NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023-2024

ELANA GORDON,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

APPENDIX

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APPENDIX CONTENTS

APPENDIX A

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FAR-29587 - Notice: FAR denied

1 message

SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us> Fri, Jan 12, 2024 at 12:50 PM
To: lawofficeofchristopherdemayo@gmail.com

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-29587

COMMONWEALTH
vs.
ELANA GORDON

Plymouth Superior Court No. 1883CR00198
A.C. No. 2022-P-0825

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on January 12, 2024, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: January 12, 2024

To: Carolyn A. Burbine, A.D.A.
Arne Hantson, A.D.A.
Christopher DeMayo, Esquire

APPENDIX B

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT NO. 2022-P-825

FAR NO. _____

COMMONWEALTH

v.

ELANA GORDON

ON APPEAL FROM A JUDGMENT OF CONVICTION OF
THE PLYMOUTH SUPERIOR COURT

ELANA GORDON'S APPLICATION FOR FURTHER APPELLATE REVIEW

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Defendant-Appellant Elana Gordon ("Ms. Gordon" or "Defendant") requests further appellate review ("FAR") of her conviction in the Plymouth Superior Court. As discussed below, Ms. Gordon is an attorney who was convicted of smuggling drugs into the Plymouth County Correctional Facility ("PCCF") while meeting an inmate, but several evidentiary errors deprived her of a fair trial and warrant reversal of the conviction.

STATEMENT OF THE 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).

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, 2019 evidentiary hearing, the motion to suppress was denied.

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, and the possession charge was dismissed as duplicative. After the verdict, Judge McGuire indicated that he would sentence Ms. Gordon to six months in the house of correction. 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.

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.

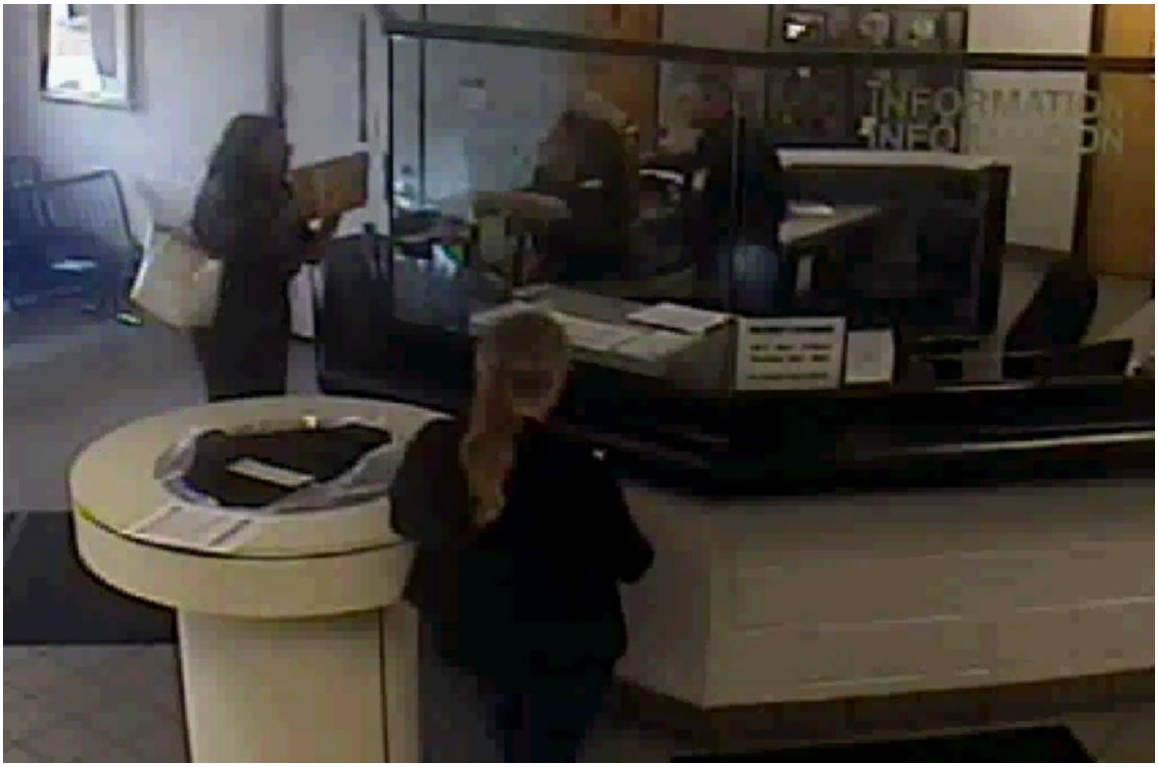
Ms. Gordon timely appealed her conviction, which was affirmed in an unpublished decision dated November 8, 2023. She has not moved for rehearing from the Appeals Court panel ("Panel").

FACTS RELEVANT TO APPEAL

On May 3, 2018 Gordon participated in two phone calls with a PCCF inmate, Jassel Castillo, in which they discussed Gordon's meeting another PCCF inmate, Noah Bell, regarding his open domestic violence case.[1] Because these "three way" phone calls were initiated by Castillo's sister, they were monitored and recorded. The

[1] Gordon disputes that Castillo "instructed" her to meet Bell, as the Panel opinion states.

next day, May 4, 2018, Gordon visited PCCF to meet with Bell. PCCF video is consistent with Gordon disclosing manilla envelopes to the correctional officer ("CO") in the lobby:



Gordon passed through the PCCF lobby and met with Bell in an attorney visiting room. At the conclusion of the meeting she left Bell with the envelopes of statutes, rules, etc. PCCF staff, suspicious after the earlier calls with Castillo, had monitored the meeting by video and seized the envelopes from Bell after Gordon departed. The envelopes were later found to contain Suboxone.

The Commonwealth introduced as trial Exhibit 1 a PCCF form Gordon signed which states "I will not accept anything from, or

deliver to any prisoner anything, except through the officer in charge." Additionally, the Commonwealth presented CO testimony that, contrary to what Exhibit 1 says about leaving items with the "officer in charge," there is an unwritten rule at PCCF that no one, including attorneys, can leave anything with prisoners.

The State Police analyst who first identified the substance found in the envelopes as containing buprenorphine, Kimberly Dunlap, was unavailable by the time of trial and, over objection, her supervisor, Carrie LaBelle, was allowed to testify as substitute analyst. LaBelle testified as to work Dunlap had performed, opined that the substance in the envelopes contained buprenorphine, and also opined that buprenorphine is a Class B drug.

Gordon took the stand in her own defense. She testified that in May 2018 she had recently gone through a difficult divorce and was trying to build back her law practice. She received the envelopes of legal papers from Castillo's sister, Minoska Bello, the night before she visited Bell and accepted them because her printer was out of ink and printing is expensive. Gordon admitted that, in hindsight, she had been foolish to deliver the papers she had received from Bello to Bell, but she denied having any knowledge of the drugs. She testified that

she had told COs that that she would be leaving paperwork with Bell, as shown in the video, and that no one had objected.

ISSUES FOR WHICH FAR IS SOUGHT

1. Did evidence of a purported PCCF rule which barred attorneys from leaving papers with inmates, mislead the jury and lack probative value? Did evidence of Ms. Gordon breaking this "rule" create a substantial risk of a miscarriage of justice where it was used as proof of intent to smuggle, and where defense conceded that the "rule" existed and that Gordon had broken it? [Unpreserved error]

2. Did the trial court erroneously admit expert testimony identifying a substance as a Class B drug where the testimony included important hearsay as to what another analyst did? Should this Court revisit its Confrontation Clause jurisprudence in *Commonwealth v. Greineder*, 458 Mass. 207 (2012), given the intervening statements of Supreme Court justices that such substitute analyst testimony is improper? [Preserved error]

3. Did it create a substantial risk of a miscarriage of justice to convict Ms. Gordon of smuggling a Class B drug into PCCF where the drug in question, buprenorphine, is not a listed Class B drug and it is unclear whether it is, in fact, Class B? [Unpreserved error]

4. Did the trial court erroneously admit, over objection, two jail phone calls involving Ms. Gordon that were prejudicial and minimally probative where the judge had never listened to them before allowing them into evidence? [Disputed whether the error was preserved]

WHY FAR IS APPROPRIATE

PCCF "Rule" Barring Attorneys From Leaving Legal Paperwork

Exhibit 1, the PCCF form Gordon signed before visiting Bell, was titled "Visitor Rules And Sign-in Form." Instruction 8 on the form states "I will not accept anything from, or deliver to any prisoner anything, *except through the officer in charge*." At trial the Commonwealth sought to distance itself from the italicized words with CO testimony of an unwritten PCCF rule that no one (including lawyers) can ever leave anything for an inmate. This was improper and extremely misleading and prejudicial to Gordon. *See* Mass. G. Evid. 403. Jails are required to have written rules regarding inmate access to attorneys, 103 C.M.R. 934.01, and inmate visits, including "procedures for submitting approved parcels and funds…" 103 C.M.R. 950.02. If Exhibit 1 is the entirety of those written rules, then COs could not contradict it, and if there were other written rules, then the Commonwealth should have introduced them through a qualified witness. The Commonwealth's suggestion at trial that there is something improper about attorneys leaving paperwork with inmates was extremely unfair and misleading where the regulations specifically provide, "Attorneys, law students, paralegals, or private

investigators shall be permitted to leave legal papers or legal documents with inmates." 103 CMR 486.09(2).

