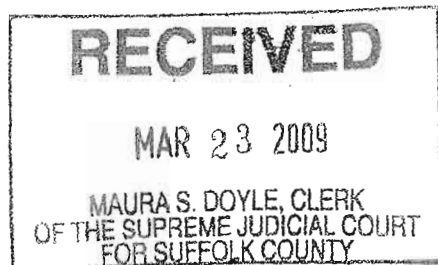


COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPREME JUDICIAL COURT
Docket No. SJ-2009-105

COMMONWEALTH OF MASSACHUSETTS)
)
v.)
)
KEJAUN CARNEY,)
KENNY FARROW)
RONALD WATSON)
Defendants)
_____)



DEFENDANTS' RESPONSE TO COMMONWEALTH'S PETITION FOR
EXTRAORDINARY RELIEF PURSUANT TO G.L. c. 211, § 3.

FACTS

Defendants adopt the facts as set forth in
Defendants' Joint Proposed Findings of Fact in Support of
Motion for Sanctions Against Commonwealth. Comm. Ex. QQ.

ARGUMENT

I. THIS CASE IS NOT PROPERLY BEFORE THIS COURT AS THE
COMMONWEALTH HAS AN ALTERNATIVE REMEDY.

The Commonwealth claims that it has no remedy from
the Cambridge District Court's order sanctioning it
\$25,000, other than invoking this Court's superintendence
power pursuant to G.L. c. 211, § 3. However, the
ordinary method for appealing an order of sanctions is
simply to appeal to the Appeals Court. *Cook v. Carlson*,
440 Mass. 1025 (2003) (Where party is sanctioned, proper

method of appeal is to be excused from paying the sanction, and appeal to the Appeals Court). While Cook is a civil case, there is nothing in the rules or caselaw to suggest that the procedure is different in a criminal case, and the Commonwealth cites no such authority.

In *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 133 (2001), this Court noted that instead of filing a petition pursuant to G.L. c. 211, § 3, prior to disobeying a court order, the Commonwealth "could have ignored the order, risked an adjudication of contempt, and appealed from a sanction for noncompliance."¹

Although this Court in *Bing Sial Liang* endorsed the propriety of relief pursuant to G.L. c. 211, § 3 under the circumstances of that case, it did so because it would "not require the Commonwealth to disobey a judicial order before an appeal can be taken." 434 Mass. at 134. Here, by contrast, the Commonwealth has already disobeyed a judicial order, and can therefore take its appeal.

Since the Commonwealth has an available alternative

¹Defendants note that the District Court has not set a deadline for payment, nor evinced any intention of doing so, so there is no danger of the Commonwealth being held in contempt for nonpayment. Contrast *Bing Sial Liang*, supra.

remedy, it is inappropriate to invoke this Court's superintendence power. See, e.g., *Norris v. Commonwealth*, 447 Mass. 1007 (2006) ("Our general superintendence power under G.L. c. 211, § 3, is extraordinary and to be exercised sparingly, not as a substitute for the normal appellate process . . . ,") quoting *Votta v. Police Dep't of Billerica*, 444 Mass. 1001 (2005)).

II. THE COMMONWEALTH'S ACTIONS IN DELIBERATELY DISOBEYING A COURT ORDER CANNOT BE JUSTIFIED.

The Commonwealth claims that the motion judge had no authority to hold an *ex parte* hearing before issuing his discovery order, and therefore could not sanction the Commonwealth for disobeying it. There are two fatal flaws in this argument: first, the Court did have such authority; second, and more importantly, even if the Court should not have held an *ex parte* hearing, that in no way excuses the Commonwealth's deliberate flouting of a court order.

As the Commonwealth acknowledges, p.8, the Reporter's Notes to Mass.R.Crim.P. 14(a)(2) explicitly state, "Nothing in this Rule is intended to prohibit the court from *ex parte* consideration of discovery motions in

appropriate circumstances, consistent with law." The Commonwealth claims that Judge Singleton's actions were not consistent with law, and goes on to state that "[t]he Commonwealth is unaware of any cases in which discovery orders pursuant to Rule 14 have been issued ex parte." The clear import of this argument is that the Commonwealth believes that *ex parte* discovery orders are never justified. This of course directly contradicts the Reporter's Notes.

