COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11764

KEVIN BRIDGEMAN, YASIR CREACH AND MIGUEL CUEVAS

Petitioners-Appellants

v.

DISTRICT ATTORNEY FOR SUFFOLK COUNTY AND DISTRICT ATTORNEY FOR ESSEX COUNTY

Respondents-Appellees

PETITION PURSUANT TO G.L. c. 211, §3
AS RESERVED AND REPORTED BY JUSTICE BOTSFORD

SUPPLEMENTAL JOINT RECORD APPENDIX OF THE PETITIONERS AND THE COMMITTEE FOR PUBLIC COUNSEL SERVICES

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Dated: January 2, 2015

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-00875

COMMONWEALTH OF MASSACHUSETTS

vs.

ANGEL RODRIGUEZ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S RENEWED MOTION FOR STAY OF EXECUTION OF SENTENCE

On November 12, 2013, a jury convicted Angel Rodriguez ("the Defendant"), of trafficking in one hundred grams or more of cocaine, pursuant to G. L. c. 94C, § 32E(b)(1). The Defendant received a sentence of eight years to eight years and one day in state prison. The Defendant now moves for a stay of execution of that sentence pending appeal, arguing that the trial and sentence were improperly based on a partially nolle prossed charge. The Commonwealth filed an opposition. The parties came before the court for a hearing on November 19, 2014. For the reasons set forth below, Defendant's motion will be **ALLOWED**.

DISCUSSION

A sentencing judge has the authority and discretion to grant a defendant's motion for stay of execution of sentence. Mass. R. Crim. P. 31(a); see also Commonwealth v. Charles, 466 Mass. 63, 72-75 (2013). To prevail in his motion, the Defendant must (1) show a likelihood of

success on appeal and (2) allay any security concerns. Commonwealth v. Allen, 378 Mass. 489, 498 (1979).

I. Likelihood of Success on Appeal

To succeed on his request for a stay of execution of sentence, the Defendant must first establish "an issue which is worthy of presentation to an appellate court [that] offers some reasonable possibility of a successful decision on appeal." Commonwealth v. Hodge, 380 Mass. 851, 855 (1980). Here, the Defendant argues that after having entered a partial nolle prosequi to a portion of an indictment for trafficking (specifically, the quantity of cocaine in which he allegedly trafficked), the Commonwealth could not prosecute and a jury could not convict him of trafficking in the quantity alleged on the initial indictment, as it stood before the nolle prosequi.

Massachusetts courts have long asserted that "no person shall be held to answer for a felony unless upon indictment" or a knowing and voluntary waiver thereof. Degolver v. Commonwealth, 314 Mass. 626, 627 (1943). At the same time, prosecutors have absolute power to enter nolle prosequi as to "any distinct and substantive part of an indictment." Commonwealth v. Harris, 75 Mass. App. Ct. 696, 703-704 (2009). Such action constitutes a declaration that the nolle prossed charge will no longer be prosecuted, Commonwealth v. Brandano, 359 Mass. 332, 335 (1971), and definitively eliminates that portion of the indictment, Commonwealth v. Miranda, 415 Mass. 1, 6 (1993).

In 2008, the Commonwealth entered a partial nolle prosequi on the Defendant's indictment for drug trafficking "as to so much of the indictment that allege[d] an offense greater

than trafficking in cocaine 28 grams or greater."[1] When the Defendant was granted a new trial in 2013, the Commonwealth proceeded on the original indictment charging trafficking in one hundred grams or more of cocaine, without seeking to re-indict the Defendant regarding the portion that it had previously nolle prossed. Where a district attorney has terminated prosecution of a portion of an indictment, "the defendant is to be treated as acquitted of the charge," unless re-indicted. Commonwealth v. Sitko, 372 Mass. 305, 308 (1977). The Supreme Judicial Court affirmed this principle in Miranda, when it reasoned that where an original indictment had been nolle prossed, "[t]he defendant ha[d] a rightful expectation that he would not be tried on the charges contained in the earlier indictment absent a new and proper indictment." Miranda, 415 Mass. at 6.