The Panel nonetheless held that there could be no substantial risk of a miscarriage of justice because "[w]here the defendant's theory at trial was that she did not know that the envelopes she gave to Bell contained Suboxone, it would not have helped her defense to inform the jury of a regulation that gave attorneys more leeway than other visitors to transmit documents to inmates." This analysis misses the mark. The appellate issue is not whether regulations should have been put before the jury. The issue is whether evidence of a nonexistent PCCF "rule" was wrongly admitted. And from Ms. Gordon's perspective, it obviously would have "helped her defense" if this "rule" had not been presented to the jury because the prosecutor argued that she had violated it by leaving the papers with Bell *and that her doing so was itself proof of intent to smuggle*. Moreover, Gordon testified that she disclosed to PCCF staff her intent to leave papers with Bell and that no one objected, so the "rule" contradicted this testimony and suggested that the rest of it – professing her ignorance of the drugs in the envelopes – was also false.

The significance of the "rule," and its prejudice to Gordon, is all too apparent from defense counsel's closing argument, where he conceded that Gordon

> [u]sed terrible judgment, terrible … You're not supposed to give anything to an inmate. You don't do it … It's wrong. It's stupid … We [lawyers are] supposed to know the law. We're supposed to avoid breaking it. That's part of our ethical obligation as attorneys. This lack of judgment is astounding. It's breathtaking. I can't understand it. I can't understand it today.

This concession, in response to testimony about the PCCF "rule," was obviously harmful to the defense given that Gordon had testified that she disclosed to PCCF staff her intent to leave papers with Bell and no one objected. Defense counsel was in effect telling the jury he doubted his own client's testimony.[2]

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[2] The Panel analyzed the harm caused by defense counsel's closing argument under a completely separate heading purporting to analyze an "ineffective assistance of counsel" claim which Gordon did not bring. The portion of the defense closing argument quoted above was a response to Commonwealth testimony about the PCCF "rule," and Gordon raised it in terms of prejudice resulting from this testimony. *See Commonwealth v. LaChance*, 469 Mass. 854, 857-58 (2014)(defendant must show prejudice when making unpreserved claim). By dividing the prejudice caused by one error under two headings the panel in effect diluted the prejudice.

That said, there was no conceivable strategic reason for defense counsel to suggest in closing that his client had lied on the stand.

Given the magnitude of prejudice stemming from the evidence of the PCCF "rule," the Panel could not reasonably have been "persuaded that it did not 'materially influence' the guilty verdict." *Commonwealth v. Alphas*, 430 Mass. 8, 13 (1999)(citations omitted). The Commonwealth's case against Gordon was not overwhelming. She was found to have delivered Suboxone to Bell, so she certainly had some explaining to do, but her testimony that she had simply been careless in accepting the papers from Bello was plausible, and the jury apparently found it so based on their request to listen to the jail calls a second time, as well as for a second instruction on "reasonable doubt." Evidence of Gordon flouting a nonexistent jail rule may well have swayed the jury, particularly when it directly resulted in counsel's harmful concessions during closing argument.

Confrontation Clause

LaBelle should not have been allowed to opine that the substance found in the envelopes was buprenorphine based on a review of Dunlap's hearsay paperwork. LaBelle, a laboratory supervisor, did not testify that she observed Dunlap's hands-on lab work. While LaBelle could testify as to what laboratory procedures *should have* been followed, she was in no position to testify about

what Dunlap actually did. LaBelle's testimony about what Dunlap did based on her review of Dunlap's paperwork, see 10/21/21 Tr.32-34, violated Gordon's Sixth Amendment Confrontation Clause rights.

In the case most relevant to Ms. Gordon's, *Williams v. Illinois*, 567 U.S. 50 (2012), the Supreme Court considered a rape conviction following a trial in which the prosecution's DNA expert had testified that the defendant's DNA profile matched that of semen recovered from the victim, even though the out-of-state analyst who prepared the DNA profile of the semen did not testify. While the court affirmed the conviction, five justices agreed that the expert's opinion (that the DNA profiles matched) would have been irrelevant unless the fact-finder accepted the underlying profiles for their truth. *See id*. at 106 (Thomas, J., concurring); *id*. at 127 (Kagan, J., dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.). Justice Thomas cast the deciding vote to affirm because in his view the DNA profile, which was created before there was an arrest in the case, lacked "solemnity" and therefore was not "testimonial." *Id*. at 111.

Turning to Ms. Gordon's case, there is no question that the data Dunlap purportedly generated from the GCMS machine was "testimonial" because Ms. Gordon had been arrested and charged with

drug offenses by the time the sample was analyzed. *See Williams*, 567 U.S. at 84, 121. LaBelle's testimony that Dunlap researched the markings on the strips, then dissolved one in solvent and ran it through a GCMS machine, thereby resulting in the data LaBelle reviewed, was entirely hearsay (based on what Dunlap had written in her notebook). Five justices in *Williams v. Illinois* would not have allowed this testimony and this Court should not either.

More recently, Justices Gorsuch and Sotomayor, dissenting from the denial of certiorari in *Stuart v. Alabama*, 139 S.Ct. 36, 36 (2018), disapproved of precisely the sort of substitute analyst testimony employed in *Williams* – and this case:

> [T]he State refused to bring to the stand the analyst who performed the [blood alcohol] test. Instead, the State called a different analyst. Using the results of the test after her arrest and the rate at which alcohol is metabolized, this analyst sought to estimate for the jury Ms. Stuart's blood-alcohol level hours earlier when she was driving. 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. The engine of cross-examination was left unengaged, and the Sixth Amendment was violated.

Insofar as this Court's opinions are to the contrary, *see Greineder*, 458 Mass. 207, it should revisit them in light of indications that the Supreme Court would not allow testimony such as LaBelle's.

Classification of Buprenorphine

Additionally, LaBelle's testimony that buprenorphine is a Class B drug was improper. Buprenorphine is not listed as a Class B drug. G.L. c. 94C, § 31. The only way for LaBelle to have found it to be Class B is by opining that it falls into the catchall category "opium or opiate," which in turn requires opining about how a substance works on the nervous system. *See* G.L. c. 94C, § 1 (defining "opiate" 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"). There is no hint in the record that LaBelle, who was offered to identify the substance in the envelopes, understood herself to be opining on its "addiction-forming" or "sustaining liability," much less that she was qualified to so opine. To the contrary, she described her experience as limited to "analyzing submitted evidence for the presence or absence of controlled substances using various instrumentation [and] performing technical and administrative reviews on other peer's work." 10/21/21 Tr.27. She is a forensic technician, not a medical doctor.

LaBelle apparently thought buprenorphine was a listed Class B drug and neither lawyers nor judge caught her mistake. Her testimony, with its implied opinion about the medical effects of buprenorphine, should have been excluded as beyond the scope of her qualifications. Contrary to the Panel's suggestion at oral argument, the claim is cognizable on appeal. *See U.S. v. Mendoza*, 244 F.3d 1037, 1046-47 (9th Cir. 2001)(reviewing record under plain error standard to consider defendant's unpreserved claim that unqualified expert was allowed to testify); *U.S. v. Ramsey*, 165 F.3d 980, 984 (D.C. Cir. 1999)(same). "All claims, waived or not, must be considered." *Commonwealth v. Zinser*, 446 Mass. 807, 808 (2006).

There must be substantial doubt about LaBelle's testimony if only because the federal drug laws on which Massachusetts law is modeled contain the same "opium or opiate" language, *see* 21 U.S.C. § 812, but place buprenorphine in Schedule III, 21 C.F.R. § 1308.13(e)(2)(i), which roughly corresponds to Massachusetts Class C. If buprenorphine is in fact Class C (or some other non-B class), then LaBelle's improper testimony, which was the only evidence on classification, must have "materially influenced the guilty verdict." *Alphas*, *supra*.

Jail Calls

When the jail calls between Gordon and Castillo were played for the jury, the prosecutor was the only one in the courtroom who had previously heard them. Neither judge nor defense counsel had been able to make the audio files play. Based on a description of the calls defense counsel had objected pre-trial, "I have some concern that we're using statements or conversations that aren't admissions against interests to impeach this young lady's credibility," but the judge overruled him without listening to the calls. This was an abuse of discretion. *See Commonwealth v. Carey*, 463 Mass. 378, 391 (2012). The Panel apparently read *Carey* to hold that a judge's review of evidence prior to ruling on its admissibility is optional, except when told beforehand the evidence is "highly inflammatory." This Court should grant FAR to correct this error. Defense counsel's objection, quoted above, was sufficient to preserve the claim that the prejudicial value outweighed the probative, and this Court should concur. Of the two calls, the first does not even contain a discussion of paperwork, and Gordon's swearing and offensive comments could well have turned the jury against her.

CONCLUSION

The Court should grant Ms. Gordon's case further appellate review and vacate the judgements of conviction.

