration CONSPIRACY TO VIOLATE DRUG LAW c94C §40

- Original Charge
- 94C/40-0 CONSPIRACY TO VIOLATE DRUG LAW c94C §40 (Misdemeanor - more than 100 days incarceration)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
12/15/2021
Filed - Guilty Plea

- **Gordon, Elana**
- - Defendant
- **Charge # 2:**
94C/32A/G-1 - Felony DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a)

- Original Charge
- 94C/32A/G-1 DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a) (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
10/22/2021
Guilty Verdict
10/22/2021
Dismissed

- **Gordon, Elana**
- - Defendant
- **Charge # 3:**
268/28/A-0 - Felony PRISONER, DELIVER DRUGS TO c268 §28

- Original Charge
- 268/28/A-0 PRISONER, DELIVER DRUGS TO c268 §28 (Felony)
- Indicted Charge
-
- Amended Charge
-

Charge Disposition

Disposition Date
Disposition
10/22/2021
Guilty Verdict

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
06/20/2018 09:00 AM	Criminal 1 Brockton		Arraignment	Davis, Hon. Brian A	Held as Scheduled
07/30/2018 09:00 AM	Criminal 1 Brockton		Pre-Trial Conference	Moriarty, II, Hon. Cornelius J	Held as Scheduled
10/18/2018 02:00 PM	Criminal 4 Plymouth		Pre-Trial Hearing	Pasquale, Hon. Gregg J	Held as Scheduled
01/11/2019 02:00 PM	Criminal 4 Plymouth		Conference to Review Status		Held as Scheduled
02/07/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Conference to Review Status	Moriarty, II, Hon. Cornelius J	Held as Scheduled
03/04/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Lobby Conference	Moriarty, II, Hon. Cornelius J	Not Held
05/02/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Lobby Conference	Moriarty, II, Hon. Cornelius J	Held as Scheduled
06/12/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Evidentiary Hearing on Suppression	Moriarty, II, Hon. Cornelius J	Held as Scheduled

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
07/31/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Conference to Review Status	Moriarty, II, Hon. Cornelius J	Held as Scheduled
10/18/2019 02:00 PM	Criminal 4 Plymouth	PLY-3rd FL, CR 3 (SC)	Evidentiary Hearing on Suppression	Moriarty, II, Hon. Cornelius J	Not Held
01/30/2020 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference		Rescheduled
01/30/2020 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference		Not Held
01/30/2020 02:00 PM	Criminal 3 Plymouth		Final Pre-Trial Conference		Rescheduled
02/03/2020 02:00 PM	Criminal 3 Plymouth		Final Pre-Trial Conference		Held as Scheduled
02/10/2020 09:00 AM	Criminal 4 Plymouth		Jury Trial		Rescheduled
02/10/2020 09:00 AM	Criminal 3 Plymouth		Jury Trial		Rescheduled
02/27/2020 02:00 PM	Criminal 3 Plymouth		Conference to Review Status		
03/05/2020 09:00 AM	Criminal 3 Plymouth		Conference to Review Status		Held as Scheduled
03/24/2020 09:00 AM	Criminal 3 Plymouth		Jury Trial		Canceled
03/26/2020 09:00 AM	Criminal 3 Plymouth		Jury Trial		Canceled
09/22/2020 02:00 PM	Criminal 3 Plymouth		Trial Assignment Conference		Held as Scheduled
10/29/2020 10:00 AM	Criminal 3 Plymouth		Motion Hearing to Modify Probation Term/Conditions		Held as Scheduled
01/08/2021 02:00 PM	Criminal 3 Plymouth		Trial Assignment Conference		Rescheduled
02/23/2021 02:00 PM	Criminal 3 Plymouth		Trial Assignment Conference		Rescheduled
03/23/2021 02:00 PM	Criminal 3 Plymouth		Trial Assignment Conference		Rescheduled
05/04/2021 02:00 PM	Criminal 3 Plymouth		Trial Assignment Conference		Not Held
10/06/2021 02:00 PM	Criminal 3 Plymouth		Final Pre-Trial Conference		Held as Scheduled
10/14/2021 02:00 PM	Criminal 3 Plymouth		Hearing for Change of Plea		Held as scheduled
10/18/2021 09:00 AM	Criminal 3 Plymouth		Jury Trial		Held as Scheduled
10/19/2021 09:00 AM	Criminal 3 Plymouth		Jury Trial		Held as Scheduled
10/20/2021 09:00 AM	Criminal 3 Plymouth		Jury Trial		Held as Scheduled
10/21/2021 09:00 AM	Criminal 3 Plymouth		Jury Trial		Held as Scheduled
10/22/2021 09:00 AM	Criminal 3 Plymouth		Jury Trial		Held as Scheduled
11/22/2021 09:00 AM	Criminal 3 Plymouth		Hearing for Sentence Imposition		Held as scheduled
12/14/2021 02:00 PM	Criminal 3 Plymouth		Conference to Review Status		Rescheduled
12/15/2021 02:00 PM	Criminal 3 Plymouth		Conference to Review Status		Held as Scheduled
05/23/2022 02:00 PM	Criminal 3 Plymouth		Conference to Review Status		