The Commonwealth argues that Commonwealth v. Rollins, 354 Mass. 630 (1968), is instructive in this case inasmuch as it allows a nolle prossed charge to proceed after a plea bargain is vacated. In Rollins, the Commonwealth indicted a defendant for first degree murder, only to later file a nolle prosequi as to the charge of murder in the first degree in exchange for a plea of guilty to second-degree murder. Rollins, 354 Mass. at 632. After the defendant successfully moved to revoke that plea, the Commonwealth re-indicted him on a first-degree murder charge. Id. The defendant challenged the Commonwealth's ability to re-indict on a charge that had previously been nolle prossed. Id. The Supreme Judicial Court held that the

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[1]As Defendant points out, the assistant district attorney did not, by either addressing it on the record or in a written statement, provide the reason for the nolle prosequi, as required by Mass. R. Crim. P. 16(a). Though perhaps it could have provided some assistance in resolving this motion, the court does not find the issue dispositive, especially where the Defendant has not shown prejudice in the absence of such a statement. See Commonwealth v. Sitko, 372 Mass. 305, 309 n. 2 (1977).

procedure followed by the Commonwealth was proper and that the second indictment could go forward against the defendant. Id. at 633. However, in dicta, the Rollins court also indicated that, upon retraction of a guilty plea given in exchange for a nolle prosequi, the Commonwealth could proceed on the initial indictment without re-indicting on the nolle prossed charge:

> We think that the Superior Court judge, whose order vacated the second degree sentence upon Rollins's motion, could have permitted the District Attorney to withdraw his discontinuance of the first degree charge . . . . When Rollins sought to withdraw his plea, there would have been no injustice in placing not only Rollins, but also the Commonwealth, in the same position in which they severally were before the acceptance of the discontinuance of the first degree murder charge and the plea . . . . The same result could be obtained by reindictment.

Id. I am unaware of any other authority for that proposition in Massachusetts case law. And, despite this language--and the passage of forty-six years of jurisprudence since the Rollins decision--the Commonwealth has presented no other Massachusetts case holding that a prosecutor may proceed on a nolle prossed charge without re-indictment.

In contrast, the permanency of the nolle prosequi and the rights of citizens to face indictment before further criminal procedure has been upheld time and again. See e.g. Commonwealth v. Benton, 356 Mass. 447, 448 (1969) (plea agreement including a nolle prosequi on which defendants reasonably relied barred the Commonwealth from re-indicting on the nolle prossed charges); Brandano, 359 Mass. at 335 (nolle prosequi as declaration by Commonwealth that it will not prosecute a charge further); Miranda, 415 Mass. at 5 (reversible error to allow reinstatement of a nolle prossed charge for trial without re-indictment thereon); Harris, 75 Mass. App. Ct. At 703-704 (nolle prosequi eliminates the offense as charged).

With the weight of these authorities balanced against the Rollins dicta, the Defendant has shown that he has some likelihood of success on the merits of his claim that his trial and

conviction were improperly founded on a partially nolle prossed indictment. See Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979) (in a motion for stay of execution, the proposed appeal need only offer an issue "worthy of presentation to an appellate court" that holds a reasonable possibility of a successful outcome).[2]

II. Security Considerations

In granting a motion for stay of execution of sentence, the court must also consider security and review various factors, such as risk of flight, recidivism, and potential dangers to the community. Hodge, 380 Mass. at 855. Here, the Defendant submits that he has a clean disciplinary record spanning over seven years of continuous incarceration, that he has a large number of immediate family in the area, and that he had enjoyed steady employment as a baker for eight years prior to being incarcerated. The Defendant further asserts that, because he only has approximately six months remaining on his eight-year sentence, he is less likely to flee to avoid punishment.

The Commonwealth does not challenge the Defendant's assertions, and does not argue that the Defendant is a danger to his community. The Commonwealth's sole concern is that the Defendant faces potential immigration consequences if released. The Commonwealth has presented no more specific evidence of that issue.[3]

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[2]Because I am satisfied that the Defendant has shown a likelihood of success on this issue, I do not address the Defendant's other arguments regarding ineffective assistance of counsel and prosecutorial vindictiveness.

[3]The record before me does not indicate if Immigration and Customs Enforcement (ICE) has lodged a detainer at the correctional facility where the Defendant is presently held.

On this record, the court holds that the Defendant does not present a security risk at this time.

CONCLUSION

As the Supreme Judicial Court has expressed, a conviction may be reversible, but time spent in prison is not. Id. at 856, quoting Levin, 7 Mass. App. Ct. at 512-513. Here, the Defendant faces the possibility of serving the entirety of what may be an unconstitutional sentence. Therefore, because the Defendant has shown a reasonable likelihood of success on appeal and appears to present little to no security risk, a stay of execution of sentence pending appeal or hearing on a new trial motion is in order.[4]

ORDER

For the reasons set forth above, it is hereby **ORDERED** that:

1. the Defendant's Motion for Stay of Execution of Sentence is **ALLOWED**;
2. the Defendant shall be brought before this court on **Friday, November 28, 2014**, at **9:00 a.m.**, at which time the court will determine the amount of the Defendant's bail and/or the conditions of his release;
3. if the Defendant intends to move for a new trial, he shall do so by filing a motion within **thirty (30) days** of the entry of this decision; and

[4]Attached to and referred to in the Defendant's Motion for Stay of Execution of Sentence is an unsigned and undated "draft" motion for a new trial. While, to date, the Defendant has not filed a motion for new trial with the court, he may do so pursuant to the terms of this decision.