Respectfully submitted,

Elana Gordon,

By her attorney,

/s/ Christopher DeMayo

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

I, Christopher DeMayo, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs. In particular, this brief was composed in 14 point Times New Roman font and the section "Why FAR Is Appropriate" is 1,999 words long.

/s/ Christopher DeMayo

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify that on this date of November 29, 2023 I served the foregoing Elana Gordon's Application For Further Appellate Review on the Commonwealth by sending copies via efileMA to counsel of record, Arne Handston, ADA.

/s/ Christopher DeMayo

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APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-825

COMMONWEALTH

vs.

ELANA GORDON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Convicted after a Superior Court jury trial of delivering a class B controlled substance to a prisoner (G. L. c. 268, § 28), the defendant appeals.[1] She argues that the trial judge erred by admitting audio recordings of two jail calls between the defendant, who is an attorney, and Jassel Castillo, an inmate at the Plymouth County house of correction, and by permitting a substitute drug analyst to opine that a substance contained buprenorphine, a class B substance. The defendant further

[1] A count for possession of a class B substance with intent to distribute (G. L. c. 94C, § 32A (a)) was dismissed as duplicative after trial. A count for conspiracy to violate the drug laws (G. L. c. 94C, § 40) was placed on file with the defendant's consent after a change of plea, and the defendant has not raised any issues related to that conviction on appeal. See Mass. R. Crim. P. 28 (e), 453 Mass. 1501 (2009). Accordingly, the defendant's appeal from that conviction is not before us and we do not address it. See Commonwealth v. Brown, 456 Mass. 708, 709 n.1 (2010).

contends that a substantial risk of a miscarriage of justice arose when correction officers testified that attorneys were prohibited from leaving paperwork with inmates, and when a State police trooper testified that the defendant's cell phone "had been reset." She also claims that her trial counsel was ineffective when he argued in closing that the defendant showed "terrible judgment" by delivering envelopes to an inmate, but did not know that they contained drugs. We affirm.

Background. On May 3, 2018, Castillo made two phone calls from the Plymouth County house of correction to his sister, who added the defendant to each call, creating three-way calls. During those calls, Castillo instructed the defendant to visit Noah Bell, who was also an inmate at the house of correction, on the following day. Castillo told the defendant, "Don't call me down tomorrow." The defendant then asked Castillo, "What do I have this paperwork for?" and Castillo replied, "Just give it to him. He'll give it to me." Castillo also told the defendant, "Just come take care of this thing tomorrow."

The next day, May 4, 2018, the defendant went to the house of correction and met with Bell. During their meeting, she gave two manila envelopes to Bell. Afterwards, officers searched Bell and found in the envelopes sixty-one strips of Suboxone, which contains buprenorphine, a class B substance.

Police arrested the defendant and seized her cell phone. Attempting to search the cell phone, a State police trooper powered it on. The phone showed a welcome screen, indicating that it had been reset.

The defense theory was that the defendant did not know that the envelopes contained Suboxone. The defendant testified that she "had no idea" there was anything other than paperwork in the envelopes which she gave to Bell. Defense counsel argued in both opening and closing that the defendant "had no knowledge" that she was bringing drugs into the jail.

Discussion. Jail calls. The defendant argues that the judge erred in admitting the audio recordings of the two jail calls between the defendant, Castillo, and Castillo's sister. The defendant claims that the prejudicial impact of the jail calls substantially outweighed their probative value because in them she used obscenities.

The defendant moved in limine to exclude the jail calls, asserting that they were improper "character evidence."[2] After the prosecutor explained that the jail calls showed the defendant's knowledge that she was delivering drugs to Bell, the

[2] The defendant also argued that the jail calls contained hearsay. At the prosecutor's request, the judge instructed the jury to disregard any conversation between Castillo and his sister in Spanish. The defendant does not raise the hearsay issue on appeal, and so we do not consider it.

judge ruled to admit the jail calls. We conclude that the judge did not abuse his discretion in determining that the jail calls were probative "to prove a plan to bring drugs" into the house of correction.

A trial judge has "broad discretion" to determine whether "the risk of prejudice substantially outweighs the probative value of the evidence." Commonwealth v. Fan, 490 Mass. 433, 444 (2022). See Mass. G. Evid. § 403 (2023). A trial judge's evidentiary ruling is reversed only if the judge made "a clear error of judgment" which "falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The judge heard extensive argument from both parties regarding the admissibility of the jail calls, considered the representations of both parties as to the calls' contents, and properly instructed the jury to consider the statements of persons other than the defendant on the calls only as to "what knowledge [the defendant] would have and to give context to any statements that she made." In those circumstances, we discern no error in the judge's implicit determination that the probative value of the jail calls outweighed any prejudice to the defendant, and no abuse of discretion in their admission. See Commonwealth v. Gardner, 102 Mass. App. Ct. 299, 306-307 (2023).

The defendant argues that the judge did not conduct the balancing test to weigh the prejudicial effect of the jail calls evidence against their probative value because, as a result of technical difficulties, he did not listen to the jail calls before they were played for the jury. The judge relied on the prosecutor's offer of proof about the contents of the jail calls, which was accurate. Based on that offer of proof, the judge could exercise his discretion to admit the jail calls, which were not the sort of highly inflammatory evidence that a judge might be required to review first. Contrast Commonwealth v. Carey, 463 Mass. 378, 390-391 (2012) (judge should have viewed "highly inflammatory" video of strangulation before admitting it).

For the first time on appeal, the defendant argues that because the jail calls included her "swearing repeatedly and acting unprofessional," their prejudicial impact outweighed their probative value. Because the defendant did not object on those grounds or request that swear words be redacted, we doubt that she preserved that claim for appellate review. We need not resolve that doubt, because even if the defendant had objected on those grounds at trial, the judge would not have been required to rule that any resulting prejudice outweighed the probative value of the calls. See Commonwealth v. Rosa, 468 Mass. 231, 241-242 (2014) (jail call in which defendant used

racial epithet as term of familiarity not unduly prejudicial); Commonwealth v. Mejia, 88 Mass. App. Ct. 227, 238 (2015) (jail call in which defendant used offensive language not unduly prejudicial).

Substitute drug analyst. The defendant argues that her confrontation rights were violated when a substitute drug analyst opined that the substance in the envelopes that the defendant gave to Bell was Suboxone, a combination of buprenorphine and naloxone.

A substitute drug analyst may testify about the identification of a substance provided that she "reviewed the nontestifying analyst's work, . . . conducted an independent evaluation of the data[,] . . . [and] then 'expressed her own opinion, and did not merely act as a conduit for the opinions of others.'" Commonwealth v. Greineder, 464 Mass. 580, 595 (2013), quoting Commonwealth v. Greineder, 458 Mass. 207, 236 (2010).

The substitute drug analyst in this case properly "described the analytic process that [the nontestifying analyst] . . . would have followed, and [her] own opinions that she had formed independently and directly from the case review and analysis she herself had performed." Commonwealth v. Chappell, 473 Mass. 191, 202 (2015) (testimony of DNA analyst's supervisor admissible). See Commonwealth v. Gonzalez, 93 Mass. App. Ct. 6, 13 (2018) (testimony of substitute chemist

admissible). The defendant cross-examined the substitute drug analyst regarding the basis on which she formed her opinion, her reliance on data generated by the nontestifying analyst, and the fact that she did not personally test the evidence. We discern no error or violation of the defendant's confrontation rights.

The defendant also argues that the substitute drug analyst improperly testified that buprenorphine is a class B controlled substance. Since the defendant did not object to this testimony at trial, we review to determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Gomes, 459 Mass. 194, 204 (2011). Based on her education and experience, the substitute drug analyst testified that buprenorphine is a class B controlled substance. No substantial risk of a miscarriage of justice arose.

Testimony of correction officers about jail policies. The defendant argues that two correction officers improperly testified that rules prohibited attorneys from leaving paperwork with inmates and prohibited inmates from making three-way calls. The defendant did not object to this testimony at trial, so we review its admission to determine whether any error created a substantial risk of a miscarriage of justice. See Commonwealth v. Grady, 474 Mass. 715, 721-722 (2016).

The defendant contends that the correction officers' testimony that attorneys were forbidden from leaving paperwork

with inmates was inaccurate. For the first time on appeal, the defendant points to a Massachusetts Department of Correction regulation providing that attorneys are "permitted to leave legal papers or legal documents with inmates." 103 Code Mass. Regs. § 486.09(2) (2015).[3]

Because the defendant did not raise this claim in the trial court, on the record before us we cannot ascertain whether the Plymouth County house of correction had a policy that differed from the regulation, or whether the correction officers were uninformed or mistaken about the regulation. Where the defendant's theory at trial was that she did not know that the envelopes she gave to Bell contained Suboxone, it would not have helped her defense to inform the jury of a regulation that gave attorneys more leeway than other visitors to transmit documents to inmates. The testimony did not create a substantial risk of a miscarriage of justice. Contrast Commonwealth v. Ware, 482 Mass. 717, 725-726, 729-730 (2019) (vacating convictions because testimony was "blatantly false" and central to Commonwealth's case).