Ticklers

<u>Tickler</u>	<u>Start Date</u>	<u>Due Date</u>	<u>Days Due</u>	<u>Completed Date</u>
Pre-Trial Hearing	06/20/2018	09/18/2018	90	10/18/2018
Final Pre-Trial Conference	06/20/2018	12/03/2018	166	02/03/2020
Case Disposition	06/20/2018	12/17/2018	180	12/16/2021

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
05/30/2018	Indictment(s) returned	1	Image
06/20/2018	Defendant arraigned before Court. Judge: Davis, Hon. Brian A		
06/20/2018	General correspondence regarding Appearance of ADA Jessica Hanley Elumba for the Commonwealth	2	
06/20/2018	Attorney appearance On this date Christopher A Perruzzi, Esq. added as Private Counsel for Defendant Elana Gordon	3	
06/20/2018	Plea of not guilty entered on all charges. Judge: Davis, Hon. Brian A		
06/20/2018	Bail set at \$0.00 Surety, \$1,000.00 Cash. cash with pre-trial probation conditions : 1. GPS monitoring 2. Stay away no contact with any inmate or House Of Correction in Massachusetts Judge: Davis, Hon. Brian A		
06/20/2018	Bail warnings read Judge: Davis, Hon. Brian A		
06/20/2018	Order for the transmittal of Bail sent to the clerk of the Plymouth District Court. \$1,000.00 copies mailed June 22,2018 Judge: Davis, Hon. Brian A	4	
06/20/2018	Case assigned to: DCM Track A - Standard was added on 06/22/2018	5	Image
06/20/2018	Case continued to July 30,2018 for pre-trial conference FTR Judge: Davis, Hon. Brian A		
07/30/2018	Event Result:: Pre-Trial Conference scheduled on: 07/30/2018 09:00 AM Has been: Held as Scheduled Hon. Cornelius J Moriarty, II, Presiding Appeared: Staff: Patrick W Creedon, Assistant Clerk Magistrate		
07/30/2018	Defendant 's Motion for issuance of subpoena duces tecum pursuant to Mass R Crim P 17 filed; ALLOWED (Moriarty,J)	6	Image
07/30/2018	ORDER: re; Application under Title 18, Unites States Code, 2703 (Moriarty,J) Judge: Moriarty, II, Hon. Cornelius J	7	
07/31/2018	Appearance of Jessica Elumba for Commonwealth	8	
07/31/2018	Notice and Summons (Dwyer) issued to Keeper of Records T-Mobile of to produce records by 08/10/2018 to the Clerk of the Superior Court. Judge: Moriarty, II, Hon. Cornelius J	9	
07/31/2018	Notice and Summons (Dwyer) issued to Keeper of Records Apple Inc of to produce records by 08/10/2018 to the Clerk of the Superior Court. Judge: Moriarty, II, Hon. Cornelius J	10	
09/26/2018	General correspondence regarding CASE SENT TO PLYMOUTH		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/18/2018	Case continued to January 11, 2019 at 2:00pm for status of discovery. Rule 36 waived for this time period. (Moriarty, J.) FTR		
01/11/2019	Defendant 's Motion to amend bail conditions; filed and after hearing denied (Moriarty,J)	12	
01/11/2019	Case continued to February 7, 2019 at 2PM by agreement for status of records and final compliance FTR		
02/07/2019	Matter continued by agreement to March 4, 2019 at 2:00 p.m. for Lobby Conference/Hearing on Return of Defendant's Property (Moriarty, J) FTR		
03/04/2019	Case continued to May 2, 2019 at 2PM by agreement for lobby conference & motion hearing FTR		
04/30/2019	Defendant 's Motion to suppress physical evidence and statements and supporting memorandum of law	13	
05/02/2019	Case continued to June 12, 2019 at 2:00 p.m. by agreement for hearing on motion to suppress (Moriarty, J) FTR		
06/12/2019	After hearing on defendant's motion to suppress continued to July 31, 2019 at 2PM by agreement for arguments and status FTR		
07/31/2019	Event Result:: Conference to Review Status scheduled on: 07/31/2019 02:00 PM Has been: Held as Scheduled Hon. Cornelius J Moriarty, II, Presiding		
10/17/2019	MEMORANDUM & ORDER: on Defendant's Motion to Suppress (Denied) Judge: Moriarty, II, Hon. Cornelius J	14	Image
10/17/2019	Defendant 's Motion to continue Judge: Moriarty, II, Hon. Cornelius J	15	
10/18/2019	case continued to January 30, 2020 at 2PM by agreement for final pre-trial conference Case continued to February 10, 2020 by agreement for trial notices mailed FTR	16	
12/05/2019	Event Result:: Jury Trial scheduled on: 02/10/2020 09:00 AM Has been: Rescheduled For the following reason: Transferred to another session Hon. Cornelius J Moriarty, II, Presiding		
12/05/2019	Event Result:: Final Pre-Trial Conference scheduled on: 01/30/2020 02:00 PM Has been: Rescheduled For the following reason: Transferred to another session Hon. Cornelius J Moriarty, II, Presiding		
01/27/2020	Event Result:: Final Pre-Trial Conference scheduled on: 01/30/2020 02:00 PM Has been: Rescheduled For the following reason: Transferred to another session Hon. Mark A Hallal, Presiding		
01/30/2020	Defendant not present Warrant to issue warrant recalled as having been reported to court that parties were misinformed as to day's date Case continued to February 3, 2020 at 2pm in the 3rd session for Final pre-trial conference FTR		
02/03/2020	Case continued to February 27, 2020 at 2pm in the 3rd criminal session by agreement re: status of 3 co-defendant's and continued March 24, 2020 by agreement re: jury trial. (Davis, J.) FTR		