Defendants suggest that this is a case that presents "appropriate circumstances" for *ex parte* consideration of discovery motions. In *People v. Superior Court (Barrett)*, 80 Cal.App.4th 1305, 1320-1321 (2000), the Court stated:

We note the trial court correctly reasoned that [defendant] should be permitted to present his relevancy theories at an in camera hearing. An in camera hearing is necessary to protect Barrett's Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel. At this investigatory stage of the proceedings, it would be inappropriate to give [defendant] the Hobson's choice of going forth with his discovery efforts and revealing possible defense strategies and work product to the prosecution, or refraining from pursuing these discovery materials to protect his constitutional rights and prevent undesirable disclosures to his adversary.

Similarly, Judge Singleton's decision in holding an in

camera hearing protected defendants from a similar "Hobson's choice."²

Moreover in this case, the Commonwealth filed a prior petition pursuant to G.L. c. 211, § 3 (SJ-2008-0394), claiming that the District Court should not have held an *ex parte* hearing. This Court, Ireland, J., denied the Commonwealth's petition.

However, even if the District Court erred in considering defendants' motion *ex parte*, that does not excuse the Commonwealth's direct disobedience of the order. The Commonwealth, p.5 *et seq.*, cites *Commonwealth v. Hernandez*, 421 Mass. 272, 274 (1995), as authority for the proposition that the Commonwealth need only obey a valid order. However, the order in *Hernandez* was to disclose a surveillance location that the Commonwealth (erroneously) believed to be exempt from disclosure. Obviously, were the Commonwealth to have obeyed that order, the propriety of the order would have been moot. Here, in contrast, the order disobeyed by the

²"Hobson, it will be recalled, was an English liveryman who required his customers to take the horse nearest the stable door or none; thus, they had an apparently free choice but no real alternative." *Commonwealth v. Ewe*, 43 Mass.App.Ct. 901, 902 (1997).

Commonwealth was to maintain the status quo. Obeying this order could not have harmed the Commonwealth, while disobeying could have and did harm defendants. Thus *Hernandez* is inapposite.

Nor is *Commonwealth v. Florence F.*, 429 Mass. 523 (1999), authority for the Commonwealth's rather remarkable assertion, that where it believes a court order is issued pursuant to procedures with which it disagrees, it may simply ignore, evade or flout the order. Needless to say, *Florence F.* does not support this proposition. In *Florence F.*, the court had issued an order in a CHINS case. 419 Mass. at 524. This Court held that a juvenile court has no authority to issue orders in a CHINS case, thus the child could not be held in contempt. *Id.* at 525. The Commonwealth does not (and cannot) dispute the District Court's authority to issue discovery orders. That it disagrees with the procedure by which the order issued is not the same as claiming that the Court lacked authority to issue the order. See *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947) ("[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and

proper proceedings.") It is beyond dispute that the District Court had jurisdiction in this case. See also *Matter of Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir.1986) (It is a "bedrock principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or vacated").

And even where courts lack authority to issue an order, the general rule is that a litigant must still obey the order, and challenge it on appeal. See *Commonwealth v. Dodge*, 428 Mass. 860, 862 (1999) (Although judge lacked authority to impose conditions of release pursuant to G.L. c. 276, § 58, "defendant then disregarded the judge's order rather than complying with it and filing an appeal. He could not attack the propriety of the order in this manner.>").

This also applies to the Commonwealth's argument that the Court should not have issued any order relative to the firearm evidence. The Court, not the prosecutor, is the final authority, and the Commonwealth, like any other litigant, is bound to obey court orders while they are in effect. As one Court eloquently put it:

[E]ven if this Court were to determine that the trial court erred in [issuing its discovery order], it nonetheless would affirm the

decision to suppress. For the true issue on appeal is whether the suppression of evidence was an appropriate sanction for *the State's intentional refusal to comply with a discovery order of the trial court*, whether or not the discovery order was in error. This Court is extremely concerned by the State's wilful disregard of a court order. . . . No Court can allow a party, especially the State through the office of the Attorney General, to announce that it will persist in its refusal to make discovery after ordered to do so by the Court. If the State's prosecutors refuse to obey an order of the Court, how can they demand respect for the rule of law from criminal defendants? Disobedience this flagrant deserves appropriate sanctions. When faced with such a situation, a trial judge should not hesitate to impose an array of sanctions including, if necessary, the ultimate sanction of a default judgment.