4. the Commonwealth shall file any opposition within **thirty (30) days** of the filing of any such new trial motion by the Defendant.

SO ORDERED.

Mary-Lou Rup
Justice of the Superior Court

Dated: November 24, 2014

Commonwealth of Massachusetts
County of Essex
The Superior Court

CRIMINAL DOCKET#: **ESCR2007-00875**

RE: Commonwealth v Rodriguez, Angel

TO: Jeffrey G. Harris, Esquire
Good Schneider Cormier
83 Atlantic Avenue
Boston, MA 02110-3711

NOTICE OF DOCKET ENTRY

You are hereby notified that on 11/25/2014 the following entry was made on the above referenced docket:

MEMORANDUM & ORDER: (1) defendant's motion for stay of execution of sentence is ALLOWED; (2) defendant's shall be brought before this court on Friday, 11/28/14 @9am at which time the court will determine the amount of the defendant's bail and/or conditions of his release; (3) if defendant intends to move for a new trial, he shall do so by filing a motion within 30 days of the entry of this decision; and (4) Commonwealth shall file any opposition within 30 days of the filing of any new trial motion by the defendant. (Mary-Lou Rup, Justice) Notices mailed 11/25/14

Dated at Lawrence, Massachusetts this 25th day of November, 2014.

Thomas H. Driscoll Jr.,
Clerk of the Court

Jose Mejia
Assistant Clerk

Telephone: (978) 242-1900

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK, ss. NO. SJC-11764

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

AFFIDAVIT OF BENJAMIN B. SELMAN

I, Benjamin B. Selman, state as follows:

1. I am an Attorney with the Committee for Public Counsel Services' Drug Lab Crisis Litigation Unit (DLCLU), which was created in April of 2013 to handle indigent defense matters arising out of the shutdown of the Hinton drug lab and the associated wrongdoing by chemist Annie Dookhan.

3. I am one of four(4) full-time Public Defender Division attorneys staffing the DLCLU. Our work has focused on the representation of indigent defendants convicted in drug cases in which the alleged narcotics were tested by Dookhan. We have been seeking relief on behalf of such individuals from convictions based upon evidence tainted by Dookhan's misconduct and the mismanagement of the Hinton lab.

4. As a DLCLU attorney I also provide advice and training to CPCS staff attorneys and bar advocates handling Hinton lab cases.

5. Our work spans the eight counties affected by the Hinton lab failure, but is concentrated in Suffolk, Plymouth, Essex, Middlesex, and Norfolk Counties.

6. In the Suffolk Superior Court's Drug Lab session, the Assistant District Attorneys make it clear that if a R 30(b) motion is allowed, their office will seek to re-prosecute the case against the defendant - including all counts of the indictment as originally charged. Various ADAs have expressly communicated this to me with regard to individual cases, and at various times have announced this generally on the record in open court.

7. I am aware of two cases in the Suffolk Superior Court Drug Lab session where new trial motions were allowed. In neither of these cases did the Commonwealth file a notice of objection nor otherwise pursue appellate review of the order of the special judicial magistrate. In both of these cases the Commonwealth has moved forward in the Court's regular sessions, re-arraigning the defendants on all counts of the original indictments and scheduling future events.

8. I always advise all of my clients of the risks of re-prosecution that attend a motion for new trial. I further advise my Suffolk Superior clients of the Suffolk District Attorney's policy and practice with respect to successful new trial motions, as well as any specific prosecutorial representations in their individual cases. I have had some clients who have elected to proceed with new trial motions in Suffolk Superior Court. I have other clients who have declined to pursue motions, in part or whole due to fear of re-prosecution and the threat of additional prison time. In one instance, a client was prepared to litigate his new trial motion, but ultimately accepted a time-served re-plea deal, motivated in large part by the fear of re-prosecution and the threat of additional prison time.