Testimony that the defendant's cell phone had been "reset." The defendant argues that testimony about the examination of her cell phone was unduly prejudicial because it permitted the jury

[3] The defendant quotes from that regulation, but miscites it as 103 Code Mass. Regs. § 486.08(2) (2015).

to infer that she had destroyed evidence. State Police Lieutenant Frank Driscoll testified that when he attempted to extract data from the defendant's cell phone, "As I powered on the phone, it had been reset . . . much like as if you get a cell phone out of a box from [the] Apple store, it had that main welcome screen, so it had been reset or never set up." The defendant did not object, and so we consider the issue to determine if it created a substantial risk of a miscarriage of justice.

The defendant maintains that she preserved this issue for appellate review because at a pretrial hearing on her motion to suppress her cell phone, defense counsel commented that it could not be fairly inferred that the defendant had remotely "wiped" the cell phone.[4] Where the issue before the motion judge at that hearing was whether police unlawfully seized and searched the defendant's cell phone, defense counsel's comment did not preserve for appellate review the defendant's present claim that the testimony that the phone "had been reset" was unduly prejudicial. See Grady, 474 Mass. at 719 ("An objection at the motion in limine stage will preserve a defendant's appellate

[4] The motion to suppress was heard by a different judge, who denied the motion, concluding after a hearing that the defendant had consented to the search of her cell phone.

rights only if what is objectionable at trial was specifically the subject of the motion in limine").

No substantial risk of a miscarriage of justice arose from the trooper's testimony that the display of a "welcome" screen on the defendant's phone evidenced that the phone had either "been reset or never set up," and that phones can be "remotely reset."[5] This testimony had a "rational tendency" to prove the defendant's knowledge that the envelopes she delivered contained drugs, as evidence of consciousness of guilt. Commonwealth v. Yat Fung Ng, 491 Mass. 247, 264 (2023), quoting Carey, 463 Mass. at 387.

Defense counsel's closing argument. For the first time on appeal, the defendant argues that trial counsel was ineffective in his closing argument. Because the defendant did not raise this claim in a motion for new trial, the record before us does not contain any information about trial counsel's strategy in making his closing argument, or the judge's assessment of its likely impact on the jury.

"The occasions when a court can resolve an ineffective assistance claim on direct appeal are exceptional." Commonwealth v. Zinser, 446 Mass. 807, 809 n.2 (2006). Courts

[5] Contrary to the assertions in the defendant's brief, at no point did the trooper testify that the phone had been "wiped" or that the defendant was the person who reset it.

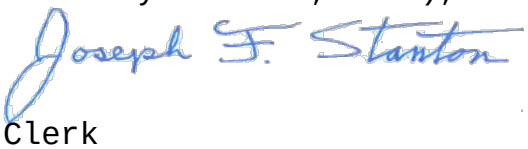
can consider such claims only when "the factual basis of the claim appears indisputably on the trial record." Commonwealth v. Adamides, 37 Mass. App. Ct. 339, 344 (1994). The burden rests with the defendant to show that counsel's behavior fell "measurably below that which might be expected from an ordinary fallible lawyer" and "likely deprived the defendant of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Defense counsel argued that the defendant showed "terrible judgment . . . . You're not supposed to give anything to an inmate. You don't do it. . . . It's wrong. It's stupid. . . . I've been practicing law for [thirty-one] years, and the lack of judgment in this case by my client is breathtaking, astounding. . . . I can't understand it." Defense counsel may well have argued that the defendant had used poor judgment in delivering the envelopes to Bell at Castillo's request because, by making that concession, the jury might be more likely to believe the defendant's claim that she did not know that the envelopes contained drugs. On this record, we cannot conclude that the argument fell below the Saferian standard. "[I]t is far too easy to examine

a transcript and point to ways to 'do it better'" (citations omitted). Commonwealth v. Moseley, 483 Mass. 295, 308 (2019).

Judgment affirmed.

By the Court (Green, C.J., Milkey & Grant, JJ.[6]),



Clerk

Entered: November 8, 2023.

[6] The panelists are listed in order of seniority.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 22-P-825

COMMONWEALTH

vs.

ELANA GORDON.

Pending in the Superior

Court for the County of Plymouth

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date November 8, 2023.

APPENDIX D

APPEALS COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

2022-P-825

COMMONWEALTH

v.

ELANA GORDON

ON APPEAL FROM A CONVICTION IN
THE PLYMOUTH SUPERIOR COURT

BRIEF FOR ELANA GORDON

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MARCH 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Massachusetts Cases

Other State Cases

Federal Cases

Statutes

Regulations

Other

ISSUES PRESENTED

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

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?

   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?

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?

   Did the testifying expert lack the necessary qualifications to opine that the sample was a Class B drug?

STATEMENT OF THE CASE

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.12-14.[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, 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,[2] and the possession charge was dismissed as duplicative. 5 Tr. 77. 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.

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[1] "RA.12-14" refers to pages 12-14 of the record appendix, and other citations to the record appendix follow this format.

[2] "5 Tr. 65" refers to page 65 of the fifth volume of the trial transcript, and other citations to the trial transcript follow this format.

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.

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].

SUMMARY OF THE ARGUMENT

The prejudicial effect of jail calls between Ms. Gordon and Castillo, which depicted the former swearing and acting unprofessional, greatly outweighed their marginal probative value. *See* pp. 20-24 below.

Testimony that Ms. Gordon violated house of correction rules likely misled the jury given the lack of foundation that these rules applied to attorneys. This evidence falsely implied there was no innocent explanation for Ms. Gordon's actions. *See* pp. 24-29 below.

Evidence about Ms. Gordon's cell phone was irrelevant and prejudicial since it insinuated that she had somehow remotely reset the phone to destroy evidence, when there was no foundation to infer that she could have done so. *See* pp. 30-33 below.

Commonwealth witness Carrie LaBelle's testimony violated Ms. Gordon's Sixth Amendment confrontation rights because it incorporated hearsay, admitted without any limiting instruction, regarding what another forensic scientists had done. *See* pp. 33-40 below. Furthermore, LaBelle was not qualified to opine that buprenorphine is a Class B drug. *See* pp. 41-43 below.

ARGUMENT

The Commonwealth presented a circumstantial case against Ms. Gordon: She carried suboxone into a correctional facility, therefore (the prosecutor argued) it was reasonable to infer that she had known what she was doing. Her defense was that, in retrospect, she had been gullible to accept papers from Bello, but that she had not realized the papers contained drugs. While the Commonwealth's case was adequate, it was not overwhelming, and the prosecution sought to shore it up with a variety of improper bad acts and consciousness of guilt evidence. The erroneous admission of this evidence warrants a

new trial, *see* Parts I, II, and III below, as does testimony by a crime lab witness about tests she never performed and scientific matters on which she was unqualified to opine. *See* Part IV.

I. The Judge Abused His Discretion By Admitting Inflammatory, Marginally-Relevant Jail Calls. This Evidence Prejudiced The Defense.

Over objection, 3 Tr. 8, 81, the judge allowed the Commonwealth to play two phone calls between Castillo and Ms. Gordon for the jury.[3] These calls were allowed into evidence on the grounds that they showed Ms. Gordon's knowledge that she was delivering drugs to Castillo and/or Bell. 1 Tr. 10. It appears that, due to the format of the audio files, neither defense counsel nor Judge McGuire had listened to these calls before they were played for the jury. 2 Tr. 90 (Defense counsel: "I know I had the same trouble that the Court had, the software I have on the disc didn't work for certain telephone calls."), 3 Tr. 78 (Judge: "I wasn't able to listen to the call because the equipment doesn't work on trial court equipment."). Defense counsel nonetheless objected that the calls were unnecessary given the Commonwealth's representation that Pedersen would testify

[3] This jail call audio has been submitted to the Court on a DVD as an addendum to the record appendix.

that Ms. Gordon had admitted to visiting Bell as a result of the calls. 3 Tr. 8. This Court should therefore review for prejudicial error. *See Commonwealth v. Andre*, 484 Mass. 403, 417 (2020).

First, the Court must address the threshold question of whether the judge abused his discretion by allowing the audio into evidence. *See Commonwealth v. Gibson*, 489 Mass. 37, 45 (2022). The two calls do not mention drugs, and by the time they were admitted and published to the jury, 3 Tr. 83, there was already evidence that Ms. Gordon had visited Bell after having a three-way call with Castillo in which they discussed her upcoming visit. 3 Tr. 67. Indeed, Trooper Pedersen specifically testified that Ms. Gordon admitted to visiting Bell as a result of the calls with Castillo. 3 Tr. 72. Defense counsel was thus correct that the content of the two calls was cumulative of this other evidence, so its probative value was slight.