State v. McMaster, 2006 WL 2724073, 3 (Del.Com.Pl., 2006)

(copy attached) (emphasis in original; punctuation omitted).

However, the Commonwealth's claim that it need not obey the order because of its belief that it was illegally issued, neatly illustrates the Commonwealth's attitude from the inception of this case: "Since we are offended by the holding of an *ex parte* hearing, we are justified in doing anything in response to the resultant Court Orders, including ignoring them, flouting them or even submitting a false affidavit in an effort to thwart them."

III. THE COMMONWEALTH MADE MULTIPLE MISREPRESENTATIONS TO BOTH THE DISTRICT COURT AND TO THIS COURT.

A. THE COMMONWEALTH SUBMITTED AN AFFIDAVIT THAT WAS MISLEADING (AT BEST) WHEN SIGNED AND ABSOLUTELY FALSE WHEN FILED.

In order to oppose defendant's motion, ADA James Mulcahy called the DNA Unit of the State Police Laboratory, and requested an affidavit that would enable him to prevent defendants from inspecting the evidence. The affidavit signed by Kristin Sullivan (See Comm. Ex. H) was highly misleading when she signed it in that it grossly exaggerated the risk of DNA contamination were defendants allowed to examine the evidence. Ms. Sullivan admitted on cross-examination that if anyone who examined the evidence wore gloves, a mask, and a lab coat, and if any surfaces were swabbed with bleach, the risk of contamination would be of no concern. It is illuminating that, prior to defendants' motion, the ballistics unit requested permission to test-fire the gun and was allowed to do so, with the only proviso being that the handler wear gloves. If firing a gun, with the attendant blowback of gunshot residue, is unlikely to produce contamination, it is unfathomable that looking at the evidence posed a serious risk of contamination. The real

difference between the two is that firing the gun was for the benefit of the prosecution, while the inspection was for the benefit of the defendants. And, the District Attorney's office started this chain of events when ADA Mulcahy requested an affidavit that would prevent defendants from examining the evidence, rather than one that would detail the precautions that would allow defendants to inspect the evidence safely.

Whatever may be said for the truth (or falsity) of the affidavit when written, there can be no dispute that three minutes after it was faxed to the DA's office, it became demonstrably false. Testimony showed that the affidavit, stating (*inter alia*) that the firearms evidence had not been swabbed for DNA, was faxed to the District Attorney's office at 9:40 a.m. on September 10, 2008, and that DNA swabbing began at 9:43 that morning. Thus, by the time the affidavit was filed with Justice Ireland later that morning, it was false. Significantly, to this day the Commonwealth has not admitted to this (or any) Court that the affidavit was false.³ Instead, on

³And any argument that the District Court could not sanction the Commonwealth for submission of a false affidavit to this Court fails in light of Justice Ireland's Order of September 10, 2008, "permitting the

September 12, 2008 it submitted "Commonwealth's Second Supplemental Filing with its Petition for Extraordinary Relief Pursuant to G.L. c. 211, § 3," that stated that "[t]he Commonwealth does not object to the District Court's order insofar as the order permits defense counsel and an investigator to 'inspect' the firearm and ammunition seized in this case by police on September 5, 2008." Conspicuously missing from his document submitted by ADA Meghan O'Neill, is any reason for this withdrawal of its opposition to this inspection, or any acknowledgment that the previously submitted affidavit was problematic in any way. This violates Mass.R.Prof.C. 3.3(a)(4) ("If a lawyer has offered, or the lawyer's client or witnesses testifying on behalf of the client have given, material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures").

B. THE COMMONWEALTH'S CLAIMS REGARDING ITS INTENT TO SUBMIT THE BAG CONTAINING MARIJUANA FOR DNA TESTING WERE FALSE AND ADVANCED IN BAD FAITH.

And, the Commonwealth's behavior with respect to the

trial court to conduct further hearing on the defendant(s)' said Motion in light of the September 10, 2008 Affidavit of Kristen L. Sullivan."

drug evidence was even more deplorable. It repeatedly claimed that the Sullivan affidavit was meant to apply to the drug evidence as well as the firearm evidence, notwithstanding the fact that at the time she signed the affidavit, Ms. Sullivan was not even aware that drugs had been seized in this case. According to the testimony of ADA James Mulcahy, he advanced this argument without ever contacting Ms. Sullivan, either before or after he represented this interpretation of her affidavit to the Court. This despite the fact that defendants argued at the time that, based on the language of the affidavit, it referred only to the firearm evidence. Again, the Commonwealth never corrected this misimpression. It only came to light at the evidentiary hearing during defendants' examination of Ms. Sullivan.