02/05/2020	Event Result:: Jury Trial scheduled on: 02/10/2020 09:00 AM Has been: Rescheduled For the following reason: Request of Defendant Comments: FTR Hon. Mark A Hallal, Presiding		
03/05/2020	Case called for status conference. Motions in limine to be filed by March 20, 2020 and case continued to March 24, 2020 at 9:00AM for trial (Davis, J.) FTR		
03/20/2020	Event Result:: Jury Trial scheduled on: 03/24/2020 09:00 AM Has been: Canceled For the following reason: By Court due to Covid-19 Hon. Brian A Davis, Presiding		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
03/20/2020	Event Result:: Jury Trial scheduled on: 03/26/2020 09:00 AM Has been: Canceled For the following reason: By Court due to Covid-19 Hon. Brian A Davis, Presiding		
09/08/2020	Defendant 's Motion for leave to temporarily remove the GPS tracking unit; filed and allowed. GPS shall be removed on Sept. 9, 2020 for a seven day period unless, on or before September 17, 2020, defendant provides medical documentation showing a need for further extension (Locke, J.)	17	Image
09/15/2020	Defendant 's EMERGENCY Motion to extend the time for reapplication of her GPS tracking device; filed and ALLOWED; in lieu of GPS monitoring during 30 day recuperation defendant shall contact probation weekly by telephone (Locke, J.)	18	Image
09/22/2020	Event Result:: Trial Assignment Conference scheduled on: 09/22/2020 02:00 PM Has been: Held as Scheduled Hon. Jeffrey A Locke, Presiding		
10/26/2020	Defendant 's Motion for leave to amend her pretrial conditions of release, to vacate the GPS requirement	19	Image
10/29/2020	Event Result:: Motion Hearing to Modify Probation Term/Conditions scheduled on: 10/29/2020 10:00 AM Has been: Held as Scheduled Hon. Elaine M Buckley, Presiding		
10/29/2020	Endorsement on Motion for leave to amend her pretrial conditions of release, to vacate GPS requirement, (#19.0): After hearing, DENIED. The interests of public safety are best served by continuation of the GPS requirement. While the defendant's law license is under Term Suspension, as noted by Gaziano, J. in his order of 10/23/18, the defendant continued to hold herself out as an attorney during her time of administrative suspension. The allegations in the pending matter against the defendant arise out of her actions in her capacity of an attorney wherein it is alleged she brought drugs into incarcerated persons. As such, the public safety concerns outweigh any prejudice to the defendant.		
01/08/2021	Event Result:: Trial Assignment Conference scheduled on: 01/08/2021 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Joseph Leighton, Presiding		
02/22/2021	Event Result:: Trial Assignment Conference scheduled on: 02/23/2021 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Hon. Joseph Leighton, Presiding		
03/22/2021	Event Result:: Trial Assignment Conference scheduled on: 03/23/2021 02:00 PM Has been: Rescheduled For the following reason: Joint request of parties Comments: Case is ready to trial assignment and defednant does not wish to avail herself of a Six man jury. Hon. Joseph Leighton, Presiding		
05/03/2021	Event Result:: Trial Assignment Conference scheduled on: 05/04/2021 02:00 PM Has been: Not Held For the following reason: By Court prior to date Comments: Parties choose October 18, 2021 at 9:00 for trial and October 6, 2021 at 2:00 for FPTC Hon. Brian A Davis, Presiding		
05/03/2021	Scheduled: Event: Jury Trial Date: 10/18/2021 Time: 09:00 AM Result: Held as Scheduled		
10/06/2021	Case continued to October 14, 2021 at 2:00pm for possible change of plea (McGuire, J.) FTR		
10/06/2021	Joint Pre-Trial Memorandum filed:	20	Image
10/14/2021	Defendant waives rights. Judge: McGuire, Jr., Hon. Thomas F	21	Image
10/14/2021	Plea colloquy given. Judge: McGuire, Jr., Hon. Thomas F		
10/14/2021	Defendant warned pursuant to alien status, G.L. c. 278, § 29D. Judge: McGuire, Jr., Hon. Thomas F		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/14/2021	Case called for change of plea Defendant files waiver of rights Plea colloquy given At the end of the plea, defendant's oral motion to withdraw waiver of rights and guilty plea: ALLOWED, Commonwealth's objection noted on the record (McGuire, J.) Defendant's oral motion for Judge McGuire to recuse himself as the trial judge: ALLOWED. (McGuire, J.) Case held for trial on October 18, 2021 at 9:00am in the 4th criminal session before Buckley, J. (McGuire, J.) FTR		
10/18/2021	Scheduled: Event: Jury Trial Date: 10/19/2021 Time: 09:00 AM Result: Held as Scheduled		
10/18/2021	Scheduled: Event: Jury Trial Date: 10/20/2021 Time: 09:00 AM Result: Held as Scheduled		
10/18/2021	Case called 14 jurors have been seated, but not sworn. Case continued until 10/19/21 for evidence to begin. Hon. Thomas F McGuire, Jr., Presiding (FTR)		
10/18/2021	Defendant 's Motion Exclude Testimony Regarding Prior Bad Acts	21.1	
10/18/2021	Defendant 's Motion To Sequester All Witnesses	21.2	
10/19/2021	Commonwealth 's Motion in limine To Admit In-Court Identification Pursuant To Commonwealth v. Collins ALLOWED. Judge: McGuire, Jr., Hon. Thomas F	22	Image
