

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

**STANDING PROCEDURAL ORDER  
ON APPOINTMENT OF COUNSEL AND  
MOTIONS UNDER 28 U.S.C. § 2255 BASED  
UPON ALLEGED MISCONDUCT AT THE  
WILLIAM A. HINTON STATE LABORATORY**

**ADM-1  
ORDER 13-01**

**ORDER**

This Standing Procedural Order governs requests for appointment of counsel under the Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A, and motions for relief under 28 U.S.C. § 2255, or other authority, by defendants convicted of a criminal offense in this court whose sentence is potentially affected by the alleged misconduct at the William A. Hinton State Laboratory in Jamaica Plain, Massachusetts, from 2003 through 2012 ("the Alleged Lab Misconduct").

**I. COURT LIST OF POTENTIALLY IMPACTED CASES**

The court cannot develop a definitive list of all cases potentially impacted by the Alleged Lab Misconduct. Using very broad data parameters, however, the court has nonetheless attempted to compile a list of potentially impacted cases ("Court List"), which includes the last counsel of record. Due to the broad data parameters used, the Court List may be over inclusive or under inclusive. Nonetheless, the Court List will be distributed to the Concord Federal Public Defender's Office and to current CJA Panel members to facilitate efforts to identify potentially impacted cases.

If the last counsel of record is a federal defender or a current CJA Panel member, then the listed attorney should review their case records to perform an evaluation as to whether the defendant's federal sentence would be impacted if an underlying Massachusetts' state court conviction is vacated based on the Alleged Lab Misconduct. For private pay cases or cases in which the last counsel of record is no longer on the CJA panel, the federal defender shall perform this analysis or shall inform the court that a conflict prevents them from doing so, in which case the court will request a CJA panel member perform this task.<sup>1</sup> For cases not on the Court List, the Concord Federal Public Defender's Office and current CJA Panel members are strongly encouraged to review their client files in order to evaluate whether a client's federal sentence in this court would be impacted by the Alleged Lab Misconduct.

## **II. MOTION TO APPOINT COUNSEL FOR PURPOSE OF PURSUING ORDER VACATING UNDERLYING STATE CONVICTION**

Prior to filing any motion for appointment of counsel to pursue an order vacating the underlying Massachusetts state court conviction, CJA counsel shall first attempt to seek compensation, pursuant to appointment or otherwise, from the state court, the Committee for Public Counsel Services, or another appropriate state agency or authority. If CJA counsel is unable to obtain such compensation notwithstanding reasonable efforts, or for other good reason, counsel may move this court for an appointment to appear in an ancillary proceeding to the federal conviction in question and the motion shall outline efforts taken to obtain a state court appointment.

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<sup>1</sup>Despite the fact that the federal defender was not trial counsel in these cases, the Office of United States Probation and Pretrial Services ("USP") is authorized to disclose the relevant presentence reports to the federal defender for the purpose of performing the contemplated evaluation.

Before filing a motion to appoint counsel in this court, even in a case that is included on the Court List, counsel or the filing pro se party shall engage in a good faith analysis to determine whether the defendant's federal sentence would be impacted if an underlying Massachusetts state court conviction is vacated based on the Alleged Lab Misconduct. Specifically, counsel shall engage in a good faith evaluation of, and the motion to appoint counsel shall address, the following:

A. Whether the defendant has an underlying Massachusetts state court controlled substance conviction, between the years of 2003 through 2012, for which the related drug testing and analysis was performed by the William A. Hinton State Laboratory in Jamaica Plain, Massachusetts;

B. Whether the Massachusetts state court controlled substance conviction:

- (1) served as the basis for the federal conviction (e.g. 18 U.S.C. § 922(g)),
- (2) served as the basis for an upward departure or variance, or
- (3) increased the defendant's base offense level, criminal history points, or statutory penalty;

C. Whether the Massachusetts conviction has already been vacated, a motion to vacate the conviction is presently pending, or an attorney has already been appointed by the Commonwealth of Massachusetts for the purpose of requesting the conviction be vacated;<sup>2</sup> and

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<sup>2</sup>Counsel should first attempt to obtain this information by contacting the court in the Commonwealth of Massachusetts in which the predicate conviction occurred. For additional assistance with questions regarding the appointment of counsel in the Commonwealth of Massachusetts, counsel may contact the Massachusetts Department of Public Health Hotline at (617) 988-8417.