Even more egregiously, the Commonwealth claimed that it was concerned about DNA contamination of the plastic bag in which the marijuana was found, stating that it might pursue DNA testing of the bag. This was clearly a pretense for several reasons. First, the marijuana was found in a police car that had transported only one defendant (Kejaun Carney), the only person charged with drug offenses. Thus, unlike the gun, there was little

doubt to who possessed the marijuana. Second, no one in this case, from the District Court judge, to the prosecutors, to the police, to the lab personnel, had ever heard of a bag containing drugs being swabbed for DNA. And finally, and perhaps most importantly, even a perfunctory investigation would have revealed that at the time the Commonwealth made this claim, the bag had been handled (without gloves) by at least four separate police officers, thus rendering it impossible to check for DNA. The Commonwealth chose instead to advance the implausible claim that it was considering swabbing the bag for DNA in order to prevent defendants' inspection of the evidence.

While the prosecutors may not have had actual knowledge that the bag had been handled in a manner that would compromise the DNA evidence, the police certainly did. See, e.g., *Commonwealth v. Lam Hue To*, 391 Mass. 301, 311 (1984) (For purpose of determining prosecutorial misconduct, "inept and 'bungling' performance of the police [] is attributed to the prosecution"). And, the several ADA's involved with this case failed to make even a simple phone call to determine the potential for DNA testing, as that might have compromised the Commonwealth's ability to argue that defendants'

inspection would contaminate the DNA. This constitutes wilful blindness by the prosecution, which is the equivalent of intentional misconduct. See *In re Goldstone*, 445 Mass. 551, 556 (2005) ("[E]ven if Goldstone did not have actual knowledge, . . . he consciously avoided obtaining readily available information that would have put him on actual notice, and thus his actions constituted wilful blindness and intentional misconduct"). It is inconceivable that, had the request for inspection of the evidence come from an agency allied with the prosecution, that the DA's office would have reacted in this manner. It did so only because it was determined not to allow defendants to inspect the evidence.

IV. THE COMMONWEALTH DELIBERATELY DISOBEYED JUDGE SINGLETON'S ORDERS OF SEPTEMBER 9, 2008, WHEN IT SWABBED THE FIREARM FOR DNA.

On September 9, 2008, the Cambridge District Court, Singleton, J., issued an order that stated:

The Commonwealth and law enforcement associated with the above-captioned matter are hereby ordered to make all evidence seized in this matter available to defense counsel and her designees (including but not limited to CPCS Investigator Sarah Galante) immediately and in any event prior to the transport of said evidence to any lab for testing.

SO ORDERED.

Later that day, Judge Singleton issued a second order, which ordered

[t]he Commonwealth and law enforcement associated with the above-caption matter(s) (including but not limited to the State Police to make all evidence seized in the investigation of this matter available for a meaningful opportunity to inspect by defense counsel and defense counsels' designees (including but not limited to CPCS Investigator Sarah Galante) *immediately*, regardless of whether the evidence has left the state police barracks facility and has been transported to another state lab or state police facility (including, but not limited to the state's Maynard ballistics unit, the State Lab in Sudbury or the drug storage unit in Foxborough.

In particular it is ordered that the State police bring on September 10, 2008, by 10:00 a.m. to this Court [] all evidence seized in the investigation of this matter . . .

(emphasis supplied).

The Commonwealth deliberately failed to obey this order both with respect to the firearm evidence and with respect to the marijuana evidence.

A. THE COMMONWEALTH'S ACTION IN SWABBING THE FIREARM WHILE THE DISTRICT COURT ORDER WAS IN EFFECT VIOLATED THAT ORDER.

The Commonwealth in its petition claims (p.12) that "there was no 'no testing' order of the firearm. This is unsupported by the evidence and contradicted by the Commonwealth's prior representations in this case.