10/19/2021	Day 2 of trial, jurors are sworn. Pre-charge and opening statements are heard. The Commonwealth begins with their first witness. Case continued until 10/20/21. Hon. Thomas F McGuire, Jr., Presiding		
10/20/2021	Day 3 of trial. Commonwealth continues to present their case. Case continued until 10/21/21. Hon. Thomas F McGuire, Jr., Presiding (FTR)		
10/21/2021	Scheduled: Event: Jury Trial Date: 10/22/2021 Time: 09:00 AM Result: Held as Scheduled		
10/21/2021	Day 4 of Trial. Commonwealth continues with the presentation of their case. Defendant presents their case. Evidence is closed. Closing arguments are heard. Case continued to 10/22/21 for jury charge and deliberations to begin. Hon. Thomas F McGuire, Jr., Presiding		
10/21/2021	Defendant 's Motion For A Required Finding Of Not Guilty DENIED	23	Image
10/21/2021	Defendant 's Motion For A Required Finding OF Not Guilty At The Close Of All Evidence DENIED	24	Image
10/22/2021	Offense Disposition:: Charge #2 DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a) On: 10/22/2021 Judge: Hon. Thomas F McGuire, Jr. By: Jury Trial Guilty Verdict Charge #3 PRISONER, DELIVER DRUGS TO c268 §28 On: 10/22/2021 Judge: Hon. Thomas F McGuire, Jr. By: Jury Trial Guilty Verdict		
10/22/2021	Offense Disposition:: Charge #2 DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a) On: 10/22/2021 Judge: Hon. Thomas F McGuire, Jr. By: Jury Trial Dismissed Charge #3 PRISONER, DELIVER DRUGS TO c268 §28 On: 10/22/2021 By: Jury Trial Guilty Verdict		
10/22/2021	Verdict affirmed, verdict slip filed	25	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
10/22/2021	Day 5 of Trial before McGuire, J and 14 jurors. Jury reduced to 12 and deliberations begin. Jury returns with Guilty Verdict, Offense 002 Dismissed as being duplicative. Case continued until 11/22/21 for sentence imposition and status Offense 001 Conspiracy. Hon. Thomas F McGuire, Jr., Presiding (FTR)		
11/22/2021	Court orders stay of execution of sentence revoked. Defendant sentenced to serve 6 months at the Barnstable County House of Correction on offense #003. (McGuire, J.) FTR		
11/22/2021	Defendant sentenced:: Revision Date: 11/22/2021 Judge: Hon. Thomas F McGuire, Jr. Charge #: 3 PRISONER, DELIVER DRUGS TO c268 §28 Committed to HOC Term: 0 Years, 6 Months, 0 Days To Serve: 0 Years, 6 Months, 0 Days Sentence Stayed Until 11/22/2021 Committed to Barnstable County Correctional Facility (BCCF) Credits 2 Days All fees waived (McGuire, J.)		
11/22/2021	Defendant notified of right of appeal to the Appeals Court within thirty (30) days. Judge: McGuire, Jr., Hon. Thomas F	25.1	
11/22/2021	Issued on this date: Mittimus for Sentence (All Charges) Sent On: 11/22/2021 09:24:33	26	
11/22/2021	Defendant 's Motion for requiring finding of not guilty (renewed) or, alternatively, for new trial	27	Image
11/22/2021	Notice of appeal filed. Applies To: Gordon, Elana (Defendant)	28	Image
11/22/2021	Defendant 's Request for transcript: filed and ALLOWED (McGuire, J.)	29	Image
11/22/2021	Defendant 's Motion for appointment of appellate counsel: filed and ALLOWED (McGuire, J.)	30	Image
11/22/2021	Findings and Order of Statutory Fees Judge: McGuire, Jr., Hon. Thomas F	25.2	Image
11/29/2021	Notice sent to parties regarding notice of appeal filed by the defendant, Elana Gordon cc: CP & JE	31	
12/13/2021	Habeas Corpus for defendant issued to Barnstable County Correctional Facility (BCCF) returnable for 12/14/2021 02:00 PM Conference to Review Status.	32	
12/14/2021	Event Result:: Conference to Review Status scheduled on: 12/14/2021 02:00 PM Has been: Rescheduled For the following reason: Request of Commonwealth Hon. Thomas F McGuire, Jr., Presiding		
12/14/2021	Habeas Corpus for defendant issued to Barnstable County Correctional Facility (BCCF) returnable for 12/15/2021 02:00 PM Conference to Review Status.	33	
12/15/2021	Defendant brought into court Case called to address offense #001 Defendant pleads guilty to offense #001 Offense #001 filed for 6 months nunc pro tunc to 11/22/21 with the consent of the defendant. (McGuire, J.) FTR		
12/15/2021	Defendant waives rights. Judge: McGuire, Jr., Hon. Thomas F	34	Image
12/15/2021	Plea colloquy given.		
12/15/2021	Defendant warned pursuant to alien status, G.L. c. 278, § 29D.		
12/15/2021	Filing of Criminal case(s) MRCP 28(e). Offense #001 filed for 6 months nunc pro tunc to 11/22/21 Judge: McGuire, Jr., Hon. Thomas F	35	Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
12/15/2021	<p>Offense Disposition::</p> <p>Charge #1 CONSPIRACY TO VIOLATE DRUG LAW c94C §40 On: 12/15/2021 Judge: Hon. Thomas F McGuire, Jr. By: Hearing Filed - Guilty Plea - filed for 6 months nunc pro tunc to 11/22/21</p> <p>Charge #2 DRUG, POSSESS TO DISTRIB CLASS B c94C §32A(a) On: 10/22/2021 Judge: Hon. Thomas F McGuire, Jr. By: Jury Trial Dismissed</p> <p>Charge #3 PRISONER, DELIVER DRUGS TO c268 §28 On: 10/22/2021 By: Jury Trial Guilty Verdict</p>		
02/10/2022	General correspondence regarding letter from CPCS assigning Attorney Christopher Demayo.	36	Image