9. In Suffolk Superior Court's Drug Lab Session, I have litigated two cases where a defendant was released on a stay of execution of sentence, and the new trial motions were denied. In both cases, prior to the motion hearings, the prosecutor made re-plea offers that would have involved "time served" dispositions. In both cases, my clients elected to proceed with their attempts to vacate their Dookhan-tainted convictions. After the motions were denied and notices of objection filed, but in advance of hearings before the Regional Administrative

Justice, I approached the prosecutors in an attempt to negotiate dispositions other than other than re-commitment to the unserved balances of the original terms of imprisonment. In each case the Commonwealth declined to agree to any disposition other than re-commitment to the original state prison sentence, stating their policy is that offers made prior to the special magistrate's hearing are withdrawn once the hearing takes place.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 29 DAY OF DECEMBER 2014.

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S.R.A. 13

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Date and time of transmission: Monday, December 29, 2014 4:19:34 PM
Number of pages including this cover sheet: 03

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FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX
DEC 29 2014
CLERK

December 29, 2014

Special Judicial Magistrate John Cratsley
c/o Essex County Superior Court
34 Federal Street
Salem, MA 01970

Re: Commonwealth v. Miguel Cuevas, Drug Lab Case, ESCR2007-01535

Dear Judge Cratsley:

I am writing to memorialize the defendant's posture in his post-conviction drug lab case, numbered above.

In October of 2012, the Mr. Cuevas filed a Motion to Vacate his guilty plea and conviction in this case based on the misconduct of Hinton Drug Lab chemist Annie Dookhan, who was involved in the analysis of the alleged narcotics in his case. Shortly thereafter, he completed the 4 ½ to 5 year State Prison sentence imposed by this court in 2009.

Since the filing of his Motion to Vacate and his discharge from State Prison, Mr. Cuevas has remained motivated to pursue relief from a conviction he feels was tainted by the misconduct of Annie Dookhan. At the same time, he is concerned that, if his conviction is vacated and he is later convicted after trial, he might face further incarceration. His concern is grounded in the fact that the Essex County District Attorney's Office has stated in open court, in his presence, that, should his plea be vacated, it would re-prosecute him on all original counts of the indictment. (His plea in 2009 was to lesser offenses - subsequent offense enhancements connected to each of the four distribution counts were dismissed.) In the Essex County Superior Court Drug Lab session over which you have presided, the District Attorneys Office has made it clear that it is its policy to seek to re-prosecute, on all original counts, defendants who succeed in vacating their drug convictions due to Dookhan's misconduct. Mr. Cuevas's is aware that the District Attorney's Office acted in accordance with this policy in the case of Angel Rodriguez (ESCR2007-00875) so that Mr. Rodriguez, after his plea was vacated due to Dookhan's misconduct, was later tried and convicted on a trafficking indictment as originally charged (he

had pleaded guilty to a lesser degree of trafficking) and sentenced to a period of incarceration in excess of what he had earlier received. Mr. Cuevas's concern has being heightened by these events.

Due to his concern about increased punishment, Mr. Cuevas, along with two others, including Kevin Bridgeman, petitioned the Supreme Judicial Court under G.L. c. 211, § 3, for relief in several forms, including a declaration that persons who succeed in vacating their drug convictions due to the misconduct of Annie Dookhan shall not be subjected to harsher punishment in the form of counts greater than or in addition to those to which they pleaded guilty and/or incarceration over and above that previously imposed. The Bridgeman petition (SJC-11764), having been reserved and reported to the full court by Justice Botsford, is scheduled for argument on January 8, 2015. In the brief they filed on December 23, 2014, respondents Essex and Suffolk County District Attorney's Offices, take the position that, where a defendant succeeds in vacating a plea due to Dookhan misconduct, revival of all original charges and return to the *status quo ante* is fair and appropriate and that the prophylactic rule sought by Mr. Cuevas and the other petitioners is "not necessary to remedy the harm caused by Dookhan." (Respondents' brief, p. 42, see attached copy. Copies of briefs filed by Petitioners and CPCS are also attached.)

Mr. Cuevas hopes to defer his decision whether or not to proceed with the Motion to Vacate filed in his case until after the Supreme Judicial Court's decision in the Bridgeman (Cuevas and Creach) petition. He will appear before you on April 9, 2015 for a status conference.

Sincerely,

Nancy J. Caplan, by Robin E

Nancy J. Caplan

Enclosures

cc: ADA Susan Dolhun, Essex County District Attorney's Office

AFFIDAVIT OF SERVICE

I, Daniel McFadden, counsel for petitioners-appellants Kevin Bridgeman, Yasir Creach, and Miguel Cuevas, do hereby certify under the penalties of perjury that on this 2nd day of January, 2015, I caused a true copy of the foregoing document to be served by Federal Express and electronic mail on the following counsel for the other parties:

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Daniel L. McFadden

Dated: January 2, 2015