Post-Conviction Discovery
And Funds

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I. Is simultaneous motion for new trial required?

A. Yes, maybe

The received wisdom is that you have to file a motion for new trial in order to get discovery. *See Commonwealth v. Arriaga*, 438 Mass. 556, 569 (2003). But no case squarely and unmistakably holds this.

If you do follow the received wisdom and file a motion for new trial that still needs discovery, file a motion for leave to amend along with your motion for discovery, citing Mass. R. Crim. P. 30(c)(2) (All grounds . . . shall be raised by the defendant in the original *or amended* motion).

But this approach can be very dangerous and risks waiving claims, particularly if the judge precipitously denies the motion. There are ways to deal with this.

B. Try anyway

First, there is no reason you cannot simply move for discovery. Let the Commonwealth object, if they like. As a matter of candor, you must cite the rule. But there is no reason why you must point the judge to the strictest interpretation of the rule that disadvantages your client. Generally speaking, judges are given "broad discretion" to order discovery under this rule. *Commonwealth v. Daniels*, 445 Mass. 392, 405-407 (2005). The judge "may authorize such discovery as is deemed appropriate" where the defendant has established "a prima facie case for relief". *Id.* at 405-406; *see also Commonwealth v. Ware*, 471 Mass. 85, 94 (2015).

C. Not required, maybe

Second, the text of the rule does not exactly say that you must file a motion for new trial contemporaneously with the motion for new trial. Rule 30(c)(4) says:

> (4) Discovery. Where affidavits filed by the moving party **under subdivision (c)(3)** establish a **prima facie case for relief,** the judge on motion of any party, after notice to the opposing party and an

> opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

But Rule 30(c)(3) just talks about "a motion", not a "a motion for new trial". The rule comprehends motions other than motion: motions for discovery, motions for funds, motions for appointment of counsel, motions for bail, and motions for attorney's fees. So the mere requirement of affidavits and a prima facie case for relief do not dictate the conclusion that a motion for new trial must be filed.

Further, a firm requirement that the defendant file a motion for new trial before obtaining post-conviction discovery would fall afoul of the right to due process because it provides the defendant with an inadequate remedy for the vindication of constitutional rights. *Marino v. Ragen*, 332 U.S. 561, 569-570, 68 S.Ct. 240, 245 (U.S. 1947) (Rutledge, J. concurring) (post-conviction remedy amounting to "merry-go-round" inadequate); *Martinez v. Ryan*, 566 U.S. 1, 12-13 (2012) (state regime limiting evidentiary hearings on claims of ineffective assistance held inadequate); *Trevino v. Thaler*, 133 S.Ct. 1911, 1919-21 (2013) (state rules limiting ability to present claim of ineffective assistance held inadequate).

II. What is a prima facie case for relief?

There are multiple statements of what a prima facie case in the caselaw, few of them helpful. This is the best one: "Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner *may, if the facts are fully developed*, be able to demonstrate that he or she is entitled to relief." *Commonwealth v. Daniels*, 445 Mass. 392, 407 (2005) (emphasis added, citing Reporters' Notes). Therefore, all a defendant seeking discovery needs to show is that he *may* be entitled to a new trial *after* the facts are fully developed.

A prima facie case, by definition, means that the defendant's assertions are taken at face value. Therefore, the Commonwealth should not be permitted to attack their credibility. While the judge is permitted to discredit affidavits in deciding the substantive motion for new trial, she should not ordinarily do so at the discovery stage. *See Commonwealth v. Smith*, 90 Mass. App. Ct. 261, 269 (2016) (judge abused discretion in denying evidentiary hearing simply because witness affiant was inmate).

Beware judges requiring you to show that the evidence "actually existed". *Commonwealth v. Camacho*, 472 Mass. 587, 600 (2015)First, *Camacho* cites no authority for such a requirement. Second, it conflicts with the prima facie standard. Third, the duty of inquiry under *Brady* and *Kyles v. Whitley*, 514 U.S. 419 (1995) imposes the opposite burden. "[T]he duty of inquiry [is not limited] to instances where a prosecutor becomes aware that additional discoverable materials may exist. 'Reasonableness' is the only limitation on the prosecutor's duty of inquiry."