The first order barred the Commonwealth from transporting the evidence to any lab for testing. While the firearm evidence was transported to the lab prior to the issuance of the order, the order can only be interpreted as barring testing of the evidence. And both orders required the evidence to be made available to defendants immediately. It is manifestly unreasonable to interpret "immediately" to mean "as soon as we have finished testing."

And, the Commonwealth understood this at the time. On September 9, 2008, ADA James Mulcahy, in responding to the Court's issuance of the Orders, stated that the Commonwealth was seeking a stay, but made it clear that he understood that the Commonwealth needed to maintain the evidence in the "same state." Defendants' Proposed Finding of Fact 38. This was confirmed by ADA O'Neill's (false) representation to Justice Ireland on September 12 that "all testing of evidence was suspended *in light of Judge Singleton's orders of September 9, 2008.*" (Emphasis supplied) (Comm. Ex. T, p.1).

Despite these representations by the Commonwealth and the court orders, at 9:43 a.m. on September 10, 2008, the State Police Laboratory began swabbing the firearm

for DNA. This violated both the letter and spirit of the orders. See, e.g., *United States v. Boston Scientific Corp.*, 253 F.Supp.2d 85, 101 (D.Mass.2003) (Defendant "violated not only the letter but also the spirit of the consent order").

And, as the testimony showed, the transportation from the Maynard laboratory to the Cambridge Court would take at least 30 minutes. Thus it is clear that the State Police laboratory personnel had no intention of complying with the order that the evidence be produced in Court at 10 a.m. While it is true that this Court, Ireland, J., stayed Judge Singleton's order at 9:55, this was not communicated to the State Police laboratory personnel until that afternoon. The later-issued stay does not excuse the Commonwealth's deliberate delaying tactics in order to avoid producing the evidence immediately. And, since the State Police personnel did not know that the order was stayed, it shows the lack of respect that they held for this Court Order. This dispels any possible doubt about the intent of the Commonwealth not to obey the Court Order.

B. THE COMMONWEALTH'S ACTIONS RELATIVE TO THE MARIJUANA EVIDENCE VIOLATED THE COURT ORDER.

The evidence at the hearing on defendants' Motion for Sanctions showed that Trooper Briody did in fact bring the marijuana evidence to Court on September 10, 2008. He reported to ADA Mulcahy that he was present with the evidence, yet neither he nor Mulcahy ever saw fit to notify either defense counsel⁴ or the Court that the evidence had been produced. The Commonwealth's argument that since the officer was in uniform and carried an evidence bag, defense counsel should have sought him out is disingenuous. The case was in the motion session; other motions were scheduled; and defense counsel had no way of knowing that this officer was present in regards to this case. The reasonable inference is that the Commonwealth deliberately failed to notify defense counsel or the court that the evidence was present in order to prevent the inspection.

IV. A COURT HAS THE AUTHORITY TO IMPOSE A FINE FOR PROSECUTORIAL MISCONDUCT.

A. THE COMMONWEALTH IS ESTOPPED FROM ARGUING THAT THE COURT LACKED AUTHORITY TO IMPOSE MONETARY SANCTIONS.

⁴Trooper Briody had also been summonsed to appear in court with the evidence at 9 a.m. by defense lawyer Lorenzo Perez. This summons stated plainly: *Please ask for Attorney Lorenzo Perez. Comm. Ex. E.

The Commonwealth argues that the District Court lacks authority to impose the \$25,000 fine. However, in the District Court it argued that since one of the charges (possession of a large capacity firearm) is beyond the District Court's jurisdiction, and as the case was to be (and during the hearing on defendants' motion was) indicted, the District Court lacked jurisdiction to either exclude evidence or dismiss the charges, but was limited to imposing monetary sanctions. See Commonwealth's Detailed Recital of Facts in Support of Its Petition for Relief Pursuant to G.L. c. 211, § 3, ¶ 122. It cannot now reverse itself and argue that the District Court had no such authority. See *Commonwealth v. Gardner*, 67 Mass.App.Ct. 744, 747 (2006) ("Judicial estoppel, which applies equally to civil and criminal proceedings is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding.") (citations and punctuation omitted).⁵ Judicial estoppel "is properly invoked

⁵It is irrelevant that the Commonwealth took inconsistent positions in the *same* proceeding in different courts. "Under the principle of judicial estoppel a party may not successfully maintain a position

whenever a party is seeking to use the judicial process in an inconsistent way that courts should not tolerate." *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 640 (2005) (citation omitted).