On the other side of the balance, the calls were clearly prejudicial "bad acts." *See* Mass. G. Evid. 403; *Commonwealth v. Petrillo*, 50 Mass. App. Ct. 104, 108 (2000)("Even if showing the tapes corroborated some of the details of [the victim's] testimony … their relevance was marginal."). The calls depict Ms. Gordon swearing repeatedly and acting unprofessional, including calling her

potential client, Bell, a "fucking asshole" and a "shitbag," as well as discussing her boyfriend's own troubles with domestic assault charges. There was a real risk that the jury would convict Ms. Gordon simply because they concluded that the sort of person who spoke this way was the sort of person who would smuggle drugs. *See Gibson*, 489 Mass. at 46 (evidence of defendant's "misbehaviors … inadmissible for the purposes of showing [the defendant's] bad character or propensity to commit the crime[s] charged.")(citations and quotation marks omitted, brackets in original). There can be no doubt that the defense viewed the audio as harmful because Ms. Gordon felt the need to apologize to the jury when she testified. 4 Tr. 51 ("I was ashamed by my inappropriate and unprofessional manner … My client was 19-years-old, and I was speaking to him, I guess, like that.").

If nothing else, the trial court should have excluded the first phone call, which included much more profanity than the second call and was even less relevant given that Ms. Gordon did not mention leaving paperwork with an inmate (as she did on the second call).

In sum, Judge McGuire abused his discretion by admitting the audio, *see Gibson*, 489 Mass. at 46, assuming he can be said to have

exercised his discretion at all where he did not listen to the audio prior to his admitting it over objection. *See Commonwealth v. Boyer*, 400 Mass. 52, 57 (1987)("Where the record shows that the judge has failed to exercise discretion, there exists an error of law requiring reversal.").

Turning to the issue of prejudice, given the circumstantial nature of the case the Court cannot be "confident" that the erroneous admission of these calls "did not influence the jury, or had but very slight effect." *Commonwealth v. Harris*, 481 Mass. 767, 777 (2019). While Ms. Gordon's actions may seem gullible or foolish with the benefit of hindsight, that is virtually always the case after someone has been duped. There was no direct evidence that she understood she was handling drugs. She steadfastly denied the allegations. None of her alleged co-conspirators testified against her, even though one (Bello) had pleaded guilty by the time of trial. No incriminating texts or other communications between Ms. Gordon and Bello were put into evidence. Given this state of the evidence, the Court cannot be sure the prejudice from the phone calls had "but very slight affect" on the jury, particularly where the jury considered the calls important enough to ask to replay them in the jury room, 5. Tr. 53-54, and no

limiting instruction was given. *Contrast Commonwealth v. Lowery*, 487 Mass. 851, 468-69 (2021)(risk of prejudice from vulgar messages mitigated by "multiple limiting instructions"). Under these circumstances it was prejudicial error for the jury to hear the calls. In the alternative, they contributed to the cumulative error. *See Commonwealth v. Yang*, 98 Mass. App. Ct. 446, 454 (2020).

II. There Was No Foundation For The Commonwealth's Claim That House Of Correction Rules, Allegedly Violated By Ms. Gordon, Applied To Attorneys. This Evidence, As Well As Defense Counsel's Erroneous Concessions During Closing Argument, Prejudiced The Defense.

A significant portion of the Commonwealth's case was devoted to fake "bad acts" evidence: Evidence of conduct which the Commonwealth claimed, without foundation, was improper. Specifically, the Commonwealth claimed that Ms. Gordon violated Plymouth Sheriff's Office rules in her dealings with Castillo and Bell, but it failed to lay a foundation that such rules apply to lawyers (or that a reasonable lawyer would have believed herself bound by the rules). Defense counsel did not object, so this Court reviews for a substantial risk of a miscarriage of justice. *See Commonwealth v. Lavin*, 101 Mass. App. Ct. 278, 292 (2022).

A. Purported Rule Against Attorneys Leaving Papers With Inmates.

Two Commonwealth witnesses testified that Ms. Gordon had violated a supposed rule at the Plymouth House of Correction that forbids attorneys from leaving papers with inmates, 2 Tr. 79, 3 Tr. 55-56, 4 Tr. 98, but Ms. Gordon disputes that any competent evidence established that such a rule exists. While Exhibit 1, a "Visitor Rules And Sign-In Form," does state that visitors will not leave anything with prisoners except through the officer in charge, on its face the form does not apply to attorneys because it references telephone calls being "monitored and recorded" and visits being limited to a half hour. RA.15. It is a general form for the general public.

The correctional officers' testimony that visitors are not allowed to leave items with inmates, and that there are signs posted saying so, falls into the same category: There was no evidence that any of these signs would put *attorneys* on notice that the signs applied to them, specifically, rather than the general public.

More broadly, Ms. Gordon disputes that the Plymouth County Sheriff even could implement such a rule. Attorney-client visits, unlike others, implicate the Sixth Amendment. The law enshrines an incarcerated client's right to confer with his attorney, stating, "[t]he

superintendent [of the Department of Correction] shall not abridge the right of an inmate of any correctional or penal institution in the commonwealth to confer with any attorney at law engaged or designated by him…". G.L. c. 127, § 36A. Indeed, Department of Correction regulations provide, "Attorneys, law students, paralegals, or private investigators shall be permitted to leave legal papers or legal documents with inmates." 103 C.M.R. 486.08(2). If nothing else, this Regulation shows that a Massachusetts criminal lawyer might well expect to leave paperwork with an inmate and that there is nothing unusual or untoward about doing so, as the prosecutor here insinuated. The extensive evidence about the supposed rule was sure to mislead the jury and cast Ms. Gordon's innocent and commonplace action of leaving papers with an inmate as improper and indictive of smuggling. *See* Mass. G. Evid. 403 (misleading and "unfairly prejudicial" evidence to be excluded).

Making matters much worse, defense counsel's closing argument conceded that Ms. Gordon

> [u]sed terrible judgment, terrible … You're not supposed to give anything to an inmate. You don't do it … It's wrong. It's stupid … We [lawyers are] supposed to know the law. We're supposed to avoid breaking it. That's part of our ethical obligation as attorneys. This lack of

> judgment is astounding. It's breathtaking. I can't understand it. I can't understand it today.

5 Tr. 109-110. It does not show "terrible judgment" to leave papers with prisoners. It is done every day and is a practice guaranteed by regulation. *See* 103 C.M.R. 486.08(2). But this was a particularly inept concession for counsel to make given that Ms. Gordon had just testified at length how she showed correctional officers the papers she left with Bell, without objection. 4 Tr. 57-59. Defense counsel was thus strongly suggesting that he did not believe his own client's testimony. In a case which turned on the jury's belief in Ms. Gordon's testimony that she had not known the envelopes contained drugs, counsel's concession was harmful, if not fatal. *See Commonwealth v. Triplett*, 398 Mass. 561, 569 (1986)("The comments by defense counsel implying disbelief of his client's testimony … [were] tantamount to an admission of his client's guilt … [c]ounsel abdicated his client's position, and left the client denuded of a defense. In such circumstances, a defendant is denied effective assistance of counsel."). Whether the quoted portion of defense counsel's argument fell to the level of ineffective assistance, it certainly worsened the harm to Ms. Gordon from the erroneous admission of evidence about a supposed rule barring attorneys from

leaving papers with inmates. These errors created a substantial risk of a miscarriage of justice. In the alternative, they contributed to the cumulative unfairness of the trial. *Yang*, 98 Mass. App. Ct. at 454.

B. Purported Rule Against Attorneys Participating In Three-way Calls.

The Commonwealth used the violation of another purported rule to unfairly cast Ms. Gordon in a bad light when, in closing, the prosecutor argued, "There isn't a single thing about this process that she [Ms. Gordon] did properly. She starts by having three-way calls, talking to an inmate she doesn't represent." 4 Tr. 116. The prosecutor was arguing that Ms. Gordon violated some rule when she spoke to Castillo on the three-way calls, but there was no basis for this claim.

As an initial matter, the attorney-client relationship can embrace communications with prospective clients, *see Commonwealth v. O'Brien*, 377 Mass. 772, 775 (1979), and Ms. Gordon testified that she understood Castillo, a former client, was interested in retaining her again. 4 Tr. 51. So, the prosecutor's characterization "an inmate she doesn't represent" was misleading at best.

Second, while there was evidence that the house of correction forbade prisoners from participating in three-way calls, 3 Tr. 75, it does not follow it is improper for an attorney to accept such calls.[4] The prosecutor was implying that Ms. Gordon was legally or ethically required to immediately hang up if she received a three-way call from an inmate, but she was not. While inmates may suffer consequences for making three-way calls, it does not follow that an attorney must immediately hang up if she receives one. The attorney must weigh her duty to communicate with clients, *see* Mass. R. Prof. Resp. 1.4, against the urgency of the issue and the loss of confidentiality when speaking over a recorded line. There was no basis for the prosecutor's simplistic claim that Ms. Gordon did not act "properly" when she spoke with Castillo.[5] This testimony, too, caused "unfair prejudice, confusing [of] the issues, [and] misleading [of] the jury," Mass. G. Evid. 403, and contributed to the cumulative risk of a miscarriage off justice. *Yang*, 98 Mass. App. Ct. at 454.

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[4] All this assumes Ms. Gordon realized she was on a three-way call. Bello does not speak to Gordon at any point.

[5] It would be a different matter if Ms. Gordon had *initiated* a three-way call, by patching in a third party after Castillo had called her, since that would have misused her attorney-client privilege to cloak a non-privileged conversation in secrecy.