Case Disposition		
Disposition	Date	Case Judge
Disposed by Jury Verdict	12/15/2021	

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS

SUPERIOR COURT DEPARTMENT

COMMONWEALTH OF MASSACHUSETTS

DOCKET NO.
1883CR00198

v.

ELANA GORDON

JURY TRIAL - DAY FOUR

BEFORE THE HONORABLE THOMAS F. MCGUIRE, JR.

APPEARANCES:

For the Commonwealth:

Plymouth County District Attorney's Office
166 Main Street
Brockton, MA 02301
By: Jessica Elumba, Assistant District Attorney

For the Defendant:

Perruzzi Law Office, LLC
1266 Furnace Brook Parkway
Suite 400
Quincy, MA 02169
By: Christopher A. Perruzzi, Esq.

Thursday, October 21, 2021
Courtroom 3
Plymouth, MA

SUSAN M. LOBIE, CET
OFFICE SOLUTIONS PLUS
15 Marion Road, Salem, MA 01970
(617) 471-3510
SueLobie@osptranscriptionervices.com

I N D E X

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(By Mr. Perruzzi)	104
(By Ms. Elumba)	115
CHARGE CONFERENCE	119

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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STEPHEN SAMMON

(By Ms. Elumba)	13		23	
(By Mr. Perruzzi)		20		

CARRIE LABELLE

(By Ms. Elumba)	25		40	
(By Mr. Perruzzi)		36		

ELANA GORDON

(By Mr. Perruzzi)	47			
(By Ms. Elumba)		63		

OFFICER SHERRIE MILLER

(By Ms. Elumba)	95		101	
(By Mr. Perruzzi)		99		

EXHIBITS

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17	Envelopes and Paperwork	20
18	Seized Narcotics (Formerly Exhibit F For Identification)	36

For Identification:

F	Seized Narcotics	18
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1 formal motion because counsel agreed, but this is
2 the substitute chemist. The original chemist has
3 since left the lab, so I just want to make the
4 Court aware as it began.

5 THE COURT: So, she's going to testify to her
6 own opinion, though?

7 MS. ELUMBA: Correct.

8 THE COURT: Not to the --

9 MS. ELUMBA: Opinion of the other, yeah.

10 She was the confirmatory chemist, so -- on this
11 actual case, so she did review this case and did the
12 technical review.

13 THE COURT: Okay.

14 MS. ELUMBA: So, I just wanted to make the Court
15 aware of that.

16 THE COURT: All right. Thank you.

17 MS. ELUMBA: Thank you.

18 SIDEBAR CONFERENCE CONCLUDED

19
20 THE COURT: Good morning, ma'am.

21 MS. LABELLE: Good morning.

22 THE COURT: You can remove your mask while
23 you're testifying.

24 MS. LABELLE: Okay.

25 MS. ELUMBA: May I inquire?

1 THE COURT: Yes.

2 MS. ELUMBA: Thank you.

3

4 DIRECT EXAMINATION

5

6 BY MS. ELUMBA:

7 Q Good morning.

8 A Good morning.

9 Q Please state your name, spelling your name for
10 the jury.

11 A My name is Carrie Labelle. My last name is
12 spelled L-A-B-E-L-L-E.

13 Q And what is your occupation?

14 A I'm a Forensic Scientist at the Massachusetts
15 State Police Crime Laboratory.

16 Q Okay. And what does it mean to be a Forensic
17 Scientist?

18 A Forensic Scientist has a variety of different
19 meanings. Currently, I work in our quality assurance
20 section. Prior to that, I was a Forensic Scientist
21 in the Drug Analysis Unit, and it was just a title
22 of someone that will review and perform testing on
23 controlled substances.

24 Q All right. I want to start with your experience
25 as someone who is doing the drug analysis.

1 Can you tell the jury a little bit about what
2 some of your duties were when you were in that role?

3 A Yes. When I was in this role, I was a Forensic
4 Scientist III, which is a Drug Unit Supervisor. So,
5 in addition to analyzing submitted evidence for the
6 presence or absence of controlled substances using
7 various instrumentation, I was also responsible for
8 performing technical and administrative reviews on
9 other peer's work.

10 Q All right. And what does it mean to conduct
11 technical or administrative review on work?

12 A So, a hundred percent of our cases go through
13 a technical and administrative review process. So,
14 what we are doing is, as an analyst, is analyzing
15 their samples. Every test that they perform generates
16 data. They also take records of what they're
17 observing at the time that they're observing them.