B. ACCEPTING THE COMMONWEALTH'S ARGUMENT WOULD OFTEN LEAVE THE COURT WITHOUT A REMEDY EVEN WHERE THERE HAS BEEN PROSECUTORIAL MISCONDUCT.

Significantly, the Commonwealth does not indicate what sanction would be appropriate in this case. If the Court cannot impose monetary sanctions, one can only wonder what remedies the Commonwealth believes are available to a judge who finds prosecutorial misconduct that is neither egregious nor prejudicial. If this Court adopts the Commonwealth's argument, judges will be left without an effective means to sanction the Commonwealth in that situation.

As the Reporter's Notes to Rule 14 correctly note, "Rights and duties are ephemeral indeed without remedies." If this Court adopts the Commonwealth's argument, remedies for prosecutorial misconduct will

in one court and thereafter repudiate or contradict that position in the same proceeding or in separate proceedings in that or other courts." *Basis Technology Corp. v. Amazon.com, Inc.*, 71 Mass.App.Ct. 29, 43 n.7 (2008).

exist only in those rare cases where defendant can prove either egregious misconduct or actual prejudice.

The Commonwealth's argument is unsupported by law. It is settled law that a court may impose a fine in these circumstances. "Mass.R.Crim.P. 48, recognizing the usually dominant role of attorneys rather than clients in procedural rule violations, permits the court to impose appropriate sanctions upon counsel, including citation for contempt or the imposition of costs or a fine." *Commonwealth v. Steinmeyer*, 43 Mass.App.Ct. 185, 190 (1997). See also *Beit v. Probate and Family Court Dept.*, 385 Mass. 854, 859 (1982) ("Judges 'have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake,'" quoting *Crocker v. Justices of the Superior Court*, 208 Mass. 162, 179 (1911)).

C. A COURT MAY IMPOSE A FINE, NOT JUST COSTS.

The Commonwealth claims that monetary sanctions "must be in the form of costs tailored to the resources wasted or unnecessarily expended as a result of the misconduct or a fine to act as a coercive remedy . . .," quoting *Avelino-Wright v. Wright*, 41 Mass.App.Ct. 1, 5

(2001). The sanctions imposed in *Avelino-Wright* were payable to the opposing party, thus were "costs" as that term is used in Rule 48 and in *Steinmeyer*. Defendants concede that costs must be so tailored so as to prevent unjust enrichment to the aggrieved party. The purpose of a fine, however, is to assure future compliance with court orders.⁶ See generally *Labor Relations Commn. v. Fall River Educators' Assn.*, 382 Mass. 465, 476 (1981). And, while the District Court could have imposed costs upon the Commonwealth, payable to defendant, it chose not to do so, other than an order that the Commonwealth pay defendants' attorneys fees. (Obviously the order to pay attorneys' fees is "tailored to the resources wasted or unnecessarily expended as a result of the misconduct, thus the Commonwealth cannot complain about it.).

The Court also imposed a fine. This was, in the words of *Avelino-Wright*, "to act as a coercive remedy. See also *Steinmeyer*, supra at 191 ("Any interest in the vindication of the rules readily could be served by the imposition upon defense counsel of the costs to the

⁶While no court order was issued in this case, the failure to follow the rules governing mandatory discovery is treated as violation of a court order. See Mass.R.Crim.P. 14(a)(1)(C).

Commonwealth of any delay or by the assessment of a fine." (emphasis supplied). However, should this Court agree with the Commonwealth (petition, p. 17) that Rule 14 only "deals with remedies that will benefit the defendant," it should remand this case for imposition of such a sanction.

Avelino-Wright also holds that a court may impose sanctions without a finding of contempt, which is exactly what Judge Singleton did here. See also *Commonwealth v. Rogers*, 46 Mass.App.Ct. 109, 111-112 (1999). Thus the Commonwealth's argument to the contrary (pp. 14-16) is simply wrong.