III. There Was No Foundation For The Commonwealth's Suggestion That Ms. Gordon Could Have Remotely Wiped Her Cell Phone, Therefore The Extensive Evidence About Her Phone Was Irrelevant. This Evidence, Meant To Insinuate That Ms. Gordon Had Destroyed Evidence From Consciousness Of Guilt, Prejudiced The Defense.

The Commonwealth also spent a significant amount of trial time presenting fake consciousness of guilt evidence: Evidence of supposed destruction of evidence which the Commonwealth insinuated, without foundation, Ms. Gordon had performed. Specifically, the prosecution made Ms. Gordon's cell phone a key part of the case. The jury learned about its seizure, about Ms. Gordon granting the police permission to search its contents, and about efforts by the police to search it. But nothing was found on the phone. It was thus irrelevant – unless one could infer that Ms. Gordon had remotely "wiped" it to destroy incriminating evidence.

This was clearly the inference the Commonwealth wished for the jury to make, but it provided absolutely no basis for the inference, so the phone-related testimony should not have been allowed. Given defense counsel's pre-trial objection to the phone being used as consciousness of guilt evidence because "there's no evidence who did the wiping of the phone," June 12, 2019 Tr. 9, the Court should apply a preserved error standard. *See Commonwealth v. Grady*, 474 Mass.

715, 719 (2016)(counsel need not renew objection to evidence at trial where prior objection overruled pre-trial).

To recap the evidence, Trooper Pedersen testified that when he and other officers arrested Ms. Gordon they seized her phone. 3 Tr. 62-63. He further testified that she consented to a search of the phone. 3 Tr. 64, 65. The consent forms were made exhibits. RA.16-17. Pedersen testified that he gave the phone to Trooper Driscoll for forensic analysis. 3 Tr. 63. Driscoll, in turn, testified that the phone was turned off when he received it, and that when he powered it on he observed a welcome screen. 3 Tr. 94. Driscoll did not testify when he analyzed the phone, although Petersen had testified at a motion to suppress hearing that Driscoll attempted to download the phone "within a day or two" of the seizure. June 12, 2019 Tr. 39. While Driscoll testified that Apple devices can be remotely reset, he also testified that the police generally put phones in airplane mode to prevent this happening, but that he did not know what Pedersen had done in this case and so could not say why the phone was in welcome screen mode when powered on. 3 Tr. 95-96.

There was no evidence that Ms. Gordon could have reset her phone after it was seized, much less that she actually did so. She

consented to its being searched when she was arrested. RA.16-17. After her arrest she was incarcerated until arraignment, 4 Tr. 64, and all the while the phone was in the custody of the police. As noted, it is standard practice for the police to put seized phones in airplane mode to prevent remote tampering. Notably, Trooper Pedersen did not testify that he *failed* to put the phone in airplane mode. Given Ms. Gordon's consent, Driscoll presumably extracted the phone's contents quickly, as Pedersen testified he did. June 12, 2019 Tr. 39. Yet Ms. Gordon was in custody until sometime May 10, 2018, when she was arraigned, and could hardly wipe the phone from jail.

In short, the Commonwealth presented extensive evidence about Ms. Gordon's phone – including the suggestive facts that it was in welcome screen mode when powered on and that it could be remotely reset – but nothing to show that she could have reset it. The "consciousness of guilt" was purely conjectural. The Commonwealth meant to suggest to the jury that *perhaps* Pedersen forgot to put the phone in airplane mode, and *perhaps* Driscoll did not examine the phone until Gordon was out of jail. But the Commonwealth needed to establish these foundational facts with testimony from these witnesses, both of whom testified, not insinuation. Without

foundation, the phone-related testimony was irrelevant. *See Commonwealth v. Watterson*, 99 Mass. App. Ct. 746 (2021)("We agree that the judge erred in admitting the photograph, as the Commonwealth did not establish its relevance.").

The phone-related evidence was prejudicial, notwithstanding its irrelevance, for much the same reason inconclusive DNA evidence is prejudicial, notwithstanding its irrelevance: Merely presenting it to a jury suggests that it might actually be inculpatory, if only more facts were known, *see Commonwealth v. Nesbitt*, 452 Mass. 236, 254 (2008), when in fact it is neither inculpatory nor exculpatory, but simply irrelevant. This prejudicial evidence warrants reversal. In the alternative, it contributed to the cumulative error. *See Yang*, 98 Mass. App. Ct. at 454.

IV. LaBelle's Crucial Drug Identification Testimony Contained Blatant Hearsay Repeating What A Former Analyst Said She Had Done With The Samples, Violating Ms. Gordon's Confrontation Rights. Furthermore, LaBelle Was Not Qualified To Opine That Buprenorphine Is A Class B Drug

Over objection, the trial judge allowed testimony by Carrie LaBelle that the 61 strips recovered from the two envelopes contained buprenorphine, and that buprenorphine is a Class B drug. LaBelle, a supervisor, did not perform the testing of the substance, or even assist

with its testing. Rather, she simply reviewed analyst Dunlap's notebooks and test results. This testimony violated Ms. Gordon's confrontation rights. Additionally, LaBelle's testimony was improper because she was not qualified to opine whether buprenorphine is a Class B drug.

A. Confrontation Clause Violation.

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.

4 Tr. 33-34. This testimony came in without any limiting instruction. Slightly later in her testimony, LaBelle testified that she reviewed "that data" referenced above and that "the data supports the identification of Buprenorphine and Naloxone." 4 Tr. 35.

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. 4 Tr. 43-44. The judge overruled the objection on the ground that LaBelle had provided an "independent" analysis of the GCMS data. 4 Tr. 44.

Given defense counsel's timely objection, as well as indications that some Supreme Court justices are interested in revisiting how the Confrontation Clause relates to expert reliance on hearsay, *see Stuart v. Alabama*, 139 S.Ct. 36, 36-37 (2018)(Gorsuch, J., dissenting from denial of writ of certiorari), Ms. Gordon wishes to preserve her argument that LaBelle's testimony violated her confrontation rights. Insofar as Supreme Judicial Court ("SJC") precedent forecloses her argument, *see Commonwealth v. Greineder*, 464 Mass. 580, 594-95 (2013); *Commonwealth v. Chappell*, 473 Mass. 191, 201-02 (2015), this law should be overruled.[6]

A brief recap of this area of law follows, then a discussion of its application to Ms. Gordon's case. Traditionally, experts could only

[6] Ms. Gordon appreciates that the Appeals Court may not be able to provide some of the relief requested in Part IV(A) of the Argument.

rely on facts that they had either personally observed or had learned about at trial. *See*, *e.g.*, *Commonwealth v. Harrison*, 342 Mass. 279, 287-88 (1961). Then, in 1975, the Federal Rules of Evidence were amended to permit an expert to opine based on hearsay, if it was the sort of hearsay that experts in the field typically employed. Fed. R. Evid. 703. With some limitations, the federal rule also allowed juries to learn of the hearsay basis for the opinion. *Id*. While the SJC declined to fully adopt the federal rule, in 1986 the court relaxed its traditional rule and held that, henceforth, expert opinions could be based on "facts or data not in evidence if the facts or data are independently admissible and are a permissible basis for an expert to consider in formulating an opinion." *Department of Youth Servs. v. A Juvenile*, 398 Mass. 516, 531. The SJC later equated "independently admissible" with "potentially … admissible through appropriate witnesses." *Commonwealth v. Markvart*, 437 Mass. 331, 337 (2002).[7]

In more recent years the Supreme Court has substantially revised its Confrontation Clause jurisprudence. In *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004), the court held that the

[7] It is unclear what this condition means since almost any hearsay is "potentially admissible" if the declarant would testify.

Confrontation Clause bars the use of "testimonial" hearsay against a criminal defendant unless the declarant is unavailable and was previously subject to cross-examination. The *Crawford* court noted that "testimonial" hearsay includes, among other things, out-of-court statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*. at 52. Later Supreme Court opinions clarified that *Crawford* applies to forensic test results. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

In the case most relevant to Ms. Gordon's, *Williams v. Illinois*, 567 U.S. 50 (2012), the court affirmed a rape conviction following a trial in which the prosecution's DNA expert had testified that the defendant's DNA profile matched that of semen recovered from the victim, even though the out-of-state analyst who prepared the DNA profile of the semen did not testify. While the fractured *Williams* court could not agree on a rationale for its affirmance, five justices did agree that the expert's opinion (that the DNA profiles matched) would have been irrelevant unless the fact-finder accepted the underlying profiles for their truth. *See id*. at 106 (Thomas, J., concurring)("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 127 (Kagan, J., dissenting) ("[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."). While all five justices agreed that the use of testimonial hearsay as the basis for the expert's opinion would violate the Confrontation Clause, Justice Thomas found that the DNA profile was not "testimonial" because it lacked "solemnity." *Id*. at 111.

More recently, Justices Gorsuch and Sotomayor, dissenting from the denial of certiorari in *Stuart v. Alabama*, disapproved of precisely the sort of substitute analyst testimony employed in *Williams* – and in Ms. Gordon's case:

> [T]he State refused to bring to the stand the analyst who performed the [blood alcohol] test. Instead, the State called a different analyst. Using the results of the test after her arrest and the rate at which alcohol is metabolized, this analyst sought to estimate for the jury Ms. Stuart's blood-alcohol level hours earlier when she was driving. 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. The engine of cross-examination was left unengaged, and the Sixth Amendment was violated.