18 So, what we do as a technical reviewer, is we
19 will go through the case file, we'll review all of
20 their submitted data, we'll review their notes, and
21 we make sure that the notes and the conclusions that
22 they've drawn from them are supported scientifically.

23 The administrative review portion is looking
24 for administrative aspects such as having a laboratory
25 number on every page and having the analyst's initials

1 on every page.

2 Q Okay. So, fair to say that doing the technical
3 and administrative work, you're sort of doing a peer
4 review or supervisor's review of the quality of the
5 work, and then you're doing an administrative review
6 to make sure that all of the administrative functions
7 that need to be done are done correctly?

8 A Correct.

9 Q Okay. Can you tell the jury a little bit about
10 your training and your education in order to be able
11 to work in drug analysis?

12 A So, I have a Bachelor's of Science in Biochemistry
13 from Suffolk University, and I also have a Master's of
14 Forensic Science from Boston University.

15 Upon starting at the drug unit, I went through
16 -- it's usually a six-month to a one-year training
17 program, which consisted of lectures, readings, oral
18 and written examinations. We did some practical
19 exercises, and at the conclusion, we do a mock court
20 and we also go to the DEA special testing lab for
21 an entire week.

22 Q Thank you. I'm going to draw your attention
23 -- actually, first I'm going to show you what has
24 now been marked for identification as F.

25 Can you take a look at that item for me?

1 A Yes.

2 Q Okay. Fair to say it has some stickers with
3 some numbers -- some letters and numbers on it?

4 Are you familiar with those stickers?

5 A Yes. This is the sticker that we put on all of
6 our external cases. It's a laboratory identification
7 number, which has the town that submitted the evidence
8 and also it looks like it has the initials of an
9 analyst that used to work there.

10 Q Okay. So, based on your examination of what
11 has been marked for identification F, is that something
12 that has been to the Massachusetts -- in your opinion,
13 has the been to the Massachusetts State Police Crime
14 Lab for analysis?

15 A Yes. It's packaged similarly and has the initials
16 and date.

17 Q All right. And when you look at that specific
18 case number, are you familiar with that case number?

19 A Yes. The laboratory number for this case is
20 18-12925.

21 Q All right. And how are you familiar with that
22 number?

23 A This was actually a case that I performed the
24 technical and administrative review for.

25 Q All right. And when you say you performed the

1 technical administrative review, is that what you
2 just described to the jury?

3 A Correct.

4 Q All right. So, is it fair to say that another
5 chemist at the lab did the actual review of the
6 substance?

7 A Yes. They analyzed the specific substances.

8 Q Okay. And then it comes to you for technical
9 administrative review?

10 A Yes.

11 Q All right. And did you go through that same
12 process on this particular case as the one that you
13 just described for the jury?

14 A Yes, I did.

15 Q All right. And who was the analyst on this
16 particular case?

17 A This case was analyst Kimberly Dunlap.

18 Q All right. And is she still employed by the
19 Massachusetts State Police Crime Lab?

20 A No, she is not.

21 Q Okay. And when you reviewed -- can you tell
22 the jury, when you review a item for technical review,
23 what are the specific steps that you take?

24 A So, when I'm reviewing a case technically, I'm
25 basically going through our entire protocol and making

1 sure that they've taken every single step appropriately
2 from first at getting the item of evidence.

3 The first thing we do is we take a weight of it
4 before any analysis begins. Each item that is tested
5 should have a weight recorded for it. There should
6 be a screening test and a confirmatory test performed.

7 And then each of those tests individually should
8 have specific data, which the analyst will record
9 in their notes. So, they'll have the volume that
10 they took, how much solution that they put in the
11 sample. They'll put the type of solution that they
12 put the sample in, and then they'll write down their
13 results for each of those tests and then their final
14 conclusion.

15 Q All right. And fair to say that in order to --
16 well, let me ask you.

17 How does an analyst -- have you worked as an
18 analyst yourself?

19 A Yes. So, prior to becoming a supervisor, I was
20 a drug analyst for about seven years.

21 Q All right. And when you do the analysis, you
22 say that data comes back; right?

23 A Yes.

24 Q Okay. So, can you describe for the jury, what
25 do you do with an actual substance to try to determine

1 what -- how -- or what's the process? Are chemicals
2 added to it, is it put into a machine?

3 How does that work?

4 A So, for something like this particular case,
5 we would consider this a pharmaceutical preparation.

6 We first look for any identifiable markings on
7 the item itself. So, pharmaceuticals will typically
8 have an imprint or specific color. So, our first step
9 in these types of cases will be to do a pharmaceutical
10 identifier search, and that's essentially just using
11 an online database.

12 We enter in the information that we have, so
13 if it's a green, round tablet imprinted with whatever,
14 we'll look that up and see if anything comes back as
15 like a preliminary indication of what the substance
16 might contain. So, that's typically the first step
17 we would do in these cases.

18 And then depending on the results of that first
19 test, we do a confirmatory test, which is where we
20 actually will take a portion of the sample, we'll
21 analyze it chemically on a instrument.

22 There's a couple different ones we use for
23 this particular case. The analyst chose GCMS, which
24 stands for Gas Chromatograph Mass Spectrometer, and
25 that particular instrument will separate out all the

1 different components of a mixture, and the mass
2 spectrometer will identify what those components
3 are as they come off the instrument.