D. THE COURT'S ORDER DOES NOT VIOLATE ARTICLE 30 OF THE DECLARATION OF RIGHTS.

Finally, the argument that a Court violates Art. 30 of the Massachusetts Declaration of Rights if it orders payment of fines by a District Attorney's office has been rejected by this Court in similar situations. "The power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice." *Chief*

Administrative Justice of the Trial Court v. Labor Relations Com'n, 404 Mass. 53, 57 (1989), quoting *State v. LaFrance*, 124 N.H. 171, 179-180 (1983). See also *Bradley v. Commissioner of Mental Health*, 386 Mass. 363, 365 (1982) ("The inherent power of courts to enter orders concerning the expenditure of funds extends only to matters essential to the courts' functions, to the maintenance of their authority, and to their capacity to determine the rights of parties.") This case comes squarely within this principle. Courts regularly make assessments in various context against governmental agencies. See, e.g., *National Lawyers Guild v. Attorney General*, 94 F.R.D. 600, 615 (D.C.N.Y., 1982) ("Fines and costs may be imposed, even against the United States [for discovery violations]"); *O'Coin's, Inc. v. Treasurer of Worcester County*, 362 Mass. 507 (1972) (Court could order county to pay for tape recorder and tapes for Court). Ironically, the Commonwealth (p.16) quotes *Commonwealth v. Gonsalves*, 432 Mass. 613, 619 (2000), in support of this proposition, without mentioning that in *Gonsalves* this Court rejected the Commonwealth's argument that ordering payment by the District Attorneys of attorneys fees pursuant to Mass.R.Crim.P. 15 violated art. 30. In

doing so this Court stated,

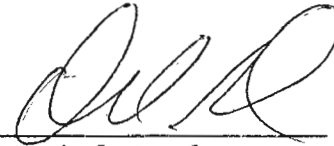
separation of powers does not require three watertight compartments within the government. An act of one branch of government does not violate art. 30 unless the act unduly restricts a core function of a coordinate branch. The essence of what cannot be tolerated is the creation of interference by one department with the power of another department. (citations and punctuation omitted)

In fact, defendant suggests that *Gonsalves* is dispositive of this case. As the *Gonsalves* Court stated: "The order [to pay attorneys' fees] is obviously not an appropriation, nor does it purport to direct the Legislature to make an appropriation." 432 Mass. at 620. This is equally true of the order at issue here. While it is true that *Gonsalves* addressed the issue of the Court ordering payments to a private party, rather than to the Court, this is the proverbial "distinction without a difference." In both cases the District Attorney's office was ordered to pay funds that the Legislature had appropriated for its use to a third party.

CONCLUSION

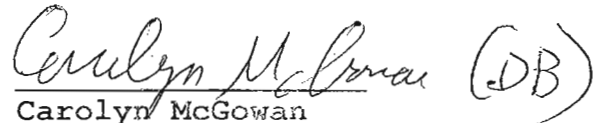
Judge Singleton acted well within his wide discretion. See *Commonwealth v. Fossa*, 40 Mass.App.Ct. 563, 569 (1996) ("Counsel could not reasonably expect an appellate tribunal to find an abuse of the assignment judge's broad range of discretion with respect to discovery sanctions.")

Respectfully Submitted,



Daniel Beck
52 Western Avenue
Cambridge, MA 02139
(617) 354-7333
BBO # 548391

March 23, 2009



Carolyn McGowan
Committee for Public
Counsel Services
Public Counsel Division
21 McGrath Highway
Somerville, MA 02143
(617) 623-0591
BBO # 635818



Lorenzo Perez
95 Third Street, Suite One
Cambridge, MA 02141
(617) 441-0444
BBO # 561908

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

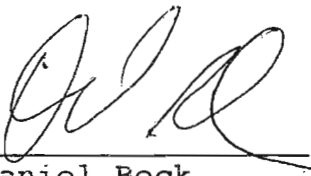
SUPREME JUDICIAL COURT
Docket No. SJ-2009-105

_____)
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KEJAUN CARNEY,)
KENNY FARROW)
RONALD WATSON)
Defendants)
_____)

CERTIFICATE OF SERVICE

I, Daniel Beck, hereby certify that on this date I served a copy of Defendants' Opposition to the Commonwealth's Petition For Extraordinary Relief Pursuant to G.L. c. 211 § 3 by mailing postage pre-paid to A.D.A. Bethany Stevens, 15 Commonwealth Avenue, Woburn, MA 01801 and to James J Arguin, Office of the Attorney General, Criminal Bureau, 20th Floor, One Ashburton Place, Boston MA 02108.

March 23, 2009



 Daniel Beck

RECEIVED
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