139 S.Ct. at 36.

Turning to Ms. Gordon's case, there is no question that the data Dunlap purportedly generated from the GCMS machine was "testimonial" because Ms. Gordon had actually been arrested and charged with drug offenses by the time the sample was analyzed. *See Williams*, 567 U.S. at 84, 121. Further, LaBelle's testimony that Dunlap reviewed the markings on the strips, then dissolved one in solvent and ran it through a GCMS machine, thereby resulting in the data LaBelle reviewed, was entirely hearsay (based on what Dunlap had either written in her notebook or told LaBelle). If anything, this hearsay is more blatant, extensive, and prejudicial than that in *Williams*.[8]

Crucially, the jury had to have accepted this hearsay for its truth for LaBelle's testimony to have any relevance. While LaBelle had the expertise to testify that a given GCMS data set was consistent with

[8] As in Ms. Gordon's case, the hearsay in *Williams* linked the materials another analyst had tested to the case at bar. Here, however, LaBelle also testified to the various details quoted on page 32. Furthermore, *Williams* involved a bench trial and one basis for the affirmance was the presumption that the judge had correctly instructed himself that the hearsay in question did not come in for its truth. 567 U.S. at 69-70. Ms. Gordon was tried before a jury and no limiting instruction was given following the testimony quoted on page 32.

buprenorphine, without some evidence tying that data to 61 strips recovered from the envelopes, her opinion would be irrelevant. Hearsay provided the vital link.

And while defense counsel could question LaBelle about lab protocol and what Dunlap *should* have done, LaBelle was in no position to testify what Dunlap *actually did*. *See Stuart*, 139 S.Ct at 36 ("[T]he State effectively denied Ms. Stuart the chance to confront the witness who supplied a foundational piece of evidence in her conviction."). Given the sorry history of crime lab fraud in this state, the concern is far from hypothetical – and in any event "[c]onfrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz*, 557 U.S. at 319.

In sum, LaBelle's recounting hearsay as the basis for her opinion, without any limiting instruction, violated the Confrontation Clause, and given the crucial role her testimony played in this case, reversal is warranted. *Cf. Garlick v. Lee*, 1 F.4th 122 (2nd Cir. 2022)(affirming grant of writ of habeas corpus based on state's expert's use of hearsay autopsy reports, where this evidence was important and non-cumulative).

B. Lack of Expert Qualification.

LaBelle's testimony was improper for the additional reason that she was not qualified to opine that buprenorphine is a Class B drug. Counsel did not raise this objection below, so the Court reviews for a substantial risk of a miscarriage of justice.

"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.").

In sum, 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."[9] If

[9] "Buprenorphine," https://www.ncbi.nlm.nih.gov/books/NBK459126/. While buprenorphine is undoubtedly a prescription drug, and therefore a Class E substance, this fact does not alter the substantial

nothing else, this error contributed to the overall unfairness of Ms. Gordon's trial. *See Yang*, 98 Mass. App. Ct. at 454.

CONCLUSION

The Court should reverse the convictions.

Respectfully submitted,

Elana Gordon,

By his attorney,

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risk analysis because the indictments specifically charged Class B offenses, RA.13-14, 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.

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

I, Christopher DeMayo, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs. In particular, this brief was composed in 14 point Times New Roman font and is 7,562 words long.

/s/ Christopher DeMayo

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify that on this date of March 15, 2023 I served the foregoing Brief for Elana Gordon, and the accompanying Record Appendix, on the Commonwealth by sending copies via efileMA to counsel of record, Carolyn Burbine, ADA.

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DAR-29321 - Notice: DAR denied

1 message

SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us> Fri, Jun 23, 2023 at 12:50 PM
To: lawofficeofchristopherdemayo@gmail.com

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: No. DAR-29321

COMMONWEALTH
vs.
ELANA GORDON

Plymouth Superior Court No. 1883CR00198
A.C. No. 2022-P-0825

NOTICE OF DENIAL OF APPLICATION FOR DIRECT APPELLATE REVIEW

Please take note that on June 23, 2023, the application for direct appellate review was denied.

Francis V. Kenneally Clerk

Dated: June 23, 2023

To:
Carolyn A. Burbine, A.D.A.
Arne Hantson, A.D.A.
Christopher DeMayo, Esquire

APPENDIX F

MS. ELUMBA: I have no further questions.

THE COURT: Okay. Anything?

MR. PERRUZZI: No follow-up, Judge.

THE COURT: All right. You can step down, sir.

MR. SAMMON: Thank you, Your Honor.

(Witness Excused)

THE COURT: Okay. Ms. Elumba?

MS. ELUMBA: Your Honor, the Commonwealth now calls Carrie Labelle.

THE COURT: Okay.

COURT OFFICER: Ms. Labelle? Carrie Labelle?

MS. LABELLE: Hi.

COURT OFFICER: Follow me, please. This way, please. Stop right here, face the Clerk and raise your right hand.

(CARRIE LABELLE, Sworn)

MS. LABELLE: I do.

THE CLERK: Thank you.

MS. ELUMBA: Your Honor, before we begin the testimony, may counsel and I approach?

THE COURT: Yes.

MS. ELUMBA: Thank you.

SIDEBAR CONFERENCE:

MS. ELUMBA: I know that we didn't have a

formal motion because counsel agreed, but this is the substitute chemist. The original chemist has since left the lab, so I just want to make the Court aware as it began.

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

MS. ELUMBA: Correct.

THE COURT: Not to the --

MS. ELUMBA: Opinion of the other, yeah.

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

THE COURT: Okay.

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

THE COURT: All right. Thank you.

MS. ELUMBA: Thank you.

SIDEBAR CONFERENCE CONCLUDED

THE COURT: Good morning, ma'am.

MS. LABELLE: Good morning.

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

MS. LABELLE: Okay.

MS. ELUMBA: May I inquire?

THE COURT: Yes.

MS. ELUMBA: Thank you.

DIRECT EXAMINATION

BY MS. ELUMBA:

Q Good morning.

A Good morning.

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

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

Q And what is your occupation?

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

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

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

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

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

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

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

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

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

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

on every page.

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

A Correct.

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

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

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

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

Can you take a look at that item for me?

A Yes.
Q Okay. Fair to say it has some stickers with some numbers -- some letters and numbers on it?
Are you familiar with those stickers?
A Yes. This is the sticker that we put on all of our external cases. It's a laboratory identification number, which has the town that submitted the evidence and also it looks like it has the initials of an analyst that used to work there.
Q Okay. So, based on your examination of what has been marked for identification F, is that something that has been to the Massachusetts -- in your opinion, has the been to the Massachusetts State Police Crime Lab for analysis?
A Yes. It's packaged similarly and has the initials and date.
Q All right. And when you look at that specific case number, are you familiar with that case number?
A Yes. The laboratory number for this case is 18-12925.
Q All right. And how are you familiar with that number?
A This was actually a case that I performed the technical and administrative review for.
Q All right. And when you say you performed the

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

A Correct.

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

A Yes. They analyzed the specific substances.

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

A Yes.

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

A Yes, I did.

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

A This case was analyst Kimberly Dunlap.

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

A No, she is not.

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

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

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

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

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

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

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

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

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

A Yes.

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

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

How does that work?

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

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

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

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

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

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

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

A Yes.

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

A Yes. 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 the 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.

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

A It's commonly referred to as a Suboxone.

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

review of that?
A Sorry, could you repeat that?
Q Sure. So, the analyst would have done, first, identification markings for pharmaceutical review followed by a confirmatory test; correct?
A Correct, yes.
Q Okay. When you did the technical review, did you review the identification markings?
A Yes, I did.
Q All right. And as a result of that, was a confirmatory test done by the analyst?
A Yes. 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.

Q Okay. So, you're able to see the data results, the same data results that the person who did the initial analysis saw?
A Correct.
Q All right. And do those data analysis allow

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

A Yes.

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

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

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

A Yes.

Q Okay. And what is that?

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

Q And that would also be considered Suboxone?

A Correct.

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

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

Q Thank you.

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

THE COURT: Okay.

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

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

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

THE COURT: Thank you.

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

THE COURT: Okay. Mr. Perruzzi?

MR. PERRUZZI: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PERRUZZI:

Q Good morning, Ms. Labelle.

A Good morning.

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

A Correct.

Q And that's for the State Police Crime Lab?
A Yes.
Q Okay. And you're also a crime Scene Responder, Clandestine Laboratory Enforcement person. You're essentially quality assurance for all drug labs in the state or all that are affiliated with the State Police Crime Lab?
A The Quality Assurance Section that I work in is for just the Crime Laboratory.
Q All right. So, that's different than being from the other labs; correct?
A Correct. It's just for the Massachusetts State Police.
Q Okay. And for three years, a little bit under three years, you were a Drug Unit Supervisor, Forensic Scientist III. And how is that different from what you do now?
A So, as a Forensic Scientist in the Drug Analysis Unit, I was essentially a Drug Unit Supervisor, so I had drug analysts that worked underneath me.

