

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2007-770

COMMONWEALTH of
MASSACHUSETTS.,

v.

ERICK COTTO, JR., and related cases.¹

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**MOTION OF
THE INNOCENCE PROJECT, INC.,
THE NEW ENGLAND INNOCENCE PROJECT,
THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND
PROFESSORS DANIEL MEDWED AND ELLEN YAROSHEFSKY
FOR LEAVE TO FILE MEMORANDUM AS *AMICI CURIAE***

The Innocence Project, Inc., the New England Innocence Project, the American Civil Liberties Union of Massachusetts, and Professors Daniel Medwed and Ellen Yaroshefsky hereby move for leave to file a memorandum as *amici curiae* in this case pursuant to Mass. R. App. P. 17; see also *Boston Police Patrolmen’s Association, Inc. v. City of Boston*, Superior Court No. 16-2670 (*amicus* memorandum filed Sept. 6, 2016, where motion for leave to file was submitted under Mass. R. App. P. 17). The proposed memorandum is filed conditionally herewith. As grounds for this motion, movants state as follows:

¹ *Commonwealth v. Aponte*, 1279CR00226; *Commonwealth v. Brown*, 0579CR01159; *Commonwealth v. Harris*, 1079CR01233; *Commonwealth v. Liquori*, 1279CR00624; *Commonwealth v. Penate*, 1279CR00083; *Commonwealth v. Richardson*, 1279CR0399; *Commonwealth v. Ware*, 0779CR01072, 0979CR01072 & 1079CR00253; *Commonwealth v. Watt*, 0979CR01068 & 0979CR01069; and *Commonwealth v. Vega*, 0979CR00097.

1. This case concerns allegations of misconduct on the part of the Massachusetts Attorney General’s Office (“AGO”) for its failure to investigate misconduct, its failure to disclose exculpatory evidence to District Attorneys or defense counsel, and for making and failing to correct misrepresentations in court.

2. Up until the day of the AGO’s February 17 submissions, the movants did not know what position the AGO would take. *See, e.g.*, Attorney General Maura Healey, Post-Election Town Hall Meeting, Feb. 16, 2017, at <http://bit.ly/AGOVideos> (referencing talks with the ACLU and criminal defense lawyers; comments begin at approximately 35:20 remaining).

3. As shown in the proposed *amicus* memorandum, the AGO’s submissions contain substantial deficiencies of fact and law. Movants have therefore worked as quickly as possible to prepare a response, and they are as follows:

- The **Innocence Project, Inc.** (“IP”) is a national legal services and criminal justice reform organization based in New York. Founded twenty-five years ago by Barry Scheck and Peter Neufeld, the IP’s attorneys pioneered the litigation model that has, to date, led to the exoneration of 349 wrongly convicted persons in the United States through post-conviction DNA testing. The IP’s attorneys have served as lead or co-counsel for nearly half of those exonerated individuals. The IP regularly consults with courts, legislators, and the scientific community to improve the reliability of forensic science, and ensure that the system has effective mechanisms in place to redress systemic errors as they occur. Given that a majority of the post-conviction DNA exonerations to date have involved the misapplication or misuse of forensic science—either at trial or in proceedings that led an innocent person to plead guilty—the IP has a strong interest in ensuring

that criminal convictions are premised upon accurate forensic work, and that the courts afford appropriate relief to those whose cases were affected by laboratory error or misconduct. The IP also has taken a leading role in redressing wrongful convictions involving serious prosecutorial error and misconduct nationwide, both to remedy the harms caused and to deter future misconduct.

- The **New England Innocence Project** (NEIP) is a charitable trust and 501(c)(3) tax-exempt organization that provides pro bono legal services to identify, investigate, and exonerate persons who have been wrongly convicted and imprisoned in New England states. NEIP also seeks to raise public awareness of the prevalence, causes, and costs of wrongful convictions and advocates for legal reforms that will reduce the risk they occur and will hasten the identification and release of innocent prisoners.
- The **American Civil Liberties Union of Massachusetts** (ACLUM), an affiliate of the national ACLU, is a nonprofit, nonpartisan organization dedicated to defending the civil rights and liberties protected by the United States Constitution and Article 14 of the Massachusetts Declaration of Rights. ACLUM is concerned about the problem of wrongful convictions in Massachusetts and, for several years, has been directly involved in seeking to remedy the Commonwealth's drug lab scandals. *See, e.g., Bridgeman v. District Attorney for the Suffolk Dist.*, 476 Mass. 298 (2017) ("*Bridgeman II*") (calling for district attorneys to identify, by April 18, 2017, "large numbers" of cases for dismissal); *Bridgeman v. District Attorney for the Suffolk Dist.*, 471 Mass. 465 , 487 (2015) ("*Bridgeman I*"); *Commonwealth v. Charles*, 466 Mass. 63 , 64 (2013).

- **Daniel Medwed** is Professor of Law and Criminal Justice at Northeastern University. His research interests include prosecutorial ethics. His book *Prosecution Complex: America's Race to Convict and Its Impact on the Innocent* (New York University Press 2012) explores how even well-meaning prosecutors may contribute to wrongful convictions because of cognitive biases and an overly-deferential regime of legal and ethical rules. He is a member of the Board of Trustees of the New England Innocence Project
- **Ellen Yaroshefsky** is the Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University. She teaches ethics courses and criminal procedure, organizes symposia, and writes and lectures in the field of legal ethics with a concentration upon issues in the criminal justice system. She is the former co-chair of the American Bar Association's Ethics, Gideon and Professionalism Committee of the Criminal Justice Section. She serves on the New York State Committee on Standards of Attorney Conduct, on ethics committees of state and local bar associations and formerly served as a Commissioner on the New York State Joint Commission on Public Ethics and from 1994-2016 she was a Clinical Professor of Law and the Director of the Jacob Burns Center for Ethics in the Practice of Law at the Benjamin N. Cardozo School of Law in New York. She has received a number of awards for litigation and received the New York State Bar Association award for "Outstanding Contribution in the Field of Criminal Law Education."

4. Movants believe that their *amicus* memorandum will assist the Court in addressing the ethics issues here. While the AGO has focused on its duty to disclose exculpatory evidence, its arguments are supported neither by the record, nor by the law or the ethics rules governing a prosecutor's duty to disclose evidence. But even if the AGO could withstand claims about disclosure, its memorandum still fails to address *numerous other ethical duties*—including but not limited to the duties to (1) demonstrate candor to the court; (2) correct false statements; and (3) conduct a reasonable investigation. As demonstrated in the proposed *amicus* memorandum, all of these duties were violated, and a substantial remedy is warranted.

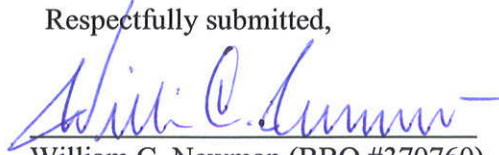
5. Counsel for the movants have consulted counsel for the parties about the filing of this motion and proposed memorandum. Counsel for the defendants consent to the filing of the *amicus* memorandum. Counsel for the District Attorney and AGO have taken no position the filing of the memorandum.

WHEREFORE movants respectfully request that they be granted leave to file the attached memorandum as *amici curiae*.

March 16, 2017

Respectfully submitted,

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*Motion for admission *pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I, William C. Newman, hereby certify that on March 16, 2017, I caused true and accurate copies of the foregoing to be filed in the office of the clerk of the Suffolk County Superior Court and served upon the following counsel by electronic and overnight mail:

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