Commonwealth v. Frith, 458 Mass. 434, 440–41 (2010) (applying *Brady* authorities to Rule 14 obligations); *Commonwealth v. Ware*, 471 Mass. 85 (2015) (remanding for to allow narrower discovery)

III. Affidavit requirement

Rule 30(c)(3) requires that motions be supported by affidavit, but not only affidavits.

However, an attorney's affidavit in support of a motion for discovery could suffice if it is based on hearsay from a reliable source which is identified in the affidavit. *Commonwealth v. Lampron*, 441 Mass. 265, 270-71 (2004).

An affidavit is not required to establish standing for a motion to suppress involving possessory offenses. *Commonwealth v. Mubdi*, 456 Mass. 385, 390 (2010).

Particularly where the contentions are wholly legal, not factual an affidavit should not be required. "The rules are not to be administered inflexibly and certainly not in a fashion which serves no purpose other than to produce redundant paper." *Commonwealth v. Downs*, 31 Mass. App. Ct. 467, 470 (1991) (citations omitted).

IV. Inherent authority to order discovery.

Apart from the rules, judges have the inherent authority to order discovery to protect important rights even though no statute or rule provided for such an order. *Commonwealth v. Teixeira*, 475 Mass. 482, 488–95 (2016) (inherent authority to order discovery prior to a probable cause hearing).

The Court has the inherent power to prevent the Commonwealth from simply waiting out its obligations under a valid discovery order or pre-trial conference report. *Commonwealth v. Gallarelli*, 399 Mass. 17, 23–24 n. 7 (1987); *cf. Commonwealth v. Healy*, 438 Mass. 672, 678 (2003) (Commonwealth not entitled to claim waiver post-conviction where it had failed to comply with pre-trial conference report).

V. *Brady* duty

The Commonwealth's *Brady* duty continues post-conviction. *See Commonwealth v. Daniels,* 445 Mass. 392, 404–405 (2005); *Commonwealth v. Camacho*, 472 Mass. 587, 598-599 (2015); *Commonwealth v. Murray*, 461 Mass. 10, 17-19 (2011).

VI. Ethical duty

"[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976); Mass. R. Prof. Cond. 3.8(c) (pre-trial *Brady* duty does not include "materiality" requirement); *In re Kline*, 113 A.3d 202 (D.C. Ct. App. 2015); Mass. R. Prof. Cond. 3.8(i-k) (limiting post-conviction duties to "reasonable likelihood" of innocence).

VII. M.G.L. c. 278A

The court on motion of any party, after notice to the opposing party and any third party from whom discovery is sought, and an opportunity to be heard, may authorize such discovery as provided for under Rule 30(c)(4) of the Massachusetts Rules of Criminal Procedure, from either party or any third party as is deemed appropriate. . . . *The court, when considering such discovery requests, shall not require the establishment of a prima facie case* for relief under Rule 30 of the Massachusetts Rules of Criminal Procedure.

M.G.L. c. 278A, § 7(c).

VIII. Funds

A. Motion for new trial not required.

Unlike Rule 30(c)(4), there is no question that Rule 30(c)(5) does not require a pending motion for new trial.

Rule 30(c)(5) provides:

> Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

B. Funds for experts

First, find an expert. Contact Anne Goldbach and Nathan Tamulis for their lists. If an expert that you want is not on the list, get their CV, send it to Anne and ask

what she would recommend be the rate for that expert. It varies by area and qualifications.

You need to make some showing that the funds should be provided. Generally, you do that by attaching affidavits, case materials, and articles.

You need to explicitly explain why the sought expert testimony would be important in the context of the case.

Some experts are willing to briefly review the case and provide a preliminary affidavit. But not all are and it is not unreasonable for them to take that position. Some counsel have also had luck discussing the case with a local professor who can provide broad outlines.

One approach is to provide your own affidavit reciting that you have spoken with the expert, provided a brief background and the expert responded with the following preliminary impressions.

Do not lowball your first request for funds. First, it makes the expert feel better. Second, judges often look askance at additional requests for funds.

If the motion is allowed, provide a copy of the endorsed motion to the expert. Make sure they are set up in Vbill and begin work!