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

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

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

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

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

A Correct.

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

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

A Correct.

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

MR. PERRUZZI: Strike that.

BY MR. PERRUZZI:

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

A The review of the evidence or the data?

Q The data?

A Could I refer to my notes?

THE COURT: Yes.

BY MR. PERRUZZI:

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

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

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

A Yes, correct.

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

A Correct.

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

that had been offered into evidence; correct?
A No. All of our items of evidence are only tested by one chemist.
Q Okay. And would it be fair to say then that following your review of the data that you testified to, up until today, at no time you've ever retested those materials; correct?
A Correct.
Q Okay. You're relying on the conclusions and opinions of the prior individual who did the actual test; correct?
A So, I am reviewing the data currently and saying that the data supports a conclusion of the results.
Q All right. But you're relying on a test performed by another person; correct?
A Correct.

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

THE COURT: Okay.

MR. PERRUZZI: Any follow-up, Jess?

MS. ELUMBA: Thank you. Just briefly.

REDIRECT EXAMINATION

BY MS. ELUMBA:

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

A By their specific supervisor?

Q Or any --

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

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

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

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

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

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

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

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

A There were none.

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

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

Q Okay. Thank you.

MR. PERRUZZI: May we approach, Your Honor?

THE COURT: Yes.

SIDEBAR CONFERENCE:

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

THE COURT: Okay.

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

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

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

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

MR. PERRUZZI: Correct, Judge.

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

MR. PERRUZZI: Which I have done; right.

I concede that.

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

MR. PERRUZZI: Mm-hmm.

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

MR. PERRUZZI: Very good, Your Honor.

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

MR. PERRUZZI: Thank you, Your Honor.

MS. ELUMBA: Thank you.

APPENDIX G

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:
-

Party Information

Plymouth County District Attorney
- Prosecutor

Alias

Party Attorney
- Attorney
- Hanley Elumba, Esq., Jessica Ann
- Bar Code
- 655236
- Address
- Cape and Islands District Attorney's Office
  PO Box 455
  3239 Main Street
  Barnstable, MA 02630
- Phone Number
- (508)362-8113
- Attorney
- Hantson, Esq., Arne
- Bar Code
- 703474
- Address
- 166 Main St
  Brockton, MA 02301
- Phone Number
- (862)777-0501

More Party Information

Gordon, Elana
- Defendant

Alias

Party Attorney
- Attorney
- DeMayo, Esq., Christopher
- Bar Code
- 653481
- Address
- Law Office of Christopher DeMayo
  PO Box 760682
  Melrose, MA 02176
- Phone Number
- (781)572-3036
- 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

Date	Session	Location	Type	Event Judge	Result
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
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

Date	Session	Location	Type	Event Judge	Result
01/30/2020 02:00 PM	Criminal 4 Plymouth		Final Pre-Trial Conference		Not Held
01/30/2020 02:00 PM	Criminal 3 Brockton		Final Pre-Trial Conference		Rescheduled
02/03/2020 02:00 PM	Criminal 3 Brockton		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 Brockton		Jury Trial		Rescheduled
02/27/2020 02:00 PM	Criminal 3 Brockton		Conference to Review Status		
03/05/2020 09:00 AM	Criminal 3 Brockton		Conference to Review Status		Held as Scheduled
03/24/2020 09:00 AM	Criminal 3 Brockton		Jury Trial		Canceled
03/26/2020 09:00 AM	Criminal 3 Brockton		Jury Trial		Canceled
09/22/2020 02:00 PM	Criminal 3 Brockton		Trial Assignment Conference		Held as Scheduled
10/29/2020 10:00 AM	Criminal 3 Brockton		Motion Hearing to Modify Probation Term/Conditions		Held as Scheduled
01/08/2021 02:00 PM	Criminal 3 Brockton		Trial Assignment Conference		Rescheduled
02/23/2021 02:00 PM	Criminal 3 Brockton		Trial Assignment Conference		Rescheduled
03/23/2021 02:00 PM	Criminal 3 Brockton		Trial Assignment Conference		Rescheduled
05/04/2021 02:00 PM	Criminal 3 Brockton		Trial Assignment Conference		Not Held
10/06/2021 02:00 PM	Criminal 3 Brockton		Final Pre-Trial Conference		Held as Scheduled
10/14/2021 02:00 PM	Criminal 3 Brockton		Hearing for Change of Plea		Held as scheduled
10/18/2021 09:00 AM	Criminal 3 Brockton		Jury Trial		Held as Scheduled
10/19/2021 09:00 AM	Criminal 3 Brockton		Jury Trial		Held as Scheduled
10/20/2021 09:00 AM	Criminal 3 Brockton		Jury Trial		Held as Scheduled
10/21/2021 09:00 AM	Criminal 3 Brockton		Jury Trial		Held as Scheduled
10/22/2021 09:00 AM	Criminal 3 Brockton		Jury Trial		Held as Scheduled
11/22/2021 09:00 AM	Criminal 3 Brockton		Hearing for Sentence Imposition		Held as scheduled
12/14/2021 02:00 PM	Criminal 3 Brockton		Conference to Review Status		Rescheduled
12/15/2021 02:00 PM	Criminal 3 Brockton		Conference to Review Status		Held as Scheduled
05/23/2022 02:00 PM	Criminal 3 Brockton		Conference to Review Status		Canceled

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
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

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
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		
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		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
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		
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.		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	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 assigment 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		
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		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	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
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		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
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
12/15/2021	Offense Disposition:: 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 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		
02/10/2022	General correspondence regarding letter from CPCS assigning Attorney Christopher Demayo.	36	Image
05/20/2022	Habeas Corpus for defendant issued to Barnstable County Correctional Facility (BCCF) returnable for 05/23/2022 02:00 PM Conference to Review Status.	37	
05/23/2022	Event Result:: Conference to Review Status scheduled on: 05/23/2022 02:00 PM Has been: Canceled For the following reason: By Court prior to date Hon. Maynard Kirpalani, Presiding		
05/23/2022	Case sent to Plymouth Superior - BROCKTON Location. **Docket entry entered in error. Case not sent to Brockton this date.		
06/24/2022	Case sent to Plymouth Superior - BROCKTON Location. **Case, trial exhibits 1-16 and ID's sent to Brockton**		
07/22/2022	CD of Transcript of 06/12/2019 02:00 PM Evidentiary Hearing on Suppression, 02/03/2020 02:00 PM Final Pre-Trial Conference, 03/05/2020 09:00 AM Conference to Review Status, 10/06/2021 02:00 PM Final Pre-Trial Conference, 10/14/2021 02:00 PM Hearing for Change of Plea, 10/18/2021 09:00 AM Jury Trial, 10/19/2021 09:00 AM Jury Trial, 10/20/2021 09:00 AM Jury Trial, 10/21/2021 09:00 AM Jury Trial, 10/22/2021 09:00 AM Jury Trial, 11/22/2021 09:00 AM Hearing for Sentence Imposition, 12/15/2021 02:00 PM Conference to Review Status received from Susan Lobie, CET.		
08/03/2022	Attorney appearance On this date Christopher DeMayo, Esq. added as Appointed - Appellate Action for Defendant Elana Gordon	38	Image
08/23/2022	One (1) copy of docket entries, original copy of transcript, one (1) copy of notice of assembly issued to parties, one (1) copy of exhibit list and list of documents, and copy of the notice of appeal, each transmitted electronically to clerk of appellate court	39	Image
08/23/2022	Notice to Clerk of the Appeals Court of Assembly of Record	40	Image
08/23/2022	Notice of assembly of record sent to Counsel	41	Image
08/24/2022	Appeal entered in Appeals Court on 08/23/2022 docket number 2022-P-0825	42	Image
09/22/2022	Notice of docket entry received from Appeals Court with respect to the MOTION of Appellant to stay appellate proceedings filed for Elana Gordon by Attorney Christopher DeMayo. (Paper #4) Allowed. The defendant is given leave to file and the trial court to consider a motion for funds for an investigator. Appellate proceedings stayed to 11/21/22. Status report due then regarding the status of the motion and the investigation into whether a motion for new trial will be pursued.	43	Image
09/30/2022	Defendant 's Motion for funds for an investigator	44	Image
10/20/2022	Endorsement on Defendant 's Motion for funds for an investigator, (#44.0): ALLOWED		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/22/2022	Notice of docket entry received from Appeals Court	45	Image
01/04/2023	Notice of docket entry received from Appeals Court RE#6: As the defendant will not be pursuing a motion for new trial at this time, the stay of appellate proceedings is vacated. The defendant's brief and appendix are due on or before 02/28/2023. *Notice.	46	Image
07/06/2023	Notice to surety bail available for return. Applies To: Riley, Joanna Taitz (Surety)	47	Image
12/20/2023	Attorney appearance On this date Arne Hantson, Esq. added as Attorney for the Commonwealth for Prosecutor Plymouth County District Attorney	48	Image
01/16/2024	Rescript received from Appeals Court; judgment AFFIRMED Judgment affirmed.	49	Image

Case Disposition

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