4 Q Okay. So, the various chemical components
5 that make up the item?

6 A Yes.

7 Q Okay. As it relates to this specific case,
8 did you perform any technical review on that
9 identification marking?

10 A Yes. So, the first test that the analyst
11 performed was a pharmaceutical ID. So, what they did
12 was, they input -- they recorded in their notes what
13 the imprint was that they observed on the actual item
14 of evidence.

15 They input that into their choice of a database.
16 I believe they used drugs.com, but I can double-check
17 on that. It gave back a preliminary identification
18 of Buprenorphine and Naloxone, and then that printout
19 is retained in the case record.

20 Q All right. And those two chemicals that you
21 just identified, is there a particular drug name or
22 a more common name that they go by?

23 A It's commonly referred to as a Suboxone.

24 Q Okay. And after -- so, if that identification
25 examination was done, did you then do a technical

1 review of that?

2 A Sorry, could you repeat that?

3 Q Sure. So, the analyst would have done, first,
4 identification markings for pharmaceutical review
5 followed by a confirmatory test; correct?

6 A Correct, yes.

7 Q Okay. When you did the technical review, did
8 you review the identification markings?

9 A Yes, I did.

10 Q All right. And as a result of that, was a
11 confirmatory test done by the analyst?

12 A Yes. Because the preliminary identification
13 indicated a mixture of Buprenorphine and Naloxone,
14 the analyst chose to do the GCMS instrument.

15 They took a portion of one of the films, they
16 recorded it into a solvent, I believe it was methanol
17 is what we commonly use, and then the instrument will
18 print out data after it goes -- runs through the
19 instrument, and then that data we retain in the case
20 and is reviewable.

21 Q Okay. So, you're able to see the data results,
22 the same data results that the person who did the
23 initial analysis saw?

24 A Correct.

25 Q All right. And do those data analysis allow

1 you to make a determination, to a scientific degree
2 of certainty, as to what type of a substance an
3 item is?

4 A Yes.

5 Q Okay. Did you yourself, during your technical
6 review, do a data review of the items on this
7 particular case?

8 A Yes. So, in reviewing the data printouts
9 independently, as another forensic scientist, the
10 data supports a conclusion of Buprenorphine and
11 Naloxone.

12 Q All right. So, in your opinion, can you say
13 with a degree of scientific certainty what that
14 controlled substance is?

15 A Yes.

16 Q Okay. And what is that?

17 A Again, the data supports the identification of
18 Buprenorphine and Naloxone.

19 Q And that would also be considered Suboxone?

20 A Correct.

21 Q All right. And to the best of your knowledge,
22 is that a particular class of controlled substance
23 within Massachusetts?

24 A One of the items in that mixture, Buprenorphine,
25 is a Class B controlled substance.

1 Q Thank you.

2 MS. ELUMBA: Your Honor, at this time I'd
3 like to mark what's been listed as identification
4 F, I'd like to introduce that as the next Exhibit.

5 THE COURT: Okay.

6 MR. PERRUZZI: I have no objection, Your Honor.

7 THE CLERK: Your Honor, Exhibit Eighteen so
8 marked, formerly F for identification.

9 (Commonwealth's Exhibit Number Eighteen marked;
10 Seized Narcotics, Formerly Exhibit F for Identification)

11 THE COURT: Thank you.

12 MS. ELUMBA: Thank you. I have no further
13 questions. Thank you.

14 THE COURT: Okay. Mr. Perruzzi?

15 MR. PERRUZZI: Yes, Your Honor.

16

17 CROSS-EXAMINATION

18

19 BY MR. PERRUZZI:

20 Q Good morning, Ms. Labelle.

21 A Good morning.

22 Q So, Ms. Labelle, you're currently employed as
23 a quality assurance person, Forensic Scientist, Grade
24 III?

25 A Correct.

1 Q And that's for the State Police Crime Lab?

2 A Yes.

3 Q Okay. And you're also a crime Scene Responder,
4 Clandestine Laboratory Enforcement person. You're
5 essentially quality assurance for all drug labs in the
6 state or all that are affiliated with the State Police
7 Crime Lab?

8 A The Quality Assurance Section that I work in
9 is for just the Crime Laboratory.

10 Q All right. So, that's different than being
11 from the other labs; correct?

12 A Correct. It's just for the Massachusetts State
13 Police.

14 Q Okay. And for three years, a little bit under
15 three years, you were a Drug Unit Supervisor, Forensic
16 Scientist III. And how is that different from what
17 you do now?

18 A So, as a Forensic Scientist in the Drug Analysis
19 Unit, I was essentially a Drug Unit Supervisor, so
20 I had drug analysts that worked underneath me.

21 I reviewed their training records, I performed
22 technical review on other's casework, and then on
23 occasion, I would go in the lab and perform drug
24 analysis myself.

25 Q Okay. And now, you just -- would it be fair

1 to say that now your position in quality assurance
2 at the same grade, Forensic Scientist, Level III, is
3 to just simply make sure that what's being tested at
4 the lab is done properly according to procedures and
5 protocols; correct?

6 A Yes. We have a whole quality assurance unit,
7 so I'm just a member of that unit now. So, instead
8 of just working particularly with the Drug Analysis
9 Unit, we work with toxicology, we work with the bio
10 unit, DNA unit.

11 Q All right. And just to be complete so that we
12 all understand, from February of 2013 until July of
13 2018, you were an actual Drug Unit Analyst; correct?