D. Whether CJA counsel has made reasonable efforts to seek compensation, pursuant to appointment or otherwise, from the state court, the Committee for Public Counsel Services, or another appropriate state agency or authority.

The motion to appoint counsel shall be conventionally filed in the potentially affected criminal case and accompanied by a financial affidavit (USDCNH-15). There shall be a presumptive limit of \$1,000 per client for fees and expenses of CJA counsel for appearances in state court proceedings ancillary to the representation of a federal client in connection with the Alleged Lab Misconduct, which may be exceeded only for good cause shown.

A pro se motion for relief based on the Alleged Lab Misconduct shall be treated as a request for the appointment of counsel.

### **III. FEDERAL HABEAS CORPUS PETITION**

Counsel may file a habeas corpus petition pursuant to 28 U.S.C. § 2255 only after successfully obtaining a ruling vacating the underlying Massachusetts state court conviction. Any such motion shall be conventionally filed and accompanied by a motion for the appointment of counsel (USDCNH-17) and financial affidavit (USDCNH-15). Upon receipt of a properly filed habeas corpus petition based on the Alleged Lab Misconduct, the following shall apply:

A. Within seven (7) days of the filing of the habeas petition, defense counsel shall provide a copy of the state court ruling vacating the controlled substance conviction, if in writing, and copies of any drug certificates obtained in connection with that case, to the Office of the United States Attorney and the Office of United States Probation and Pretrial Services ("USP").

B. Within thirty (30) days of the filing of the habeas petition, the USP shall prepare a supplemental presentence report ("Supplemental Report") that accounts for the change in

circumstances resulting from the vacation of the underlying Massachusetts state court controlled substance conviction. The USP shall provide the following upon request: Plea Agreement; Final Presentence Report; Judgment and Committal Order; and Statement of Reasons.

C. To the extent counsel do not intend to stipulate to a sentencing disposition and no sentencing transcript has been previously prepared, defense counsel shall file an assented to motion for a transcript of the sentencing hearing at the government's expense on or before seven (7) calendar days after receipt of the Supplemental Report.

D. On or before fourteen (14) calendar days after receipt of the Supplemental Report, counsel shall file the following with the court and shall send a copy to the USP:

1) A stipulation, signed by counsel, containing a fully agreed upon disposition of the sentencing issues presented, indicating that the parties consent to the imposition of the agreed upon disposition without the necessity for a hearing and that the defendant waives any right to a hearing on the matter; or

2) If counsel do not reach an agreed upon disposition, counsel shall file the following:

a) Separate sentencing memoranda addressing the factual and legal basis supporting their respective positions on contested sentencing issues; and

b) Separate notices, or a joint notice if counsel concur, addressing whether the matter can be resolved based on the pleadings submitted or whether a hearing is necessary to resolve the sentencing issues presented. Any counsel requesting a hearing shall indicate the factual and legal basis for the request and the estimated duration of any such hearing. Counsel

objecting to a hearing shall similarly state the factual and legal basis for the objection.

3) In the event the court grants a request for hearing, counsel are advised that it may take a minimum of four (4) weeks to have the defendant transported back to the District of New Hampshire if the defendant is currently detained outside the district. In these circumstances, counsel may consider requesting permission for the defendant to appear by video conference. Prior to making such a request, however, counsel shall confirm that the Bureau of Prisons facility where the defendant is being housed can accommodate that request.

#### **IV. Prematurely Filed Habeas Corpus Petitions**

The Government need not respond to any motion to appoint counsel or habeas corpus petition that does not comply with the procedures set forth in this order and all such requests, except habeas corpus petitions filed pro se that are construed as requests for counsel as set forth above, shall be denied without prejudice.

SO ORDERED.

Date: March 12, 2013



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Joseph N. Laplante  
Chief Judge