14 A Correct.

15 Q Okay. Drawing your attention to this particular
16 situation and what's been identified for evidence,
17 would it be fair to say that this process -- and not
18 to overly simplify it, that's not my effort, ma'am.

19 One person, another Drug Unit Analyst, did the
20 actual testing of what's been marked as an Exhibit
21 today; correct?

22 A Correct.

23 Q And you, in your position back in 2018 as a Drug
24 Unit Supervisor, you --

25 MR. PERRUZZI: Strike that.

1 BY MR. PERRUZZI:

2 Q When did you do your review of this evidence,
3 ma'am?

4 A The review of the evidence or the data?

5 Q The data?

6 A Could I refer to my notes?

7 THE COURT: Yes.

8 BY MR. PERRUZZI:

9 Q Well, do you have a independent memory of when
10 you did it or do you have no memory whatsoever as
11 to when you reviewed the data?

12 A It would have been shortly after the analyst
13 had put it to technical review. So, I believe it
14 was sometime early 2019.

15 Q Okay. And so, at that point in time, you were
16 a Drug Unit Supervisor; correct?

17 A Yes, correct.

18 Q And so, you took it upon yourself, as standard
19 office procedure to review this data to make certain
20 that it satisfied the procedures and protocols of
21 the State Police Crime Lab; correct?

22 A Correct.

23 Q Okay. Would it be fair to say that at no time
24 back in -- at that timeframe in July, did you actually
25 conduct an independent or separate test of the items

1 that had been offered into evidence; correct?

2 A No. All of our items of evidence are only
3 tested by one chemist.

4 Q Okay. And would it be fair to say then that
5 following your review of the data that you testified
6 to, up until today, at no time you've ever retested
7 those materials; correct?

8 A Correct.

9 Q Okay. You're relying on the conclusions and
10 opinions of the prior individual who did the actual
11 test; correct?

12 A So, I am reviewing the data currently and saying
13 that the data supports a conclusion of the results.

14 Q All right. But you're relying on a test
15 performed by another person; correct?

16 A Correct.

17 MR. PERRUZZI: I have no further questions,
18 Your Honor.

19 THE COURT: Okay.

20 MR. PERRUZZI: Any follow-up, Jess?

21 MS. ELUMBA: Thank you. Just briefly.

22

23 REDIRECT EXAMINATION

24

25 BY MS. ELUMBA:

1 Q How many cases that are reviewed by analysts, by
2 drug analysts, undergo a technical and administrative
3 review by their supervisor?

4 A By their specific supervisor?

5 Q Or any --

6 A Oh, yes. All of our case are technically and
7 administratively reviewed.

8 Q Okay. So, it wasn't something about this case
9 specifically that got a review, it's that every case
10 by the drug lab, that where drugs are analyzed, a
11 supervisor does the technical and administrative
12 review?

13 A It could be anyone that's authorized to perform
14 a technical review. So, there are some forensic
15 scientist students that can perform technical reviews,
16 but a hundred percent of our cases are reviewed.

17 Q Okay. And is -- am I -- let me ask you this.

18 If there were an issue between the technical
19 review and what was -- what an analyst put forward,
20 would that cause perhaps a retesting?

21 A Yes. So, if any discrepancies are noticed during
22 the technical or administrative review that require
23 the analyst to go back into the case, they would go
24 back, take a fresh sample, perform the appropriate
25 steps or instrumentation technique, and then that --

1 all of that data would still be retained within the
2 case.

3 Q All right. So, let me ask you, as it relates
4 to this particular case, were there any discrepancies
5 between the initial analysis and your technical and
6 administrative review?

7 A There were none.

8 Q Okay. And finally, as it relates to your opinion
9 about this substance, is that based on the work of
10 someone else or your own review of the raw data?

11 A In reviewing the actual case file, which I have
12 here, I'm giving an independent conclusion based on
13 that information.

14 Q Okay. Thank you.

15 MR. PERRUZZI: May we approach, Your Honor?

16 THE COURT: Yes.

17

18 SIDEBAR CONFERENCE:

19 MR. PERRUZZI: Permission to remove -- to take
20 this off?

21 THE COURT: Okay.

22 MR. PERRUZZI: Judge, I move to strike this
23 witness and her testimony. She conducted no independent
24 tests for the items. I thought -- I wasn't sure what
25 I was going to hear from this particular witness.

1 All she's doing is reviewing data, testifying
2 to conclusions that were arrived at by a person who
3 is not here and not available for cross-examination
4 or for direct examination for that matter.

5 So, this testimony is lies in the face of
6 Melendez-Diaz and all the cases that follow regarding
7 my client's right to confrontations not being protected,
8 so to speak. So, --

9 THE COURT: Well, she's giving -- it's her
10 opinion.

11 MR. PERRUZZI: Correct, Judge.

12 THE COURT: And so, you have the right to
13 confront and cross-examine her on her opinion.

14 MR. PERRUZZI: Which I have done; right.

15 I concede that.

16 THE COURT: She's not giving us anyone else's
17 opinion.

18 MR. PERRUZZI: Mm-hmm.

19 THE COURT: So, for that reason, I'm going to
20 deny the motion to strike.

21 MR. PERRUZZI: Very good, Your Honor.

22 THE COURT: But your rights are saved on that
23 issue.

24 MR. PERRUZZI: Thank you, Your Honor.

25 MS. ELUMBA: Thank you.